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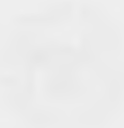

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CONTENTS

Table of Cases VII
Cross-Reference XII
Decisions and Orders of the Board 1

This volume includes all important Decisions and Orders issued by the Board during the period June 1 through July 29, 1988.

Some Board Decisions granting routine motions for summary judgment contain nothing of precedential value and are not included in this volume. Copies of such Decisions can be obtained from the NLRB, Division of Information, Washington, D.C. 20570, by reference to volume and pamphlet number.

The page numbers of Board Decisions that carry pamphlet numbers may be found by referring to the Cross-Reference which appears immediately after the Table of Cases.

NOTE: The Board Decisions cited herein that contain the volume and pamphlet number, rather than the volume and page number, may be located in the Table of Cases or the Cross-Reference table of the particular volume cited.

TABLE OF CASES

PAGE

513 13th Street, N.W., Inc. t/a Warner Theatre, see Wolf Trap Foundation
Aero Alloys, 21-CA-25207 497
Air Cargo Transport, 19-RC-11058 176
Air Express International Corp., 12-CA-12758 608
Albertsons, Inc., 10-CA-17793 177
Albuquerque Publishing Co., 28-CA-8998 No. 108*
Allied Used Truck Exchange, see Frank Mascali Construction
Amazing Stores, 4-CA-15602, 4-RC-16096 163
American Brands, see Martha White Foods
American Fleet Maintenance Co., 7-CA-27039 764
American Telephone & Telegraph Co., see Communications Workers Local 4354 (American Telephone)
Amoco Oil Corp., 14-RD-1190 280
Associated General Contractors of Massachusetts, see Carpenters Local 33 (AGC of Massachusetts)
Atwood & Morrill Co., 11-CA-9483 794
Aztec Bus Lines, 21-CA-19497 1021
B & R Coal Co., 9-CA-23286 729
Baker Protective Services, see Wells Fargo Alarm Services
Baltimore Blast, see Blast Soccer Associates
Beatrice Grocery Products, see Martha White Foods
Beckley Belt Services Co., 9-CA-20653 1179
Biltmore Construction Co., 17-CA-13638 719
Blast Soccer Associates, 5-CA-18686 84
Blount Bros. Corp., see Carpenters Local 33 (AGC of Massachusetts)
Brannan Sand & Gravel Co.
  27-CA-9329-3 977
  27-CA-9329-2 1492
Brice Bros., see Metro Foods
Bruce-Cadet, Inc., see Electrical Workers IBEW (Bruce-Cadet)
Building Contractors Association, see Lathers Local 46 (Building Contractors)
C.P.P. Associates Printing Co., 10-CA-22427 No. 71*
Calloway & Co., 5-CA-19110 73
Canonie Transportation Co., 7-RC-18255 299
Capitol Transit, 7-CA-26211 777
Captain's Table, 2-CA-18465 22
Carpenters Local 33 (AGC of Massachusetts), 1-CD-714 1482
Carpenters Local 33 (CB Construction), 1-CC-2153 528
Casci Decorators, 18-CA-9647 1408
Case Mfg. Co., see Metco Products
CB Construction Co., see Carpenters Local 33 (CB Construction)
Cement League, see Lathers Local 46 (Building Contractors)
Chas. S. Winner, Inc., 4-CA-14811 62
Chassis Maintenance, 32-CA-8370 289
Children's Habilitation Centers, 13-CA-27423 No. 109*
Cincinnati Suburban Press, 9-CA-23931 966
Cisco Trucking Co., 9-CA-23231 1399
City Dodge Center, 18-CA-9798 194
Clean Sweep Janitorial Services, see First Class Maintenance
CMD, Inc., see Geo. V. Hamilton, Inc.
Coastal Cargo Co., see Longshoremen ILA Local 3000 (Coastal Cargo)
Columbia Park Assn., 5-RC-12886 123
Comm-Tract Corp., see Electrical Workers IBEW Local 103 (Comm-Tract)
Communications Resources, see D.S.I. Com Source

---

*Summary judgment decision not reported in this volume. A copy can be obtained from NLRB, Division of Information, Washington, D.C. 20570, by reference to volume and pamphlet number.

PAGE

Communications Workers Local 4354 (American Telephone), 9-CB-6608 1173
Continental Insurance Co., 2-CA-17886 579
Contract Cleaning Maintenance, 13-CA-25063 995
Cooke's Crating, 21-CA-25659 1100
Corporacion de Servicios Legales, 24-RC-6913 612
Correctional Medical Systems, 33-RC-3099 810
Corry Contract, 6-CA-19180 396
Council's Center for Problems of Living, 2-CA-19586, 2-CG-33 (formerly 2-CB-9688) 1122
D. Aldrich Cartage, see Galewood Cartage
D.S.I. Com Source, 4-CA-16926 .... No. 29*
Delta-Macon Brick & Tile Co., 26-CA-9030 830
Destileria Serralles, 24-CA-5335 51
DMR Corp., 16-CA-8530 19
Dold Foods, 17-CA-11309 1323
Dresser Industries, 39-CA-1392 90
E. H. Mann, Inc. d/b/a, see Warrenton Rubber
E. I. duPont & Co., 4-CA-9821 627
El San Juan Hotel, 24-CA-4663, 24-CB-1179 1453
Electrical Workers IBEW Local 77 (Bruce-Cadet), 19-CB-6077 516
Electrical Workers IBEW Local 103 (Comm-Tract), 1-CD-822 281
Elevator Constructors (Long Elevator), 14-CC-1878 1095
Emery Air Freight Corp. d/b/a Emery Worldwide, see Teamsters Local 25 (Emery Worldwide)
Emery Worldwide, see Teamsters Local 25 (Emery Worldwide)
Ernst Enterprises, 9-CA-23593 565
Esmark, Inc., see Swift Independent Corp.
Evergreen Cemetery Assn., 12-CA-12792 .... No. 110*
Eye Care, see Professional Eye Care
Facet Enterprises, see Purolator Products
First Class Maintenance, 3-CA-13279 484
Fleet Services, 2-CA-22359 .... No. 16*
Ford's Theatre Society, see Wolf Trap Foundation
Francis J. Fisher, Inc., 27-CA-10021 815
Frank Mascali Construction, 29-CA-5975, 29-CB-3075 1155
Fremont Ford, 32-CA-4866 1290
G. J. Luchetti, Inc., see Laborers Local 33 (AGC of Massachusetts)
G. Zaffino & Sons, 29-CA-6890 571
Galewood Cartage, 13-CA-27447 .... No. 27*
Garrett Railroad Car, 6-CA-16116 158
Geo V. Hamilton, Inc., 6-CA-17619 1335
Gold Star Mining Corp., 9-CA-23816-1 314
Golden Grain Macaroni Co., see Longshoremen ILWU Local 6 (Golden Grain)
Golden Years Rest Home, 9-RC-15128 1106
Graphic Communications Local 670 (Reynolds Metals), 5-CD-288 947
Gupta Permold Corp., 6-CA-18542, 6-RC-9627 1234
H. B. Zachry Co., 5-CA-17605 838
Haley & Haley, Inc., 36-CA-4967 649
Harrill Electrical Contractors, see DMR Corp.
Hawkins-Hawkins Co., 32-CA-7962, 32-RC-2337 1423
Holiday Gifts d/b/a, see Viscount Hotel
Horton Automatics, 23-CA-10594 405
Hyatt Regency Flint, 3-CA-27909 .... No. 3*
Ida Cal Freight Lines, see Teamsters Local 483 (Ida Cal)
Industrial Security Services, 23-CA-9232(E) 459
Industrial Supply Co., 18-CA-10072 639
Interstate United Corp., see Continental Insurance Co.

---

*Summary judgment decision not reported in this volume. A copy can be obtained from NLRB, Division of Information, Washington, D.C. 20570, by reference to volume and pamphlet number.

PAGE

Island Creek Coal Co., 9-CA-23181 ... 851
J. L. Marshall & Sons, see Laborers Local 721 (Marshall & Sons)
Jerry's United Super, 17-CA-10188 ... 125
Jilts, Inc., see Golden Years Rest Home
Jim Walter Resources, 10-CA-19452 ... 1441
JJ Printing Co., see C.P.P. Associates Printing Co.
Johns-Manville Sales Corp., 32-CA-4012 ... 358
Kelly's Private Car Service, 29-CA-11940 ... 30
Kenmore Contracting Co., 3-CA-11787 ... 336
Kent Products, 7-CA-26649 ... 824
Kettenburg Marine Division, see Whittaker Corp.
Koba Associates, 5-RC-12553 ... 390
Laborers Local 721 (Marshall & Sons), 1-CD-811 ... 285
Lapeer Foundry & Machine, 7-CA-20895 ... 952
Larsen Supply Co., 21-CA-20622 ... 295
Lathers Local 46 (Building Contractors), 2-CB-6021(E) ... 505
Leasco, Inc., 6-CA-19520 ... 549
Long Elevator & Machine Co., see Elevator Constructors (Long Elevator)
Longshoremen ILA Local 1575 (Puerto Rico Marine), 24-CD-17 ... 1215
Longshoremen ILA Local 3000 (Coastal Cargo)
    15-CD-293 ... 542
    15-CD-295 ... 546
Longshoremen ILWU Local 6 (Golden Grain), 32-CD-82 ... 1
Lustrelon, Inc., 22-CA-14639 ... 378
M & H Riggers & Erectors, see MIS, Inc.
Machinists Local 87 (O'Brien's Brake), 32-CB-1864 ... 1286
Macromedia Publishing, see Newspaper & Mail Deliverers (Macromedia Publishing)
Maid In New York, 2-CA-21817 ... 524
Marriott Food Service, see Continental Insurance Co.
Martha White Foods, 26-CA-12479 ... No. 1*
Mash Transportation, 25-CA-17484 ... 49
Master Iron Craft Corp., 29-CA-4853 ... 1087
Mastercraft Casket Co., 18-CA-9923 ... 1414
May Department Stores Co., 13-CA-21660 ... 661
Metco Products, 11-CA-12436 ... 76
Metro Foods, 20-CA-20928 ... 1107
MIS, Inc., 9-CA-22555 ... 491
Mississippi River Grain Elevator, see Longshoremen ILA Local 3000 (Coastal Cargo)
Mohawk Steel Fabricators, 29-CA-4853 ... 1193
Nagio Restaurant d/b/a, see Captain's Table
National Posters, 5-CA-14585 ... 468
National Theatre, see Wolf Trap Foundation
New Jersey Bell Telephone Co., 22-CA-12078 ... 318
New National Theatre Corp. t/a National Theatre, see Wolf Trap Foundation
New Sipco, Inc., see Swift Independent Corp.
Newspaper & Mail Deliverers (Macromedia Publishing), 22-CP-356 ... 537
Newspaper Guild Local 82 (Seattle Times), 19-CB-5614 ... 902
North American Coal Corp., 18-CA-10202 ... 788
North Star Steel Co., 18-CA-10208 ... 1188
Nu Dawn Homes, 19-CA-19053 ... 554
O'Brien's Brake Service, see Machinists Local 87 (O'Brien's Brake)
Oceanway Transport, see Haley & Haley, Inc.
Old Dominion Security, 21-RC-17828 ... 81
Omnix International Corp., see Waterbed World
Peelle Co., 29-CA-10584 ... 113

---

*Summary judgment decision not reported in this volume. A copy can be obtained from NLRB, Division of Information, Washington, D.C. 20570, by reference to volume and pamphlet number.

PAGE

Pennsylvania Electric Co., 6-CA-17557 1200
Pepsi-Cola Bottling Co., 31-RD-1060 736
Pierce County Medical Bureau, 19-CA-19347 .... No. 61*
Postal Service, 10-CA-22420(P) 942
Postmasters/Same Day Plus, 11-CA-12583 .... No. 115*
Potters' Medical Center, 8-CA-15759 201
Preece Coal Co., 9-CA-24228 731
Presbyterian/St. Luke's Medical Center, 27-RC-5935 249
Prince Trucking Co., 9-CA-23189 1262
Printing Methods, Inc., 3-CA-13801 1231
Professional Eye Care
  19-CA-18510 738
  19-CA-17267 1376
Puerto Rico Marine Management, see Longshoremen ILA Local 1575 (Puerto Rico Marine)
Purolator Products, 11-CA-12071 986
Purolator Products, 11-CA-12446 984
Quality C.A.T.V., 25-CA-14714 648
Red Arrow Freight Lines, 26-CA-11970 227
Reynolds Metals Co., see Graphic Communications Local 670 (Reynolds Metals)
River City Mechanical, 20-CA-16451 1503
Rocky Mountain Hospital
  27-CA-7682, 27-RD-587 1347
  27-CA-8722 1370
Ron E. Savoia Construction Co., 8-CA-18771 200
Rose Metal Products, 17-UD-98 1153
Rose Printing Co., 12-CA-11819 252
Sampson Steel & Supply, 8-RC-13666 481
San Juan Hotel Corp. d/b/a, see El San Juan Hotel
Schiavi's, Inc., 7-CA-27439 .... No. 112*
Schwartz Mfg. Co., 18-CA-9323 874
Seattle Times, see Newspaper Guild Local 82 (Seattle Times)
Service Employees Local 32B-32J, 2-CB-11879 632
Shaw's Supermarkets, 1-CA-24543, 1-RC-18882 844
Sheraton Hartford Hotel, 39-CA-3385 463
Sloan Steel Erectors, see Kenmore Contracting Co.
Southern Foods, 9-CA-23902 152
Southwestern Portland Cement Co., 9-CA-22509 1264
Spann Maintenance Co., 14-CA-16799 915
Staff Builders Services, 13-CA-27124 373
Storer Communications, 9-CA-25052 .... No. 114*
Stroehmann Bakeries, 3-CA-13439-2 1523
Suburban Communications Corp., see Cincinnati Suburban Press
Superior Industries, 31-CA-16587 834
Swift Independent Corp., 13-CA-21156 423
System 99, 32-CA-4055 723
Teamsters Local 25 (Emery Worldwide), 1-CD-757 1395
Teamsters Local 483 (Ida Cal), 19-CC-1715 924
TIC Investment Corp., see W. Pat Crow Forgings
Toledo World Terminals, 8-CA-16959, 8-CB-4706 670
Transcontinental Leasing, see Capitol Transit
Tri-State Transportation Co., 1-RC-18975 356
Tube Craft, Inc., 8-CA-18371 862
United Press International, 2-CA-21016 309
University of Dubuque, 33-UC-98 349
Vabs Realty Corp., see G. Zaffino & Sons

---

*Summary judgment decision not reported in this volume. A copy can be obtained from NLRB, Division of Information, Washington, D.C. 20570, by reference to volume and pamphlet number.

PAGE

Vanden Brink Meat Co., 7–CA–25102 1289
Venture Stores Division, see May Department Stores Co.
Viscount Hotel, 31–CA–16438 288
Volpe Construction Co., see Laborers Local 33 (AGC of Massachusetts)
W.A.D. Rentals d/b/a, see Kelly's Private Car Service
W. E. Colglazier, Inc., 21–CA–21371 1219
W. Pat Crow Forgings, 16–CA–12321 213
Waikiki Plaza Hotel, 37–CA–2585 .... No. 86*
Warner Theatre, see Wolf Trap Foundation
Warrenton Rubber, 10–CA–20791 3
Washington Heights-West Harlem-Inwood Mental Health Council, see Council's Center for Problems of Living
Waterbed World, 24–CA–5160, 24–RC–6985 808
Weingart Center Assn., 21–CA–24841 .... No. 82*
Wells Fargo Alarm Services, 32–RC–2549 562
Westcroft Realty Corp., 2–CA–22327 1017
Westvaco Corp., 11–CA–11872 301
White Cloud Division, see Kent Products
Whittaker Corp., 21–CA–21801 933
Willets Point Contracting Corp., see Frank Mascali Construction
Wolf Trap Foundation, 5–CA–13813, 5–CB–3889 760
Woods Chapel United Super d/b/a, see Jerry's United Super
Workroom for Designers, 1–CA–19731 1437
WXON–TV, 7–CA–25199 615
York Products, see Mastercraft Casket Co.
Zayre Department Stores, 30–CA–9355 1183

---

*Summary judgment decision not reported in this volume. A copy can be obtained from NLRB, Division of Information, Washington, D.C. 20570, by reference to volume and pamphlet number.

CROSS-REFERENCE

Advance Sheet Numbers and Volume Page Numbers

No.	Page	No.	Page	No.	Page	No.	Page
1	*	44	299	87	649	130	1087
2	19	45	301	88	661	131	995
3	*	46	309	89	670	132	1095
4	1	47	288	90	719	133	1017
5	3	48	314	91	723	134	1107
6	22	49	373	92	729	135	1193
7	874	50	396	93	731	136	1200
8	49	51	423	94	736	137	1290
9	30	52	378	95	738	138	1347
10	51	53	459	96	760	139	1370
11	84	54	463	97	764	140	1100
12	90	55	318	98	777	141	1106
13	62	56	336	99	984	142	1215
14	73	57	405	100	794	143	1219
15	76	58	468	101	808	144	1376
16	*	59	481	102	788	145	1122
17	113	60	484	103	810	146	1153
18	81	61	*	104	815	147	1155
19	123	62	491	105	824	148	1173
20	125	63	497	106	834	149	1395
21	152	64	505	107	1188	150	1399
22	158	65	516	108	*	151	1231
23	227	66	524	109	*	152	1179
24	163	67	528	110	*	153	1183
25	194	68	537	111	830	154	1234
26	200	69	542	112	*	155	1408
27	*	70	546	113	902	156	1323
28	201	71	*	114	*	157	1414
29	*	72	549	115	*	158	1423
30	249	73	554	116	933	159	1262
31	252	74	562	117	838	160	1437
32	213	75	565	118	915	161	1264
33	390	76	571	119	844	162	1286
34	349	77	579	120	924	163	1441
35	289	78	608	121	851	164	1453
36	176	79	612	122	862	165	1335
37	280	80	615	123	942	166	**
38	356	81	627	124	986	167	1482
39	177	82	*	125	1021	168	1289
40	358	83	632	126	952	169	1492
41	295	84	639	127	966	170	1503
42	281	85	648	128	977	171	1523
43	285	86	*	129	947		

---

*Summary judgment decision not reported in this volume. A copy can be obtained from NLRB, Division of Information, Washington, D.C. 20570, by reference to volume and pamphlet number.

** Unassigned.

Warehouse Union Local 6, International Longshoremen and Warehousemen's Union *and* Golden Grain Macaroni, Company. Case 32–CD–82

June 8, 1988

DECISION AND ORDER DENYING MOTIONS

BY CHAIRMAN STEPHENS AND MEMBERS JOHANSEN, BABSON, AND CRACRAFT

Upon a charge filed by Golden Grain Macaroni Company (the Employer) on October 5, 1984, and duly served on Warehouse Union Local 6, International Longshoremen and Warehousemen's Union (the Respondent), the General Counsel of the National Labor Relations Board issued a complaint August 14, 1985, against the Respondent alleging that it had violated Section 8(b)(4)(i) and (ii)(D) of the National Labor Relations Act.[1]

The complaint alleges that on October 2, 1984, the Respondent claimed that employees represented by it, rather than employees represented by Local 125, Bakery, Confectionery & Tobacco Workers' International Union (Local 125), were entitled to package bread crumbs for Golden Grain stuffing mix at the Employer's Ghirardelli Chocolate Company plant (disputed work). The complaint also alleges that on October 4 and 5, 1984, the Respondent, in furtherance of its claim, encircled a machine at the Ghirardelli Chocolate Company plant, wrapped paper around it, and placed on it a sign bearing the legend "Unfair to Local 6." The complaint further alleges that by such conduct the Respondent induced and encouraged individuals employed by Golden Grain to engage in a strike or refusal in the course of their employment to use, manufacture, process, transport, or otherwise handle or work on any goods, articles, materials, or commodities or to perform services, and threatened, coerced, and restrained the Employer and other persons engaged in commerce, or in industries affecting commerce, with an object of forcing or requiring the Employer to assign the disputed work to employees it represents, rather than to employees represented by Local 125. The complaint further alleges that the Respondent has failed and refused to comply with the Board's July 19, 1985 Decision and Determination of Dispute,[2] which awarded the disputed work to Local 125-represented employees, by failing to give the Regional Director timely and unequivocal written notice of its intent to comply with the decision. On August 22, 1985, the Respondent filed an answer admitting in part, and denying in part, the complaint allegations, denying the commission of any unfair labor practices, and asserting the work preservation doctrine as an affirmative defense.

On September 9, 1985, the General Counsel filed a Motion to Strike Denials in the Respondent's Answer and Motion for Summary Judgment. The General Counsel asserts that summary judgment should be granted because all evidentiary issues raised by the Respondent's answer were either litigated in the underlying 10(k) proceeding, admitted by the Respondent, or have been established by undisputed evidence.

On September 17, 1985, the Board issued an order transferring the proceeding to the Board and a Notice to Show Cause why the General Counsel's Motion for Summary Judgment should not be granted. The Respondent filed a response, again asserting that the Respondent's conduct is protected by the work preservation doctrine.

We find, contrary to the General Counsel's contentions, that the pleadings and submissions of the parties raise issues which can best be resolved by a hearing before an administrative law judge. In its answer to the complaint, the Respondent denied, inter alia, that the Employer assigned the disputed work to Local 125-represented employees; that the Respondent claimed that Local 6-represented employees were entitled to perform the work; that the Respondent encircled a machine, wrapped paper around it, and placed a sign on it; that such conduct induced employees to engage in a work stoppage; that an object of the conduct was to force the Employer to assign the work to Local 6-represented employees rather than to Local 125-represented employees; and that the Respondent has refused to comply with the Board's determination of dispute by failing to state in writing its intent to comply.[3] The Respondent also raised its work preservation defense in both its answer to the complaint and its response to the Board's Notice to Show Cause.

289 NLRB No. 4

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[1] On August 23, 1985, the complaint was amended to correct the caption.

[2] *Longshoremen ILWU Local 6 (Golden Grain)*, 275 NLRB 1128 (1985). In that case the Board rejected the Respondent's work preservation defense and found reasonable cause to believe Sec. 8(b)(4)(D) of the Act had been violated. No credibility issues were raised.

[3] We note with regard to this final allegation that the Respondent has not submitted evidence to rebut the General Counsel's affidavit showing noncompliance. Such refusal to promise compliance with the 10(k) determination does not, however, serve as an independent basis for finding an 8(b)(4)(D) violation. Rather, such noncompliance serves as a triggering event for the issuance of a complaint. See *Iron Workers Local 595 (Bechtel Corp.)*, 112 NLRB 812, 817 (1955); *Operating Engineers Local 150 (D. H. Johnson Co.)*, 268 NLRB 1339, 1341 (1984), enfd. 755 F.2d 78 (7th Cir. 1985). To the extent that cases such as *Longshoremen ILWU Local 62–B (Alaska Timber)*, 271 NLRB 1291 fn. 3 (1984), modified 781 F.2d 919 (D.C. Cir. 1986), and *Plumbers Local 195 (Texas Oil)*, 231 NLRB 525, 527 (1977), enfd. 574 F.2d 1215 (5th Cir. 1978), are inconsistent, they are overruled.

An 8(b)(4)(D) proceeding, unlike a 10(k) proceeding, is an adjudicatory proceeding required to be conducted pursuant to the Administrative Procedure Act, 5 U.S.C. § 554. As the Supreme Court noted in *ITT v. Electrical Workers IBEW Local 134*, 419 U.S. 428, 446 (1975), relying on the following footnote from *NLRB v. Plasterers Local 79*, 404 U.S. 116, 122 fn. 10 (1971):

> The 10(k) determination is not binding as such even on the striking union. If that union continues to picket despite an adverse 10(k) decision, the Board must prove the union guilty of a 8(b)(4)(D) violation before a cease-and-desist order can issue. The findings and conclusions in a 10(k) proceeding are not *res judicata* on the unfair labor practice issue in the later § 8(b)(4)(D) determination. *International Typographical Union*, 125 N.L.R.B. 759, 761 (1959). Both parties may put in new evidence at the § 8(b)(4)(D) stage, although often, as in the present cases, the parties agree to stipulate the record of the 10(k) hearing as a basis for the Board's determination of the unfair labor practice. Finally, to exercise its powers under § 10(k), the Board need only find that there is reasonable cause to believe that a § 8(b)(4)(D) violation has occurred, while in the § 8(b)(4)(D) proceeding itself the Board must find by a preponderance of the evidence that the picketing union has violated § 8(b)(4)(D). *International Typographical Union*, supra at 761 fn. 5 (1959).

Therefore, when a 10(k) determination does not end the work dispute, the proceeding becomes adjudicatory following the issuance of an unfair labor practice complaint. *Bricklayers v. NLRB*, 475 F.2d 1316, 1322 (D.C. Cir. 1973), enfg. 188 NLRB 148 (1971). At that point, if a genuine issue of material fact exists whether an unfair labor practice has occurred, a hearing before an administrative law judge is required, even if the issue was previously litigated in the underlying 10(k) proceeding. In this regard, we find that a genuine issue of material fact exists when there are credibility issues to be resolved or when a respondent denies the existence of an element of the 8(b)(4)(D) violation, either directly or by raising an affirmative defense. An 8(b)(4)(D) respondent is not, however, required to proffer new and previously unavailable evidence in order to be entitled to a hearing.[4] Accordingly, we overrule prior Board cases to the extent they suggest that a respondent in an 8(b)(4)(D) proceeding is not entitled to relitigate factual issues concerning the elements of the 8(b)(4)(D) violation that were raised in an underlying 10(k) proceeding unless it presents new or previously unavailable evidence.[5]

Thus, summary judgment will be appropriate only when the parties have stipulated the record of the 10(k) hearing as a basis for the Board's determination of the unfair labor practice or when a respondent has not demonstrated the existence of a material issue of fact with respect to the findings made at the 10(k) proceeding.[6] In these instances, the Board will continue to utilize the record in the 10(k) hearing in order to determine whether, by a preponderance of the evidence, an 8(b)(4)(D) violation has occurred.

In this case, the parties have not stipulated the 10(k) record as a basis for the 8(b)(4)(D) unfair labor practice determination. Further, the Respondent's work preservation defense is a mixed question of fact and law relating to the alleged illegal object of the Respondent's conduct. We find that, by its renewal of the work preservation defense in its answer to the complaint and in its response to the notice to show cause, combined with its denial of the complaint allegations relating to whether the alleged unlawful conduct occurred, the Respondent has demonstrated the existence of a material issue of fact regarding the elements of the alleged 8(b)(4)(D) violation. Accordingly, we conclude that summary judgment is inappropriate in the instant case.

ORDER

It is ordered that the General Counsel's motions are denied and the proceeding is remanded to the Regional Director for Region 32 for further appropriate action.

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[4] The Board will not, however, relitigate threshold matters that are not necessary to prove an 8(b)(4)(D) violation. See *Bricklayers*, above, in which the court found the threshold issue of whether there had been an agreed method of settlement had been resolved by the Board in the 10(k) proceeding.

[5] See, e.g., *Operating Engineers Local 571 (J. E. D. Construction)*, 241 NLRB 1066 (1979), enfd. 624 F.2d 846 (8th Cir. 1980); *Iron Workers Local 433 (Plaza Glass)*, 218 NLRB 848 (1975), enfd. 549 F.2d 634 (9th Cir. 1977), cert. denied 434 U.S. 832 (1977); *Electrical Workers IBEW Local 3 (Mansfield Contracting)*, 206 NLRB 423 (1973).

[6] Member Cracraft expresses no view as to what result she would have reached here had the General Counsel's Motion for Summary Judgment been "made and supported" in conformity with Rule 56 of the Federal Rules of Civil Procedure. See Rule 56(e), which provides, inter alia, as follows: "When a motion for summary judgment is made and supported as provided in this rule, an adverse party may not rest upon the mere allegations or denials of his pleading, but his response, by affidavits or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial."

E. H. Mann, Inc., d/b/a Warrenton Rubber *and* General Teamsters Local Union No. 528, AFL-CIO.[1] Case 10-CA-20791

June 8, 1988

DECISION AND ORDER

BY MEMBERS JOHANSEN, BABSON, AND CRACRAFT

On October 13, 1987, Administrative Law Judge Robert A. Gritta issued the attached decision. The Respondent filed exceptions and a supporting brief.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and brief and has decided to affirm the judge's rulings, findings,[2] and conclusions and to adopt the recommended Order.

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge and orders that the Respondent, E. H. Mann, Inc., d/b/a Warrenton Rubber, Warrenton, Georgia, its officers, agents, successors, and assigns, shall take the action set forth in the Order.

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[1] On November 2, 1987, the Teamsters International Union was readmitted to the AFL-CIO. Accordingly, the caption has been amended to reflect that change.

[2] The Respondent has excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

Sharon Howard, Esq., for the General Counsel.
James P. Cobb, Esq. (Wimberly, Lawson & Cobb), of Atlanta, Georgia, for the Respondent.

DECISION

STATEMENT OF THE CASE

ROBERT A. GRITTA, Administrative Law Judge. This case was tried before me on 23, 24, and 25 September 1986 in Warrenton and Thomson, Georgia, based on a charge filed by General Teamsters, Local Union No. 528 (the Union) on 5 March 1985 and a complaint issued by the Regional Director for Region 10 of the National Labor Relations Board on 4 April 1985.[1] The complaint alleged that E. H. Mann, Inc., d/b/a Warrenton Rubber (Respondent) violated Section 8(a)(1) and (3) of the Act by discharging two employees for engaging in union activities. Respondent's timely answer denied the commission of any unfair labor practices.[2]

All parties were afforded full opportunity to be heard, to examine and cross-examine witnesses, to introduce evidence, and to argue orally. Briefs were submitted by the General Counsel and Respondent on 10 November 1986. Both briefs were considered.

On the entire record in this case and from my observation of the witnesses and their demeanor on the witness stand, and on substantive, reliable evidence considered along with the consistency and inherent probability of testimony, I make the following

FINDINGS OF FACT

I. JURISDICTION AND STATUS OF LABOR ORGANIZATION—PRELIMINARY CONCLUSIONS OF LAW

The complaint alleges, Respondent admits, and I find that E. H. Mann, Inc., d/b/a Warrenton Rubber is a Georgia corporation engaged in the manufacturing of innertubes in Warrenton, Georgia. Jurisdiction is not in issue. E. H. Mann, Inc., d/b/a Warrenton Rubber, in the past 12 months, in the course and conduct of its business operations, shipped products from its Warrenton facility valued in excess of $50,000 directly to points located outside the State of Georgia. I conclude and find that E. H. Mann, Inc., d/b/a Warrenton Rubber is an employer engaged in commerce and in operations affecting commerce within the meaning of Section 2(2), (6), and (7) of the Act.

The complaint alleges, Respondent admits, and I conclude and find that the Union is a labor organization within the meaning of Section 2(5) of the Act.

II. BACKGROUND

Respondent is the successor to Polson Rubber Co., for whom several current employees and supervisors were employed. The product is rubber innertubes. At present the plant manufactures on three shifts and the shipping department operates on two shifts. Bill Bonner is plant manager, Jim Harper is personnel manager, Lewis Newsome is production superintendent, Earnest Hobbs is shipping manager, and Grover Jobes is the subordinate shipping supervisor responsible for the boxing employees on each of the two shifts, 8 a.m. to 4 p.m. and 4 p.m. to midnight. Each of the three manufacturing shifts is supervised by a general foreman. Boyd Taylor is the general foreman on the first shift and Linton Jones is the subordinate mill supervisor on the first shift. Each manufacturing shift has mold lines, splice and valve employees, and inspectors. A chief inspector is present on each manufacturing shift. Eloise Braddy was chief inspector on the first shift in manufacturing and Gloria Yarbough was boxing supervisor on the second shift in shipping.

On 31 August 1984 the Union won an election among Respondent's employees. The Union was not certified as

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[1] All dates are in 1984 unless otherwise specified.

[2] The General Counsel at trial moved to amend the complaint by adding two counts of coercive interrogation. The motion was granted and Respondent answered orally on the record, denying the allegations.

289 NLRB No. 5

the exclusive representative, however, until 11 November 1985. From that certification until June 1986 the parties were engaged in motions including a summary judgment for the General Counsel. The Board denied the summary judgment and notice of hearing issued on 23 July 1986.

Respondent in its answer to the General Counsel's complaint admitted the discharges of Eloise Braddy and Gloria Yarbough on 28 September 1984. Respondent also admitted that the two employees were discharged for engaging in union activities.

The General Counsel's complaint alleges that the discharges violate the Act and Respondent contends that the two employees are "supervisors" and therefore not protected by the Act.

Pertinent testimony of witnesses is detailed below.

III. THE ALLEGED UNFAIR LABOR PRACTICES

Eloise Braddy testified that her previous employment of 5 years was at Polson Rubber, the predecessor company, where the last 2 years she served as chief inspector. Her employment at Polson ceased 18 January 1980 and she was hired by Respondent on 26 January 1981. Braddy was hired by Melissa Dawkins, personnel director of Respondent, along with all other inspectors from Polson. There was no discussion of duties or responsibilities of inspectors for Respondent because all inspectors were experienced. Braddy was hired as chief inspector on the first shift (7 a.m. to 3 p.m.). She was salaried at $10,000 progressing to $12,559 on the day of her discharge and was a nonexempt employee for overtime pay purposes. Braddy, as chief inspector, had contributory health insurance on an 80/20 basis of company pay/-employee pay, whereas the hourly paid employees had a 60/40 ratio. She received a 2-week vacation after 1 year and 3 weeks after 5 years, contrasted with hourly employees, who received 1 week and 2 weeks, respectively.

Braddy oversees the on-the-job training of new inspectors but has no authority to hire or fire employees nor to assign employees to a particular work station. Plant management hires employees and assigns employees to work stations. All new hires for the inspector classification train on the first shift without regard for their permanent shift assignment. Taylor decides what position the new hire is assigned to and Braddy trains the new hire in that same position. Usual training period is 3 weeks devoted to learning to spot open splices, wrinkles, pinches, holes, and thin sidewalls. Inspectors mark tubes with defects and place them on a conveyor to repair. Good tubes are placed on a conveyor to warehousing preparatory to boxing and shipping.

There are 13 hourly employees in the inspection department; 8 regular inspectors, 1 relief inspector, 2 repair persons, 1 classifier, and 1 warehouseman. There are four production lines (A, B, C, and D) consisting of approximately 14 molds each. Two inspectors are stationed on each production line and divide the output of the molds evenly. Normal production consists of standard passenger car tubes or truck/tractor tubes that are larger. Passenger tubes flow down the line at the rate of one per minute, and that is the established standard for the inspectors, seven tubes each 7 minutes. The truck/tractor tubes are larger and require more molding time and more inspection time. Typically, two inspectors on a line will pass 700 passenger tubes and reject 50 to 100 as defects. Braddy, as chief inspector, inspects all defective tubes from the four production lines to determine repairability and marks each tube with her stamp before sending it to repair. Braddy follows the established standard of no more than three repairs per tube, unless the repairs are small, allowing a total of four repairs. Any tubes less than 50 percent rubber or outside the repair standard are labeled scrap and recycled into production. Tubes with more than 50 percent rubber and outside the repair standard are labeled "blems" and sold as seconds. On occasion Braddy's inspection does not substantiate a defect and the tube is returned to the original inspector. Many tubes, in addition to repairs, labeling as scrap or blems must be buffed to remove unwanted and excess rubber dregs before proceeding to warehousing. Braddy's department in the past had a buffer classification but that has not been the case for years. Braddy, in addition to inspecting 400 to 500 tubes from all 4 lines per day, must operate the buffing machine and see that the department is supplied with valve cases and necessary tools. Ninety-five percent of Braddy's workday is spent at her station inspecting and handling tubes from the production line. The remainder of her workday is spent on recordkeeping of scrap and repairs per day and the filling out of forms for employees in her department.

All tubes needing repair are repaired by one of the two repair persons and then sent to the classifier. The classifier determines if the repair is satisfactory or if the tube should be scrapped. Usually all tubes produced on a shift are inspected rather than leaving any for the next shift. Occasionally, repairs or blems may be left for the next shift depending on the critical nature of the scheduled production.

Quality control, a separate department, spot checks first-line tubes (those tubes passed by the inspectors) for defects or other misinspections. Any tubes found defective by quality control are red-tagged with the original inspector's number and returned to the production department. Boyd Taylor decides if the red-tagged inspector will be disciplined and if so whether it will be a warning or a writeup. Taylor then instructs Braddy to do it. Braddy either executes the warning or writeup during shift or after shift, depending on her own workload of tubes. Braddy includes all writeups with her record sheets and turns them in daily to Taylor. She does not see the writeup again. Someone in management is responsible for them and for implementing the discipline policy of three writeups, then discharge. From time to time the number of red tags becomes a problem. The shift will start with all employees going through the red-tagged tubes to familiarize themselves with what is causing red tags in an effort to increase efficiency. Taylor has in the past instructed Braddy to counsel certain employees about their work performance and to help them do a better job of inspecting.

Braddy also, on instructions from Taylor, writes up employees for tardiness and absenteeism. The Company's rule requires employees to call in before shift to report unavailability. Usually the third-shift supervisor or Boyd Taylor will take the call and tell Braddy who would be out or late that day. Braddy has sometimes been in the office before shift and taken a phone call; she cannot, however, excuse employees on her own. She has to report to Taylor and he decides what to do. All writeups by Braddy are subject to approval by Taylor, the personnel department, or the production superintendent. On several occasions writeups by Braddy were changed by Taylor or someone else without consultation of Braddy. Braddy has not, on her own or via a recommendation, told Taylor that anyone should be disciplined or fired. On one recent occasion, an employee called Braddy a "bitch" during shift. At some later time Braddy mentioned it to Taylor, and he said she should have reported the incident to him, and he would have sent the employee home. Taylor also told Braddy that she should have written up the employee. Braddy's standing instructions from Taylor were to report to him any employees not doing their work. If Taylor did not personally speak to the employee, he would tell Braddy what to say to the employee. If the employee did not thereafter perform satisfactorily, Braddy was to write up the employee. All inspection employees are evaluated after the first 30 days of employment. The wage schedule for inspectors contains four steps from hire-in wage to top of the scale. Evaluations are based on the Company's inspection standard of five large tubes each 13 minutes and seven passenger tubes each 7 minutes. Braddy has, on four or five occasions since 1981, checked a new employee against the standards and filled out an employee status change sheet, which allows the employee to receive the appropriate step increase in wage. The employee status sheets are supplied by the personnel office at the appointed time for each employee. Most frequently, Taylor filled out the sheets and gave them to Braddy to sign. Braddy stated that she had authority to recommend discipline of employees by writing up the employee for poor quality of production, tardies, and absences because that was what she did in accord with the procedures. The writeups were turned in to Taylor at shift's end for processing.

Employees are allowed several breaks and lunchtime each shift. Inspectors are relieved for breaks so the production line can continue running. Reliefs are handled by the relief inspector. There have been times when the relief inspector was absent or filling in for an absent inspector and inspectors would break at the same time as the molder to keep tubes from piling up during break. Each inspector takes breaks according to an early or late schedule. In the past the schedule allowed the same inspector the same break every shift. Even though inspectors were allowed to switch breaks with each other as long as the line was attended, the schedule was the rule. The inspectors complained to Braddy about the inequity and she talked to Taylor. Taylor told Braddy the inspectors could rotate by line so no one inspector would always be early or late.

Taylor decides when overtime is necessary and tells Braddy to check for volunteers. If an insufficient number of employees volunteer for overtime, the employees draw straws to see who must work. Any employees who refuse to work their overtime are disciplined. Taylor decides what discipline and instructs Braddy to write up the employee. Taylor usually knows when employees are to be late or absent, but if an employee does not report for work Braddy advises Taylor. He picks employees from a call-board and either he or Braddy makes the call to the employee. The process continues repeatedly until contact with an accepting employee is made.

As chief inspector, Braddy has the authority to shut down a certain mold continuously producing defective tubes, but she must immediately notify Taylor so he can find the trouble and correct it.

From plant opening in 1981 to the union campaign beginning in July, there were scheduled meetings of supervisors. Braddy was not required to attend nor was she invited to attend any of the supervisors' meetings. After employees walked out 10 July, management commenced daily meetings of all salaried production employees on each shift. Quality control employees also attended the meetings. Management was seeking information about union discussions among employees and speculation of who would vote for the Union and who would vote for the Company.

On two other occasions Braddy attended meetings with management. One just before the election and the other 2 weeks before her discharge. Both meetings were held in Bonner's office in the presence of Bonner, Newsome, and Company Attorney Cobb. In the first meeting Braddy was asked to reveal what she had heard about the Union from employees in her department and to designate the affiliation of each employee in her department for the upcoming election. Braddy told the assembled management what she knew of the union conversations among employees in her department and characterized each employee as procompany or prounion. The second meeting included additional supervisors, Harper and Taylor. Cobb started the meeting by telling Braddy that five employees had reported threats by her to management. Cobb stated that the five employees said Braddy had told them to join the Union or she would have them fired. Braddy denied making any such threats to employees and further denied talking to employees about the Union. Cobb asked if she had signed a union card or attended union meetings. Braddy replied that she had neither signed a card nor attended union meetings. Cobb then asked Braddy if she would be willing to go before the National Labor Relations Board and state that she had talked to all employees in the plant and influenced them to vote for the Union. Cobb told Braddy if she spoke to the National Labor Relations Board he felt the election would be thrown out. Braddy told the assembled management that she would do whatever they wanted. Cobb then asked Braddy if she would submit to a polygraph test and Braddy agreed to do so. The meeting ended and Braddy left to go to her car. As she approached her car she became upset and started crying. On reflection Braddy felt she was not being treated right so she reentered the plant and went to Bonner's office. She told the assembled management that she had changed her mind and would not talk to the National Labor Relations Board or submit to a polygraph test.

Braddy added that they could fire her for not doing it if they wanted to. Bonner stated that no one said anything about firing her and asked Braddy if she was feeling all right. Braddy told Bonner that she was all right and left again to go home. Braddy worked as usual after that and no one mentioned the meeting or its substance again.

Braddy worked 28 September, without incident and without conversation from her supervisor. She felt something was wrong because Newsome spent the day just looking at her and not saying a word. At 2:55 p.m., Taylor brought Braddy her paycheck and told her to see Harper in his office. Braddy compiled her production sheets, as she always did, and turned them over to Taylor and went to Harper's office. Harper had Braddy's personnel folder and a completed separation notice before him when Braddy arrived. Braddy asked why she was being fired and Harper replied that he was told to discharge her for "union activities."

Ophelia Grier testified that she worked as an inspector for Polson Rubber and was hired by Warrenton as an inspector when the plant started operations. She worked first shift with Braddy. Grier, although employed at Warrenton, would on occasion fill in for chief inspectors on other shifts, but did not fill out any forms or documents normally executed by the chief inspector. Several times Grier has heard Taylor instruct Braddy to write up employees for too many red tags. Once Grier herself and two other employees were subjects of writeups dictated by Taylor. In the past Grier was forced by severe winter weather to call in absent. She would ask for Taylor or Braddy when calling, but Taylor answered the phone and told her to get to work when she could. Grier has not talked to Braddy when calling in. Whenever she wanted to leave work early Grier would make the request of Braddy. Braddy did not on her own grant any permission to leave work. Braddy would tell Taylor of the request and then relay Taylor's answer to the employee. Either "yes" or "no." Grier also worked as relief inspector. She would relieve each line inspector and then the chief inspector although the chief did not have a set time to break. The chief inspector's job is harder than the line inspectors because the chief has more work to do. Relief inspectors also fill in for any absent inspector for the whole day. Whenever Grier filled in for the chief inspector, whether breaktime, lunch, or the full day, she did have to relay Taylor's instructions or criticisms to the employees. "If they had done wrong and if Taylor come to me I have to tell them what Taylor said."

Gloria Yarbough testified that she worked in the boxing department of Polson and was hired by Warrenton for boxing in 1981 at an hourly rate on the first shift. After 3 months she became crew leader of boxing on the second shift at the same hourly rate. The second shift boxing crew is composed of five boxers, one conveyor man, one tube supplier, and the crew leader. The second shift times are 3 to 11 p.m., but the crew leader always arrives 15 minutes early to consult with the first-shift crew leader about the ongoing order. Each tube size has to be packed in different boxes and each crew leader has a list of tube sizes to be packed on that shift. Yarbough always started her shift with extra sheets of orders supplied by Shipping Supervisor Jobes. As crew leader, Yarbough would determine from the shipping list what size boxes the crew would need. She physically moved the correct bundle of boxes to the work area and labeled the boxes with the tube sizes and quantity. There were approximately 50 different sizes. Tubes to be packed would be moved into the area by the supply person and if bundles of boxes were short he also moved them in. On occasion when special orders required more speed, Yarbough would tell the tube man to give a certain size tube to a particular boxer because she could box faster than the others. Usually on Thursdays or Fridays a rush order would require one or two boxes of tubes made up before the truck was loaded and someone would tell Yarbough what to box and she would either get it boxed or do it herself. There are times when an unusual size is ordered and Jobes or Hobbs would have to determine the box size and quantity before the crew could box them.

Whenever employees were not working as they should, Yarbough told them if they did not stop what they were doing or pay more attention to their work, she would tell Jobes or Hobbs. Jobes would normally come out on the floor and talk with the employees to get them straightened out. On occasion, Jobes told Yarbough to send the employee to his office. Blank writeup notices were kept in Jobes' office. Although Yarbough wrote up employees, she could not do so unless Jobes or Hobbs told her to do so. She did not on her own volition write up or otherwise discipline employees. After being instructed to write up an employee, Yarbough always turned in the writeup to Jobes and never saw it again. Yarbough also filled out employee attendance information sheets whenever employees were absent, tardy, or left work early and turned in the sheets to Jobes. Only Jobes or Hobbs could give employees permission to leave work early and, if both Jobes and Hobbs had left for the day when an employee requested permission to leave early, Yarbough called one or the other at home to see if the employee could leave early. At all times when employees called in to report an absence or being late to work, they spoke to Jobes or Hobbs. Yarbough would not know of an absent or late employee until supervision informed her.

All employees trained on the job at the hire-in rate. If a new employee was boxing at a speed comparable to the older employees Yarbough told Jobes. Sometimes Jobes told Yarbough to check on the performance of certain employees and report to him. Jobes would decide if a new employee could have a first wage increase and whether older employees were entitled to a wage increase. When Jobes decides that an employee is entitled to a wage increase he tells Yarbough to write up the employee for an increase. Yarbough would do so and leave the form with Jobes for his approval. Normally, Yarbough did not have time during shift to make whatever writeups she was told to do, so she waited until the end of the shift to do her paperwork, sometimes during the last 15 minutes and sometimes after shift.

In the past, Yarbough has complained to Jobes and/or Hobbs about certain employees not doing their job or causing friction among the crew. She suggested one time that a particular employee be discharged because he would not do his job and always caused trouble. Both Jobes and Hobbs talked to Yarbough about the situation and decided to transfer the employee to another shift. Several other employees have been a problem either due to slow work or bad work, and Yarbough also reported their performance to Jobes. After such a report Jobes or Hobbs would come to the floor and counsel the employee to do better. If an employee was not keeping up with the crew and had been reported by Yarbough to Jobes or Hobbs, either or both of them would observe the employee's work. They then decided whether to give the employee more time to work up to speed or to tell Yarbough to write them up. One employee was fired by Jobes because the wrong size tubes were shipped and then returned by the customer.

Whenever overtime was required Hobbs or Jobes decided how long to work. With the exception of Saturdays, usually several employees had to work. Yarbough was told to check with the employees to see who wanted to work overtime. If no one, including Yarbough, wanted to work overtime either Jobes or Hobbs would talk to the whole crew. There were times when only Yarbough was willing to work overtime and she would work by herself. Several Saturdays, Jobes and Hobbs called Yarbough at home for overtime work and she came in to work by herself.

Work breaks among the boxing crew were taken all at the same time unless there was an order that had to be finished. In that event Yarbough would relieve each employee, one by one, until all had been given a break. The order of relief was decided by the employees and who wanted to go on break first. On one occasion, the whole crew took a few extra minutes on break. Jobes saw that Yarbough was the only one at her work station. Jobes told Yarbough to write up all five employees for overstaying break when there was work to do.

During the month of July, on Fridays, when shift started, if the first shift had left enough boxes and tubes to keep the second shift occupied for awhile, Yarbough would not have to move boxes or tubes into position right away. With the crew already working Jobes would tell Yarbough to get the timecards from the rack and initial the employees' recorded time. The initialing of timecards was actually Jobes' responsibility, but he would utilize Yarbough's slow time to help him.

About the first week in August, Yarbough was put on salary, contrary to her wishes. Hobbs called her to his office and asked how she felt about going on salary. Yarbough told Hobbs she preferred staying at an hourly rate because of the weekly paycheck. Hobbs told her to think about it for a few days and they would talk again. Yarbough went to Hobbs several days later and told Hobbs she did not want to go on salary. Hobbs said she had to go on salary whether she wanted to or not and told her to see Harper in the personnel office. Yarbough told Harper that she preferred an hourly wage, but Harper said she had to go on salary and explained to her that she would get a raise and additional benefits. On salary, Yarbough received a paid vacation whereas before she had not, and with a salary she no longer punched the timeclock. She kept the title crew leader and was not told she was thereafter a supervisor. Hobbs did tell Yarbough that she could not talk to the union employees nor could she vote in the election because she was now a salaried employee. Yarbough did feel that she was a supervisor of sorts because she was instructed to see that the work was done and was to report any deficiencies of employees' performances to Jobes or Hobbs. Also Yarbough did the same work that Dorothy Ray did on first shift, and Yarbough considered her to be a supervisor. Yarbough, however, did not have the authority to hire or fire employees nor the authority to recommend such actions. Yarbough's job remained the same after salary as it had been before with the exception that she was given one additional duty, the initialing of timecards whenever employees worked overtime. Yarbough was paid for her overtime, at an hourly rate, after she was put on salary just as she had been before.

Within a week of the election Yarbough was called to the front office by Hobbs. Hobbs informed her that Bonner and Newsome wanted to ask her some questions. When Yarbough arrived at the front office, Attorney Cobb was also present. Cobb did most of the talking and wrote a statement of Yarbough's responses. Cobb asked Yarbough if she went to the union meetings in the city park and she said she had. She was asked if she had signed a union card and told management present that she had. Yarbough was then asked to recall which employees she had seen in attendance at the park meetings, but she said there were too many to name. Yarbough was asked to sign the statement that Attorney Cobb wrote during the meeting and she did.

On 28 September when Yarbough arrived for work she was called to Harper's office. Harper told Yarbough she was fired for having engaged in union activities. Harper paid her and she left the property.

Lula West testified she had been employed as a repair person since Respondent opened the plant. She repairs tubes on the first shift. Occasionally, West runs the buffing machine in addition to repairing tubes. At present her hourly rate of pay is $4.53 and has been since 1984. Although Braddy was chief inspector, if West wanted to leave work early, she would notify Braddy. Braddy in turn would ask Taylor if West could leave early. Taylor's decision was then passed on to West by Braddy. On the days that West intended to come in late or be absent the whole day she would call in. West would tell whoever answered the phone to tell Taylor of her absence or her tardiness. West never spoke to Braddy when calling in nor did she ever ask for Braddy. In overtime situations, if employees refused to work overtime, Braddy told them that Taylor said to write up anyone who did not stay over. Delores Pinkston, chief inspector on the third shift, was transferred to first shift after Braddy was discharged. Taylor does little, if any, manual work in the plant. Mostly he checks the molds and the tubes in various stages of production.

Grover Jobes testified that he retired from Respondent's employment on 6 March 1986. While employed he was shipping supervisor with responsibility to schedule the work of the boxing department and see that the proper crew was in the department each shift. He also had responsibility for completion of shipping schedules of the shipping employees. Jobes worked from 7:30 a.m. to 5 p.m. normally but on a weekly basis worked over 3 or 4 days until 6 or 7 p.m. There were two shipping employees on the second shift under Jobes' supervision, but after Jobes left for the day they were unsupervised. Jobes relied on one of the most senior employees to get the order shipped in his absence.

When the plant reopened in 1981, the boxing department was set up with a crew leader, Dorothy Ray, on the first shift only. Within a short time Ray was changed from hourly to salary. Jobes explained that Ray was referred to as a supervisor after she became salaried. Gloria Yarbough had boxing experience when she was hired into the boxing department with Ray. Yarbough on occasion assisted Ray in the boxing operation. When a second-shift boxing department was installed, Yarbough became the crew leader on the second shift. Jobes instructed her to handle the second shift according to what she was supposed to do or what she was trained to do. Jobes did not tell her what her title would be. He took for granted that Yarbough would know what her position would be and what she would be doing. Jobes did not, in any descriptive language, tell Yarbough that she was a supervisor or the supervisor of the second-shift boxing. Jobes did recall that when Yarbough was put on second shift he talked to both she and Ray. He instructed both that they had the authority to orally discipline employees and showed them the discipline forms to use. Jobes showed them where the discipline forms were kept in his office, but he did not tell Yarbough that she could write up employees without first reporting to him. Specifically, whenever Yarbough reported an incident to Jobes before any discipline was administered, Jobes never told her that she could discipline or write up employees without checking with him. Jobes, on occasion, after hearing Yarbough's report of an employee, would tell her to let the incident pass without a writeup or he would talk to the employee himself. Jobes initialed all writeups because if he did not, when Hobbs saw the writeup without Jobes' approval he would say, "Jobes, do you agree with this?"

One example of the discipline procedure cited by Jobes occurred in May 1984. Jobes had instructed Yarbough to have employee Vernon Johnson stock a certain size tube when he started his shift. Later in the shift Yarbough called Jobes and reported that she had given Johnson the instruction but he refused to do the task. Jobes told Yarbough that she knew the procedure, what "we" had to do and to go ahead and do it. Yarbough then wrote up Johnson for refusal to follow instructions and poor quality workmanship. Jobes initialed the writeup to confirm that Yarbough had followed through with what she was supposed to do.

A second example of discipline occurring in May 1984 involved Willie Norris. He reported for work intoxicated at 8 p.m. Yarbough called Jobes at home to report the incident. Jobes returned to the plant and sent Norris home. The following morning Jobes wrote up the incident on a discipline form and signed Yarbough's name to show that the incident took place on the second shift. Jobes also reported the incident to Hobbs.

Jobes also stated that both Ray and Yarbough talked to employees who had trouble doing the work or trouble on the shift. They would more or less give the employees an oral discipline and then report to him. A writeup of the employee on a discipline form following a report to Jobes was standard procedure. In fact, in the absence of Ray or Yarbough from the boxing department, Jobes would discipline employees followed by a writeup, but Jobes always signed the crew leader's name to the writeup. On occasion, but not at all times, Jobes would notify the crew leader on her return of the previous writeup.

Also in May, Wyvonie Collins was in training as a boxer on second shift. Yarbough saw that Collins was working at a speed comparable to the older employees but receiving the hourly wage of trainees. Jobes told Yarbough to put it in writing to him and Hobbs. Yarbough wrote a note to Hobbs and Jobes recommending that Collins be taken off the training pay and given her first incremental pay raise. Jobes discussed Collins with Hobbs and Hobbs told Jobes to take it to personnel to see if she could get a raise. Jobes followed through and Collins got her raise.

Typically, Yarbough's workday began with her checking with first-shift boxers (Ray) to see what was left to do on any current orders and checking with Jobes for any additional orders to work. Jobes had premade lists of tubes to be boxed and shipped for Yarbough to work from, and he would supply her with enough lists to last the entire shift. If special orders were needed Jobes would supply a written schedule of tubes and tell her what priority the special order had. After Yarbough received the production schedules, she would check to see if all employees reported for work. If all employees had not reported for work, Yarbough informed Jobes and he would get with Hobbs to determine if someone from first shift should be held over, if someone should be called in for overtime, or if Yarbough should work with a short crew. The decision by Jobes and Hobbs rested on the critical nature of the orders on the production schedule. Once the shift started Yarbough made up boxes with labels according to written specifications detailing how various sized tubes were to be boxed and shipped. Yarbough also gave the tube supplier a copy of the production schedule so he would know what size tubes to supply to the boxers. The box label told the boxers what size tube and the quantity to put in each box. Yarbough would stack the prepared boxes in separate areas so the tube supplier would know where to put the correct size tubes to be boxed. Yarbough, during shift, would inspect random boxes to check the accuracy of the boxers' work.

The Company's call-in rule applied plantwide to all employees. The employees were instructed to call in at least one-half hour before shift time if they expected to be late or absent. Second-shift boxing employees were to call in and speak to Jobes or Hobbs. First-shift employees who called in to report late or absent were instructed to speak to Taylor or Newsome. If a second-shift boxer had called in as instructed, Jobes would tell Yarbough when she came on shift that an employee would be late or absent.

The Company's rule on employees leaving early from shift also applies throughout the plant to all personnel. The Company would not require employees who become sick at work or who have a personal emergency to stay at work. If a second-shift boxer became sick or had an emergency, Yarbough was not required to notify Jobes of the emergency at his home. Any other request to leave early, less than major or catastrophic, had to be decided by Jobes or higher authority before the fact. Yarbough could not on her own release employees making such a request. Whenever a boxer did leave early, Yarbough had to finish the shift with the short crew since she did not have authority to call in off-shift employees. Only Jobes or Hobbs could authorize replacement employees.

Overtime for the boxing employees was only authorized by Hobbs. He would tell Jobes how much overtime for any given day and how many employees would be needed. Jobes would pass the word on to Yarbough. If less than the full crew was needed, Yarbough would ask for volunteers. In the event no employees volunteered, Yarbough reported to Jobes who then went to the boxing area and appointed the requisite number of employees to stay and work overtime. At the end of each week, all timecards showing overtime had to be initialed before employees would receive overtime pay. Jobes had instructed both Ray and Yarbough that the timecards had to be initialed before they were picked up on Friday evenings by payroll and told Ray and Yarbough to initial them.

Yarbough did not have authority to hire or fire employees. Although she never recommended anyone be hired, she did on one occasion recommend that a recalcitrant employee, Vernon Johnson, be discharged. Yarbough reported to Jobes in June 1984 that Johnson refused to do work that she had instructed him to do. Jobes told Yarbough to follow the procedures, make a writeup and turn it in to him. Jobes in turn discussed the writeup with Hobbs. Both separately counseled Johnson and later Hobbs told Jobes that he would handle the situation. Jobes had no further involvement with the incident.

Yarbough, also, did not have authority to remedy any employee complaints relative to hours worked or wages received. Only Jobes could make any adjustments for the employees. Yarbough could handle complaints by employees of water on the floor by having the janitor clean it up. Although other employees could not leave their work stations to look for the janitor, if the janitor was in the area, any employee could tell him to clean up a wet floor.

Jobes was not aware that Yarbough was put on salary until she told him. Although he did not know when Yarbough went on salary, he knew that her status changed from boxer to supervisor with the salary. The changed status, however, did not carry with it any additional duties. Yarbough worked as she always had since going on the second shift.

Shortly after Yarbough's discharge, the second-shift boxing department was discontinued due to a reduction in tube orders.

Evelyn Reynolds testified she has been a boxer on the second shift for 3 years. She was hired by the office and interviewed in the office. When Reynolds began employment, she was sent to Jobes' office. Jobes told Reynolds that she would be working under Yarbough and that Yarbough was the "boss." Jobes added that if Reynolds had any problems, she was to come to him, or, if there are problems that Yarbough cannot handle, come to him. Jobes also told Yarbough if she had any trouble with the employees to call him. Yarbough told Reynolds that Barbara would show her what to do and how to put the tubes in the boxes. Yarbough asked Barbara to help Reynolds and show her what to do. The box labels state the tube size and quantity for each box. The boxers simply put the stated tube size and number in each box. The production quota for each boxer was 1000 tubes in 8 hours. Each day a boxer begins work at the same work station unless the boxes and tubes are stacked differently. If the work stations are different, Yarbough will tell the employees what kind of orders are to be done and how the boxing is to be done. The department is set up with four boxing stations and two extras. All six stations are supplied with boxes and tubes each day. Any time a boxer completes the boxes and tubes at her station, she is supposed to move to one of the extra stations and continue working. As a work station is emptied, a new supply of boxes and tubes are brought in. When the boxer at the extra station runs out of work the movement is reversed.

Reynolds came to work one night and Yarbough told her that she looked sick. Reynolds told Yarbough that she did not feel good but she wanted to try and make the shift. Later Reynolds told Yarbough that she could not make it and was going home. Yarbough asked Reynolds if she had a way home and Reynolds responded, "yes." Yarbough told Reynolds to bring a doctor's excuse when she returned. Reynolds came to work the next day and turned in her doctor's excuse to Jobes.

Vernon Johnson was the tube supplier and Yarbough always had trouble with him. Johnson would shout and cuss Yarbough whenever she corrected what he was doing. Usually, Johnson would not put the tubes in the right work station. Yarbough would end the colloquy with, "I'll call Grover [Jobes]" or "I'll write you up." Johnson responded, "I can write too." On occasion, Yarbough reminded Johnson that she was his "supervisor" to which Johnson replied, "You wasn't shit."

Bernice Johnson, another employee that Yarbough had trouble with, would argue with her. When Yarbough told Bernice that she was her supervisor, Bernice would reply that Yarbough "wasn't nothing." Yarbough at that point would take Bernice from the work floor, but Reynolds did not know where they went.

Willie J. Norris, an additional troublesome employee that was told by Yarbough "I am your supervisor," would engage in cussing Yarbough with language too nasty to repeat.

Reynolds knew that both Johnson and Norris were written up for their nasty conduct, but Yarbough never made the writeups at the time of the incidents. Yarbough made all the writeups after the shift ended. On many occasions when Yarbough had trouble with an employee she would say, "I'm going to tell Earnest [Hobbs] or I'm going to tell Grover [Jobes]." Some time later, either Hobbs or Jobes would come into the department and talk to the employees. Jobes called the whole crew into his office one afternoon and told them, "Yarbough is your boss, you do what she say do." Jobes added that he did not want to have to come back into the plant every night to straighten things out.

One week Reynolds and several others were shorted on their paychecks. The employees told Yarbough and gave her their check stubs. Later Jobes came to the department and told Yarbough the pay oversight was straightened out, and Yarbough told all the employees what Jobes had said.

Yarbough never told Reynolds that she was the supervisor during working hours, but one time riding enroute to work she did. Yarbough said she had been made supervisor but was not ready for it because she needed to get her weekly check to catch up her bills. Even though Yarbough said she was to be a supervisor, the only thing that changed was Yarbough no longer punched a timeclock.

When Reynolds was in training, she was slow working up to the standard of 1000 tubes. At one point, Yarbough told Reynolds that "they" were getting on her and she would have to tell "them" when Reynolds was doing her job right. Yarbough said she told Jobes that Reynolds was slow but she was a steady worker and could do it. Reynolds completed her probationary period producing below standard, and received a partial raise. Later, Reynolds did start producing at standard and Yarbough said she would tell Jobes. After awhile, Yarbough told Reynolds that her raise had been granted and Reynolds did later get her raise.

Wyvonie Collins testified that she was hired as a boxer on the second shift by the personnel office. After the interview, the office lady took Collins to the boxing department, showed her how to use the timeclock, and introduced her to Yarbough. The office lady told Collins that Yarbough would tell her what to do. Collins was not told that Yarbough was her supervisor, but she was told that she would be working under Yarbough. Collins' first day was spent training with a first-shift boxer that stayed over. Thereafter, Yarbough showed her how to do the work. Yarbough told Collins if there was anything she did not understand, to tell Yarbough and she would help her all she can. Each day the boxers turn in a tally of completed boxes to Yarbough who in turn checked the tally against the department production. After checking, Yarbough knew on a daily basis each boxer's production and whether it was standard or not.

Collins recalled that when she began boxing 1000 tubes per shift, which was standard, Yarbough told her she was doing a good job. Yarbough also said she would talk to someone about Collins getting a raise. Later, Collins saw a note that Yarbough had written to Jobes relative to a pay raise for Collins. Collins did not say anything more to Yarbough about a raise.

Collins worked with Vernon Johnson who was the tube supplier. Johnson was slow and, on occasion, the boxers would run out of tubes. When Yarbough would tell Johnson to hurry up, he would cuss her and tell her to shut up because she was not his boss. One evening he and Yarbough got into an argument and Yarbough told him if he cannot do the job to go on home. Johnson responded to Yarbough that she did not hire him and cannot fire him and laughed. Yarbough told Johnson that she was going to tell Jobes of his conduct.

Another employee, Dooley, had a habit of wandering off. Yarbough told him he would have to stay in the department and do his job. Yarbough told Dooley that she was going to tell Hobbs because she was sick and tired of how some of the people were talking to her.

Collins had to leave the shift early twice because her grandbaby was sick. The first time she got word from home that her grandbaby had to be taken to the hospital, Collins told Yarbough of the sickness and asked to leave early. Yarbough said she would have to call Jobes at home and get his approval, but Collins could not wait and left anyway. The second time it happened, Collins did not see Yarbough so she told her coworkers to tell Yarbough that she left early because her grandbaby was sick again.

Collins, at one point, wanted to change shifts and work the first shift for awhile. She asked Yarbough if she could change, and Yarbough told her to see Jobes or Hobbs for permission.

Earnest Hobbs testified that he was hired as traffic and shipping warehouse manager on 22 February 1982. Hobbs met Yarbough 2 weeks later while she was working the first-shift boxing as helper to Dorothy Ray. Ray puts labels on boxes and places the boxes in the several work stations. Ray was called the boxing supervisor.

When the Company decided to set up a second-shift boxing department, Hobbs talked to Yarbough about taking the second-shift boxing position. Hobbs told Yarbough that she would be in charge of boxing and he would hold her responsible for what happened. Although Dorothy Ray on the first shift was doing the same job as Yarbough on the second shift, Ray was salaried and Yarbough was hourly. Hobbs stated that he submitted three requests for Yarbough to be put on salary with the first being made while Yarbough was Ray's helper on the first shift. The second and third requests were made after Yarbough was transferred to the second shift. Hobbs did not remember the dates, but he was sure that the third and final request for Yarbough's salary came just before the walkout by employees and was approved before the elections. Hobbs stated that he was motivated, in part, to request a salary for Yarbough due to her complaints that she was doing the same job as Ray but not making the same amount of money and he assumed she would welcome a change to salary. Hobbs called Yarbough to his office to inform her that a salary had been approved but Yarbough said she was not ready for it. Yarbough told Hobbs that she could not afford to miss a pay period by going to a 2-week period on salary. Hobbs explained to her that she would not miss a week of pay because she would get the 1-week's pay that was held back to fill the gap in the first 2-week period of salary. Yarbough said she would think about it. In the interim, Yarbough spoke to Harper in personnel about the salary plan. Later, Harper and Yarbough told Hobbs that she had decided to "try it," meaning the salary. After Yarbough went on salary, Hobbs explained the better insurance and better vacation benefits she would receive. He did not discuss the timeclock or the signing of timecards; Yarbough had previously begun signing employees' timecards. Hobbs did not detail any new responsibilities for Yarbough following her salary approval because he had always depended on her to get the work done and treated her as his supervisor on the second shift. Hobbs never told Yarbough that she was a "supervisor" or the "boss" of the second shift. He did tell her she was "in charge" of the second-shift boxing and was supposed to answer to Jobes. Yarbough was the only employee Hobbs ever recommended for a salary. Hobbs never used the term "crew leader" for Yarbough or Ray. Hobbs stated that Yarbough had recommended several employees for pay raises and employees knew if Yarbough did not recommend the raise they would not get it. Hobbs admitted that there was a standard of 1000 tubes for small tubes and 80 to 90 tubes for tractor tubes per shift, but he said Yarbough was not bound by the standards for pay raises, e.g., Hobbs said he would not know when an employee was boxing 1000 tubes until Yarbough told him. In addition, an employee boxing to standard had to also maintain a 90 to 95 percent accuracy to get a pay raise. All employees were subject to a three-step wage system, hire in, midrange, and final with the amount of wage for each step set by upper management. Hobbs was the only authority to decide when an employee's error factor was low enough to get a raise. There was an additional policy for boxing employees in training. If the employee was not up to midrange of the standards after 30 days of work, the employee probably would not work out.

Hobbs stated that Yarbough did not have to check with him before giving any employees an oral or a written warning for rule violations, and in fact she never did with the exceptions of employees Johnson and Norris. Regarding the Vernon Johnson incident, Hobbs said such warnings went through Jobes first and most of the time never got to him. Hobbs did not recall any writeups on Vernon Johnson, but did recall that he transferred him to the first shift rather than discharge him. Hobbs' decision to transfer rather than discharge was based on a personal remark Yarbough had made to Johnson during the verbal altercation.

Hobbs attended supervisory meetings composed of department heads and the plant manager. If anything arose in the meetings relative to boxing, he would later pass it on to Jobes who in turn passed it on to Ray and Yarbough. Jobes had in the past attended supervisory meetings, but when Hobbs was hired, Jobes no longer attended.

All employees are hired by the personnel department, but Hobbs interviews employees for boxing before hiring and assigns them to a classification after they are hired. Hobbs is the only person in shipping and boxing who can discharge employees without consultation.

Each shift in boxing is started by giving Ray and Yarbough an order sheet listing all tube sizes to be boxed during the shift. The tube supply person is also given an order sheet so he will know what tubes to supply. If the tubes needed in the department differ from the listing, Yarbough would tell him what sizes to bring first.

Yarbough could not handle complaints about working conditions but she could relate them to Jobes or Hobbs. If an employee complained to Yarbough about short pay she would tell Hobbs or Jobes. Either Hobbs or Jobes would pull the employee's timecard and check for overtime worked but not paid. Hobbs admittedly never told Yarbough that she could call off-shift employees to work when her crew was short, but he said she could have if she wanted to.

Delores Pinkston testified that she was an inspector on first shift from her hiring date in January 1981 until August 1982. She was relief inspector while Braddy was chief inspector. Pinkston stated that Braddy would discipline employees with writeups but never said she had any prior approval to do so. On occasion, usually precipitated by too many red tags, Braddy would conduct meetings of the inspectors and tell the employees they had to do a better job or get their act together. Boyd Taylor attended some of the meetings but not all. Braddy told the inspectors during the meeting that they could be fired if they could not do the job. Pinkston recalled that Braddy told one inspector at her work station that if she did not do better to lessen the number of red tags, she would be out the door. Pinkston and the other inspectors had been told to see Braddy if they had any complaints about work or pay. Braddy did handle a short check complaint for Pinkston saying she would handle it. Later, Pinkston got the shortage. Whenever the crew was short and no one could work overtime, Braddy would rearrange the work stations of the inspectors. Braddy never mentioned that Taylor told her to do so. There were also times that production schedules changed and other size tubes were also being produced. Those inspectors who worked better on the odd tube sizes would be rescheduled by Braddy to work the odd sizes. Pinkston stated that breaks were scheduled by Braddy, and the relief inspector followed the schedule set by Braddy. Braddy also made the decision when she would take her break, which usually was before the other inspectors. Pinkston was not aware that inspectors could change breaktimes among themselves without first checking with Braddy. Days when Braddy was behind in defects, Pinkston or another employee would help Braddy to reduce the number of tubes in the cage. Pinkston never saw Taylor help Braddy whenever she was behind. Pinkston also helped Braddy buff tubes but not on a daily basis.

One day near the end of the shift, Pinkston became visibly ill and told Braddy that she needed to go home. Braddy told Pinkston she could go home early without mention of approval by Taylor. Pinkston, while working as an inspector, only called in to report an absence one time and she spoke to Taylor. She did recall that the inspectors were told to call Braddy for absence reports. Overtime was usually handled by volunteers but when the overtime was mandatory, the inspectors would be assigned days that they were required to work overtime. Braddy would tell the inspectors what their overtime assignments were. Whenever employees worked overtime, Braddy later signed all timecards.

Pinkston is now employed as chief inspector on first shift. A typical production day now is less than what it was when Braddy was chief inspector. An average day of defects now is in the 200 range. Pinkston does her paperwork on company time, not her own time.

Although Pinkston could not specifically recall, she stated that Braddy assigned trainees to work stations and did recommend pay raises for new hires.

Pinkston came to Warrenton from Polson Rubber where she was a chief inspector. Polson supervisors had additional responsibilities that chief inspectors did not have but her foreman called her a supervisor.

As chief inspector for Warrenton on the third shift, Pinkston issued written warnings without consulting with her foreman, albeit, she did not issue any final warnings within the progressive discipline system of "three and you're out." Pinkston stated that Newsome had told her during her tenure as chief inspector she did not have to check with her foreman before issuing a written warning. Pinkston was never told she had authority to allow employees to leave early, but if the employee had an emergency, she did have authority to release them from the shift. Whenever the third shift was short Pinkston either called in someone from the first shift or told the chief inspector on the second shift to assign someone to work overtime. Pinkston said she had the authority to call in any number of people she needed to fill her crew. Although she did not have to check with her foreman before exercising any authority, she did, as a matter of courtesy, keep him informed of her actions. Pinkston also assigned employees to work overtime within the framework of set days for each employee to work overtime when needed.

Boyd Taylor testified that as general foreman, he had direct supervision over molding, seven employees; splicing, eight employees; head in, three employees; and valve spray, one employee. He had general supervision over mill, 7 employees and inspection with 13 employees. Taylor had the responsibility for making tubes on the first shift. On a good day inspection would handle 768 tubes with defects numbering about 150. On a bad day the defects number between 300 to 350. Braddy would spend 25 percent of her time working defects on a good day and 50 percent of her time on a bad day. The remainder of her workday is spent checking repaired and classified tubes. Although Polson Rubber had a buffer classification, at Warrenton the chief inspector does the buffing. Many tubes that have been rejected or repaired need to be buffed before passing them to the warehouse. Braddy had authority to assign someone to help her with defects whenever she needed to but has gone to Taylor to get approval for help. Braddy had authority to write up employees for red tags without consultation with Taylor. Taylor would see red tags with employees' names on them and ask Braddy if she had written the employee a warning. He had nothing more than that to do with writeups for red tags. Taylor did not tell Braddy not to write up employees who got red tags. Although Taylor stated that Braddy had authority to issue writeups for poor performance, he could only recall one instance where Braddy did so without first checking with him. In all cases, Braddy turns in the writeups to Taylor or Newsome by leaving them on their desks at the end of the shift. Braddy, on occasion, would hold meetings with inspection employees because too many defects were being thrown out. One such meeting she told Taylor, "I am taking my inspectors into a meeting, you're welcome to attend if you want to." Taylor attended but said nothing. Braddy explained to the inspectors exactly how she wanted the job done and how she expected them to do it. Braddy also had authority to give employees approval for tardiness or absenteeism. Taylor's only discussion with Braddy about tardiness or absence was his telling her, "that's her department."

Taylor stated that Braddy had the authority to fire employees after first checking with him. He could not recall whether Braddy ever exercised her discharge authority. Braddy could, on the spot, discharge an employee for fighting on the job, but Taylor could not recall whether he ever told Braddy she had such authority.

Taylor recalled that Braddy had two employees who gave her a hard time, and she asked if the employees could be transferred to another shift. Although Taylor did not recall what he told Braddy, he stated that she knew the employees had seniority and could not be moved off the first shift. Taylor stated that in an overtime situation, Braddy would seek volunteers first. If no one wanted to work, Taylor said he was sure he had instructed Braddy to appoint someone to work overtime. Taylor stated that Braddy had the authority to call employees in from other shifts to work overtime when she decided that overtime was needed. She could not order employees to work but she could ask. If any employee refused, she could report the refusal to Taylor and they would handle it. Taylor could not think of any specifics except three occasions when Braddy did not get volunteers for overtime and reported to Taylor. He told Braddy to have the employees draw straws. Braddy had no authority to hire employees and Taylor did not know if Braddy had any input into a new hire's initial classification or station assignment. Taylor did recall one employee that was hired and he told Braddy to station the employee as a rear tractor inspector for training. Taylor also stated that Braddy rarely came to him just before taking any action with employees.

Lewis Newsome testified he has been production manager since 5 January 1981. Salaried employees are paid on a straight 40-hour basis. Eighty percent of insurance premiums for salaried employees are paid by the Company. The hourly employees receive only 60 percent of their insurance premiums from the Company. Salaried employees get more vacation time than hourly employees with both based on years of service. All information of vacations, salary, and insurance for salaried personnel are kept in the "black book" by the personnel manager.

During the walkout in July, all salaried employees worked whereas 50 to 70 hourly employees were on strike. Only salaried employees are given performance appraisals. The appraisals are made annually.

Newsome stated that the personnel department has the only authority to hire or fire employees. Boyd Taylor does not have authority to fire employees, but he can recommend that employees be fired.

All classifications in manufacturing are duplicated on all three shifts excepting that the first shift does not have a splicing supervisor. It was decided in the beginning that with all the other supervision and experience present on the first shift, a splicer supervisor was not needed.

Analysis and Conclusions

The gravamen of this case is the supervisory status of two employees; Eloise Braddy, chief inspector on first shift, and Gloria Yarbough, crew leader of the boxing department on second shift. Both employees were discharged.

Respondent claims both employees are statutory supervisors, and therefore neither is protected by the antidiscriminatory provisions of the Act. The burden of proving supervisory status rests with Respondent.

The General Counsel alleged both discharges to be violative of Section 8(a)(3) of the Act because Braddy and Yarbough were discharged for engaging in union activities during the union campaign. Respondent admitted the discharges and that union activity was the reason for both.

A corollary issue of coercive interrogation involving both Braddy and Yarbough depends on resolution of the supervisory issue.

The statutory provisions and governing principles that determine an individual's supervisory status are well settled. Section 2(11) of the Act defines a supervisor as:

> The "term supervisor" means any individual having authority, in the interest of the employer, to hire, transfer, suspend, lay off, recall, promote, discharge, assign, reward, or discipline other employees, or responsibly to direct them, or to adjust their grievances, or effectively to recommend such action, if in connection with the foregoing the exercise of such authority is not of a merely routine or clerical nature, but requires the use of independent judgment.

In making determinations of supervisory status, the Board is careful not to construe supervisory status too broadly because any employee found to be a supervisor is denied protection of the Act. The statutory indicia of supervisory status is stated disjunctively and only *one* need exist to confer supervisory status on an individual. Possession alone of one of the statutory indicia, however, is not sufficient to establish supervisory status. The determination rests on the individual's functions and authority. Thus, an assigned title or job classification, standing alone, is insubstantial evidence of statutory authority. If an individual *possesses* the statutory authority and *uses* independent judgment in *performing* the supervisory functions in the *interest* of management, that individual is a statutory supervisor.

Respondent contends that Braddy has been a supervisor since the plant opened and that Yarbough was made a supervisor when she was put on salary several months before her discharge. Respondent argues alternatively that Yarbough was a supervisor on assuming leadership of the second-shift boxing crew, but does not contend that Yarbough's later change to salary with its attendant increase in benefits was a supervisory promotion.

The record evidence discloses several facts common to a determination of supervisory status of both Braddy and Yarbough.

Production Superintendent Newsome credibly testified that only the personnel department has the authority to hire and fire employees. Hobbs, shipping manager, credibly testified that only himself and other department heads attended the regularly scheduled supervisory meetings, and Taylor credibly testified that Braddy did not attend supervisors' meetings. Both Hobbs and Taylor further testified that neither Yarbough nor Braddy was ever told they were supervisors or what authority, if any, they were to exercise. Hobbs and Taylor expected Yarbough and Braddy to do what they were trained to do and thus help keep production flowing smoothly. New hires, according to Hobbs, were assigned their job classification by himself. Taylor, when newly hired employees reported for work, would tell Braddy where to place them on the inspection lines. Hobbs stated that Yarbough did not have to check with him before disciplining employees but added that Yarbough had to clear everything through Shipping Supervisor Jobes. Jobes testified that he never told Yarbough that she had the authority to discipline employees on her own. Jobes did tell her she was to check with him first and discuss it. Jobes cited three examples of discipline for boxing employees. Two occurred in May and one in June. Vernon Johnson had been instructed by Jobes to perform a certain task. Later, Jobes asked Yarbough if the task was completed and Yarbough reported that Johnson had not started the task. Jobes instructed Yarbough to write up Johnson. Yarbough did so, signed the writeup, and turned it in to Jobes. On another occasion during the second shift, after Jobes had left for home, Willie Norris came to work late and under the influence of alcohol. Yarbough called Jobes at home to report the incident and Jobes returned to the plant and disciplined Norris. Vernon Johnson, in June, refused to follow the instructions of Yarbough, and she reported to Jobes recommending that Johnson be discharged. Jobes and Hobbs considered the incident and transferred Johnson to the first shift due to his disruptive behavior on the second shift.

Taylor testified that Braddy had the authority to initiate writeups on employees but could only recall one instance in which she did so. In all other instances, she sought Taylor's approval first. Hobbs stated that Yarbough could not handle any employee complaints. She could only relate the complaint to himself or Jobes. Jobes testified that Yarbough could not remedy employee complaints, but she could initiate a "clean up" if water or some other liquid was on the work floor. Taylor simply testified that Braddy handled her department, and he left the department to her without specifying employee grievances as such. Testimony of inspector witnesses shows clearly, however, that Braddy just passed on to Taylor any complaint made by employees. Of the 40 exhibits offered to show Braddy's exercise of supervisory authority from 1981 through 1984: 26 are nothing more than writing up the employee subsequent to the receipt of a red tag originating from the quality control department and without any input from Braddy; 6 are writeups dictated by the absence and tardiness policy including the uniform rule that all employees must bring a doctor's excuse when returning to work; 3 are writeups resulting from an employee's refusal to work previously scheduled overtime dictated by the established overtime selection procedure; 3 are writeups issued to employees failing to perform at the acceptable level dictated by the predetermined standard of production; and 2 were issued for refusing to follow instructions, namely, employee Lewis, who was first disciplined in the office by Taylor for failing to sort tubes, and employee Christine Johnson who was jointly disciplined by Taylor and Braddy for failing to perform an assigned task without backtalk or remarks. Of the 10 exhibits offered to show Yarbough's exercise of supervisory authority from 1982 through 1984 (with all exhibits dated 1984): 5 were issued by Yarbough at Jobes' direction to write up all employees for overstaying break when there was work to do; 1 was issued by Yarbough per Jobes' instruction when a box was shipped with less tubes packed than the order called for; 1 was issued by Yarbough after Jobes instructed an employee to perform a task and he failed to do so. Jobes checked with Yarbough and found that the employee had so failed and instructed Yarbough to write up the employee; one was issued by Yarbough to an employee who had called in with car trouble. Jobes told the employee to come in tardy but the employee failed to report for work. Yarbough wrote up the employee for the absence, one was issued by Yarbough to an employee who refused to perform the daily cleanup of the work station as required, and one was issued by Jobes to an employee reporting for work under the influence of alcohol. Yarbough called Jobes at home to report the employee and Jobes returned to the plant and sent the employee home. The following morning, Jobes wrote up the employee and signed Yarbough's name to the form.

Thus, it is clear that neither Yarbough nor Braddy had authority to hire, discharge, assign, or discipline employees or to adjust grievances of employees. It is equally clear that neither could effectively recommend such action as contemplated by the statute.

There is no evidence in the record relating to the authority of any individual to suspend, lay off, recall, or promote employees. There is a limited reference in the record to a company policy that no employee is required to remain at work if a family emergency exists, or the employee becomes ill. Several witnesses testified to practices under the policy. Ophelia Grier testified that whenever she wanted to leave work early, she made the request to Braddy. Braddy would tell Taylor of Grier's request and Braddy would later relay Taylor's answer to Grier. Grier stated that Braddy did not grant permission to leave work. Lula West testified that while Braddy was chief inspector, she would notify Braddy if she wanted to leave work early. Braddy in turn would ask Taylor if West could leave early and later Braddy would pass on Taylor's decision to West. Wyvonie Collins testified that during her employment as a boxer on the second shift with Yarbough, she had several family illnesses. The first instance involved her grandbaby being taken to the hospital. Collins received word at work of the sickness and asked Yarbough if she could leave work. Yarbough told Collins that Jobes had to be notified at home before anyone could leave work. Before Yarbough could talk to Jobes, Collins left work to care for her grandbaby. A second sickness occurred, and when Collins was notified at work, she did not see Yarbough so she told her coworkers to notify Yarbough that her grandbaby was sick again. Both Braddy and Yarbough testified that they did not have authority to release employees to leave work early except in cases of an emergency. When emergencies existed and employees left work, both Braddy and Yarbough simply notified their foreman and continued the shift with a short crew. Taylor and Jobes credibly testified that neither Braddy nor Yarbough had authority to replace absent employees no matter the reason for the absence, and Jobe stated that only he or Hobbs had authority to release employees to go home early. Pinkston's testimony to the contrary, I do not credit with probative value of Braddy's work functions. Pinkston's testimony involved her duties as chief inspector on a different shift and, as she noted, she functions differently than Braddy for whatever reason. I do credit the testimony of employees Grier, West, Collins, Braddy, and Yarbough. The credible record evidence shows that the practice of releasing employees does not involve any supervisory function of Braddy or Yarbough nor does the practice entail the use of independent judgment by Braddy or Yarbough. In addition, Braddy credibly testified without contradiction to an episode involving an inspector during the working shift. The inspector in the course of a conversation with Braddy became angry and called Braddy a "bitch." Sometime later, Braddy mentioned the incident to Taylor. Taylor told Braddy that she should have reported the incident to him when it happened and he would have sent the employee home. Taylor's belated resolution of the incident is instructive of the status Braddy enjoyed vis-a-vis the employees. I conclude and find that neither Braddy nor Yarbough possessed authority to suspend, lay off, recall, or promote employees or that either exercised such authority.

The record shows that overtime, when ordered by Taylor, Hobbs, or Jobes, was fulfilled first by volunteers and second by drawing straws. If the overtime crew needs were small and the employees did not volunteer or draw straws, a selective procedure was followed. In inspection, each employee was previously assigned a weekday. Whenever overtime occurred (without volunteers or drawing of straws), the employees named for that weekday were required to work. When there were no volunteers for overtime in boxing, Jobes selected which employees were required to work the scheduled overtime. Failure of an employee to work scheduled overtime under the weekday selection process or by direction of Jobes was automatically disciplined by writeup under the progressive discipline policy. The testimony of Hobbs that Yarbough could have called off-shift employees and ordered them to report for work I do not credit due to the highly speculative nature of the testimony and

Hobbs' admission that Yarbough was never told she had or could exercise such authority. Likewise, Taylor's testimony that Braddy had authority to call in employees from other shifts to perform overtime work I do not credit due to the failure of Taylor to inform Braddy that she had such authority or could exercise such authority. Further, neither Braddy nor Yarbough ever called in off-shift employees to work for overtime or fill in purposes. Both Braddy and Yarbough worked shorthanded whenever their crew sizes were reduced by absence, illness, or lack of sufficient employees to work overtime.

All employees have seniority based on their date of hire and their seniority gives them shift preferences. Neither Braddy nor Yarbough possesses any authority to transfer employees off their respective shifts for any reason. As Taylor testified, Braddy knew that she could not effect the transfer of a recalcitrant employee so she had to learn to put up with the inconvenience of the employee. Employee Collins credibly testified that she asked Yarbough for a transfer to the first shift and Yarbough told her she would have to see Hobbs or Jobes for permission to transfer. In addition to the lack of authority to transfer employees, the record is silent on the exercise of any such authority by either Braddy or Yarbough.

Respondent offered evidence of the authority of both Braddy and Yarbough to reward employees by recommending wage increases. The evidence was employee status change forms signed by Braddy and Yarbough for several employees. There is no dispute that the status change forms were executed by Braddy and Yarbough and turned in to their foreman or the personnel office. The mere execution of the form, however, does not establish the authority to grant wage increases or the authority to effectively recommend a wage increase. The additional record evidence shows clearly that all hourly employees are paid according to a wage policy composed of four increments from hire-in rate to maximum rate for each classification of employee. Each increment is effective for an established period of time. The passage of that time and an acceptable level of performance qualifies the employee for the stated wage increase. The work performance of inspectors and boxers is measured against a standard set by upper management. Inspectors must inspect 7 tubes in 7 minutes (of the size mostly produced) and boxers must box 1000 tubes per 8-hour shift to be performing at an acceptable level. Both Braddy and Yarbough maintain daily records of each employee's performance, which are turned in at the end of each shift. Simple arithmetic determines whether an employee is at standard or below. Braddy credibly testified, and without contradiction, that the office sent the employee status change forms to the department for each employee at the appropriate time. Braddy simply verified the employees' performance and the next wage increment within the established wage policy. Braddy did not determine any employees' eligibility for a wage increase nor the amount of any such increase. Both eligibility and amount are predetermined by the established wage policy. Yarbough credibly testified that whenever employees were ready for a wage increase within the predetermined wage policy, Jobes told her to fill out a wage form for the employee and give it to him. Jobes credibly testified that only he or Hobbs decided the wage increases of employees and did not testify that Yarbough had authority to recommend pay raises. Although Hobbs testified that Yarbough had recommended several employees for wage increases and that employees knew that Yarbough had to recommend them for wage increases only one such instance was evidenced in the record. The record evidence as a whole is contra to Hobbs' statement of Yarbough's authority to recommend wage increases. Yarbough was never informed that she had authority to recommend pay increases for boxing employees nor were the boxing employees told that Yarbough had such authority. Yarbough credibly testified that she told Jobes that Collins, a trainee, was boxing up to standard before her training period was completed and should be getting more than the training rate. Jobes told Yarbough to write a note to him and Hobbs and turn it in to him. Jobes and Hobbs decided whether Collins would get her wage increase increment early. As Hobbs stated in his testimony, whether a boxer is performing up to standard is not controlling. The controlling factor is the accuracy of that performance and he alone determines whether the employee is accurate enough to get a raise in pay. It is clear that neither Braddy nor Yarbough had authority to grant wage increases or to effectively recommend wage increases for employees. It is equally clear that neither exercised such authority. The mere filling out of a status form within the framework of the personnel procedures falls short of the independent judgment required by the statute. It is nothing more than a clerical function, which is later acted on independently by Hobbs, Jobes, or the personnel department and within the established wage levels policy.

Respondent's policies on absence and tardiness are applied uniformly throughout the plant. Individual employee reports of absence or tardiness are made to General Foreman Taylor, Production Superintendent Newsome, Shipping Manager Hobbs, Shipping Supervisor Jobes, or the personnel department as directed by the policy. The recordkeeping for Respondent is accomplished by the employee attendance information form. Both Braddy and Yarbough credibly testified, and without contradiction, that they filled out the forms at the direction of Taylor and Jobes. As the forms indicate, they record the information relative to an employee's attendance. Taylor's testimony that Braddy had authority to approve absences or tardiness is contrary to the testimony of other witnesses as well as his additional testimony. Taylor takes the calls from employees reporting an absence or tardiness and at that time tells the employee what to do. Taylor then notifies Braddy of the circumstances and directs her to complete the employee attendance information form. Braddy acts as nothing more than a clerk for Taylor. Any employee absent due to illness must conform to the Company's policy of bringing a doctor's release when returning to work. With the release, the employee's absence is excused; without the release the absence is unexcused. In such a case, Braddy, when filling out the form, is merely following an established policy and performing a ministerial act. In addition, the recording by Braddy is neither approval nor rejection because the record form is subsequently acted on by management and the personnel department. Yarbough, likewise, did not receive employee reports of absences or tardiness. Jobes or Hobbs took the calls during the first shift. Most days Yarbough learned of an absence or tardiness when she had a vacancy at a work station. Nonetheless, the recordkeeping chore fell to Yarbough. She recorded the information about the employee, which she received from Jobes. As Jobes stated many times when Yarbough reported an employee-related circumstance to him, "You know the procedure, fill out a form and turn it in." A more clerical function could not be devised. Yarbough was trained to fill out the forms and turn them in to Jobes. Jobes took for granted that Yarbough was trained and knew her position and never told Yarbough she was a supervisor or that she had any supervisory authority. The objective evidence offered by Respondent to reflect exercise of supervisory authority by Yarbough is not probative of the issue. A September warning by Yarbough for an employee's refusal to follow instructions was predicated on a daily chore of cleanup. When Yarbough reported to Jobes that the employee refused to do the cleanup, he directed Yarbough to write up the employee. An 8 May 1984 warning for absenteeism was executed by Yarbough several months before she was placed on salary and purportedly became a supervisor. A 15 May 1984 warning for reporting under the influence of alcohol occurred not only several months before Yarbough became salaried, but resulted from Yarbough's telephonic report to Jobes at home and his return to the plant to handle the situation. The following day Jobes executed the warning but signed Yarbough's name merely to record the fact that the incident occurred on Yarbough's shift. An 18 May 1984 warning for refusal to follow instructions (again several months before the date of supervisory authority for Yarbough) was issued by Yarbough but at Jobes' direction. The instructions to the employee had been given by Jobes, and Yarbough reported the failure to act when asked by Jobes and Jobes told her to write up the employee. Six additional employee attendance information forms and six employee warning forms offered to show Yarbough's exercise of supervisory functions were dated prior to Yarbough's supposed date of attaining supervisory status and therefore are not probative of the issue. They are, however, instructive to show that Respondent's claim of supervisory exercise by Yarbough comprises duties she exercised long before being salaried and claimed to be a supervisor. Thus, it is abundantly clear that Braddy and Yarbough have no authority to determine absences, tardiness, or work performances of employees but rather perform clerical or ministerial duties as instructed by their supervisors and within the specifications, set by the plant policies. Such duties do not require the use of independent judgment nor carry the force of an effective recommendation for employee conduct.

It is undisputed that timecards were initialed by Braddy and Yarbough whenever employees worked overtime and that employees would not be paid for the overtime if the initials were omitted. It is equally undisputed that both Braddy and Yarbough were instructed to initial the cards to confirm the overtime hours authorized by Taylor or Hobbs. Such a confirmation carries no weight of authority for the instance of overtime worked but simply records that previously authorized by someone else. The recordation is purely clerical and does not show the exercise of a supervisory function. Likewise, the execution of accident reports and workmen's compensation forms is more a clerical function than the exercise of a supervisory function. Both Braddy and Yarbough simply reduced to writing what the affected employee explained about the injury and whether the employee wanted to see a doctor. The forms were then turned over to Taylor or Jobes. Neither Braddy nor Yarbough had authority to release employees from work and neither assumed the exercise of such authority. Release of injured employees and transportation of injured employees was effected by Taylor or Jobes.

The pay differential between alleged supervisor and rank-and-file employees may be a consideration depending upon the dollar amount involved. In this case, the differential is insignificant due to the dollar amount. The significance of the differential is further diminished when contrasted with the pay differential existing between the alleged supervisors and their immediate foremen or managers. In addition, Braddy and Yarbough are in a nonexempt pay status as are the rank-and-file employees, whereas foremen and managers are in an exempt pay status. Respondent's contention that the salary classification is indicia of supervision is without merit since the entire quality control department is on salary rather than hourly wage. Generally, a salary pay status in opposition to an hourly pay status does not necessarily evidence a separation of supervision from rank and file. Moreover, the record evidence as a whole conclusively establishes that management seized on the salary classification merely to separate the unit employees from the nonunit employees. One can conclude from Respondent's lengthy refusal to delegate supervisory authority to Braddy and Yarbough that any recognition of their supervisory status was precipitated by the union organizational drive and nothing more. The multiple instances in this record when Respondent could have affirmatively enforced a supervisory status for both individuals, from their dates of hire to their dates of discharge, but did nothing, serves to buttress my conclusion that neither Braddy nor Yarbough functioned as, nor was meant to function as, a supervisor as defined in the Act. Newsome's evaluation of the lack of need for minor supervision on the first shift and Jobes' willingness to allow shipping employees on the second shift to work under the guidance of a senior rank-and-file employee applies equally well to the situations involving Braddy and Yarbough and further support my conclusion of nonsupervisory status for Braddy and Yarbough.[3]

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[3] Frequently, the Board will consider the ratio of admitted supervisors to rank-and-file employees when the supervisory status of an individual is in question. This case, however, presents no such opportunity because the pleadings are silent on Respondent's supervisory hierarchy and no stipulations were offered by counsel to fill the void. The organizational chart offered in evidence by Respondent was admittedly drawn for use during trial and does not purport to be an administrative decree or departmental schematic.

The single theme that continuously emerges from the evidence in this record is that no one in management told Braddy and Yarbough that they were supervisors or that they had any supervisory authority. Albeit, Yarbough was later placed on salary, Hobbs' testimony clearly shows that his recommendation for her salary had nothing to do with her work functions. Further, Jobes' conclusion that Yarbough became a supervisor when she changed to salary is founded on a mere statement by his superior that Ray, when salaried on the first shift, was thereafter treated as a supervisor; a treatment unattended by the granting of any authority. The many attempts to show an exercise of supervisory function tend to show that Braddy and Yarbough were overloaded with paperwork and recordkeeping in addition to their undisputed manual tasks. Assuming arguendo, the evidenced exercise was both isolated and sporadic. The several instances of employees' recalcitrant conduct toward both Braddy and Yarbough also supports the conclusion that neither functioned as a supervisor within the definition contained in the statute. Accordingly, I conclude and find that Eloise Braddy and Gloria Yarbough are not supervisors as defined in the Act and therefore are guaranteed the rights of employees enumerated in Section 7 of the Act. The discharges, as alleged in the complaint, are violative of Section 8(a)(1) and (3) of the Act and I so find.

The coercive interrogation of Braddy and Yarbough amended into complaint paragraph 9, though denied by Respondent on the record, was not denied in the record testimony. Both Braddy and Yarbough credibly testified to interrogation about their union activity occurring in the months of August and September 1984. I conclude and find that the several instances of interrogation are coercive and therefore violative of Section 8(a)(1) of the Act.

I shall order that all violations be remedied.

ADDITIONAL CONCLUSIONS OF LAW

1. Respondent, by interrogating employees Eloise Braddy and Gloria Yarbough about their union activity during the organizational campaign of the Union, has violated Section 8(a)(1) of the Act.

2. Respondent, by discharging employees Eloise Braddy and Gloria Yarbough because they engaged in union activity, has violated Section 8(a)(1) and (3) of the Act.

3. The above-described unfair labor practices affect commerce within the meaning of Section 2(6) and (7) of the Act.

THE REMEDY

Having found that Respondent has engaged in certain unfair labor practices, I find it necessary to order Respondent to cease and desist therefrom and to take certain affirmative action designed to effectuate the policies of the Act.[4]

Respondent, having discriminatorily discharged employees Eloise Braddy and Gloria Yarbough, it must offer them full reinstatement to their former positions, or, if those positions no longer exist, to a substantially equivalent position, with backpay computed on a quarterly basis and interest thereon to be computed in the manner prescribed in *F. W. Woolworth Co.*, 90 NLRB 289 (1950), and *New Horizons for the Retarded*,[5] from the date of discharge to the date of a proper offer of reinstatement.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[6]

ORDER

The Respondent, E. H. Mann, Inc., d/b/a Warrenton Rubber, Warrenton, Georgia, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Interrogating employees about their union activity.

(b) Discharging employees for engaging in union activity.

(c) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Offer Eloise Braddy and Gloria Yarbough immediate and full reinstatement to the jobs from which they were discharged on 28 September, or, if those jobs no longer exist, to a substantially equivalent position, without prejudice to their seniority or any other rights and privileges enjoyed, and make them whole for any earnings they lost, plus interest, as outlined in the remedy section of this decision.

(b) Remove from its files any reference to the unlawful discharges and notify the employees in writing that this has been done and that the discharges will not be used against them in any way.

(c) Preserve and, on request, make available to the Board or its agents for examination and copying, all payroll records, social security payment records, timecards, personnel records and reports, and all other records necessary to analyze the amount of backpay due under the terms of this Order.

(d) Post at its offices in Warrenton, Georgia, copies of the attached noticed marked "Appendix."[7] Copies of the

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[4] The General Counsel in brief moved for a remedial Order containing a "visitatorial" provision authorizing "discovery," if necessary, to monitor compliance with the Board's Order. The need for such an order is not demonstrated. I therefore deny the General Counsel's motion.

[5] In accordance with our decision in *New Horizons for the Retarded*, 283 NLRB 1173 (1987), interest on and after January 1, 1987, shall be computed at the "short-term Federal rate" for the underpayment of taxes as set out in the 1986 amendment to 26 U.S.C. § 6621. Interest on amounts accrued prior to January 1, 1987 (the effective date of the 1986 amendment to 26 U.S.C. § 6621), shall be computed in accordance with *Florida Steel Corp.*, 231 NLRB 651 (1977). See generally *Isis Plumbing Co.*, 138 NLRB 716 (1962).

[6] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes. The General Counsel's formal papers, in evidence as G.C. Exhs. 1(a)-1(l), although indexing the original of Respondent's answer to the complaint, does not contain the answer.

[7] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the Nation-

Continued

notice on forms provided by the Regional Director for Region 10, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately on receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material.

(e) Notify the Regional Director in writing within 20 days from the date of this Order what steps the Respondent has taken to comply.

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

Section 7 of the Act gives employees these rights.

To organize
To form, join, or assist any union
To bargain collectively through representatives of their own choice
To act together for other mutual aid or protection
To choose not to engage in any of these protected concerted activities.

WE WILL NOT interrogate employees about their union activities on behalf of General Teamsters, Local Union No. 528 or any other labor organization.

WE WILL NOT discharge employees for engaging in union activities on behalf of Teamsters Local Union No. 528 or any other labor organization.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL offer Eloise Braddy and Gloria Yarbough immediate and full reinstatement to the jobs from which they were discharged on 28 Sept. 1984, or, if those jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority or any other rights or privileges previously enjoyed and WE WILL make them whole for any loss of earnings and other benefits resulting from their discharge, less any net interim earnings, plus interest.

WE WILL notify Eloise Braddy and Gloria Yarbough that we have removed from our files any reference to their discharges and that the discharges will not be used against them in any way.

E. H. MANN, INC., D/B/A WARRENTON
RUBBER

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al Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

DMR Corp. and Harrill Electrical Contractors, Inc. *and* IBEW Local 59, IBEW Local 116, International Brotherhood of Electrical Workers. Case 16–CA–8530

June 9, 1988

SECOND SUPPLEMENTAL DECISION AND ORDER

BY MEMBERS JOHANSEN, BABSON, AND CRACRAFT

On February 9, 1988, Administrative Law Judge Philip P. McLeod issued the attached decision. The Respondent filed exceptions and a supporting brief, and the General Counsel filed an answering brief.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings,[1] and conclusions and to adopt the recommended Order.

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge and orders that the Respondent, DMR Corp., Dallas, Texas, and Harrill Electrical Contractors, Inc., Mesquite, Texas, its officers, agents, successors, and assigns, shall take the action set forth in the Order.

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[1] We agree with the judge that the Fifth Circuit specifically rejected the Respondent's affirmative defense. *NLRB v. DMR Corp.*, 795 F.2d 472, 477–478 (5th Cir. 1986). The Respondent's reliance on the Fifth Circuit's fn. 6 is misplaced. In leaving to compliance the issue of whether DMR employees suffered any harm by the Respondent's refusal to apply the Unions' contracts, the court was merely restating the general rule that issues relevant to determining the amount of backpay are left to the compliance stage of the proceeding. This standard compliance language does not open the door for the Respondent to relitigate issues already resolved against it.

Edward B. Valverde, Esq., for the General Counsel.

George A. Harper, Esq., of Ennis, Texas, for the Respondent.

G. William Baab, Esq. (Mullinax, Wells, Baab & Cloutman, P.C.), of Dallas, Texas, for the Charging Parties.

DECISION

STATEMENT OF THE CASE

PHILIP P. MCLEOD, Administrative Law Judge. On 30 September 1981, the National Labor Relations Board issued a Decision and Order[1] finding, inter alia, that DMR Corp. and Harrill Electrical Contractors, Inc. are a single employer within the meaning of the National Labor Relations Act (the Act); that DMR was created in order to avoid dealing with the bargaining representatives of Harrill's employees; and that employees of the two entities constitute a single employerwide bargaining unit. To remedy this unfair labor practice, the Board directed Respondent to make whole individuals who suffered because of the failure to honor the collective-bargaining agreements with the Union. This decision was affirmed in part and remanded in part by the U.S. Court of Appeals for the Fifth Circuit, in 699 F.2d 788 (5th Cir. 1983). Following this remand, on 13 February 1985, the Board issued a Supplemental Decision and Order again finding that employees of DMR Corp. and Harrill Electrical Contractors, Inc. constitute a single employerwide bargaining unit and ordering that employees be made whole as provided for in its earlier decision. The Board's decision on remand was affirmed and enforced by the U.S. Court of Appeals for the Fifth Circuit in 795 F.2d 472 (5th Cir. 1986) (*DMR II*). The parties being unable to agree on the amount of backpay due under the terms of the Board's Supplemental Decision and Order, the Regional Director for Region 16 issued a backpay specification dated 16 June 1987. Respondent filed an answer admitting certain allegations and denying others.

A hearing was held before me on 20 August 1987 in Fort Worth, Texas. All parties were afforded full opportunity to be heard, to examine and cross-examine witnesses, and to introduce relevant evidence. At the hearing, counsel for the General Counsel amended the backpay specification in various particulars, which are discussed in greater detail below. Following the close of the trial, all parties filed timely briefs with me which have been duly considered.[2]

FINDINGS OF FACT

Through the backpay specification, Respondent's answer, and stipulations entered into by the parties at the hearing herein, it has been established (1) that gross backpay computations were computed by multiplying the number of hours worked by each employee with the applicable rate of pay based on the appropriate collective-bargaining agreement; (2) that net backpay computations were derived by subtracting interim earnings (which were the actual amounts paid each discriminatee by calendar quarter, as taken from employer payroll records) from the gross backpay computations; and (3) that the fringe benefits due (including health and welfare, annuity plan/pension, National Electrical Benefit Plan, apprenticeship and training, and national electrical industry fund) were as stated in the backpay specification as amended and were based on applicable rates in the appropriate collective-bargaining agreement. Two individuals, Bill Lance and Donald Ray Smith, were stipulated to be supervisors within the meaning of the Act and by agreement were, therefore, removed from the backpay specification because of their supervisory status. Respondent's challenge to the inclusion of other named individuals was withdrawn.[3] The only issue which remains for consideration is Respondent's affirmative defense.

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[1] 258 NLRB 1063 (1981).

[2] Counsel for the General Counsel's unopposed motion to correct the transcript is granted.

289 NLRB No. 2

Respondent's answer to the backpay specification sets forth an affirmative defense, which is elaborated on and explained in greater detail in its amended answer dated 14 July 1987. The amended answer states:

> Respondent denies that any backpay is due the individuals listed in the Specification. The Specification attempts to apply the collective-bargaining agreements negotiated between Local 59 and Local 116 and Harrill Electrical Contractors to projects constructed by employees of DMR Corporation. In bidding on those projects, DMR utilized a wage computation significantly less than that called for by the collective-bargaining agreement. Moreover, each job specification had a published wage rates [sic] for electricians which was significantly less than the collective-bargaining agreement's rates. This published rate was utilized by DMR as well as unsuccessful bidders to compute projected labor costs. Had DMR used the labor rates set forth in the collective-bargaining agreements, DMR's bid would have vastly exceeded the bid of other unsuccessful electrical contractors. DMR would not have obtained these projects if it had submitted a bid based on those wage rates agreed to by Harrill Electrical. Accordingly, a retroactive application of the collective bargaining wage rates to these projects worked by DMR would grant employees rights and awards they would not have been entitled to in the absence of any violation. Therefore, the imposition of the backpay called for in the Specification would be punitive to Respondent and is therefore unenforceable.

My reading of the Board's decisions in this case and even more so the decisions of the U.S. Court of Appeals for the Fifth Circuit leads me to the conclusion that Respondent's position before me was specifically considered and rejected by the court, and that Respondent is precluded from raising that position again before me. Nevertheless, Respondent was given the opportunity to fully explain its position and to place into the record all of its available evidence on this point so that Respondent's position may be considered in full on appeal. Respondent was also given the opportunity to file a posthearing brief, which Respondent did.[4]

In the decision of the Fifth Circuit enforcing in part and remanding in part the Board's initial decision in this case, the circuit court stated that its remand was for "a new hearing" on the appropriate unit question. After further hearing was held to receive evidence on this issue, the administrative law judge issued a supplemental decision which was affirmed by the Board. The Board's decision, in turn, was wholly enforced by the Fifth Circuit in *DMR II.*

In its posthearing brief, Respondent argues:

> At the hearing on the (unit) issue, Respondent took the unfortunate position that, notwithstanding the instruction from the Fifth Circuit, the Board was precluded from having a second evidentiary hearing. Based on this assertion that the hearing could not be lawfully held, Respondent refused to participate.
>
> In hindsight, it seems clear that the sharp difference between the public contract work done by some DMR employees with the other commercial electrical labor performed by both DMR and Harrill employees is evidence which should have been presented by Respondent at the (unit) hearing. . . . Respondent's failure to present . . . available evidence resulted in the Board's finding that DMR and Harrill constituted a single bargaining unit. [T]his determination . . . specified that individuals who suffered harm be "made whole." It did not mandate automatic application of Harrill's "inside wireman" agreement to all of DMR employees where Respondent could demonstrate that such an award would constitute a windfall to those employees.

In *DMR II*, the Fifth Circuit specifically considered the Board's remedy. The circuit noted that "to remedy Respondent's violations of the NLRA, the Board ordered Harrill and DMR to . . . make their employees whole for any losses suffered by reason of their failure to honor the collective-bargaining agreements with the Unions." The circuit then stated:

> Respondents claim that the Board erred in ordering make-whole relief. This claim is wholly without merit.
>
> . . . .
>
> The Board may properly prevent the Respondent from gaining an advantage by their unlawful conduct. An order requiring that the employees be made whole for the unlawful repudiation of a collective-bargaining agreement serves this end. [Citations omitted.]
>
> . . . .
>
> Similarly, mere prospective application of the contracts would permit the company to reap an unjust advantage from its unlawful conduct and would not adequately redress the employees' losses. The Board's order, "which deprives an employer of advantages accruing from a particular method of subverting the Act, is a permissible method of effectuating the statutory policy." [Citation omitted.]

Reduced to its simpliest form, Respondent's argument before me is that if Respondent had not committed the unfair labor practices it did, it would not have received the bids its did, and therefore employees would not have had the work they did. Respondent argues that as a result, to apply the terms of the appropriate collective-bargaining agreement to that work is an unjust "windfall" to employees. This is the very argument that was specifically rejected by the Fifth Circuit in affirming the Board's remedy.

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[3] Respondent had contended that Riley F. Barber, Dennis Allen Crenshaw, David Wayne Davis, Lawrence Robert Pinzel, John Caleb Ryan III, and Rusty Leroy Sargent were laborers/helpers and not covered by the collective-bargaining agreements between Harril and the Unions. Respondent had also alleged that David L. Keller, Todd A. Liverman, Donald Kay Shankles, and Charles L. McFerrin were supervisors within the meaning of the Act and therefore not covered by the agreements. At the hearing, however, Respondent withdrew these contentions.

[4] Counsel for the General Counsel's motion to strike Respondent's brief is denied.

At one point during the hearing before me, it appeared that Respondent was not challenging the appropriateness of the relief ordered but rather which collective-bargaining agreement applied to the work that had been performed by employees and was the subject of the make-whole remedy. I noted that this could well be an appropriate issue to raise in a backpay proceeding. Respondent's counsel, however, assured me and counsel for the General Counsel that Respondent was not contending the wrong collective-bargaining agreement had been applied in computing backpay within the specification. Rather, as stated in its affirmative defense, Respondent was challenging the appropriateness of the backpay award itself.

As Respondent's case was developed before me, it appeared Respondents were essentially attempting to establish that Harrill Electric and DMR were operating in two, and perhaps more than two, different economic climates. I noted to Respondent that the Fifth Circuit specifically discussed *Peter Kiewit Sons' Co.*, 231 NLRB 76 (1977), enf. granted 595 F.2d 844 (D.C. Cir. 1979), involving double-breasted operations where the issue of multiple economic climates is a crucial inquiry. The court specifically adopted the Board's finding that this case is not a double-breasted-operation case where the respondent was dealing in two different economic climates. Respondent responded by stating, "It's evidence which would have been very appropriate to have presented to the Board on the remand of the appropriateness of the single bargaining unit and it was not. But I also believe, of course, the Respondent's position that the evidence is also relevant to the appropriate make-whole remedy and that's the purpose of the introduction." Despite Respondent's assurance that it was not attempting to relitigate an issue that had already been decided against it, in its posthearing brief filed with me, Respondent argues, "This finding of liability should not now preclude Respondent from maintaining in the damage phase of this proceeding that even if it was liable, its actions did not harm those DMR employees who worked in a vastly different economic climate." It is clear to me that Respondent is indeed attempting to relitigate that which has already been decided against it, and I find that Respondent is not free to relitigate those issues at the compliance stage of this proceeding. Accordingly, I reject Respondent's affirmative defense, and I find that backpay is due the discriminatees in the amount claimed by the General Counsel as amended at the hearing.

CONCLUSIONS OF LAW

1. The gross backpay formula used by counsel for the General Counsel is reasonable and appropriate.

2. The net backpay amounts set forth by counsel for the General Counsel in the backpay specification, as amended at the hearing, are accurate and correct.

3. The affirmative defense of Respondent DMR Corp. and Harrill Electrical Contractors, Inc. has been specifically considered and rejected by the Fifth Circuit in enforcing the Board's Order in this case, is without merit, and may not be appropriately raised again at this stage in the proceeding.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[5]

ORDER

The Respondent, DMR Corp., Dallas, Texas, and Harrill Electrical Contractors, Inc., Mesquite, Texas, its officers, agents, successors, and assigns, shall satisfy its obligation to make whole employees by paying them the net backpay amounts set forth in the backpay specification, as amended at the hearing, plus interest thereon accrued to the date of payment computed in the manner prescribed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987),[6] minus any tax withholdings required by Federal and state laws, plus amounts due on behalf of such employees for fringe benefits as set forth in the backpay specification, as amended at the hearing, plus interest thereon to be computed in the manner prescribed in *Merryweather Optical Co.*, 240 NLRB 1213, 1216 fn. 7 (1979).

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[5] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

[6] Under *New Horizons*, interest is computed at the "short-term Federal rate" for the underpayment of taxes as set out in the 1986 amendment to 26 U.S.C. § 6621. Interest accrued before 1 January 1987 (the effective date of the amendment) shall be computed as in *Florida Steel Corp.*, 231 NLRB 651 (1977).

Nagio Restaurant, Inc. d/b/a Captain's Table *and* **Local 6, Restaurant and Club Employees and Bartenders Union, AFL-CIO.** Case 2-CA-18465

June 9, 1988

DECISION AND ORDER

BY MEMBERS JOHANSEN, BABSON, AND CRACRAFT

On March 8, 1983, Administrative Law Judge Harold B. Lawrence issued the attached decision. The Respondent and the General Counsel filed exceptions and supporting briefs.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings,[1] and conclusions only to the extent consistent with this Decision and Order.[2]

The judge found that in negotiations for a contract with the Union, the Respondent failed to bargain in good faith in violation of Section 8(a)(5) and (1) of the Act by engaging in delay and formulating and adhering to proposals designed to stall negotiations, avoid reaching agreements, and undermine the Union as bargaining representative. We reverse, finding that on the facts of this case the Union did not test the Respondent's willingness to bargain and that the Respondent's conduct cannot therefore be found unlawful.[3]

The operative facts follow. On June 22, 1981,[4] the Respondent agreed to recognize Local 6 (the Union) as the collective-bargaining representative of its employees previously represented in two separate units by two locals that at some point had merged into Local 6. The Union waited 6 weeks before contacting the Respondent about a date to meet and bargain. The parties met, as agreed, on August 18. The Union presented its standard form contract, the provisions of which were previously included in the contracts between the Respondent and the now merged locals. The Union also presented economic demands. The Respondent indicated that the Union's demands were too high and that the Respondent would review the proposed contract and get back with the Union.

The Respondent's negotiators, President Biagio Musso and his counsel, Pinto, met some time thereafter and worked on counterproposals. In late August or early September, Union Negotiator Darwin Lanyi called Pinto to arrange a second meeting. Pinto indicated the earliest date available for himself and Musso was late October. Lanyi sought an earlier meeting but agreed to the October date proposed by Pinto.

The October 22 meeting lasted 3 hours. Pinto opened by stating that the Union's proposals were far too expensive. He reviewed each provision of the Union's standard form contract and proposed substantial deletions or revisions. Action on the Union's proposed "Present Practice" clause was deferred pending resubmission of a list from the Union enumerating the practices, privileges, and benefits the clause would obligate the Respondent to maintain.[5] Concerning economic matters, Pinto said the Respondent's terms "would be a step backwards," that there would be no increase in pension or insurance contributions, and that, if anything, there would be a 25-percent reduction in wages. Pinto said the Respondent was not prepared to give specific counterproposals to the Union's economic demands. The meeting closed with the parties agreeing to meet again in November.

The November 17 meeting was held as scheduled. Lanyi indicated that the Respondent's suggested changes to the Union's standard form contract were, in the majority, out of line and unacceptable. The Union came without the list of "Present Practices" the Respondent had requested. The Respondent did not have the specific economic counterproposal sought by the Union. In fact, neither side made concrete proposals and no progress was made.

The fourth bargaining session, scheduled and held December 22, lasted about 2 hours. The Union again indicated that the Respondent's requested text changes to its standard form contract were unacceptable. Lanyi admitted that there was some give and take on these provisions. According to Lanyi, the Respondent made a "big thing" of wanting the Union to provide the list of "Present Practices." Lanyi said the employees would know

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[1] The Respondent has excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

[2] We deny as untimely the General Counsel's request for backpay to remedy a unilateral reduction in wages made by the Company following the parties' final bargaining session. No violation based on this conduct was alleged in the complaint, and the General Counsel sought relief with respect thereto for the first time in exceptions to the judge's decision. The Company was therefore never given an opportunity to litigate this issue.

[3] See generally *Times Publishing Co.*, 72 NLRB 676, 683 (1947).

[4] All dates are in 1981, unless otherwise indicated.

[5] Although not discussed by the judge, this fact is reflected by Pinto's notes of the October 22 meeting, which Lanyi testified accurately reflect the changes proposed by the Respondent.

289 NLRB No. 6

this information better than he would and he did not have such a list. The Union adhered to its proposed wage increases and renewed its request for economic counterproposals. The Respondent said it was losing money, that it could not come up with the increases, and asked for a 50-percent wage cut for all employees.[6]

Either at or after the December 22 meeting, the parties agreed to get together after the holidays. No meetings occurred during the month of January, however, due to Musso's illness. Thereafter, neither party attempted to contact the other.[7]

We do not agree with the judge that these facts show the Respondent breached the obligation it shared with the Union under Section 8(d) of the Act to "meet at reasonable times and confer with respect to wages, hours, and other terms and conditions of employment." The judge found that the Respondent exhibited "inordinate delay" in coming to the bargaining table by virtue of its request that the second bargaining session be held 1-1/2 months after the date of the Union's call to arrange such a meeting. The Respondent told the Union its proposed date was the earliest available for its only two negotiators. The Union, which itself had waited an equivalent period after the Respondent agreed to bargain before attempting to arrange the parties' first meeting, did not contest the explanation offered and, in fact, acceded to the meeting schedule the Respondent proposed. Although we do not encourage such prolonged delay between negotiating sessions, particularly one so meagerly explained, we do not find this single unchallenged request to schedule a meeting on the first date all negotiators were available supports the judge's finding of inordinate delay by the Respondent.

Also lacking evidentiary support is the judge's finding that the Respondent engaged in delay at and after the second meeting. Like the first two meetings, the third and fourth proceeded without delay or rescheduling by either side. At the second meeting the Respondent made counterproposals to the Union's standard form contract. The third meeting was devoid of proposals by either side. By the close of the fourth meeting the Respondent had yielded on some of its proposed changes to the Union's standard form contract and had made a specific wage proposal as the Union had requested. For its part, the Union had yielded on some of the Respondent's proposed changes. The Union had not, however, compiled the list of "Present Practices" important to, and repeatedly sought by, the Respondent. Following the fourth meeting and Musso's January illness, neither party contacted the other to pursue negotiations further. On these facts, no charge of unlawful delay can legitimately be levied against the Respondent.

Nor do we find that when negotiations ended prematurely through the default of both parties after the December 22 meeting, the Union had sufficiently tested the Respondent's proposals to permit us to assess the latter's willingness to bargain in good faith. In this regard, the judge's finding that the Respondent rigidly adhered to its proposals for substantial contract revisions and wage reductions predictably unacceptable to the Union is not supported by the record. The Respondent's proposed revisions to the standard form contract made at the second meeting were criticized as being "out of line" by the Union when the parties next met. The Union made no counterproposals until the fourth meeting, however, when, as the Union admits, some give and take occurred. At the first negotiation session, the Respondent had termed the Union's demand for annual wage increases too high. The Respondent's first specific counterproposal regarding wages, given on December 22, was a starting point for future negotiations. The Respondent neither stated nor suggested by its conduct that it intended its first wage offer to be its last.[8] To the contrary, it is uncontested that the Respondent's wage offer was on the table, awaiting a response, at the close of the parties' fourth and final bargaining session. An anticipated fifth meeting, at which wages and other outstanding issues might have been discussed, never materialized due to the mutual neglect of the parties.

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[6] The judge found the Respondent's December 22 economic proposal to be "spurious" in nature and independent evidence of a lack of good faith because it required a wage reduction that would have put the employees below the legal minimum wage. The record, however, is far from clear exactly what hourly wage rate employees in each unit classification earned or what they would receive as a result of the Respondent's wage reduction proposal. Even where dollar figures are mentioned, there is no indication whether these figures include tips, gratuities, and meals, all relevant to the determination of the hourly wage rate of the subject employees. See generally Fair Labor Standards Act, 29 U.S.C. §§ 201-219. Further, the record fails to support the judge's finding that "[t]he parties at the hearing accepted it as a given proposition" that the Respondent's proposed reduction would have brought employees below the legal minimum wage. The subject of minimum wage was raised at the hearing by counsel for the General Counsel, who asked Musso if he realized that "if the union agreed to the proposed cut or wages, that it would have put the wages of the employees below the minimum wage?" Musso said he was being advised by counsel that "I was paying for Darwin Lanyi, that he took the last Labor Department minimum; that's what he could do." Counsel for the General Counsel then sought clarification by asking Musso whether he was saying that "if the 50-percent cut would have put the wages below the minimum wage scale, as required by the government, you were not aware of it." The Respondent's counsel objected to this question on the grounds that Musso had testified to what his lawyer advised him. The judge sustained the objection, noting, "I think the point is made." No further testimony regarding minimum wage was elicited by any party. Although counsel for the Charging Party asserted in summation, as does the General Counsel in her brief to the Board, that the Respondent's wage offer was below the legal minimum, we do not find the above testimony, the only evidence of record on the subject, sufficient to support a finding that the Respondent's wage offer would have brought employees below the legal minimum. In addition, Musso's testimony that the Respondent's proposed 50-percent reduction would have put employees on a par with the average wage paid by nearby restaurants is uncontradicted. On these facts we find the evidence fails to establish that the Respondent proposed reducing employees' wages below the legal minimum.

[7] The judge found that following the December 22 bargaining session, Lanyi testified that he called Pinto to set the parties' next meeting date; that Pinto promised to talk to Musso and get back with Lanyi to schedule a date to resume negotiations; and that when Pinto failed to do so by January 13, the Union, believing the Respondent was "dragging its feet" in setting up a fifth meeting, filed the charge initiating the instant proceeding. Contrary to the judge, the record establishes that the charge was filed on December 2 after the parties' third bargaining session. Further, Lanyi did not testify that he called Pinto after the fourth and final December 22 meeting. Rather, at one point, when Lanyi was claiming that the December 22 meeting never occurred, he testified that he might well have had a telephone conversation with Pinto in early January, but he "didn't know." Later, when Lanyi was recalled and testified that the December 22 meeting did in fact occur, he denied calling Pinto after the December 22 meeting. Accordingly, Lanyi's testimony does not support a finding that the charge was precipitated by the Respondent's dragging its feet in setting up a fifth meeting. Rather, it supports our finding that after plans for a January meeting were abandoned due to Musso's illness, the parties failed to contact one another, and thus must share responsibility for the fact that a fifth meeting never occurred.

The bargaining process in this case reveals that the normal give and take of negotiations had just begun when the Union, soon after the parties' initial exchange of proposals, filed the instant unfair labor practice charges. Only one more meeting followed before the parties drifted apart, leaving the Respondent's proposals on the bargaining table. Under these circumstances, and absent evidence that the Respondent engaged in any unlawful conduct away from the bargaining table that might have affected the negotiations, we cannot find the facts establish that the Respondent exhibited an unwillingness to reach agreement.

Accordingly, we shall dismiss the complaint.

ORDER

The complaint is dismissed.

Haywood E. Banks, Esq., for the General Counsel.

William P. Maloney, Esq. (Verini, Maloney & Gottlieb), of New York, New York, for the Respondent.

Rochelle L. Roth, Esq., of New York, New York, for the Charging Party.

DECISION

STATEMENT OF THE CASE

HAROLD B. LAWRENCE, Administrative Law Judge. This case was heard before me on September 30, 1982, at New York City. The charge was filed on December 2, 1981, by Local 6, Restaurant and Club Employees and Bartenders Union, AFL–CIO (the Union). On January 13, 1982, a complaint and notice of hearing was issued alleging violations of Section 8(a)(1) and (5) of the National Labor Relations Act (the Act), by reason of the Respondent's alleged failure to bargain collectively in good faith with the representative of its employees. The case is based on the contention that, though the Respondent met with the Union for negotiations on several occasions, it did not bargain in good faith with the intention of reaching an agreement, as evidenced by the fact that the Respondent made proposals calling for the elimination of numerous provisions contained in earlier collective-bargaining agreements that Respondent had had with predecessor unions, the making of unreasonable wage counterproposals, and delaying of the negotiations.

The Respondent's answer denies all allegations of wrongdoing and statutory violation and places in issue the jurisdiction of the National Labor Relations Board in this case.

The Respondent alleged as a first affirmative defense that employees in another restaurant owned by the owner of Respondent had rejected Local 6 as their bargaining agent in a Board-supervised election and that the instant action was instituted after filing of a petition for an election, by the employees of the Respondent without knowledge or participation of Respondent's management. A second affirmative defense alleged that each of the restaurants does less than $500,000 gross annual volume.

The parties were afforded full opportunity to be heard, to call, examine and cross-examine witnesses, and to introduce relevant evidence. Posthearing briefs have been filed on behalf of the General Counsel and on behalf of the Respondent.

On the entire record and based on my observation of the demeanor of the witnesses and the manner in which they gave their testimony, and after consideration of the briefs submitted, I make the following

FINDINGS OF FACT

I. JURISDICTION

In its answer, Respondent admits that it and Musso's 860-2 Rest., Inc. are corporations wholly owned by Biagio Musso, which operate seafood restaurants in New York City at 410 Avenue of the Americas (Captain's Table) and at 860 Second Avenue (Musso's), respectively, and that both are employers engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act. Respondent also admitted, and stipulated at the hearing, that the aggregate purchases made by each restaurant from points outside New York State exceeded $10,000 per year. Respondent disputed the Board's jurisdiction in this case, however, on the ground that the businesses are separate and independent entities. It alleged that each restaurant's gross receipts were less than $500,000 per annum. Although the Respondent's answer is unclear and seems to read as an admission on this point, Respondent established at the hearing that Respondent's gross receipts for the fiscal year ending August 31, 1982, had amounted to $337,623 and that its annual gross receipts in the preceding year had been only slightly higher, and Respondent argued that this had to be considered independently of the gross receipts of Musso's, which had amounted to $1,099,841 for the fiscal year ended October 31, 1981.

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[8] Musso in fact testified that the 50-percent wage cut was proposed to see how low the Union would go and where the parties were going to meet. He indicated that the Respondent was willing to give more and awaited the Union's response.

The factual issue is therefore squarely presented whether the management of these enterprises is characterized by the kind of centralized control of labor relations and other incidents of common or integrated operation that warrant consideration of the aggregate income of both enterprises in determining whether jurisdictional requisites have been met. The important factors are interrelation of operations, common management, centralized control of labor relations, and common ownership.[1] Centralized control of labor relations has long been regarded as the critical factor.[2]

Musso has operated Captain's Table since 1971 and Musso's since 1977. The purchase of Musso's was consummated by taking title in the name of Nagio Restaurant, Inc., the Respondent, which as part of the purchase price assumed a security agreement covering the restaurant equipment. Subsequently, because his accountant changed his mind about how the transaction should be structured, Musso purchased all the stock of the owning corporation, Musso's 860-2 Rest., Inc. for $30,000 payable by a series of notes over the course of several years.

Each restaurant has its own manager, who concerns himself with the details of daily operation. Musso spends his time at Musso's. That restaurant receives its supplies from overseas and from the Fulton Fish Market. It has 18 employees and is open Monday through Friday from noon to 3 p.m. for lunch and from 5 to 11:20 p.m. for dinner. On Saturday it is open for dinner only. Captain's Table has had a complement of 12 employees since its inception. It is closed on Monday instead of Sunday, and is open from noon to 11 p.m. on the other six days of the week. Musso's accepts American Express, Visa, and Master Charge credit cards, while Captain's Table accepts Visa, Master Charge, and Diners Club. The bank accounts, payrolls, insurance policies,[3] and liquor licenses are separate. The two salaried managers operate independently of each other and there is no interchange of personnel between the two restaurants. Each restaurant pays for its own deliveries.

Despite this superficial veneer of independence, however, it is apparent that Biagio Musso is the controlling influence in the operation of each restaurant. He is the sole stockholder of each corporation and he and his wife are the sole directors and officers. The prescribed days and hours of operation have never been varied by the local managers. Musso testified that slight fluctuations in the number of employees at Respondent's restaurant would be left to managerial discretion, since the managers hire and fire personnel, but any substantial change would have to be cleared with him. At Musso's, the manager and Musso jointly hire and fire employees and determine the number needed. Mrs. Musso signs checks for payment of bills of both restaurants from their separate bank accounts. One accountant services both corporations. A statement of joint control is incorporated in the tax returns of both corporations pursuant to regulations of the Internal Revenue Service.

Musso's testimony left no doubt that he has complete control of labor relations for both restaurants. The respective managers have never participated in the negotiation of collective-bargaining agreements covering the restaurants' employees; this has been handled solely by Musso. Musso entered into collective-bargaining agreements with union locals that were predecessors of Local 6, and a subsequent agreement recognizing Local 6 as the exclusive bargaining representative of Respondent's employees after the merger of those unions into Local 6. It was conceded that although the manager at Captain's Table is not expressly required to do so, he does in fact consult with Musso from time to time regarding the assignment of work to employees at that restaurant, work hours of particular employees, and assignments to particular work stations. These are precisely the types of matters that would normally be left to the sole discretion of a manager on the spot. Musso also testified that he personally decided to cut wages of employees at Captain's Table because it had been losing money for 2 years and that he personally explained the cut to the employees, citing wage scales in neighboring restaurants. In addition, Musso continued to draw $26,000 per annum as chief executive officer, which I regard as considerably weakening Musso's contention that his role in the operation of the restaurant was almost nil.

I conclude from this evidence that Musso was intimately involved in the management of Captain's Table notwithstanding the presence of a manager on the scene. In addition, it is uncontroverted that ultimate authority with respect to its management rested with Musso.

On the basis of the proven common ownership, common financial control, common direct and ultimate control of operations by Musso, and Musso's admitted control of labor relations for both restaurants, I find that they constitute a single enterprise for jurisdictional purposes and that their aggregate receipts bring them within Board jurisdiction.[4] I find that at all material times here, Respondent has been an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

II. THE LABOR ORGANIZATION INVOLVED

I find that at all times material here the Union has been a labor organization within the meaning of Section 2(5) of the Act.

The employees at Captain's Table had been represented by two unions, with which Nagio Restaurant, Inc. entered into collective-bargaining agreements. Local 22, Chefs, Cooks, Cafeteria, Food, Beverage & Service Employees Union, AFL-CIO represented chefs, relief cooks, and dishwashers employed by the restaurant. Local 1, Restaurant Employees Union, affiliated with Hotel and Restaurant Employees and Bartenders International Union, AFL-CIO represented employees in a unit described as follows:

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[1] *Radio Union Local 1264 v. Broadcast Service*, 380 U.S. 255, 256 (1965).

[2] *Speedee 7-Eleven*, 170 NLRB 1332, 1334 (1968); *Atwood Leasing Corp.*, 227 NLRB 1668, 1669 (1977).

[3] There is no evidence whether they employ the same or different insurance brokers.

[4] *Swift Cleaners*, 191 NLRB 597 (1971); *Family Laundry*, 121 NLRB 1619 (1958).

> All captains, waitresses, waiters, busboys, busgirls, cashiers, floor walkers, hostesses, food checkers, dining room employees, employed at the restaurant, excluding all other employees, guards and supervisors as defined in the Act.

Local 1 and Local 22 subsequently were merged into Local 6. Local 6 filed an unfair labor practice charge against the Respondent. On June 22, 1981, the proceeding was settled by means of an agreement whereby Respondent agreed to bargain with Local 6 on request as the exclusive collective-bargaining representative "of our employees with respect to their rates of pay, wages, hours of employment and other terms and conditions of employment." That agreement defines the appropriate bargaining unit involved in this case, which in any event would comprise the units defined in the earlier collective-bargaining agreements between the Respondent and the two merged unions.

III. THE REFUSAL TO BARGAIN IN GOOD FAITH

A. *History of Negotiations*

Representatives of the Respondent and the Union met for the purpose of negotiating a new collective-bargaining agreement on four occasions, from August through December 22, 1981. All the meetings were at the offices of Respondent's attorney, Pinto. Darwin Lanyi, an administrative aide employed by Local 6, arranged the meeting of August 18, but it was attended by John F. Leaver, an executive vice president of the Union. Leaver met with Musso and Pinto for about 1 hour. He presented them with a proposed standard form contract covering both kitchen and dining room personnel. This contract had been drawn up by Local 6 with the object of combining in the Local 6 contract features of the contracts formerly used by Local 1 and Local 22. The contract was thus a recodification of the terms of the Local 22 contract, covering kitchen workers, the Local 1 contract covering waiters, and the Local 6 contract covering bartenders, but while it incorporated many provisions of the earlier agreements, and sought renewal thereof, the contract itself was not one that had been previously seen or signed by Respondent.

There is no conflict in the testimony respecting this first meeting. Leaver presented the contract as a proposal and orally stated a number of economic demands, that Pinto wrote down: a $30 raise for kitchen employees and a $10 raise for dining room employees for each year of what was proposed as a 3-year contract, increases in welfare and pension plan, bereavement pay, and vacation and sick leave. No negotiations took place. Musso and Pinto responded by saying that they thought the demands were too high, and that they would review the contract and get back to him. No date was set for the next meeting.

Musso testified that, following this meeting, he met with Pinto and they worked on counterproposals.

In late August or early September, Darwin Lanyi, who had become responsible for further negotiations, telephoned Pinto for a response to the proposals. He received none and, despite his efforts to fix an early date for negotiations, was unable to persuade Pinto to fix a meeting date earlier than October 22. Pinto insisted that that was the earliest date when both he and Musso could be available.

Accordingly, the second meeting took place on October 22. Lanyi met with Pinto and Musso for almost 3 hours. According to Musso, Pinto communicated counterproposals and presented management's position. Musso testified that he advised Lanyi that he would consider changes to the Union's proposals, by which I understand him to mean that he would give serious consideration to them in modified form. Lanyi, however, presents a picture of a meeting characterized by unmitigated recalcitrance on the part of Pinto and Musso. He quotes Pinto as stating that the proposals were "far too expensive" and depicts his review of the Union's standard contract clauses as something akin to putting the pages through a paper shredder: "and he just proceeded to shatter it." Pinto made no economic counterproposals and said nothing other than that the Union's proposals were far too expensive and that Respondent's terms "would be a step backwards." There would be no increases in the pension and insurance contributions and there would be a 25-percent reduction in wages. Most of the meeting was spent going through the standard form contract. Pinto wanted to eliminate most of the standard clauses, which according to Lanyi were boilerplate that had been carried over from the earlier agreements to which Respondent had been a party. Pinto marked up a copy of the agreement and also noted the changes he wanted on a yellow pad. (The marked-up agreement and the memorandum of changes are both in evidence.)

Lanyi testified that he explicitly asked for counterproposals and was told by Pinto that Respondent was not prepared to furnish counterproposals at that time. I have noted that Musso testified that he had worked on counterproposals with Pinto prior to the second meeting. It is not apparent whether economic counterproposals were included in their discussions, but Musso also testified that by agreement with Lanyi negotiations respecting the economic provisions were reserved for a later meeting, and this was the reason why no economic proposals were made by Respondent until the fourth meeting.

At the conclusion of the second meeting, it was agreed that a third meeting would be held in November. Lanyi, Pinto, and Musso met on November 17. According to Lanyi, whose memory was fuzzy about this meeting, no counterproposals were presented by the Respondent and there was no progress, so they set a date for a December meeting, which never came about. He recalled having told Pinto that he had discussed the suggested changes in the standard contract terms with his supervisor and "that the changes he was proposing were, in the majority, out of line. We were not going to delete all of the things that he wanted out of the standard contract."

Lanyi then went on to testify that a further meeting was scheduled for December 22. Pinto telephoned him, however, either on that date in the morning or the day before, and stated that Musso would not be available and that Pinto would get back to him after the holidays. Later, Lanyi changed his testimony and asserted that he called Pinto on the morning of December 22 to let him know he was on his way to the meeting, whereupon Pinto said he was glad Lanyi called because Musso could not make the meeting, and he could not set an alternate date without conferring with Musso. He promised to contact Lanyi after the holidays.

There were no subsequent meetings, according to Lanyi, because the events of December 22, considered with everything else, convinced him that Respondent was dragging its feet. When Pinto failed to call by January 13, 1982, the charge was filed.

Musso testified that a fourth meeting had in fact taken place on December 22 and had lasted for 2 hours. Musso testified that at the third meeting, on November 17, "Mr. Pinto was asking for certain conditions and Mr. Lanyi did not come up with it." They agreed to meet further on December 22 and in fact did so, from 2:30 to 4:30 p.m. The persons present at this last meeting were Lanyi, Musso, Pinto, and Emil Bonati. Pinto made notes of the meeting, which are in evidence. Musso asserted that counterproposals were made, but his testimony makes it clear that during the fourth meeting, apart from the suggestion that the employees take a deep cut in pay, he had no economic counterproposals in mind. He testified that because the restaurant was losing money, he offered a 50-percent cut in pay, but that Pinto at the same time acceded to union demands regarding vacation, sick pay, and holidays. He asserted that he was willing to have further meetings, but he was waiting for the Union to come up with a counteroffer to his proposal for sweeping cuts in pay. It was apparent to me that Musso failed to recognize that the burden of making a responsible counterproposal respecting wages was on him, the Union having presented its position on wages at the very first meeting.

Lanyi's memory improved considerably after Musso testified. He then testified that at the fourth meeting, on December 22, he had set forth the union position that the requested contract textual changes were unacceptable. (Musso had testified that only economic terms had been discussed and that there was no discussion of other changes in the standard form contract.) Lanyi also testified that "we were still asking for a response to the wage proposal that we had asked for and which we had not gotten at the two previous meetings." He cited rising living costs. When it came time to set a date for a further meeting, a date could not be set because Musso had medical problems.

Unquestionably, Musso was compelled by medical problems to spend the entire month of January 1982 away from work. He underwent surgery, which hospitalized him at the beginning of the month and required him to recuperate at home for the last 3 weeks of January, by which time the charge here had been filed.

I credit Lanyi's version of the events which transpired at the final meeting, despite his memory lapse, and I do not credit Musso's assertion that the Union agreed to wait quiescently for a response to its economic demands and to sit through several meetings watching Pinto tear up the standard forms.

I also credit Lanyi's testimony that early in January he telephoned Pinto, who promised to get back to him with a date for resumption of negotiations. It is the type of conversation that would logically take place under such circumstances. The date when Musso would be physically capable of resuming negotiations was within Musso's and Pinto's knowledge. They made no effort to suggest a date although in September 1981, they had been able to fix a meeting date 6 weeks ahead of time.

B. *Analysis*

The issue is whether in the circumstances of this particular case, the statutory obligation to bargain in good faith has been met.[5] It has been observed that surface-bargaining cases present problems of great complexity and that no case can be a determinative precedent for another: "It is the total picture shown by the factual evidence that either supports the complaint or falls short of the quantum of affirmative proof required by law."[6]

In the present case, there was inordinate delay on the part of the Respondent in coming to the bargaining table. The meeting in August 1981 involved more than presentation of the Union's demands. The Respondent's counsel put off negotiations until the latter part of October without adequate explanation of the need for such a lengthy delay. Pinto's statement that it was the first available date both he and Musso could attend was no explanation at all. Musso did not amplify it in his testimony and Pinto did not appear at the hearing. There can be no argument about Respondent's obligation to meet with the Union upon some reasonable timetable; that is, the statutory mandate. Respondent's failure to do so is one of the factors that may be considered with the totality of conduct to determine whether it was engaging in good-faith bargaining as required by the Act.[7]

The delay continued at and after the second meeting. The Union's form contract and economic demands, whether acceptable to Respondent, have never been claimed by Respondent to have been unreasonable or outrageous, yet no response to the economic demands was forthcoming until the fourth meeting, on December 22, 4 months after their original presentation to Respondent. The process of excision of standard clauses carried out during the second meeting was tantamount to wholesale expurgation of standard form provisions which in many cases were nothing more than carryovers from earlier collective-bargaining agreements to which Respondent had been a party.

The Respondent conceded[8] what is apparent from the documentary evidence: that the Respondent sought elimination of features that had existed in earlier agreements with the separate union locals which had merged into Local 6 and that did not in any manner impinge on economic problems of the Respondent. Respondent offered almost no justification for its sweeping attack on the noneconomic provisions of the contract. Musso attributed the idea of eliminating the union-security clause to remarks made by the administrative law judge who had been involved in settlement of the charge filed earlier by Local 6. Musso asserted that, not only was that idea not original with him, but the Union had not found it objectionable when suggested by the judge. Nevertheless, that would hardly be justification for the broad attack on the other provisions or for assuming the justification of the demand for elimination of the union-security clause in the present circumstances.

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[5] *NLRB v. Truitt Mfg. Co.*, 351 U.S. 149 (1956).

[6] *Borg-Warner Corp.*, 198 NLRB 726 (1972); *Sweeney & Co.*, 176 NLRB 208, 211 (1969), modified but enfd. as to this point 437 F.2d 1127 (5th Cir. 1971) (the quotation is from *Borg-Warner*).

[7] *Borg-Warner*, above at 734.

[8] The concession was made by counsel for Respondent during final argument.

Each party blames the other for the delay in negotiating the economic proposals, and each party seeks to cast the onus on the other for producing counterproposals. Lanyi testified that he kept pressing for an economic response; Musso says it was understood that that would be left for last. It may be argued that Lanyi's failure to recall the December meeting should be regarded as a serious qualification of his credibility, but I do not accept it as such. I regard it, rather, as a true lapse which requires that his testimony regarding some of the details of the meetings be accepted only with great care. It does not weigh half as much on me as does the impression, on these facts, that much of the Respondent's preoccupation with the form contract was a stall to avoid coming to grips with the economic demands. That impression is reinforced both by the extreme nature of Respondent's objections to the standard form contract and by the spurious nature of the economic counterproposal,[9] which Musso admitted was made purely to compel the Union to come forward with another proposal and did not at all reflect what he was willing to negotiate. He waited for the Union to negotiate against itself instead of making a bona fide counterproposal.

Lack of good-faith bargaining is also indicated by Respondent's advancement of an illegal proposal. The parties at the hearing accepted it as a given proposition that a 50-percent reduction would have brought the employees' wages below the legal minimum wage. Musso excused himself on the basis that he acted on advice of Counsel but that does not explain why such a proposal was made in the first place. He did not bring his attorney in to explain it. This proposal is also indicative of lack of good-faith bargaining when viewed from another standpoint. An employer's insistence on making proposals to a newly certified union, which are less than what the employees are currently receiving has been held to be, in the proper overall context, failure to bargain.[10] Thus, the Respondent's argument that the contract presented to it by the Union was an altogether new contract and not a renewal is seen not to be helpful at all to the Respondent. In any event, however, the same logic has been held applicable to negotiations involving renewals, it being held that one of the factors to be considered in determining whether an employer is bargaining in good faith is whether its proposals would reduce the employees' existing working conditions or wages, an inference unfavorable to the employer being permissible if reductions are something more than de minimis.[11]

Consideration of all the circumstances of the present case makes it apparent that the Respondent did not simply adhere to a bargaining position that was unpalatable to the Union but formulated and maintained a position designed to stall negotiations, avoid reaching an agreement, and undermine the position of the Union as the representative of the Respondent's employees. Musso and his attorney had to have known that their proposals, economic and otherwise, would encounter serious resistance from the Union.[12] It is well settled that rigid adherence to proposals of a type which are "predictably unacceptable" to the Union may be considered with other evidence "as evidencing a predetermination not to reach agreement."[13] The same is true of proposals advanced in expectation of union rejection by an employer's negotiator who is "well schooled in the realities of collective bargaining."[14] The Respondent, in effect, called on the Union to abdicate its normal right to represent the employees effectively,[15] and "a violation is made out when, as here, the employer demands a contractual provision which would exclude the labor organization from any effective means of participation in important decisions affecting the terms and conditions of employment of its members."[16]

IV. THE EFFECT OF THE UNFAIR LABOR PRACTICES ON COMMERCE

The violations of the Act herein found to have been committed by the Respondent have a close, intimate, and substantial relationship to trade, traffic, and commerce among the several States and tend to lead to labor disputes burdening and obstructing commerce and the free flow of commerce.

CONCLUSIONS OF LAW

1. Respondent is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

2. The Union is a labor organization within the meaning of Section 2(5) of the Act.

3. All employees of the Respondent except guards and supervisors as defined in the Act constitute a unit appropriate for the purposes of collective bargaining within the meaning of Section 9(a) of the Act.

4. The Union is the exclusive representative of the employees in the aforesaid unit for the purpose of collective

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[9] The nature of the employer's proposals may be taken into account in assessing its motivation in collective-bargaining negotiations. *Sweeney*, above at 212, modified but enfd. as to this point 437 F.2d 1127 (5th Cir. 1971).

[10] *Dothan Eagle*, 174 NLRB 804, 815 (1969), enfd. 434 F.2d 93 (5th Cir. 1970).

[11] *Borg-Warner*, above at 736.

[12] "It would be unreasonable to assume that Respondent's attitude with respect to economic issues was taken without anticipating that communication of its views to the Union would create anything other than immediate stalemate." *Sweeney & Co.*, above at fn.9.

[13] *NLRB v. Herman Sausage Co.* 275 F.2d 229 (5th Cir. 1960), enfg. 122 NLRB 168 (1958), quoted in *Borg-Warner*, above at 727. See also *Sweeney & Co.*, above at 212, and *Tomco Communications*, 220 NLRB 636 (1975), enf. denied 567 F.2d 871 (9th Cir. 1978).

[14] *Tomco Communications*, above at 637.

[15] Failure to bargain is indicated by lack of movement because of adherence to original position, adamant insistence on a bargaining position, and failure to make meaningful concessions. Id. at 637; *NLRB v. Cable Vision*, 660 F.2d 1 (1st Cir. 1981), enfg. 249 NLRB 412 (1980).

[16] *United Contractors (JMCO Trucking)*, 244 NLRB 72, 73 (1979) (citing *Tomco*), enfd. mem. 108 LRRM 3152 (7th Cir. 1980).

bargaining with respect to rates of pay, wages, hours of employment, and other terms and conditions of employment.

5. Respondent violated Section 8(a)(5) and (1) of the Act by failing and refusing to bargain collectively in good faith with the Union with respect to rates of pay, wages, hours of employment, and other terms and conditions of employment.

6. The aforesaid unfair labor practice is an unfair labor practice affecting commerce within the meaning of Section 2(6) and (7) of the Act.

THE REMEDY

Having found that the Respondent has engaged in an unfair labor practice by reason of its refusal to bargain in good faith with the Union with respect to rates of pay, wages, hours of employment, and other terms and conditions of employment, I shall recommend that Respondent be required to cease and desist from such conduct and that it be required, on request of the Union, to negotiate with respect to such subject matters and, if an agreement is reached, embody the same in a signed agreement.[17]

[Recommended Order omitted from publication.]

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[17] This is the relief requested by the General Counsel (G.C. Br. 12) and suffices to effectuate the policies of the Act. I considered the propriety of recommending backpay in view of the delay in bargaining combined with actual implementation by Respondent of a 50-percent reduction in wages, but concluded on the basis of evidence in the record that such relief would not effectuate the purposes of the Act, might be injurious to the interests of all parties, and would be better left to the discretion of the parties in the course of the collective bargaining which is here directed to proceed. Such a remedy was invoked by the trial examiner in *Freeman Co.*, 194 NLRB 595 (1971), but the Board reversed his finding that Sec. 8(a)(5) had been violated. See *Steelworkers v. NLRB*, 430 F.2d 519, 521 (D.C. Cir. 1970), enfg. 178 NLRB 711 (1969); *Royal Typewriter Co. v. NLRB*, 533 F.2d 1030 (8th Cir. 1976), enfg. 209 NLRB 1006 (1974); *Tiidee Products*, 194 NLRB 1234 (1972); *Southland Dodge*, 232 NLRB 878 (1977).

W.A.D. Rentals, Limited d/b/a Kelly's Private Car Service *and* Local 3036, Taxi Drivers and Allied Workers Union, Service Employees International Union, AFL-CIO-CLC. Case 29-CA-11940

June 9, 1988

DECISION AND ORDER

BY CHAIRMAN STEPHENS AND MEMBERS JOHANSEN AND BABSON

On April 28, 1987, Administrative Law Judge Jesse Kleiman issued the attached decision. The Respondent filed exceptions and a supporting brief, and the Charging Party filed an answering brief.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings, and conclusions and to adopt the recommended Order.

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge and orders that the Respondent, W.A.D. Rentals, Limited d/b/a Kelly's Private Car Service, Queens, New York, its officers, agents, successors, and assigns, shall take the action set forth in the Order.

Lyn Neugebauer, Esq., for the General Counsel.

Stuart M. Kirshenbaum, Esq. and *Sanford E. Pollack, Esq. (Marshall M. Miller Associates, Inc.)*, of Hewlett, New York, for the Respondent.

David Stolow, Esq. (Donald F. Menagh, P.C.), of New York, New York, for the Charging Party.

DECISION

STATEMENT OF THE CASE

JESSE KLEIMAN, Administrative Law Judge. On the basis of a charge filed on 2 July 1985 by Local 3036, Taxi Drivers and Allied Workers Union, Service Employees International Union, AFL-CIO-CLC (Union or Charging Party), the General Counsel of the National Labor Relations Board, by the Regional Director for Region 29, Brooklyn, New York, issued a complaint and notice of hearing on 16 September 1985, against W.A.D. Rentals, Limited d/b/a Kelly's Private Car Services (Respondent) alleging that the Respondent engaged in certain unfair labor practices within the meaning of Section 8(a)(1) and (5) of the National Labor Relations Act (the Act). On 26 September 1985 the Respondent duly filed an answer to the complaint, in substance, denying the material allegations. In its answer to the complaint, the Respondent raised the following affirmative defenses.

1. The Complaint fails to state a claim upon which relief can be granted pursuant to any of the provisions of the National Labor Relations Act, as amended.
2. Any claims asserted against the Respondent, irrespective of their veracity, are in any event time-barred and must be dismissed pursuant to the six (6) month statute of limitations set forth at Section 10(b) of the Act.

On 30 December 1985, the Respondent filed a Motion for Summary Judgment alleging that an objective basis existed for the Respondent to believe that the Union no longer had the support of a majority of the employee drivers because there has been several layers of turnover of employees in the past 5 years, and therefore the Respondent had no continuing obligation to recognize and bargain with the Union or to execute a written collective-bargaining agreement on demand; that the Union had abandoned representation of unit employees; and that the Union did not make a timely demand for bargaining. The Respondent sought dismissal of the complaint in its entirety. By Decision and Order dated 9 April 1986, the Board denied the Respondent's Motion for Summary Judgment for the reason that "the Respondent has not met its burden of demonstrating the absence of a genuine dispute as to the material facts in issue."

A hearing was held before me in Brooklyn, New York, on 14, 15, and 24 July 1986.[1] All parties were afforded full opportunity to appear, to introduce evidence, to examine and cross-examine witnesses, to argue orally on the record, and to file briefs. At the opening of the hearing the Respondent renewed its "motion for a summary judgment. Predicated largely on [Section 10(b)]'s statute of limitations [sic] at 6 months imposed under the Act." I reserved decision on this motion. At the close of the General Counsel's case the Respondent renewed its motion to dismiss the complaint for various reasons,[2]

289 NLRB No. 9

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[1] On 24 June 1986 the Respondent filed a petition to quash subpoenas. The General Council opposed such petition in writing filed on 10 July 1986. The Respondent also filed a petition to revoke subpoena ad testificandum and subpoena duces tecum on 14 July 1986. At the opening of the hearing I denied the Respondent's petitions. At the close of the General Counsel's case, however, the Respondent amended its answer to admit "commerce jurisdiction," in effect resolving this issue. Moreover, on 9 June 1986 the Respondent filed a motion and demand for a bill of particulars. The General Counsel filed a reply in part and opposition in part to motion for bill of particulars on 30 June 1986. By letter dated 3 July the Respondent renewed its request for a bill of particulars, asserting that the General Counsel's reply was inadequate. The General Counsel thereafter filed an amended reply in part and opposition in part to motion for bill of particulars on 10 July 1986. At the hearing I found that "the information that was supplied to the Respondent's counsel adequately satisfies as much of the request for the bill of particulars as is warranted."

[2] Briefly, the reasons set forth by the Respondent as the basis for dismissal of the complaint are: That any claim of an unfair labor practice is time-barred by Sec. 10(b) of the Act; that the refusal of the Regional Director to issue a complaint in a previous case based on a charge filed by the Union involving the same parties and factual background and considered with any additional facts, the "entirety of those matters are now [Res Judicata] and compose the law of this case with respect to these dealings between the employer and the union"; that the Union is guilty of *laches* since it failed to demand bargaining or execution of a written contract for 15 months after the parties allegedly reached agreement on all

Continued

which will be fully discussed. I denied the Respondent's motion to dismiss the complaint. The Respondent again renewed its motion to dismiss the complaint in its entirety at the close of the hearing on the same grounds, in substance, as previously asserted. I reserved decision on the motion. Thereafter, the General Counsel, the Respondent, and the Union all filed briefs in this case. In its brief the Respondent seeks dismissal of the complaint, "For all the foregoing reasons and those depicted on the evidentiary record." For the reasons set forth, I grant the Respondent's motion to dismiss the complaint in part, and deny its motion to dismiss in other part.

On the entire record and the briefs of the parties, and on my observation of the witnesses, I make the following

FINDINGS OF FACT

I. THE BUSINESS OF THE RESPONDENT

The Respondent, at all times material, has been a New York corporation with its principal office and place of business at 212-35 42d Avenue, Queens, New York, engaged in the business of providing private car transportation services. In the course and conduct of its business operations during the preceding 12 months, these operations being representative of its operations at all times material, the Respondent derived gross revenues in excess of $500,000. During the same period of time, the Respondent, in the course and conduct of its business operations, purchased and received at its place of business gasoline, automobile parts, and other products, goods, and materials valued in excess of $50,000 from other enterprises, located within the State of New York, each of which other enterprises had received these products, goods, and materials directly from points outside the State of New York. The complaint alleges, the Respondent admitted to the above as fact at the hearing,[3] and, therefore, I find that the Respondent is now, and has been at all times material, an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act. The complaint also alleges, the Respondent admits, and I find that William Kelly, the Respondent's president, at all times material has been, and is now, a supervisor within the meaning of Section 2(11) of the Act, and an agent of the Respondent within the meaning of Section 2(13) of the Act.[4]

II. THE LABOR ORGANIZATION INVOLVED

The complaint alleges that Local 3036, Taxi Drivers and Allied Workers Union, Service Employees International Union, AFL-CIO-CLC is a labor organization within the meaning of Section 2(5) of the Act. The Respondent in its answer denies this allegation on the basis of lack of knowledge and information sufficient to form a belief thereon. On 5 February 1982, the Board certified the Union as the exclusive representative of the Respondent's employees in an appropriate unit for the purposes of collective bargaining regarding rates of pay, wages, hours of employment, or other conditione of employment, after a union victory in a Board-conducted election. Moreover, the Union has an industrywide collective-bargaining agreement with the Medallion Taxicab industry. I therefore find and conclude that Local 3036, Taxi Drivers and Allied Workers Union, Service Employees International Union, AFL-CIO-CLC is a labor organization within the meaning of Section 2(5) of the Act.[5]

III. THE APPROPRIATE BARGAINING UNIT

The complaint alleges that the following employees of the Respondent constitute a unit appropriate for the purposes of collective bargaining within the meaning of Section 9(b) of the Act:

> All full-time and regular part-time drivers employed by the Employer at its Queens garage, excluding all office clerical employees, dispatchers, bookkeepers, management personnel, guards and all supervisors as defined in Section 2(11) of the Act.

The Respondent denies this allegation. In a Stipulation for Certification upon Consent Election dated 15 December 1980, signed by the Respondent and the Union and agreeing to a Board-conducted secret-ballot election of its employees, the Respondent accepted as appropriate for the purposes of collective bargaining this very same unit. The Board certified the Union on 5 February 1982 as the exclusive bargaining representative of the Respondent's employees in the same described unit. The Respondent offered no evidence to refute the appropriateness of this unit for purposes of collective bargaining.

Therefore, I find and conclude that:

> All full-time and regular part-time drivers employed by the employer at Queens garage, excluding all office clerical employees, dispatchers, bookkeepers, management personnel, guards and all supervisors as defined in Section 2(11) of the Act, constitute a unit appropriate for the purposes of collective bargaining within the meaning of Section 9(b) of the Act.

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contractual terms; that the Respondent had a good-faith doubt of the Union's majority status at the time it withdrew recognition of the Union, founded on objective considerations, namely, the abandonment of the unit employees and the "several layers of turnover of employees during the almost 5 years since the Union's narrow 15-14 election victory in December 1981"; and the General Counsel's failure of proof in this case.

[3] Although the Respondent amended its answer at the hearing to admit the jurisdictional allegations in the complaint as fact, it continued to deny the legal conclusion that the Respondent is an employer within the meaning of Sec. 2(2), (6), and (7) of the Act.

[4] The evidence shows that Edward Kelly, son of William Kelly, and the Respondent's vice president, is a part owner of the Respondent and the Respondent's manager, and at all times material has been, and is now, a supervisor within the meaning of Sec. 2(11) of the Act, and an agent of the Respondent within the meaning of Sec. 2(13) of the Act.

[5] *Photo Drive Up*, 267 NLRB 329 (1983); *Michigan Bell Co.*, 182 NLRB 632 (1970). Additionally, the Respondent failed to produce any evidence at the hearing contradicting this or supporting its denial of the Union's status as a labor organization within the meaning of the Act.

IV. THE ALLEGED UNFAIR LABOR PRACTICES

The complaint alleges that since on or about 13 June 1985, the Respondent has failed and refused, and continues to fail and refuse, to execute a written collective-bargaining agreement embodying the terms and conditions of employment agreed on between the Respondent and the Union about 16 January 1984, although requested to do so by the Union; and that about 13 June 1985, the Respondent withdrew its recognition of the Union as the exclusive-bargaining representative of its employees in an appropriate unit, and since that date has failed and refused, and continues to fail and refuse to recognize and bargain with the Union as the exclusive bargaining representative of such employees, and by such acts the Respondent has interfered with, restrained, and coerced, and continues to interfere with, restrain, and coerce its employees in the exercise of the rights guaranteed in Section 7 of the Act in violation of Section 8(a)(1) of the Act, and the Respondent has also refused to bargain collectively and is refusing to bargain collectively with the Union in violation of Section 8(a)(5) of the Act. The Respondent denies these allegations.

A. *Background*

The Respondent operates a taxi service whose business mainly consists of providing passenger fare service to and from the Long Island Railroad Station in Bayside, Queens, New York. This is a family-owned business whose owners include William Kelly, his son Edward Kelly, and, at the time of the events, another relative, Carmello Forame. For the past few years and for all intents and purposes, Edward Kelly has run and managed the business due to debilitating medical illnesses affecting his father, William Kelly, and uncle, Forame. The Respondent's business operation differs from the New York City medallioned taxicab industry in that it is a private car service or livery business, whose drivers may not accept street fares, passengers who hail a cruising cab from the sidewalk for a metered ride. Instead, all riders are obtained either by telephone calls directly from customers or by picking up passengers at the Long Island Railroad Station in Bayside. Cars are dispatched either from the Respondent's headquarters or by two-way radio communication. Fares are set by the Respondent and are not subject to regulation by the New York City Taxi and Limousine Commission.

The Union began its organizing campaign among the Respondent's drivers in 1980. The Respondent and the Union executed a Stipulation for Certification upon Consent Election on 15 December 1980, and the ensuing Board-held secret-ballot election on 9 January 1981 resulted in a 15 to 14 vote in favor of the Union. The Regional Director for Region 29 certified the Union as the exclusive bargaining representative of the Respondent's employees in the appropriate unit for the purpose of collective bargaining on 5 February 1982. Thereafter, and at the Union's request, the parties entered into negotiations for a collective-bargaining agreement.

B. *The Evidence*

The record shows that the Respondent and the Union held approximately six or seven negotiation meetings at the Traveller's Inn near LaGuardia Airport in Queens, New York, commencing on 26 April through 3 November 1982. At these negotiations, the Respondent was represented by Edward Kelly and Carmello Forame, part-owners, and Brian Tunney, Esq.,[6] while the Union representatives were Gasper Pecorella and Michael Rosenthal, the Union's vice president and recording secretary, respectively, Stuart Bochner, Esq.,[7] and two bargaining unit employees, Milton and Connors.

At the first negotiation meeting on 26 April 1982, the Union presented its list of proposals for inclusion in a collective-bargaining agreement and, for use as a guideline in negotiating the agreement, proffered a copy of an agreement between the Union and the Metropolitan Taxicab Board of Trade, the Union's "master contract."[8] Rosenthal testified that with Tunney and Bochner acting as spokesmen for the Respondent and the Union, respectively, the parties discussed the following items: dues checkoff, which was proposed by the Union and opposed by the Respondent; arbitration, the Union seeking the New York State Mediation Board and the Respondent asserting the American Arbitration Association as arbitrator; union security, the Union requiring a union-security clause and the Respondent rejecting this demand; health, welfare, and pension plans, with the Union offering to include management representatives in the plans, subject to the legality of this arrangement.

Although the record is unclear regarding the specifics, the evidence shows that the Respondent and the Union continued to meet and discuss the terms and conditions of a collective-bargaining agreement at several subsequent negotiation sessions through October 1982. The parties met again on 3 November 1982.[9] Rosenthal testified that they reviewed "topics" that had been agreed to at the previous bargaining sessions and negotiated to agreement various other issues such as: some aspects of the driver work shift schedules, vacations, jury duty pay, car wash responsibility, interior car care; breakdown pay,[10] the noncommissionable portion of the fare rate;[11]

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[6] During these negotiations, the Respondent was represented by the law firm of Putney, Twombly, Hall and Hirson, Esqs., and Tunney was "of counsel."

[7] At the time, Bochner was a partner in the law firm of Menagh, Trainor and Bochner, Esqs., which represented the Union in collective-bargaining negotiations.

[8] While Kelly raised an objection to the use of the master contract as a guide in the negotiations because some of its terms were not applicable to the type of car transportation service operation run by the Respondent, he did, although reluctantly, allow it to be used in such a manner.

[9] Although Rosenthal testified that Bochner was present at this meeting, Tunney disputed this in his testimony. Moreover, although Bochner testified as a witness, he neither confirmed nor denied his presence at this meeting.

[10] When a car in service becomes disabled, the driver receives an hourly rate up to 4 hours or, on repair of the automobile, whichever is less.

[11] The Respondent receives an amount that "comes off the top of the fare," which is not subject to driver commissions.

seniority; leaves of absence; bulletin boards; a credit union; and a 3-year contract term. Rosenthal stated that other items discussed, but not fully agreed to, were: driver commissions, gasoline charges, radio charges, union security, dues checkoff, a final driver work shift schedule, and arbitration. Rosenthal recounted that at the negotiations agreement regarding particular issues was signified by Bochner and Tunney stating so, and that there was no initialing or "signing off" of the item in any written proposal, or the master contract or in any notes kept by the parties.

Regarding the 3 November 1982 negotiation meeting, Tunney testified that:

> [I]t was a rocky session as the last session always is; at the conclusion of which, having agreed on such things as commissions and whatever other terms, a great number of terms, the parties shook hands and went off their separate ways. The expectation being that a document would be prepared by the Union . . . within a reasonable time . . . and the parties would have to work out the language and—and any other miscellaneous terms. . . . I expected a tough drafting session after I got the first draft, that's what I expected as I left the room in November of '82. . . . The sense—and what I'm trying to point out is, we—I anticipated a contract to be forthcoming and we would look forward to what kind of language would be worked out in that agreement so that we could say all right yes, that is exactly the agreement.

Tunney also testified, however, that not all the issues discussed at this meeting had been resolved. We stated:

> [T]he master agreement had many many terms, many of which did not apply to us. But we went through each of those terms deleting some of them, talking about others and on some of them, we put a hold. At the time that we concluded our negotiations in November of '82, there was still a number of items that was still a hold.

Bochner testified, in substance, that by the end of negotiations in November 1982, agreement on a full collective-bargaining contract had been "about 90 percent done." Left "open" for resolution was some aspect of the "commission package" and shift scheduling. Bochner added that, "all of the non economic, non wage related items were fairly well set," most of the "scheduling was agreed to," "hospitalization was taken care of," as well as pension, major medical, and sick days.

Moreover, it is uncontested that at the conclusion of this meeting the Union agreed, at the Respondent's request, to prepare a draft collective-bargaining agreement and send it to the Respondent for review.

Rosenthal testified that there was no contact between the Respondent and the Union until January 1984 for the reason that starting in October 1982, the Union had been engaged in negotiating a new collective-bargaining agreement with the Metropolitan Taxicab Board of Trade, a new master contract affecting the Medallion Taxi fleets, and that covered the Union's entire membership with the exception of Kelly's employees. Rosenthal related, "The entire focus of the Union became an attempt to get that contract. It's the only contract we have." While the master contract had expired on 16 November 1982, the parties thereto had agreed to extend it until 10 March 1983 while they met to negotiate a new agreement. However, Rosenthal added that despite the Union's preoccupation with its efforts to negotiate a new master contract, he attempted to contact Tunney by telephone "5 to 10 times" during the period from January through March 1983 in order to continue contract negotiations, but was unable to reach him, being told that either Tunney was ill, unavailable at the time, or out of the office. Although Rosenthal related that he left messages with Tunney's secretary for Tunney to call him back, Tunney never in fact returned his calls.

Rosenthal related that from March through July 1983, the Union was engaged in sporadic selective strikes throughout the taxicab industry that totally absorbed its time and effort. He testified:

> In July 1983, pretty much everything fell apart. We were just about ready to begin our election period for our union officers who are elected every 3 years, and 6 of our vice presidents decided to run against the incumbent leadership, including Mr. Pecorella who was the primary person dealing with Kelly's.
>
> From July 1983 through November 1983 nothing was accomplished. We had no contract with the Metropolitan Taxicab Board of Trade so we couldn't do anything with them. We were totally immersed in the election and could not do anything else.

Rosenthal continued that in and around Thanksgiving 1983, the Union reached agreement with the Metropolitan Taxicab Board of Trade on a new bargaining contract and that, "The period of December 1983 was taken up with the ratification of the contract."

Tunney testified that "after negotiations in November of '82, there was no contact that I recall for a substantial period of time; six months, eight months, nine months." According to Tunney, he then received two or three telephone calls, "all in late '83," presumably from Rosenthal, who on one occasion told him that the draft of the bargaining agreement was almost complete, and Tunney requested that a copy be sent to him when it was finished. Tunney related that during another of these calls Rosenthal told him that the Union was having an "internal union election problem," a problem with the "Medallion Cab Industry" negotiations and a strike, and that he was "sorry it's taking so long; I'll get back to you," with reference to the draft of the collective-bargaining agreement.

Rosenthal testified that in early January 1984, Bochner contacted Tunney and a meeting was scheduled for 16 January 1984 and held at Bochner's office in Manhattan, New York.[12] Present at this meeting were Bochner and

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[12] Tunney testified that it was Rosenthal who had scheduled this meeting and had asked Tunney to bring his notes, taken at the last negotiating

Continued

Rosenthal for the Union, and Tunney on behalf of the Respondent. Neither Kelly nor Forame attended the meeting.[13] Bochner testified that the purpose of the meeting was "to finalize" all the terms and conditions of employment to be included in the collective-bargaining agreement. His account of what occurred is as follows:

> We did discuss all of the terms which the Union believed had been agreed to prior to that time, and did discuss the terms that were close to agreement and eventually reached agreement that day. . . . Brian Tunney had made his notes and I made my notes and we went through all the items and then finalized it with a substitute set of notes . . . the notes that I made at the end of the meeting when we finalized everything. . . . Tunney and I agreed that after we had all the items set forth that I would draft a proposed agreement embodying those things for his review. That was the way we left it at that meeting. We didn't sign off on each other's notes or anything like that. . . . There wasn't any initialling [sic].[14]

Rosenthal testified similarly regarding what had happened at the meeting and added that the meeting closed

> with handshakes all around, congratulating ourselves for a clean, fair negotiation. Each side felt that they had done the best they could. There was some discussion with regard to which attorney would actually draft the language, but it was clear at the end of the meeting that Mr. Bochner was supposed to draft the language. We left agreeing to contact each other when the language was ready.

Tunney's recollection of the 16 January 1984 meeting was that its primary purpose was to update Bochner regarding what had been agreed to between the parties so that Bochner could prepare a written draft of the proposed collective-bargaining agreement, since he had not attended the last negotiation meeting in November 1982. Tunney stated that they discussed the terms of the proposed contract, "such things as the commission rates, the three year agreement, the many other terms that had been spoken about, many of which had in fact been agreed to during the '82 negotiations." Tunney maintained that this meeting was not a negotiating session because he would not conduct any negotiations without his client, Kelly, being present at the meeting. Tunney added:

> As we concluded what at best could be described as an attempt at a drafting session, it lasted less than an hour, Mr. Rosenthal, whom I have affection for, in truth . . . said to me, "Brian, when we get the agreement to you, do you think you'll have any problem having Kelly sign it?" And I said, "Mike look, it's been 14 months, please get the agreement to me and we'll see what happens," and I left it at that.[15]

Kelly testified that he was unaware of the 16 January 1984 meeting at Bochner's office because Tunney had not advised him about it, nor did Tunney apprise him of what had occurred at the meeting or discuss this with him. Kelly stated that he had attended all the prior negotiating sessions through November 1982. He added that although he had never told Tunney that Tunney could not negotiate on the Respondent's behalf without Kelly being present also, they in fact had never discussed this at all. Moreover, Kelly denied that the parties had reached agreement to most or all the items to be includ-

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session on 3 November 1982, since Bochner had not attended that meeting and this would perhaps facilitate the negotiations and the preparation of a draft bargaining agreement. Although Bochner could not recall if he or Rosenthal had arranged this meeting with Tunney, he did testify that, "for a period prior to January 1984" he had attempted to contact Tunney in order to finalize the agreement but unsuccessfully.

[13] Although Tunney testified that he had no authority to negotiate a new bargaining agreement without Kelly's presence, Bochner testified that Tunney had told him that he had authority to bind the Respondent in such negotiations and that was also "evident from the prior negotiating sessions, and from the fact that [Tunney] agreed to sit down at the [16 January 1984] meeting and finalize the contract." However, both Bochner and Rosenthal also testified that the issue of Tunney's authority was never raised by them nor did it come up for discussion in any manner during the negotiations or at the 16 January 1984 meeting, although at the latter meeting Kelly, for the first time, failed to appear at a negotiation session. Moreover, on cross-examination, Bochner stated that Tunney had in effect made representations regarding his authority since "[Tunney] was their spokesman and there were Kelly's present when he . . . said we have agreement on those points and no people who I knew to be Kelly's had contradicted him." Rosenthal also testified that throughout the negotiations it was Tunney who spoke in authority for the Respondent at all times.

[14] According to the testimony of Bochner and Rosenthal the parties reached agreement on the previously unresolved issues and reviewed those items previously agreed to including: shift scheduling, medical benefits, vacations, an agency shop clause, no payroll dues deduction, the American Arbitration Association as arbitrator, a 41-percent commission for drivers, a 40-cent noncommissionable amount, and no driver gas or radio use charges, jury duty pay, no driver carwash charges; and the Union withdrew its demands for pension, major medical coverage, and sick leave days.

[15] Tunney testified that the proposed draft bargaining agreement was expected to contain the items agreed on during the negotiations and those items left on "hold" to which agreement between the parties had not yet been reached. The Respondent and the Union would then sit down and discuss the acceptability of the language regarding the terms already agreed to and "further talk" about those provisions about which final agreement had not been reached so that a complete agreement could then be signed. He stated:

> In my lexicon, there is no agreement [until there is] full agreement. . . . I don't think on the economic side, while we talked about everything, and we were real close . . . there were still many questions about how that would be phrased on the economic side. On the [non]economic side of things, there were many open gaps. . . . So was there complete, full, final binding agreement. . . ? No. Had the parties had a meeting of the mind on many terms? Yes.

Moreover, on cross-examination, Tunney was referred to the parties "last negotiating session" and asked if agreement had been reached on specific contract terms. We acknowledged that the parties had reached agreement on the amount of driver commissions, welfare and hospitalization benefits for employees, but not for dependents thereof, breakdown pay, call-in pay, jury duty pay, vacation pay, carwash charges, arbitration and grievance procedure, union security, and a "sense of an agreement" regarding driver work schedules. He continued that *no* agreement had been reached on the inclusion of a credit union provision, *no* agreement on dependent coverage under the health and welfare benefits programs, *no* agreement for the Respondent to provide an electric dryer for the drivers or bullet proof partitions in the motor vehicles used, and no agreement on the contracts effective dates although the parties had agreed to a 3-year contract term.

ed in the bargaining contract, and maintained that the last negotiation session between the Respondent and the Union occurred in November 1982.

On 5 February 1984, by letter to the Respondent's unit employees, Rosenthal notified the employees that negotiations between the Respondent and the Union had been concluded with "many new benefits and improvements contained in the proposed contract." The employees were advised that a draft agreement was being prepared and that a copy would "be given to the workers for their approval."[16] Thereafter, by letter dated 8 March 1984 Bochner notified Tunney that he had finished drafting a collective-bargaining agreement embodying "all of the terms agreed to at our meeting of January 16, 1984 at our office," and requested a meeting "to go over the Agreement and have it executed by our clients." Bochner testified that he never received a written response from Tunney regarding his letter and when he telephoned Tunney's office thereafter he was advised that Tunney was ill. Bochner related that he also sought Rosenthal's assistance in contacting Tunney in an effort to have the parties review and execute the bargaining contract.

Rosenthal testified that from March through June 1984, he telephoned Tunney's office between 10-20 times but was unsuccessful in reaching him, Rosenthal leaving messages for Tunney, "saying that we were ready to sit down and put our signatures on the contract and could we set up a meeting date," to which Tunney never responded nor contacted Rosenthal. By letter dated 12 June 1984 Rosenthal advised the Respondent that a draft of a proposed bargaining agreement was completed, and that the Union had been unable to reach Tunney to arrange a meeting; he requested that the Respondent contact the Union within 10 days to do so or the Union would "refer this matter to the National Labor Relations Board." Rosenthal added that on 27 June 1984 he telephoned Edward Kelly and was informed by Kelly that Tunney had left Putney, Twombly, Hall and Hirson, Esqs., and that the Respondent intended to obtain new legal counsel.[17] After Rosenthal advised Kelly that if this matter was not "resolved very soon" the Union would file a charge with the Board, Kelly hung up on him.

On 17 July 1984, the Union filed an unfair labor practice charge against the Respondent with the Board alleging that the Respondent had refused to bargain with the Union as the "certified bargaining representative of the Respondent's employees" by refusing to sign a collective-bargaining agreement with the Union.[18] During the investigatory stage of the charge, the Union, by mailgram dated 14 September 1984, sent to the Respondent, demanded "immediate negotiations to complete the collective bargaining agreement."[19] In a letter to Rosenthal dated 25 September 1984, Tunney requested that the Union "forward to me for review, whatever draft you may have prepared in connection with our negotiations." By letter dated 8 October 1984, Rosenthal informed Tunney that Bochner was on vacation at that time and, on his return, the Union would forward the proposed bargaining agreement to him.

On 12 October 1984 the Regional Director for Region 29 notified the Union by letter that he had refused to issue a complaint in this matter because an investigation of the charge had shown that the parties agreed in January 1984 that the Union would draft and present to the Respondent a written contract for the Respondent's signature, but that the Union had failed to do so at the time of the dismissal of the charge in October 1984.[20]

Bochner left the law firm representing the Union on 17 January 1985. Although Bochner maintained that he had drafted and completed a proposed collective-bargaining agreement based on the negotiations between the Respondent and the Union, he did not recall whether it had been typed or remained in longhand, or whether it had been misplaced, lost, or somehow inadvertently destroyed, since it was never located despite a search for the document engaged in both by Bochner himself and David Stolow, Esq., another attorney at the Menagh law firm, who replaced Bochner regarding representing the Union in this matter. Be that as it may, no copy of Bochner's proposed draft agreement was ever sent to or was received by the Respondent.

Stolow testified that after he "inherited" the Kelly Private Car Service file in mid-January 1985, Bochner told him that although he had prepared a draft bargaining agreement previously, it could not now be located nor had a copy been sent to the Respondent, therefore Bochner and Tunney had never had the opportunity to review the draft. Stolow stated that he then attempted to contact Tunney "about three or four times" in late January or early February 1985, but unsuccessfully. Stolow continued that finally in late February 1985, he was able to reach Tunney, and Stolow advised Tunney that Bochner had left the Menagh law firm, that he was now handling the matter between the parties, and that he would attempt to prepare a draft agreement based on Bochner's notes, if this was acceptable with Tunney. Stolow recounted:

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[16] The Union used the *Excelsior* list (election eligibility list) prepared in December 1980 in the representation proceeding (Case 29-RC-5223), in which the Union won certification, to establish the names and addresses of the Respondent's employees to whom such notices were sent.

[17] Tunney testified that he became associated with the law firm of Putney, Twombly, Hall and Hirson, Esqs., in May 1976 until February 1984. He stated that "From February of '84 through May of '85, I was a part-time consultant for the firm."

[18] Case 29-CA-11312. The Union notified the Respondent's employees by letter dated 24 July 1984 that it was filing a charge against the Respondent with the Board because the Respondent had refused to meet with the Union to sign the collective-bargaining agreement.

[19] Rosenthal explained that what he meant by "immediate negotiations to complete the collective bargaining agreement," was that the Respondent should "sit down and sign a contract." When asked why he had not used the latter language in his mailgram instead of "immediate negotiations to complete," Rosenthal replied, "Because I knew what I meant and I assumed Mr. Tunney would. Maybe I was mistaken."

[20] The Union also notified the Respondent's employees by letter dated 17 October 1984 of the Region's dismissal of its charge and promised to "explore further action" to compel "Kelly to live up to the agreement he agreed to." Again, by letter dated 20 December 1984, the Union advised the employees that there were "no new developments in our dispute with your employer."

> Mr. Tunney said that he was waiting and that I should put a draft together and send it to him and he'd go over it with his client. I asked Mr. Tunney to be patient in that I was going to have to now piece together an agreement that I was not privy to the negotiation of . . . I'd have to recreate what had happened and get that down on paper and if I left anything out or added something in that Mr. Tunney didn't think was correct, he should just let me know and we would straighten it out and he said that was okay—that's where he and I left it.

Stolow related that, thereafter, on 18 March 1985 he met with Rosenthal and, using Bochner's notes of the 16 January 1984 meeting, Rosenthal's recollection of the negotiations based on his notes and remembrances, a copy of the "industry-wide agreement" with Bochner's notations and markings, and a letter from Bochner to Board Agent Kevin Kitchen in the fall of 1984 that set forth what Bochner alleged was the agreement between the Respondent and the Union reached on 16 January 1984, Stolow began to prepare a draft of a collective-bargaining agreement.[21] On 17 April 1985 Stolow forwarded a draft of a bargaining agreement to Tunney for review. Stolow stated that after being apprised by Rosenthal a few days later that there were two errors in the draft agreement, he notified Tunney of the proposed corrections by letter dated 22 April 1985.[22] Also by letter dated 22 April 1985, the Union notified the Respondent's employees that a draft bargaining agreement had been forwarded to the Respondent and that the employees should, "Demand that Kelly sign the contract now." Stolow recounted that failing to hear from Tunney regarding the draft agreement, he attempted unsuccessfully to contact Tunney, "once or twice" in late April or early May 1985. Stolow wrote to Tunney on 16 May 1985 requesting a meeting "to finalize the written memorialization of its Collective Bargaining Agreement with Kelly's Private Car Service." By letter dated 21 May 1985 Tunney responded to Stolow's letter advising Stolow that he had reviewed the draft agreement, would shortly meet with the Respondent concerning it, and would contact Stolow "shortly thereafter regarding same."

Stolow continued that he telephoned Tunney on 3 June 1985 and Tunney advised him that he had discussed the draft agreement with the Respondent and that

> the draft was basically correct, it was accurate, there were one or two things he thought had to be added to it. . . . We said I had gotten most of it—that it was pretty good. . . . My response to that was since I in fact was coming into this as I was that that would probably prove to be the case and we discussed actually sitting down so that we could get into a room with the draft—that would just end the proceedings then and there because if there was something left out Tunney would point it out and we'd have a contract.

Stolow suggested that the parties meet including Tunney and "some principal from Kelly's" and Stolow and Rosenthal for the Union and "put the finishing touches on this thing and get a signed contract." Tunney agreed and a meeting was scheduled for 10 June 1985 at the Traveller's Inn for 10 a.m. On the following day, 4 June 1985, Tunney contacted Stolow and the meeting was rescheduled for 13 June 1985. Stolow continued that when he and Rosenthal arrived at the Traveller's Inn on 13 June 1985 only Edward Kelly appeared for the Respondent, and Kelly advised them that Tunney was no longer the Respondent's attorney and that Kelly "couldn't meet with us or sign anything without an attorney." Rosenthal then told Kelly that the Union would wait 2 weeks for Kelly to obtain a new attorney and "then get back to Mr. Kelly to see where we go from here."[23]

Tunney testified that on receipt of Stolow's draft bargaining contract in "April of '85," he reviewed the document "page by page, line by line," comparing its provisions with "my notes, the master agreement, whatever else," and "marked up (the agreement) in great detail as to any terms that were incorrect or that I didn't like or question marks or whatever else," and that these notations were substantial. Tunney related that some of the contract language did not reflect what had been agreed to on particular issues, and that other provisions included had never been discussed or agreed to at all and had "no place in this document in terms of our agreement." He testified:

> Some items in here were hold, meaning the parties have never concluded negotiations. Some items that are in here, the parties explicitly had agreement to delete and they're back in here. It's a whole spectrum of reasons why many parts of this document are not in fact the agreement arrived at . . . between the parties in November of '82. . . . We're talking of a document that finally arrives two and a half years later. I frankly wouldn't know what to do with some of the terms that are now in the agreement.[24]

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[21] Stolow testified:

> I thought I understood what had been agreed to and that I would then draft using language from the industry-wide agreement to the extent that either it had been agreed to or just as a practical matter where there had been no specific language referred to but some concept agreed to make it look like a taxi industry contract and I would get that draft to Mr. Tunney and Mr. Rosenthal.

[22] These changes involved jury duty pay and the address of the credit union.

[23] Rosenthal testified similarly.

[24] Regarding the proposed draft agreement sent to him by the Union in April 1985, Tunney testified that: the recognition and union-security clauses were accurate; while there was agreement on a bulletin board provision, this was not accurately reflected in the proposed contract; the "cooperation" section does not conform to what was agreed to; the commission and surcharge provision needs clarification regarding the 25-cent noncommissionable amount to the employer; art. 7, sec. 2(B),VI is not applicable to tile Respondent's operation; the vacation clause was accurate; the jury duty clause was amended by the Union by letter dated 22 April 1985 (Tunney could not recall what the agreement on jury duty pay was); the bereavement clause was accurate; the leave of absence clause was correct except for some minor additions or amendments; the breakdown pay amounts in art. 12 of the proposed contract were incorrect as to what was agreed to; Tunney could not recall if the call-in pay provision accurately reflects what was agreed to although the parties had agreed "to something"; there was agreement on the seniority clause, but

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Tunney related that he sent a copy of the draft agreement with his notations thereon to Edward Kelly. By letter dated 21 May 1985 Tunney acknowledged receipt of the draft agreement from Stolow and advised Stolow that he would meet with Kelly and then contact Stolow. Subsequently Tunney met with Kelly to discuss the proposed agreement and at this meeting he advised Kelly that he was leaving "Putney, Twombly" and taking a position with the New York City Transit Authority. Tunney stated that he and Kelly "were going to set up another meeting with the union to talk about this draft, but shortly after that, everything fell into place, I was leaving the firm . . . [Kelly] discharged the firm or retained other counsel." Thereafter a meeting was arranged between the parties for 13 June 1985 to be held at the Traveller's Inn. Tunney began his employment with the New York City Transit Authority on 17 June 1985.[25]

Kelly testified that when he received the Union's draft bargaining agreement from Tunney,

> there were some points that were the same points we had discussed in negotiations but there were some very very critical points that we had discussed and I had taken a negative view on that I did not want in there that were in there and I couldn't believe that they would be in there so it didn't really resemble any kind of document that I was going to sign.[26]

Kelly denied that agreement had been reached between the Respondent and the Union on work shift schedules, regarding the effective date of the agreement, jury duty pay, and health and welfare benefits for dependents of employees. He stated that the terms of a bargaining agreement negotiated back in 1982 would not all be acceptable in 1984 or 1985 because of "certain changes within my industry and certain economic changes within the country," i.e., a 3-year contract term. He added that the Union's proposed agreement was, "not the agreement that I felt in substance that I had agreed to in '82."

Rosenthal testified that on 18 June 1985, in the late morning, he, the Union's president, Goldberg, and Union Business Agent Chyla appeared at the Respondent's place of business and spoke to the Respondent's employees who were "on line waiting for fares at the railroad station." According to Rosenthal, Kelly came out of his office, refused to discuss his efforts regarding a new attorney or to speak to the union officials at all, and then returned to his office. Rosenthal stated that after they spoke to "five or six drivers" and distributed some union leaflets, the union officials left the premises. Rosenthal related that on 27 June 1985, the same union officials returned to the Respondent's business location and again spoke to the drivers present. This time, Forame appeared from out of the office, demanded that they discontinue talking to the employees and leave the premises, threatened to run them down with his automobile when they refused to do so because they were on a public street, and called the police. Rosenthal continued that after the police arrived, a compromise was worked out regarding where the union officials could locate themselves regarding speaking with the employees. He added that after the union officials broke for lunch and returned, apparently Forame had directed all drivers to leave the area so that the Union could not communicate with them. The Union then filed a charge with the Forame in the instant case alleging unfair labor practices on the Respondent's part.[27]

Moreover, Kelly testified that of approximately 20 to 27 employees who had voted in the Board's election back in 1981 only 3 employees remained employed in 1986; William Butler, Charles Walters, and Benjamin Carpino.[28] Kelly stated that since the election in 1981 and until the Respondent had received a copy of the draft bargaining agreement from the Union, in 1985 there had been an employee turnover rate of "over 500 percent." He acknowledged, however, that such a high turnover of employees was "characteristic of the industry in general" since most people "don't want to drive a taxi for the rest of their life."

Additionally, Kelly testified that "in the course of events after, lets say 1982," a majority of the Respondent's employees had indicated that they did not support the Union. He stated:

> My office is a small office and all employees sometime in the course of the day see me and speak to me and in that long span of time, numerous occasions, drivers would come and speak to me about, you know, whatever happened to the union? . . . Because there are so many people that are working for me that have no idea that a union election was held in '81 and what the results of those elections would have brought. They just had no idea that there was—as far as they were concerned, there was no union in my office. . . . I see every employee . . . . And on numerous occasions, someone would bring up a union non-related to 3036 and someone would get on the topic of the three members—three people still working for me that were

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Tunney thought that there were some amendments needed in the language of the draft agreement; art. 15, p. 23—"Safety and Sanitary Conditions"—Tunney acknowledged agreement to sec. 1, could not recall if there was agreement to sec. 2-7, and denied there was agreement on sec. 8 (floor-to-ceiling bullet resistent partitions in cars); there was agreement on radio charges, carwash charges, and gasoline charges although Tunney could not recall "which way it went" on some of these. Moreover, Tunney stated that the credit union provision in the proposed contract was never agreed to; the proposed contract included health and welfare coverage for employee's dependents, which was never agreed to; and a provision to supply an electric dryer for the employees' use, which was never agreed to.

[25] Tunney acknowledged that he had never apprised Stolow or the Union of the possibility that he might not be representing the Respondent regarding these negotiations in the near future.

[26] Kelly testified that he had not compared the draft agreement with the notes he made at the negotiating sessions when he made this assessment of the contract.

[27] By letter dated 1 July 1985 the Union advised the employees of this incident of some of the bargaining agreement terms and of the charge filed with the Board in this case. Additional letters were sent to the employees on 18 December 1985 and 26 February 1986 regarding the status of the case.

[28] Kelly also testified that as of 1984, "four or five" of the employees who had participated in the Board's election in 1981 were still in the Respondent's employ.

> on the Excelsior list, something—some joke would be brought up about the taxi union or whatever, about them not being there. So I know that when someone would say "What union, what are you talking about?" that they knew nothing of a union being in my office.

C. *Analysis and Conclusions*

1. The 10(b) period

Section 10(b) of the Act provides "That no complaint shall issue based upon any unfair labor practice occurring more than six months prior to the filing of the charge with the Board and the service of a copy thereof upon the person against whom such charge is made . . . ." Section 10(b) is a statute of limitations and is not jurisdictional in nature. It is an affirmative defense that must be pleaded and, if not timely raised, is waived.[29] The Respondent has timely raised such a defense contending in its brief:

> In November, 1982, the parties scheduled a negotiating session wherein *many* of the parties' concerns *seemed largely* resolved. . . . Rosenthal promised to provide a draft agreement to Kelly's. He never did so. . . . In calendar 1983, the parties had no further negotiating sessions whatsoever. The union and its attorneys absolutely failed to forward a draft agreement at any time in 1983. . . . In January, 1984, the union apparently asked for a meeting in Stuart Bochner's office to review what had been discussed in November, 1982, some fourteen (14) months earlier. . . . Utilizing either one of the two pivotal dates, the unfair labor practice complaint must be dismissed as time-barred under the six month limitations period congressionally imposed under the Act. . . . Even assuming *arguendo* that this later point is utilized as a predicate, the union's failure to proffer a writing embodying a collective bargaining agreement until some fifteen (15) months later in April, 1985 further depicts that the union's claims are time-barred under the Act.

I do not agree.

In *Machinists Local 1424 v. NLRB*, 362 U.S. 411 (1960), the Supreme Court of the United States held that when occurrences within the 6-month limitations period in and of themselves may constitute, as a substantive matter, unfair labor practices, earlier events may be utilized to shed light on the true character of matters occurring within the limitations period.[30] The Supreme Court further held at 417 and 422:

> [W]here conduct occurring within the limitations period can be charged to be an unfair labor practice only through reliance on an earlier unfair labor practice . . . the use of the earlier unfair labor practice is not merely "evidentiary," since it does not simply lay bare a putative current unfair labor practice. Rather, it serves to cloak with illegality that which was otherwise lawful. And where a complaint based upon that earlier event is time-barred, to permit the event itself to be used in effect results in reviving a legally defunct unfair labor practice. . . .
>
> [A] finding of violation which is inescapable grounded on events predating the limitations period is directly at odds with the purposes of the Section 10(b) proviso.[31]

The Union's charge in this case, filed with the Board on 2 July 1985, alleges that since on or about 17 April 1985, the Respondent has unlawfully "refused to bargain collectively with the certified representative of its employees by":

> [F]ailing and refusing to bargain in good faith over the terms and conditions of employment of employees; by failing and refusing to bargain in good faith over the language to be included in a written contract setting forth agreements previously reached between the parties and by failing and refusing to execute such a written contract.

Since the Union's unfair labor practice charge allegations are based on events which occurred subsequent to its forwarding a copy of a draft collective-bargaining agreement to the Respondent on 17 April 1985, albeit events arising prior thereto were used "to shed light on the true character of matters occurring within the limitations period,"[32] the charge was timely filed.[33] When an employer's obligation to bargain arose before the 10(b) period, but the refusal to bargain occurred during the 10(b) period, a complaint is not time barred.

Also, both the courts and the Board have held that the 6-month limitations period does not begin to run until the aggrieved party has received actual or constructive notice of the conduct constituting the alleged unfair labor practice.[34] Moreover, as the Board stated in *Strick Corp.*, 241 NLRB 210 fn. 1 (1979), "[N]otice, whether actual or constructive, must be clear and unequivocal, and that the burden of showing such notice is on the party raising the affirmative defense of Sec. 10(b)." Given the facts of this case, especially because of the Respondent's continued willingness to meet with the Union and to accept and to review a proposed collective-bargaining agreement until the events of 13 June 1985 and thereafter, despite the substantial passage of time since the date of the Union's certification, it would be unreasonable to assume, nor has the Respondent shown, that the Union knew or could have known of the Respondent's refusal to bargain.[35] The allegations in the complaint are not barred by Section 10(b) for this additional reason.[36]

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[29] *Federal Management Co.*, 264 NLRB 107 (1982); *McKesson Drug Co.*, 257 NLRB 468 fn. 1 (1981); *Penn Corp.*, 239 NLRB 45 (1978). Moreover, the burden of proving such an affirmative defense rests squarely on the Respondent.

[30] The Supreme Court stated, supra at 416, "[F]or that purpose Section 10(b) ordinarily does not bar such evidentiary use of anterior events."

[31] The Supreme Court noted in *Machinists Local 1424 v. NLRB*, supra at 419, that the policies underlying Sec. 10(b) "are to bar litigation over past events 'after records have been destroyed, witnesses have gone elsewhere, and recollections of the events in question have become dim and confused,' and of course to stabilize existing bargaining relationships."

[32] *Machinists Local 1424 v. NLRB*, supra; *Pulitzer Publishing Co.*, 242 NLRB 35 (1979).

[33] *J. Ray McDermott & Co.*, 227 NLRB 1347 (1977).

[34] *American Distributing Co. v. NLRB*, 715 F.2d 446 (9th Cir. 1983); *Metromedia, Inc. v. NLRB*, 586 F.2d 1182 (8th Cir. 1978); *Pinter Bros.*, 263 NLRB 723 (1982); *Florida Steel Corp.*, 235 NLRB 1010 (1978).

Because of all the above, I find and conclude that the Respondent has failed to sustain its burden of showing that Section 10(b) bars consideration of the charges alleging unlawful conduct on its part and, therefore, I deny the Respondent's motion to dismiss the complaint as being time barred under the Act.

2. Res judicata

The Respondent asserts in its brief that:

> In the summer of 1984, Local 3036 initially filed a Section 8(a)(5) charge against Kelly's alleging the failure to bargain in good faith by reason of Kelly's failure to execute a collective bargaining agreement with the union. The union's filing of the unfair labor practice charge occurred subsequent to both the November, 1982 negotiation and the January, 1984 meeting with Brian Tunney which had been conducted in Stuart Bochner's office. Regional Director Kaynard investigated the charge and found no reason to believe that the Act had been violated. The Regional Director's finding was sustained on appeal. It is clear then that whether the predicate date is November, 1982 (the final negotiating session) or January, 1984 (the date of the meeting in Mr. Bochner's office) the instant Section 8(a)(5) charge is merely a regurgitation of the 1984 charge and is either time-barred under section 10(b) of the Act or is controlled by the Regional Director's determination in 1984 not to issue a complaint.

I do not agree.[37]

Res judicata is defined as a

> [r]ule that a final judgment rendered by a court of competent jurisdiction on the merits is conclusive as to the rights of the parties and their privies, and, as to them, constitutes an absolute bar to a subsequent action involving the same claim, demand or cause of action.[38]

It is well settled that the dismissal of a prior charge by a Regional Director, even where the identical conduct is involved, does not constitute an adjudication on the merits, and no res judicata effect can be given to these actions.[39] Moreover, it should be noted that the Union's previous charge in Case 29–CA–11312 filed on 17 July 1984 alleged a refusal to bargain because the Respondent "among other things it has refused to sign a collective bargaining agreement containing provisions previously agreed upon." The Regional Director refused to issue a complaint on this charge because the Union had failed to send a draft of an agreement to the Respondent for its approval and signature, although obligated to do so. The Union's charge in the instant case alleges a refusal to bargain by the Respondent, "by failing and refusing to bargain in good faith over the language to be included in a written contract setting forth agreements previously reached between the parties and by failing and refusing to execute such a written contract." This later charge was filed with the Board on 2 July 1985 after a copy of a draft agreement had been sent to the Respondent in April 1985, and the refusal to execute the contract occurred thereafter, in June 1985.

Accordingly, from all the above I find and conclude that the Regional Director's prior dismissal of the charge and refusal to issue a complaint does not mandate dismissal of the complaint.

3. The Respondent's refusal to sign an alleged agreed on collective-bargaining agreement

As set forth in *Fred Tuch Buick*, 199 NLRB 876, 880 (1972):

> Section 8(d) of the Act includes among the elements of good-faith bargaining required of representatives of parties to negotiations "the execution of a written contract incorporating any agreement reached if requested by any party." In contemplation of this statutory mandate the refusal to incorporate into a written agreement the terms of a bargain orally reached has consistently been prescribed by the Board[9] and the courts.[10]
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> [9] *Truck Drivers Local Union No. 807, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America (Relay Transport, Inc.)*, 195 NLRB No. 115 [and other cases cited therein].
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> [10] *H. J. Heinz Co. v. NLRB*, 311 U.S. 514, 523–526 [1941]; *Huttig Sash & Door Co.*, 362 F.2d 217 (C.A. 4).

Further, it is well settled that a collective-bargaining agreement arises only after a meeting of the minds on all material terms of the contract.[40] That the parties plan later to sign an agreement does not preclude prior formation of the contract by signifying assent to an unsigned paper; the issue is one of intention.[41] The burden of proof on the issue of whether the requisite "meeting of the minds" occurred is on the General Counsel.[42]

Additionally, as the Ninth Circuit stated in *NLRB v. Donkin's Inn*, 532 F.2d 138, 141 (9th Cir. 1976):

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[35] The Respondent has failed to sustain its burden of showing any notice on the part of the Union prior to 13 June 1985.

[36] Ibid. fn. 33.

[37] The Respondent's 10(b) defense has been discussed, considered, and rejected.

[38] *Black's Law Dictionary*, Sixth Edition (1983); also see 46 *Am. Jur. 2d* 558.

[39] *Pepsi-Cola Bottlers of Atlanta*, 267 NLRB 1100 fn. 2 (1983); *Walter B. Cooke, Inc.*, 262 NLRB 626, 636 (1982), and cases cited therein.

[40] *Steelworkers (Porter Co.) v. NLRB*, 397 U.S. 99, 102 (1970); *Roman Iron Works*, 282 NLRB 725 (1987); *Koenig Iron Works*, 282 NLRB 717 (1987).

[41] *Genesco, Inc. v. Joint Council 13, United Shoe Workers of America*, 341 F.2d 482 (2d Cir. 1965).

[42] *Teamsters Local 287 (Reed & Graham)*, 272 NLRB 348 (1984).

> In the context of labor disputes, and particularly section 8(a)(5) violations, however, the technical question of whether a contract was accepted in the traditional sense is perhaps less vital then it otherwise would be. Rather, a more crucial inquiry is whether the two sides have reached an "agreement" even though that "agreement" might fall short of the technical requirements of an accepted contract.[43]

The parties all agree that the Respondent is obligated to execute the draft of a collective-bargaining contract that correctly reflects the agreed-on terms, if complete agreement in fact had been reached, and that the Respondent would have violated the Act by not doing so. The General Counsel and the Union both contend that an agreement was reached. The Respondent argues that full agreement regarding all the terms of a bargaining contract was never reached. The record evidence clearly shows that the Respondent and the Union reached agreement on a substantial number of bargaining contract terms, apparently extensive enough so that the parties believed that a written draft of a collective-bargaining agreement could be prepared by the Union. In April 1985 the Union sent a draft bargaining agreement to the Respondent for review and consideration. In support of its contention that the parties never reached full agreement, the Respondent argues that the "many inaccuracies" contained in the agreement demonstrate that "no meeting of the minds on all substantive issues" ever occurred.

Generally, inadvertent errors contained in a written contract do not indicate lack of agreement between the parties and the need for minor alterations and language changes in the agreement does not relieve the parties of the obligation to execute the contract agreed to, particularly when the other party indicates a willingness to make such alterations.[44] That errors existed in the Union's draft bargaining agreement is conceded by the Union, i.e., the Union's brief states:

> While errors did exist the Union's representative had at all times expressed a willingness to sit down and correct these errors. In fact, the Union's attorney conceded that errors were likely given his lack of familiarity with the bargaining history.

In reviewing and considering the behavior of the parties during the negotiations, the record evidence, the Union's draft collective-bargaining agreement, and the arguments of the parties, I do not believe that the General Counsel has sustained her burden of proof in showing that the parties reached full agreement on a bargaining contract. Applicable to the circumstances present in the instant case is the Board's holding in *Luther Manor Nursing Home*, 270 NLRB 949 fn. 1 (1984), affd. sub nom. *Food & Commercial Workers Local 304A v. NLRB*, 772 F.2d 421 (8th Cir. 1985):

> As we indicated in *Georgia Kraft Co.*, 258 NLRB 908 (1981), 696 F.2d 931 (11th Cir. 1983), the duty to bargain includes the obligation to assist in reducing an oral agreement to writing. That obligation, however, arises only after a meeting of the minds on all substantive issues has occurred. Here, the parties' disagreement transcended a dispute as to contract language, and involved a disagreement over the substance of certain contract terms. Thus, the requisite meeting of the minds as to all substantive matters did not occur.[45]

In the instant case the Respondent asserts that

> [T]here were dozens of terms and provisions in this agreement that were never agreed to by the parties. There were terms in the 1985 draft that were neither discussed at all or ever agreed to. . . . The proposed Taxi and Limousine Commission language did not apply to Kelly's operations and had not been discussed.

Although some of these assertions are not substantiated by the evidence here,[46] others are. The Respondent more particularly alleges that the Union's draft agreement provided for health plan coverage for employee's eligible dependents, a credit union, and safety floor-to-ceiling bullet resistant partitions in the Respondent's vehicles, all of which the Respondent never agreed to. This assertion has merit.

In this regard, the Respondent's witnesses, Brian Tunney and Edward Kelly, testified that these contract provisions had either been discussed by the parties and placed on "hold" for final resolution during the parties review of the draft agreement, or had never been discussed and agreed to by the parties at all during the negotiations. The General Counsel's witnesses, Michael Rosenthal and Stuart Bochner, testified that all the items in the draft agreement had been resolved by either the Union's acceptance of the Respondent's proposals there or by "trade-offs" between the various proposals.

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[43] *Shawn's Launch Service*, 261 NLRB 836 (1982); *Penasquitos Gardens, Inc.*, 236 NLRB 994 (1978), enfd. 603 F.2d 225 (9th Cir. 1972); *Ellis Tacke Co.*, 229 NLRB 1296 (1977).

[44] *Fashion Furniture Mfg.*, 279 NLRB 705 (1986); *Ace Machine Co.*, 249 NLRB 623 (1980); *Trojan Steel Corp.*, 222 NLRB 478 (1976).

[45] Also see *Soar v. NFL Player's Assn.*, 550 F.2d 1287 (1st Cir. 1977).

[46] For example, the Respondent alleged that agreement between the parties had never been reached on driver's work schedules, radio charges, and jury duty pay. Tunney, the Respondent's own witness, however, acknowledged such agreement although he also indicated that "there was some language to be worked out," and that the draft agreement did not always reflect accurately what the agreement on that item was. The Respondent also alleged that:

> The April, 1985 draft unilaterally proposed a three (3) year term commencing on June 1, 1985 and terminating on May 31, 1988. The agreement's effective dates were *never* discussed in 1982 nor would Kelly's have agreed to a three (3) year agreement in April 1985.

The parties had agreed on a 3-year term for the bargaining agreement and had left the start and end dates open. Neither the Union nor the Respondent had insisted on these dates as being important or crucial to the negotiations. It appears that Stolow's inclusion of those particular dates were merely for the reason that they coincided with a time period within which the draft agreement was completed and mailed to the Respondent and within which the Union believed the agreement could be reviewed, discussed, and executed. Moreover, the fact that the substitution of the dates anticipated by the Respondent (November 1982 or January 1984) would have meant that most of the contract's term had elapsed, it still would not have alleviated the parties' obligations to sign the agreement if such obligation existed. *Operating Engineers, Local 30 & 30A (Hyatt Management)*, 280 NLRB 205 (1986).

In resolving this issue, first I have carefully considered the record evidence and, basing my findings on my observations of the witnesses, the weight of the respective evidence, established and admitted facts, inherent probabilities, and reasonable inferences that may be drawn from the record as a whole, I credit Tunney's testimony.[47] Tunney testified in a forthright manner[48] and, most importantly, his testimony was consistent with other evidence in the record and therefore believable. Moreover, at the time he testified as a witness in this proceeding, Tunney was no longer employed by the law firm that had represented the Respondent during its negotiations with the Union, having left that law firm over a year before, and he would, therefore, have no biased interest in the outcome of this case.[49] This is not to say that I disbelieved all the testimony given by Rosenthal and Bochner in this proceeding. In truth, I believed much of what they said except, as in this instance, when it conflicted with the testimony given by Tunney.[50]

Although I was not unimpressed by their general demeanor as witnesses, yet I found Rosenthal's testimony at times to be guarded, defensive, and evasive on cross-examination and on occasion not entirely plausible, i.e., Rosenthal's testimony regarding the circumstances surrounding Bochner's alleged preparation of a draft bargaining agreement back in 1984 and Rosenthal's seeming indifference to his own lack of awareness thereof, and whether Bochner actually did send a copy of a draft agreement to the Respondent and the reason for his failure to do so. Bochner's testimony regarding his inability to explain what happened to the draft agreement he allegedly prepared and why another draft agreement was not completed and sent to the Respondent did not ring true; nor was his testimony believable that after preparing the draft agreement he then decided not to send a copy to the Respondent because it was the usual procedure in contract negotiations for the Respondent's attorney to prepare the draft, especially in light of the fact that the Union had twice agreed to prepare the draft agreement, once by Rosenthal in November 1982 and thereafter by Bochner himself, in January 1984, and he never conveyed his change of mind to Tunney so that Tunney might draft an agreement on the Respondent's behalf, or apparently to Rosenthal, his own client.[51]

Second, other evidence in the record supports the Respondent's assertion that there was "no meeting of the minds on all substantive issues" of a collective-bargaining agreement. The documents in evidence that Stolow used to prepare the Union's draft agreement sent to the Respondent in April 1985 are significant in this regard. The Union's "marked copy" of the collective-bargaining agreement between it and the Metropolitan Taxicab Board of Trade, Inc. (master contract), used as a guideline by the parties during the negotiations and reviewed at the 16 January 1984 meeting, shows that the provisions there entitled "Health and Welfare," "Credit Union," and "Safety and Sanitary Conditions," where section 12 provides for a "floor-to-ceiling bullet resistant partition" in vehicles, were all designated as "hold" items, and this designation was never changed. Moreover, Bochner's notes of the 16 January 1984 meeting, in which it is alleged that the parties reached full agreement on all the terms of a bargaining contract, is silent regarding any agreement reached on the credit union or safety partitions in the Respondent's vehicles, and while indicating that "Full Hospitalization" was agreed to does not show whether this provision includes employee's dependents in the coverage.[52] Bochner's notes do reflect agreement on other substantial contract items such as driver commission rates; the noncommissionable charge; no radio or carwash charges; breakdown, call-in, and jury duty pay; vacations; arbitration; a 3-year contract term; union security; and driver shift schedules.

Additionally, when Rosenthal and Bochner were asked both on direct and cross-examination to set forth the various items that had been agreed to by the parties during the negotiations, they never once mentioned dependent coverage under the hospitalization and medical plan, although they referred to the health benefit provision and the safety partition provision, and only Rosenthal mentioned agreement on the credit union. Even after Tunney had testified that no agreement had been reached between the parties on these particular provisions, the General Counsel and the Union continued to rely on the general testimony of Rosenthal and Bochner that all terms of the draft agreement had been resolved. Also, admittedly, the draft agreement contained errors both in language and content. In fact, the Union on its own, amended the draft agreement by letter dated 22 April 1985.

As the Board held in *Automatic Plastic Molding Co.*, 234 NLRB 681 (1978):

> We agree with the Administrative Law Judge that the contract submitted by Martin to Bonnheim

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[47] *Gold Standard Enterprises*, 234 NLRB 618 (1978); *V & W Castings*, 231 NLRB 912 (1977); *Northridge Knitting Mills*, 223 NLRB 230 (1976).

[48] Although on occasion Tunney could not recall whether a particular provision of the draft bargaining agreement language-wise reflected accurately what the parties had agreed to, to whether full agreement had been reached on a particular provision, it was obvious that his inability to remember the details was due solely to the long passage of time since the events occurred, rather than a deliberate attempt to hide information for an ulterior purpose or in favor of a party. Additionally, at times his answers seemed to reflect a refreshing candor, because they could be construed as being helpful or harmful, alternately, to either side in this proceeding.

[49] It should also be remembered that Tunney had not volunteered his testimony; he was a subpoenaed witness, albeit for the Respondent.

[50] As Judge Learned Hand stated in *NLRB v. Universal Camera Corp.*, 179 F.2d 749, 754 (2d Cir. 1950): "It is no reason for refusing to accept everything that a witness says, because you do not believe all of it; nothing is more common in all kinds of judicial decisions than to believe some and not all."

[51] I am not unaware that prior to his testifying in this matter, Bochner also had left the law firm that represented the Union during the negotiations and currently in this proceeding, and in which he was a partner, as regards his disinterest as a witness. For the reasons stated above, however, I still credit Tunney's testimony over his. Moreover, concerning Edward Kelly, I found his testimony to be less reliable on the whole than the other witnesses who testified. For example, he testified, in substance, that there was very little agreed to between the parties during the negotiations. This is contrary to the weight of the credible evidence in the record and conflicts with the testimony of the Respondent's other witness, Tunney.

[52] Bochner testified that his notes, made at the end of the 16 January 1984 meeting, reflected the finalization of the agreement after the parties had gone over all the provisions of the master contract including the hold items.

> for signature contained discrepancies. Thus, as set out by the Administrative Law Judge, Martin had added to Respondent's seniority proposal language which seriously altered its meaning. In addition there was a minor discrepancy in the sick leave language and a possible discrepancy in the shift starting time provision. The contract submitted by Martin contained a health and welfare proposal which reads in its entirety, "The Company shall provide each eligible employee coverage for health and welfare at a cost of $30.00 per month to the Employer." Respondent however had not proposed to provide such coverage but one to check with its insurance carrier to *see* what coverage could be provided at that cost.
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> We agree with the Administrative Law Judge that because of these discrepancies Respondent was not obligated to execute the document submitted by Martin. The issue here, however, is not whether the document submitted by Martin contained discrepancies but whether, in fact, an oral understanding was reached. . . . we find that no such agreement was reached. . . . Although which employees would be eligible under the Respondent's proposal could be inferred from the Union's proposal, other aspects could not be so inferred because of the differences in costs. Accordingly, we find that no understanding had been reached on health and welfare benefits.
>
> Health and Welfare benefits constituted a substantial and significant part of the proposed contract. . . . As there was no agreement with respect to a substantial provision of the proposed contract, we find that there was no orally agreed-upon collective-bargaining contract.

Because of all the above and applying the above law to the facts in this case, I find and conclude that there was no orally agreed-on collective-bargaining contract because the requisite meeting of the minds regarding all substantive matters did not occur.[53] Accordingly, the Respondent was not obligated to execute a collective-bargaining agreement, and when it refused to sign the Union's draft agreement, the Respondent did not violate Section 8(a)(5) and (1) of the Act. Therefore, I will recommend the dismissal of that part of the complaint applicable there.

4. The withdrawal of recognition

The Board's principles concerning an employer's burden of rebutting an incumbent union's presumption of majority status are well settled. A certified union, on expiration of the first year following certification, enjoys a rebuttable presumption that its majority representative status continues. An employer may rebut the presumption by demonstrating either that the union in fact no longer enjoyed majority status, or that its refusal to bargain is predicated on a good-faith and reasonably grounded doubt of the Union's majority status.[54] Further, in order to sustain the second of these defenses, the employer must show that its asserted doubt is based on objective considerations and that it was not advanced for the purpose of gaining time in which to undermine the union.[55] Any doubt as to the continuing majority status must rest on a reasonable basis and may not depend on unfounded speculation or a subjective state of mind.[56] The Board's decisions, however, do not require an employer to meet a stringent "clear, cogent, and convincing" standard[57] in order to rebut the presumption of a union's majority status.[58]

Moreover, as the Board in *Sofco, Inc.*, 268 NLRB 159 (1983), citing *Celanese Corp.*, 95 NLRB 664 (1951), stated:

> By its very nature, the issue of whether an employer has questioned a union's majority in good faith cannot be resolved by resort to any simple formula. It can only be answered in the light of the totality of all the circumstances involved in a particular case.
>
> Thus, even when a particular factor considered alone would be insufficient to support a good faith doubt of a union's majority status, the "cumlative force of the combination of factors" may be adequate to support such a doubt.[6] In this regard, we note that a respondent does not bear the burden of proving that an actual numerical majority opposes

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[53] *Roman Iron Works*, supra; *Koenig Iron Works*, supra; *Teamsters Local (Reed Graham)*, supra; *Luther Manor Nursing Home*, supra; *Automatic Plastic Molding Co.*, supra; *Soar v. NFL Football League Player's Assn.*, supra. Moreover, I do not find the cases cited by the General Counsel and the Union to be persuasive in this matter. For example, in *Fashion Furniture Mfg*. supra, the Board held that an employer's refusal to execute a written agreement submitted by a union, which admittedly contained inadvertent errors, was unlawful when the refusal to sign the agreement did not hinge either on the inadvertent errors in the written agreement or a purported condition precedent, but rather on the Union's denial of an additional and belated demand for concessions in the agreement by the Respondent, especially because of the Union's willingness to correct such inadvertent errors in the agreement. In *Ace Machine Co.*, supra, the Board affirmed an administrative law judge's finding that two inadvertent errors in a proposed bargaining agreement submitted to an employer does not excuse a complete refusal to execute the agreement previously reached when the errors could be easily corrected and were admittedly not fatal to the entire agreement, nor did the employer assert that these errors were the cause of the rejection of the agreement.

In *Georgia Kraft*, supra, the Board found that the parties had made specific proposals on all the outstanding contractual issues and that these proposals were still viable and available for acceptance when the union agreed to accept the employee's proposals. The Board also rejected the employer's argument that resolution of the contractual issues was also made contingent on the resolution of strike-related issues.

In *Charles Sportswear Mfg. Co.*, 231 NLRB 797 (1977), the Board found that complete agreement on the terms of a bargaining contract had been reached by the parties, and that the employer had engaged in a protected period of bad-faith bargaining during the negotiations.

It is clear that these cases are all distinguishable in light of the difference in the circumstances present in the instant case.

[54] *American Mirror Co.*, 277 NLPB 1626 (1986); *Terrell Machine Co.*, 173 NLRB 1480 (1969), enfd. 427 F.2d 1088 (4th Cir. 1970).

[55] *Ries Vending Service*, 272 NLRB 1336 fn. 1 (1984); *Bennington Iron Works*, 267 NLRB 1285 (1983); *Guerdon Industries*, 218 NLRB 658 (1975), *Terrell Machine Co.*, supra.

[56] *Ries Vending Service*, supra; *NLRB v. Gulfmont Hotel Co.*, 362 F.2d 588 (5th Cir. 1966).

[57] *NLRB v. Pennco, Inc.*, 684 F.2d 340 (6th Cir. 1982), enfg. 242 NLRB 467 (1979), cert. denied 459 U.S. 944 (1982), supp. dec. 250 NLRB 716 (1980); *NLRB v. Tahoe Nugget*, 584 F.2d 293 (9th Cir. 1978), cert. denied 442 U.S. 921 (1979).

[58] *Ries Vending Services*, supra.

> the union.[7] However, it must demonstrate that it had objective reasons for doubting the union's majority status.[8]
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> [6] *Golden State Habilitation Convalescent Center v. NLRB*, 566 F.2d 77, 80 (9th Cir. 1977), denying enf. of 224 NLRB 1618 (1976); see also *National Cash Register Co. v. NLRB*, 494 F.2d 109 (8th Cir. 1974).
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> [7] *Laystrom Mfg. Co.*, 151 NLRB 1482 (1965), enf. denied on other grounds 359 F.2d 799 (7th Cir. 1966); see also *NLRB v. Randle-Eastern Ambulance Service*, 584 F.2d 720 (5th Cir. 1978).
>
> [8] *Laystrom Mfg. Co.*, supra.[59]

Additionally, the Respondent must raise such doubt in a context free of unfair labor practices.[60]

The Respondent contends that its refusal to continue to recognize the Union as the bargaining representative of its employees in an appropriate unit was not in violation of the Act because the Union in fact did not represent a majority of the Respondent's employees at the time it withdrew recognition and/or that the Respondent had a good-faith doubt as to the Union's majority status based on objective considerations. Both the General Counsel and the Union contend that the Respondent's withdrawal of recognition of the Union was unlawful and violated Section 8(a)(5) and (1) of the Act.

The Respondent asserts that substantial employee turnover, a lack of awareness by employees of the Board election, or that the Union represented them for purposes of collective bargaining, the Union's failure to forward a draft of a proposed agreement from November 1982 until April 1985 2-1/2 years later, and the Union's "total inactivity and abandonment" of the employees, constitute "unusual circumstances" that relieved the Respondent of "any further obligation to bargain with Local 3036 in 1984, 1985, or 1986," and provides "evidence of a sufficient objective basis for reasonably doubting the majority status of Local 3036 years after the certification year had long since expired." I do not agree.

The Respondent states in its brief:

> [B]y 1984–1986 Kelly's had experienced *several distinctive* layers of employee turnover. . . . [S]ince the January, 1981 election in which Local 3036 had prevailed by a 15–14 vote, Kelly's experienced a 500% rate of employee turnover with only three (3) eligible voters still in its employ in [1985].

That the Respondent experienced a 500 percent rate of turnover during the period 1981–1985, and that its work force at the time of the Respondent's withdrawal of recognition from the Union was completely different except for three employees, is not contested in the record. However, while both the Board and the courts have found employee turnover to be a factor in determining the existence of objective considerations sufficient to justify a withdrawal of recognition, the Board has ruled, with court approval, that turnover among employees cannot, by itself, be used as a basis for belief that a union has lost majority support since it is presumed that, absent evidence that would justify a contrary conclusion, new employees will support the union in the same ratio as those whom they have replaced.[61] Moreover, this is particularly true when high turnover is prevalent in the industry involved.[62]

The next "privotal" factor listed in the Respondent's brief is

> The Kelly's employees have neither indicated to management they are aware of a 1981 Board election or that Local 3036 represents them. *They indicated instead, just the reverse.*

The Respondent maintains that this indicates a lack of support of the Union by its employees and evidences the Union's "total inactivity and abandonment, by 1984, virtually of the Kelly's drivers." In this regard, testimony was adduced from the Respondent's owner and manager Edward Kelly to the effect that he believes a majority of the Respondent's employees no longer support the Union because on "numerous occasions," drivers asked him, "[W]hatever happened to the Union?" Kelly stated that there were "so many" employees who were unaware that the Union had won a Board election in 1981 that "as far as they were concerned, there was no union in my office." Kelly also testified that on "numerous occasions" employees would "bring up a union non-related to 3036," and that employees "joked" about the Union "not being there." Kelly added that when this occurred, other employees would ask, "What Union are you talking about?", and he therefore knew that these employees "knew nothing of a union being in my office."

While it is true that the Board has held that expressions of antiunion sentiment can constitute sufficient objective evidence to support a good-faith and reasonably grounded doubt of a union's continued majority status,[63] the Board has also held that such statements must convey a clear intention by the employees not to be represented by the Union.[64] Clearly, the above statements would not constitute expressions of employee rejection of the Union as their bargaining agent. Additionally, Kelly's testimony about the various employee statements made directly to, or overheard by, him was in large measure speculative, conjectural, and vague, and lacking in specificity regarding the identity of these employees and as to the details and dates of the conversations or occurrences.[65] Moreover, much of Kelly's testimony in this connection constituted self-serving, general assertions by an employer that in its opinion the employees did not support the Union.[66] Importantly, the Respondent presented no evidence showing that any employee ever expressed a desire not to be represented by the Union.[67] Therefore, the Respondent has presented no adequate evidence to establish that a majority of its employees rejected the Union as their bargaining representative at any time relevant.

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[59] Generally, several indicia of loss of majority support are required, and no one factor (e.g., high employer turnover or union dormancy) is determinative. *Soule Glass & Glazing Co. v. NLRB*, 652 F.2d 1055 (1st Cir. 1981).

[60] *Guerdon Industries*, supra; *Nu-Southern Dyeing & Finishing*, 179 NLRB 573 fn. 1 (1969), enfd. in part 444 F.2d 11 (4th Cir. 1971).

[61] *Lockheed Engineering Co.*, 271 NLRB 119 fn. 2 (1984); *Sahara-Tahoe Hotel*, 241 NLRB 106 (1979); *Club Cal-Neva*, 231 NLRB 22 (1977) (the turnover of employees each year during the term of a last agreement had been approximately 500 percent); *Whisper Soft Mills, Inc. v. NLRB* 754 F.2d 1381 (9th Cir. 1984); *Soule Glass & Glazing Co. v. NLRB*, supra; *NLRB v. King Radio Corp.*, 510 F.2d 1154 (10th Cir. 1975), cert. denied 423 U.S. 839 (1975) (where the number of employees had risen to 876 from 343, and in a 5-year period since certification, 4214 persons had been hired and 3433 terminated. The court held the turnover did not afford reasonable grounds for doubting the union's majority).

[62] Kelly testified that light turnover of employees is "characteristic of the [private car transportation] industry in general." See *NLRB v. A. W. Thompson, Inc.*, 525 F.2d 872 (5th Cir. 1976); *NLRB v. Hondo Drilling Co.*, 525 F.2d 864 (5th Cir. 1976), cert. denied 429 U.S. 818 (1976).

[63] *Sofco, Inc.*, supra; *NLRB v. Middleboro Fire Apparatus*, 590 F.2d 4 (1st Cir. 1978).

[64] *Gregory's, Inc.*, 242 NLRB 644 (1979).

The Respondent also lists as a factor in its brief:

> The union abandoned the drivers and totally failed to properly pursue the interests of the drivers by failing to forward to Kelly's a draft agreement for two and one half (2-1/2) years from November, 1982 until April, 1985.
>
> Closely aligned with the preceding point is the notion that under Board law, Local 3036 *abandoned* any representative interest that it may have had during its certification year in later years by reason of its *laches*, its failure to represent the drivers and the 500% employee turnover experienced at Kelly's.

The Respondent has sought to characterize the passage of time in this case as a waiver by the Union of its right to bargain, thereby allowing the Respondent to lawfully withdraw its recognition of the Union. Such a waiver, however, may only be proven by a clear and unequivocal evidencing of such intent by a labor organization.[68] Additionally, although the Board has recognized this criterion as one that may help to establish a good-faith doubt of the majority status of a labor organization,[69] the mere passage of time, by itself, does not constitute such proof of waiver, nor is it considered to be sufficient evidence of a dissipation of majority status.[70] The Act does not impose any time limit on good-faith bargaining.[71]

In the instant case the record evidence shows that after the Union's certification as the bargaining representative of the Respondent's employees in an appropriate unit on 5 February 1982, the Respondent and the Union held six or seven negotiating sessions from 26 April 1982, through 3 November 1982. At the close of the last meeting, the Respondent requested and the Union agreed to prepare a proposed draft collective-bargaining agreement to be sent to the Respondent for review. However, due to the Union's concentrating all its efforts into the renegotiation of its expiring master contract with the Metropolitan Taxicab Board of Trade affecting the Union's entire membership except for the Respondent's employees, and solving its internal union election problems, no further negotiation meetings were held between the parties at the end of 1982 or during the entire year of 1983 nor was a draft of a proposed bargaining agreement forwarded to the Respondent during this period.

Rosenthal testified that notwithstanding the Union's preoccupation with the master contract negotiations and internal union election problems, he attempted to contact the Respondent's attorney, Tunney, by telephone between 5 and 10 times January through March 1983, but was unable to do so because Tunney was never available and did not return Rosenthal's calls. Bochner testified that he tried calling Tunney "for a period prior to January 1984" in order to arrange a meeting to finalize the bargaining agreement but was also unsuccessful in doing so. Tunney, on the other hand, testified that after the last negotiation meeting in November 1982, several months passed before the Union contacted him, and then Rosenthal called him two or three times in late 1983 to explain the Union's delay in preparing and forwarding a draft bargaining agreement to the Respondent. Tunney's response each time was to request a copy of the proposed bargaining agreement and Rosenthal promised to "get back to him." Be that as it may,[72] either Bochner or Rosenthal did finally reach Tunney in early January 1984, and Tunney agreed to meet with them regarding the status of the negotiations.

The parties met to discuss negotiations on 16 January 1984. On 5 February 1984, Rosenthal, using the 1981 "*Excelsior* list" established for the Board's election in that year, notified the Respondent's employees on that list and still working for the Respondent, regarding the progress of the negotiations. By letter dated 8 March 1984 Bochner notified Tunney that the draft agreement was completed and requested a meeting between the parties to review the provisions and to have it signed. Tunney never sent a reply to Bochner's letter, and when Bochner attempted to contact Tunney by telephone, he was advised that Tunney was ill. Rosenthal now testified that from March through June 1984, he unsuccessfully attempted to reach Tunney by telephoning his office between 10 and 20 times, and Tunney never returned his calls although Rosenthal left messages for him to do so. By letter dated 12 June 1984 Rosenthal notified the Respondent that the draft bargaining agreement was ready and that, since the Union was experiencing severe difficulties in reaching Tunney, if the Respondent failed to contact the Union within 10 days to arrange a meeting to review the agreement, the Union would "refer the matter to the National Labor Relations Board." Not hearing from the Respondent, Rosenthal called Kelly on 27 June and was advised that Tunney had left "Putney Twombly" and the Respondent was seeking new legal counsel, whereupon Rosenthal told Kelly that if the negotiations were not "resolved very soon" the Union would file a charge with the Board.

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[65] *Robertshaw Controls Co.*, 263 NLRB 958 (1982); *Gregory's Inc.*, supra; *NLRB v. Tahoe Nugget, Inc.*, supra.

[66] *NLRB v. Tahoe Nugget, Inc.*, supra; *Industrial Workers Local 289 v. NLRB*, 476 F.2d 868 (D.C. Cir. 1973); *NLRB v. Little Rock Downtowner*, 414 F.2d 1084 (8th Cir. 1969).

[67] *Gregory's, Inc.*, supra.

[68] *Soule Glass & Glazing Co. v. NLRB*, supra; *Conkle Funeral Home*, 266 NLRB 295, 297-298 (1983).

[69] *Club Cal-Neva*, supra; *NLRB v. Tahoe Nugget Inc.*, supra.

[70] As stated in *Long Island College Hospital*, 228 NLRB 83, 86 (1977):

> Certification is not a license which, upon the mere passage of time, expires as if it were a license to operate a motor vehicle. Rather, certification is a key which opens a collective-bargaining relationship. That relationship remains viable until some material circumstance arises to place the continued existence of that relationship in question. The passage of time, alone, is, as noted, not such a material circumstance. See, for example, *Ray Brooks v. N.L.R.B.*, 348 U.S. 96, 98 (1954); *King Radio Corporation*, 208 NLRB 578 (1974), enfd. 510 F.2d 1154 (C.A. 10, 1975); *Laystrom Manufacturing Co.*, 151 NLRB 1482, 1483 (1965).

[71] *Lockheed Engineering Co.*, supra.

[72] I credit the testimony of Rosenthal and Bochner regarding their unsuccessful attempts to reach Tunney in 1983. The record indicates that Tunney was, in fact, difficult to reach at the Putney, Twombly law firm, perhaps because of his changing relationship with his employer. Rosenthal, Bochner, and Stolow all testified regarding their difficulty in reaching Tunney, and Tunney's failure to return their calls, and for that matter so did the Respondent's witness Kelly, and Tunney's testimony did not, in substance, contradict or deny this, nor did Tunney offer any explanation in regard thereto.

On 17 July 1984 the Union filed an unfair labor practice charge against the Respondent with the Board that was subsequently dismissed by the Regional Director for Region 29 on 12 October 1984, as detailed. The Union, using the same listing as used for its prior communication to the Respondent's employees, notified these employees by letter dated 24 July 1984 about the charge being filed and the reason therefor. During the investigation of the pending charge, the Union sent a mailgram to the Respondent dated 14 September 1984 demanding "immediate negotiations to complete the collective bargaining agreement." In response by letter dated 25 September 1984, Tunney requested that the Union send a copy of the proposed draft agreement to him for review. By letter dated 8 October 1984 Rosenthal informed Tunney that Bochner was on vacation and on his return would forward the proposed agreement to him. On Bochner's return, however, the proposed draft agreement that he professed he had completed could not be found in any form and, therefore, nothing was forwarded to the Respondent. On 17 October 1984 the Union notified the same employees it had contacted before about the Region's dismissal of the charge and promised to "explore further action" to compel the Respondent to "live up to the agreement." Again on 20 December 1984 the Union advised these employees that there were "no new developments" in the matter.

After Bochner left the law firm representing the Union on 17 January 1985, the drafting of the proposed bargaining agreement was assigned to another attorney, David Stolow. Stolow related that he attempted to contact Tunney "three or four times" in late January or early February 1985, but was unsuccessful in doing so. Stolow testified uncontradictedly that he was finally able to reach Tunney by telephone in late February 1985, and he advised Tunney that he would prepare the proposed draft bargaining agreement based on Bochner's notes, if that was acceptable with Tunney, and Tunney replied that Stolow should send the proposed agreement to him, when completed, for review with his client. On 17 April 1985 Stolow forwarded a copy of the completed proposed draft bargaining agreement to Tunney. Corrections to the agreement were sent by Stolow to Tunney on 22 April 1985. Failing to hear from Tunney regarding the proposed agreement and being unsuccessful again in contacting Tunney by telephone in late April or early May 1985, Stolow wrote to Tunney on 16 May 1985 requesting a meeting between the parties "to finalize" the collective-bargaining agreement. By letter dated 21 May 1985 Tunney advised Stolow that he had reviewed the agreement and would meet with the Respondent and then contact Stolow "shortly thereafter."

On 3 June 1985 Stolow telephoned Tunney and a meeting between the parties was arranged for 10 June 1985. This was rescheduled the next day by Tunney for 13 June 1985. As described in detail above, the parties met only briefly on 13 June 1985 because the Respondent had discharged "Putney Twombly" as its legal counsel as Tunney had now severed all connection with that law firm, and because Kelly himself had experienced difficulty contacting Tunney directly through that firm. On 18 and 27 June 1985, when union officials appeared at the Respondent's place of business to speak to the Respondent's employees, they were rebuffed by the Respondent's management representatives as set forth above, evidencing a clear intention by the Respondent not to deal with the Union as its employees' bargaining representative.

In applying Board and court law to the facts present in this case, I cannot find nor conclude that the Union "abandoned any representative interest" in the unit employees. Although the Union must accept responsibility for the lack of negotiations during 1983 since it failed to prepare and send a draft bargaining agreement to the Respondent, as agreed on in November 1982, its attempts to contact the Respondent's attorney during this period, while unsuccessful and seemingly tentative, perhaps due to the master contract negotiations and internal union problems, was still some evidence of the Union's interest in negotiating a collective-bargaining agreement as the representative of the Respondent's employees, and the Respondent must be perceived as having recognized this continued interest since it agreed to meet with the Union's representatives on 16 January 1984, without then raising any issue regarding the Union's majority status.

Moreover, the Union's subsequent actions dispel any notion that the Union abandoned its position as the exclusive collective-bargaining representative of the Respondent's employees. Frustrated by being unable to reach the Respondent's attorney and to arrange a meeting between the parties, the Union filed an unfair labor practice charge with the Board in July 1984. In September 1984, the Respondent requested a copy of the proposed draft collective-bargaining agreement. The Respondent continued to request the draft agreement through March 1985 and did, in fact, review the agreement in April or May 1985. Moreover, the Respondent, notwithstanding the long delay in receiving the proposed draft bargaining agreement, agreed to meet with the Union in June 1985, and at no previous time expressed any doubts about the Union's continued majority status. Additionally, the evidence does indicate that the Union also made attempts to maintain contact with the bargaining unit employees, although some question can be raised about the effectiveness of the steps it took to accomplish this.

In sum, the record evidence indicates that the Union maintained contact with the Respondent, or attempted to do so, and communicated with some bargaining unit employees with varying degrees of success. And although the Respondent may argue that the Union abandoned the employees because it failed to forward a draft of the proposed collective-bargaining agreement until April 1985, this argument becomes untenable when reviewed in light of the circumstances, the willingness of the Respondent to meet with the Union, its continuing requests for the proposed bargaining agreement, and its finally reviewing the agreement and acquiescing to meet with the Union for discussions in June 1985. Moreover, the Respondent's actions cannot reasonably be construed as those of an employer who has a good-faith doubt that a union continues to represent a majority of its employees.

From all the above I find that the Respondent cannot rely on the Union's inactivity to support a reasonably based doubt of continued majority support nor do I find that the facts support the conclusion that the Union abandoned its representative interest in the unit employees.[73]

Last, the Respondent asserts in its brief

> Moreover, for Kellys to continue to recognize and negotiate with a union which no longer represented an uncoerced majority of its employees would have represented a violation by Kellys of Section 8(a)(2) of the Act.

Because of my above findings, I conclude that this assertion has no merit.

In consideration of all the foregoing[74] I find and conclude that the Respondent has totally failed to affirmatively establish either that the Union actually lost its majority status, or that its alleged good-faith doubt was based on objective considerations and, therefore, when the Respondent withdrew its recognition of the Union, this constituted an unlawful failure and refusal to recognize and bargain with the Union as the exclusive bargaining representative of the Respondent's employees in the appropriate unit in violation of Section 8(a)(5) and (1) of the Act.

V. THE EFFECT OF THE UNFAIR LABOR PRACTICES ON COMMERCE

The activities of the Respondent set forth in section IV, above, found to constitute unfair labor practices occurring in connection with the operations of the Respondent described in section I, above, have a close, intimate, and substantial relationship to trade, traffic, and commerce among the several States and tend to lead to labor disputes burdening and obstructing commerce and the free flow thereof.

VI. THE REMEDY

Having found that the Respondent has violated Section 8(a)(1) and (5) of the Act, I shall recommend that it be required to cease and desist therefrom and to take certain affirmative action designed to effectuate the policies of the Act. I shall recommend that the Respondent be ordered to recognize and, on request, bargain with the Union as the bargaining representative of the employees in the appropriate unit and to post appropriate notices.

Additionally, the General Counsel requests in her brief that

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[73] *Lockheed Engineering Co.*, supra (the union's certification was over 7-1/2 years old, no collective-bargaining agreement had been signed, and there had been no bargaining between the parties for over a year); *Club Cal-Neva*, supra; *Pioneer Inn*, 228 NLRB 1263 (1977); *Long Island College Hospital*, supra; *NLRB v. Tahoe Nugget, Inc.*, supra.

Additionally the cases cited by the Respondent in support of its above contentions are clearly distinguishable. In *Whisper Soft Mills v. NLRB*, supra, the court held that although the presumption that new employees will support the union in the same ratio as those whom they have replaced, this presumption does not extend to strikers, as were involved in that case. Moreover, the Union throughout the strike demanded that the employer reinstate all the strikers, which would result in a loss of employment for a majority of the new employees. Thus it could not be presumed that these employees would support the union in any ratio, and turnover of employees became a significant factor. These circumstances are not present in the instant case. In *Pipe Line Development Co.*, 272 NLRB 48 (1984), the Board held that the employer's receipt of a petition signed by a majority of unit employees, following expiration of the extended certification year, provided the objective consideration necessary to support a good-faith doubt of the union's majority status. There was no employee petition signed by a majority of the unit employees present in the instant case.

In *U-Save Food Warehouse*, 271 NLRB 710 (1984), the Board found that management's uncontradicted testimony regarding specifically identified employees disclosed unambiguous statements made at sufficiently identified prerecognition withdrawal periods of time, constituted highly probative evidence, and, along with the inactivity of the union, was sufficient evidence to rebut the resumption that new employees will support the union in the same ratio as those whom they replace. As indicated, in the instant case the evidence adduced by the Respondent in this regard was nonspecific regarding the identity of employees who made such statements and when and where they were made; and, importantly, the statements did not convey a clear intention by the employees not to be represented by the Union.

In *Industrial Waste Service*, 268 NLRB 1180 (1984), the employer received a petition signed by a majority of the employees stating, "We don't want the Union." This was sufficient to give the employer a good-faith doubt of the Union's majority status, again unlike the facts in the instant case. In *Arkay Packaging Corp.*, 227 NLRB 397 (1976), the Board found that the employer had a reasonably based doubt of the union's majority status because the employer's communications to the unions involved advised that strikers, who were union members, were going to be replaced, that the unions failed to respond to the employer's letters and, after the replacements were hired, the unions made no effort to contact the employer or to police its collective-bargaining agreement. The Board held that to apply the presumption that new employees will be presumed to support a union in the same ratio as those whom they replace was unwarranted because of the circumstances therein and especially since strikers were involved. Again, the differences between the instant case and *Arkay Packaging* is obvious, i.e., strikers are not involved and I did not find sufficient evidence to support a conclusion that the Union abandoned its representation of the Respondent's unit employees.

Finally, in *Colonial Manor Convalescent & Nursing Center*, 188 NLRB 861 (1971), the Board found that the union's failure to attend the last scheduled negotiation session without any notice to the employer, and its failure to do anything for 3 months after it received notice of the dismissal of an employee decertification petition, established a reasonable basis for doubting the union's majority status. In the instant case, and although there was a lengthy passage of time before a bargaining agreement was drafted and sent, the Union still maintained contact with the Respondent sufficient to evidence its interest in representing the unit employees and it might even be strongly argued that the Respondent, in effect, waived the passage of time as a factor when it agreed to meet with the Union each time it was requested to do so after 3 November 1982 and agreed to review the draft bargaining agreement in April 1985 without raising this as a defense.

[74] In light of the circumstances discussed, I also do not find that the closeness of the Union's victory in the Board election affects my findings and conclusions.

> [T]he recommended remedial order include a visitorial [sic] clause, authorizing the Board to engage in discovery under the Federal Rules of Civil Procedure that it will be able to monitor compliance with the Board's order, as enforced by the court of appeals.[2]
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> [2] A visitorial [sic] clause permits an agency to examine the books and records of a respondent and to take statements from its officers and employees and others for the purpose of determining or securing compliance with a court's judgment. The discovery rules of the Federal Rules of Civil Procedure provide a mechanism for achieving the objectives of a visitorial [sic] clause.

Under the circumstances of this case, however, I find it unnecessary to include such a clause. Although the General Counsel makes a fine and detailed presentation of the historical and legislative background and general justification for such remedial relief, she has failed to demonstrate sufficient grounds for the need for a visitatorial clause in this case. Therefore, I deny the General Counsel's request for such a clause in the recommended Order.[75]

CONCLUSIONS OF LAW

1. The Respondent, W.A.D. Rentals, Limited d/b/a Kelly's Private Car Service, is now and has been at all times relevant an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

2. Local 3036, Taxi Drivers and Allied Workers Union, Service Employees International Union, AFL-CIO-CLC is a labor organization within the meaning of Section 2(5) of the Act.

3. All full-time and regular part-time drivers employed by the Employer at its Queens, New York garage, excluding all office clerical employees, dispatchers, bookkeepers, management personnel, guards, and all supervisors as defined in Section 2(11) of the Act, constitute a unit appropriate for the purposes of collective bargaining within the meaning of Section 9(b) of the Act.

4. At all times material, the Union has been and is the exclusive bargaining representative of all the employees within the above-described unit appropriate for the purposes of collective bargaining within the meaning of Section 9(a) of the Act.

5. The Respondent has engaged in, and is engaging in, unfair labor practices within the meaning of Section 8(a)(5) and (1) of the Act by failing and refusing to recognize and bargain in good faith with the Union as the exclusive representative of the employees in the appropriate unit.

6. By failing and refusing to execute a written contract allegedly embodying an agreement reached between the Respondent and the Union with respect to terms and conditions of employment of the Respondent's unit employees, the Respondent has *not* violated Section 8(a)(5) and (1) of the Act.

7. The aforesaid unfair labor practices are unfair labor practices affecting commerce within the meaning of Section 2(6) and (7) of the Act.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[76]

ORDER

The Respondent, W.A.D. Rentals, Limited d/b/a Kelly's Private Car Service, Queens, New York, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Failing or refusing to recognize and bargain collectively in good faith with the Union as the exclusive representative of all its employees in the appropriate unit.

(b) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Recognize and, on request, bargain collectively with the Union as the exclusive representative of all employees in the appropriate unit regarding rates of pay, hours of employment, and other terms and conditions of employment and, if an understanding is reached, embody such understanding in a signed agreement.

(b) Post at at its Queens, New York facility copies of the attached notice marked "Appendix."[77] Copies of the notice, on forms provided by the Regional Director for Region 29, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material.

(c) Notify the Regional Director in writing within 20 days from the date of this Order what steps the Respondent has taken to comply.

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD

An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

WE WILL NOT fail or refuse to recognize and bargain collectively in good faith with Local 3036, Taxi Drivers and Allied Workers Union, Service Employees International Union, AFL-CIO-CLC as the exclusive representative of all employees in the following appropriate unit:

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[75] *Hohn Industries*, 283 NLRB 71 (1987); *Nathan's Furniture Store*, 278 NLRB 268 (1986).

[76] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

[77] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

> All full-time regular part-time drivers employed by the Employer at it's Queens, New York garage, excluding all office clerical employees, dispatchers, book-keepers, management personnel, guards and all supervisors as defined in Section 2(11) of the Act.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL recognize and, on request, bargain collectively with Local 3036, Taxi Drivers and Allied Workers Union, Service Employees International Union, AFL-CIO-CLC as the exclusive representative of all employees in the appropriate unit rates of pay, hours of employment, and other terms and conditions of employment and, if an understanding is reached, embody such understanding in a signed agreement.

W.A.D. RENTALS, LIMITED D/B/A
KELLY'S PRIVATE CAR SERVICE

Mash Transportation, Inc. *and* **Mark S. Combs.** Case 25-CA-17484

June 10, 1988

SUPPLEMENTAL DECISION AND ORDER

BY CHAIRMAN STEPHENS AND MEMBERS JOHANSEN AND BABSON

On September 11, 1986, the National Labor Relations Board issued a Decision and Order in this proceeding,[1] in which the Board ordered the Respondent, inter alia, to make whole certain employees for any loss of earnings suffered as the result of the Respondent's unfair labor practices. On August 4, 1987, the United States Court of Appeals for the Seventh Circuit entered a judgment enforcing the Board's Order.[2] A controversy having arisen over the amount of backpay due under the Board's Order, as enforced by the court, the Regional Director for Region 25 issued and duly served on the Respondent a backpay specification and notice of hearing alleging the amount of backpay due the discriminatees.

About December 28, 1987, the Respondent filed a response and objection to the backpay specification, asserting that the discriminatees were ineligible to work for the Respondent during the backpay period. The answer was not sworn to by the Respondent or its attorney, nor did it specifically respond to each allegation of the complaint.

On March 15, 1988, the General Counsel filed with the Board a "Motion for Order Transferring Proceeding to the National Labor Relations Board: Motion to Strike Answer of Respondent to Backpay Specification and Notice of Hearing, and Motion for Summary Judgment; or in the Alternative, Motion for Partial Summary Judgment," with exhibits attached. The General Counsel alleges that the Respondent's answer failed to conform to the requirements of Section 102.54(b) and (c) of the Board's Rules and Regulations in that the answer, inter alia: (1) was not sworn to by the Respondent or by a duly authorized agent with appropriate power of attorney affixed; (2) failed to admit, deny, or explain each allegation of the specification, or state that the Respondent is without sufficient knowledge to answer each allegation; (3) failed to fairly respond to the substance of any of the allegations of the specification; and (4) failed to dispute the accuracy of any of the backpay figures or the premises upon which they are based. Accordingly, the General Counsel requested that the answer be stricken and that pursuant to Section 102.54(c) of the Board's Rules and Regulations all allegations of the backpay specification be deemed to be admitted as true and that summary judgment should be granted. In the alternative, the General Counsel requested that in the event the Respondent's answer is deemed to raise issues requiring a hearing, partial summary judgment should be granted finding that all allegations of the specification are true.

On March 18, 1988, the Board issued an order transferring the proceeding to the Board and a Notice to Show Cause why the General Counsel's motion should not be granted. On April 1, 1988, the Respondent filed a motion and amended response and objection to backpay specification which either admits or denies each allegation of the specification, and an affirmative defense which was similar to the Respondent's previous response and objections to the backpay specification. The motion, amended response and objection, and affirmative defense were sworn to and signed by the Respondent's president.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

On the entire record in this proceeding, the Board makes the following

Ruling on Motion for Summary Judgment

Section 102.54(b) and (c) of the Board's Rules and Regulations states:

> (b) *Contents of the answer to specification.*—The answer to the specification shall be in writing, the original being signed and sworn to by the respondent or by a duly authorized agent with appropriate power of attorney affixed, and shall contain the post office of the address respondent. The respondent shall specifically admit, deny, or explain each and every allegation of the specification, unless the respondent is without knowledge, in which case the respondent shall so state, such statement operating as a denial. Denials shall fairly meet the substance of the allegations of the specification denied. When a respondent intends to deny only a part of an allegation, the respondent shall specify so much of it as is true and shall deny only the remainder. As to all matters within the knowledge of the respondent, including but not limited to the various factors entering into the computation of gross backpay, a general denial shall not suffice. As to such matters, if the respondent disputes either the accuracy of the figures in the specification or the premises on which they

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[1] 281 NLRB 444.

[2] Unpublished.

> are based, he shall specifically state the basis for his disagreement, setting forth in detail his position as to the applicable premises and furnishing the appropriate supporting figures.
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> (c) *Effects of failure to answer or to plead specifically and in detail to the specification.*—If the respondent fails to file any answer to the specification within the time prescribed by this section, the Board may, either with or without taking evidence in support of the allegations of the specification and without notice to the respondent, find the specification to be true and enter such order as may be appropriate. If the respondent files an answer to the specification but fails to deny any allegation of the specification in the manner required by subsection (b) of this section, and the failure so to deny is not adequately explained, such allegation shall be deemed to be admitted to be true, and may be so found by the Board without the taking of evidence supporting such allegation, and the respondent shall be precluded from introducing any evidence controverting said allegation.

As indicated above, the General Counsel filed a motion to strike the Respondent's answer in its entirety and to grant summary judgment on the basis of alleged procedural and substantive deficiencies in the answer. It is clear that the answer filed about December 28, 1987, standing alone, is procedurally deficient in that it is not sworn to by the Respondent or by a duly authorized agent with power of attorney. The Respondent's amended response and affirmative defense, however, were sworn to by the Respondent's president. The Board, under similar circumstances, has viewed such an attempt to cure the procedural defects of an initial answer to a backpay specification as a timely amended answer.[3] Accordingly, we deny the General Counsel's Motion to Strike and Summary Judgment on the basis of procedural defects.

We further find that the answer is not substantively deficient. In addition to the general denial that is sufficient to place interim earnings into issue for both discriminatees, the Respondent denies gross backpay allegations to the extent that its affirmative defense specifically alleges that discriminatee Authur Craig Scheid was ineligible to work for the Respondent during the backpay period inasmuch as he was ineligible to work for the Postal Service and had misrepresented his driving record, and that discriminatee Mark S. Combs was also ineligible to work for the Respondent during the backpay period because of his excessive number of moving traffic violations and his misrepresentation of his driving record. The Respondent's affirmative defense, therefore, raises substantial and material issues as to the discriminatees' gross backpay warranting a hearing. Accordingly, we shall deny the General Counsel's motions and we shall remand this proceeding for a hearing.

ORDER

It is ordered that the General Counsel's motion to strike answer of Respondent to backpay specification and notice of hearing is denied.

IT IS FURTHER ORDERED that the General Counsel's Motion for Summary Judgment; or in the alternative, Motion for Partial Summary Judgment is denied.

IT IS FURTHER ORDERED that this proceeding is remanded to the Regional Director for Region 25 for the purpose of issuing a notice of hearing and scheduling a hearing before an administrative law judge to determine the backpay owed discriminatees Mark S. Combs and Arthur Craig Scheid.

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[3] *Scotch & Sirloin Restaurant*, 287 NLRB 1318 (1988); *Standard Materials*, 252 NLRB 679 (1980).

Destileria Serralles, Inc. *and* **S.I.U. de Puerto Rico, Caribe & Latin-America affiliated with Seafarers International Union of North America, AFL-CIO.** Case 24-CA-5335

June 13, 1988

DECISION AND ORDER

BY CHAIRMAN STEPHENS AND MEMBERS JOHANSEN AND BABSON

On March 2, 1987, Administrative Law Judge Arline Pacht issued the attached decision. The Respondent filed exceptions and a supporting brief, and the General Counsel filed an answering brief to the Respondent's exceptions.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings,[1] and conclusions and to adopt the recommended Order.

In this case, the Respondent, an admitted successor employer, withdrew recognition from the Union January 22, 1986. To justify that withdrawal, the Respondent had to show that on that date "the union had in fact lost its majority status . . . *or* that the refusal to bargain was grounded on a good-faith doubt based on objective factors that the union continued to command majority support." *Harley-Davidson Co.*, 273 NLRB 1531 (1985) (emphasis added; citation omitted). The Respondent attempted to prove the second prong of this disjunctive test, i.e., that it had a good-faith doubt based on objective factors that the Union continued to command majority support. It argues, however, based on certain statements that the judge made in her decision that the judge erroneously required it to prove the first prong of the test, i.e., actual loss of majority status, in support of its reliance on the second prong of the test. We have closely reviewed the judge's decision, and we are satisfied that, although the judge made at least one finding that has no bearing on the issue of the Respondent's good-faith doubt (a finding concerning the accuracy of employee Gonzalez' trial testimony concerning what he *knew* about employee sentiment regarding the Union, as distinct from what he *told* the Respondent's agents about such sentiment), the judge nonetheless directly addressed the second prong of the test. She did not, in her analysis, improperly require the Respondent to prove actual loss of majority in order to establish good-faith doubt.

Furthermore, after carefully reviewing the record ourselves, we have also reached the conclusion that the Respondent has failed to meet either prong of the test for the lawful withdrawal of recognition. In so concluding, we have taken account of the various bases relied on by the Respondent and discussed by the judge, as well as Attorney Chevere's testimony concerning Union President Hernandez' January 21, 1986 comments to him, and we have also considered the cumulative force of the Respondent's offered reasons for withdrawing recognition. But we have not considered any post-withdrawal-of-recognition events offered by the Respondent.

Additionally, while not necessarily agreeing with them, we find that the present case is factually distinguishable from *J & J Drainage Products Co.*, 269 NLRB 1163 (1984), and *Sofco, Inc.*, 268 NLRB 159 (1983), on which the Respondent relies, in which the Board found that the employers had lawfully withdrawn recognition. In this regard, we note that in *J & J Drainage* the Board cited, as a factor justifying withdrawal of recognition, a statement by one of the union stewards to the employer's general manager that a majority of the employees were not interested in the union. Contrary to the Respondent, however, we do not see a close analogy in Union Delegate Gonzalez' remarks to Plant Manager Esteva. Gonzalez and Esteva each testified that there were two occasions on which Gonzalez conveyed to Esteva certain views regarding the Union—once after a representative of a rival union appeared outside the plant distributing cards and on another occasion after Gonzalez took a telephone call at the plant from union representatives, who requested that he come to San Juan to participate in contract negotiations with the Respondent. According to Gonzalez' testimony, he told Esteva on the first occasion that "people were negative towards the [rival Union] or the S.I.U. I told him on my own and notified him just as something personal of mine." Esteva's testimony about this occasion indicates that Gonzalez "commented that he didn't want to get involved in any kind of union." Gonzalez testified that on the second occasion, following

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[1] The Respondent has excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

We note that the judge found that the Respondent hired all four of the employees who had served as union delegates while employed by the Respondent's predecessor. Although the Respondent accurately points out in its exceptions that Jorge Gonzalez and Juan Alvarez were the only two employees that it hired who had served as union delegates, we do not find that the judge's misstatement is sufficient to affect the validity of her ultimate conclusions.

In adopting the judge's decision, we do not rely on her finding, based on Union Delegate Alvarez' testimony at the hearing, that "less than a majority of employees opposed union representation."

289 NLRB No. 10

the phone call from union representatives that he received at the plant, he told Esteva that no employee wanted to travel to San Juan to participate in negotiations with the Union. Esteva characterized Gonzalez' comments as signifying that Gonzalez was not interested in going to the negotiating meeting and "he wasn't going to San Juan." Neither Gonzalez nor Esteva testified that Esteva overheard the actual phone conversation.

We conclude that Gonzalez' own testimony regarding the first incident is subject to many interpretations and is ambiguous. The testimony could indicate that he *told* Esteva that his personal opinion was that employees were negative to the Union. It could also indicate that he was conveying only his personal opinion to Esteva *without* so stating that fact. Further, it can be read to indicate that he was conveying a sentiment that applied to a number of employees, or that he was conveying a sentiment that applied to him only.[2] Gonzalez' testimony about the second incident only shows employee disinterest in attending a negotiating session and nothing more. Moreover, we stress that the above-quoted testimony by *Esteva* clearly shows that he viewed Gonzalez on both occasions as speaking only of his own sentiments. We therefore conclude that none of these remarks purports to represent whether a significant number of employees wanted to rid themselves of union representation.

In *Sofco*, the Board found that the respondent had a reasonably based doubt of the union's continued majority status based on evidence that 23 of 24 bargaining unit employees made the following kinds of comments to the plant manager: they wanted "to do away with the union, get away from the union, and be on our own"; they indicated "[if] Sofco [bought the predecessor], we could make out better without a union"; and they indicated "they were dissatisfied with the present union and that there was a lot of them that just plain wanted out." During his testimony in this case, the Respondent's plant manager, Esteva, named eight employees who he said had told him that either they were "dissatisfied with the [Union]" or "were not interested in any Union." *Sofco Inc.*, 268 NLRB 159. However, two of the men whom Esteva identified, Rivera and Arce, expressly stated at the hearing that they did not inform Esteva of their union sentiments. Furthermore, when Esteva was asked if he could recall other employees who made similar comments to him, he simply replied that he would have to name most of the employees in the plant. On these facts, we find that Esteva's testimony regarding the unit employees' union sentiments is not as definite and detailed as the evidence of the employees' statements to the plant manager in *Sofco*. As the judge noted here, Esteva offered no details on his conversations and his comments that employees were "dissatisfied" with the Union or "not interested in any union" are vague. The judge aptly stated that "without a more precise description of what individual employees may have said, it is impossible to determine from Esteva's comments whether employees actually expressed anything more than disenchantment with the Union's past performance or a disinclination to be active Union members, as distinguished from a current desire to be rid of Union representation," or how many employees made such statements. We further note that in *Sofco*, the Board also relied on the presence of a number of antiunion signs posted in the plant and the employees' hostility toward the union steward as corroboration of the employees' dissatisfaction with the union. No such indicators are present here.

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge and orders that the Respondent, Destileria Serralles, Inc., Camuy, Puerto Rico, its officers, agents, successors, and assigns, shall take the action set forth in the Order.

Simao J. Avila, Esq., for the General Counsel.

Francisco Chevere, Victor M. Comolli, and *Radames Torruella, Esqs. (McConnell Valdes Kelley Sifre Griggs & Ruiz-Suria)*, of San Juan, Puerto Rico, for the Respondent.

Ginoris Vizcarra De Lopez-Lay, Esq., of Santurce, Puerto Rico, for the Charging Party.

DECISION

ARLINE PACHT, Administrative Law Judge. Based on an unfair labor practice charge filed by the S.I.U. de Puerto Rico, Caribe & Latin-America (the Union or S.I.U.), on 14 March 1986, a complaint issued on 30 May 1986 alleging that the Respondent, Destileria Serralles, violated Section 8(a)(1) and (5) of the National Labor Relations Act (the Act) by refusing to recognize and bargain with the Union since on or about 1 November 1985 and continuously thereafter. Alternatively, the complaint alleges that on 8 November 1985 and on various dates thereafter, the Respondent recognized and agreed to bargain with the Union but on or about 22 January 1986 withdrew recognition from the Union in bad faith. At the hearing in this case held in Hato Rey, Puerto Rico, on 17, 18, and 19 November 1986, all parties were afforded full opportunity to participate. On the entire record,[1] from my observation of the demeanor of the witnesses, and with careful consideration of the posttrial briefs submitted by counsel for the General Counsel (the General Counsel) and the Respondent, I make the following

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[2] Indeed regarding the last possibility, we note that the followup question and answer to Gonzalez' testimony was:

> Q. You told him your own personal feelings regarding the unions?
>
> A. Well, I told him that I did not, in other words, that I was giving him this because I did not want to get involved again or anymore.

FINDINGS OF FACT

I. JURISDICTION

The complaint alleges and the answer admits that the Respondent is a corporation with its principal office and place of business at Mercedita in Ponce, Puerto Rico, and with other places of business in Puerto Rico, including a facility at Camuy. At all material times, Respondent has engaged in distilling, processing, bottling, distributing, and selling alcoholic beverages, liquors, distilled spirits, and related products. During the past calendar year, which is representative of its annual operation, Respondent produced, sold, and distributed from its facilities products valued in excess of $50,000 directly to points outside the Commonwealth of Puerto Rico. Accordingly, the complaint alleges, the Respondent admits, and I find that the Respondent is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the National Labor Relations Act.

The Union is now, and has been at all times material, a labor organization within the meaning of Section 2(5) of the Act.

II. BACKGROUND

A. *The Union's Representation Under P.R.D.*

On 18 October 1985, Respondent purchased the assets, business, and goodwill of the Puerto Rican Distilleries (P.R.D.) pursuant to a contract in which Seralles disclaimed liability for a collective-bargaining agreement between its predecessor and the S.I.U., the bargaining agent for employees at the Camuy facility since 1964.[2] On that same date and without prior notice to the work force, P.R.D. ceased operations at its facilities in Camuy and Arecibo and discharged the employees.

The S.I.U. was last certified as the unit's exclusive bargaining representative in January 1982. Prior to and for a brief period of time after P.R.D. closed, Camuy employees were involved in union activities. For example, several employees participated in negotiations leading to the most recent collective-bargaining agreement effective from 2 March 1985 to 1 March 1988; a large percentage of the unit voted for four delegates (shop stewards) in early October 1985 and all unit members continued paying union dues through October 1985 pursuant to a checkoff provision in the contract. After P.R.D. was sold, six or seven employees joined union representatives in bargaining about the effects of the plant's closure, with a final accord reached on 7 November.

B. *The Union Requests Recognition*

On 18 October 1985, after learning of Respondent's acquisition of P.R.D., S.I.U. President Conrado Hernandez, wrote to Alberto Torruella, Respondent's vice president and secretary, to request that Serralles recognize the Union as the exclusive bargaining representative for the Camuy employees and honor its collective-bargaining agreement with P.R.D. Hernandez also proposed that the parties meet on 21 October. Receiving no response, Hernandez again wrote to Torruella on 30 October renewing his earlier request that the Respondent recognize the Union and honor the collective-bargaining agreement.

Before Respondent received this second letter, Radames Torruella, Respondent's counsel,[3] telephoned the Union's counsel, Ginoris Vizcarra, explaining that Serralles recently retained him to represent the Company on labor law matters. He also stated that the Respondent had not yet decided how or to what extent, if any, it would operate the former P.R.D. facilities. In a followup letter to Hernandez dated 1 November, Attorney Torruella repeated these remarks and promised to contact the Union as soon as he had reviewed the situation. (G.C. Exh. 4.)

Several days later on 4 November, Alberto Torruella met with Attorney Torruella to discuss the Company's legal obligations in light of its indefinite long-range plans for the Camuy facility and consider S.I.U.'s request for recognition, given the possibility of a competing claim from another union, the U.G.T., which represented a bargaining unit at Serralles' facility in Ponce. According to Torruella, Respondent had not yet decided whether it would continue all operations previously performed at Camuy and, if it did, whether it would employ a work force composed of both Camuy and Arecibo employees or with Camuy employees alone. Alternatively, Respondent also was considering transferring the former P.R.D. bottling operations to its Ponce facility which had a sufficiently large production capacity, leaving only aging and storing operations intact at Camuy.

Torruella further testified that after the acquisition, Respondent discovered that the inventory for certain P.R.D. brands was low. Consequently, Respondent decided to commence operations in Camuy at least on a short-term basis and began hiring former P.R.D. employees under temporary employment contracts. Production started on 11 November 1985 with a work force of 17 former Camuy employees, a number that the parties agreed constituted a representative complement.

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[1] By order dated 21 November 1986, the parties were directed to submit preliminary briefs on the question of whether Respondent could properly claim privilege for and refuse to produce a letter written by its vice president while acting in a legal capacity which had been disclosed inadvertently to the General Counsel prior to the hearing. Subsequently, the Respondent released the letter voluntarily. It was marked R. Exh. 11 and is admitted into evidence.

Respondent and the General Counsel also submitted a joint motion to correct the transcript. The motion is granted and made a part of this record as Jt. Exhs. 3 a–e. Hereinafter, the General Counsel's exhibits will be referred to as G.C. Exh; Respondent's exhibits as R. Exh; the Charging Party's exhibits as C.P. Exh; and joint exhibits as Jt. Exh.

[2] The S.I.U. contract with P.R.D. provided that the union agreement would be binding on any successor.

[3] Hereinafter, Respondent's counsel will be referred to as Attorney Torruella to distinguish him from the Company's vice president.

At the conclusion of their 4 November meeting, Respondent's vice president authorized counsel to meet with the S.I.U. and to commence bargaining, if he believed that a sound relationship was feasible. Several days later Attorney Torruella telephoned Ms. Vizcarra and arranged an exploratory meeting for 8 November. To prepare for this meeting, Alberto Torruella compared the S.I.U. labor contract with the U.G.T. agreement covering the Ponce employees. After completing this review, he identified for Attorney Torruella 11 provisions in the S.I.U. contract that he wished to renegotiate in order to conform them with the U.G.T. labor agreement.

C. *The 8 November Meeting*

As agreed, Vizcarra and Hernandez met with Attorney Torruella and his associate, Francisco Chevere, on 8 November. At the outset, Attorney Torruella handed Vizcarra and Hernandez duplicate letters which responded to the Union's written requests for recognition and acceptance of its P.R.D. labor contract in the following noncommittal terms:[4] "At least for the moment said meetings . . . must not be considered as one of negotiation, nor necessarily as evidence that we have already recognized S.I.U. as the exclusive representative of any employee who is hired in Camuy." (G.C. Exh. 6.)

Attorney Torruella next outlined the alternatives that Respondent was weighing with regard to continuing operations at Camuy or transferring them to Ponce. However, he indicated that employees would be hired at Camuy on a temporary basis to deal with a depleted inventory. He further informed them that the U.G.T. had requested certain information about Respondent's purchase of P.R.D. and might assert a representational claim at Camuy under an accretion clause in its collective-bargaining agreement.

Attorney Torruella then outlined specific clauses in the S.I.U./P.R.D. labor contract that the Respondent wanted to alter. Attorney Vizcarra did not oppose modifying the contract. In fact, without signifying assent, she stated that many of the proposed changes were not unreasonable. She then raised some concerns and suggestions about other terms in the agreement. At Vizcarra's request, Attorney Torruella agreed to reduce Respondent's proposals to writing and directed Chevere to prepare a draft that would be used as a basis for future negotiations. Vizcarra mentioned that although the S.I.U. constitution did not require employee ratification of collective-bargaining agreements, she preferred having members of the bargaining unit involved in negotiations.

D. *Communications Between the Parties After 8 November*

After some weeks had elapsed without further word from the Respondent, Vizcarra wrote to Torruella on 15 December reminding him that she had previously requested recognition and asked him to send the promised document without delay. Noting that the employees were working under temporary contracts, Vizcarra urged that the parties act quickly to formalize and stabilize their labor-management relations. (R. Exh. 5(b).) Attorney Torruella did not respond specifically to the request for recognition. Instead, at some undefined time, he told Vizcarra that recognition would be settled in the collective-bargaining agreement.

Chevere mailed a complete draft agreement to Vizcarra on 23 December. Apart from the modifications proposed by the Respondent, the contractual terms were identical to those in the S.I.U.-P.R.D. labor agreement, including a standard recognition clause. Vizcarra wrote to Respondent's counsel once again on 7 January seeking information about Respondent's current negotiations with the U.G.T. so she could compare S.I.U.'s bargaining position with those proposed for the Ponce employees. Chevere mailed the requested material to her on 16 January and included a copy of an authorization card that the U.G.T. organizer recently had attempted to distribute to Camuy employees. In a cover letter accompanying these materials, Chevere confirmed a previous telephone conversation with Vizcarra in which he offered to discuss the proposals over the weekend. Chevere explained that Respondent was interested in reaching an agreement with the Union as soon as possible, preferably before the employees' temporary contracts expired on 24 January.

On 17 January, Hernandez, Vizcarra, Chevere, and Torruella participated in a conference call to discuss arrangements for forthcoming negotiations. Attorney Torruella testified that during this exchange he mentioned that Respondent had heard rumors that the employees were not interested in union representation and were unwilling to attend a bargaining meeting. Chevere, whose recollection of this exchange was similar to that of Attorney Torruella's in most respects, explained that earlier in the week, a Serralles official told him that "an employee or some employees" had refused to attend the negotiations. Vizcarra insisted that such rumors were false and said that if there were any truth to them she would not continue bargaining. She assured Respondent's counsel that employee representatives would attend the negotiations.

Either during this conversation or possibly a few days later, Hernandez asked Attorney Torruella if he could enter the plant to speak to the employees as S.I.U. agents had done under P.R.D. management.[5] Torruella denied this request, relying on the fact that Respondent had refused to allow the U.G.T. to enter the plant and that no collective-bargaining agreement was yet in place to justify such visitation rights.

On Monday, 20 January, during extended telephone calls, Vizcarra and Chevere discussed the contract terms, clause by clause, omitting only matters such as the recognition clause, about which there was no dispute. Intermittently, Chevere conferred with Attorney Torruella or the Respondent's vice president about specific language to be included.[6] Vizcarra testified that she insisted that

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[4] Attorney Torruella explained that his letter had been completed in time for delivery prior to the meeting.

[5] The parties disagree about the date of Hernandez' request but not that it was made.

[6] Vizcarra believed that her protracted telephone discussions with Chevere about the terms of the proposed collective-bargaining agreement

Continued

any contract for the Camuy bargaining unit must contain the same benefits offered to the Ponce employees. She also disagreed with the Respondent's position on a no-strike clause. After an exchange lasting some 4 hours, the attorneys reached tentative agreement on most items with only a few matters left unresolved. The parties scheduled 22 January to meet with two employee representatives present in the hope of concluding an agreement.

E. *The Respondent Asserts Doubts as to the Union's Majority*

The January 22 meeting never came to pass; it was canceled at the Union's request when Hernandez was unable to persuade any employee to attend.

Hernandez testified that he and Marcos Cordero, the union's service representative, traveled to Camuy on 21 January in order to personally invite S.I.U. delegates, Juan Alvarez and Jorge Gonzalez, to the bargaining meeting set for the following day. According to Hernandez, as employees left the plant for their lunchbreak, they greeted the union agents but seemed fearful when Alvarez approached. Over lunch, Hernandez told Alvarez of the bargaining meeting scheduled for the next day. Alvarez purportedly asked them if Seralles had recognized the Union and on learning that recognition had not been granted, said "that many of his workers were traumatized because of what had been done to them." Hernandez further testified that Alvarez feared reprisals by Serralles and asked them to obtain written recognition before he or Gonzalez attended a bargaining meeting. Cordero testified that Alvarez simply declined the invitation to attend the 22 January meeting by saying "he was not sure he would go since they were in a probationary period and it would be difficult for them to attend a meeting with us."

Alvarez, offering a wholly different reason for declining to attend the bargaining session, testified that he told the union officials his health prevented him from participating.[7] Relying on his credible testimony, I find it unlikely that Alvarez would have insisted on formal recognition as a prerequisite to attending the negotiations because he had decided to withdraw from union activities for personal reasons.[8] Moreover, if Alvarez had asked for some guarantee of recognition, Hernandez could have pointed to the unchallenged recognition clause in the collective-bargaining agreement which lacked little more than employee ratification to become final and binding.

Hernandez stated that he informed Vizcarra later that day that the employees were afraid to attend the negotiations unless Serralles recognized the S.I.U. On Vizcarra's advice, Hernandez then telephoned Chevere notifying him that the meeting on the following day would have to be canceled; that in fear of losing their jobs, the employees did not want to attend until they were certain that Respondent had granted recognition. Chevere reportedly replied that working with antagonistic employees was difficult and that he would communicate with his superiors to see what could be done.

Chevere offered a somewhat different account of his telephone call with Hernandez. Recalling the exact word that Hernandez used, Chevere stated that the union president told him that the employees were "trancados"; that is, "dead set" against coming to the meeting. When Chevere assured Hernandez that Respondent had authorized the employees to attend the meeting with pay, Hernandez replied "as a responsible union leader, I can do no more, if they have no interest." Attorney Torruella also testified to a similar telephone call with Hernandez who repeated that the employees did not want to come to a bargaining session and did not want to get involved. Neither attorney indicated that Hernandez specifically referred to a problem with recognition or the employees' insecurity about their jobs.[9]

Chevere testified without dispute that, later the same day, he was privy to a telephone conversation in which Alberto Torruella told Vizcarra that the employees' refusal to attend the bargaining meeting confirmed all the rumors management had received about employee dissatisfaction with the Union. Consequently, he advised her that Respondent had formed a good-faith doubt that the S.I.U. had the support of a majority of the Camuy employees. At this time, the work force consisted of 55 employees.

Both Attorneys Vizcarra and Torruella recalled an encounter several days later while they were working on another legal matter. In Torruella's opinion Vizcarra appeared frustrated that the Camuy employees refused to be involved in negotiations. Vizcarra recalled, however, that her comments to Torruella were far more adversarial in nature. She insisted that Respondent had to recognize and bargain with the Union and that by refusing to allow Hernandez entry to the plant, Respondent was making it very difficult to reach any agreement. Attorney Torruella then asserted that the Respondent had information that the S.I.U. had lost majority support. The Union did not request recognition or further bargaining after this date.

On 24 January the Respondent offered the Camuy employees regular employment contracts starting with a 90-day probationary period and, unilaterally instituted other terms and conditions of employment.[10]

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occurred on Friday, 17 January. Since she did not receive the U.G.T. materials until 16 January, it seems more likely that their lengthy exchange occurred on 20 January after Vizcarra had time over the weekend to review them.

[7] Alvarez explained at the hearing that the union agents knew he suffered from epilepsy.

[8] Although Alvarez spoke in Spanish, a language with which I am unfamiliar, I nevertheless found that he communicated much by way of demeanor. He was a sincere and unassuming witness who I am convinced would not distort the facts as he knew them.

[9] Hernandez may have alluded to his belief that the employees were fearful for this would explain why Chevere mentioned that the Respondent was willing to subsidize the delegates' attendance at the bargaining meeting.

[10] On 23 December Respondent hired a number of employees to staff a second bottling line in response to increased Christmas sales. Many of these workers were laid off on 27 January.

F. *The Respondent's Grounds for Withdrawing Recognition*

In marshaling evidence to show the objective grounds on which it relied to form a good-faith doubt of the Union's majority, the Respondent called on four employees, each of whom testified about his own and his coworkers' attitude toward the Union. Jose Gonzalez was a pivotal witness in this regard for he was the only employee to testify about his direct contacts with both Union and management.

Apparently, because Gonzalez had been elected by his peers to serve as one of four union delegates since October 1985, his fellow workers came to him with their complaints. Thus, he testified that when Serralles reopened the Camuy plant, employees told him "they did not want to be members of any union." In mid-December, after a U.G.T. representative from Ponce began to distribute authorization cards, the employees commented that "they did not want U.G.T. or S.I.U. because they were in temporary employment and in a new industry . . . they did not want to get involved with any labor union." Gonzalez showed one of the U.G.T. leaflets to his supervisor, Jaime Ayende, and to plant manager, Lorenzo Esteva, telling them that he no longer wished to be involved with the Union and that other employees also were "negative" to any union.

Gonzalez also testified about several telephone conversations with Hernandez. The first call came to his home some time in mid-December. On this occasion, Hernandez told him that the Respondent was going to recognize or negotiate with the Union. Gonzalez advised the union president that his coworkers were "negative" or "skeptical" toward the Union and assured Hernandez that these attitudes were not the result of pressure from the Respondent. Attorney Vizcarra then took the telephone and, in essence, asked Gonzalez how the employees could be so disloyal after the Union had worked so effectively for them and obtained severance benefits from the P.R.D. Gonzalez merely repeated what he had told Hernandez; that the employees were negative.

On a subsequent occasion, Hernandez contacted him at the plant, reaching him on a telephone in the plant manager's office. Esteva personally summoned Gonzalez to his office to take the call. When Hernandez invited him to a bargaining meeting to be held with Serralles, Gonzalez replied that "people were negative and nobody was willing to go to San Juan." Afterwards, Gonzalez reported this conversation to Esteva who assured him that the Company had authorized and would pay for the employees' attendance at the meeting.[11]

Three other employees, Angel Cortes, Rafael Arce, and Isidro Rivera,[12] testified that they and their fellow employees were dissatisfied with S.I.U. representation even before P.R.D. was sold, principally because they believed the Union was too slow in resolving their problems.[13] They also asserted that neither they nor their fellow workers wanted to be represented by any union after Serralles reopened the company facility.

Specifically, Cortes, an employee with 21 years' experience working for P.R.D., stated that when operations started under Serralles "since we were new there . . . . all of the employees said that we would not belong to any union." Although Cortes said that many of the employees complained about union representation, he could not recall any particular problem. Rivera also heard "plenty" of his fellow employees comment that they did not want to be represented by any union. Both Cortes and Rivera were certain they had not shared their views with any member of management.

Arce too, said that "several" employees did not want union representation. In fact, Arce stated that he could think of no employee who favored the Union or lauded its accomplishments. When asked why the employees were dissatisfied, Arce explained that the employees had problems that the Union could not solve and, therefore, they preferred to "remain without a union."

Arce was the only employee besides Gonzalez who testified that he aired his antiunion views directly with members of management. He stated that he spoke with his foreman and supervisor, but not with Esteva. In addition, both Arce and Rivera testified that their fellow workers expressed unfavorable opinions about the Union at times and places in the plant where they could have been overheard by management. However, I do not find Rivera's testimony reliable in this regard for he avowed in his pretrial affidavit that he knew of no instance when his or other employees' remarks reached management. His attempts to reconcile these contradictory statements at the hearing were unpersuasive.

Respondent presented one other witness, Camuy Plant Manager Esteva, who testified that he had heard either directly or indirectly from most of the Camuy workers that they did not want representation.

Esteva named eight employees who told him that either they were "dissatisfied with the S.I.U." or "were not interested in any Union." Two of the men who Esteva identified, Rivera and Arce, expressly stated, however, that they did not speak about such matters with Esteva. When asked if he could recall other employees who made similar comments to him, Esteva replied that he would have to name most of the employees in the plant. Esteva added that three of his supervisors also conveyed the employees' antiunion feelings to him and that he, in turn, transmitted such information to his superiors in Ponce.[14]

To refute Esteva's claims, the General Counsel called on Alvarez, the chief employee delegate, who testified that his coworkers' views toward the Union fell into three categories: some 20 to 25 employees told him they were not interested in being represented by any union; another 8 to 10 were indifferent about union representation; a third group of some 15 to 20 employees indicated that they preferred to withhold any comment that might affect their jobs. Although Alvarez did not specify into which category he fit, he acknowledged that he and other employees believed that the S.I.U. had represented the Camuy employees adequately.

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[11] Although Hernandez did not remember calling Gonzalez at the plant, Gonzalez' and Esteva's testimony about this communication was too specific to be discounted.

[12] In accordance with Spanish custom, the metronymic surname of each employee also appears in the transcript.

[13] One employee also mentioned some difficulty in obtaining a medical plan, but admitted that the Union resolved this matter in 1978.

[14] In lieu of presenting testimony from two or three additional employees, Respondent offered to stipulate that their testimony would be cumulative to that of the four employees whom it already had called. The record does not clearly show whether the other parties agreed to this stipulation. Therefore, I can make no finding that this stipulation was admitted as evidence.

Soon after the Respondent had withdrawn recognition from the Union, Hernandez prepared a letter addressed to Alvarez and Gonzalez containing the following relevant passages:

> As you know, we made many efforts to continue representing you and to negotiate a collective bargaining agreement that would give you protection and job security. I assured you that you would not have any problems with your new employer, Destileria Serralles, Inc., and that we could guarantee you a reasonable collective-bargaining agreement.
>
> By the same token, I told you that I would obtain permission for one of you and another employee to attend the negotiations without any problem. We are surprised that employees who have enjoyed the benefits of their labor organization for years have reacted this way, not realizing that it is preferable to be represented by a union than to be defenseless and without any kind of representation. . . .
>
> I hope that you will reconsider it and that you will do it in time, since really, even though we are willing to represent you, I don't think you should make the Union incur additional expenses if you are not interested at all.

Hernandez concluded this message by urging the employees to sign and return a union authorization form printed at the bottom of the letter.

Cordero hand-delivered 50 copies of this letter to Alvarez who attempted unsuccessfully to distribute them to some of his coworkers. When these efforts failed, Alvarez left the copies inside the plant where the employees had access to them. He subsequently retrieved the copies finding that none had been taken. No authorization forms were returned to the Union.

Nevertheless, the union agents remained in contact with the Serralles employees and after a complaint in this case issued, wrote to them outlining the allegations therein.[15]

III. DISCUSSION AND CONCLUSIONS

A. *The Respondent Granted De Facto Recognition to the Union*

The complaint, which is framed in the alternative, first alleges that at no time did the Respondent accede to the Union's repeated requests for recognition. In determining the merits of this allegation, the parties do not dispute the applicable legal principles. Thus, they agree that *NLRB v. Burns Security Services*, 406 U.S. 272 (1972), the definitive statement of a successor's legal obligation to the bargaining representative of its predecessor employees, requires that a new employer must bargain with the union "when it selects as its work force the employees of the previous employer," but it is not bound by the terms of the predecessor's labor agreement. Id. at 278, 281-282.[16] The bargaining duty arises when the Union has made a demand for recognition and a representative complement composed of a majority of the predecessor's employees has been hired. *Fall River Dyeing Corp.*, 272 NLRB 839, 840 (1984), enfd. 775 F.2d 425 (1st Cir. 1985).

Respondent admits that it was a successor to P.R.D. and that a representative complement of S.I.U. employees was working at the Camuy plant by 13 November 1985. Accordingly, Respondent acknowledges that its duty to recognize and bargain with the Union was fixed on that date.

The General Counsel contends that the Respondent disregarded its legal duty and consistently ignored the Union's repeated requests for recognition. Counsel further submits that the meeting on 8 November may not be regarded as valid evidence of recognition for Respondent's letter to the Union on that date expressly restricted the purpose of the meeting. The Respondent states to the contrary that its conduct at the 8 November meeting demonstrates that it implicitly recognized the Union and commenced bargaining.

The Board has no prescribed formula governing the manner in which a Respondent must grant recognition, and, in appropriate circumstances, will find that an employer's deeds speak louder than words as evidence of recognition. For example, in *Harley-Davidson Co.*, 273 NLRB 1531 (1985), the employer refused to acknowledge that the union represented a majority of employees in the bargaining unit and did not explicitly grant recognition. However, it did agree to bargain. The Board concluded that "by conceding its obligation as a successor and agreeing to negotiate the Respondent voluntarily recognized the Union." Ibid.

Similarly, in *Landmark International Trucks*, 257 NLRB 1375, 1379 (1981), vacated and remanded on other grounds 699 F.2d 815 (6th Cir. 1983), the administrative law judge ruled, with Board approval, that by meeting with the union that had requested recognition and bargaining and agreeing to a date for subsequent meetings, the employer indicated "a recognition of the Union . . . [and] demonstrated an undertaking . . . to negotiate with the Union."

These precedents compel the conclusion that by its behavior the Respondent granted de facto recognition to the Union at the 8 November meeting. On that occasion, the Respondent presented specific proposals to modify the S.I.U.'s former labor agreement, agreed to prepare a written draft contract to be used at subsequent meetings and discussed other matters affecting the manner in which negotiations would be conducted. By these actions, which cannot be viewed as anything less than bargaining, Respondent waived the qualifications expressed in its 8 November letter. As *Harley-Davidson* and *Landmark* make clear, when, as here, a respondent engages in even the preliminary steps of collective bargaining, recognition is assumed.[17]

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[15] Respondent points out that Hernandez omitted informing the employees of an allegation that Serralles had refused to recognize the Union. I do not regard the failure to include every allegation in the complaint as a serious omission. It appears that the Union President simply wanted to communicate some of the complaint's essential elements.

[16] Thus, as a matter of law, the S.I.U.-P.R.D. contract could not bind Respondent to the substantive terms of the predecessor's labor agreement.

Respondent's subsequent actions were consistent with and lend weight to the conclusion that it impliedly recognized the Union on 8 November. As promised, Respondent prepared the draft contract and forwarded it to the Union on 23 December; provided requested information to the Union without protest or hesitation on 7 January; offered to negotiate over a weekend, and engaged in earnest bargaining on 20 January, ultimately reaching tentative agreement on that date about most terms of a revised contract. The recognition clause in the S.I.U.-P.R.D. agreement was never disputed and was preserved intact. Respondent indicated that it was willing to execute the agreement on 22 January, regarding the presence of employee representatives at this final session as a formality.

On these facts, I conclude that the Respondent recognized the Union on 8 November 1985, and continued bargaining with the S.I.U. until on or about 22 January. Accordingly, the allegation that the Respondent violated Section 8(a)(5) and (1) of the Act by unlawfully refusing to recognize and bargain with the Union shall be dismissed.

B. *Respondent withdrew Recognition without Sufficient Objective Criteria*

By impliedly recognizing the Union, Respondent acknowledged that the S.I.U. presumptively represented a majority of its employees. See *Harley-Davidson Co.*, supra at 1535. Respondent's subsequent challenge to that presumption as a basis for withdrawing recognition must be assessed in accordance with well-established precedent that holds that after the certification year, an employer may withdraw recognition of an incumbent union at any time if it affirmatively establishes either that (1) the union has lost majority support, or (2) had a reasonably grounded good-faith doubt based on objective, verifiable considerations, untainted by unfair labor practices, that the Union no longer enjoyed majority status. Id. at 1531;[18] *Terrell Machine Co.*, 173 NLRB 1480 (1969), enfd. 427 F.2d 1088 (4th Cir. 1970).

The General Counsel maintains that by withholding recognition from the Union, denying the union agents access to the plant, and retaining employees under temporary contracts, the Respondent instilled fear in the workers causing them to detach themselves from the Union to appease their new employer. Consequently, counsel contends that Respondent is precluded from withdrawing recognition from the S.I.U. because its doubt of majority support was not asserted in good faith or raised in an atmosphere untainted by unfair labor practices.

The record leaves little doubt, and the General Counsel correctly observes, that the employees were fearful about the permanence of their employment. Alvarez may have expressed it best when he said that the employees were traumatized by what happened to them. But P.R.D. was as responsible for that trauma as Serralles. Without any formal notice, P.R.D. abruptly closed its facilities and discharged the entire work force. Although the Union succeeded in negotiating severance benefits for the discharged employees, it was unable to prevent the plant's closure and the Employer's exodus to the United States. After Serralles resumed operations at Camuy, the work force was reduced by more than 50 percent. Surely some employees feared that the Union could not prevent a future closure. It is in this context that the employees' ambivalence toward the Union must be examined. In its 4 February letter to the employees, the Union implicitly acknowledged the employees' apprehension and attempted to allay their fears by assuring them that the Respondent was cooperating in the bargaining process. At least at that time, the Union did not accuse the Respondent of bad faith.

Further, and contrary to the General Counsel's contention, Serralles did not unlawfully withhold recognition. As discussed above, Respondent constructively recognized and began to bargain with the Union as early as 8 November. It is true that Respondent did not extend recognition in an overt manner. Nevertheless, the employees had reason to know that their employer had agreed to bargain. Hernandez told union delegate Gonzalez as much. If the employees were unaware of the Respondent's willing participation in the collective-bargaining process, perhaps the responsibility lay in part with the Union's failure to better inform them.

The General Counsel and Charging Party submit that the Union's ability to reach and reassure the employees was impeded by Respondent's refusal to admit the S.I.U. agents into the plant. Clearly, Respondent could have authorized such a visit; the reasons offered to justify the Union's exclusion were meritless. By the same token, Respondent had no legal duty to grant access and did not violate the Act by refusing entry.[19]

Moreover, Respondent did not interfere in any other way with the Union's efforts to contact the workers. The record shows that Hernandez and Cordero met freely with the employees just outside the plant on a few occasions; the plant manager made his office available to Gonzalez to speak by phone with the union president, and Alvarez apparently did not hesitate to leave union literature in the plant where employees had access to it. Thus, even if Respondent's refusal to admit the union representatives into the plant was unreasonable, that act alone could not have affected "the Union's status, cause employee disaffection or improperly affect the bargaining relationship itself." *Hotel & Restaurant Employees Local 19 (Burger Pits) v. NLRB*, 785 F.2d 796, 800 (9th Cir. 1986).

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[17] See *General Electric Co.*, 173 NLRB 253, 257 (1968), in which the Board ruled that preliminary arrangements for negotiations are mandatory subjects of bargaining and "are just as much a part of the process of collective bargaining as negotiations over wages, hours, etc."

[18] *Harley-Davidson* overrules prior case law that required a successor employer to bargain for a reasonable time even it alleged a good faith doubt of the union's majority support.

[19] Here, unlike the situation described in *Triangle Plastics*, 191 NLRB 347 (1971), denial of access to the plant did not prevent the S.I.U. agents from effectively serving the employees in collective bargaining.

The General Counsel relies on Alberto Torruella's 15 October letter to a credit institution as proof that Respondent had decided to hire 65 employees for the Camuy facility. From this, counsel reasons that Respondent was committed to operating the Camuy facility permanently, and, therefore, had no legitimate excuse for hiring workers under temporary employment contracts other than to breed fear and underscore their dependence on a new employer whose disposition toward the Union was unknown. Counsel attaches more significance and finality to this letter than is warranted. It is true that Torruella expressed an intent to open the Camuy plant. However, he also projected a work force composed of former P.R.D. employees from both Arecibo and Camuy. In fact, the Camuy facility reopened with a work force composed solely of former S.I.U. members. This departure from the plan set forth in Torruella's letter, supports Respondent's argument that decisions about Camuy's future were not cast in concrete at the time that operations began there.

The 15 October letter did not expressly state that closure was one of the options being considered for the Camuy plant. However, the letter does refer to future consolidation of operations. Further, as Torruella testified and as Plant Manager Esteva confirmed, the Ponce facilities were large enough to house the Camuy bottling operation. Therefore, transferring portions of the Camuy enterprise to Ponce was not out of the question. In fact, Esteva spontaneously volunteered that Respondent had experimented with performing certain bottling operations at Ponce that traditionally were accomplished at Camuy. Respondent abandoned the experiment after determining that these functions could be performed more efficiently at Camuy.

Torruella and Esteva agreed that Respondent decided to start production at Camuy on a trial basis after finding that the inventory there was low.[20] Under these circumstances, offering temporary employment contracts to employees whose skills were then unknown, does not seem to be an aberrant business decision.

The 15 October letter also refers to the possibility that the U.G.T. might seek to represent the Camuy employees. Thus, Respondent's concern about competing claims between the U.G.T. and S.I.U. was not bogus or recently invented to serve its ends in this litigation. Whether the U.G.T. would have prevailed had it pursued representational rights at Camuy is an altogether different question than whether such a claim would be asserted.

Having determined that the Respondent did not withdraw recognition in bad faith, a final question remains whether Respondent presented sufficient objective evidence that a majority of the 55 employees in the unit no longer desired union representation.[21]

In rebutting the Union's presumption of continued majority support, an employer bears a heavy burden of presenting "clear, cogent and convincing evidence" that indicates that a union's support has declined to a minority. *Hotel & Restaurant Employees Local 19 v. NLRB*, supra at 799. The Respondent has failed to meet its considerable burden.

In evaluating the numerous factors that Respondent has proffered to justify belief in a union's loss of majority support, the Board regards employee statements made directly to the employer as particularly probative. See *Glosser Bros.*, 271 NLRB 710, 715 (1984). In the present case, Respondent predicates its doubt on the testimony of four employees and the Camuy plant manager. Careful scrutiny reveals that their statements are far from clear, convincing, or cogent.

Only two of the four employee witnesses acknowledge speaking directly with managerial personnel. Esteva recalled the names of no more than eight individuals with whom he spoke directly. Of these eight, two denied having talked to him. Thus, in a unit of 55 employees, Respondent's evidence, viewed in its best light, establishes that a small minority, six to eight employees in all, spoke individually and directly to management officials about their union sentiments.

Through the testimony of a few witnesses, however, Respondent attempted to prove that many other employees rejected union representation. Thus, Gonzalez testified that he informed Esteva that other employees joined in his decision to reject union representation, but he failed to discuss specific incidents or identify a single employee who shared his view. The Board does not favor such testimony. First, such comments are hearsay. See *Roza Watch Corp.*, 249 NLRB 284, 287 (1980). In addition, the Board has observed that employees' statements "which purport to convey sentiments of employees other than themselves" might lead to a few antiunion employees providing "the basis for withdrawal of recognition when in fact there is actually an insufficient basis for doubting the Union's continued majority support." *Dalewood Rehabilitation Hospital*, 224 NLRB 1618, 1619–1620 (1976).

J & J Drainage Products Co., 269 NLRB 1163 (1984), is a departure from the Board's traditional rejection of such testimony. In that case, the Board adopted the administrative law judge's ruling that that an employer could rely in part on the comments of one of two union stewards who said that several of the 32 unit employees were disinterested in the union. Id. at 1171. I do not find that Gonzalez' remarks about the views of other employees deserves the same deference. Gonzalez, one of four delegates in a 55-man unit, attributed a single, uniform position to the unidentified, unenumerated employees for whom he purportedly spoke. Consequently, I had little confidence that he accurately presented the diversity of opinion that invariably exists in any group of 55 individuals. Alvarez, the main union delegate, testified in a more reliable manner, categorizing his fellow workers' views into three separate schools of thought. If Alvarez' estimates were correct, then less than a majority of employees opposed union representation.

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[20] The General counsel suggests that Torruella and Esteva contradicted each other about when the Respondent determined that the inventory was depleted. In fact, no contradiction exists. Both men agreed that production started at Camuy in November, after Respondent determined that the inventory had to be replenished. Esteva explained that a second bottling line was opened at Camuy when increased sales required even greater production immediately prior to Christmas. In other words, I construe their testimony to mean that the inventory was insufficient in November and continued to fall short of demand, particularly as sales increased during the peak holiday season.

[21] The Respondent did not attempt to prove that the Union did not actually represent a majority of unit employees.

Supervisory reports to Esteva, involving double hearsay problems, were equally unreliable evidence on which to premise doubt of the Union's continued majority. As the Board found in *Thomas Industries*, 255 NLRB 646, 647 (1981), "supervisors' subjective estimates that a majority of the employees did not want a union add little, if anything, to the probative force of the employees' statements which constituted the only concrete evidence on which the supervisors' estimates were based."

Esteva's testimony regarding the alleged antiunion attitudes of most of the employees in the plant is equally troublesome. Like Gonzalez, Esteva offered no details. Instead, he stated generally that employees were "dissatisfied with the S.I.U." or "were not interested in any union." Without a more precise description of what individual employees may have said, it is impossible to determine from Esteva's comments whether, or how many, employees actually expressed nothing more than disenchantment with the Union's past performance or a disinclination to be active union members, as distinguished from a current desire to be rid of union representation. Thus, by invoking and relying on such conclusory testimony, Respondent failed to clearly delineate which employees may have unequivocally repudiated the Union. See *Thomas Industries*, supra at 647;[22] *Dalewood Rehabilitation Hospital*, supra.

The Respondent also based its doubt of continued majority support on the Union's failure to persuade any employees to attend the 22 January bargaining meeting. The Board consistently has rejected evidence of employee disinterest in union activity as an accurate index of the majority's union sentiments. Employee attendance at union meetings, like membership in or financial support of a union, does not necessarily signify that a majority of the work force opposes union representation.[23] Consequently, the Respondent may not rely on the employees' unwillingness to appear at negotiations as objective evidence that justifies withdrawing recognition.

In sum, Respondent has not adduced concrete and unequivocal expressions of antiunion sentiment from a sufficient number of employees or managerial personnel to support a reasonable doubt that the Union no longer enjoyed majority support on or about 22 January 1986. Id. at 653. Accordingly, the Respondent's withdrawal of recognition from the Union on that date was unwarranted and violates Section 8(a)(1) and (5) of the Act.

CONCLUSIONS OF LAW

1. Respondent Destileria Serralles, Inc., is engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

2. The S.I.U. is a labor organization within the meaning of Section 2(5) of the Act.

3. All production and maintenance employees including mechanics, messengers, and truckdrivers employed by the Respondent at its redistilling and bottling plant in Camuy, Puerto Rico, excluding all other employees, executive, administrative, and professional personnel, the chemist, the shipping and receiving clerks, office and plant clerical employees, foremen, guards, and supervisors, constitute a unit appropriate for the purpose of collective bargaining within the meaning of Section 9(b) of the Act.

4. At all times material, the Union has been and is now the exclusive representative of all employees in the aforesaid appropriate unit for the purpose of collective bargaining within the meaning of Section 9(a) of the Act.

5. On 8 November 1985, the Respondent recognized the Union and bargained with it from that date until 22 January 1986.

6. By withdrawing recognition and refusing to bargain with the Union as the exclusive bargaining representative of the employees in the above-described appropriate unit, since on or about 22 January 1986, Respondent violated Section 8(a)(5) and (1) of the Act.

7. The aforesaid unfair labor practices affect commerce within the meaning of Section 2(6) and (7) of the Act.

THE REMEDY

Having found the above-cited violation of the Act, I shall recommend that Respondent be required to cease and desist therefrom. Affirmatively, Respondent will be required to recognize and, on request, bargain with the Union and post an appropriate notice.

The General Counsel submits that a visitatorial clause is required in this case so that the Board may engage in discovery to properly monitor Respondent's compliance with the Board's Order. Based upon all of the circumstances in this case, and particularly on my finding that the Respondent did not act in bad faith, I do not agree that a visitatorial provision is necessary. Accordingly, the General Counsel's motion to include such a provision in the Order is denied.

On these findings of fact and conclusions of law, and on the entire record in this proceeding, I issue the following recommended[24]

ORDER

The Respondent, Destileria Serralles, Inc., Camuy, Puerto, Rico, its officers, agents, successors, and assigns, shall

1. Cease and desist from

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[22] The vagueness of Esteva's reports about the employees' antiunion attitudes may explain why the Respondent discounted them and remained willing to execute a collective-bargaining agreement with the Union until 21 January, just 1 day before it withdrew recognition.

[23] See, e.g., *Cut & Curl*, 277 NLRB 1869, 1873 (1977); *Orion Corp.*, 210 NLRB 633 (1974), enfd. 515 F.2d 81 (5th Cir. 1975).

[24] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

(a) Refusing to recognize and bargain collectively with the S.I.U. de Puerto Ricco, Caribe & Latin America affiliated with Seafarers International Union of North America, AFL-CIO as the collective-bargaining representative of its employees in the following appropriate unit:

> All production and maintenance employees including mechanics, messengers, and truckdrivers employed by the Respondent at its redistilling and bottling plant in Camuy, Puerto Rico, excluding all other employees, executive, administrative and professional personnel, the chemist, the shipping and receiving clerks, office and plant clerical employees, foremen, guards, and supervisors as defined in the Act.

(b) In any like or related manner interfering with, restraining, or coercing employees in the exercise of their Section 7 rights.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) On request, bargain collectively with the S.I.U. de Puerto Rico, Caribe & Latin-America affiliated with Seafarers International Union of North America, AFL-CIO as the exclusive collective-bargaining representative of its employees in the above-described unit and, if an agreement is reached, embody that agreement in a signed contract. Post at its Camuy, Puerto Rico facilities, copies of the attached notice marked "Appendix."[25] Copies of said notice on forms provided by the Regional Director for Region 24 of the National Labor Relations Board, after being signed by Respondent's representative, shall be posted by it immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by Respondent to ensure that the notices are not altered, defaced, or covered by any other material.

(b) Notify the Regional Director in writing within 20 days from the date of this Order what steps have been taken to comply.

IT IS FURTHER RECOMMENDED that allegations of the complaint that allege unfair labor practices not specifically found in this decision be dismissed.

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

Section 7 of the Act gives employees these rights.

To organize
To form, join, or assist any union
To bargain collectively through representatives of their own choice
To act together for other mutual aid or protection
To choose not to engage in any of these protected concerted activities.

WE WILL NOT refuse to recognize and bargain collectively with the S.I.U. de Puerto Rico, Caribe & Latin-America affiliated with Seafarers International Union of North America, AFL-CIO as the exclusive representative in the bargaining unit described below.

WE WILL recognize and upon request bargain with the S.I.U. de Puerto Rico, Caribe & Latin-America affiliated with Seafarers International Union of North America, AFL-CIO as the exclusive representative of employees in the bargaining unit which includes:

> All production and maintenance employees including mechanics, messengers, and truckdrivers employed by Respondent at its distilling and bottling plant in Camuy, Puerto Rico, but excluding all other employees, executive, administrative and professional personnel, the chemist, the shipping and receiving clerks, office and plant clerical employees, foremen, guards, and supervisors as defined in the Act.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce our employees in the exercise of rights guaranteed under Section 7 of the Act.

WE WILL recognize and on request bargain with S.I.U. de Puerto Rico, Caribe & Latin-America affiliated with Seafarers International Union of North America, AFL-CIO as the exclusive representative of our employees in the bargaining unit described above with respect to wages, hours, and other terms and conditions of employment and, if an understanding is reached, embody such understanding in a signed agreement.

DESTILERIA SERRALLES, INC.

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[25] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

Chas. S. Winner, Inc. ***and*** **Local No. 115, a/w International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, AFL-CIO.**[1] Case 4-CA-14811

June 14, 1988

DECISION AND ORDER

By Members Johansen, Babson, and Cracraft

On September 24, 1985, Administrative Law Judge Irwin Kaplan issued the attached decision. The General Counsel filed exceptions and a supporting brief, and the Respondent filed cross-exceptions and a supporting brief.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions, cross-exceptions, and supporting briefs and has decided to affirm the judge's rulings, findings, and conclusions[2] and to adopt the recommended Order.

ORDER

The recommended Order of the administrative law judge is adopted and the complaint is dismissed.

Member Johansen, dissenting.

For the reasons set forth in my dissent in *Western Commercial Transport*, 288 NLRB 214 (1988), I find that the Respondent's employees' affiliation with Teamsters Local 115 was valid and that the Respondent violated Section 8(a)(5) and (1) of the Act by refusing to bargain with Local 115, engaging in direct dealing with the employees, instituting unilateral changes, and refusing to discuss grievances. Additionally, I find that the Respondent also violated Section 8(a)(2) and (1) of the Act, as alleged, in its statements and conduct that conveyed it was futile for employees to support Local 115, and by resuming dues checkoff on behalf of OVSC, processing a grievance filed by OVSC, and bargaining and executing a new collective-bargaining agreement with that labor organization.

On May 11, 1984, the Respondent's employees voted 17 to 12, in a unit of approximately 30,[1] to affiliate with Local 115 and immediately thereafter voted unanimously to dissolve OVSC and to transfer the latter's treasury to Local 115. The election was the culmination of an investigation into the prospects of affiliating with another labor organization that was undertaken by OVSC members and officers more than a month earlier. Employees signed petitions authorizing Local 115 to represent them and a special notice was posted 1 week in advance of the May 11 meeting and vote. The employees voted by secret ballot. Accordingly, due process safeguards were met.[2] Consistent with my dissent in *Western Commercial Transport*, supra, therefore, I find that Local 115 obtained the majority support of the Respondent's employees. Indeed, a clear majority of all unit employees favored affiliation. Moreover, I find that Local 115 retains majority support despite employees voting to disaffiliate and to revive OVSC inasmuch as the subsequent election was the direct and desired result of the Respondent's unfair labor practices.

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[1] On November 1, 1987, the Teamsters International Union was readmitted to the AFL-CIO. Accordingly, the caption has been amended to reflect that change.

[2] In agreeing with the judge that there is no continuity of representative under the circumstances herein, we rely on the Board's recent decision in *Western Commercial Transport*, 288 NLRB 214 (1988).

In his decision, the judge discussed at length the potential applicability of *Quemetco, Inc.*, 226 NLP.B 1398 (1976), to affiliation cases. The Board, at fn. 13 of *Western Commercial Transport*, supra, overruled *Quemetco* "to the extent that it holds that an amendment of certification may be granted notwithstanding evidence showing the absence of continuity of representative."

We find it unnecessary to pass on the judge's discussion of the Respondent's collateral estoppel defense contained in fn. 17 of his decision.

Member Cracraft finds it unnecessary to rely on the judge's citation of *RCA Del Caribe*, 262 NLRB 963 (1982).

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[1] All unit employees had an opportunity to vote.

[2] I reject the Respondent's contention that due process was not observed because the vote contravened a provision of the OVSC constitution requiring a two-thirds majority to amend the constitution. Whatever the ramifications of affiliation, it cannot be characterized as a constitutional amendment. Significantly, no employees complained that the constitution was disregarded or that the election was conducted improperly.

William Slack Jr., Esq. and *Judith I. Katz, Esq.*, for the General Counsel.

Steven W. Suflas, Esq. (Archer & Greiner), of Haddonfield, New Jersey, for the Respondent.

Norton Brainard, Esq., of Philadelphia, Pennsylvania, for the Charging Party.

DECISION

Statement of the Case

Irwin Kaplan, Administrative Law Judge. This case was heard on April 22, 23, and 24, 1985, in Philadelphia, Pennsylvania. The underlying charges were filed on 9 January 1985, by Local No. 115, a/w International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America (Local 115, Union, or Teamsters), and gave rise to a complaint and notice of hearing on 28 February 1985, amended at the hearing (G.C. Exh. 2), alleging that Chas. S. Winner, Inc.[1] (Respondent), engaged in certain conduct violative of Section 8(a)(5), (2), and (1) of the National Labor Relations Act (the Act).[2]

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[1] The caption appears as amended at the hearing (G.C. Exh. 2).

[2] As a result of a partial settlement at the outset of the hearing, the allegations contained in pars. 10, 11(a), 12(a), 15, and 18 of the original complaint were deleted.

289 NLRB No. 13

The essence of the outstanding allegations is that the Respondent unlawfully refused to accept the affiliation of the Organization of Vehicle Sales Counselors (OVSC) with the Teamsters by refusing to recognize and bargain with the Teamsters in violation of Section 8(a)(5) and (1) of the Act.

Further, it is alleged that Respondent independently violated Section 8(a)(5) and (1) of the Act by dealing directly with unit employees over mandatory subjects of bargaining and bypassing the Teamsters; by making certain unilateral changes in terms and conditions of employment without providing notice and giving the Teamsters an opportunity to bargain; and by refusing to discuss a discharge grievance under the then-outstanding collective-bargaining agreement with representatives of the Teamsters.

Correspondingly, it is alleged that Respondent violated Section 8(a)(2) of the Act by its continued support and recognition of the OVSC following the affiliation, as well as, by negotiating and executing a new collective-bargaining agreement with that organization.

Still further, it is alleged variously that the Respondent independently violated Section 8(a)(1) of the Act by creating the impression to employees that their union activities were under surveillance; by informing employees that it would continue to recognize and bargain only with the OVSC and, conversely, that it would never recognize the Teamsters; by other statements, acts, and conduct conveying to employees that their efforts in support of the Teamsters would be futile; by threatening to close the facility if the employees supported the Union; and by conditioning increased employee benefits on their support for the OVSC and a corresponding abandonment of the Teamsters.

The Respondent filed an answer conceding, inter alia, jurisdiction, the labor organizational status of Local 115 and the OVSC, the appropriateness of the bargaining unit, and the statutory supervisory status of the individuals so alleged. Respondent denied that it committed any unfair labor practices. Affirmatively, Respondent challenges the validity of the affiliation in question, mainly, because it assertedly resulted in a break in the "continuity of representation" and, as such, it failed to comport with the outstanding Board and court precedents.[3]

On the entire record, including my observation of the demeanor of the witnesses, and after careful consideration of the posttrial briefs,[4] I make the following

FINDINGS OF FACT

I. JURISDICTION

The Respondent is a New Jersey corporation engaged in the business of selling new and used vehicles at its sole facility, which is located in Cherry Hill, New Jersey. During the past year, Respondent, in connection with its aforenoted business operations, derived gross revenues in excess of $500,000 and purchased and received goods and materials valued in excess of $50,000 directly from points outside the State of New Jersey.

It is admitted, the record disclosed, and I find that the Respondent is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

II. LABOR ORGANIZATIONS INVOLVED

It is admitted, the record disclosed, and I find that the OVSC is a labor organization within the meaning of Section 2(5) of the Act.

It is admitted, the record disclosed, and I find that Local 115 is a labor organization within the meaning of Section 2(5) of the Act.

III. THE ALLEGED UNFAIR LABOR PRACTICES

A. *Background and Sequence of Events*

The Respondent voluntarily recognized the OVSC for a unit comprised of its new- and used-car salesmen in 1978. Since then, they have been parties to successive collective-bargaining agreements, the last of which by its terms is effective 27 March 1985 through 27 March 1989 (Jt. Exh. 2). The Teamsters first became involved around April 1984 or midterm of the previous collective-bargaining agreement, which by its terms was effective 1 September 1983 through 28 February 1985 (Jt. Exh. 3). In March or early April 1984[5] a number of Respondent's unit employees met and explored the prospects of replacing OVSC with another union as their collective-bargaining representative. Among the employees present at that meeting were the officers of OVSC: President William Francis, Secretary John Fearow, and Treasurer William Casey. A committee was formed, which included employee Leonard Baldino, to commence a search for an outside union.[6] The search for another union led to Teamsters Local 115, and meetings were conducted in April between the committee and representatives of the aforesaid Teamsters local. On 30 April, the committee informed Local Teamsters President Joe Yeoman and Business Representative Robert Henninger that a majority of Respondent's employees favored joining their organization. The Teamsters representatives informed the committee members of the mechanics necessary for union affiliation. Within the next few days virtually all of Respondent's employees signed Teamsters authorization petitions indicating their "desire" to become members of Local 115 and designating that Union as their collective-bargaining representative (Jt. Exhs. 8, 9, 10, and 11). On 2 May, employee Leonard Baldino dropped off these signed Teamsters petitions at the local union office. The following night Business Representative Henninger gave Baldino copies of a notice to post at Respondent's facility advising all the employees of a meeting and vote to be held on 11 May to determine whether to affiliate with the Teamsters (G.C. Exh. 3). The notice, which was posted about 4 May, in its entirety reads as follows:

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[3] In its posttrial brief, Respondent made some subsidiary contentions. These too have been considered and will be treated infra.

[4] Respondent's unopposed motion to correct transcript is granted.

[5] Unless otherwise specified, all dates refer to 1984.

[6] The OVSC, the incumbent Union, is an independent union with its members comprised of only Respondent's employees.

> **The Organization of Vehicle Sales Counsellors**
>
> There will be a meeting held on Friday, May 11, 1984, at the Best Western Gloucester Inn, US Route 130 & North-South Freeway, Gloucester, N.J., to vote by secret ballot on the question of whether to affiliate the Organization [OVSC] with Teamsters Union Local No. 115.
>
> The meeting will begin promptly at 7:00 PM and the election will be held from 8:00 PM until 9:00 PM to give everyone an opportunity to vote.
>
> We look forward to seeing you on May 11.

At the outset of the 11 May affiliation meeting, the employees signed a sign-in sheet indicating their presence (G.C. Exh. 12). William Francis, the OVSC president, made some preliminary remarks noting that the employees were there to vote whether they wanted to affiliate with the Teamsters. Yeoman and Henninger also attended that meeting as representatives of the Teamsters to answer any questions from Respondent's employees. The affiliation election by secret ballot took place shortly after the Teamsters representatives left the room. The question posed on the ballot was: "Should the Organization of Vehicle Sales Counsellors affiliate with Teamsters Union Local No. 115 a/w the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America?" (G.C. Exh. 14.) Employees Edward Lipman and Jerry Graham acted as observers and in connection therewith checked off the names of employees from a voting list (G.C. Exh. 13) as employees came up to the table for their ballots. The ballots were counted that night and disclosed that 17 were cast for affiliation and 12 votes were cast against.[7] (G.C. Exh. 15.) After the votes were counted, Francis invited a motion from the floor turning over the assets of OVSC to the Teamsters and that the organization be deemed dissolved. The motion was made and carried.

The next morning Respondent's general manager, Joseph Marazzi, heard talk around the dealership and learned the result of the affiliation vote. Marazzi also acknowledged receiving from OVSC President Francis a letter addressed to John Hynansky, Respondent's president, dated 14 May, formally notifying him that "A substantial majority" of OVSC voted to affiliate with the Teamsters (Jt. Exh. 7). About that same time Respondent ceased its monthly practice of deducting dues from employees' paychecks for remittance to OVSC.[8] Also, about that time, a check in the amount of approximately $3400, which represented the sum in the OVSC treasury, was turned over to the Teamsters.[9] Still in May, and approximately a week to 10 days after the affiliation vote was taken, Teamsters Local President Yeoman designated employee Leonard Baldino as the Local's representative for Respondent's employees. By letter dated 29 May, Respondent, by its counsel, Stephen Suflas, responded to the Teamsters letter of 14 May and, in essence, declined to bargain concerning the members of OVSC. (Jt. Exh. 8.) Attorney Suflas disputed the affiliation vote as legally defective because it contravened the provisions of the OVSC constitution and, also, on the basis that the purported affiliation created a break in the continuity of representation.[10] On 19 June, one of the unit employees handed Marazzi a written grievance signed by nearly all the employees in response to Respondent's refusal to recognize the Teamsters as the "successor and assign [of OVSC] under Section 7 of [the] collective-bargaining agreement."[11] (Jt. Exh. 9; Jt. Exh. 1, par. 7.) Marazzi brought up the subject of the grievance on Wednesday, 21 June, at a regularly scheduled weekly sales meeting and made arrangements for another meeting to be held with the OVSC committee to discuss that grievance. That meeting was held within a few days in the office of Thomas Hatzis, a co-owner of Respondent and its secretary-treasurer.[12] Hatzis along with co-owner and President John Hynansky and Marazzi attended this meeting on behalf of management; the employees were represented by Robert Esposito, Edward Stasny, Richard Wilson, Vincent Baldino, John Fearow, and Bill Francis, collectively, a so-called liaison committee of OVSC (Jt. Exh. 11).

Hynansky carried the bulk of the discussion and touched on a dialogue for revising three major ongoing concerns of the employees: the house deal or bone system, the phone-up system, and the pension plan.[13] A few days later Hynansky, Hatzis, and Marazzi met with the entire OVSC membership. Hynansky opened the meeting stating that it is the Company's position, under the advise of counsel, that the affiliation vote was not legal. Further, that the Company's bargaining obligation continued to be with OVSC and not the Teamsters. As such, Hynansky requested that the employees withdraw their grievance (Jt. Exh. 9) over the Company's refusal to recognize the Teamsters. During the course of that session Hynansky repeated what he had conveyed to the liaison committee a day or two earlier, to wit, that he was amenable to certain revisions in the phone-up and bone programs and the pension plan.

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[7] There were 30 unit employees then employed. Thus, only one employee failed to cast a ballot. There is no contention, nor does the record tend to show that any unit employee was denied an opportunity to cast a ballot. Further, Respondent does not dispute that the ballots were cast in secret.

[8] The record is unclear regarding the individual who authorized this action.

[9] This check was commingled with the Teamsters local's general treasury as well as any dues to be collected from Respondent's employees. The Teamsters local also assumed the liabilities of OVSC.

[10] The Respondent relies on the provision in the constitution providing for amendments (art. XIX) that requires the approval of a two-thirds vote to amend provisions in the constitution (Jt. Exh. 4, pp. 7-8).

[11] Sec. 7 of the then-outstanding collective-bargaining agreement between Respondent and OVSC provided: "This agreement shall be binding upon the Company and the Organization and their successors and assigns." (Jt. Exh. 3, p. 5.)

[12] The record is somewhat inconsistent and confusing with regard to the precise dates and events during the 6-day period commencing 18 June. However, a composite of the material facts during the aforenoted timeframe, as related herein, is essentially undisputed.

[13] A "bone" involves a car sold by a manager for which a salesman is given credit for commission purposes. The salesmen had complained about the manner in which bones were assigned. While no changes were agreed to at that meeting, the discussions thereon eventually led to, inter alia, revisions in the house deal system. Thus, after July, the bones were rotated among the salesmen. Similarly, the salesmen had complained that phone-ups were distributed unfairly. Phone-ups refer to a system by which customer phone calls are distributed. Formerly, the company telephone operator routed the call directly to the manager, who in turn, passed this call or potential sale to one of his salesmen. This system was revised (after July) by the operator bypassing the manager and paging the sales floor so that any salesman answering the page got the call. As for the pension plan, the Company later agreed to increase its contribution to 2 percent of the salesman's salary. Again, these items were only explored in June but not agreed to until July.

About 24 June, William Francis gave Marazzi a two-page document dated 23 June summarizing recent events dealing with the affiliation vote and union representation, which was signed by nearly all the employees (Jt. Exh. 11). The summary included an "understanding" that Respondent would make an "immediate response" to employee grievances dealing with phone-ups, house deals, or bones and the pension plan. The concluding paragraph in the summary document stated as follows:

> It was suggested and discussed among members attending this [liaison committee] meeting that the letter of the 18th [sic] of June be withdrawn and dialogues kept open on all issues above.

To Hynansky, the aforenoted document constituted "a withdrawal of the grievance" over the Company's failure to recognize the Teamsters. In early July, Len Baldino handed Marazzi another grievance under Section 7 of Respondent's collective-bargaining agreement with OVSC over Respondent's refusal to recognize the Teamsters as the assignee or successor to OVSC.[14] According to Hynansky, as Baldino was not a representative of OVSC, he would not discuss the grievance. By letter dated 6 July, Attorney Suflas responded to Baldino's grievance stating the Company's position as follows:

> [Y]our grievance was not properly filed and it is not arbitrable or cognizable under the terms of the Company's current collective-bargaining agreement with the Organization of Vehicle Sales Counselors [Jt. Exh. 14].

Along with the aforenoted response, Attorney Suflas provided Baldino a copy of his earlier letter to the Teamsters dated 29 May disputing the legality of the affiliation vote.

On 11 July, Hynansky once more addressed the entire sales force, at a meeting at Respondent's facility, over employee grievances and the subject of union representation. He continued to dispute the legality of the affiliation vote and expressed a willingness to deal only with representatives of OVSC over employee problems. Hynansky indicated that he was receptive to employee complaints about inequities in the house deal and phone-up programs and over the pension plan but only in a setting free of Teamsters representation. According to Hynansky, the two union situations generated much confusion and prevented any open dialogue with employees over their grievances and he therefore asked for a "vote of confidence." Hynansky left the room to permit the employees to decide by themselves whether to press for Teamsters representation or to open dialogue as OVSC members. This latter condition was clearly favored by Hynansky. However, the employees could not then agree on a course of action and decided not to conduct a vote.

On 12 July, Francis called another meeting of the OVSC membership and pressed for another election as urged by Hynansky. This was not without opposition as some employees considered the earlier affiliation vote designating the Teamsters as their bargaining representative as valid. A heated encounter between Francis and employee Edward Lipman (who opposed another election) ensued. Lipman challenged Francis' authority pointing out that he was no longer president and that OVSC no longer existed. Lipman, unable to prevent another election at that time, left the room in protest and did not vote. Len Baldino testified that, although he was with a customer at the time the vote was taken, he was told (by someone unnamed) that the employees voted 18 to 4 against Teamsters representation. In any event, it is undisputed that a majority of the employees voted against the Teamsters on that occasion. Later that day, Francis gave Hynansky a document signed by most of the employees abandoning their interest in the Teamsters (Jt. Exh. 17). The document stated as follows:

> We desire to continue a direct dialogue with the Company on all issues regarding our employment. We do not wish to be represented by Teamsters Local 115. We hereby nullify the affiliation vote taken on May 11, 1984.

On 16 July, Hynansky, Hatzis, and Marazzi met with OVSC representatives and employees Francis, Wilson, Fearow, and Stasny and reached a memorandum of understanding (Jt. Exh. 31), which contained, principally, revisions in phone-ups, house deals, and an increase in the company pension plan contribution to 2 percent of the annual salary for each employee.[15]

In mid-July and within a few days of the employee petition rejecting the Teamsters, Lipman had a conversation with Respondent's general sales manager, Richard Cusato, after work, at Shepherds Inn in Cherry Hill, New Jersey, over company reprisals as a result of employee support for that union. While it is undisputed that the subject of reprisals had come up on that occasion, the respective accounts provided by Lipman and Cusato are vastly different.

According to Lipman, Cusato told him on the occasion in question that the Company knew the identity of the Teamsters supporters and maintained a "hit list" of those supporters it intended to fire. At that time Cusato also assertedly disclosed that he had a tape of an employee meeting at the Gloucester Inn where they had explored substituting outside union representation for the OVSC and decided to search for such a union. According to Lipman, Cusato convinced him that the Company had such a tape because he recited nearly word for word statements made by him (Lipman) and employee William Casey at that meeting.

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[14] This grievance (Jt. Exh. 13) was signed by *Baldino*, as a Teamsters representative, unlike the earlier grievance (Jt. Exh. 9), which was signed by all the OVSC members. *Baldino* had been in Florida for a 2- to 3-week period in June and missed some of the events leading to withdrawal of the earlier grievance.

[15] According to *Hynansky*, the Company had intended to increase its pension contribution to only 1 percent at that meeting, but the "goodwill" generated by the employees in signing the petition on 12 July rejecting the Teamsters (Jt. Exh. 17), encouraged the Company to fatten its contribution to 2 percent. Further, in that same spirit of "good will" it decided to rescind all prior employee disciplinary warnings contained in their personnel files.

On the other hand, Cusato testified that Lipman introduced the subjects of "hit list" and "tape recordings" in the conversation. According to Cusato, Lipman was under the impression that the Company had a list of employees (Teamsters supporters) which included Lipman's name targeted for dismissal. Cusato testified that he told Lipman that he had no knowledge of any such list or tape of any union meeting and in fact, asserted, that he has no such knowledge.

Lipman also testified, without corroboration, that around mid-July, he had a brief encounter with Marazzi over his support for the Teamsters. According to Lipman, and denied by Marazzi, the latter shouted at him and Len Baldino and told them that they were not going to tell him how to run his business. Further, during this conversation Marazzi also stated "You know, the cards are stacked against you guys. You should be smart enough to know you can't win this thing." Marazzi denied that any such conversation occurred.

On another occasion, as testified by Lipman, in late August, he had a much more lengthy conversation with Marazzi, in his office, about the Union. According to Lipman, he continued to press for Teamsters recognition without any success. Marazzi assertedly told Lipman that the owners would go to any length, including selling the facility, to keep that Union out. Marazzi on the other hand places this meeting in late October and, although he acknowledged that the subject of the Union came up, his version of what transpired at that session is substantially different from the account provided by Lipman. Marazzi testified that Lipman asked him why the Company refused to recognize the Teamsters and he, in turn, responded, that OVSC has always been the recognized Union and under the advice of counsel, the Company will continue to recognize that organization. He denied, inter alia, that he told Lipman that the owner's would close down the facility or go to any length to avoid dealing with the Teamsters. According to Marazzi, most of that session was devoted to Lipman's performance as a salesperson, which assertedly was not up to par.

In mid-October, Respondent resumed deducting dues from employees' salary for OVSC. That month, Francis, as president of OVSC, called the first membership meeting since July. According to Lipman, there was a good deal of confusion over the bargaining status of OVSC given the earlier Teamsters affiliation vote, the recent resumption of dues, and the fact that the OVSC had not conducted a membership meeting since July. A motion was made from the floor and carried to elect new OVSC officers. On 24 October, an election by secret ballot was conducted whereby Lipman and Bob Wyatt were elected president and secretary, respectively, and William Casey reelected treasurer.

Within a few days, Hatzis congratulated Lipman on being elected president and asked him to name the other officers. According to Lipman, Hatzis also pressed for the minutes of the OVSC meeting. This was denied by Hatzis. While Hatzis acknowledged that he referred to the minutes, he asserted that he did so because Lipman told him that he forgot who else was elected. According to Hatzis, he made inquiries regarding the identities of the new officers because it was soon time to commence negotiating a new collective-bargaining agreement and he wanted to know the identities comprising the union negotiating team. Hatzis and Lipman continued to disagree at that time whether the Company's bargaining obligation was with OVSC or the Teamsters, with Lipman, notwithstanding his elective office with OVSC, still supporting the Teamsters.

About 12 November, Marazzi met with Lipman and Len Baldino at the Hideaway Restaurant and the question of the Company's bargaining obligation, vis-a-vis, the Teamsters or OVSC was raised once again. According to Lipman and Baldino, the former urged Marazzi to recognize and bargain with the Teamsters. Baldino testified that he was asked by Lipman to attend that meeting because he was a Teamsters representative. While there was no tangible movement on the question of union representation, Marazzi testified that Lipman told him that if the OVSC leadership was happy with the outcome of contract negotiations, it would recommend that the sales force support the organization.

By letter dated 15 November, the Teamsters served notice on Respondent of its desire to terminate the collective-bargaining agreement due to expire 28 February 1985.[16] (Jt. Exh. 25.) Respondent was then involved in ongoing related Federal court litigation contesting, inter alia, the Teamsters' standing as a "successor" or "assign" to the OVSC.[17] By letter dated 20 November, Respondent restated its position, to wit, that it was not obligated to bargain with the Teamsters and would not negotiate with that Union as representative of its salesmen. (Jt. Exh. 26.)

In early December, Marazzi wrote to Lipman, in the latter's capacity as president of OVSC, about meeting to commence negotiations with the organization for a new collective-bargaining agreement (Jt. Exh. 27). Marazzi also requested a letter from Lipman "listing all of the newly elected officers of the organization."

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[16] As noted previously, the Teamsters contends that after the affiliation, it replaced OVSC as a party to the collective-bargaining agreement by virtue of the Sec. 7 successors-and-assigns provision therein. The aforenoted notice was sent in compliance with sec. 30 of that agreement, which requires either party desiring to terminate the agreement to provide written notice at least 90 days before the expiration date. (Jt. Exh. 2.)

[17] On July 6, 1984, the Teamsters filed a demand for arbitration with the American Arbitration Association. The Respondent, on 9 August, filed a complaint in the United States District Court for the District of New Jersey to enjoin this action (Jt. Exh. 22). On 7 March 1985, District Judge Stanley S. Brotman found, inter alia, that the Company was not bound by the collective-bargaining agreement to bargain or arbitrate with the Teamsters (Jt. Exh. 23). Respondent contends that the Board is collaterally estopped from deciding the refusal-to-recognize-and-bargain allegations.

Lipman was discharged on 13 December. On 20 December, Lipman filed a grievance asserting that Marazzi discharged him without just cause in violation of the collective-bargaining agreement (Jt. Exh. 29). At that time, Lipman appeared at Respondent's facility accompanied by two Teamsters business representatives who asked Marazzi to discuss Lipman's discharge. Marazzi noted that the Company does not recognize the Teamsters and refused to discuss Lipman's grievance. A moment or two later Hatzis took the same position.[18]

In early January 1985, Richard L. Wilson was elected the new president of OVSC. Soon after, Hatzis approached Wilson with regard to commencing negotiations for a new collective-bargaining agreement.[19] The negotiations commenced about 10 January and, in all, there were five bargaining sessions culminating in the current collective-bargaining agreement effective by its terms 27 March 1985 through 27 March 1989 (Jt. Exh. 2).

B. *Discussion and Conclusions*

1. The 8(a)(5) allegations

It is undisputed that this case turns largely on whether the affiliation in question was valid. The General Counsel, in urging that the affiliation be upheld, contends, that the Board's requirements for "minimal due process" and "continuity of representation" were clearly met. In so contending, the General Counsel relies heavily on *Quemetco, Inc.*, 226 NLRB 1398 (1976), asserting that the facts in the instant case "are identical in [many] respects to those in *Quemetco.*"

Although it is undisputed that adequate notice of the meeting to vote on affiliation was provided, that all unit employees had an opportunity to cast secret ballots, and that a majority of them voted by a 17-to-12 margin in favor of affiliation, Respondent contends that the vote was nonetheless defective and fell short because, under the OVSC constitution, a two-thirds vote was required. However, Respondent's principal challenge to the validity of the affiliation relative to the allegations herein is that it assertedly created a break in the "continuity of representation." According to Respondent, the newly affiliated union (Local 115), with different officers, a substantially larger constituency of approximately 2500 members, and a different constitution and bylaws, constituted a new and separate entity that no longer ensured the employees of the continuity of their bargaining representative. As such, and in reliance on *Gulf Oil Corp.*, 135 NLRB 184 (1962), and its progeny, Respondent denies that it was obligated to recognize and bargain with the Teamsters because the attempted affiliation, in the face of contract-bar principles (at best) prematurely raised a question concerning representation (QCR).[20]

Whether under *Quemetco*, relied on by the General Counsel, which involved a refusal-to-recognize allegation under Section 8(a)(5) of the Act, or *Gulf Oil*, relied on by Respondent, which involved a motion to amend a certification under Section 9(b) of the Act (see also 29 C.F.R. 102.60 (b)), the Board, in dealing with affiliations, basically considers the same factors. See *Independent Drug Store Owners*, 211 NLRB 701 fn. 2 (1974); *Newspapers, Inc.*, 210 NLRB 8, 9 fns. 2 and 4 (1974). In either situation the newly affiliated organization is seeking the Board's imprimatur as the employees' collective-bargaining representative. *Newspapers*, supra at 10 fn. 13.

The *Quemetco* approach perceives efforts to affiliate as essentially internal union matters so long as they allow for minimal due process "with respect to registering the desires of the employees." *Quemetco*, supra at 1399. Accord: *Williamson Co.*, 244 NLRB 953, 955 (1979); see generally *New Orleans Public Service*, 237 NLRB 919 (1978). Under *Quemetco* concepts, once the employees' desires have been registered favoring affiliation, the only "legitimate interest" an employer has in "continuity of representation" is that the newly affiliated organization honor all the contractual commitments of its predecessor (the original contracting labor organization). *Quemetco*, supra at 1399.

On the other hand, in *Gulf Oil*, in which a majority of the employees of one local (Local 715) favored a merger with another local (Local 826) of the same International union and in which Local 826 expressed its willingness to honor the contractual responsibilities of Local 715, such factors were not enough to carry a motion to amend the certification. The Board rejected the motion stating as follows:

> [I]t appears that the changes contemplated by Local 715 are not simple administrative structural changes. *There is no indication that the changes are designed to insure to the employees presently represented by Local 715 a continuity of representation.* Rather it appears that the change would result in a complete loss of the identity of Local 715, and the substitution of a new and different local union as representative of the employees in the unit for which Local 715 was certified. From this, it is clear that the . . . motion constitute[s] an attempt to raise a question concern-

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[18] *Marazzi* testified without contradiction that on 26 December, he discussed *Lipman's* grievance with the grievance committee of OVSC and they agreed with the Company's action. While the grievance was not processed further, the subject of *Lipman's* discharge was incorporated in the unfair labor practice charges filed in January 1985 and subsequently alleged as a discriminatory discharge within the meaning of Sec. 8(a)(3) and (1) of the Act. As noted previously, certain of the allegations including *Lipman's* alleged discriminatory discharge were settled at the opening of the instant trial.

[19] According to *Wilson*, the affiliation vote designating the Teamsters as the employees' bargaining representative, which he supported, was valid, even during contract negotiations in 1985. However, he asserted that he reluctantly participated in those negotiations because, inter alia, the Company refused to recognize the Teamsters.

[20] The Board's contract-bar rule generally precludes an election or a QCR from being raised for 3 years or the term of the contract, whichever is shorter. *General Cable Corp.*, 139 NLRB 1123 (1962). Respondent also devoted substantial attention to a trilogy of Third Circuit decisions, where, in each case the court refused to uphold the affiliation for a failure to establish continuity of representation. See *United States Steel Corp. v. NLRB*, 457 F.2d 660 (3d Cir. 1972); *NLRB v. Bernard Gloekler North East Co.*, 540 F.2d 197 (3d Cir. 1976); *Sun Oil Co. of Pennsylvania v. NLRB*, 576 F.2d 533 (3d Cir. 1978). With due respect to the court, while I have carefully noted these cases, I am also mindful of the fact that I am bound by outstanding Board precedent unless the Supreme Court has decided the matter in question. *Iowa Beef Packers*, 144 NLRB 615, 616 (1963).

> ing representation . . . . The Act and the Board policy, however require that such matters be determined through a petition and secret ballot of the employees concerned [pp. 184–185, emphasis added].

Thus, given the aforenoted *Gulf Oil* considerations, unlike the more limited standards expressed by the Board in *Quemetco*, an employer may legitimately and successfully challenge the bargaining status of a merged or affiliated organization where the identity of the absorbed or original contractual organization has been lost or sufficiently changed. This is so, even where, as a concomitant of such change, there is a willingness to continue to honor all contractual commitments. The employer in such circumstances may refuse to recognize the new organization at least until it has timely established its majority status in a Board-conducted election. Accord: *Independent Drug Store Owners*, supra (involving an employer's refusal to recognize and bargain). However, while *Gulf Oil* considerations are still viable, *Quemetco*, which at times has been ignored, also has never been expressly overruled.[21]

Basically, I find in agreement with the General Counsel that the instant case closely resembles the circumstances presented in *Quemetco*. Thus, in both situations, inter alia, an independent labor organization, comprised solely of employees employed at a single facility, attempted to affiliate with the same International union, the Teamsters. Further, in both situations adequate notice was provided and all unit employees had an opportunity to cast secret ballots with a result favoring affiliation. Although the vote in favor of affiliation was unanimous in *Quemetco*; whereas, in the instant case, a majority voted to affiliate, the Board only requires that the proposed change be approved by a simple majority. See *Williamson Co.*, supra at 955. Because in neither case were unit employees precluded from participating in the affiliation vote, the democratic voting procedures necessary to establish minimal due process were satisfied.[22] See *NLRB v. Newspapers, Inc.*, 515 F.2d 334, 339 (5th Cir. 1975); *Insulfab Plastics*, 274 NLRB 817, 822 (1985); *Williamson Co.*, supra at 955 fn. 10. Cf. *Jasper Seating Co.*, 231 NLRB 1025, 1026 (1977) (nonmembers were not provided an adequate opportunity to vote); *Amoco IV*, supra.

Having found that minimal due-process requirements were met, the remaining question vis-a-vis a valid affiliation determination, is whether the change constituted a substantial break in the continuity of representation. Again, here, as well as in the *Quemetco*, the affiliated union clearly manifested its intention to honor all contractual commitments. As noted previously, inter alia, in *Quemetco*, the aforenoted factor is all that is necessary to satisfy this critical element. On the other hand, also as noted previously, a willingness to honor all contractual commitments falls short of satisfying the standards of *Gulf Oil*, and its progeny. Thus, the Board in treating "continuity," has taken into account such factors as whether the union has retained the same union leadership; whether it continues to administer the contract; and whether it has otherwise maintained autonomy over such matters as contract negotiations, strikes, and processing of grievances. Compare *Hamilton Tool Co.*, 190 NLRB 571, 575 (1971) (affiliation upheld where the employer was informed that the officers would be the same), *Newspapers*, supra (merger upheld where "the same people who had represented [the affected employees] prior to the merger continued to do so after the merger") with *Independent Drug Store Owners*, supra (merger not upheld where all the officers were different). See also *J. Ray McDermott & Co. v. NLRB*, 571 F.2d 850, 858 (5th Cir. 1978) (upheld where, inter alia, autonomy, dues structure, and leadership remained unchanged); *NLRB v. Pearl Bookbinding Co.*, 517 F.2d 1108, 1111-1112 (1st Cir. 1975) (merger upheld, where, inter alia, the original local continued to negotiate contracts for the affected employees as well as administer the collective-bargaining agreements to which it was a party), *New Orleans Public Service*, 237 NLRB at 921 (affiliation upheld where, inter alia, the affiliating local retained the right to negotiate its own collective-bargaining agreement and process its own grievances through the same elected individuals).

Aside from noting that *Quemetco* involved a refusal-to-recognize-and-bargain allegation; whereas, the underlying document in *Gulf Oil* was a motion to amend the certification (which difference for reasons noted previously is not deemed material), the cases cannot really be reconciled. However, while neither case has been expressly overruled, the overwhelming weight of Board and court decisions tend to either ignore *Quemetco* or favor the *Gulf Oil* approach. For example, more recently, in *Charlie Brown's*, 271 NLRB 378 (1984), the Board refused to certify a local union that won a Board-conducted election but that had its International organization impose a trusteeship on a part of the winning union. There the Board determined that the change was structural and "raise[d] a question as to continuity of representation, requiring a showing that it reflects the employees' desires." The Board, citing *Newspapers Inc.*, 210 NLRB 8 (1974), stated that employees' desires in such cases is our "primary concern." As the employees' desires with regard to the disputed change were either ignored or had not been demonstrated, the Board, set aside the election and dismissed the petition. In effect, the Board treated employees' desires as a threshold matter stating: "We therefore do not discuss the other factors that we would usually examine in determining continuity of representation." (Id. at fn. 4.)[23] As examples of such factors the Board cited *Montgomery Ward*, 188 NLRB 551 (1971), *Canton Sign Co.*, 174 NLRB 906, 908 (1969), and significantly *Gulf Oil*.[24]

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[21] See generally *Baldor Electric Co.*, 258 NLRB 1325 (1981). The Board more recently has rejected the notion that affiliations are purely internal union matters. *Amoco Production Co.*, 262 NLRB 1240 (1982), affd. 721 F.2d 150 (5th Cir. 1982) (*Amoco IV*). *Amoco*, however, is factually distinguishable from *Quemetco*, as all unit employees were not permitted an opportunity to vote. In any event the subject is not yet settled. See *NLRB v. Financial Institution Employees Local 1182) Seattle-First National Bank) v. NLRB*, 752 F.2d 356 (9th Cir. 1984), [affd. 475 U.S. 192 (1986)].

[22] I reject Respondent's contention that the affiliation vote was defective because it fell short of a two-thirds vote for any decision "to change or delete any part of the Constitution," as required by art. XIX of the OVSC constitution. Strict adherence to the constitution is not a controlling factor, where as here, all unit employees had an adequate opportunity to express their desires in secret and a clear majority voted to affiliate. See *Newspapers*, supra at 9 fn. 3; *East Dayton Tool & Die Co.*, 190 NLRB 577, 579 (1971); see also *Hamilton Tool Co.*, 190 NLRB 571, 574 fn. 8 (1971).

Noting the foregoing, I am persuaded that the Board is not yet ready to abandon *Gulf Oil* considerations. As for *Quemetco*, it is noted that even where treated approvingly, there are other factors in those cases tending to support "continuity" over and above a commitment to honor contractual obligations such as the retention of union leadership and organizational autonomy. *Williamson Co.*, supra; *New Orleans Public Service*, supra. In *Newspapers, Inc.* (relied on so heavily by the Board in *Quemetco*), the Board there noted that the "same people" continued to represent the affected employees and, in pertinent part, added as follows:

> This factor, that the employees involved are assured the *continuity of their present organization and representation, has been deemed of primary importance.* . . . See *The Hamilton Tool Co.*, 190 NLRB 571, *Gulf Oil Corporation*, 135 NLRB 184 [210 NLRB 8, 9, fn. 2, emphasis added].

Thus, while in order to establish minimal due process in affiliation-type cases, it is of primary importance to register employees' desires, the continuity principles (as noted above) have also been deemed to be of "primary importance." It is this latter element, where I find little or no support for the *Quemetco* approach.[25] I am therefore unpersuaded that reliance thereon, as urged by the General Counsel, is warranted. It follows then that the General Counsel has failed to satisfy the continuity principles by merely showing that the Teamsters had committed itself to honor all contractual obligations. Aside from the aforenoted factor, there is a dearth of evidence supporting this critical element. Indeed, if the affiliation were permitted to stand, it would have effectively obliterated all traces of the OVSC. The organization's funds and assets would have been commingled with the affiliated Teamsters, the OVSC leadership would have been fully replaced by Teamsters officers, and the OVSC union affairs would have been governed in accordance with the Teamsters' constitution and bylaws. As such, the Teamsters, for bargaining purposes, do not qualify as a successor organization, but rather constitutes a new and different union.[26] Given the contract-bar principles referred to previously (see fn. 20, supra), the Respondent was not under any obligation to deal with the Teamsters.

Accordingly, I find that the Respondent did not unlawfully refuse to recognize and bargain with the Teamsters in violation of Section 8(a)(5) and (1) of the Act and I shall recommend that this allegation be dismissed.[27]

2. The 8(a)(2) allegations

These allegations are largely predicated on the premise that the purported affiliation was valid. The OVSC had transferred its treasury and assets to the Teamsters and Respondent had stopped deducting OVSC dues from its employees' paychecks. The Teamsters, assertedly, had become the successor to OVCS's representational and contractual rights. The OVSC, assertedly, had become defunct. According to the General Counsel, the Respondent, by making it known that it would deal only with the OVSC, thereby coercively conveyed to its employees the futility of their continued support for the Teamsters. As such, it is contended that the Respondent unlawfully induced employees to abandon the Teamsters and, correspondingly, after a 5-week hiatus, it also unlawfully contributed to the resurrection of the OVSC. According to the General Counsel, the "new OVSC" as reconstituted, after the 5-week hiatus, was a separate labor organization different from its predecessor of the same name.

Other 8(a)(2) allegations involve Respondent's statements, acts, and conduct in dealing with and favoring the "new OVSC" over the Teamsters. These include the resumption of dues deductions on October 16, the processing of Lipman's discharge grievance in December, and executing a new collective-bargaining agreement with the OVSC on March 27, 1985.

In rejecting these allegations, I rely principally on my earlier finding that the purported affiliation was invalid for bargaining purposes. Thus, the General Counsel's premise is faulty. Given the finding that the affiliated Teamsters did not constitute a "successor" organization, and noting that the Teamsters prematurely demanded representational rights in the face of an outstanding collective-bargaining agreement (contract-bar principles, fn. 20 supra), the Respondent's bargaining obligation extended only to the contractual party, the OVSC. See *NLRB v. Marcus Trucking Co.*, 286 F.2d 583, 593 (2d Cir. 1961); *Westwood Import Co.*, 251 NLRB 1213, 1214 (1980); *Universal Tool & Stamping Co.*, 182 NLRB 254, 259 (1970). If, however, the OVSC had effectively dissolved itself, as contended by the General Counsel, or if a schism was involved, such would have relieved Respondent from its bargaining obligations and raised a question concerning representation to be resolved at a Board election. See *Hershey Chocolate Corp.*, 121 NLRB 901, 911 (1958); *Universal Tools*, supra. The General Counsel makes much of the 5-week hiatus (from the May 11 affiliation vote to Respondent's meeting with the OVSC liaison committee about 21 June), in contending that the OVSC resurfaced as a new and different organization. On the total state of evidence before me, I cannot agree.

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[23] This two-tier approach is not confined to *Charlie Brown's*. See, e.g., *Port Chester Nursing Home*, 269 NLRB 150 fn. 2 (1984); *F. W. Woolworth Co.*, 268 NLRB 805, 806 fn. 6 (1984); *Amoco IV*, supra.

[24] Although both *Montgomery Ward* and *Canton Sign* represent cases in which the changes in question were validated, those cases are factually distinguishable from *Quemetco*. In *Montgomery Ward*, inter alia, the same business agent continued to service the affected employees. In *Canton Sign*, inter alia, the employer first recognized and then declined to further recognize and bargain with the so-called successor union.

[25] As pointed out by Respondent in its brief, even the Ninth Circuit in *Financial Institution Employees v. NLRB*, 752 F.2d 356 (1984), called into question the Board's *Amoco IV* approach (that affiliation procedures are *not* merely internal union matters), it is noteworthy that the court went to great lengths to define and explain the continuity of representation tests in terms consistent with the non-*Quemetco* cases.

[26] I am unpersuaded that the successors and assigns provision, as urged by the General Counsel, without more, contemplates the affiliation of the OVSC with another union, particularly, as the changes herein were not merely technical but would have resulted in a complete loss of identity of the OVSC.

[27] As the instant case involved representation case issues, I have rejected Respondent's collateral estoppel defense (fn. 17 supra). See, e.g., *Port Chester Nursing Home*, supra, fn. 3. I also reject Respondent's contention that it had a good-faith doubt regarding the Teamsters majority on the basis that the employees had repudiated that organization. The record disclosed that the employees repudiated the Teamsters only after the Respondent made it clear that it would only deal with the OVSC.

It has long been noted that "mere temporary inability to function does not constitute defunctness." *Hershey Chocolate Corp.*, supra at 911. See also *Harbor Carriers of the Port of N.Y. v. NLRB*, 306 F.2d 89, 94 (2d Cir. 1962) (old organization deemed viable notwithstanding the defection of officers and the seizure of assets to the new organization). It is not surprising that the OVSC engaged in little or no formal union activity in the brief 5-week period following the affiliation vote because serious and legitimate questions were raised by the employer regarding the identity of the bargaining representative. See *Universal Tools*, supra at 260. The employer's action in bypassing the Teamsters and favoring the OVSC during this period of confusion and uncertainty appears vindicated given the finding that the Teamsters did not represent an organizational continuation of the OVSC, but rather a separate and different union.[28] After all, the OVSC was the contracting party, the incumbent union. As noted by the Board in *RCA Del Caribe*, 262 NLRB 963, 965 (1982), "unlike initial organizing situations, an employer in an existing collective-bargaining relationship cannot observe strict neutrality." This somewhat exalted position for an incumbent union is deemed to be in the interest of "industrial stability" and consistent with the purposes of the Act.

In the instant case, affiliation was opposed by a substantial minority, approximately 40 percent of the unit. Moreover, while the Employer stopped deducting OVSC dues from employees' paychecks shortly after the affiliation, there is no evidence tending to show that any OVSC member or unit employee requested this action. Further, given the rejection of the affiliation herein, it would appear that the OVSC constitution and bylaws remained intact. As for the attempted dissolution of the OVSC after the affiliation vote, this too must be assessed in an appropriate context. For example, as the Teamsters had no contractual standing as a successor or otherwise, the OVSC remained the contracting party. The employees clearly recognized the viability of that collective-bargaining agreement by filing a grievance thereunder, *albeit*, the document manifested support for the Teamsters (Jt. Exh. 9). It is also noted that none of the OVSC officers formally resigned after the affiliation or at any time during the hiatus period. They, as well as the OVSC liaison committee were accessible and amenable to discuss unit problems and to administer the contract. This in fact was done commencing about June 21, after the brief 5-week hiatus. Under all the foregoing circumstances, I cannot find that OVSC became defunct or disappeared. Rather, after a temporary interlude, when it became clear that Respondent would not deal with the Teamsters (a legitimate position in the circumstances herein), the OVSC resumed its active role as the exclusive collective-bargaining representative.

As the incumbency remained viable, the Respondent was obligated under the Act, and consistent with contract-bar principles, to continue to recognize and bargain with the OVSC. In this regard, I find, inter alia, that the Respondent properly dealt with the OVSC rather than the Teamsters over such matters as Lipman's discharge grievance.

As for the resumption of dues deductions, it is noted that the then outstanding collective-bargaining agreement provided for the deduction of dues from the wages of all salesmen who had provided written authorization. (Jt. Exh. 3, p. 2.) As noted previously, the record is devoid of any evidence tending to show that any unit employee withdrew that authorization. As the General Counsel's contention is based on the faulty premise that the Teamsters were then the exclusive bargaining agent rather than the OVSC, I find that this allegation is without merit. The General Counsel contends, for essentially the same reason, that Respondent unlawfully executed the new collective-bargaining agreement on March 27, 1985. In the absence of having the May 11 affiliation vote upheld, the Teamsters did not have any standing at the time the new agreement was negotiated and executed. The Teamsters' support was dated and not cognizable having come at a time when the old contract still had some 9 months to run and no question concerning representation could be raised. There was no evidence of fresh or timely support for the Teamsters such as new authorization cards. In these circumstances, I find that the disputed collective-bargaining agreement was lawfully executed at a time when the Teamsters' interest did not comprise a substantial rival claim and raise a question concerning representation.

In short, I find all the 8(a)(2) allegations to be without merit and I shall recommend that these allegations be dismissed in their entirety.

3. The 8(a)(1) allegations

The record disclosed that on 11 July, Hynansky told his entire sales force that he was receptive to improving the house deal, phone-up program, and pension plan but only in a setting free of Teamsters interference. Hynansky also informed his employees on that occasion that he would only recognize and bargain with the OVSC and not the Teamsters. I find, contrary to the General Counsel, that Hynansky's statements, in the circumstances of this case, did not constitute violations of Section 8(a)(1).

Although Hynansky indicated a willingness on the occasion in question to improve the house deal and phone-up programs and pension plan, the record disclosed that these matters had been under discussion for months and before the advent of the Teamsters. In any event, contrary to the General Counsel, I have already found that the Teamsters did not have any representative standing vis-a-vis the unit employees at the time in question or at any time material herein. As Respondent was not then legally obligated to bargain with the Teamsters, the General Counsel's assertion that Respondent unlawfully bypassed the Teamsters cannot be maintained.

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[28] As noted previously, Attorney *Suflas*, by letter dated May 29, notified the Teamsters that it deemed the affiliation ineffective because, inter alia, it "represent[ed] a break in the continuity of representation," (Jt. Exh. 8).

Similarly, I cannot find that Hynansky unlawfully conveyed to employees that it would be futile for them to support the Teamsters because Respondent would only deal with the OVSC. As I have previously rejected the attempted affiliation, the Teamsters did not become a successor to the OVSC for bargaining purposes. Neither the Respondent nor the OVSC ever repudiated the collective-bargaining agreement. Given the contract-bar principles discussed previously, the Teamsters could not then raise a QCR or a cognizable rival claim. In these circumstances, Hynansky was free to communicate the Company's legal position that it would only bargain with the OVSC. In short, I find that the Respondent, by Hynansky's statements, did not violate Section 8(a)(1) as alleged.

Additionally, certain statements were ascribed to General Manager Marazzi, that he conveyed to employees that it was futile for them to continue to support the Teamsters. In support thereof, the General Counsel relied principally on the testimony of Edward Lipman, a former employee. In this regard, Lipman testified that Marazzi told him on two occasions that "the cards were stacked against" employees supporting the Teamsters and that they could "never win." Further, Lipman testified that on the second of these occasions Marazzi warned him that the owners would go to any length and if need be, sell the business in order to keep the Teamsters out.

Marazzi, on the other hand, admitted only that he would not deal with the Teamsters on the advice of counsel and conveyed this position to employees including Lipman. He denied making the other statements ascribed to him by Lipman.

As noted above (Hynansky discussion), because the Teamsters were not a successor organization and could not raise a QCR at the time of Marazzi's remarks, I find that Marazzi could lawfully refuse to deal with the Teamsters and advise the employees of this position. With regard to the other remarks ascribed to Marazzi, they are disputed and rest solely on credibility.

I credit Marazzi's denials over Lipman's assertions. In doing so, I rely on demeanor as well as certain questionable actions taken by Lipman tending to cast doubt on the reliability of his testimony. For example, the record disclosed that Lipman joined nearly all the other employees in signing a document withdrawing an earlier grievance over Respondent's refusal to recognize the Teamsters (Jt. Exh. 11). According to Lipman, he signed this document without reading it or knowing what was contained thereon. Although Lipman characterized this action as a "mistake," this does little to dispel a perception of duplicity on his part. Thus I view with suspicion Lipman's later accession to the presidency of the OVSC. According to Lipman, he accepted the position so that he could turn over the reigns of the OVSC to the Teamsters. It appears to me that, however, Lipman was playing both ends against the middle in order to extract from the Company a more favorable offer for the new collective-bargaining agreement. Thus, I credit Marazzi's uncontroverted testimony that Lipman told him at a meeting on 9 November that if he were happy with the upcoming negotiations, he would recommend that the employees support the OVSC, but, if not, he would recommend that they support the Teamsters.

In these circumstances, I am unpersuaded that the General Counsel has established by credible evidence that Marazzi made the threats ascribed to him by Lipman, or that he otherwise violated Section 8(a)(1) of the Act. Accordingly, I shall recommend that these allegations be dismissed.

Still further, it is contended that General Sales Manager Cusato conveyed the impression to Lipman that the employees' activities in support of the Teamsters were under surveillance by Respondent. Lipman testified that at a meeting with Cusato in July at the Shepherd's Inn, the latter tried to dissuade him from supporting the Teamsters and referred to a "hit list" maintained by the Company of employees suspected of supporting the Teamsters. Further, Lipman testified that Cusato told him that the Company knew the identity of the employees who voted for the Teamsters in the affiliation election and that the Company had a tape of an April meeting where OVSC members discussed whether to search for an outside union. According to Lipman, while he did not believe Cusato at first, the latter proceeded to recite almost word for word what was stated at that April meeting.

As noted previously, Cusato provided a vastly different account. Aside from Cusato's denials regarding Lipman's main assertions, the former testified that it was Lipman (not Cusato) who introduced the subject of the tapes by asking Cusato whether he knew anything about it. Cusato testified that Lipman told him that employee Ed Stasny had a tape recorder at one of the meetings. According to Cusato, he had no knowledge of any "hit list" or tapes and conveyed that to Lipman.

I credit Cusato over Lipman in all material respects where their testimony is in conflict. As noted above in discussing the allegations relative to Marazzi, I found Lipman's testimony unreliable in material respects. On the other hand, I found Cusato to be responsive, forthright, and impressive. It is noted for example that Cusato did deny that the meeting in question took place or that the subject of tapes had come up. As Lipman had engaged in some questionable actions bordering on duplicity (noted previously), I find Cusato's account more likely, to wit, that Lipman introduced the subject of the tapes at the meeting. In crediting Cusato, it is also noted that the occasion in question was a chance meeting, and there is no other evidence linking Cusato with statements, acts, or conduct in violation of Section 8(a)(1). In these circumstances, I shall recommend that all allegations relative to Cusato also be dismissed as not supported by credible evidence.

CONCLUSIONS OF LAW

1. The Respondent is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

2. The OVSC and Teamsters are and have been, at all times material, labor organizations within the meaning of Section 2(5) of the Act.

3. The Respondent did not engage in the unfair labor practices alleged in the complaint, as amended.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[29]

ORDER

The complaint, as amended, is dismissed in its entirety.

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[29] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

Calloway and Company ***and*** **International Brotherhood of Electrical Workers, Local Union 934.** Case 5-CA-19110

June 14, 1988

DECISION AND ORDER

BY CHAIRMAN STEPHENS AND MEMBERS BABSON AND CRACRAFT

Upon a charge filed by International Brotherhood of Electrical Workers, Local Union 934, the Union, on September 16, 1987, the General Counsel of the National Labor Relations Board issued a complaint against Calloway and Company, the Respondent, alleging that it has violated Section 8(a)(1) and (3) of the National Labor Relations Act by discharging and/or laying off employee H. Larry Haga from its Bristol, Virginia jobsite for engaging in protected concerted and union activity. Although properly served copies of the charge and complaint, the Respondent failed to file an answer.

On April 11, 1988, the General Counsel filed a Motion for Summary Judgment and Memorandum in Support, with exhibits attached. On April 19, 1988, the Board issued an order transferring the proceeding to the Board and a Notice to Show Cause why the motion should not be granted. The Respondent timely filed a response to the Notice to Show Cause.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

Ruling on Motion for Summary Judgment

Section 102.20 of the Board's Rules and Regulations provides that the allegations in the complaint shall be deemed admitted if an answer is not filed within 14 days from service of the complaint, unless good cause is shown. The complaint states that unless an answer is filed within 14 days of service, "all the allegations in the complaint shall be deemed to be admitted to be true and shall be so found by the Board." Further, the undisputed allegations of the Motion for Summary Judgment disclose that a Board agent from Region 5 attempted to contact the Respondent's president, Roscoe Calloway, by telephone on February 1, 1988, and, Calloway being unavailable, left a message that the Respondent had not filed an answer, that an additional period of time for filing would be granted, and that unless an answer was received by February 16, 1988, a Motion for Summary Judgment would be filed. By letter of February 1, 1988, served on the Respondent by certified mail, the Board agent repeated the above information, including the Regional Director's intention to file a Motion for Summary Judgment if no answer was received by February 16, 1988. No answer had been received and no request for an extension of time to file an answer had been made by April 6, 1988, the date of the General Counsel's motion.

As a response to the Notice to Show Cause, due and received May 3, 1988, the Respondent submitted a letter from Calloway in which Calloway "attempted to address all issues set forth in . . . [the] original complaint." Specifically, Calloway denies personal knowledge of any union activity on his Bristol, Virginia jobsite by alleged discriminatee Haga or any other person in his employ, and claims that Haga was laid off for cause, i.e., "slothful work attitude and behavior." The letter contains no explanation why the Respondent failed to answer the complaint despite appropriate notice and the warnings that if no answer was forthcoming by February 16, 1988, a Motion for Summary Judgment would be filed. Nor does it explain why the Respondent never requested an extension of time in which to file an answer.

Because the Respondent has not explained why it failed to contact the Regional Office concerning an answer or request an extension of time for filing an answer, we find the Respondent has not shown good cause for failing to file a timely answer.[1] Accordingly, we grant the General Counsel's Motion for Summary Judgment.

On the entire record, the Board makes the following

FINDINGS OF FACT

I. JURISDICTION

1(a) At all times material, the Respondent, a Virginia corporation with an office and place of business in Chesapeake, Virginia, and a jobsite at Bristol, Virginia, the only site involved here, has engaged in the business of electrical contracting work.

(b) During the 12-month period preceding issuance of the complaint, a representative period, the Respondent, in the course and conduct of its business operations described above in paragraph 1(a), provided services valued in excess of $50,000 directly for English Construction Company, Inc., a general contractor within the Commonwealth of Virginia.

(c) English Construction Company, Inc., located in Alta Vista, Virginia, is engaged in the business of general construction contracting work.

289 NLRB No. 14

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[1] *Monroe Furniture Co.*, 231 NLRB 143 (1977). See also *Urban Laboratories*, 249 NLRB 867 (1980).

(d) During the 12-month period preceding issuance of the complaint, a representative period, English Construction Company, Inc., in the course and conduct of its business operations described above in paragraph 1(c), directly derived gross revenues in excess of $50,000 for the performance of work outside the Commonwealth of Virginia.

(e) English Construction Company, Inc. is now, and has been at all times material, an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

(f) The Respondent is now, and has been at all times material, an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

2. The Union is now, and has been at all times material, a labor organization within the meaning of Section 2(5) of the Act.

II. ALLEGED UNFAIR LABOR PRACTICES

About September 8, 1987, the Respondent at its Bristol, Virginia jobsite discharged and/or laid off its employee H. Larry Haga because he joined, supported, or assisted the Union and engaged in concerted activities for the purposes of collective bargaining or other mutual aid or protection, and in order to discourage employees from engaging in such activities or other concerted activities for the purpose of collective bargaining or other mutual aid or protection.

Based on the above, we find the Respondent has discriminated, and is discriminating, in regard to the hire or tenure or terms or conditions of employment of its employees, thereby discouraging membership in a labor organization, and the Respondent thereby has been engaging in unfair labor practices within the meaning of Section 8(a)(1) and (3) and Section 2(6) and (7) of the Act.

Conclusions of Law

About September 8, 1987, the Respondent discharged and/or laid off its employee H. Larry Haga because he joined, supported, or assisted the Union and engaged in protected concerted activities, in violation of Section 8(a)(1) and (3) of the Act.

Remedy

Having found that the Respondent has engaged in certain unfair labor practices, we shall order it to cease and desist and to take certain affirmative action designed to effectuate the policies of the Act.

Having found that the Respondent discriminatorily discharged and/or laid off H. Larry Haga, we shall order it to offer him immediate and full reinstatement to his former job or, if that job no longer exists, to a substantially equivalent position, without prejudice to his seniority or any other rights and privileges previously enjoyed. We shall also order the Respondent to make him whole for any loss of earnings and other benefits, computed on a quarterly basis from the date of his discharge and/or layoff to the date of proper offer of reinstatement, less any net interim earnings, as prescribed in *F. W. Woolworth Co.*, 90 NLRB 289 (1950), with interest to be computed in the manner prescribed in *New Horizons for the Retarded*.[2] In addition, the Respondent must remove from its files any reference to the unlawful discharge and/or layoff of H. Larry Haga and notify him in writing that this has been done and that the discharge and/or layoff will not be used against him in any way.[3]

ORDER

The National Labor Relations Board orders that the Respondent, Calloway and Company, Chesapeake, Virginia, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Discharging or laying off employees because they engage in protected concerted or union activities.

(b) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Offer H. Larry Haga immediate and full reinstatement to his former job or, if that job no longer exists, to a substantially equivalent position, without prejudice to his seniority or any other rights or privileges previously enjoyed, and make him whole for any loss of earnings and other benefits suffered as a result of the discrimination against him, in the manner set forth in the remedy section of the decision.

(b) Remove from its files any reference to the unlawful discharge and/or layoff of H. Larry Haga and notify him in writing that this has been done and that the discharge and/or layoff will not be used against him in any way.

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[2] 283 NLRB 1173 (1987). Interest on and after January 1, 1987, shall be computed at the "short-term Federal rate" for the underpayment of taxes as set out in the 1986 amendment to 26 U.S.C. § 6621. Interest on amounts accrued prior to January 1, 1987 (the effective date of the 1986 amendment to 26 U.S.C. § 6621), shall be computed in accordance with *Florida Steel Corp.*, 231 NLRB 651 (1977).

[3] The General Counsel requests a visitatorial clause authorizing the Board, for compliance purposes, to obtain discovery from the Respondent under the Federal Rules of Civil Procedure under the supervision of the United States court of appeals enforcing the Order. Under the circumstances of this case, we find it unnecessary to include such a clause. Accordingly, we deny the General Counsel's request. See *Cherokee Marine Terminal*, 287 NLRB 1080 (1988).

(c) Preserve and, on request, make available to the Board or its agents for examination and copying, all payroll records, social security payment records, timecards, personnel records and reports, and all other records necessary to analyze the amount of backpay due under the terms of this Order.

(d) Post at its facility in Chesapeake, Virginia, copies of the attached notice marked "Appendix."[4] Copies of the notice, on forms provided by the Regional Director for Region 5, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material.

(e) Notify the Regional Director in writing within 20 days from the date of this Order what steps the Respondent has taken to comply.

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

Section 7 of the Act gives employees these rights.

To organize

To form, join, or assist any union

To bargain collectively through representatives of their own choice

To act together for other mutual aid or protection

To choose not to engage in any of these protected concerted activities.

WE WILL NOT discharge or otherwise discriminate against any of you for engaging in protected concerted or union activities.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL offer H. Larry Haga immediate and full reinstatement to his former job or, if that job no longer exists, to a substantially equivalent position, without prejudice to his seniority or any other rights or privileges previously enjoyed and WE WILL make him whole for any loss of earnings and other benefits resulting from his discharge and/or layoff, less any net interim earnings, plus interest.

WE WILL notify H. Larry Haga that we have removed from our files any reference to his discharge and/or layoff and that the discharge and/or layoff will not be used against him in any way.

CALLOWAY AND COMPANY

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[4] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

Metco Products, Inc., Division of Case Manufacturing Company *and* Communications Workers of America. Case 11-CA-12436

June 14, 1988

DECISION AND ORDER

BY MEMBERS JOHANSEN, BABSON, AND CRACRAFT

On February 29, 1988, Administrative Law Judge Philip P. McLeod issued the attached decision. The Respondent filed exceptions and a supporting brief.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and brief and has decided to affirm the judge's rulings, findings, and conclusions and to adopt the recommended Order as modified.[1]

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge as modified below and orders that the Respondent, Metco Products, Inc., Division of Case Manufacturing Company, Greensboro, North Carolina, its officers, agents, successors, and assigns, shall take the action set forth in the Order as modified.

Substitute the following for paragraph 2(b).

"(b) Give effect to the terms of the contract retroactive to June 30, 1987, and make employees whole for any losses they may have suffered by reason of the Respondent's failure to execute and sign this agreement, with backpay to be computed in the manner prescribed in *Ogle Protection Service*, 183 NLRB 682 (1970), and interest thereon to be computed in the manner prescribed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987)."

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[1] We shall modify par. 2(b) of the judge's recommended Order to provide that backpay be computed in a manner consistent with Board policy as set forth in *Ogle Protection Service*, 183 NLRB 682 (1970).

Jasper C. Brown Jr., Esq., for the General Counsel.

Charles P. Roberts III, Esq. (Haynsworth, Baldwin, Miles, Johnson, Greaves, & Edwards), of Greensboro, North Carolina, for the Respondent.

Delbert Gordon, of Greensboro, North Carolina, for the Charging Party.

DECISION

STATEMENT OF THE CASE

PHILIP P. MCLEOD, Administrative Law Judge. I heard this case on 9 December 1987 in Greensboro, North Carolina. The charge that gave rise to the case was filed on 8 July 1987. A complaint and notice of hearing issued on 19 August 1987 that alleges, inter alia, that Metco Products, Inc., Division of Case Manufacturing Company[1] (Respondent) violated Section 8(a)(1) and (5) of the National Labor Relations Act (the Act), by refusing to execute a collective-bargaining agreement agreed on with Communications Workers of America (the Union), the bargaining representative of Respondent's employees.

In its answer to the complaint, Respondent admitted certain allegations including the filing and serving of the charge; its status as an employer within the meaning of the Act; the status of Communications Workers of America as a labor organization within the meaning of the Act; and the status of certain individuals as supervisors and agents of Respondent within the meaning of Section 2(11) of the Act. Respondent denied having engaged in any conduct that would constitute an unfair labor practice within the meaning of the Act.

At the trial, all parties were represented and afforded full opportunity to be heard, to examine and cross-examine witnesses, and to introduce evidence. Following the close of the trial, counsel for the General Counsel and Respondent both filed timely briefs with me, which have been duly considered.

On the entire record in this case and from my observation of the witnesses, I make the following

FINDINGS OF FACT

I. JURISDICTION

Metco Products, Inc., Division of Case Manufacturing Company, is a North Carolina corporation with a place of business in Greensboro, North Carolina, where it produces cabinet furniture. In the course and conduct of its business operations, Respondent annually purchases and receives at its North Carolina facility products, goods, and materials valued in excess of $50,000 directly from points outside the State of North Carolina. In addition, Respondent annually sells and ships from its North Carolina facility products valued in excess of $50,000 directly to points outside the State of North Carolina.

Respondent is, and has been at all times material, an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

II. LABOR ORGANIZATION

Communications Workers of America is, and has been at all times material, a labor organization within the meaning of Section 2(5) of the Act.

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[1] The complaint and notice of hearing captions this case as indicated and includes various substantive jurisdictional paragraphs that refer to Metco Products, Inc. as being a division of Case Manufacturing Company. In its answer, Respondent titles the caption as Metco being a division of Casard Furniture Manufacturing Company but then proceeds to admit the substantive jurisdictional paragraphs that refer to Metco as being a division of Case. In view of these facts and for the sake of consistency, I have continued to refer to Metco as a division of Case.

III. THE UNFAIR LABOR PRACTICES

At its Greensboro, North Carolina facility, Respondent manufactures ready-to-assemble furniture, including television stands and entertainment centers. It employs approximately 120 production and maintenance employees. In October 1986, an election was conducted among Respondent's production and maintenance employees, which resulted in the Union being certified as the exclusive collective-bargaining representative of these employees.

On 3 November 1986, the Union sent a letter to Paul Saperstein, Respondent's president, requesting to meet and bargain concerning the terms of a collective-bargaining agreement covering unit employees. In response to this request, Attorney Robert Pearlman telephoned Union Representative Delbert Gordon and notified Gordon that he would be representing Respondent during negotiations. The parties held their first negotiation session on 25 November 1986. Thereafter, the parties met approximately eight more times during December 1986 and January, February, March, and June 1987.

The Union's negotiating team included Delbert Gordon, Local Union President Charles Carroll, and employee Kenneth Stalley. At the first negotiating session, Respondent was represented by Attorney Robert Pearlman and Supervisor J. D. Parrish. This was the only meeting that Parrish attended. Thereafter, he was replaced by Plant Manager Larry Clark. At the first session on 25 November, Gordon introduced himself and other members of the Union's negotiating team. Gordon informed Respondent that he was the chief negotiator for the Union and was there with full authority to reach an agreement. Gordon testified credibly and without contradiction that Pearlman responded by stating he was chairman of Respondent's bargaining committee, and that he too was given the authority to negotiate an agreement. The Union then presented Respondent with a package of contract proposals covering everything except wages. The remainder of this meeting was devoted to the parties discussing the Union's proposals and Gordon explaining them where necessary.

During the meetings in December 1986 and January, February, and March 1987, various proposals and counterproposals were exchanged. The primary issues in dispute between the parties related to job security, arbitration, dues checkoff, movement of personnel, job classifications, and wages. Gordon testified without contradiction that the parties reached agreement on the majority of noneconomic issues during the January, February, and March meetings.

Although negotiations were ongoing, the Union received a copy of a letter that Respondent distributed to employees informing employees that the parties were at an impasse. As a result, the Union sought the services of the Federal Mediation and Conciliation Service. Federal Mediator Leonard Duggins was assigned to assist in negotiations. Thereafter, Duggins convened several meetings during March and on 4 June. During the March meetings, the parties did not meet face to face. Instead, Duggins shuttled between the two parties with proposals and counterproposals. Gordon testified without contradiction that during the meeting on 18 March, Duggins transmitted a written proposal from Pearlman in which Respondent increased its wage raise proposal from 15 to 20 cents per hour. Gordon inquired whether Respondent was proposing a 3-year contract. It is undisputed that Pearlman responded in the affirmative.

The final negotiating session between the parties was held by Federal Mediator Duggins on 4 June. The Union was represented by Gordon, Carroll, and Stalley. Respondent was represented by Pearlman. The parties met face to face. Duggins began the meeting by informing Pearlman the Union had told him they were prepared to make major concessions. Duggins then turned to Gordon and allowed him to proceed with the meeting.

Gordon testified that in preparation for this meeting, he made an outline of each proposal submitted by the parties. Gordon utilized this outline in making his remarks during the meeting. Gordon cross-referenced each union proposal with the corresponding proposal from Respondent. Regarding those items that were in dispute, Gordon either agreed to Respondent's proposal or withdrew the Union's demand. Through this process, all issues were resolved. The last two items to be discussed related to the length of time allowed a union representative in the investigation of a grievance and the duration clause of the contract itself. Gordon testified credibly and without contradiction that both of these matters were discussed and agreed on by Pearlman at the meeting on 4 June. Gordon told Pearlman it could take a union representative at least 5 minutes to find the person he might be seeking during an investigation. Gordon asked Pearlman for a 10-minute period to conduct such an investigation. Pearlman agreed.

Gordon asked Pearlman if he was still proposing a 3-year agreement, and Pearlman said he was. Pearlman stated Respondent wanted the contract to become effective on 30 June. Federal Mediator Duggins then suggested that the contract expire on 29 June 1990. Both Pearlman and Gordon agreed to this date. The parties agreed to use the Union's proposed language concerning the duration clause. Gordon then stated that the parties had a contract and Pearlman agreed. Pearlman and Gordon discussed the logistics of preparing clean copies of the agreement in its final form. Pearlman stated he had to go out of town, so Gordon volunteered to have the contract typed in final form for the parties' signature.

Within a few days of the meeting, Gordon mailed copies of the agreement typed in final form to Pearlman and Plant Manager Larry Clark. When Gordon did not hear from Pearlman, Gordon telephoned Pearlman on 22 June and told Pearlman the Union was prepared to meet and sign the agreement. Pearlman told Gordon that he had every intention of signing the agreement, but that he had to run the agreement by Saperstein. Within a few days, Pearlman telephoned Gordon's office and left a message that there were a couple of areas in the agreement he still wanted to review with Saperstein. On 29 June, Gordon again telephoned Pearlman. Pearlman again stated that he had to review the document with Saperstein. Pearlman also stated, however, that Respondent would put the agreed-on wage proposal into effect.

When Gordon questioned Pearlman on this matter, Pearlman hung up.

Analysis and Conclusions

Respondent admits it retained Pearlman to act as its spokesman in negotiations with the Union. Respondent did not call Pearlman to testify in this proceeding, and Respondent does not dispute the fact that agreement was reached concerning the terms of the contract at the meeting on 4 June. Indeed, in its posttrial brief, Respondent admits that sometimes after the 4 June meeting, Pearlman informed Saperstein that he had reached an agreement with the Union. After reviewing this agreement, Saperstein fired Pearlman because the agreement allegedly included compromises that Saperstein had never authorized or agreed to concerning the time allowed the Union for the investigation of grievances and the duration of the contract. Saperstein testified he fired Pearlman because Pearlman had exceeded his authority in consenting to those proposals. Respondent's defense, therefore, is based entirely on its contention that Pearlman did not have authority to reach agreement with the Union without Saperstein's approval.

Saperstein testified that Pearlman was retained to prepare Respondent's initial proposals to the Union and to keep Saperstein apprised of other developments as negotiations progressed. Saperstein claims it was up to him to approve or disapprove any modified proposals by Respondent. Respondent argues that the Union knew, or should have known, that Pearlman was acting with limited authority because Gordon admitted that on many subjects Pearlman indicated he would have to review union proposals and respond at a later meeting. Respondent also argues, "The fact that Pearlman was an outside consultant and not an employee of Metco in itself indicated that he was not making substantive decisions regarding proposals." Finally, Respondent argues, "Just as it was implicit that the agreement was subject to ratification of employees, it was also implicit that it was subject to ratification by Saperstein."

The evidence is quite clear that Respondent made no attempt whatever to notify or inform the Union that Pearlman would be acting in any limited capacity. Respondent does not even advance such a claim. Pearlman informed the Union during the first negotiating session that he had authority to negotiate a contract. Pearlman himself placed no limitations or restrictions on his authority. Respondent not only failed to call Pearlman as a witness, but also failed to call Superintendent J. D. Parrish who was its other representative at the first negotiating session. At this first meeting and throughout negotiations, the Union was led to reasonably believe that Pearlman possessed the authority to obligate Respondent to the terms of a final agreement. Gordon testified credibly that although Pearlman sometimes expressed a need to talk to Saperstein before making certain commitments, at other times Pearlman made commitments on many proposals without waiting until the following meeting or indicating any need to talk to Saperstein. I find that throughout negotiations Pearlman had the apparent authority to bind Respondent to a collective-bargaining agreement.

Saperstein's testimony concerning his reasons for not signing the collective-bargaining agreement is itself somewhat suspect. Saperstein claims Pearlman exceeded his authority by agreeing to allow the Union 10 minutes to investigate grievances and by agreeing to a 3-year contract. Saperstein makes this claim even though he admittedly approved a 3-year wage proposal at an earlier meeting and even though Saperstein admits he did not require Pearlman to seek his approval on noneconomic issues such as the grievance investigation proposal. Although Saperstein claimed that he did not approve a 3-year contract, Plant Manager Clark testified that Saperstein approved a 20-cent wage offer for 3 years after the Union rejected Respondent's initial 15-cent-per-hour wage increase proposal. It is altogether inconsistent that Respondent would make a 3-year wage proposal without intending a 3-year agreement. It appears that for some reason, which is not altogether clear, Saperstein became displeased with the contract after the parties reached agreement on 4 June and is now attempting to abrogate that agreement. Whether such be the case, however, I conclude the evidence establishes quite clearly that Respondent and the Union in fact reached agreement on the terms of a collective-bargaining agreement at the meeting of 4 June and that Respondent's representative at that meeting. Attorney Robert Pearlman, had at least apparent authority to enter into that agreement.

Section 8(d) of the Act requires "the execution of a written contract incorporating any agreement reached if requested by either party." It is well-established Board law that a party to a collective-bargaining relationship violates its bargaining obligation under Section 8(a)(5) of the Act if it refuses to execute an agreement once reached. *H. J. Heinz Co. v. NLRB*, 311 U.S. 514 (1941); *Fashion Furniture Mfg.*, 279 NLRB 705 (1986). In reaching the conclusion that the parties to such a relationship arrived at a "meeting of the minds" on the substantive terms of an agreement, "the Board is not strictly bound by the technical rules of contract law." *NLRB v. Electra-Food Machinery*, 621 F.2d 956 at 958 (9th Cir. 1980). It is well established that "when an agent is appointed to negotiate a collective-bargaining agreement, that agent is deemed to have apparent authority to bind his principal in the absence of clear notice to the contrary." *University of Bridgeport*, 229 NLRB 1074 (1977). It is undisputed that in this case Respondent did nothing to notify the Union of any restriction or limitation placed on Pearlman's authority to negotiate a collective-bargaining agreement on behalf of Respondent.

Considering all the above, I find that Respondent and the Union arrived at a complete meeting of the minds, that there was no valid or unfulfilled condition preceding or subsequent in any way that affects the agreement, that Respondent has failed and refused to execute the agreement, and that in doing so, Respondent violated Section 8(a)(1) and (5) of the Act.

CONCLUSIONS OF LAW

1. The Respondent, Metco Products, Division of Case Manufacturing Company, is an employer engaged in

commerce within the meaning of Section 2(6) and (7) of the Act.

2. Communications Workers of America is, and has been at all times material herein, a labor oraganization within the meaning of Section 2(5) of the Act.

3. On 20 October 1986 the Union was certified as the exclusive collective-bargaining representative of Respondent's production and maintenance employees at its Greensboro, North Carolina facility.

4. On 4 June 1987, Respondent and the Union reached agreement on the terms of a collective-bargaining agreement covering the terms and conditions of employment of Respondent's employees in the bargaining unit described above.

5. By failing and refusing to execute the written contract incorporating the agreement reached between it and the Union, Respondent has engaged in, and is engaging in, unfair labor practices within the meaning of Section 8(a)(1) and (5) of the Act.

6. The unfair labor practices that Respondent has been found to have engaged in, as described above, have a close, intimate, and substantial relationship to trade, traffic, and commerce among the several States and tend to lead to labor disputes burdening and obstructing commerce and the free flow of commerce within the meaning of Section 2(6) and (7) of the Act.

THE REMEDY

Having found that Respondent has engaged in certain unfair labor practices in violation of Section 8(a)(1) and (5) of the Act, I shall recommend that it be ordered to cease and desist therefrom and to take certain affirmative action designed to effectuate the policies of the Act.[2]

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[3]

ORDER

The Respondent, Metco Products, Inc., Division of Case Manufacturing Company, Greensboro, North Carolina, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Refusing to bargain collectively and in good faith with Communications Workers of America by declining to execute a written agreement embodying the terms of the contract fully agreed to between the parties.

(b) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Sign the collective-bargaining agreement agreed to by Respondent and the Union on 4 June 1987.

(b) Give effect to the terms of the contract retroactive to 30 June 1987 and make employees whole for any losses they may have suffered by reason of Respondent's failure to execute and sign this agreement, with interest to be computed in the manner prescribed in *F. W. Woolworth Co.*, 90 NLRB 298 (1950), with interest thereon to be computed in the manner prescribed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987).[4]

(c) Preserve and, on request, make available to the Board or its agents for examination and copying, all payroll records, social security payment records, timecards, personnel records and reports, and all other records necessary to analyze the amount of backpay due under the terms of this Order.

(d) Post at its Greensboro, North Carolina facility copies of the attached notice marked "Appendix."[5] Copies of the notice, on forms provided by the Regional Director for Region 11, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material.

(e) Notify the Regional Director in writing within 20 days from the date of this Order what steps the Respondent has taken to comply.

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

Section 7 of the Act gives employees these rights.

To organize

To form, join, or assist any union

To bargain collectively through representatives of their own choice

To act together for other mutual aid or protection

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[2] Counsel for the General Counsel has requested that the remedy include a visitatorial clause giving counsel for the General Counsel certain specific discovery powers during the compliance stage of this proceeding. The Board has granted such a request only on a case-by-case basis where it has felt such a clause is warranted. The Board has declined to routinely include visitatorial clauses in its order. *Cherokee Marine Terminal*, 287 NLRB 1080 (1988). Counsel for the General Counsel points to no specific facts and no special circumstances that would warrant such a clause in this case, and the request is denied.

[3] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

[4] Under *New Horizons for the Retarded*, interest is computed at the "short-term Federal rate" for the underpayment of taxes as set out in the 1986 amendment to 26 U.S.C. § 6621. Interest accrued before 1 January 1987 (the effective date of the amendment) shall be computed as in *Florida Steel Corp.*, 231 NLRB 651 (1977).

[5] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

> To choose not to engage in any of these protected concerted activities.

WE WILL NOT refuse to bargain collectively and in good faith with Communications Workers of America by refusing to execute the collective-bargaining agreement embodying the terms of the contract agreed to between us.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL sign the collective-bargaining agreement agreed to by us and the Union on 4 June 1987 defining wages, hours, and working conditions of our production and maintenance employees employed at our Greensboro, North Carolina facility.

WE WILL give retroactive effect to the terms of that contract to 30 June 1987, and WE WILL make employees whole for any losses they may have suffered by reason of our failure to execute and sign that agreement, with appropriate interest.

METCO PRODUCTS, INC., DIVISION OF
CASE MANUFACTURING COMPANY

Old Dominion Security, Inc. *and* **International Union of Security Officers, Petitioner.** Case 21-RC-17828

June 14, 1988

DECISION ON REVIEW AND ORDER

BY CHAIRMAN STEPHENS AND MEMBERS JOHANSEN AND CRACRAFT

On December 16, 1986, the Regional Director issued a Decision and Order in which she declined to assert jurisdiction over the Employer under the test set forth in *Res-Care, Inc.*, 280 NLRB 670 (1986), and *Long Stretch Youth Home*, 280 NLRB 678 (1986), and dismissed the instant petition. In accordance with Section 102.67 of the Board's Rules and Regulations, the Petitioner filed a timely request for review of the Regional Director's decision, in which the Petitioner contended that the Board should assert jurisdiction. By unpublished order dated April 8, 1987, the Board granted the request for review. Both parties filed briefs on review.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

We have considered the entire record in this case, and conclude, for the reasons set forth below, that it is appropriate to assert jurisdiction herein.

I.

The Employer is engaged in providing security services for the U.S. Navy at the Naval Ocean Systems Center (NOSC), a secure military installation at Point Loma, California. The current contract between the Employer and the Navy is a 1-year, fixed-price contract, with the option to renew annually for a total duration not to exceed 3 years.

Petitioner seeks to represent the Employer's security guards employed at NOSC; the proposed unit consists of approximately 80 guards. The Regional Director concluded that under *Res-Care, Inc.*, above, and *Long Stretch Youth Home*, above, the Board should not assert jurisdiction over the Employer, finding that the Navy determines the employees' initial wage rate and benefits, and exercises a significant degree of control over day-to-day labor relations.

The Employer is a contractor subject to the terms of the Service Contract Act of 1965, as amended, 41 U.S.C. § 351. Under that statute, every contractor performing services for the Federal Government must provide its service employees wages and benefits which, at a minimum, meet the compensation levels prevailing in the locality for wages and benefits, as established by the Department of Labor (DOL) in a wage determination. 41 U.S.C. § 351(a)(1), (2); see *Dynaelectron Corp.*, 286 NLRB 303 (1987). In *Dynaelectron*, we concluded that the Service Contract Act in itself does not bar meaningful bargaining. The statute provides for substitution of collectively bargained wages and benefits for the prevailing compensation rates set forth in wage determinations. Id. at 303. Thus, as a service contractor, the Employer must compensate its employees at a minimum in accordance with the levels established by the DOL. Here, the wage determination requires that the Employer's class I guards, who are those guards in training, receive a minimum wage of $3.85 an hour, and that class II guards, who are all other guards, receive a minimum of $5.49 an hour. The wage determination also requires that the Employer provide fringe benefits valued. In at a minimum of 32 cents per hour, $12.80 per week, or $55.46 per month.[1] In addition, the wage determination requires that employees receive vacation and eight paid holidays each year.

The Navy specifies the number of guard posts that must be manned, sets the daily and annual hours for each post, and sets staffing levels for each post. The Employer in its bid proposed an hourly rate for each of the approximately 20 guard posts; the contract's fixed price is based on the hourly rate for each post multiplied by the number of annual hours at each post. The hourly rate includes labor costs, overhead, and profit. The record does not show what percentage of the hourly rate is allocated to each category.

The contract with the Navy does not prohibit payment of wages higher than those established by the wage determination, although here the Employer pays the employees the wages specified as minimums in the wage determination. The only limitation on the Employer is a requirement to obtain Navy approval before granting overtime above a certain amount. Similarly, there is no limitation or ceiling on the benefits that are paid, and as long as the Employer provides compensation for benefits valued at the minimum rate, the Employer may provide these benefits in any form it chooses. Here, the Employer has chosen to provide monetary compensation in lieu of actual benefits. Fur-

289 NLRB No. 18

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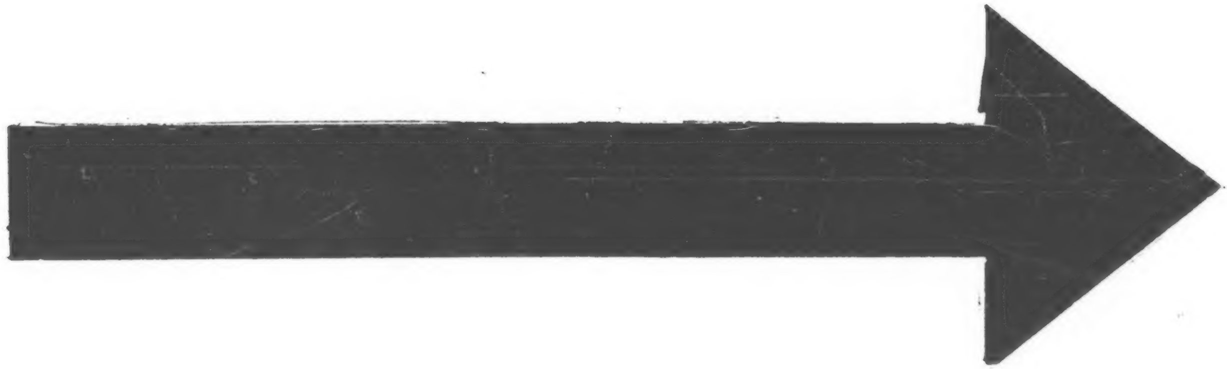
[1] The Service Contract Act requires that a contract set forth, "for information only," the compensation paid Federal employees who perform services comparable to that performed by the service contractor's employees. See 41 U.S.C. § 351(a)(5). The wage determination's minimum wage standard in this case is the same as the wage rates paid Federal employees performing comparable work. The equivalent Federal employees would receive health and insurance benefits valued at 5.1 percent of the hourly rate and retirement benefits of 7 percent of the hourly rate, but, contrary to the Regional Director's finding, these amounts do not correspond to those specified in the wage determination for fringe benefits.



thermore, the contract includes a price adjustment clause such that if the DOL revises the wage determination to require a wage increase, the contract price is adjusted.

With respect to operational functions, the Employer must staff three shifts in accordance with hours set by the Navy. The Employer has the authority to hire, discipline, and terminate. The Navy requires that all guards have a minimum of 20 hours of training and that, among other qualifications, they possess firearm permits and be licensed in California as guards. On hiring an employee, the Employer submits documentation to the Navy to demonstrate that the employee meets minimum qualifications. Employees also must receive a security clearance and observe security directives; employees who are deemed security risks are subject to termination. Employees also must follow certain Navy rules and regulations, including a dress code. The Navy establishes guards' qualifications and the specific training for each post, but the Employer's shift supervisors assign particular guards to the various posts based on individual employees' qualifications. The Navy issues orders for each post that dictate procedures that guards must follow, but the Employer's supervisors direct the guards in their duties.

The Navy inspects on a random basis the work of the Employer's guards and, in addition, audits the Employer's overall contract performance on an annual basis. The Navy has made oral and written complaints to the Employer regarding poor employee performance or rule infractions witnessed during these inspections, along with requests for corrective action or discipline. The Employer has complied with such suggestions or requests for discipline to ensure contract renewal; under the contract, the Employer must maintain appropriate standards.

II.

In *Res-Care*, the Board refined the basic test for whether an employer shares a governmental entity's exemption from the Act that was set forth in *National Transportation Service*, 240 NLRB 565 (1979). The Board explained in *Res-Care* that the decision whether to assert jurisdiction will be based on the extent of control retained by the employer over essential terms and conditions of employment as well as on the degree of control exercised by the exempt entity over labor relations. In essence, jurisdiction is asserted if the employer has the "final say on the entire package of employee compensation, i.e., wages and fringe benefits . . . ." *Res-Care*, supra at 674.

The exempt entity in *Res-Care* placed direct limits on employee compensation, which precluded bargaining by the employer over economic terms and conditions of employment. There, the salary ranges and benefits were subject to DOL approval. The proposed cost of wages and benefits and other items plus a fixed fee became the contract price, once the exempt entity accepted the bid; the contract set forth minimum and maximum wages and benefits. Thereafter, the employer could not change employee compensation without the exempt entity's approval. The exempt entity could disallow payment of wages that were higher than the approved maximum, and it issued payments on a monthly basis on review of vouchers submitted by the employer for expenses. By contrast, the Board asserted jurisdiction in *Long Stretch* because the exempt entity did not place specific limits on expenditures for employee compensation. Rather, it placed only a ceiling on the employer's total budget. Id. at 673 fn. 14.

Limits that existed in *Res-Care* are not present here. The guards here receive the minimum wage and minimum monetary value for benefits set forth in the wage determination. The contract lists the total costs for each guard post and the total of these quantities becomes the basis for the contract price. Although the contract price is affected by the staffing levels set by the Navy as well as by the number of hours required for each post, the Employer sets the proposed wages and benefits, subject to the standards of the Service Contract Act. There is no evidence that the Navy would disallow expenditures or decrease payments if the Employer, as a result of a collective-bargaining agreement, paid employees more or extended greater benefits than the amounts required in the wage determination. Indeed, under the Service Contract Act, the collectively bargained rate almost certainly would be incorporated into the next fiscal year's wage determination. See 41 U.S.C. § 351(a)(1), (2). See also *Dynaelectron Corp.*, at 303. Moreover, unlike *Res-Care*, the exempt entity here does not require submission of the Employer's personnel policies for review.

Although the DOL's wage determination here corresponds to the actual wage rates paid by the Employer, the Employer is not prohibited from compensating its employees at more than the minimum levels set by the DOL. The Employer is not subject to specific limits on employee compensation expenditures, except to provide the minimum required by the operation of the Service Contract Act. Unlike *Res-Care*, the contract here does not specify wage ranges and, as noted above, with regard to benefits, the Employer is limited only by the requirement to provide the minimum level of benefits.

III.

Finally, the Employer contends that the Navy exercise control over labor-management relations and that thus the Employer is a joint employer with the Navy and shares the Navy's statutory exemption. We find that the control exercised neither limits bargaining nor indicates that there is a joint employer relationship.[2] The Navy sets minimum qualifications, requires security clearances, and adherence to a dress code, establishes shifts, and specifies duties for the various posts. The Navy also monitors employee performance, specifies post operating procedures, approves overtime above a particular limit, and suggests disciplinary measures when appropriate. However, the operational controls in force here ensure contract compliance and maintenance of security measures at a secure facility. They do not limit the Employer's ability to bargain. See *Trailways Commuter Transit*, 284 NLRB 935 (1987); *Rustman Bus Co.*, 282 NLRB 152 (1986); *Long Stretch*, supra at 682 fn. 15; *Res-Care*, supra at 674 fn. 22; see also *Champlain Security Services*, 243 NLRB 755 (1979); *Atlas Guard Service*, 237 NLRB 1067 (1978). The exempt entity's inspection of the Employer's operations does not limit bargaining over employee compensation. The Employer's employees are subject to Navy regulations and directives, and the Navy may request that the Employer discharge personnel, but the Employer is responsible for hiring, assignment and direction of work, discipline, and termination. In *Dynaelection*, we stated that the "Navy's contractual right to request dismissal of an employee in the event of misconduct or for security reasons does not, alone, preclude the assertion of jurisdiction over the Employer." Id.

In sum, we find that the Employer retains sufficient control over its employees' terms and conditions of employment to engage in meaningful collective bargaining, and that its contract with the Navy does not limit the Employer's ultimate discretion over wage and benefit levels. See *ARA Services*, 283 NLRB 602, 603 (1987); *Long Stretch*, supra at 680. We therefore conclude that it will effectuate the purposes and policies of the Act to assert jurisdiction over the Employer. Accordingly, we reverse the Regional Director's Decision and Order, and reinstate the petition.

ORDER

The petition in Case 21-RC-17828 is reinstated and remanded to the Regional Director for further appropriate action.

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[2] As the Board indicated in *Res-Care*, supra at 673, fns. 12 and 14, however, its consideration of whether to assert jurisdiction in this type of case does not focus on whether there is a joint employer relationship between the employer and the governmental entity.

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Nathan Scherr, Howard Perlow, Kenneth Hesson, Harold Cohen, Victor Cohen, Robert Footlick, Robert Pickner, Stuart Weitzman, Albert Weitzman, Ronald Weitzman, and Kenneth S. Cooper d/b/a Blast Soccer Associates d/b/a Baltimore Blast *and* Major Indoor Soccer League Players Association, affiliated with Federation of Professional Athletes, AFL-CIO. Case 5-CA-18686

June 15, 1988

DECISION AND ORDER

By Chairman Stephens and Members Johansen and Cracraft

On January 26, 1988, Administrative Law Judge David S. Davidson issued the attached decision. The Respondent filed exceptions and a supporting brief.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings, and conclusions and to adopt the recommended Order as modified.

We agree with the judge that the Respondent violated Section 8(a)(5) and (1) of the Act by unilaterally adjusting employee Resad Kunovac's grievance without honoring the Union's statutory right to be present at the settlement discussion. However, we find merit in the Respondent's exception to the judge's recommendation remedy insofar as the remedy includes an automatic setting aside of the individual agreement reached between Kunovac and the Respondent on February 13, 1987. Although the Board customarily directs an employer to restore the status quo ante if it has taken unilateral action to an employee's detriment, we are unable in this instance to determine definitively whether the Respondent's grievance adjustment was detrimental to Kunovac in any regard. Therefore, we shall order the status quo ante restored conditioned on Kunovac's affirmative desire as expressed through his collective-bargaining representative.[1] The Respondent accordingly shall set aside the unilaterally adjusted grievance if the Union elects with Kunovac's concurrence to have previous conditions restored.

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge as modified below and orders that the Respondent, Nathan Scherr, Howard Perlow, Kenneth Hesson, Harold Cohen, Victor Cohen, Robert Footlick, Robert Pickner, Stuart Weitzman, Albert Weitzman, Ronald Weitzman, and Kenneth S. Cooper, d/b/a Blast Soccer Associates d/b/a Baltimore Blast, Baltimore, Maryland, its officers, agents, successors, and assigns, shall take the action set forth in the Order as modified.

1. Delete paragraph 1(a) and reletter the subsequent paragraph.

2. Insert the following as paragraph 2(a) and reletter the subsequent paragraphs.

"(a) On request by the Union with the concurrence of Resad Kunovac, set aside the February 13, 1987 agreement which unilaterally adjusted the Kunovac grievance."

3. Substitute the attached notice for that of the administrative law judge.

APPENDIX

Notice To Employees
Posted by Order of the
National Labor Relations Board
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

We will not refuse to bargain collectively with the Major Indoor Soccer League Players Association, affiliated with Federation of Professional Athletes, AFL-CIO by adjusting contract grievances with individual unit employees without affording the Union the opportunity to be present at such adjustment.

We will not in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed them by Section 7 of the Act.

We will, on request of the Union with the concurrence of Resad Kunovac, set aside the February 13, 1987 agreement which unilaterally adjusted the Kunovac grievance.

Nathan Scherr, Howard Perlow, Kenneth Hesson, Harold Cohen, Victor Cohen, Robert Footlick, Robert Pickner, Stuart Weitzman, Albert Weitzman, Ronald Weitzman, and Kenneth S. Cooper d/b/a Blast Soccer Associates d/b/a Baltimore Blast

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[1] See *Postal Service*, 281 NLRB 215 (1986); *Dura-Vent Corp.*, 257 NLRB 430, 433 (1981).

289 NLRB No. 11

James P. Lewis, Esq., for the General Counsel.

Adin C. Goldberg, Esq. (Spengler, Carlson, Gubar, Brodsky & Frischling), of New York, New York, for the Respondent.

Timothy English and *Peter McGee, Esqs.*, of Washington, D.C., for the Charging Party.

DECISION

STATEMENT OF THE CASE

DAVID S. DAVIDSON, Administrative Law Judge. This case was tried at Baltimore, Maryland, on 3 September 1987. The Union filed the charge on 2 March 1987, and the Regional Director issued the complaint on 14 April 1987. The issue is whether Respondent[1] violated Section 8(a)(5) of the Act by settling a grievance with a member of the bargaining unit represented by the Union without giving the Union an opportunity to be present at the adjustment of the grievance.

On the entire record, including my observation of the demeanor of the witnesses, and after consideration of the briefs filed by the parties, I make the following

FINDINGS OF FACT

I. JURISDICTION

Respondent, a partnership, operates a professional indoor soccer team at Baltimore, Maryland. In the course of its operations, it annually derives gross revenues in excess of $500,000 and purchases goods and materials in excess of $10,000, which it causes to be transported and delivered in interstate commerce. I find that Respondent is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act and that the Union is a labor organization within the meaning of Section 2(5) of the Act.

II. THE ALLEGED UNFAIR LABOR PRACTICES

A. *The Facts*

At all times material the Union (MISLPA) has been the exclusive collective-bargaining representative of a unit including all soccer players under contract with the Major Indoor Soccer League, Inc. (MISL), and its member teams of which Respondent is one. The most recent collective-bargaining agreement between MISL and the Union runs from 28 March 1986 to 30 June 1989. The collective-bargaining agreement covers terms and conditions of employment of those in the unit, but also provides for individual contracts between players and management, as follows:

> Article XIX
>
> *Individual Negotiations*
>
> Section 1. *Union's Limited Waiver*: For purposes of this agreement, MISL Clubs and the League recognize that, absent an express waiver by the MISLPA, they could not negotiate or execute agreements with individual Players. The MISLPA authorizes the Clubs, for the term of this agreement only, to enter into, negotiate and execute individual employment agreements.
>
> Section 2. *Right of Union to Participate*: For purposes of this agreement, MISL Clubs and the League recognize that the MISLPA has a right to attend all individual negotiating sessions, absent an express waiver to that effect by the MISLPA. The MISLPA authorizes the Clubs for the term of this agreement only to engage in individual negotiating sessions with Players without the participation of the MISLPA. MISL Clubs agree to negotiate with the MISLPA or its agent in order to facilitate agent regulation.
>
> . . . .
>
> Section 4. *Subjects for Individual Agreements*: The subjects and limitations of individual agreements are described in the form attached hereto as Appendix A. Club will provide every Player or prospective player with a copy of said form during individual negotiations.
>
> Section 5. *Standard Player Contract*: All players shall be required to execute the MISL Standard Player Contract. Upon the completion and execution of each Standard Player Contract, or amendments thereto, such contract or amendments, if any, and Appendix A referred to above in Section 4, shall be forwarded to the MISLPA ten (10) days after receipt by the Commissioner's Office.
>
> Section 6. *Expedited Arbitration*: The MISLPA shall have the right to challenge the validity of any individual contract through expedited arbitration within ten (10) days of its receipt of the individual contract in question on the following grounds:
>
> (a) Incompleteness in expression of its terms;
>
> (b) Any conflict between its terms and the Collective Bargaining Agreement between MISL and MISLPA (including attachments);
>
> (c) The Club, or a Club official, has made or agreed to make payment or convey anything of value to any firm or person for legal or representational services provided to a Player in connection with the negotiation of a contract between such Club and Player that is not set forth in the MISL Standard Player Agreement or attachments thereto.

Insofar as material, Appendix A provides:

> FORM DESCRIBING THE SUBJECTS FOR INDIVIDUAL AGREEMENTS
>
> The sole issues to be negotiated between the Club and the Player in individual negotiations are the following:
>
> (1) His salary, additional compensation, such as signing bonuses or performance bonuses or incentive bonuses;
>
> (2) Lodging and/or automobile allowances;
>
> (3) Payment schedule;

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[1] Respondent's name appears in the caption as amended at the hearing.

> (4) Guarantee, no-cut, and no-trade provisions;
> (5) Educational payments;
>
> The Club cannot negotiate any benefits, terms, or other conditions of employment with individual Players which conflict in any way with (decreasing or modifying benefits) the terms of the Collective Bargaining Agreement.

Pursuant to these provisions on 10 June 1983 Respondent entered into an individual agreement with player Mesad Kunovac for four playing seasons beginning on 1 October 1983 and ending 31 May 1987 "unless extended, terminated, or renewed as specified elsewhere in his contract." The agreement provides in section 6.2 that Respondent may terminate the agreement on written notice if the player shall at anytime among other things "fail, in the opinion of the Club's management, to exhibit sufficient skill or competitive ability to qualify for or continue as a member of the Club's team." Among its special provisions the agreement provided that a portion of the player's salary each season was to be payable to the player's agent Branko Perovanovic. It also provided, "All monies guaranteed, provided player passes club physical each season."

On 3 July 1985, pursuant to section 6.2 Respondent's executive vice president and head coach, Kenneth Cooper, notified Kunovac that Respondent did not intend to bring him back for the next soccer season.

On 24 October 1985, the Union by letter to Respondent's counsel, Rachel Zelkind, filed a grievance on behalf of itself and Kunovac protesting the failure of Respondent to pay any of his guaranteed salary after 1 October 1985. By letter of 7 November 1985, Zelkind replied raising procedural objections and denying that Respondent had any continuing salary obligation to Kunovac under the terms of the agreement taken as whole.

On 2 December 1985 the Union and Kunovac filed a notice of appeal to George Nicolau, permanent umpire under the collective-bargaining agreement, seeking arbitration of the grievance.

Around that time, the Union's assistant director Peter McGee and Zelkind spoke about setting up a meeting with Kunovac's agent Perovanovic to discuss settlement of the grievance, and on 5 December 1985 Perovanovic, McGee, and Zelkind met at Zelkind's office. McGee and Perovanovic proposed a settlement figure that Zelkind rejected as excessive. At that time McGee informed Zelkind of the request for arbitration that she had not yet received. Zelkind told them that Respondent intended to raise all its procedural and substantive objections to the grievance.

At the conclusion of the meeting the parties remained interested in settlement. McGee indicated to Perovanovic and Zelkind that settlement should be pursued, and asked Perovanovic to keep him apprised. McGee left Zelkind with the understanding that she and Perovanovic should talk.

About 2 weeks later, in mid-December Perovanovic again appeared in Zelkind's office with another player who was a friend of Kunovac and they discussed settlement of the Kunovac grievance further. Two or three days later she phoned McGee and told him of the meeting, indicating that she was open to further discussion of the grievance. McGee did not protest her meeting with Perovanovic or indicate a desire to be present at any future meeting between Zelkind and Perovanovic. There were no further meetings between them.[2]

Processing of the grievance continued. At Respondent's request the arbitrator heard the issues of untimeliness and arbitrability separately before hearing the grievance on its merits. On 30 May 1986 Arbitrator Nicolau issued an interim award finding that the claim of Kunovac and the Union was arbitrable. On 2 October 1986 the arbitrator issued a second interim award finding that the grievance and the appeal to arbitration were timely.

Although neither McGee nor Zelkind participated in further settlement discussions after December 1985, Cooper had settlement discussions with Perovanovic in 1985 and 1986.

In January 1987 Perovanovic met with Cooper in Baltimore about another matter. In the course of the meeting he asked about Kunovac and said that they wanted to settle. Cooper asked if he was representing Kunovac, and Perovanovic answered affirmatively. He asked Perovanovic what he wanted to settle for and Perovanovic gave a figure of $30,000. Perovanovic indicated that he had spoken to Kunovac and his wife and that Mrs. Kunovac wanted Cooper to call him. Cooper eventually reached Mrs. Kunovac by telephone in Yugoslavia. He told her of his conversation with Perovanovic, and she indicated that the proposed figure was acceptable to her and her husband.

Following this conversation Cooper got approval from Respondent's other owners and arranged to meet Kunovac on 12 February 1987 in London to complete the settlement.

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[2] Zelkind so testified and I have credited her. Initially, McGee testified that this meeting occurred before the Union appealed the grievance to arbitration and that there were no settlement discussions after the appeal was filed.

After Zelkind testified, McGee testified that her testimony refreshed his recollection. He testified that after Zelkind rejected the proposed settlement figure he told her that they would go forward with the grievance, while continuing to try to settle it. During the discussions it became clear that an obstacle to settlement was the fact that under Kunovac's agreement there were payments due Perovanovic linked to the payments due Kunovac. According to McGee, he "left it that Mr. Perovanovic was welcome to try to work out some kind of—to discuss some kind of settlement language with the Club, both on behalf of himself and on behalf of the player, and I left it with Mr. Perovanovic and Ms. Zelkind that if they were able to arrive at such a settlement document, at such a settlement agreement, that that would be fine as long as the union was able to put final approval on it, since we were involved with a grievance." McGee also testified that in his mid-December telephone conversation with Zelkind he repeated that the Union would have to approve any final settlement. Zelkind denied that McGee ever told her that the Union would have to approve any settlement agreement.

It is understandable that in the lapse of almost 2 years between the December 1985 conversations and the hearing in this case, neither Zelkind nor McGee had a verbatim recollection of their December conversations. Yet, it appeared that until Zelkind testified, McGee had no recollection of conversations between them after the grievance was appealed to arbitration, and it is impossible to avoid the conclusion that McGee's refreshed recollection was colored, however unconsciously, by the position taken by the Union in this case. I do not credit McGee's testimony that he stated that the Union would have to approve any final settlement reached between Zelkind and Perovanovic.

Sometime before Cooper's trip, John Kerr, the Union's director, and McGee heard rumors that Perovanovic was trying to settle the grievance. On 5 February Kerr wrote Cooper that it had come to his attention that he was trying to settle the Kunovac case directly or indirectly with Kunovac and that he wanted to remind Cooper that the grievance was filed by the Union and therefore could not be settled through the player's former agent.

Cooper left for London on 8 February and did not see Herr's letter until his return.

In the meantime on 12 February Cooper met Kunovac in London. He gave Kunovac a draft of a proposed settlement agreement and arranged to meet him again the next day. The next day Kunovac arrived wih a friend to represent him and signed the agreement.

The agreement captioned "Termination of Standard Player Agreement and Release," provided, among other things:

> 5. Player, for himself, his successors and assigns and his agents and representatives hereby remises, releases and forever discharges Team, its successors and assigns, employees, agents, attorneys, and those individuals and entities who hold partnership interests in the Team from all . . . claims . . . grievances, arbitrable matters . . . whatsoever which Player, his assigns, representatives and agents may have, now or in the future, against Team, its successors, assigns, employees, agents, attorneys and those individuals and entities who hold partnership interests in the Team . . . arising out of or related to (i) the Employment Agreement, (ii) the Player's employment by the Team under the Employment Agreement or otherwise, (iii) the termination of the Employment Agreement and Player's employment thereunder, (iv) this Agreement and the formation hereof and the provisions hereof and the entering herein . . . .
>
> . . . .
>
> 7. In the event that Player and/or the Team has initiated, prior to the date hereof, a grievance and/or any action in regard to the Employment Agreement or the performance thereof, that party who initiated such grievance or action immediately shall take any and all actions necessary to terminate the same and shall instruct either the MISL and/or the MISLPA, as appropriate, to terminate any grievance and/or action which such entity may have initiated and/or furthered in any capacity whatsoever in regard to (i) the Player and/or Team as appropriate, (ii) to the Employment Agreement, (iii) to the performance of the terms thereof and/or (iv) to Player's employment by the Team. In the event that Player and/or Team respectively has authorized or appointed the MISL and/or the MISLPA respectively to represent it or otherwise act as its agent in the above mentioned grievance and/or action, the Player and/or the Team hereby withdraws and terminates such authorization and appointment. This agreement is a bar to either the Player or the Team or anyone on their respective behalf or for their respective benefit directly or indirectly, continuing or participating in any way whatsoever in any action as mentioned above.

Cooper did not respond to Kerr's 5 February letter after finding it on his return from England, but Zelkind sent the Union a copy of the termination of standard player agreement and release executed by Kunovac.

On 24 February Zelkind sent the following letter to Arbitrator Nicolau:

> Enclosed is a copy of a writing styled "Termination of Standard Player Agreement and Release" ("Termination") dated February 13, 1987, executed by Blast Soccer Associates ("BSA") and Resad Kunovac. The Termination speaks for itself, and based thereon, I formally request that you dismiss the arbitration now before you concerning performance of the Standard MISL Players Agreement between Mr. Kunovac and BSA, regardless of the party bringing the grievance.
>
> On even date herewith, I have sent a copy of this letter and the enclosed document to W. Buckley Briggs, Esq., appearing before you for the MISLPA.

B. *Discussion*

The General Counsel and the Union contend that Respondent violated Section 8(a)(5) by settling the Kunovac grievance without giving the Union the opportunity to be present at the adjustment.

Respondent does not dispute that absent a waiver, the second proviso to Section 9(a) of the Act required it to give a representative of the Union an opportunity to be present at the adjustment of the grievance. *Top Mfg. Co.*, 249 NLRB 424 (1980).[3] Respondent contends, however, that a waiver is to be found in the collective-bargaining agreement as well as in the conduct of Union Representative McGee relating to the grievance.

It is well settled that the Board will not lightly infer waiver of statutory rights. Rather there must be a clear and unmistakable showing that statutory rights have been waived.[4]

As set forth above, the collective-bargaining agreement in article XIX authorized Respondent to "enter into, negotiate and execute individual employment agreements" (sec. 1), and "to engage in individual negotiating sessions with Players without the participation of the MISLPA" (sec. 2). The collective-bargaining agreement provided that among the issues for individual negotiation were salary and guarantees.

The issue raised by the grievance filed by the Union and Kunovac is whether under the compensation schedule and guarantee included in Kunovac's individual agreement Respondent had any remaining financial obligations to Kunovac after it notified him that it did not intend to bring him back for the 1985–1986 season.

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[3] There the union filed a grievance over an employee's discharge. After an arbitrator awarded reinstatement and backpay, the employer negotiated directly with the employee to settle the grievance by payment of backpay without reinstatement. The Board found that the employer violated Sec. 8(a)(5) of the Act by bypassing the union to negotiate directly with the employee and by settling the grievance without giving the bargaining representative an opportunity to be present. Here there is no contention that Respondent bypassed the Union by engaging in direct negotiations with Kunovac.

[4] *Owens-Corning Fiberglas Corp.*, 282 NLRB 609 (1987).

Respondent contends that because the collective-bargaining agreement specifically authorized individual negotiations and agreement with respect to compensation and guarantees, it also authorized individual negotiations and agreement to resolve grievances arising over these issues. Although the Union's waiver of its right to participate in individual negotiations under article XIX, section 2 seems broad enough to encompass grievance negotiations as well as negotiations leading toward individual employment contracts, the authority to enter into individual agreements is narrower. It is directed specifically to individual employment agreements, it provides that such agreements shall be submitted to the Union, and it provides the Union with the right to challenge the validity of an individual agreement on certain specified grounds, with any disputes to be resolved by arbitration. Thus, although the authorization to negotiate with players individually is broad, the authority to enter into individual agreements is narrower, and the specification of individual employment agreements and the procedure for reviewing them indicates that it is not so broad as to include agreements resolving disputes over termination. Indeed, those disputes typically are disputes to be resolved through a grievance procedure, and here the grievance procedure specifically contemplates grievances filed by the Union and/or players involving the interpretation, application, or compliance with the terms of the collective-bargaining agreement or the standard player agreement.[5]

Accordingly, I conclude that the waiver contained in article XIX authorized Respondent to negotiate directly with Kunovac or his agent over settlement of the grievance but not to enter into an agreement adjusting the grievance without giving the Union an opportunity to be present.[6]

Respondent contends that in any event the Union waived its right to be present at the adjustment of the Kunovac grievance by McGee's statements to Zelkind on 5 December 1985 and in their mid-December telephone conversation.

Although I have credited Zelkind's version of those conversations and find that McGee gave verbal approval to continued settlement discussions between Zelkind and Perovanovic, I cannot conclude that this verbal approval went beyond the Union's contractual authorization of individual negotiations between players and teams without the Union's presence contained in article XIX, section 2. Respondent stresses that McGee never told Zelkind that the Union would have to be present at the adjustment or would have to approve it. However, waiver must be express. What Zelkind understood was that she and Perovanovic should continue to talk and that Perovanovic should keep McGee informed. The first portion entailed no more than the contractual waiver. The second added nothing to it. McGee was silent about what would happen if and when negotiations produced agreement between Respondent and Perovanovic. Had Zelkind gone further to state an understanding that she and Perovanovic could adjust the grievance finally without further union involvement, and had McGee remained silent in the face of such an assertion, then waiver of any further union role might be inferred from his silence. But nothing was said that required McGee to speak further in order to avoid waiving what both the agreement and the statute required.[7]

Accordingly, I find that McGee's conduct did not waive the Union's right to be present at the adjustment of the Kunovac grievance.[8]

Having found no waiver by the Union of its rights, I conclude that Respondent violated Section 8(a)(5) and (1) of the Act by adjusting the grievance filed by the Union and Kunovac through the execution of the 13 February 1987 settlement agreement without honoring the Union's statutory right to be present at such adjustment.

THE REMEDY

Having found that Respondent has engaged in unfair labor practices, I shall recommend that it be ordered to cease and desist therefrom and to take certain affirmative action to effectuate the purposes of the Act.

The General Counsel requests that the remedy include setting aside the grievance adjustment obtained by Respondent as a result of its unlawful conduct, citing *Top Mfg. Co.*, supra, 249 NLRB at 426. Although there was an additional violation found in *Top Mfg.* not present here,[9] I find that the rationale advanced by the General Counsel for requiring the same remedy is persuasive. Absent setting aside the adjustment of the Kunovac grievance, there can be no effective remedy for Respondent's failure to afford the Union its rights. However, I reject the General Counsel's further contention that the remedy should include a visitatorial clause. Apart from the arguments in support of the general contention that such clauses should routinely be included in all Board orders, which it should be clear by now that the Board has rejected, the General Counsel points to no special circumstances that would warrant such a clause in this case.

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[5] In the arbitration proceeding over the Kunovac grievance, Respondent argued that the issue of compliance with the compensation and guarantee provisions of the standard player agreement between Respondent and Kunovac was not a grievance cognizable under the collective-bargaining agreement. In his first interim award the arbitrator rejected that contention.

[6] In connection with its contractual waiver contention, Respondent argues in its brief that the 13 February 1987 termination of standard player agreement and release deals only with Kunovac's grievance and not with the Union's. Respondent states, "Kunovac's settlement may, of course, have some impact on the grievance or upon any remedy, but these are matters for the arbitrator to determine. Clearly, however, the 13 February 1987 agreement did not purport to affect the Union's right to pursue its grievance to arbitration." This contention is at odds with Zelkind's 24 February 1987 letter to the arbitrator requesting dismissal of the arbitration based on the termination agreement "regardless of the party bringing the grievance."

[7] *Challenge-Cooke Bros.*, 282 NLRB 21 (1986); *Borden Inc.*, 261 NLRB 64, 82 (1982), enfd. 711 F.2d 348 (D.C. Cir. 1983).

[8] In view of this conclusion, I find it unnecessary to consider other contentions of the Union relating to the effectiveness of McGee's conduct as a waiver.

[9] I.e., direct dealing with the grievant in derogation of the employer's bargaining obligation. See fn. 3, above.

CONCLUSIONS OF LAW

1. Nathan Scherr, Howard Perlow, Kenneth Hesson, Harold Cohen, Victor Cohen, Robert Footlick, Robert Pickner, Stuart Weitzman, Albert Weitzman, Ronald Weitzman, and Kenneth S. Cooper d/b/a Blast Soccer Associates d/b/a Baltimore Blast constitute an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

2. Major Indoor Soccer League Players Association, affiliated with Federation of Professional Athletes, AFL-CIO is a labor organization within the meaning of Section 2(5) of the Act.

3. The following employees of members of Major Indoor Soccer League, Inc., including Respondent, constitute a unit appropriate for purposes of collective bargaining within the meaning of Section 9(b) of the Act:

> All soccer players under contract and amateur players under contract including players on the active, suspended, disabled, military and voluntarily retired lists of members of the Association and of the employers who have authorized said Association to bargain on their behalf, including Respondent, but excluding all other employees, veteran free agents, managerial and executive personnel, head coaches and supervisors as defined in the Act.

4. Since 26 January 1984, the Union has been and now is the exclusive bargaining representative of all employees in the appropriate bargaining unit for purposes of collective bargaining within the meaning of Section 9(a) of the Act.

5. By adjusting a unit employee's grievance without giving the Union an opportunity to be present at the adjustment, Respondent has engaged in unfair labor practices affecting commerce within the meaning of Section 8(a)(5) and (1) and Section 2(6) and (7) of the Act.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[10]

ORDER

The Respondent, Nathan Scherr, Howard Perlow, Kenneth Hesson, Harold Cohen, Victor Cohen, Albert Footlick, Robert Pickner, Stuart Weitzman, Albert Weitzman, Ronald Weitzman, and Kenneth S. Cooper d/b/a Blast Soccer Associates d/b/a Baltimore Blast, Baltimore, Maryland, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Continuing or giving effect to the 13 February 1987 agreement purporting to settle the grievance claims of Mesad Kunovac and Major Indoor Soccer League Players Association, affiliated with Federation of Professional Athletes, AFL-CIO.

(b) Adjusting bargaining unit employees' grievances without giving the Union an opportunity to be present at any such adjustment.

(c) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Post at its facility in Baltimore, Maryland, copies of the attached notice marked "Appendix."[11] Copies of the notice, on forms provided by the Regional Director for Region 5, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material.

(b) Notify the Regional Director in writing within 20 days from the date of this Order what steps the Respondent has taken to comply.

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[10] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

[11] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

Dresser Industries, Inc. *and* **Abel Ferreira.** Cases 39-CA-1392, 39-CA-1416, and 39-CA-1509

June 15, 1988

DECISION AND ORDER

BY CHAIRMAN STEPHENS AND MEMBERS JOHANSEN AND BABSON

On November 2, 1984, Administrative Law Judge Joel P. Biblowitz issued the attached decision. The Respondent filed exceptions and a supporting brief. The General Counsel filed cross-exceptions and a brief in support and in opposition to the Respondent's exceptions. Thereafter, the Respondent filed an answering brief to the General Counsel's exceptions.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings,[1] and conclusions,[2] as modified, and to adopt the recommended Order as modified and set out in full below.

The judge found that the Respondent violated Section 8(a)(3) and (1) in late 1982[3] when it disciplined employees Lucas, McDonald, and McClain for "poor workmanship." We disagree.

The Respondent disciplined these employees on the ground that they collectively produced a part out of stainless steel rather than the required carbon steel. Although it is disputed whether all three employees were responsible for the defective parts, it is clear that they produced the type of tube in question. Lucas performed the initial operation by selecting and measuring the tube's thickness, McDonald performed the second and third operations by cutting and burring the ends, and McClain performed the final two operations by swagging and annealing the tubes.[4]

According to the Respondent, the defective parts were produced in early August and remained in stock until late October, when the parts became components of an assembly. During the first week of November, the Respondent rejected several of these assemblies because the defective parts cracked when the assemblies were pressure tested. On investigation, the Respondent discovered that the parts were made out of stainless steel rather than the required carbon steel; the Respondent states that upon checking inventory it discovered that Lucas, McDonald, and McClain had produced the parts in August.

On November 24, Lucas, McDonald, and McClain were given written warnings for "poor workmanship." The McDonald and McClain warnings contained references to previous written warnings[5] and each was given a 2-day suspension. Discipline for Lucas was limited to a "verbal" warning dated December 3. The Respondent also gave a "verbal" warning to Josephine Coble, an inspector, who is not alleged as a discriminatee.

The judge found that the General Counsel had sustained her initial burden based on the employees' union activities and the timing of the discipline. The judge reasoned that since the parts were produced in early August and the defect was not discovered until a few days after the November union nominations, the Respondent had seized on the opportunity as a means to justify the warnings regardless of who was at fault.

We disagree with the judge that the General Counsel has established that the discipline was motivated by the employees' union activities. In order to establish such a violation, the General Counsel must make a prima facie showing that the employer made a decision to discipline the employees and that the employees' protected conduct was a motivating factor in the employer's decision. *Wright Line*, 251 NLRB 1083, 1089 (1980). In the instant case no such showing was made.

There is no indication that the Respondent was aware of either Lucas' or McDonald's union activity. Lucas' union activity was limited to his Novem-

289 NLRB No. 12

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[1] We find without merit the Respondent's allegation of bias and prejudice on the part of the judge. On our full consideration of the record and the judge's decision, we perceive no evidence that the judge made prejudicial rulings or demonstrated bias against the Respondent in his analysis or discussion of the evidence. We also find no merit in the Respondent's exceptions to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

[2] We agree with the judge's finding that the Respondent violated Sec. 8(a)(3) and (1) by laying off employee McClain in November 1982, while retaining employee Neely who had less seniority. Like the judge, we find that the Respondent failed to show that, absent McClain's union activities, it would have laid him off out of seniority. In this regard, the Respondent's assertion that Neely was retained because he was more qualified does not withstand scrutiny. The Respondent has failed satisfactorily to explain why McClain, on twice facing layoff in department 145, once in November 1982 and again in September or October 1983, could not bump Neely on the first occasion but could bump Neely on the second one, when he was offered the opportunity to do so but declined. No evidence was presented that the skills or classifications of these two employees in relationship to each other changed between the first and second layoffs. Thus, we conclude that the only factual accounting for McClain's layoff out of seniority in November 1982 was that he was running as union trustee on an insurgents' slate to which the Respondent was hostile.

[3] All dates are 1982 unless otherwise indicated.

[4] Stainless steel and carbon steel are easily distinguishable; stainless steel has a bright silver look and carbon steel has a dark dull look. However, if, as in the present case, stainless steel is put through the annealing process, it comes out indistinguishable in appearance from carbon steel.

[5] These earlier warnings were issued in March 1982 and are outlined in fns. 11 and 15 of the judge's decision.

ber 2, nomination of Grodis for the vice president position at a union meeting. McDonald's union activity was limited to his response to employee Germano, an incumbent union trustee and steward, who asked him on November 3, how he intended to vote. McDonald replied that he wanted to hear the issues before he decided. Germano shouted, "In other words you are going to vote for them."[6] Under these circumstances, we find the General Counsel has failed to show that the Respondent had knowledge of Lucas' or McDonald's union activity. Thus, so far as the evidence shows, the Respondent knew of the union activities of only one of the three men, i.e., the Respondent knew about McClain's agreement, in late October, to run for a trustee position on the slate opposing the incumbents, because on the day following McClain's decision to run he informed Foreman Thompson by asking Thompson what he thought about McClain's candidacy.

Although we agree with the judge that the Respondent acted to favor the incumbent union officers, we find this favoritism and the Respondent's knowledge that one of the three employees disciplined was involved in the campaign against the incumbents provide, under the circumstances, an inadequate base on which to make a finding that the discipline imposed was motivated by the employees' union activity. McClain had received a prior warning in March 1982 for poor workmanship, which stated that a repetition could be grounds for discharge. McDonald similarly had received a previous written warning for poor workmanship in March 1982 for using the wrong material, and he had been given a 3-day suspension. The discipline imposed in November on these two employees—written warnings and a 2-day suspension—is not out of proportion to that imposed the prior March before the union activity. Lucas' written warning without suspension is similarly in accord with his record. He had not incurred prior related discipline and the discipline imposed on him was like that given to Coble, who is not alleged to have been unlawfully discriminated against. Under these circumstances, we find that the types of discipline imposed do not suggest discriminatory motivation.

Similarly, we do not find that the Respondent's delay in discovering the defect supports the General Counsel's case. It does not appear unusual, considering the nature of the Respondent's business, that the parts could remain in stock from June until October. The Respondent manufactures and sells pressure gauges and temperature instruments. The Respondent manufactures the individual component parts and assembles the parts based on orders from customers. Further, after McClain performed the annealing process, the parts incorrectly made from stainless steel became indistinguishable in appearance from those correctly made of carbon steel and thus there was no visible indication that a defect existed in the parts while they were stored in the stockroom. Further, the record does not contradict the Respondent's explanation for the timing of the discipline—that the defect in the parts had become apparent when they were placed in an assembly in late October and that some time was required thereafter to retrieve production information and to complete an investigation showing which employees had fabricated the defective parts. Under these circumstances, we conclude that the General Counsel has failed to show that the timing of the discipline evidenced that the Respondent's decision was discriminatorily motivated. In sum, we find that the General Counsel has not satisfied her initial burden under *Wright Line*, i.e., she has failed to establish a prima facie case that the discipline was motivated by union activity.

AMENDED REMEDY

Having found that the Respondent has engaged in certain unfair labor practices, we shall order it to cease and desist and take certain affirmative action designed to effectuate the policies of the Act. We shall order the Respondent to offer Grodis and McClain[7] immediate and full reinstatement to their former jobs or, if those jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority and other rights or privileges previously enjoyed.[8]

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[6] The judge noted that McDonald's union activities were extremely limited and would clearly not be adequate to sustain a violation. The judge concluded, however, that if the Respondent wanted to penalize Lucas and McClain for their activities McDonald would have to be included because he was between Lucas and McClain in the production of the part.

[7] The record is unclear whether McClain was recalled to department 145 on a full-time basis subsequent to his November 1982 layoff. The record indicates that commencing March 1983 McClain was recalled to department 145 on a sporadic basis, and that in August or September he was recalled on some undefined basis to department 145 before again being laid off in September or October for lack of work. We shall leave resolution of this issue to the compliance stage of this proceeding. If it is determined there that McClain was recalled to department 145 on a full-time basis in 1983, we shall not order reinstatement as provided in this remedy, and the make-whole remedy regarding him will terminate with the date of such recall.

[8] Contrary to the judge, we do not order the Respondent to offer reinstatement to employee Bromley. We note that subsequent to Bromley's discharge on November 4 the Respondent offered Bromley reinstatement to his former position and that Bromley declined the offer. Further, although Bromley later accepted employment with the Respondent in a different position, we have found, in agreement with the judge, that Bromley was not constructively discharged from that latter position. In these circumstances, we find that Bromley is not entitled to reinstatement.

We shall also order the Respondent to remove from its files any reference to the October 1 discharges of Ferreira and Grodis, the November 4 discharge of Bromley, and the November 11 layoff of McClain, and notify them in writing that this has been done and that their discharges or layoffs will not be used against them in any way. We shall also order the Respondent to make Ferreira, Grodis, Bromley, and McClain whole for any loss of earnings and benefits in accordance with *F. W. Woolworth Co.*, 90 NLRB 289 (1950), with interest to be computed in the manner as prescribed in *New Horizons for the Retarded.*[9]

ORDER

The National Labor Relations Board orders that the Respondent, Dresser Industries, Inc., Stratford, Connecticut, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Discharging, suspending, or otherwise discriminating against its employees because of their support for, or participation in, a slate of candidates opposing the incumbent officers or agents of Food, Beverage and Express Drivers, Teamsters Local No. 145, a/w International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, AFL-CIO (the Union) in an intraunion election.

(b) Reprimanding employees, through warnings or other means, because of their support for, or participation in, a slate of candidates opposing the incumbent officers or agents of the Union in an intraunion election.

(c) Disparately applying its November 12, 1982 memorandum by allowing campaigning by the nominees on the slate with William Kuba, while, at the same time, forbidding campaigning by nominees on the slate with Abel Ferreira.

(d) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action to effectuate the policies of the Act.

(a) Offer Francis Grodis immediate and full reinstatement to his former job or, if that job no longer exists, to a substantially equivalent position, without prejudice to his seniority or any other rights or privileges previously enjoyed, and make him whole for any loss of earnings and other benefits suffered as a result of the discrimination against him, in the manner set forth in the remedy section of the decision.

(b) Offer Glean McClain immediate and full reinstatement to his former job, if it has not already done so, or, if that job no longer exists, to a substantially equivalent position, without prejudice to his seniority or any other rights or privileges previously enjoyed, and make him whole for any loss of earnings and other benefits resulting from his layoff, plus interest.

(c) Make Abel Ferreira and Antonio Bromley whole for any loss of earnings and other benefits resulting from their discharges, plus interest.

(d) Remove from its files any reference to the October 1, 1982 discharges of Ferreira and Grodis, the November 11, 1982 layoff of McClain, and the November 4, 1982 discharge of Bromley, and notify them in writing that this has been done and that evidence of this unlawful activity will not be used as a basis for future personnel actions against them.

(e) Post at its Stratford, Connecticut facility copies of the attached notice marked "Appendix."[10] Copies of the notice, on forms provided by the Officer in Charge for Subregion 39, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material.

(f) Notify the Officer in Charge in writing within 20 days from the date of this Order what steps the Respondent has taken to comply.

IT IS FURTHER ORDERED that the consolidated complaint is dismissed insofar as it alleges violations not specifically found herein.

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[9] In accordance with our decision in *New Horizons for the Retarded*, 283 NLRB 1173 (1987), interest on and after January 1, 1987, shall be computed at the "short-term Federal rate" for the underpayment of taxes as set out in the 1986 amendment to 26 U.S.C. § 6621. Interest on amounts accrued prior to January 1, 1987 (the effective date of the 1986 amendment to 26 U.S.C. § 6621), shall be computed in accordance with *Florida Steel Corp.*, 231 NLRB 651 (1977).

[10] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

WE WILL NOT discharge, lay off, suspend, or otherwise discriminate against you because of your support for, or participation in, a slate of candidates opposing the incumbent officers or agents of Food, Beverage and Express Drivers, Teamsters Local No. 145, a/w International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, AFL-CIO in an intraunion election.

WE WILL NOT reprimand you, through warnings or other means, because of your support for, or participation in, a slate of candidates opposing the incumbent officers or agents of the Union in an intraunion election.

WE WILL NOT disparately apply our November 12, 1982 memorandum by allowing campaigning by the nominees on the slate with William Kuba, while, at the same time, forbidding campaigning by nominees on the slate with Abel Ferreira.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL offer Francis Grodis immediate and full reinstatement to his former job or, if that job no longer exists, to a substantially equivalent position, without prejudice to his seniority or any other rights or privileges previously enjoyed and WE WILL make him whole for any loss of earnings and other benefits resulting from his discharge, less any net interim earnings, plus interest.

WE WILL offer Glean McClain immediate and full reinstatement to his former job, if we have not already done so, or, if that job no longer exists, to a substantially equivalent position, without prejudice to his seniority or any other rights or privileges previously enjoyed, and WE WILL make him whole for any loss of earnings and other benefits resulting from his layoff, plus interest.

WE WILL make Abel Ferreira and Antonio Bromley whole for any loss of earnings and other benefits resulting from their discharges, plus interest.

WE WILL remove from our files any reference to the October 1, 1982 discharges of Ferreira and Grodis, the November 4 discharge of Bromley and the November 11, 1982 layoff of McClain and *we will* notify them in writing that this has been done and that the discharges and layoff will not be used against them in any way.

DRESSER INDUSTRIES, INC.

Thomas W. Meiklejohn, Esq., for the General Counsel.
William C. Bruce, Esq. (Lynch, Traub, Keefe & Snow, P.C.), for the Respondent.
James L. Kestell, Esq. (Kestell, Pogue & Deinhart), for the Charging Party.

DECISION

STATEMENT OF THE CASE

JOEL P. BIBLOWITZ, Administrative Law Judge. This case was tried before me in Fairfield, Connecticut, on December 5 through 9, 1983, and February 6, 1984. The order consolidating cases and complaint and notice of hearing issued on August 12, 1983, based on the above-mentioned charges (and a first and second amended charge in Case 39-CA-1509) filed on October 25 and November 10, 1982,[1] and January 24 and March 3, 1983. The consolidated complaint basically alleges that Dresser Industries, Inc (Respondent) engaged in discriminatory conduct against Abel Ferreira, Francis Grodis, Glean McClain, Antonio Bromley, Edward McDonald Jr., and Edward Lucas Jr. because they ran for offices and positions in Food, Beverage and Express Drivers, Teamsters Local No. 145, a/w International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America (the Union), against the incumbents of the Union and engaged in other concerted activities. The consolidated complaint also alleges that Respondent promulgated a rule regarding campaigning in order to discourage employees from campaigning for union office and, further, enforced the rule unfairly to allow campaigning by the incumbent group, while preventing the above-mentioned insurgent candidates from campaigning. All this is alleged to be in violation of Section 8(a)(1) and (3) of the Act.

On the entire record, including my observation of the demeanor of the witnesses, and after consideration of the briefs filed by the parties, I make the following

FINDINGS OF FACT

I. JURISDICTION

Respondent, a Delaware corporation with an office and place of business in Stratford, Connecticut, is engaged in the manufacture and nonretail sale of pressure gauges and temperature instruments. During the calendar year ending December 31, Respondent, in the course and conduct of its business operation, purchased and received at its Stratford facility products, goods, and materials valued in excess of $50,000 directly from points outside the State of Connecticut. Respondent admits, and I find, that it is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

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[1] Unless indicated otherwise, all dates mentioned refer to the year 1982.

II. LABOR ORGANIZATION STATUS

Respondent admits, and I find, that the Union is a labor organization with the meaning of Section 2(5) of the Act.

III. THE FACTS

A. *Formation of the Insurgent State*

The Union has been the collective-bargaining representative of Respondent's production and maintenance employees for approximately 20 years; at the time of the hearing this unit comprised in excess of 500 employees. For much of this period, William Kuba, the Union's secretary-treasurer, and Ernie Porco, an employee of Respondent and an assistant business agent of the Union, had been union officers. The General Counsel alleges that the difficulties involved here commenced because in 1982 Ferreira organized a slate of individuals to run against Kuba and Porco's slate in the upcoming union election. The necessary implication of this argument is that Respondent preferred to deal with the Kuba-Porco slate, rather than Ferreira and his slate.

Sometime prior to April, employee Paul Keegan encouraged Ferreira to run on a slate against the incumbent union officers because of what he claimed was the poor representation they were receiving from the Union; Ferreira rejected these appeals. About April, Ferreira informed Keegan that he changed his mind and would run for secretary-treasurer and organize the remaining slate to run against the Kuba team. Shortly thereafter, Ferreira asked Grodis if he would be willing to run for president of the Union on Ferreira's slate, and he said that he would. Sometime thereafter, Ferreira told Grodis that he felt it would be better to have candidates who were employed at other companies as well as Respondent, and he asked Grodis if he would run for vice president instead, and he again agreed.[2] Ferreira asked Keegan to run on his slate as trustee and fellow employee Loretta Bennadette as recording secretary, and they agreed. In May or June he asked Bromley to join his slate as a trustee, and he said that he would think about it. About October, Ferreira repeated the request and on this occasion, Bromley agreed. About the end of October (after returning to Respondent's employ subsequent to being discharged) Ferreira asked McClain to be on his slate as a trustee; on the following day, McClain agreed. At the union meeting on November 2, Ferreira's slate was nominated, as was the Kuba-Porco slate; Lucas nominated Grodis at this meeting. Ferreira testified that prior to November 2, other than his conversations with the candidates on his slate, he did not inform anybody else of the candidates on his slate, except for his own candidacy.

About September, while Ferreira was working on his machine, fellow employee Daniel Zajac approached him with the union contract in his hand and asked Ferreira's advice about a grievance he had filed; Ferreira told him that he did not want to get involved. At that moment, Irving Nash, Ferreira's foreman and an admitted supervisor, came out of his office and said that he did not want Ferreira discussing union business, and that he was not going to fight two unions. At that point, Zajac walked away.

About August or September, Grodis spoke to John Caldwell, Respondent's manufacturing manager: "I wanted to see how he felt about running for Union office, how he felt . . . about me running. I didn't mention any names or I didn't say we." Caldwell said he had no objection and felt that it was good to run for election, "but he just didn't want any trouble in the plant because . . . he said that there could be bloodshed." Grodis assured him that there would be no trouble. On September 29, Grodis went to the office of Neil Priestly, Respondent's general superintendent, to discuss a suggestion he had conceived of; after discussing this suggestion, Grodis informed Priestly of his intention to run for union office. Priestly said that there was nothing he could do, and Grodis asked if he would do him a favor and keep Respondent's Personnel Manager Robert Martin "off our backs" since Martin was friendly with Porco. Priestly said that there was nothing he could do and that he did not want to get involved; he wished him luck. On another occasion (he could not place the time) Grodis informed his foreman, William Sherwood, that he was running for union office.

McClain testified that later in the day after he informed Ferreira that he would consider being a candidate on his slate, he asked his foreman (and friend) Howard Thompson what he thought of his running on Ferreira's slate as a trustee. Thompson told him that it would be good if he won, but if he lost, the pressure would be put on him. He told McClain that he was making good money and he should think about it, but "if I was you I wouldn't do it. He said that he had run against the Kuba slate 20 years earlier and lost, and it might look like he was pushing McClain to run because he and Kuba do not like each other.

Bromley testified that in August he asked Thompson (his supervisor whom he had known for many years) what he thought about he and Ferreira running for union office against the Kuba slate. Thompson told him that he had run for union office many years earlier and he encountered a lot of trouble because of the Union's influence with Respondent, and they would also have a difficult time for that reason. Thompson agrees that Bromley told him of his candidacy substantially before late October. Martin testified that he did not learn that Ferreira was running for union office until mid- or late-November; he did not learn of Grodis' involvement until "a long time" after his discharge on October 1, also about late November. Ridolfi testified that he does not remember ever being informed that Bromley was running on the Ferreira slate. He testified that the first he learned of Ferreira's involvement was in November when Nash complained to him of all the activity in his department as a result of Ferreira's candidacy. Shortly thereafter, he knew for sure when he received the unfair labor practice charge filed by Ferreira with the Board on November 10.[3] He testified that he did not receive this knowledge from the October 25 charge.

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[2] At Ferreira's request, Steven Jablonski and Tony Amaro (both employed by Drake's Bakery, whose employees are represented by the Union) agreed to run on Ferreira's slate for president and business agent, respectively.

B. *Discharge of Ferreira and Grodis*

Ferreira had been employed by Respondent for 7 years; during that period, the only reprimand he received was a verbal warning for poor attendance some years prior. Grodis had been employed by Respondent for 6 years and had never received any warnings or discipline; in mid-September he received a promotion to leadman. For many years prior to their discharge, nobody had ever been disciplined for engaging in gambling or promoting gambling at the plant. Stated briefly, the General Counsel alleges that Ferreira and Grodis were discharged because they were candidates on the slate running against Kuba's incumbent slate. Respondent counters that their union activity was not cause of their discharges; rather they were discharged for violating a rule against gambling, more particularly selling New York State Lottery (lottery) tickets to fellow employees.[4] The General Counsel, in turn, states that Ferreira and Grodis had been purchasing lottery tickets as a favor for their fellow employees for 4 months and that this was a pretext that Respondent seized on in order to discharge them. Additionally, the General Counsel alleges that Respondent permitted numerous forms of gambling and commercial activity, more serious than that undertaken by Ferreira and Grodis, without penalty, thereby establishing that it was their anti incumbent union candidacy that caused their discharges.

Commencing about June, Ferreira and Grodis drove to New York once a week in order to purchase lottery tickets; they sometimes went together and, at other times, separately. Within a short period of time, their fellow employees became aware of it and asked Ferreira and Grodis to purchase tickets for them. On these occasions the employees paid them, in advance, the amount required to purchase the tickets and, on occasion, gave them an additional dollar to cover gas and tolls.[5] On the average they purchased tickets for 15 employees a week; they testified that Nash often gave them money to purchase tickets for Richard Rodenhizer, Respondent's general foreman. At the end of each week, Ferreira wrote the winning lottery number in large print on the inspection table in his department, together with the word "Lotto" so that the people would not continually question him about the winning number. Zajac testified that when he first observed Ferreira with lottery tickets he asked him if "he would do me the favor and pick some up for me." Ferreira did so and each week Zajac paid him $4 for the lottery tickets; every other week, Zajac gave him a dollar for gas; he did this voluntarily, not because Ferreira asked him, but because Ferreira was doing him a favor. Employee Freddie Washington testified that he also asked Ferreira to purchase lottery tickets for him; on each of these occasions he gave Ferreira $4 for the tickets and an additional dollar to cover gas. Rodenhizer testified that he never purchased lottery tickets in the plant; he did purchase them while visiting relatives in New York State, and brought them back into Connecticut. He never personally observed Ferreira or Grodis selling lottery tickets in the plant, although he had "heard that they had Lotto tickets."

Early on the morning of October 1, Grodis was in the digigauge room of the plant looking at a newspaper to see if any of the winning numbers corresponded to his lottery tickets; prior to that, an employee (identified only as "Mac") had given him money to purchase lottery tickets for him. Martin walked into the room and asked Grodis what he was doing; Grodis told him that he was checking his lottery tickets against the winning numbers, closed the paper, walked out, and returned to work. Shortly thereafter, about 8 a.m., Martin stopped Grodis in the hallway and told him that William Ridolfi, Respondent's manager of industrial relations, wished to speak to him in his office; on the way, Martin asked Porco to accompany them to Ridolfi's office. Grodis testified that when they arrived at Ridolfi's office, Ridolfi told Grodis that he was being terminated for selling lottery tickets, which was a serious offense. Grodis said that he never sold lottery tickets, although he did play them. Ridolfi said that by law what he did was illegal and he was considering contacting the Federal authorities and having him arrested for his activities. Grodis was then asked to go to Martin's office where he stayed for a few hours; during this period Porco told him that Respondent was interviewing witnesses. About 11 a.m., Martin and William Sherwood, Grodis' supervisor, came into Martin's office; Porco was still present. At that time, Martin told him that he was being terminated for selling lottery tickets in violation of Respondent's policy. He was given his personal property and left.

Ferreira testified that on October 1, Nash told him that he was to report to Martin's office. He and his steward went to Martin's office, stopping along the way to get Porco. When they arrived at his office, Martin read from a paper and said that Respondent had conducted a lengthy investigation into lottery gambling at the plant and had determined that it was against Respondent's policy and Federal law. He asked Ferreira if he had anything to say and Ferreira said that he did not. Martin asked if he admitted selling lottery tickets and Ferreira said that he was not admitting to anything, and asked who said that he was selling the lottery tickets; Martin said that he was. Ferreira asked what he was going to do, and Martin said that he was going to terminate Ferreira; Porco told Martin that he did not have any proof. Ferreira then asked Martin for proof and Martin said that he did not have to show him anything, and he was escorted out of the plant.

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[3] The initial unfair labor practice charge filed October 25 and received by Respondent on October 27, alleges that Respondent violated Sec. 8(a)(1) and (3) of the Act by terminating Ferreira and Grodis on October 1, on the demand of the Union "in derogation of the rights guaranteed in Section 7 of the Act and in order to encourage membership in said labor organization." Ferreira filed another charge against Respondent on November 10 alleging: "Since on or about November 3, 1982, and continuing to date, the above Employer has restricted my right to engage in union activities on behalf of Teamsters, Local 145, while permitting other employees' their Section 7 rights."

[4] Counsel for Respondent alleges that these acts by Ferreira and Grodis also constituted a violation of 19 U.S.C. § 1301. As I find this irrelevant to the instant proceeding, I make no determination in that regard.

[5] The distance is about 50 miles and approximately $1.50 in tolls in each direction. Regarding the total amount he received weekly from his fellow employees for gas and tolls, Grodis testified: "If I got seven dollars, I was doing good." Ferreira testified that the amount they received for gas and tolls ranged from $10 to $18.

In 1981, Respondent posted the following notice entitled "Plant Rules and Regulations: The following practices are strictly forbidden. Employees violating these rules will be subject to disciplinary action including dismissal." Rule 13 states: "Gambling or promoting gambling," rule 19 states: "Violations of any criminal law." The notice states that it was revised April 1981. In addition, on August 20, 1982, Respondent posted the following notice[6] entitled "Special Notice" and signed by Martin:

> Dresser Industries Instrument Division has the responsibility and obligation to provide a safe, pleasant, and lawful working environment for employees. Specifically, as stated in our rules and regulations, the Company prohibits:
>
> 1. Violation of Company policy or any criminal law.
>
> 2. Gambling or promoting gambling on Company property.
>
> It is Dresser's policy to assist the authorities in prosecuting violations of criminal law by employees or former employees. Offenses of this nature may be grounds for termination.
>
> The position of Dresser, is, and will continue to be, quite firm.
>
> 3. Gambling, either by arranging for games of chance of whatever kind or by contributing to such activities, on Company property will not be tolerated.
>
> Dresser will actively continue investigations and will employ all measures necessary to assure that everyone is provided with a quality work environment.

Martin testified that this notice was posted as a result of rumors he had heard that gambling was occurring on the premises. Ridolfi testified that about January or February he was informed that there was gambling taking place in the plant: "I went out to the plant and looked around and I didn't see anything." He did not ask anyone to investigate this allegation. Later at a retirement party in May he was informed of gambling activities taking place at the plant; no names were mentioned, but pools were mentioned; he does not believe that the lottery was mentioned. He decided to post the notice referred to above.

Martin testified that weeks prior to October 1, Ridolfi informed him that gambling was taking place in the plant; whether an investigation began prior to October 1, he testified: "Whatever information I could glean, yes,"[7] although it did not focus on anyone in particular, Grodis was one of the employees he suspected. He testified that on the morning of October 1, Ridolfi told him that he heard that there was gambling taking place in the digigauge room and that Grodis was involved in it; he told Martin to see if anything was taking place there. He told Martin that he had received a tip from someone that this was taking place, but he did not identify from whom he received the tip. When he arrived at the room he observed Grodis conversing with another employee, James McGuire; Grodis' hand containing lottery tickets was extended toward McGuire. Martin asked Grodis what he was doing and Martin said: "Nothing. I'm checking my numbers," put the tickets back into his wallet and left the room. Martin then returned to Ridolfi's office and informed him of what he had witnessed. Ridolfi told him to bring Grodis to his office; Martin got Grodis and Porco and brought them to Ridolfi's office. Ridolfi asked Grodis if he was engaged in gambling and selling lottery tickets; Martin initially testified: "Grodis denied everything." He later testified that Grodis denied that he was engaged in gambling and does not remember whether he answered the allegation regarding selling lottery tickets. Ridolfi then said that there was evidence that Grodis was involved in gambling; Grodis repeated his denial and Grodis, Porco, and Martin then left and went into Martin's office. Up to that time (according to Martin's testimony) Ridolfi had not told Grodis he was terminated. For the next 2-1/2 hours, Martin, Grodis, and Porco waited while Ridolfi further investigated the situation. At 11 a.m. they returned to Ridolfi's office together with Sherwood; Ridolfi asked him if he was engaged in gambling or playing the lottery. Initially Grodis denied both; Ridolfi said that they had evidence to establish otherwise, and Grodis admitted that he had purchased lottery tickets for himself and for other employees. Ridolfi asked if he made a profit on these purchases and Grodis said that some of the employees gave him extra money to cover gas and tolls. Ridolfi said that based on the evidence that he had, Grodis was engaged in promoting gambling and gambling activity, and for that reason he was being terminated, and Grodis left.

Martin testified that subsequent to that, Ridolfi told him that he had evidence that Ferreira, as well as Grodis, was involved in gambling activity and that he should meet with Ferreira and his steward. At this meeting, Martin told Ferreira that they had evidence that he was engaged in a violation of rules regarding gambling or promoting gambling, and asked if it were true. Ferreira said that he would not respond. Martin said, "Well, the evidence is pretty clear and as a result of our investigation in this matter you're being terminated."

Ridolfi testified that when he arrived at his office on September 30, a typed unsigned note was on his desk stating that Ferreira and Grodis were engaged in selling lottery tickets on a weekly basis; the note also listed about 30 to 35 names of employees who purchased these tickets from Ferreira and Grodis. (Ridolfi said that he had previously received similar unsigned notes, and it has also happened since these occurrences.) Because he was busy that day, he paid "no particular attention" to it and placed it in his briefcase. At the end of the day he read the letter and told Martin to walk around the plant and investigate the situation the next day. Early the next morning, Martin told him that he did not observe any gambling in his inspection, and Ridolfi told Martin to go to the digigauge to see if any gambling activity was taking place there; he testified that he did this because McGuire's name was the first name (after Ferreira and Grodis) on the anonymous note as one of the purchasers of lottery tickets from Ferreira and Grodis, and he worked in the digigauge room. Martin brought Grodis and Porco to his office; Ridolfi asked Grodis if he were selling lottery tickets and Grodis said that he was not. Ridolfi said that he had reason to believe that he was selling lottery tickets to fellow employees; Grodis said it was not true. He testified that at this meeting he did not tell Grodis that he was fired. Ridolfi then asked Martin to take Grodis and Porco to his office. He then called for some of the employees whose names were on the anonymous note. He first met with McGuire and asked him if he had purchased lottery tickets from Grodis. He said that he had and Ridolfi asked him how often he purchased the tickets and how much he paid. McGuire said that he purchased them every week and, in addition to the regular cost for the ticket, he paid something extra "for the service." Ridolfi asked McGuire if he would sign a statement to that effect and he said that he would, and he did. Ridolfi then met with Joe Minaudo and asked him the same questions; Minaudo said that he was purchasing lottery tickets, but when Ridolfi asked if he would sign a statement to that effect, he walked out, saying "No way." Ridolfi then interviewed three to eight additional employees and then told Martin to bring Grodis and Porco back into his office. At that time, Ridolfi told Grodis that he had proof that he was selling lottery tickets; Grodis said that he did not actually sell them; rather he purchased the tickets for other employees. Ridolfi asked if he charged higher prices than the actual ticket price; Grodis said that he did not. When Ridolfi said that he had evidence that he received additional money for the tickets, Grodis said that some employees give him money for gas. Ridolfi told him that based on the evidence he was in violation of Respondent's rule on gambling (which Grodis said that he was aware of) and because of that, he was being discharged.

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[6] References to theft in this notice are omitted.

[7] He testified that prior to October 1, this investigation consisted of: "Being more diligent and observant as to the potential for gambling when I was out on the shop floor."

Regarding the discharge of Ferreira, Ridolfi testified that in his discussions with Minaudo and Nash, they informed him that they had purchased the tickets from Ferreira; on that basis, Ridolfi told Martin to call in Ferreira, tell him that they had evidence that he was involved in the sale of lottery tickets "gambling" and that he should inform him that he was being discharged.

Martin testified that it was Ridolfi who made the decision to fire Ferreira and Grodis; since Ridolfi became manager of industrial relations (about 1981) these decisions have generally been made by Martin; he could only testify to one situation, where an employee threatened Ridolfi, where Ridolfi made the determination to discharge an employee, since assuming his new position. Ridolfi testified that he has made the decision to discharge four employees since becoming the manager of industrial relations.

Martin testified that later on October 1, he called employee Freddie Washington into his office as part of the further investigation because Ridolfi told him that his name was included on the anonymous note he received. Washington admitted that he had purchased lottery tickets and, according to Martin's testimony, he admitted indirectly that he purchased the tickets from Ferreira. He also interviewed two other employees who admitted that they had asked Grodis to purchase lottery tickets for them. Ridolfi had directed him to speak to these employees as well, and neither they nor Washington was disciplined for their activities; the reason, according to Martin's testimony "in this case we went to the heart of the matter and disciplined those people who were at the very heart of the gambling operation."

Washington testified that his meeting with Martin took place in Martin's office a day or two after Ferreira and Grodis' discharge. Martin told Washington he wanted to speak to him and asked if he wished to have his steward present; Washington said that he did not. Martin asked him if he had been purchasing lottery tickets in the shop and Washington said yes, he had been playing the lottery. Martin asked him if he had been purchasing the tickets from Ferreira, and Washington said that he would not say from whom he purchased the tickets. Martin said that it was against company policy to gamble or promote gambling in the plant and it was grounds for discharge; Martin then showed Washington Respondent's rule to that effect. Washington said he did not believe he was doing anything wrong because it was a legal lottery operated by New York State; he also told Martin: "how can you tell me that I can lose my job for that, and it's legal, where there's so much illegal stuff going on in the shop?" In this regard he mentioned illegal numbers games, football pools, and the sale of jewelry. Martin did not ask him who was involved in these activities and said "that's not the issue right now." Martin then asked him to sign a statement that he had purchased lottery tickets from Ferreira; Washington refused. He testified that this statement was prepared prior to when he entered Martin's office.

Ridolfi testified that the only other employee who was disciplined for his lottery involvement was Nash,[8] who was given a written warning admonishing him for his involvement, and providing that any additional violation would lead to his discharge; nobody else was disciplined because "we would probably end up discharging a good number of people." Nash only received a reprimand because: "He was purchasing the tickets. He wasn't involved in the sale of it."

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[8] Ridolfi testified regarding his meetings with Nash:

> The first time he said that he purchased from Mr. Ferreira and Mr. Grodis. Then the . . . subsequent meeting he denied, or was very vague on Mr. Ferreira's involvement, and that he ever purchased from Mr. Ferreira.

He never asked Nash for a written statement.

On October 13, representatives of Respondent and representatives of the Union (Kuba and Porco) together with Ferreira met to discuss the discharges. Respondent claimed that it had enough evidence to uphold the discharges; the Union claimed that it did not and said that it would take the case to arbitration. On October 25 Kuba informed Ferreira that Respondent agreed to reinstate him the following day, but without backpay for the period that he was out and Ferreira returned to work the next day. Grodis was never reinstated. Ridolfi testified that he had signed statements from employees regarding Grodis' involvement in the sale of lottery tickets, and he felt that this discharge would be sustained through an arbitration procedure. However, he had no signed statement regarding Ferreira's involvement and although Nash originally implicated Ferreira, his "testimony" changed a few weeks later; he was never asked to give a written statement. On this basis, Ridolfi did not feel its determination would stand, so Ferreira was reinstated.

The Union grieved both terminations: Ferreira's October 25 suspension and Grodis' discharge. When no satisfactory agreement was reached on these matters, arbitrations were scheduled for both. Ferreira and Grodis each withdrew the grievances prior to arbitration.

Respondent defends that Ferreira and Grodis were discharged solely for gambling in violation of Respondent's rules posted in 1981 and 1982. The General Counsel counters that the numerous gambling activities occurring in the plant establish that the Ferreira and Grodis discharges were pretextual, and were actually caused by their insurgency slate in the upcoming union election.

Anthony Iodice

Iodice (who did not testify) is a steward and is employed by Respondent as a tow motor operator; his son, Guy Iodice, is a foreman employed by Respondent. There was a great deal of testimony about Iodice's operation of an illegal numbers operation at Respondent's plant; it follows:

As part of his job, Iodice drives his vehicle through the aisles at Respondent's plant delivering and picking up goods and material. Grodis testified that during the entire period of his employment with Respondent, he observed Iodice on a daily basis stopping his vehicle in the aisle, asking employees if they wanted to play a number, and writing the number on a piece of paper and driving off. Ferreira testified that beginning when he commenced his employment with Respondent through October 1983 he observed Iodice operate an illegal numbers game regularly while he was employed on days, although this activity "slowed down" during 1982. He observed Iodice stopping his vehicle in an aisle, speaking to an employee, receiving money, writing the number on a piece of paper, and leaving. Ferreira purchased numbers from him in the past. Employee Judy Tumbleston testified that for the 7-year period of her employment with Respondent, she has observed Iodice collecting numbers from employees three or four times a week. This involved stopping his tow motor, taking the numbers from the employees, collecting the money, and later using the public telephone to call the numbers in, about noontime. Employee Lorrie Coverson testified that she first observed Iodice taking numbers from employees when she commenced her employment with Respondent about 1977; the most recent occasion was early in 1983. She observed him doing this: "Not regularly. On occasion I would have to say." On one occasion while she was talking to him, an employee approached him, and gave him a number on a piece of paper and some money. In addition, on occasion when she was with fellow employee Natalie Howard, she observed Iodice approach her and take her number. She has also heard Iodice calling in his numbers over the bank of pay telephones about 15 feet from Respondent's personnel department. Lucas testified that he first observed Iodice playing numbers about 1974, when he commenced his employment with Respondent; from that time until about 1981, when he drove a tow motor like Iodice, he observed Iodice selling numbers three to five times a week. The usual procedure was that Iodice stopped his tow motor in the aisle and there was no room for Lucas to drive by; Lucas stopped his tow motor to find Iodice, and observed him taking numbers and money from employees on these occasions. He also observed Iodice calling in these numbers on the telephone in his son's office, and on the pay phones. Since 1981 he has not observed Iodice's operation with the same frequency. The last occasion that he observed Iodice's number operation was approximately a month prior to the instant hearing.

Zajac testified that he observed Iodice's numbers operation from the time he commenced working days (approximately 1978) until 2 weeks prior to the hearing, and almost on a daily basis in between. Zajac played the numbers regularly with Iodice; Iodice drove his tow motor into the area, parked it in the aisle and got the number and the money from Zajac. On one occasion, Nash told Lucas that he had won on a number, although he did not say that it was bet through Iodice.

McClain testified that beginning when he commenced employment with Respondent, about 1976, until a few weeks prior to the instant hearing, he saw Iodice taking numbers from employees, and almost on a daily basis. On one occasion, while McClain was on the pay phone in the plant, Iodice asked if he could use the phone; he gave McClain a dime and called in his numbers; he has also observed Iodice counting his money in the bathroom. McDonald testified that "on many occasions" he has observed Iodice taking numbers and money from employees, the last time being within a month of the hearing. Keegan testified that he has observed Iodice on approximately 100 occasions taking numbers; the procedure is for him to stop his tow motor and the employee gives him a piece of paper and the money. When I asked Thompson if he knew that Iodice was running a numbers operation in the plant, he testified: "No. I don't know that for a fact." Martin testified that he never saw or heard that Iodice was involved in running a numbers operation at the plant. Ridolfi testified that after October 1, he received another anonymous note that referred to some wrongdoing by Iodice. He directed Martin to go through the plant to observe Iodice, and he did the same; neither saw Iodice doing anything improper.

Other Forms of Gambling or Commercial Activity

Another alleged form of gambling taking place at the plant during this period was a football pool operated on Fridays during the football season by George Germano, employee, union trustee, and steward. Grodis testified that Germano operated a pool on the weekend football games. He first observed it when he commenced working days and last observed it shortly prior to his discharge. Germano drew up a sheet of paper that was later numbered 1 to 10 along the top, and 1 to 10 down, but not in numerical order. Employees wrote their names in one (or more) of these 100 boxes to bet on the score of the particular game. The employee whose name corresponded to the last digits of the score of the game was the winner. Germano posted the sheet on his workbench where employees filled in their name. Ferreira testified that he observed employees placing their names on the paper (hung on the board at his desk) and paying Germano a dollar per bet, but he could not remember when he last observed it. Zajac testified that Germano conducted the football pool, but did not conduct it in 1982. Germano left the sheet on top of his desk and the employees picked a square and wrote their name on it. Zajac won the pool on a number of occasions. McDonald testified that he first observed Germano operating the football pool about 5 years earlier; he last observed it in 1981 or 1982. He observed the sheet hanging at Germano's desk for the employees to fill in their names. Keegan testified that Germano ran the football pool and, at times, a baseball pool. The sheet was hung on a board at his desk for the employees to choose a box and fill in their name. The last time he observed it was December 1982. Thompson testified that he never observed a football pool at the plant, but "there were rumors to that effect." Rodenhizer was asked if he were aware that a football pool was conducted at the plant from 1981 to the present time; he testified: "Only through hearsay that they existed." He never conducted an investigation to determine whether gambling was actually occurring at this time. Martin testified that he had heard that there was a pool on the results of the Super Bowl in January 1982, although he never observed it. He did not take any action in this regard.

Ferreira testified that about 1977, while he was employed in department 181, during the football season, he observed Joe Minaudo, an employee and union steward, selling slips for gambling on the professional football games. He was engaged in this activity from about Tuesday through Friday. Each slip had 10 games listed on it, with the point spread, and if you won all 10, you won $300. Ferreira won it once. This ceased the summer 1982 when Minaudo was arrested for engaging in gambling activities. McDonald testified that while he was employed in department 145 (until about 1982), he observed Minaudo passing out the slips for the football games the following weekend, between Tuesday and Friday of that week. He first observed this about 1978. Grodis testified that employee Heddy Pasank ran a World Series pool at the plant. This involved picking a team and an inning and the employee who picked the half inning with the most runs scored won; she posted the notice at her work station, and he observed Nash participating in the pool. He last observed this in 1981. Zajac testified likewise about the World Series pool conducted by Pasank and that there was no pool in 1982.

There was also testimony regarding commercial activity on Respondent's premises engaged in by Barbara Raganese, a timekeeping employee. Raganese's work location is on the main aisle approximately 100 feet from Respondent's personnel department, with a door in between. Tumbleston testified that Raganese ran "a general store" at her desk, displaying goods ranging from jewelry to toys, which she sold, on her desk. Some of the displayed items were up to 2 feet tall; she first observed this in fall 1982 and last observed it Christmas 1982. Coverson testified that Raganese sells toys and dolls that are displayed on her desk; one of the dolls was about 2 feet tall. She observed these items on Raganese's desk about twice a week from fall 1982 through August 1983. About September 1982 she purchased a toy dog from Raganese. Zajac testified that his work location is at a different end of the plant, and only passes Raganese's desk when he uses the pay telephones near the personnel department. He first noticed Raganese's commercial operation about Christmas 1982; the last time was about a month prior to the hearing. He observed dolls, jewelry, and other items on her desk; the items varied and were not visible on every occasion that he walked by her desk, but were usually there during holiday periods. Some of the items were small, and others were as large as 2 feet high. Keegan testified that "since I can remember" Raganese has old and displayed toys from her desk in the plant; the most recent occasion he observed toys displayed on Raganese's desk was a few weeks prior to the hearing.

Thompson testified that he walks past Raganese's desk and "may have seen . . . watches or things of that nature . . . . Quite often she has flowers or little decorations or little things up there. A lot of employees in the shop have." He has not seen more than one doll on her desk at any one time. He heard that she was selling items from her desk. Within the year prior to the hearing he spoke to her about it, and "she said that she had been warned and said there was no way that she was going to get involved with anything like that again." Rodenhizer testified that he was aware that Raganese had items on her desk for sale during 1982, but he did not know what time of the day this activity was taking place. Martin testified that his office is approximately 25 feet from the entrance to the production area of the plant, and he goes into the plant five or six times a day on an average, and when he walks straight down the main aisle he walks past Raganese's desk, but he has never observed dolls, toys, or other similar items displayed on her desk. He testified, however, that about October 1982 he heard that she sold dolls and toys to other employees; he later testified that "long after this 1982 period" he learned of Raganese's commercial operation through an anonymous note; although it would be a violation of rule 16 of Respondent's plant rules and regulations posted in April 1981, referred to earlier, no disciplinary action was taken against her because "I have no evidence that she actually did that." Raganese had never spoken to him about it and never asked Martin's permission to continue selling these items after Ferreira and Grodis' discharge. Ridolfi testified that he passes Raganese's desk four or five times a week and never noticed anything displayed on her desk. Raganese (who is still employed by Respondent) testified that prior to March 1983 she had sold goods in the plant without permission; at that time, Porco told her to ask Martin's permission for it. She asked Martin, and he said that she could do it, but not during her working time. About 2 months later, Martin approached her at her desk and handed her an anonymous note, saying, "I wish you could use more discretion." She looked at the note and it said that Iodice was taking numbers, she was selling items, and other employees were doing things and getting away with it, while other employees were being fired. Martin told her that she should be less obvious and she told him that she had permission and how could she be less obvious. He said that she should have the people pick up the items from her car rather than bring them into the shop.

C. *Layoff of McClain*

McClain commenced his employment with Respondent about 1976; for the 3 years prior to October he had been employed in department 145 as a heat treating machine operator; in addition to heat treating, the other areas of department 145 are hand welding and machine welding; Thompson is the foreman of the department. The base rate for his job was $6.40 an hour.[9] It took him a few months before his production reached that level; later, he was able to earn between two and three times this amount through his increased production. As stated, supra, in late October McClain agreed with Ferreira that he would run for trustee on his slate and spoke to Thompson about this decision; at the union meeting on November 2 he was nominated for that position. On the next morning, McClain observed Thompson and Germano talking in Thompson's office. Germano came out and told McClain "Cut your percentage because you're next." McClain said that one other employee, Chris Neely, had less seniority than he, and should be laid off ahead of him;[10] Germano said Thompson disagreed because Neely was the setup and instruct man on the night shift. Later that day, Thompson called McClain and Germano into his office; Thompson said that there was a lack of work and McClain was the next to be laid off and it would be effective the following Wednesday, November 11. McClain said that Neely had less seniority than he, and Thompson answered that Neely would be retained because he was the night-shift setup man. McClain said that there was nothing to set up because he was the only nightshift employee (all the others had previously been laid off). Thompson said that because he was the setup man on the night shift McClain could not bump him. McClain then went to see Martin; present at this meeting in Martin's office were McClain, Porco, Martin, and Thompson. Martin told him that he was being laid off due to a lack of work; he also gave him a choice of positions in other departments that he could "bump" if he wished to do so; he accepted a bench soldering position in department 127. He testified that at these meetings he was never asked if he would accept the night-shift job in department 145 (Neely's job) nor did he say that he was unavailable for that position. He also never offered to work nights. Thompson also testified that at this meeting McClain was never asked if he wished to transfer to the night shift. Prior to his layoff, two other employees in the heat treat area of his department were laid off.

Thompson testified that for the 6-month period prior to McClain's layoff production dropped by half; his entire department went from 32 employees to 18 or 19. Five or six of the 14 heat treat employees were laid off between late 1981 and November 1982; McClain was the last to be laid off. The only employee in the department in the heat treat area with less seniority was Neely, but he had a higher classification of set up operator and instruct, which meant that he had received instructions and could set up and perform every operation on every machine in the area, which McClain could not do. (McClain testified that he could operate every machine in the heat treat area, and because there was nobody else employed on the nightshift with Neely, the instruct classification meant nothing.) Neely's ability to set up and operate all the machines was important because Respondent periodically received orders for a small quantity of goods; rather than complete these orders on the day shift with an inordinate time being spent on the numerous setups, these orders were completed by Neely on the night shift; his ability to set up and operate all the machines made that possible. About 1981 McClain had been given the opportunity to learn all the operations in the heat treat area, but Thompson found that he was incapable of doing it. Neely acquired the setup and instruct classification more than a year prior to McClain's layoff.

Thompson testified that the past practice at the plant is that layoffs are by shift and job classification rather than plantwide seniority; the contract provides that layoffs are determined by seniority within the department, "providing the remaining employees can satisfactorily perform the remaining available work in the department." He testified that he uses the contract as a "guideline."

Employee Joan Johnson testified that in March 1983 she had a conversation with Thompson, who approached her while she was in her department. He told her that he had finally gotten rid of McClain, who was a troublemaker. He had work for him but he wanted to see McClain on the unemployment line (which he repeated a few times). Thompson testified that he did have a conversation in March 1983 with Johnson (Johnson is his late daughter's sister-in-law, and he had gotten her the job with Respondent). He stopped to speak to her (she works in a different department) and she asked if there were any layoffs in his department because there were layoffs throughout the plant. He said that there were and that McClain was laid off. Johnson asked if he would be returning and Thompson said that he did not believe so because work was very slow. Thompson also told her that McClain had been giving him problems[11] and maybe the transfer would make him appreciate the job and the high rate of pay he was earning when he returned; that was the extent of the conversations. He did not refer to McClain as a troublemaker or say that he wanted him to be on unemployment. He testified: "I would be guarded in my words, or anything I may have said to" Johnson because she was Coverson's sister-in-law, and Coverson was "very close" to McClain. Between that time and about September 1983, McClain was recalled to department 145 on a sporadic basis (between 1 and 3 days a week) "when the work picked up to the point where we required additional personnel"; about September 1983 he was again laid off from department 145 for lack of work. At that time, at a meeting in Martin's office with Martin, Rodenhizer, Thompson, Porco, and Germano, Martin asked McClain if he were interested in bumping Neely and working nights; McClain said that he was not because he had a part-time job teaching basketball at the "Y." Thompson testified that McClain's layoff was not connected in any way with the fact that he was running for union office.

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[9] The plant generally operates on a piecework, incentive basis. If the amount of items he produced hourly equaled $6.40, it was referred to as earning 100 percent. If the amount of items he produced was less than 100 percent, he would still receive his base pay of $6.40 an hour, but if this continued for an extended period, Respondent would probably transfer him from the position. Under this incentive system, many employees were able to earn twice their base pay (200 percent) or more.

[10] Neely was the only employee in the heat treat area of department 145 with less seniority than he: there were two other employees in the other areas of the department with less seniority, but they engaged in operations he was not trained for.

Martin testified that in November McClain's job classification was heat treat, setup, and operate, while Neely's classification was heat treat, setup, operate, and instruct; the difference was that Neely had been rated qualified to instruct other employees. At the time, there were no other heat treat employees on the night shift that Neely was employed on; however, the job classification "instruct" means, in addition to instruct, that the employee is capable of performing all job classifications in the areas; Neely could, McClain could not. He testified that Respondent determines layoffs "by seniority within job classification within department." (McClain's seniority date is September 1976; Neely's is November 1979.) When he met with McClain and his steward in early November in his office, and informed him that he was going to be laid off, he asked McClain which shift he preferred, and he said he preferred that first shift. He then asked McClain if he were able to work the second shift and McClain said that he was not.

D. *Discipline of McClain, Lucas, and McDonald*

The genesis of this allegation was the alleged use of an incorrect metal product in the assembly of a part. The part involved is a steel tube, part no. ABX142E and the particular order involved was produced during the summer in department 145; McClain, Lucas, and McDonald were each involved in the production of this particular order.

There are three kinds of steel used in Respondent's operation: Chrome-molly, also known as carbon steel (carbon steel), stainless steel, and K-Monel. Stainless steel has a silver look to it, while carbon steel is darker (K-Monel is not involved here, so its properties will not be discussed). After the annealing (baking) process, carbon steel and stainless steel are indistinguishable; the tubes in question, admittedly, were made from stainless steel rather than carbon steel.

On November 24, McClain and McDonald were given written warnings for "poor workmanship"; the warnings recited that their use of stainless steel instead of carbon steel caused 161 tubes and 60 systems to be scrapped by Respondent. The warnings referred to previous written warnings McClain and McDonald had received and requested "that appropriate disciplinary action be taken against you up to and including discharge." (They were given brief suspensions.) Lucas' warning was dated December 3 (repeating a November 23 verbal warning he had been given) and recites that the cost of the error was $984; it states that "any recurrence of this same nature will require stronger disciplinary action and could even result in termination."

The General Counsel alleges that these warnings were issued in retaliation for the employees' union activity; as stated, supra, McClain ran for trustee on Ferreira's slate and Lucas nominated Grodis for his position. McDonald testified that on November 3, Germano (who did not testify) asked him whom he intended to vote for. McDonald answered that he wanted to hear the issues before he decided, Germano shouted, "In other words, you are going to vote for them." McDonald attempted to explain that he was undecided, but Germano walked away before he could do so. Respondent's position is that these warnings were caused solely by the errors made by McClain, Lucas, and McDonald in the processing of this order.

McDonald has been employed by Respondent since 1978. His stockroom is adjacent to department 145 and stores the parts for that department. One of the numerous items stored in that stockroom is the tube in question ABX142E. He testified that on November 4 or 5, Thompson approached him with one of Respondent's order forms in his hand, which was for the ABX142E,[12] and he asked McDonald if he had any of those tubes in his stockroom and McDonald said that he did. Thompson told him that they were made with the wrong material, stainless steel instead of carbon steel, so he should put a hold on the tubes. McDonald then checked the daily delivery sheets of his stockroom and found that 233 tubes produced from order 2BY82928 were received in his stockroom on August 10. About a day later, Thompson came into the stockroom and McDonald told him that the stockroom received 233 of the tubes in order 2BY82928, which was more recent than the order Thompson had shown him. Thompson then left and returned with order 2BY82928 and told McDonald to take a physical count of the ABX142E tubes in stock [13] (the count showed about 80 pieces, and to take them out of stock, which he did. Thompson then tested these tubes and when they did not stick to a magnet, he determined that they were made with stainless steel rather than carbon steel. A few days later, Thompson informed McDonald that Rodenhizer said that everybody who was involved with order 2BY82928 would be written up.

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[11] Thompson testified that McClain was often arguing with the leadman and fellow employees in the department, to the point, at times, where he was uncontrollable. In 1981, McClain was involved in a fight with another employee in the department. In March 1982 McClain was given a warning by Thompson for poor workmanship. It stated that a repetition would be grounds for discharge.

[12] McDonald testified that the order form Thompson showed him was the same type of order involved, but was not the actual order form involved here, 2BY82928.

[13] McDonald testified that there is no way of determining which order a particular tube in the stockroom was produced from.

McDonald testified that he later attended a disciplinary meeting with Martin, Rodenhizer, Thompson, and his steward. At the meeting he was informed that he was being disciplined[14] for his part in the error on the order in question. He told them that he was still not convinced that the tubes in question were produced by order 2BY82928. Although Thompson had shown him a document allegedly establishing that ABXI42E had "zeroed out" prior to the fabrication of the order in question, he was not satisfied that it established that. He then asked why his leadman, Ernest Otero, who had assigned him the job, was not disciplined.[15] They said that he was not in question.

The question of fault arises here in two ways: the General Counsel denies that the defective tubes were produced in order 2BY82928, but defends that even if the wrong metal were used in order 2BY82928, it was not the responsibility of McDonald, Lucas, or McClain to select or check on the metal being used. This is more pronounced in the case of Lucas, whose position put him at the initial step in the process. The order states the different processes that were to be performed, and the order in which they would be performed. Lucas is the employee who performed the initial job function on order 2BY82928: "Issue tubing, check wall thickness." Lucas testified that he picked the material of this order, but alleges that he picked the correct material. He is confident of this because he wrote the bin location (from which he took the materials) on the order, and it is the correct bin location as specified on the order. Regarding the different kinds of metals used by Respondent, Lucas testified: "that is not my job to know." He removes the stock from the bin, ties it up, and writes the date, his clock number, the material, and the part number. He then brings it to the department involved. Each department has an inspector whose job it is to inspect the material prior to its issuance to an operator. In the last week of November, Fred DeLibro, his supervisor, told him that department 145 had a problem with some incorrect material he had issued them in June, but they were looking into it. On December 3, he was called into DeLibro's office; present were he, DeLibro, and his union steward, Richard Lupo. He told him that he was being given a verbal warning for issuing the wrong material on order 2BY82928 and gave him a copy of the order. Lucas asked how he could have issued the wrong stock when the order shows that the bin location he wrote on the order was the correct bin; DeLibro agreed with him and said that he could not understand it either. Lucas then told Lupo that it was the first time he was disciplined in 9 years of employment at Respondent, and asked him what he could do to fight the warning; Lupo (who did not testify) said that he could "wipe his ass" with it. DeLibro said that he did not feel it warranted any disciplinary action because it was his first disciplinary action, but Thompson wanted disciplinary action to be taken against him. He had asked for a written warning, but DeLibro convinced them that a verbal warning was adequate. McDonald performed the second and third process, "Cut to 7 3/4 length," "Burr both ends inside and out and wash" on June 23. McDonald testified that it was the responsibility of the leadman to give him the material to work on and, on the day in question, he finished a job and he asked Otero (who did not testify), his leadman, for another job. Otero gave him order 2BY82928 and brought him to a bench where the material was. He cut the material to the proper length, cut it and burred it as set forth in the order. He did not see the top left-hand portion of the order, which identified Chrome-molly as the material to be used, and testified that, at the time, he had no knowledge of what Chrome-molly was; he knew what carbon steel was, but did not know that it was the same as Chrome-molly. He testified: "When I'm given a job I assume that's the proper material, by the leadman . . . when he gives me a job it's his job to make sure that I've got the proper material with the order that he's given me." Several years earlier, the operators used to get their own materials for their orders; that was changed so that the leadmen give the operators the materials.

McClain testified that he first learned of the problem on November 24, while he was working in department 127; at that time he was called to Thompson's office; also present were Thompson, Rodenhizer, and Germano. Thompson told him that Respondent had lost a lot of money on some work that he performed and that he performed the job the wrong way because he did not read the entire order. He showed McClain order 2BY82928 with his initials on it; the order indicates that McClain performed two operations on this order: "Swage one end," which means that he makes one end of the tube smaller so that it will fit into another tube, and "Anneal at 1275 degree F," which means that he sets the furnace for 1275 and bakes it for an hour at that temperature. McClain asked Thompson what he meant by the entire order and Thompson pointed to the top-left hand portion of the second page of the order where it said "material" and "Chrome-molly." McClain told him that he had never worked with the material before and he was taught to read the orders for the operations to be performed. He also told him that he had received the work from Otero and the inspector, Josephine Coble, had signed the order establishing that it was correct and that the employees performing the operations ahead of him should have caught the error. McClain testified that the procedure he followed in department 145 was that the lead man gave him the order form and took him to where the material was. He then checks the order to see what operations he was assigned to do; "Nobody taught me how to look up in the corner what material it was. I've been there three years and nobody taught me that." Regarding whether he was aware that carbon steel is Chrome-molly, he testified "I never knew that name." He also testified that while he was employed in department 145 he always had the inspector inspect his work and initial the order: "Because that's the first thing Howard (Thompson) tells you, get the Inspector first."

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[14] No grievance was filed regarding this discipline.

[15] On March 19, 1982, McDonald was issued a written warning for using K-Monel rather than carbon steel, causing the tube to be rejected. He received a 3-day suspension for this error. He testified that when he was given this warning Thompson told him to "follow the order properly," but did not tell him that it was his responsibility to check that the proper material was being used.

Thompson testified that McDonald and McClain were disciplined for performing operations on the order without checking the type of material to be used, an error that caused Respondent to incur a loss of approximately $1000. He testified that it is the responsibility of the operator to check to see that the material he is operating on is correct; this is not the responsibility of the leadman: "The lead man's function is to assign work, to make major setups; major fixture changes and . . . help instruct and train the employees . . . . It is not his responsibilities to read and identify each and every order for an operator. It is the operator's responsibility. . . ."

Regarding the employees' testimony that they had not been instructed as to what Chrome-molly was, Thompson testified: "I can only say that an individual who's worked in that department all this time and does not know what type of material he's working with, or how to identify the type of material he's working with, I'm surprised that we've managed to make a gauge."

Stainless steel and carbon steel are easily differentiated; however, if stainless steel is mistakenly put through the annealing and oiling processes meant for carbon steel[16] (as occurred here), it comes out indistinguishable in appearance from carbon steel; that is the reason that those employees who performed operations on the order subsequent to McDonald and McClain were not disciplined; they had no way of knowing that the material was not carbon steel. When stainless steel is annealed, it becomes worthless to Respondent because it no longer meets its specifications.

Thompson testified further that at the end of October, the processing of an order, which contained tube ABX142E as a component part, was begun. The order was processed, and in about the second week of November, Thompson was informed by Otero and Coble that approximately 30 of the systems cracked when they were pressurized. He checked the order and saw that the tube should have been made of carbon steel; on checking it with a magnet he realized that it was stainless steel. He then determined to find out how many of these defective tubes there were and to isolate them; for that purpose, he went to the stockroom and asked McDonald to get all the ABX142E tubes in the stockroom; he tested them with his magnet and found that they were all stainless steel and he had them all removed from the stockroom and charged them to his department. Thompson then checked the bin box in the stockroom where these tubes came from and found an inspection tag identifying them as having been produced in order 2BY82928. As he learned that there was an order for ABX142E subsequent to order 2BY82928, he inspected the bin containing this order in the stockroom. He found few units left, and the ones that were there were made of carbon steel. He determined from this that the defective tubes were produced in order 2BY82928 and he went to Respondent's cost department and obtained a copy of the order, thereby learning which operators were involved in the processing of the order. Thompson then discussed the situation with Rodenhizer and they decided that because another order of ABX142E had gone into stock subsequent to those produced pursuant to order 2BY82928, that they should request an activity sheet (a computer printout of the quantity of the particular part entering and leaving the stockroom) of the part.[17] Thompson testified that this activity sheet established that there were 15 to 18 ABX142E tubes in the stockroom when the 2BY82928 order went into stock, which was probably in August because the order was being worked on in July, and the plant was closed the last 2 weeks of July. Rodenhizer told Thompson to figure the loss Respondent suffered due to the error. When this was determined, he and Rodenhizer decided that as McDonald and McClain were responsible for the error, they would be disciplined.

Thompson also testified that ABX142E is just one component of about seven necessary for a completed part, and such a part can remain in the stockroom for months before it is needed for production; that is why the error was not discovered until November.

Thompson also testified that Otero set up McClain's machines for him to perform his work assignments; he would set it up pursuant to the specifications set forth in the order. The operators should be aware of the differences in metals they work with, and should check all portions of the orders (including the material listed on the top left-hand corner of the second page) prior to performing their operations. In fact, when Thompson gave McClain his prior warning on March 19 he told him that it was his responsibility to read each order prior to performing any work on it to be sure that he had selected the proper materials and parts.

Rodenhizer testified that when Thompson first informed him of the faulty tube, he told Thompson to investigate the situation and locate the origin of the order. In this regard he reviewed numerous documents with Thompson, including the inventory activity sheet for ABX142E, which showed "basically only the one order in question. It is a relatively low active part." It showed that this part entered inventory in July and was issued in October or November; on this basis he recommended that McDonald and McClain be disciplined because it was their responsibility to check the material specified in the work order, and their failure to do so caused Respondent to suffer a loss. He did not recommend any discipline for Otero because he had nothing to do with the problem: "He would not have any recourse to go over there unless they have got a problem." When an order came into the department, he would set up the machine to cut the tubing at the specified length, but he would not necessarily cut the actual material. The material is chosen by the stockclerk from the stockroom based on the contents of the order. It is then the responsibility of the operator to "verify the material" and cut it on the machine previously set up by Otero. Martin testified that when McClain was first notified of his error, he defended that he could not tell the difference between the materials from the order (presumably, the word Chrome-molly), but that when he showed him the different materials, he was able to differentiate between carbon steel and stainless steel.

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[16] Respondent does not perform annealing of stainless steel on its premises; it requires a different process and is performed elsewhere.

[17] Counsel for Respondent indicated at the hearing that the particular activity sheet that Thompson and Rodenhizer referred to no longer exists. However, the General Counsel introduced (and had received) into evidence an inventory activity sheet for ABX142E dated December 10. This covers receipts and issues of ABX142E (including the order numbers) from November 1981 through November 1982, approximately 50 transactions in all. Order 2BY82928 was not included, nor were any transactions between July 9 and October 28. This omission was never explained by Respondent.

E. *Discipline of Bromley*

Bromley has been employed by Respondent since about 1977; in January he transferred to department 145 (with some assistance from Thompson, whom he had known for a long time) and assumed the job of leak tester, a job paid on a piecework, incentive basis. The allegations regarding Bromley are that he was given a written warning dated October 21 and, after transferring to another department, was harassed, discriminated against, and threatened with discipline, all because he was nominated as a union trustee on Ferreira's slate. Respondent alleges that he received the warning dated October 21 because he was purposely misapplying his time and production, thereby improperly increasing his earnings, and that he was never harassed in his new position; rather his supervisors were attempting to get the appropriate amount of production from him.[18]

As stated, supra, Bromley transferred to department 145 in January, and from that time through September 27, he worked in that department as a leak tester. On that date he was injured on the job and was out until October 26, when he went to Respondent's personnel office with a doctor's note saying that he was only capable of performing limited duty for the next week; Respondent had no light work available and Bromley did not return to work until November 4, on which date he was given the warning dated October 21, to be discussed more fully, infra.

The leak tester tests the parts or assemblies produced by Respondent to be certain that they are airtight and can withstand a certain amount of pressure. For this purpose there are two different testing stations: the high pressure station tests the assemblies with air and the low pressure station tests them with water. There are a total of 14 or 15 fixtures available on these stations and the assemblies are attached to these fixtures for testing. Not all of these fixtures are operable at all times, and the rate paid to the leak tester depends on the number of fixtures available, e.g., at the time in question, if only 7 fixtures were operable, the leak tester's rate is 50 percent higher than if all 14 fixtures were available. Respondent provides a form for the leak testers, where they list the number of assemblies tested under the column of the number of fixtures available and, in a separate column, the number of assemblies that failed the test (leakers), which the leak test operator is also paid for on a specified piecework basis. Respondent alleges that Bromley was given the warning dated October 21 solely because he was cheating Respondent in two areas: he was claiming that fewer fixtures were available than actually were available, thereby receiving a higher rate for each assembly tested (Bromley denies this, and he was taking double credit for the leakers; this part will be discussed first.

As an illustration, order 2BY85466 was tested by Bromley on September 7; the order consisted of 100 assemblies. After testing them Bromley filled out the form listing 96 pieces under 8 fixtures (with a rate of 1.28), 4 pieces under 4 fixtures[19] (with a rate of 1.82), and 58 leakers (with a rate of 3.22) that had to be returned to be repaired. Respondent alleges that Bromley was therefore taking credit for 158 assemblies on an order of 100. What he was supposed to do was to take credit for 42 (rather than 100) assemblies under the proper number of fixtures and then list 58 leakers. Bromley testified that when he commenced employment as a leak tester, a man, who could not speak English, and did not know how to properly fill out the timesheets, instructed him on the job for a half day and he started filling out these sheets "through common sense." He also testified that because he lost time (downtime) on these machines due to minor problems with them, Thompson told him to fill out the timesheets that way rather than taking downtime (which is charged against the department).

The other aspect of Bromley's alleged cheating was his listing of the number of fixtures available. Bromley testified that some of the available fixtures were always inoperable, and the number available generally ranged from 7 to 10 (out of 14 or 15) and his reports confirm this. The most common problem was that the threads on the fixtures were worn out, making the fixture inoperable because he had little success in finding replacement parts for the fixtures. Bromley denies listing fewer fixtures on his report than were actually available.

George Strich, who is employed by Respondent as an industrial engineer, testified that he was asked by Thompson and Rodenhizer to study Bromley's operation as a leak tester; they said that they felt there were discrepancies and they asked him to determine what they were. In this regard, using Bromley's reports for the week beginning September 13, he determined that if Bromley had applied the "proper rates against the proper quantities" he would have earned $385 rather than the $496 he reported for the week. He found that this was caused by Bromley taking double credit for leaders (which was not proper) and his understating the number of fixtures available. In this regard, he checked the original orders against the forms Bromley filled out and determined that he was taking credit for more assemblies than were in the order; he did this by listing the leakers twice. Regarding the number of fixtures available, Strich testified that "on the average they should all be available," but "at the very most there might be times when you might have one, or perhaps two fixtures out of action."[20] When he visited the leak test station on one occasion in September, 15 fixtures were available on one line, and 11 or 12 on the other. He testified: "I doubt very much it would go down to eight because it would not be practical to run them at that quantity . . . without getting it repaired . . . because of the excessive cost involved": the rate is about 40 percent higher than when 14 fixtures were available. He also testified that when he prepared the rates for the leak tester position in 1978 he prepared an explanation of the operation of these rates. However, at the time in question, both Thompson and Bromley told him that they never received this explanation.

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[18] This allegation was an unpleasant and difficult one at the hearing (and correspondingly difficult at this stage) because, at the time of the events in question, and to a lesser degree at the time of the hearing here, Bromley was experiencing some psychological difficulties for which he had been hospitalized and was receiving medical care. The issue therefore arises whether his supervisors were exercising their normal supervisory prerogatives in motivating him to greater production, or were "nagging" him more than necessary, knowing that his precarious psychological state would cause him to overreact.

[19] These four pieces were correctly listed under 4 fixtures because with 8 fixtures available, the first 96 assemblies were tested on these fixtures on 12 shifts. As only four remained, the tester can take credit for four fixtures.

Thompson testified when Bromley began working in his department about January 18, he received approximately a week's training by the previous operator, Ginetti, who had worked as the leak tester for 4 years; the training included instructions on filling out the timesheet forms, and during this period he personally observed Ginetti and Bromley with timesheets many times (50 to 150 times during that week "whenever I would pass through that area.") However, received into evidence were payroll records maintained by Respondent, which establish that Ginetti transferred to another department on January 4, and was employed there for at least the following 6 weeks.

The usual procedure is that the operator fills out the forms on a daily basis; they then come to Thompson's desk and he checks them only for "obvious errors." Thompson regularly receives from Respondent's payroll department computer printouts listing employees' total weekly wages. He testified that in about September, he noticed on these reports "that on a particular day his earnings were above normal; what he had normally been earning" and, on that basis, he requested Strich to determine if Thompson was properly applying the rates. On cross-examination, Thompson testified: "I don't know what triggered my auditing or whether or not I just decided to audit it." (Strich testified that the fact that an employee was earning 200 percent would "not in itself" be particularly suspicious.) Strich later told him that Bromley had properly applied the rates, but a few days to a week later Strich told him that he did not feel that an operator could earn as much as Bromley was earning if the rates that he established were properly applied; that a competent operator could earn 160 or 170 percent; but Bromley's earnings were in the area of 200 percent. Thompson testified that because Bromley was an excellent worker whom he had known for a long time ("I trusted Tony"), and because of the complexity of the rates ("the rates are confusing to me"), Thompson determined that Bromley's errors were due to confusion, rather than cheating and he informed Strich of this. A short time later (in late August or the first week in September), Thompson told Bromley that Strich felt that he was misapplying the rates; but that he did not agree and felt that it was caused by confusion; he was also unsure of how they operated and he requested that Bromley be reinstructed on the rates. Thompson then informed Rodenhizer of the situation and he (Rodenhizer) said that he would like to discuss it further with Strich. Shortly thereafter Thompson and Rodenhizer met with Strich and determined from an analysis of Bromley's production reports from January that the misapplication of rates could not have been an error, rather it was done purposely. He testified that this determination was based on the fact that Bromley's timesheets for the first 3 or 4 months in 1982 were properly filled out, after that there was a steady, but definite, increase in the misapplication of rates until it reached a certain high point and leveled off. Thompson then called Bromley into the office (this was on September 27, the day Bromley sustained his back injury) and told him that whereas he had originally attributed his errors on the reports to confusion on his part, a review of these sheets convinced him that, rather, it was a deliberate cheating and misapplication of time. Bromley did not respond; later that same day Thompson was informed that Bromley was injured. When Bromley returned to Respondent's employ on November 4, he was given the written warning.

In order to support its position that Bromley purposely misapplied the rates and time on the daily production reports, Respondent moved into evidence a number of these reports filled out by Bromley in January and September, presumably, to illustrate that he knew how to properly fill them out in January, and deliberately misapplied them in September. Because those exhibits do not establish the number of assemblies to be tested in these orders, it is not helpful in that regard. However, the exhibits do establish that Bromley's entries for operable fixtures in January averaged 10.04 out of 14 fixtures. In his September entries, the average was 7.89.[21]

On November 4, Bromley was called into Thompson's office; present were Thompson, himself, and his union steward, Billy Ryan. Thompson gave him the warning (the first he had received from Respondent), which stated:

> Based upon the summary relating to the misuse of standards report issued September 27, 1982 [Strich's report], covering misapplying time, incorrect standards, incorrect quantities, and excessive use of standards, I am requesting the appropriate disciplinary action be taken up to and including discharge.

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[20] Received in evidence were three daily production reports filled out by Bob Keegan in April and May and one filled out by Joseph Ginetti on September 29. These reports list one occasion where 10 fixtures were operating, 10 with 9 operable fixtures, 1 with 8, and 2 with 7.

[21] I understand that this is not, in itself, conclusive as the condition of the fixtures may have worsened since January.

Thompson told him "you don't work in my department anymore." Ryan walked out with him and told him to return to his job and he would contact Porco. Shortly thereafter, Porco approached him and said: "stay here and work . . . Thompson don't know what he's talking about." Later that day he was called to a meeting in the personnel office; also present were Thompson, Rodenhizer, Martin, Porco, and Ryan. Martin asked him what he had to say about the warning and Bromley said he did what Thompson told him to do. Martin told him that he was fired. Bromley was called to another meeting in the personnel office about November 12; Kuba, Porco, Rodenhizer, Ridolfi, and Martin were also present. At this meeting Ridolfi asked Bromley if he still wanted to be employed by Respondent and he said that he did but felt that he did not want to return to department 145 because he felt that Thompson was out to get him. Ridolfi told him that he would treat him as layoff and allow him to return in another department and bump anybody with less seniority. Bromley was given a choice of two other positions and he chose the position of electrolytic cutter in department 191.

Rodenhizer testified that sometime during the summer Thompson spoke to him of a misapplication of time by Bromley; on the basis of this, they decided to have Strich do an indepth review of the job. Strich's report concluded that because Bromley had initially properly filled out his daily reports, his later reports clearly showed a change and misapplication of rates. On learning this, Rodenhizer recommended that Bromley be given a written warning for this offense. He testified that this warning had no connection to any union activities on Bromley's part and, in fact, at the time he had no knowledge that Bromley was engaged in any union activities.

Martin testified that he also reviewed Bromley's daily reports from January through September against Respondent's order forms and determined that during the latter portion of this period Bromley was taking double credit for leakers; that is why Bromley was given the October 21 warning; at the time, he was not aware that Bromley was involved in any intraunion activity. At the meeting with Bromley on November 4, Bromley denied understating the number of available fixtures, but after being shown certain documents, Bromley admitted taking double credit for leakers, and he was suspended pending a final review of the situation. At the November 12 meeting, attended by Ridolfi himself, Kuba, Porco, and Bromley, Bromley admitted that he had misapplied his time, but said that it was unintentional. Bromley was asked if he wished to return to work and he said that he did, but not as a leak tester. Ridolfi decided that because this was Bromley's first offense in 6 years of employment, it would be treated as layoff rather than a discharge. Bromley and Porco then met with Martin at which time Bromley decided to bump an employee in department 191. Both Ridolfi and Martin testified that the meetings of November 4 and 12 were the only occasions when he discussed Bromley's discharge or suspension with the Union and that, at the time, they were not aware that Bromley was involved in an intraunion election campaign.

Frank Stramski Jr., who was also employed in department 145, was discharged in March 1982 for his fifth offense of falsification of time. Roman Bielawa and F. Bouchard were each issued warnings by Respondent in October for filling in their timesheets incorrectly by putting down a rate seven times what they should have received credit for; neither one was suspended.

The remaining allegation regarding Bromley is that after he transferred to department 191, his supervisors, Robert Powers and Edward Stott, harassed him to such a degree that he quit, and he therefore was discharged constructively, due to his presence on the Ferreira slate of candidates. About late January 1983, Bromley went on medical leave; he did not return to Respondent's employ until a year later. During this period he was treated for depression. The General Counsel alleges that Bromley's departure in January 1983 was a result of two written warnings given him on January 7, 1983, and other harassment, which was intended to force him to quit. One of these warnings requested disciplinary action including time off or discharge because 3000 pieces of a part he produced contained a 77-percent rejection rate, costing almost $300. The other warning stated:

> On December 17, 1982, I instructed you to run the Pines Cutoff machines. I also told you that everyday you should check and do whatever orders that were at the machines. On December 23, 1982, you did not operate this machine.
>
> On January 3, 1983, in the presence of Mr. E. Stott, Mr. J. Soltis [second-shift union steward] I asked you why you did not operate the Pines Cutoff machine on December 23, 1982. You did not have any explanation.
>
> I am recommending appropriate disciplinary action.

Bromley testified that on transferring to department 191 he was given 1 week's training on the operation of the electrolytic cutter. On his second night of employment in the department, Stott (who did not testify) told him that he cut the wrong tubes the previous evening. They got into an argument about it; people gathered around and Stott told Powers (who did not testify) to take Bromley to the personnel office because he was fired. Bromley told him that he had never previously operated the machine and that Stott had set it up for him, so that if there was a mistake, it was due to Stott. (Apparently, he was not brought to the personnel office that day.) He also testified that over the next 2 months Stott told him on about 10 occasions that he was going to fire him; on 2 or 3 occasions, he informed Bromley that he was making too many errors and he told him "all the time" that he was not producing enough. Bromley also testified that while he was employed in department 191 there were some large orders that required that both he and the day person work on the electrolytic cutter; the orders showed that he had produced more than the day person.

About December, Bromley met Porco in the aisle at the plant and told him that he wanted to file a grievance against Stott and Powers because they were harassing him. Porco told Bromley that if his brother-in-law (Ferreira) had any compassion for him he would tell him to resign as trustee, and he should go to Kuba's office and resign as trustee because "I've seen people with those problems like you . . . go crazy." On January 5, 1983, Stott and Powers brought Bromley to Martin's office saying that Bromley said that he wished to be taken off the job because their harassment of him was affecting his health; Bromley denied having made such a request.

Of the two warnings issued to him on January 7, 1983, regarding the alleged 77-percent rejection rate warning, Bromley testified that he and the day person jointly produced the order containing 40,000 pieces, and their production was mixed in the same basket, so Stott and Powers had no way of knowing that he produced the rejected pieces. Additionally, once that machine is set up at the desired setting, it runs automatically until it runs out of stock or is turned off; therefore, either all or none of the production should have been accepted or rejected. Regarding the warning for not operating the Pine Cutoff machine on December 23, the General Counsel produced Respondent's time pass stating that on December 23 Bromley left the plant at 8 p.m. (rather than the shift end) due to "personal illness." On January 7, after receiving these warnings, Bromley left work early at 7 p.m., after going to the nurse's office, because "it was starting to get to me." About a week or two later Bromley went to Martin's office and told him that he wanted to quit; he said that until his nomination for trustee he never had any problems in his employment at Respondent. Porco then came by and told Bromley that he should resign as trustee; Porco got a witness and Bromley filled out a form stating that he was resigning as trustee; Porco told him to go and get the help that he needed and he left the plant and did not return until a year later. During this period he was placed on medical leave status by Respondent. Whether he or his wife called Respondent after January 1983 saying that he was sick, Bromley testified that he could have, but he did not remember.[22] After leaving Respondent's employ in January 1983 he was under psychiatric care for depression anxiety. During the period that he was out, Martin called him "quite a few times" and told him that he should call him a few weeks before he was ready to return to work; during this period he was "afraid" to return to work" because of the harassment that they gave me," "they" being Stott and Powers; in his numerous conversations with Martin after he left, he never asked to return to employment in a different department.

Martin testified that he was present at the January 7, 1983 meeting with Bromley, Stott, Powers, and Porco to discuss the two warnings to Bromley of that date; Bromley said that Stott and Powers were harassing him. Martin asked Bromley if the supervisors had the right to direct employees' work and he said that they did. Martin asked him what he meant by harassment, and Bromley said that they were constantly telling him what to do and when to do it. Martin asked, "didn't he previously say that a supervisor has the right to do that," and Bromley said, "Yes." Martin asked: "Well, is the supervisor harassing you?" and Bromley said, "No, I guess he's not." Martin testified further that about 2 weeks after this January 7, 1983 meeting, he received a telephone call from Bromley stating that he was seeing a doctor and would not return to work while he was under a doctor's care. After that Martin periodically called Bromley, asked how he was feeling; and asked if he could give him an idea of when he would return to work; Bromley's reaction was that he was still under a doctor's care and could not give him a firm date.

F. *Alleged Favoritisim Toward Kuba Slate*

This allegation involves the following rule that was posted by Respondent on November 12:

> The company is aware there may be a possible Union election within 145. It is the position and policy of the Company not to endorse any union campaign during working hours.

There are two violations alleged in this regard: that Respondent promulgated this rule to discourage employees from campaigning for union office and that Respondent disparately enforced this rule and other unwritten rules by permitting employees to campaign for the Kuba slate while preventing employees from campaigning for the Ferreira slate.

On November 3, the morning after the Union's nominations, Nash (Ferreira's foreman) approached Ferreira at his work station and told him that he was not allowed to talk to anyone or to leave his machine and area. Ferreira asked why and Nash said: "I'm telling you, I don't want you talking to anybody or leaving your machine and area" and he walked away and returned to his office. A few minutes later he came out of his office, approached Ferreira, and asked: "Did I make myself understood? I don't want you talking to anybody." Ferreira asked Nash why he did not say anything to Germano or Joe Marinko who were speaking to a large number of employees in the aisles. Nash said: "In other words, you are not going to do what I am telling you?" Ferreira said that was not what he was saying; he was just saying that he should tell Germano and Marinko the same thing. Nash said that would be too conspicious and that he would get his boss. Ferreira observed Nash go into his office and saw through the glass that he was on the phone. A few minutes later, Leo Perry, the general foreman, Neil Priestly, the plant superintendent, and Rodenhizer all congregated in Nash's office, although nothing further was said to Ferreira at the time.

Later that day Zajac was checking his work in the same area as Ferreira, and started to talk to him; Ferreira observed Nash watching from his office, and he quickly came out of his office and told Zajac not to talk to Ferreira. Later that week, during Ferreira's coffeebreak, fellow employee Al Minchik came over to him to congratulate him on the nomination. Nash immediately came out of his office and asked Minchik: "Don't you have anything better to do?" Minchik walked away. Shortly thereafter a fellow employee named Heddy approached

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[22] Bromley's testimony regarding the post-January 7, 1983 events and exactly when he left Respondent's employ is somewhat vague. He testified that during this period he was under medication—Elavil and Valium.

Ferreira at his machine to speak to him. About a minute later, Nash came over and told her not to talk to Ferreira at his machine, but before he could say anything, Nash sent him away. In addition, whenever Ferreira went to the bathroom, Nash followed him.

Ferreira testified that prior to November 3, the practice in the plant was that fellow employees could speak for a minute or two at the work stations without restriction by the foreman. Zajac testified that prior to November 3, the policy was: "As long as you're not there for an excessive time, nobody ever says anything." After November 3, nobody could get close to Ferreira's machine to speak to him: "Mr. Nash would constantly come out and chase the people away." Nash also warned other employees about conversing with their fellow employees, but not with the same frequency as Ferreira, who usually had more visitors. On November 4, Zajac asked Nash why he only interrupted Ferreira's conversations with his fellow employees; after that, Nash began to interrupt other employees' conversations as well. About November 3, McDonald went to speak to Ferreira at his work station about the upcoming election; as soon as he got there, Nash came out of his office and told him to leave. McDonald testified that as long as he had been employed by Respondent (almost 6 years) the policy had been that you can speak to fellow employees as long as you keep the conversation brief. On November 3, about 3:15 Keegan (who was then employed on the second shift) stopped to talk to Ferreira at his work station, as was his custom when he arrived for work; he asked Ferreira about the prior evenings' nominations. After about 3 to 5 minutes, Nash approached and told Keegan that he did not want him talking to Ferreira. Keegan asked why, since everybody stops and talks, and Nash said, "I don't care, you heard what I said." Keegan testified that as long as he had been employed by Respondent (13 years) employees were allowed to converse for a few minutes.

Approximately a week prior to the union election (January 28, 1983), while Ferreira was at his machine, he observed Porco handing Germano some T-shirts that were blue with yellow print, stating on the front: "Progress Not Promises" and on the back it said "Vote for the Kuba team." Later he observed Germano, Joe Atkins, and union trustee and steward Lupo handing these shirts to employees in the plant.

On November 3, while Judy Tumbleston was working, Mike Varonka, her steward, asked her to sign a petition stating that attendance at 50 percent of the union meetings was a prerequisite to running for union office. She refused to sign it, but Varonka spent a half hour asking everybody in the department to sign it. She is not aware of whether her foreman witnessed this. One afternoon in late January 1983, Coverson observed union steward Steve Bryant walk past the glass-enclosed portion of her foreman Bob Waters' office, carrying the Kuba slate T-shirts referred to, supra. Waters was present in his office at the time. Bryant was walking through the department, passing them out, and throwing them to employees, saying: "Be sure to vote the right way." Waters' desk faces the department, but she testified that she could not specifically say that he observed Bryant's actions.

One morning in mid-January 1983, shortly prior to 7 a.m., Lucas observed Porco and his son-in-law and union steward John Blake walking into departments 125 and 126 carrying a carton of the previously referred to T-shirts and Kuba campaign buttons; Porco was also wearing a Kuba jacket. They started handing out the shirts, and continued after the 7 a.m. buzzer went off and handed them out until 7:15; the foreman of the departments, William Muldowny, was present at the time. About 7:30 a.m., Lucas observed Iodice distributing the Kuba T-shirts in department 145, in the presence of Nash and Thompson. About 8:30 that same morning, Iodice drove his tow motor into Lucas' department (receiving) and distributed the T-shirts to the employees in the department in the presence of the Foreman Fred DeLibro who was watching but said nothing. About an hour later, while Lucas was in department 191, he observed Iodice distributing the T-shirts in that department.

About mid-January, about 11 a.m., Zajac observed Germano distributing Kuba campaign buttons to employees in department 145. At the time, Nash was in his office, and Germano was about 25 feet from the office, but he does not know whether Nash observed the incident.

In mid-January 1983, employee Eldwyn Worster observed Porco walk into department 145 about 10:30 a.m. carrying Kuba campaign T-shirts and distributing them to employees in the department. Worster asked Porco for a shirt and Porco said: "If you want one we'll get you one." Nash observed this and laughed, saying: "You guys are something else" and walked into his office without attempting to hinder Porco's distribution. In January 1983, McDonald observed Germano handing out the campaign T-shirts to employees in the aisle between departments 145 and 173. Germano asked McDonald if he wanted one and McDonald refused, saying he would not campaign for either side. About a week prior to the election about 7:10 a.m., Keegan observed Porco carrying a carton of Kuba campaign shirts, and observed him giving them to Germano. He also gave some of these shirts to Iodice who drove by on his tow motor. Porco remained for a few more minutes before he left the department. Keegan observed Thompson, Nash, and Foreman Tony Farrar in the window office at the time, although Keegan could not tell whether they were observing Porco and Germano. Keegan later asked Ridolfi why Porco was allowed to distribute T-shirts in the plant; Ridolfi said that there was nothing he could do about what employees have written on the shirts they are wearing; but that they would check into whether they are being distributed during working hours. Later, Ridolfi told Keegan that he had spoken to Porco about it, and Porco said that it was not being done during working hours, but that he would watch the situation.

Ridolfi testified that about early November, Nash complained to him that he was having a difficult time controlling his department because of the upcoming union election. He said that he was having trouble with the incumbents and stewards, and he was also disturbed by the large number of employees coming to talk to Ferreira at his work station. Nash described the department as a "hot bed of activity on both sides." A few days later, Ferreira complained to him about the incumbents circulating the petition regarding the requirements that people running for office attend a certain percentage of the union meetings; this complaint was "part of the cause" of the November 12 notice.

IV. ANALYSIS AND CONCLUSIONS

Respondent alleges that the Board should defer to the arbitration process the discharges of Ferreira and Grodis. It is undisputed that both Grodis and Ferreira had filed grievances regarding their discharges and both these grievances were pending arbitration hearings when they were withdrawn by Grodis and Ferreira. The General Counsel alleges that while similar cases might normally be subject to deferral under recent Board law, this case is distinguishable because of the lack of "substantial harmony" between the interests of the Union and that of Grodis and Ferreira.

In *United Technologies Corp.*, 268 NLRB 557 (1984), the Board decided to overrule *General American Transportation*, 228 NLRB 808 (1977), and return to the doctrine of deferral as set forth in *Collyer Insulated Wire*, 192 NLRB 837 (1971). Although I might ordinarily agree with counsel for Respondent's argument, the General Counsel's argument that deferral is not appropriate due to the circumstances here is persuasive. Ferreira organized and headed the slate opposing the reelection of the incumbent union officials and Grodis was nominated for vice president. Apparently the campaign was a rough one; within a day or two of the nominations, the incumbents were circulating a petition throughout the plant seeking to establish a requirement that candidates attend a majority of the Union's meetings; this would have made ineligible some of the candidates on Ferreira's slate. In addition, when Bromley was going through a difficult time in late January 1983, Porco convinced him to resign as trustee, in what was clearly not a humanitarian gesture. Finally, when Lucas asked union steward Lupo how he could fight the warning he received, Lupo told him that he would "wipe his ass" with it. Although there was also evidence that Porco and other union representatives assisted Ferreira, Grodis, and the others involved here in their meetings with representatives of Respondent, there is substantial evidence that Ferreira and Grodis had valid reasons for feeling that their representation by the Union in the upcoming arbitrations might be lacking in sincerity.

In *United Technologies*, supra, the Board cites with approval the dissent in *General American Transportation*, supra, which stated that the Board "has refused to defer where the interests of the union which might be expected to represent the employee filing the unfair labor practice charge are adverse to those of the employee." *National Radio Co.*, 198 NLRB 527 (1972), cited by the Board with approval in *United Technologies*, involved discipline of an active union adherent, who had been president of the union for 5 years and had handled grievances and contract negotiations for the union. The Board, in deciding to defer to the arbitral process, stated:

> We may assume that the Union will be aware of its institutional interests in protecting its officer and leading proponent against discipline which is thought to restrict his activities on the Union's behalf. In that respect, especially, it must be noted that the interests of the employee and his representative are in substantial harmony in this case and are likely to be so in every such case. It is sufficient to note here that in protecting O'Connell, the Union protects itself as well.

Because of the campaign undertaken by Ferreira and Grodis, no such assumption can be made here. Although it cannot be stated with certainty that the union leadership would inadequately represent them at an arbitration proceeding, there is sufficient evidence of animus by the union leadership to Ferreira and the other members of his slate, so that they should not be relegated "to an arbitral process authored, administered, and invoked entirely by parties hostile to their interests." *Kansas Meat Packers*, 198 NLRB 543, 544 (1972).

On the basis of the record testimony, I find that Respondent favored the Kuba slate over the Ferreira slate in the union election. The uncontradicted credible evidence establishes that beginning the day after the union nominations, Respondent restricted, or completely eliminated, the employees' ability to communicate with Ferreira at work; whenever an employee approached him after that date, Nash was out of his office to warn the employees not to talk to him. This represented a change from Respondent's prior policy of allowing employees to talk for a few minutes as long as production was not adversely affected. The timing of this change (the day following the union nominations) leaves little doubt regarding its cause. At the same time, however, Respondent was allowing the Kuba slate what appeared to be almost free reign in distributing its T-shirts and campaign buttons throughout the plant, on both working and nonworking hours. A clear demonstration of this favortism is Worster's testimony that while Nash was observing Porco distributing T-shirts during working hours, he (Nash) laughed and said, "You guys are something else." This is the same foreman who immediately came out of his office every time an employee stopped to talk to Ferreira. All this testimony was credible and uncontradicted and establishes that Respondent disparately enforced its November 12 rule by permitting the Kuba slate to campaign during working hours while denying that right to the Ferreira slate, in violation of Section 8(a)(1) of the Act.[23] However, I find insufficient evidence to support the General Counsel's other allegation in this regard, that Respondent promulgated this rule to discourage campaigning, and this allegation will therefore be dismissed.

In *Wright Line*, 251 NLRB 1083 (1980), the Board set forth the rule to be applied in determining whether certain actions are in violation of Section 8(a)(1) or (3) of the Act: "First we shall require that the General Counsel make a prima facie showing sufficient to support the inference that protected conduct was a motivating factor in the employer's decision. Once this is established, the burden will shift to the employer to demonstrate that the same action would have taken place even in the absence of the protected conduct." This burden was approved by the Supreme Court in *NLRB v. Transportation Management Corp.*, 462 U.S. 393 (1983).

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[23] As should be obvious, this finding does not mean that employers violate the Act when they restrict intraunion campaigning during the working hours. Rather, the violation results from allowing one side to campaign freely while denying that right to the other side.

The General Counsel has clearly made the required prima facie showing regarding the discharges of Ferreira and Grodis. I have previously found that Respondent's action established that it favored the incumbent slate over the insurgent slate headed by Ferreira. Regarding knowledge of Grodis and Ferreira's union activities, Grodis asked Caldwell for his opinion of opposing the Kuba slate and later informed Priestly and Sherwood of his intention to do so; although neither expressed any hostility to him at the time, it establishes that they were aware of his actions although Ferreira was more secretive about the members of his slate, Respondent's knowledge of his participation in this slate is established by Nash's comment, interrupting Ferreira's discussion with Zajac, that he did not want Ferreira discussing union business and that he was not going to fight two unions. This indicates that Nash was aware of the insurgent slate and Ferreira's position on it.[24] And finally, Ferreira and Grodis, who were both excellent employees, were discharged without any prior warnings compared with other employees who had received numerous warnings before being discharged; Ferreira had previously received one verbal warning years before for poor attendance, and Grodis had never previously received any warnings or discipline; in fact, 2 weeks prior to his discharge he was promoted to a leadman's position.

Next for analysis is whether Respondent satisfied its burden. Respondent posted two notices, one in 1981 and one on August 20, 1982, prohibiting gambling. However, the uncontradicted and credible testimony establishes that the 1981 notice and (to a lesser extent) the August 1982 notice were consistently violated and were only enforced against Ferreira and Grodis). Gambling and commercial activities were widespread throughout the plant and yet nobody was ever discharged or disciplined for this prior to Grodis and Ferreira. The degree of the gambling activities was so widespread that I do not credit the testimony of Respondent's witnesses that they were unaware of these activities; it is difficult to believe that Martin, who appeared to be an attentive and diligent personnel manager who walked through the plant regularly (six times a day on the average) did not observe Iodice selling numbers or Raganese (whose desk he generally must walk past in entering the plant) selling dolls and other items from her desk. Also relevant is the gravity of the activity involved; Iodice was selling numbers while operating his tow motor; he was stopping employees during their worktime and blocking the aisles with the tow motor, while there is no evidence that Ferreira and Grodis' activities interfered in any way with production.

Finally, Respondent's testimony of the events leading to the discharges does not ring true: the anonymous note informed them of the activities of Ferreira and Grodis (and nothing else); additionally, the investigation appears to have been fabricated to cover up the discriminatory purpose of the discharges. It is interesting to note Martin's answer to Washington who, while being questioned by Martin regarding his involvement in purchasing lottery tickets from Ferreira and Grodis, mentioned all the other "illegal stuff" like numbers and pools that was occurring at the plant; Martin answered: "that's not the issue right now." I have limited my discussion of these discharges somewhat because the evidence establishes that they were obviously pretextual. As Administrative Law Judge Gerald A. Wacknov stated in *Igloo Corp.*, 254 NLRB 641, 647 (1981):

> On the basis of the foregoing, I find that the reasons advanced by Respondent for the discharges of Kuebler and Aguilar are so unpersuasive, unreasonable, and unnatural, and are so far removed from any semblance of justifiability in terms of past practice, as to mandate the conclusion that the assigned reasons for the discharges are pretextual.

I therefore find that Respondent violated Section 8(a)(1) and (3) of the Act by discharging Ferreira and Grodis on October 1.

When the *Wright Line* test is applied to McClain's layoff, it is also clear that the General Counsel has sustained his initial burden. He had been employed in department 145 for 3 years and was informed of the layoff on the day following his nomination as trustee on the Ferreira slate. As I have found that Respondent favored the Kuba slate that, alone, would be enough to satisfy the initial burden. There is also the testimony of Johnson that Thompson told her that he had finally gotten rid of McClain, whom he referred to as a troublemaker. Thompson denies this, testifying that he told Johnson that McClain was laid off, that he was giving him problems in that he was often arguing with others in the department, and his transfer might make him appreciate the job and the earnings of department 145. I generally found Johnson to be an unconvincing witness and I would credit her testimony over that of Thompson, and I would therefore find that Thompson made the statement to Johnson.

Regarding Respondent's burden, they allege that numerous employees were laid off from department 145 prior to McClain due to a drop in production in the department. What was not satisfactorily explained was why McClain was laid off ahead of Neely. McClain had 3 years higher seniority than Neely. At the time of the layoff, Neely was the only departmental employee on the night shift. Martin testified that in November he offered McClain Neely's night-shift job, but he refused it. McClain and Thompson testified that McClain was not offered this position in November; rather it was in September or October 1983 when he was again laid off from department 145 that he was offered Neely's night-shift position, which, at that time, he refused because he had another job. Respondent never satisfactorily explained why it did not offer McClain Neely's night-shift position in November, as is apparently required by the contract's provision that seniority is by department. Respondent defends its action on the ground that Neely's job classification was set up, operate, and instruct, while McClain was only set up and operate. As Neely was the only employee on the shift, there was nobody to instruct; and even it it is true that the classification "instruct" also means that the employee is capable of operating every machine in the heat treat area, I would credit McClain over Martin and Thompson and find that he was able to do so. I therefore find that Respondent has not satisfied its burden under *Wright Line*, and its layoff of McClain (and subsequent transfer) therefore violates Section 8(a)(1) and (3) of the Act.

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[24] Additionally, I do not credit Martin's testimony that he did not learn of Ferreira's candidacy until mid- or late-November. His frequent trips through the plant and contacts with the department foreman make this extremely unlikely. He certainly was aware of it at the end of October, on receiving the charge from the Board.

Regarding the warnings given to McClain, Lucas, and McDonald, the General Counsel has again sustained his initial burden; Lucas nominated Grodis for the vice president's position on the Ferreira slate at the Union's nominations on November 2 and McClain was a candidate for trustee on the Ferreira slate. McDonald's union activities were more limited: on November 3 Germano asked him whom he intended to vote for; when he answered that he wanted to hear the issues before he decided, Germano shouted, "In other words, you are going to vote for them." Although McDonald's activities were extremely limited and would clearly not be adequate to sustain a violation alone, McClain and Lucas engaged in such activities and, if Respondent wished to penalize them for these activities, it would have to include McDonald in this penalty as he was between Lucas and McClain in the production process. Finally, the timing of the "discovery" supports the General Counsel's case; although the error was made in June, it was not discovered until a few days after the nominations.

I find that Respondent has not sustained its burden of establishing that Lucas, McDonald, and McClain would have been reprimanded even absent their activities. Clearly a mistake was made in the type of metal used in an order, but Lucas, McDonald, and McClain testified credibly that they were not familiar with the term Chrome-molly although they know what carbon steel is. Interestingly, throughout his testimony, Thompson generally referred to this metal as carbon steel. Even if these employees were expected to look at the second page of the order where the word "Chrome-molly" appears, they would not have been able to identify the substance. In addition, if a mistake were made in not checking and properly identifying the material to be used, the mistake was by Lucas or Otero who picked the material; even that it is not clear, however, as the work order indicates that Lucas obtained the material from the correct bin. McDonald and McClain were justified in assuming that the material they received was the proper material. Most importantly, Respondent has not established that the improper tubes discovered in November were produced in order 2BY82928. Thompson's testimony in that regard is not supported by documentary evidence (the unexplained inventory activity sheet) or reasonable inferences. For example, the incomplete inventory activity sheet in evidence states that on June 4, the stockroom received 148 ABX142E tubes; between that date and the time that order 2BY82928 was produced, 113 of these tubes were issued by the stockroom for orders, leaving 35 tubes from that order, and whatever may have remained from other prior orders. As I credit McDonald's testimony that there is no way of determining from which order specific tubes were produced, I therefore find that Respondent had no way of knowing that the defective tubes were manufactured in order 2BY82928. Regardless of who was at fault, I find that Respondent seized on these defective tubes as a means of justifying its warnings to Lucas, McDonald, and McClain. In this regard, the inventory activity sheet in evidence establishes that for the first 6 months of 1982, the stockroom issued 501 ABX142E tubes in 24 transactions. With such a fairly active turnover, it is reasonable to assume that a defect would have been discovered earlier than 3 months after the parts entered the stockroom. As Respondent has not sustained its burden. I find that its warnings to Lucas, McDonald, and McClain, and the brief suspensions of McDonald and McClain violate Section 8(a)(1) and (3) of the Act.

The General Counsel has also sustained his initial burden regarding Bromley's discharge, which was later changed to a layoff and transfer. The timing is again important; Bromley informed Thompson of his intention of running for trustee on Ferreira's slate in August; shortly thereafter Bromley's daily production reports were being investigated by Strich, at the request of Thompson and Rodenhizer. Thompson testified he did not know what prompted this investigation; he also testified that on a particular day Bromley's earnings were above normal and on that basis he asked Strich to investigate Bromley's reports. Strich testified that the fact that Bromley was earning 200 percent would not alone be particularly suspicious. In this regard, it should be noted that Bromley had, at that time, been employed by Respondent for 5 years and during the period he had an unblemished work record. With such an excellent employee whom he had known for a long time, it would seem that Thompson would remember what event caused him to investigate whether Bromley was dishonestly preparing his daily reports. Thompson's imprecise testimony in this regard supports the General Counsel's theory that it was Bromley's position on the Ferreira slate that caused Bromley to be investigated and later laid off and suspended.

I would also find that Respondent has not sustained its burden of establsishing that Bromley would have been disciplined as he was, absent his union activities. Principal among my reasons was the uncertain testimony of Thompson about what triggered the investigation, and Strich's conflicting testimony in this regard. Also, prior to this, Bromley had been a perfect employee for 5 years; he was immediately discharged (later changed to a layoff and transfer) for this offense; yet Stramski (also employed in department 145) was not discharged until his fifth offense of falsification of time, earlier that year. In addition, two other employees were only given warnings in October for taking credit for a rate seven times what the proper rate should have been. Finally, it is clear from the record that Bromley did take double credit leakers; however, his uncontradicted testimony is that Thompson told him to do so rather than taking downtime for defective equipment. Additionally, Thompson's testimony that Ginetti spent a full week explaining the job and rates to Bromley is contradicted by the evidence that Ginetti transferred from the department prior to that; rather I credit Bromley's testimony that his training for the job was minimal. I therefore find that by discharging Bromley on November 4, Respondent violated Section 8(a)(1) and (3) of the Act.

There are two elements necessary to establish a constructive discharge:

"First, the burdens imposed on the employees must cause, and be intended to cause, a change in his working conditions so difficult or unpleasant as to force him to resign. Second, it must be shown that those burdens were imposed because of the employee's union activities." *Crystal Princeton Refining Co.*, 222 NLRB 1068, 1069 (1976); *K & S Circuits*, 255 NLRB 1270 (1981). *Montgomery Ward & Co.*, 160 NLRB 1729, 1742 (1966), stated: "An employer 'constructively' discharges an employee in violation of the Act where, for discriminatory reasons, he makes the employee's conditions of work so intolerable or undersirable that he is thereby forced to quit his job." In *Bechtel Corp.*, 200 NLRB 975 fn. 2 (1972), the Board stated that they have found constructive discharge situations where an employer had made "conditions for an employee so intolerable that no *reasonable person* could be expected to remain in employment" (emphasis supplied). See also *Hit 'N Run Food Stores*, 231 NLRB 660 (1977), and *Panscape Corp.*, 231 NLRB 693 (1977). In *Crystal Princeton Refining*, supra, the Board stated that the new tasks had to be either physically or emotionally impossible for the employee to perform, to convert a quit to a constructive discharge. *Van Pelt Fire Trucks*, 238 NLRB 794 (1978). One reason for this rule is that parties to Board proceedings must mitigate whenever possible and "the Act provides an appropriate and direct remedy for infringement of rights protected by Section 7." *Central Casket Co.*, 225 NLRB 362, 363 (1976). In the situation herein rather than resigning, an unfair labor practice could have been filed alleging that the "harassment" was unlawfully motivated.

I find insufficient evidence that Respondent's actions constituted a constructive discharge. In the 2-month period that he worked in department 191, Stott and Powers gave Bromley two warnings, warned him that they were going to fire him and told him that he was making too many errors and was not producing enough. Although this made it difficult for Bromley, especially considering his fragile psychological state, it did not make his working conditions so difficult, unpleasant, intolerable, or undesirable to cause a reasonable person to quit. For this reason, I find that Bromley was not constructively discharged in January 1983; I therefore find it unnecessary to determine whether Stott and Powers' actions were caused by Bromley's union activities.

CONCLUSIONS OF LAW

1. The Respondent is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

2. The Union is a labor organization within the meaning of Section 2(5) of the Act.

3. Respondent violated Section 8(a)(1) of the Act by disparately enforcing the November 12, 1982 memorandum, by restricting campaigning by employees favoring candidates on the Ferreira slate, while allowing such campaigning by candidates on the Kuba slate.

4. Respondent violated Section 8(a)(1) and (3) of the Act by discharging Ferreira and Grodis on October 1, 1982.

5. Respondent violated Section 8(a)(1) and (3) of the Act by its layoff of McClain from his heat treat position in department 145 on November 11, 1982.

6. Respondent violated Section 8(a)(1) and (3) of the Act by its warnings given to McClain and McDonald, dated November 24, 1982, and its warning given to Lucas, dated December 3, 1982, and by the subsequent suspensions given to McClain and McDonald.

7. Respondent violated Section 8(a)(1) and (3) of the Act by discharging Bromley on November 4, 1982.

8. Respondent did not violate the Act as further alleged in the consolidated complaint.

THE REMEDY

Having found that Respondent has engaged in certain unfair labor practices, I shall recommend that it be required to cease and desist therefrom, and take certain affirmative action designed to effectuate the policies of the Act.

I have found that Respondent discriminatorily discharged, laid off, or suspended Ferreira, Grodis, McClain, McDonald, and Bromley. Lucas received a warning but was not suspended; Grodis was never reinstated, while the others returned to Respondent's employ from a few days to 25 days after the discriminatory action. I shall order that Respondent make these individuals whole for any loss of earnings they suffered as a result of the discrimination, by payment of a sum equal to that which they otherwise have earned, absent the discrimination, with backpay and interest computed in accordance with *F. W. Woolworth Co.*, 90 NLRB 289 (1950), and *Florida Steel Corp.*, 231 NLRB 651 (1977), see generally *Isis Plumbing Co.*, 138 NLRB 716 (1962). In addition, I shall recommend that any references to these discharges, layoffs, suspensions, or warnings in the files of Ferreira, Grodis, McClain, McDonald, Lucas, and Bromley, be removed from their employment records. I shall also recommend that Respondent be ordered to offer Grodis full and immediate reinstatement to his former position or, if that position no longer exists, to a substantially equivalent job, without prejudice to his seniority or other rights and privileges. I shall also recommend that Respondent be ordered to offer to McClain and Bromley the option of reinstatement to the positions they were employed in immediately prior to the discrimination against them.

[Recommended Order omitted from publication.]

The Peelle Co.[1] ***and*** **Shopmen's Local Union No. 455, International Association of Bridge, Structural and Ornamental Iron Workers, AFL–CIO.** Case 29–CA–10584

June 15, 1988

DECISION AND ORDER

BY MEMBERS JOHANSEN, BABSON, AND CRACRAFT

On February 28, 1985, Administrative Law Judge Raymond P. Green issued the attached decision. The General Counsel filed exceptions and a supporting brief, and the Respondent filed an answering brief, exceptions, and a supporting brief.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings,[2] and conclusions as modified and to adopt the recommended Order as modified.[3]

We agree with the judge that the Respondent violated Section 8(a)(5) and (1) of the Act by unilaterally granting its employees merit increases in July 1983.[4] However, we reverse the judge's finding that the Respondent did not violate the Act when it unilaterally granted wage increases to two employees in January and February 1984.

Since 1978, the Respondent's employees of more than 6 months have received wage increases on an annual basis. The Respondent granted the wage increases generally in July in amounts above or below a predetermined average percentage figure based on the employee's performance. Consequently, the wage increases varied over a wide range. The record establishes that the Respondent granted its employees wage increases in July 1983. Because newly hired employee Paul Simonson had not received a July merit increase, the Respondent granted him a wage increase in January 1984. Subsequent to a change from part-time to full-time status, the Respondent also granted employee Donald O'Sullivan a wage increase in January 1984. In February 1984 O'Sullivan was given a second increase. The Respondent's treasurer testified that the increase was given because O'Sullivan threatened to quit unless he was given more money.

The judge rejected the Respondent's argument that the July 1983 wage increases resulted from its longstanding policy of granting merit increases each July and were not a unilateral change. Citing, inter alia, *NLRB v. Katz*, 369 U.S. 736 (1962), for the proposition that an employer must bargain over the discretionary aspects of merit wage increases, the judge found that in granting the July 1983 increase without prior notification to the Union, the Respondent violated Section 8(a)(5) of the Act. The judge found, however, that the January and February 1984 wage increases to employees O'Sullivan and Simonson did not violate the Act. The judge held that these wage increases were given to the two employees at a time well after bargaining had ceased between the Union and the Respondent, and at least as far as O'Sullivan was concerned, merely constituted individual pay adjustments.

The General Counsel excepts to the judge's finding regarding the wage increases to O'Sullivan and Simonson, and we find merit in the exception. We find no record evidence of an impasse existing prior to the January and February 1984 wage in-

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[1] The caption is corrected to spell the Respondent's name properly.

[2] In sec. I, par. 1, and thereafter, the judge incorrectly spelled Respondent The Peelle Co.'s name as "Peele."

In sec. II, par. 6 of his decision, the judge erroneously stated that the Union notified Independent Association of Steel Fabricators on June 20, 1976, rather than January 20, 1976, that it did not consent to certain members withdrawing from that multiemployer bargaining association.

In sec. II, par. 9, the judge incorrectly cited the first court of appeals decision to which he referred. The correct citation is *NLRB v. Independent Assn. of Steel Fabricators*, 582 F.2d 135 (2d Cir. 1978), cert. denied 439 U.S. 1130 (1979). The Second Circuit Court of appeals decision, *NLRB v. Koenig Iron Works*, issued June 7, 1982, not June 6, 1983, and is reported at 681 F.2d 130.

In sec. III, par. 2, and thereafter, the judge incorrectly spelled William Colavito's surname as "Colovito."

In the last paragraph of sec. III, the judge stated that Israel wrote to Colavito on February 7, 1983. The correct date is February 7, 1984.

In sec. IV, par. 5, the judge set forth a chart showing wage increases the Respondent's employees received. C. Hollamby, however, received a 40-cent wage increase in July 1983, not 50 cents. G. Pagano received $1.35 in July 1981, not $1.05, and 61 cents in July 1979, not 66 cents. C. Scholl received a 60-cent increase in July 1983, not 1982; his wage change is set forth in fn. 11 of the judge's decision.

In fn. 11, the judge erroneously stated C. Scholl's personnel card indicated he earned $1985 per month as of July 1, 1980. The correct figure is $1485 per month.

In sec. V, par. 1, the judge referred in the text to a fn. 15. There is no fn. 15. [The footnotes have been renumbered.]

In sec. V, B, par. 15, the judge erroneously stated the Respondent proposed in October 1983 that any contract entered with the Union expired September 30, 1988, rather than 1987.

In the last paragraph of sec. V, B the judge omitted a reference to fn. 20 at the end of that paragraph. [Noted and corrected.]

We correct these inadvertent errors.

[3] We have modified the recommended Order to provide that the Respondent cancel any unilateral changes in wages if requested to do so by the Union. *Elias Mallouk Realty Corp.*, 265 NLRB 1225 fn. 3 (1982).

[4] In finding that the July 1983 wage increases violated the Act, we note that this case is distinguishable from *NLRB v. Patent Trader, Inc.*, 415 F.2d 190 (2d Cir. 1969), modified as to remedy 426 F.2d 791 (2d Cir. 1970) (en banc), in which the court refused to enforce a finding of unlawful unilateral wage increase because the union never protested the various increases as they were granted, even though the union did in fact know about them and about the company's general practice of granting wage increases on a semiannual basis. Further, the court found that negotiations were not obstructed by the grant of discretionary increases because the company merely continued its policy. In the instant case, no evidence exists that the Union was aware prior to the hearing of the Respondent's grant of the July increases or its general practice of granting wage increases on an annual basis. Accordingly, the facts establish the very danger seen in such discretionary increases outlined by the court in *Patent Trader*. Id. at 199–200.

289 NLRB No. 17

creases. We further find no significant distinction between the July 1983 wage increases that the judge found were violative of the Act and the January and February 1984 wage increases that the judge found were lawful. Simonson's wage increase in January reflected the July 1983 wage increase given to all employees. Likewise, O'Sullivan's January wage increase, although resulting from a change in status, reflected the July increase as well. Further, the Respondent's explanation for the February 1984 increase to O'Sullivan is irrelevant to the issue of the Respondent's duty to bargain over a discretionary wage increase. Thus, we find no basis in fact or law for the judge's finding regarding the lawfulness of the January and February wage increases. Accordingly, we conclude that the unilateral grant of the January and February 1984 wage increases, as well as the July 1983 wage increases, violated Section 8(a)(5) of the Act.

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge as modified below and orders that the Respondent, The Peelle Co., Bay Shore, New York, its officers, agents, successors, and assigns, shall take the action set forth in the Order as modified.

1. Substitute the following for paragraph 1(a).

"(a) Refusing to bargain collectively with Shopmen's Local Union No. 455, International Association of Bridge, Structural and Ornamental Iron Workers, AFL-CIO by unilaterally granting wage increases to employees without prior notice to and consultation with the Union."

2. Substitute the following for paragraph 2(a).

"(a) On request by Local No. 455, cancel the unilateral wage increases granted to bargaining unit employees."

3. Substitute the attached notice for that of the administrative law judge.

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

Section 7 of the Act gives employees these rights.

To organize

To form, join, or assist any union

To bargain collectively through representatives of their own choice

To act together for other mutual aid or protection

To choose not to engage in any of these protected concerted activities.

WE WILL NOT refuse to bargain collectively with Shopmen's Local Union No. 455, International Association of Bridge, Structural and Ornamental Iron Workers, AFL-CIO by unilaterally granting merit wage increases to our employees during the course of collective-bargaining negotiations, without prior notice to and consultation with the Union.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

On request by the Union, WE WILL cancel the unilateral wage increases granted to bargaining unit employees.

THE PEELLE CO.

Beatrice Kornbluh, Esq., for the General Counsel.

Robert A. Goldstein Esq. (Kliegman, Goldstein, Israel & Cooper), of New York, New York, for the Respondent.

Belle Harper, Esq. (Sipser, Weinstock, Harper & Dorn), of New York, New York, for the Charging Party.

DECISION

STATEMENT OF THE CASE

RAYMOND P. GREEN, Administrative Law Judge. This case was heard by me in Brooklyn, New York, on May 31 and June 1, 4, and 21, 1984. The charge in this proceeding was filed on July 8, 1983, and a complaint was issued on October 31, 1983. In substance, the complaint alleged that the Respondent, since at least February 8, 1983, bargained in bad faith with no intention of reaching an agreement with the Union. At the hearing the General Counsel moved to amend the complaint to add an allegation that in July 1983 and January and February 1984, the Respondent granted unilateral wage increases to its employees.

Based on the entire record in this proceeding, including my observation of the demeanor of the witnesses, and after reviewing the briefs of counsel, I make the following

FINDINGS OF FACT

I. JURISDICTION

It is agreed by all parties that The Peele Co. is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act. It also is agreed that the Union is a labor organization within the meaning of Section 2(5) of the Act.

II. BACKGROUND

This case and a series of other cases[1] have a long history of litigation. Insofar as relevant, the background is described below.

For a period of time prior to 1975, Peele had maintained a collective-bargaining relationship with the Union, initially on an independent, as opposed to multiemployer, basis. (Before 1975, the Union also bargained with an employer association called the Allied Building Metal Industries Inc.) As a result, Peele and other independent companies that bargained with the Union came to have a history of executing a series of successive contracts that basically were referred to as the standard independent contract. Over a period of time there evolved a degree of difference between the standard independent contracts and the Allied contracts.

In early 1975 Peele, along with other companies that were not members of the Allied Building Metal Industries Inc. (the Allied Association), decided to form their own multiemployer association called the Independent Association of Steel Fabricators. One of the new Association's goals was to achieve parity with the contract held by the Allied Association.

Bargaining between the Union and the Independent Association commenced on June 1, 1975. No contract having been reached by June 30, 1975, the Union commenced a strike on July 1 1975. From July 1 to late August there was a hiatus in negotiations, albeit one of the Independent Association's members signed a separate contract with the Union.

In late August and through October 1975, negotiations were held between the Union and the Independent Association. However, not much progress was made. In October the spokesman of the Association advised Local 455 that another union was interested in organizing the employees involved. Subsequently, between November 1975 and January 1976, some of the employer-members of the Independent Association entered into contracts with Local 810 International Brotherhood of Teamsters, an action later held to be unlawful by the Board and the Second Circuit. 231 NLRB 264 and 582 F.2d 135.

In early January 1976, the Union and the Allied Association reached a contract settlement. On January 14 the Union offered the wage and fund package to the Independent Association on the same basis as had been agreed to with the Allied Association. However, the Independent Association, desirous of parity, offered to accept the exact same terms as had been agreed to with the Allied Association. The Union refused. On January 16, Local 455 was notified that 19 of the Independent Association's members had withdrawn from the Association. On June 20, the Union notified the Association that it did not consent to such withdrawals. It further advised that any agreement made between it and the Association's remaining members would be binding on those employers who had attempted to withdraw without the Union's consent.

On January 23, 1975, Local 455 met with three employers that had not withdrawn from the Independent Association. At this meeting the parties present reached an agreement, although the three employers stated that they were not authorized to represent the Association. Thereafter in late January, five employers signed the January 23 stipulation, albeit refusing to do so on behalf of the Independent Association.

Meanwhile the strike was continuing against the other members of the Independent Association who had not signed contracts with Local 455. The Union thereupon sent a letter to the employers who had withdrawn from the Independent Association, requesting that they implement the January 23 stipulation.[2] Two employers did execute agreements identical to the January stipulation. The others, including Peele, did not.

In light of the situation summarized above, Local 455 filed various unfair labor practice charges. Also an unfair labor practice charge was filed against the Union. All those cases were consolidated for trial and ultimately led to a series of decisions by the Board and the Second Circuit reported at 231 NLRB 264, 528 F.2d 135, 252 NLRB 922, and 110 LRRM 2995 (June 6, 1983). Insofar as relevant to the present case, certain former members of the Independent Association, including Respondent, were ordered to bargain on an individual basis (as opposed to a multiemployer basis) with Local 455. Also certain employers who had executed contracts with Local 810 were ordered to abrogate such contracts and withdraw recognition with that Union.

During the course of the strike and throughout the next 7 years, Peele operated essentially as if it were a nonunion enterprise. That is, it did not renew its contract with Local 455 and it ceased to abide by the terms and conditions of the expired contract.[3] Additionally, many new employees were hired as replacements of the strikers, albeit two of the strikers did return to work in 1976 and 1977. At the time negotiations between Peele and Local 455 were resumed in the summer of 1982, the Company employed, at its Bay Shore facility, about 13 employees. Also noted is that during the strike, the Company moved a large part of its fabricating operation to Canada leaving its Bay Shore facility primarily as a warehouse with fewer employees than had been employed before the strike.

III. THE NEGOTIATIONS

After the court's June 6 opinion, the Union on June 8, 1982, sent a letter to Peele and other companies asking to start negotiations. On July 12 the Union sent another letter requesting information including the names and addresses of employees.

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[1] On various days in March, April, June, and September 1984, I heard a number of other cases in which the facts were substantially related to the instant case. These were G. Zaffino & Sons Inc., Case 29-CA-10582; Achilles Construction Co., Case 29-CA-10585; Roman Iron Works Inc., Case 29-CA-10583; and Koenig Iron Works, Case 29-CA-10586. As the cited cases were not consolidated for hearing with the present case, I shall, in due course, issue separate decisions in each of these.

[2] On the theory that their withdrawals from the Independent Association were untimely and therefore they were bound to execute any agreement made between the Union and the remaining members of the Association.

[3] For example, on expiration of that contract, Peele ceased making payments to the various trust funds as required by that contract.

On August 18, 1982, a meeting was held between William Colovito, president of Local 455, and Stanley Israel, a labor attorney representing Peele and seven other companies. (These were G. Zaffino and Sons Inc., Achilles Construction Co., Koenig Iron Works, Melto Metal Products Inc., Master Iron Craft Corp., and Mohawk Steel Fabricators Inc.)[4] At this time, Colovito presented, as the Union's proposal, certain wage increase demands plus the same Standard Independent Contract that these companies had rejected in 1975. Israel, on behalf of his clients, told Colovito that they would not agree to the standard independent contract and would each insist on negotiating contracts suitable to themselves.

On September 1, 1982, Israel forwarded to Colovito a letter setting forth information the Union had requested, plus a document purporting to be a contract offer.[5] The proposed contract has a number of interesting features, foremost being that the Union is never mentioned as being a party to the contract. Among the proposed clauses were the following:

> (1) Article 1, stated, *inter alia* that "The Employer reserves the right to change without notice all or any portion of these Articles after due and reasonable consideration, except where notice is specifically stated."
>
> (2) "An employee(s) may be dismissed where in the opinion of the Company a disharmonious relationship would result from continued employment."
>
> (3) Article 19 contains an employee complaint procedure which does not include or mention union representation.

The covering letter of September 1, 1982, states, inter alia:

> We also submit to you the following contractual counterproposal.
>
> 1. Enclosed is the basic form of Agreement we propose. To the extent, benefits as previously disclosed to you are superior, they are to be substituted for those in this document.
>
> 2. We also require a strong management rights clause (including control over all matters not covered in the contract), a no strike-no lockout clause, a "just cause" discharge clause, an arbitration clause (AAA).
>
> 3. Prior employment with the Company is not to be counted for any purpose.
>
> 4. Working foremen need not be members of the Union, but shall be allowed to do production work. In this regard, the three current highest paid employees shall be deemed to be working foremen.
>
> 5. There is to be an "open" shop.
>
> 6. The contract shall be of six years duration commencing October 1, 1982. Across the Board increases equal to the cost of living increase for each prior year shall be given to each then employee on the 1st day of October 1983, 1984, 1985, 1986 and 1987. Classification rates shall *not* be affected.

At the next meeting on September 17, Mr. Colovito said that the Company's proposed contract was unacceptable and looked more like work rules than a collective-bargaining agreement. Colovito was told by Israel that the two major concerns of the Company were (1) an open-shop and (2) a long duration contract.

Unlike the negotiation involving Roman Iron Works and some of the other companies, it appears that far less time was spent between Israel and the Union. This may have been due to the somewhat outlandish initial proposals of Peele and that discussions between Israel and Colovito regarding Israel's other employer-clients were following more traditional paths. Suffice it to say that the record suggests that for whatever reason, discussions between Peele and the Union were to a great extent put on the backburner while more intensive negotiations centered on some of the other companies.

On October 5, 1982, Peele sent to the Union a copy of its pension and welfare plans. On December 12, Colovito sent Israel some revisions of the Union's initial contract proposal for all the companies, including Peele. On January 4, 1983, after having been notified by the Regional Director for Region 29 that the withholding of employee addresses was probably illegal, Peele forwarded a list of employee names and addresses to the Union.[6]

On April 8, 1983, Israel sent a letter to the Union modifying Peele's September 1 proposal as follows:

> (1) We will include a checkoff provision to conform to that contained in Section 5 of the Agreement we have proposed with respect to Achilles, Melto, Roman, Mohawk and Zaffino.
>
> (2) We will include the following grievance procedure clause:
>
>> Any dispute between the companies and the Union arising out of this agreement or as to the meaning, application, or alleged violation of any provision or provisions of this Agreement, shall upon request of either party to this Agreement, be submitted to an Arbitrator of the American Arbitration Association designated in accordance with its rules and regulations. The Arbitrator's decision shall be final and binding upon the employees involved and upon the parties to this Agreement.
>
> (3) We will include a provision providing for the furnishing of work shoes or a work shoes allowance, to the extent previously granted by this employer.

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[4] Of these companies, Master, Mohawk, and Melto ultimately signed contracts with Local 455.

[5] Also forwarded was a list of employees giving their history of wage increases.

[6] Israel took the position that because of certain union misconduct during the strike, the Union was not entitled to employee addresses. It is noted that the delay in furnishing employees' addresses is not alleged as being violative of the Act, but is only offered as background evidence for the General Counsel's contention that the Company engaged in surface bargaining.

In May 1983, Colovito revised his economic demands vis-a-vis all the companies. Thereafter, by letter dated June 6, 1983, Peele revised its offer as follows:

> This letter is being submitted to you as a FINAL offer in advance of our June 7, 1983 negotiating session.
>
> The offer contained in our letter of September 1, 1982, as thereafter modified in our letter of April 8, 1983, is further modified in the following regards:
>
> (1) The term of the Agreement shall be *five (5)* years from October 1, 1982.
>
> (2) The cross-the-board wage increases shall in no event be less than 50¢ per hour in each year.
>
> (3) There shall be no restriction on subcontracting.
>
> We shall be prepared to discuss the final offer at our June 7 meeting.
>
> In response to your recent inquiry, the Company has been advised of a pending 17% Blue Cross premium increase.

The third meeting exclusively concerning Peele took place on June 13, 1983. At this meeting the Company offered to have the cost-of-living increases take effect in July rather than October and to use New York City cost-of-living statistics as the basis of its COLA proposal. (As noted above, the Company also proposed a 50-cent floor on its COLA proposal.) There also was a discussion of what the Company meant by part-time employees it proposed to exclude from contract coverage. Regarding this issue, the Company asserted that it basically was talking about students who worked 2 hours a day, 4 days a week.

On July 1, 1983, Local 455 and Master Iron Craft entered into a 4-year contract containing, inter alia, a provision allowing the Company the unrestricted right to subcontract.

On July 25, 1983, Colovito wrote to Israel as follows:

> It would greatly help us, and avoid unnecessary confusion in our ongoing negotiations with the above Employers, if you could supply us with a separate statement for each of the Employees, setting forth its last offer, covering all items.

On July 28, 1983, Israel's response included the following economic offer of Peele:

> *Peele*
>
> (a) Five year contract from October 1, 1982.
>
> (b) Across-the-board (not classification minima) cost of living increases on July 1 of each year, commencing July 1, 1983, but in no event less than 50¢ per hour.
>
> (c) All other existing economic items to remain as is.
>
> This letter is intended *only* as the *recapitulation* you requested. It is not intended to modify any prior offers or current positions and any discrepancy between the prior offers and this recapitulation is to be resolved in favor of the prior offers.
>
> I wish also to point out that each of the employers requires the same subcontracting clause as negotiated with Master. I mention this item specifically inasmuch as you might consider it as part of the economic package.

A meeting was scheduled for early August but Colovito could not attend and had to call it off on short notice. On August 4, Israel wrote to Colovito as follows:

> I was unable to head off Ed Peele and he was rather put out coming into New York only to find that the collective bargaining session had been cancelled at the last moment. However, and in order to move this matter along, I have been authorized to revise the Peele offer contained in our June 6th letter in the following respects:
>
> (1) The Company will agree to an Agency shop on terms we can discuss at our next meeting.
>
> (2) The Company will agree to include a contract provision providing for Union visitation rights.
>
> (3) The Company will grant Washington's Birthday as an additional paid holiday.
>
> (4) The Company will agree to notify the Union of job openings and allow the Union to recommend employees under conditions which we will set forth at the next meeting.

At a meeting on September 21 or 25, Israel said he would put together a complete contract offer. As a consequence, Israel, on behalf of Peele, forwarded a contract offer on October 10, 1983. This proposed contract, which is based, to some degree, on the contract proposal made in September 1982, eliminates many of the more absurd aspects of the earlier offer. Thus this contract contains the following provisions:

> (1) A job referral clause wherein the employer agrees to give the Union 48 hours to furnish new employees from its hiring hall.
>
> (2) A dues check off clause.
>
> (3) A clause permitting discharge of non-probationary employees only for just cause.
>
> (4) A union visitation clause.
>
> (5) An arbitration clause providing for final and binding arbitration of grievances in accordance with the rules of the American Arbitration Association.
>
> (6) A clause providing super seniority for shop stewards.
>
> (7) Cost of Living Wage Increases with a floor of 50¢ per hour.
>
> (8) A clause setting forth three proposed job classification[s] (trainee, experienced, experienced welder) providing for minimum rates of pay for each classification.

Regarding the above-noted contract proposal, it is noted that although the Company continued to propose that working foremen be excluded from the unit, it no longer was defining this category as being the three highest paid employees. As to this issue, the parties had further discussion, without resolution, at a meeting on October 13, 1983.

On October 14, Israel sent a correction of an error in its October 10 contract proposal. On October 27 Israel, in response to the Union's request for employee job classifications, sent a chart purporting to be a description of the jobs performed by each of Peele's employees. Thereafter, there were no further communications between the Union and Peele until January 19, 1984, when Colovito wrote to Israel seeking updated information relating to Peele's employees. Israel responded on January 23 that there were no changes. On February 7, 1983, Israel wrote to Colovito informing him of the hire of a new employee, the granting of wage increases to two employees, and the granting of a Christmas bonus to all employees. On February 10, 1984, Colovito sent another letter to Israel, regarding Peele, in which he modified the Union's economic demands. Although requesting another meeting, Peele did not respond. This was, as far as this record shows, the final communication between Local 455 and Peele.

IV. THE ALLEGED UNILATERAL WAGE INCREASES

At the trial the General Counsel moved to amend the complaint to allege that Respondent unilaterally granted wage increases in July 1983 and January and February 1984. I granted that motion to amend, and gave Respondent additional time to respond to the amendment.

Peele's records show that all but one of its employees at its Bay Shore facility received wage increases in early July 1983. These wage increases varied over a fairly wide range and were given by the Company as merit increases. The records also showed that two employees received wage increases in January and February 1984 as described below. There is no dispute that the Union was never notified of these wage increases. In fact, Colovito first learned of the July raises at the hearing after examining certain business records that the General Counsel had subpoenaed.[7]

The Company's records also establish that since at least 1978 all employees, except for newly hired employees, received wage increases each July. (In 1980, the wage increases were given in late June.) The Company's controller, Fred Weber, testified that for many years the Company has had a policy of annually budgeting wage increases as an average percentage increase. He also testified that, based on annual performance reviews, wage increases are granted in July to each of its employees (if employed for more than 6 months) in amounts above or below the predetermined average percentage figure, depending on the employee's performance.

In the case of the two employees who received wage increases in January and February 1984, Weber explained these situations as follows. In the case of Paul Simonson, Weber stated (and the records confirm) that he was hired on February 8, 1983, and therefore did not receive a merit increase in July because he had not yet worked for 6 months. Weber asserts that in accordance with company policy, Simonson nevertheless received, on January 16, 1984, a raise around his anniversary date (50 cents), and would thereafter be eligible for the annual July raises. Regarding Donald O'Sullivan (hired in May 1982), Weber states that on January 20, 1984, O'Sullivan changed from being a part-time to full-time employee and therefore, in accordance with company policy, received a pay adjustment to reflect this change of status. As to the February wage increase, Weber testified that this simply resulted from O'Sullivan's threat to find employment elsewhere unless he got a raise.

Regarding Weber's testimony concerning the annual July raises, the Company's records show the following:[8]

Name	*July 1978*	*July 1979*	*July 1980*	*July 1981*	*July 1982*	*July 1983*
C. Hollamby	$ .25	$ .35	$ .45	$ .50	$ .50	$ .50
G. Pagano	.25	.66	.89	1.05	1.05	1.00
A. Reynolds	.25	.51	.74	1.10	.85	.85
S. Sinclair	.25	.35	N/E*	N/E*	.60	.40
M. Lilly [9]	0	0	0	0	.85	1.00
D. O'Sullivan [10]	0	0	0	0	.60	0
C. Scholl [11]	0	0	0	0	.60	0
C. Ramsden [12]	0	0	1.25	.50	1.00	.40
P. Simonson [13]	0	0	0	0	0	0
A. Torres [14]	0	0	0	.50	.50	.40

* Not employed.

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[7] Inasmuch as Colovito was never informed of the July raises until the trial, the Respondent can hardly claim that the Union waived its right to bargain about those wage increases.

[8] It is noted that the Company's records show that there have been occasions when employees have also gotten raises at times other than July. However, the records indicate that such non-July raises have normally been given on a change in an employee's status. For example, when an employee changes from being part time to full time, or when an employee changes classification, or when an employee gains a new skill.

[9] M. Lilly was hired on 12/14/81.

[10] D. O'Sullivan was hired on 5/17/82.

[11] C. Scholl was hired on 2/26/47. His personnel card indicates that as of 7/1/80 he was paid $1985 per month; that on 7/1/81 he was raised to $1620 per month; that on 7/4/82 he was transferred to the weekly payroll at $10.05 per hour; and that on 7/4/83 he received a raise to $10.65 per hour.

[12] C. Ramsden was hired on 10/31/79. His personnel card indicates that on 12/7/81 he became a general mechanic and received a raise of 45 cents per hour.

[13] P. Simonson was hired on 2/8/83.

[14] A. Torres was hired on 6/26/80.

III. ANALYSIS

A. *The Wage Increases*

Insofar as the July 1983 wage increases, there is no question but that the Union was never informed that those increases were granted. Accordingly the Union was therefore never given either an opportunity to bargain about such wage increases *or* given the opportunity to waive its right to bargain about this subject.

Insofar as I can determine, the principal defense of the Respondent can only be that because it had a longstanding policy of granting merit increases each July, the July 1983 raises cannot be construed as a unilateral change. Put somewhat differently, Respondent might argue that given this longstanding practice, if it had ceased giving such merit increases during the course of the negotiations, it could be argued that it would have violated Section 8(a)(1) and (3) of the Act. See for example *Palestine Bottling Co.*, 269 NLRB 639 (1984), and *Southeastern Michigan Gas Co.*, 198 NLRB 1221 (1972), enfd. 485 F.2d 1239 (6th Cir. 1973). Respondent would therefore argue that it would be anomolous to hold that it would violate Section 8(a)(1) and (5) by granting the July 1983 wage increases, but on the other hand, subjecting it to liability under Section 8(a)(1) and (3) of the Act if it chose to withhold these increases.

In *NLRB v. Katz*, 369 U.S. 736, 746 (1962), the Supreme Court held that the company violated Section 8(a)(5) of the Act when, during the course of negotiations and absent an impasse, it granted merit increases to some of its employees without prior notice to the Union. Although arguing that these raises were part of an established practice, the Court noted that the merit raises in question were "in no sense automatic, but were informed by a large measure of discretion. There simply is no way in such case for a union to know whether or not there has been a substantial departure from past practice, and therefore the union may properly insist that the company negotiate as to the procedures and criteria for determining such increases."

In a very recent case, *State Bank of India*, 273 NLRB 267 (1984), the Board stated at 267:

> Finally, the Bank's contention that it gave the wage increase on the basis of an earlier promise is not a legally sufficient defense. Even accepting the Bank's evidence that the employees were promised a wage increase in April and that the timing of the increase was predetermined, the amount of the increase was discretionary and became a matter as to which the Bank was obligated to consult with the bargaining agent.

Is there therefore an unresolvable dilemma facing employers who embark on labor negotiations while having a past history of granting annual merit increases? The answer to this problem was given in *Oneita Knitting Mills*, 205 NLRB 500 fn. 1 1973. The Board stated:

> Respondent argues that a finding that the unilateral grant of merit increases was a violation of Sec. 8(a)(5) would be inconsistent with the holding of this Board in *Southeastern Michigan Gas Company*, 198 NLRB No. 8, wherein we found a discontinuance of merit increases to have been a violation of Sec. 8(a)(5). We disagree. An employer with a past history of a merit increase program neither may discontinue that program (as we found in *Southeastern Michigan*) nor may he any longer continue to unilaterally exercise his discretion with respect to such increases, once an exclusive bargaining agent is selected. *N.L.R.B. v. Katz*, 396 U.S. 736 (1962). What is required is a maintenance of preexisting practices, i.e., the general outline of the program, however the implementation of that program (to the extent that discretion has existed in determining the amounts or timing of the increases), becomes a matter as to which the bargaining agent is entitled to be consulted.

In view of the above, it is my opinion that by granting the July 1983 merit increases without prior notification to the Union, the Respondent, in the circumstances herein, violated Section 8(a)(1) and (5) of the Act.[15] On the other hand I do not view the January and February 1984 raises to employees O'Sullivan and Simonson as being violative of the Act. In the case of O'Sullivan, he received a raise on January 20, 1984, when he changed from part-time to full-time status. He received another raise in February 1984 when he threatened to quit unless he got more money. Simonson got his raise on January 16, 1984, because he was not eligible for the July 1983 merit increases. These wage increases were given to the two employees at a time well after bargaining had ceased between the Union and the Company and, at least as far as O'Sullivan was concerned, merely constituted individual pay adjustments.

B. *The Surface Bargaining Allegation*

Section 8(d) of the Act, which defines the duty to bargain, does not compel either party to a collective-bargaining relationship to agree to a proposal or to make a concession. Therefore, insofar as mandatory subjects of bargaining (generally relating to wages, hours, and terms and conditions of employment), the Act does not require either party to yield or compromise its position. In this respect, the Supreme Court in *NLRB v. American National Insurance Co.*, 343 U.S. 395, 404 (1952), stated:

> [T]he Board may not, either directly or indirectly, compel concessions or otherwise sit in judgment upon the substantive terms of collective bargaining agreements.

The court further stated in *H. K. Porter v. NLRB*, 397 U.S. 99, 107–108 (1970):

> It is implicit in the entire structure of the Act that the Board acts to oversee and referee the process of collective bargaining, leaving the results of the contest to the bargaining strengths of the parties. . . .

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[15] For the same reasons set forth in my opinion in *Achilles Construction Co.*, JD–NY–9–85, I reject Respondent's reliance on *M & M Contractors*, 262 NLRB 1472 (1982), and *AAA Motor Lines*, 215 NLRB 793 (1974).

> While the parties' freedom of contract is not absolute under the Act, allowing the Board to compel agreement when the parties themselves are unable to agree would violate the fundamental premise on which the Act is based—private bargaining under governmental supervision of the procedure alone, without any official compulsion over the actual terms of the contract.

It also is clear that it was the intention of Congress to permit (within limits) employers and unions to utilize their relative economic strengths vis-a-vis each other as part of the bargaining process.[18] As pointed out by the Supreme Court in *NLRB v. Insurance Agents*, 361 U.S. 477, 489 (1960):

> The presence of economic weapons in reserve, and their actual exercise on occasion by the parties, is part and parcel of the system that the Wagner and Taft-Hartley Acts have recognized. . . . [T]he truth of the matter is that at the present statutory stage of our national labor relations policy, the two factors—necessity for good-faith bargaining between parties, and the availability of economic pressure devices to each to make the other party incline to agree on one's terms—exist side by side.

It therefore is not necessarily unlawful for the stronger side to make demands or take positions consistent with its strength. Quite obviously, the respective strength of a union versus a company in bargaining is largely dependent on the support of the employees it represents, their willingness to strike, and the vulnerability of the company to a strike. See, for example, *World Publishing Co.*, 220 NLRB 1065, 1071 (1975), enfd. sub nom. *Omaha Typographical Union 190 v. NLRB*, 545 F.2d 1138 (8th Cir. 1976). Furthermore, collective bargaining is basically a two-way street. Thus although a union may lawfully make demands designed to improve existing employee wages and benefits, there is nothing in the Act that denies an employer the right, for its part, to demand givebacks. Where the parties are negotiating to replace a prior contract, neither side is precluded from seeking modifications to its own advantage. The Act simply does not preclude an employer from demanding that various provisions of the old contract be modified, altered, or even eliminated. Thus, in the present case, when the General Counsel argues that the Respondent sought to modify or eliminate contractual provisions contained in the contract that expired in 1975, I am unimpressed as to the materiality of such a fact.

Although it is not illegal for a company to engage in hard bargaining, Section 8(a)(5) of the Act nevertheless requires the company to bargain in good faith, which is essentially defined as a willingness to enter into a contract. *NLRB v. Insurance Agents*, supra, 361 U.S. 477, 485. Thus, although a company may use its relative strength to press for contract terms favorable to itself, it may not use its strength to engage in futile or sham negotiations with the intention of never reaching an agreement. *NLRB v. Herman Sausage Co.*, 275 F.2d 229, 232 (5th Cir. 1960). As stated in *Abingdon Nursing Center*, 197 NLRB 781, 787 (1972):

> Good faith, or want of it, is concerned essentially with a state of mind. . . . That determination must be based upon reasonable inference drawn from the totality of conduct evidencing the state of mind with which the employer entered into and participated in the bargaining process. . . . All aspects of the Respondent's bargaining and related conduct must be considered in unity, not as separate fragments each to be assessed in isolation.

I have already indicated my view that the initially proposed "contract," tendered by the Respondent on September 1, 1982, was problematical at the very least. However, it is not unusual for both unions and companies to make initial proposals that they know will be unacceptable to the other side and that they do not seriously pursue throughout negotiations. The key question in surface bargaining cases is not what a respondent initially offers, but what its bottom line position is throughout or at the end of the negotiations. In fact, it has been argued that if a company or union comes to the table with a reasonable offer from which it is unwilling to compromise, that such a position would constitute surface bargaining.

Although I view the Respondent's initial contract proposal as being unreasonable, the evidence suggests that Israel on behalf of Peele had every intention of making compromises as the negotiations advanced. For better or worse, however, it seems that progress in these particular negotiations proceeded at a rather slow pace in that Colovito and Israel concentrated their bargaining on some of the other companies with whom Local 455 was simultaneously negotiating.

The evidence in this case shows that the Respondent, during the course of the negotiations, made substantial concessions, eliminated some of its more objectionable proposals, and made significant offers on substantive issues. The following are examples.

(1) Although the initial contract offer tendered on September 1 (G.C. Exh. 6b), made no reference to a union-management grievance procedure, the accompanying letter and later offers make it clear that the Respondent offered a rather traditional grievance-arbitration procedure.

(2) Although the Company's initial contract offer stated that the contract could, in effect, be changed at the Company's sole discretion and without notice, this absurd provision was soon dropped and long forgotten.

(3) The initial company proposal included a provision allowing employees to be dismissed if, in the opinion of the Company, "a disharmonious relationship would result from continued employment." This proposal was thereafter dropped and replaced by a company proposal for a standard clause permitting discharge only for "just cause."

(4) Although the initial company proposal called for the exclusion from the bargaining unit, as working fore-

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[18] There are of course statutorily defined limits on each side's use of economic power. Thus for example, Sec. 8(b)(4)(B) prohibits a union from engaging in secondary boycotts, and Sec. 8(a)(3) would preclude an employer from discharging employees who join or support a union.

men, the three highest paid employees, this demand was dropped and replaced by a demand that those persons who were working foremen be excluded from the unit. The evidence, although documenting the company and union positions on this issue, does not, however, establish that the Respondent insisted to impasse or as a condition of reaching agreement, that the bargaining unit be modified to exclude nonsupervisory employees who otherwise should be part of that unit.[17]

(5) The initial company proposal did not offer either union-security or checkoff provisions. However, on August 4, 1983, Peele offered an agency shop and on October 10, offered a dues-checkoff provision. As to a union-security clause, Israel expressed the Company's view that notwithstanding the Court's enforcement of the bargaining order on June 6, 1982, a number of employees were not interested in joining the Union and the Company did not want to compel their membership.

(6) On August 10, 1983, the Company offered to use the Union's hiring hall on a first-call basis, for the referral of new employees.

(7) Insofar as wages, the Company's initial offer was to grant cost-of- living raises each October over the 6-year term of a contract (to September 30, 1988). On June 6, 1983, in response to the Union's modification of its initial demands, the Company offered a cost-of-living increase each year with a floor of 50 cents per hour. On June 13 the Company proposed that such raises be given each July rather than each October. Its final proposal in October 1983 was for cost-of-living increases each July until the contract expired (proposed to be September 30, 1988) with a 50-cent floor.

Notwithstanding the above, there are a number of factors from which an argument might be made that Respondent should be inferred to have bargained without an intention of reaching agreement. Some examples shall be discussed below, but in my opinion they do not, in the context of this entire record, warrant the ultimate conclusion that the General Counsel would draw.

(1) The Respondent refused to furnish the addresses of its employees until January 1983. Notwithstanding the fact that Local 455 was held to have committed some 8(b)(1)(A) violations in 1975, I have no doubt that Peele was legally obligated to furnish the names of its employees in 1982. *Gehnrich & Gehnrich, Inc.*, 238 NLRB 528, 535 (1981). However, the Company's refusal to furnish addresses occurred outside the statute of limitations period and, in my opinion, is only remotely related to the issue of surface bargaining.

(2) The Company gave unilateral increases during the negotiations which I have found above to have constituted a violation of Section 8(a)(1) and (5) of the Act. Unlike the refusal to furnish addresses, it is my opinion that the unilateral wage increases are much more directly related to the issue of surface bargaining. See for example *NLRB v. Fitzgerald Mills Corp.*, 313 F.2d 260, 267 (2d Cir. 1963). Yet here too we are dealing with evidentiary points and I cannot say that such unilateral changes necessarily demonstrate an intent to avoid entering into a contract.

(3) The General Counsel contends that the Company's insistence on a provision that would permit it to subcontract is evidence of its intention to avoid reaching an agreement. Her argument appears to be that if the Company were able to obtain such a clause, it theoretically could subcontract out all of its business and eliminate the bargaining unit.

The subject of subcontracting is a mandatory subject of bargaining, which means that either side may insist on its position regarding the subject. Thus, a union would clearly be within its right if, during negotiations, it insisted on a clause that precluded all subcontracting by a company.[18] By the same token I can see nothing illegal in a company refusing to agree to subcontracting restrictions or, alternatively, insisting on a right to subcontract during the life of the labor agreement. To hold otherwise would, in effect, impose a lack of mutuality in collective bargaining, which I do not believe was envisioned by Congress. In the present case there is no evidence that Peele was taking its positions vis-a-vis subcontracting because it, in fact, intended to take the draconian step of eliminating the bargaining unit. All that can be said is that Israel intended to give the Company the option of subcontracting if economic circumstances made that desirable. I therefore do not believe that the Company's position regarding subcontracting is evidence of surface bargaining in the context of this case.

(4) The General Counsel correctly notes that the Company wanted significant give backs from the last contract it had with Local 455. However, there had been a 7-year hiatus between the expiration of that contract and the resumption of negotiations, and a great many changes had evolved in the Employer's terms of employment during the interim. Moreover, I do not perceive the Act to prohibit a company from demanding give backs. Collective bargaining is a two-way street and each side, based on its relative strength, is entitled to try to get the best deal possible for itself. *Gehnrich & Gehnrich, Inc.*, 258 NLRB 528 (1981).

(5) Although a union-security clause was contained in the contract that expired in 1975, the Company, during these negotiations, offered only an agency-shop and a dues-checkoff provision. However, as noted above, several years had elapsed since the expiration of the last contract and most of the Company's current employees had neither been employed before the strike nor had been members of Local 455. Under such circumstances, I do not view as unreasonable the Company's refusal to agree to a union-security clause.

It seems to me that although the General Counsel has presented some evidence that perhaps in another context might give rise to a prima facie inference of surface bargaining, the record in this case convinces me that she has not sustained her burden of persuasion. Thus, although I would say that the Respondent has engaged in hard bargaining consistent with its relative strength vis-a-vis the Union, I am equally convinced that it did not cross the line into surface bargaining.[19]

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[17] In *NLRB v. Borg-Warner Corp.*, 356 U.S. 342 (1958), the Supreme Court held that although either side may seek to bargain about nonmandatory subjects of bargaining, a Respondent will only violate the Act if it bargains to impasse over that subject or insist on its position vis-a-vis a permissive subject, as a condition of reaching an agreement.

[18] I should note, however, that there are certain types of subcontracting clauses that are illegal pursuant to Sec. 8(e) of the Act. For a discussion of so-called union signatory clauses in the context of Sec. 8(e) see for example *Retail Clerks Local 1288 (Nickel's Pay-less)*, 163 NLRB 817 (1976), enfd. 390 F.2d 856 (D.C. Cir. 1968).

CONCLUSIONS OF LAW

1. Respondent, The Peele Co., is and has been, at all times material, an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

2. Shopmen's Local Union No. 455, International Association of Bridge, Structural and Ornamental Iron Workers, AFL–CIO is, and has been at all times material, a labor organization within the meaning of Section 2(5) of the Act.

3. By unilaterally granting wage increases to employees in July 1983 without prior notice to, and consultation with, the Union during collective-bargaining negotiations, Respondent has violated Section 8(a)(1) and (5) of the Act.

4. The aforesaid unfair labor practice affects commerce within the meaning of Section 2(6) and (7) of the Act.

5. The Employer has not violated the Act in any other respect alleged by the complaint.

REMEDY

Having found that the Employer has engaged in certain unfair labor practices, I find it necessary to order the Employer to cease and desist therefrom and to take certain affirmative action designed to effectuate the policies of the Act.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[20]

ORDER

The Respondent, The Peele Co., Bay Shore, New York, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Refusing to bargain collectively with Shopmen's Local Union No. 455, International Association of Bridge, Structural and Ornamental Iron Workers, AFL–CIO by unilaterally granting wage increases to employees, during the course of collective-bargaining negotiations, without prior notice to, and consultation with, the Union provided, however, that nothing contained in this Order shall compel Respondent to rescind such wage increases previously granted.

(b) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) In the event that the Respondent and the Union resume negotiations, Respondent shall notify the Union as to all proposed wage increases to employees in the bargaining unit and shall not implement such wage increases absent an impasse in negotiations or consent by the Union.

(b) Post at its plant copies of the attached notice marked "Appendix."[21] Copies of the notice, on forms provided by the Regional Director for Region 29, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material.

(c) Notify the Regional Director in writing within 20 days from the date of this Order what steps the Respondent has taken to comply.

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[19] The record shows that on February 10, 1984, long after negotiations had ceased, Colovito requested further meetings and that Peele did not respond. The General Counsel does not allege, however, that this action constituted a refusal to bargain. As there was no other evidence regarding this event, and as the Company did not seek to litigate this matter, I shall not find that the Respondent's failure to respond to the Union's February 10, 1984 letter was a violation of the Act.

[20] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

[21] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

The Columbia Park and Recreation Association, Inc. *and* Amalgamated Transit Union, Local 1300, Petitioner. Case 5–RC–12886

June 15, 1988

DECISION ON REVIEW, DIRECTION, AND ORDER

By Members Johansen, Babson, and Cracraft

On May 29, 1987, the Regional Director for Region 5 issued a Decision and Direction of Election in the above-entitled proceeding in which he asserted jurisdiction over the Employer.[1] The Employer filed a timely request for review of the Regional Director's decision. On July 9, 1987, the Board granted the Employer's request for review.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the entire record, including the briefs, and finds, in agreement with the Regional Director, that the Employer is an employer within the meaning of Section 2(2) of the Act[2] and that it is appropriate to assert jurisdiction.

Accordingly, we affirm the Regional Director's Decision and Direction of Election and shall direct that the ballots cast in the June 26 and 27, 1987 election be opened and counted and an appropriate certification issued.

DIRECTION

It is directed that the Regional Director for Region 5 open and count the ballots and thereafter prepare and serve on the parties a tally of ballots and issue an appropriate certification.

ORDER

It is ordered that this proceeding is remanded to the Regional Director for Region 5 for further proceedings.

Member Johansen, dissenting.

Contrary to my colleagues, I would decline to assert jurisdiction. In my view, this case is covered by my dissenting position in *Imperial House Condominium*, 279 NLRB 1225 (1986). Here, as there, property owners collectively pay an assessment to the Employer which funds the recreational opportunities and community services provided by the Employer. When individual homeowners pool their resources in order to secure these types of services for themselves, in my view, this is not the type of enterprise to which the Board should attach jurisdiction.

APPENDIX

The parties stipulated that the Columbia Park and Recreation Association, Inc. is a non-profit Maryland corporation with annual gross revenues in excess of $1,000,000 and that in the past 12 months the Association has purchased and received goods and services in excess of $50,000 directly from points outside the State of Maryland. The parties also stipulated that the Association operates a transit system (also known as ColumBus) that annually generates approximately $125,000 in fares and receives approximately $300,000 in state and federal grants. Petitioner seeks to represent all full-time and regular part-time drivers and mechanics. The petitioned-for unit comprises approximately 16 employees. There is no dispute concerning unit issues, as set forth below.

The sole issue in this matter arises out of the Association's claim that it is exempt from the Board's jurisdiction as a "political subdivision" within the meaning of Section 2(2). Petitioner argues that the Association is an employer within the meaning of Section 2(2).

The parties agree that the Association's status under Section 2(2) is to be resolved by applying the Supreme Court's decision in *NLRB v. The Natural Gas Utility District of Hawkins County, Tennessee*, 402 U.S. 600 (1971), which affirmed the Board's determination that an employing entity is a political subdivision within the meaning of Section 2(2) if such entity is: 1) created directly by the state so as to constitute a department or administrative arm of the government; or 2) administered by individuals who are responsible to public officials or to the general electorate. See, e.g., *Detroit Institute of Art*, 271 NLRB 285 (1984). Applying these standards, I make the following findings.

Columbia is a planned community located in Howard County, Maryland that was created in the 1960's by Howard Research and Development Corporation. It is not an incorporated city. The Association is the governing body of Columbia and was incorporated in 1965. In 1966, a Deed, Agreement and Declaration of Covenants, Easements, Charges and Liens (Declaration of Covenants) was filed in Howard County covering Columbia and its lands. The Declaration of Covenants, inter alia, created easements, and use requirements, and various property encumbrances. It also established an assessment that is payable to the Association. The assessment is based on the assessed value of property in Columbia as

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[1] An election was conducted June 26 and 27, 1987, and the ballots were impounded.

[2] The pertinent part of the Regional Director's Decision and Direction of Election (the text of fn. 3) is attached as an appendix. In agreeing with the Regional Director that the Employer is not a political subdivision, we note particularly that the composition of the Employer's nine-member board is established by its "Amended and Restated Charter," not by law. Therefore, to the extent that the members may be accountable to the general electorate of the villages from which they were elected, they are accountable by choice rather than law. Accordingly, the Employer does not qualify as a political subdivision. See *Jefferson County Community Center v. NLRB*, 732 F.2d 122, 125 fn. 3 (10th Cir. 1984); *Crestline Memorial Hospital Assn. v. NLRB*, 668 F.2d 243, 245 (6th Cir. 1982).

We note that the Board's decision in *Imperial House Condominium*, 279 NLRB 1225 (1986), which reaffirmed the policy of asserting jurisdiction over residential condominiums and cooperatives, was enforced recently by the United States Court of Appeals for the Eleventh Circuit, *NLRB v. Imperial House Condominium*, 831 F.2d 999 (1987).

289 NLRB No. 19

determined by the Howard County property tax assessment of such property. The assessment has priority over mortgages, is normally paid by assesses as part of their mortgage, is not deductible from Federal taxes, and does not serve as a credit or offset to property owners' Howard County taxes. This assessment is the primary revenue source for the Association. While the Association can impose special assessments, it has never done so. The Association has no tax imposition authority. Nor does it exercise any sovereign powers such as eminent domain.

The Association is controlled by the Columbia Council (hereinafter the Council). The Council is composed of nine members, one from each "village" in Columbia. Council members are elected annually. Eight of the nine villages vote based upon a single vote being accorded each property interest. One village allows each resident of the village to vote. Thus, only property interest holders (in eight villages) or residents (in one village) are entitled to vote. Council members are subject to recall. Council members are not state or local officials and Columbia residents are not represented separately in the Howard County Council.

Based on the foregoing, it does not appear that the Association was created directly by the state so as to constitute a department or administrative arm of the government. *Minneapolis Society of Fine Arts*, 194 NLRB 371 (1971). Rather, it was created by private individuals to serve, in essence, as a homeowner's association for the purpose of providing services to Columbia land owners and residents.

Indeed, it does not appear that the Employer argues otherwise. Thus, in seeking to meet the first prong of the *Hawkins* criteria, the Employer does not claim that the state created the Association, but rather, it presented evidence at the hearing and argues in its brief that the Association is "for all intents and purposes, the local government of Columbia." The Employer presented evidence of the vast array of services that the Association provides, ranging from parks and recreation facilities to child care and public transportation. In essence, the Employer argues that the Association is the functional equivalent of a city government.

Under current Board law, however, the Employer's contentions in this regard do not advance its claim of political subdivision status. Rather, its evidence and arguments amount to an attempt to apply the "intimate connection" test whereby an employing entity that performs functions that are intimately related to the traditional functions of an exempt government entity is excluded from the Act's coverage. See, e.g., *Rural Fire Protection Co.*, 216 NLRB 584 (1975). That standard, however, was rejected by the Board in *National Transportation Service*, 240 NLRB 565 (1979), and again in *Res-Care, Inc.*, 280 NLRB 670 (1986). Thus, regardless of how similar the Association's functions might be to those of a "typical" city government, those similarities alone do not provide a basis for excluding the Association from the Act's coverage. Moreover, even if the Employer's evidence concerning the Association's purported functional equivalence to a city government was aimed at an attempt to apply the *Res-Care* standard, the Employer conceded at the hearing that the Association retains, with regard to the petitioned-for employees, the ultimate authority to hire, fire, train, supervise, evaluate, discipline and handle employee grievances and in addition has control over wages and benefits. Accordingly, absent a right of control being exercised by an exempt entity, the degree of similarity between the Association and a city government is irrelevant. *Res-Care*, supra at 672.

In addition, the evidence presented reveals that the Association is more aptly analogous to a homeowners' or condominium association, which are entities that the Board has recently reaffirmed fall within the Act's jurisdiction. *Imperial House Condominium*, 279 NLRB 1225 (1986). Granted, the Association here provides many more services than does the typical condominium association. That difference, however, appears to arise out of the Association's unique opportunity to command significant assets rather than out of any municipal or governmental status.

Regarding the second prong of the *Hawkins* test, the Employer argues that its Council is responsible to public officials and the general electorate. As noted, while the Council is elected and subject to recall, the Council is not responsible to the *general electorate*. Rather, it is only Columbia property interest holders or, in one of nine villages, residents to whom the Council is responsible.

Concerning the Council's responsibility to public officials, the record shows that the Council is responsible to various county, state and federal officials by virtue of the Association's dependence upon public funding through various grants, the requirements imposed by those grants, and various licensing requirements imposed by government. Such "dependence" and grant administration oversight, however, do not establish that the Council members are responsible to public officials. Cf. *D. T. Watson Home for Crippled Children*, 242 NLRB 1368, 1370 (1979) cited with approval in *Res-Care*, supra at 674 fn. 22. Indeed, under the Employer's argument, any business entity that received state or federal grants, or was subject to state or federal regulation would be "responsible to public officials" under *Hawkins*.

In sum, the record fails to support a finding that the Employer is a "political subdivision" within the meaning of Section 2(2). See cases cited by Petitioner: *Truman Medical Center*, 239 NLRB 1067 (1978), 247 NLRB 396 (1980), enfd. 641 F.2d 570, 574 (8th Cir. 1981); *Minneapolis Society of Fine Arts*, supra. Accordingly, I find that the Association is an employer within the meaning of Section 2(2) of the Act, and that it is appropriate for the Board to assert jurisdiction herein.

Of the cases cited by the Employer, I note that *MTL Inc.*, 223 NLRB 1071 (1976) and *Transit Systems, Inc.*, 221 NLRB 299 (1975), both were decided under the standard set forth in *Rural Fire Protection*, supra. Since *National Transportation*, supra, this standard is no longer viable, and those cases cannot control this one. The employers in *The City Public Service Board of San Antonio*, 197 NLRB 312 (1972), and the *Pennsylvania State Association of Boroughs*, 267 NLRB 71 (1983), both were found to meet the second part of the *Hawkins* test. The Employer here, as discussed above, does not, in the opinion of the undersigned, meet that test.

Woods Chapel United Super, Inc. d/b/a Jerry's United Super, and Jerry's United Super, Inc.[1] *and* United Food and Commercial Workers Union, Local No. 782. Case 17–CA–10188

June 15, 1988

DECISION AND ORDER

BY CHAIRMAN STEPHENS AND MEMBERS JOHANSEN AND BABSON

On April 20, 1983, Administrative Law Judge Jesse Kleiman issued the attached decision. Respondent Woods Chapel United Super filed exceptions and a supporting brief, and the General Counsel filed an answering brief.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings, and conclusions[2] and to adopt the recommended Order.[3]

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge and orders that the Respondent, Woods Chapel United Super, Inc. d/b/a Jerry's United Super, Blue Springs, Missouri, and Jerry's United Super, Inc., Independence, Missouri, its officers, agents, successors, and assigns, shall take the action set forth in the Order.

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[1] We have amended the caption to add Jerry's United Super, Inc., which the judge found to be a single employer with Respondent Woods Chapel United Super, Inc. d/b/a Jerry's United Super (Woods Chapel United Super).

[2] We reject Respondent Woods Chapel United Super's contention that we should dismiss the complaint and that the Board has no authority to issue an order against Jerry's United Super, Inc. "because of General Counsel's failure to join Jerry's United Super, Inc. as a party to this action." Although Jerry's United Super, Inc. was not named in the complaint caption, the complaint alleges that it and Respondent Woods Chapel United Super were a single employer and that issue was fully litigated at the hearing. Also, both entities share common stock ownership and corporate officers. We therefore find Jerry's United Super, Inc. had its "day in court." Contrast *George C. Shearer Exhibitors Delivery Service*, 246 NLRB 416 fn. 3 (1979), enfd. mem. 636 F.2d 1210 (3d Cir. 1980), on which Respondent Woods Chapel United Super relies. In that case, the Board held that it would not issue an order against an alter ego not named in the complaint and whose alter ego status was not alleged until after the hearing.

[3] We amend the judge's remedy to provide that the Respondent shall pay backpay as prescribed in *Ogle Protection Service*, 183 NLRB 682 (1970), enfd. 444 F.2d 502 (6th Cir. 1971). Further, in accordance with our decision in *New Horizons for the Retarded*, 283 NLRB 1173 (1987), interest on and after January 1, 1987, shall be computed at the "short-term Federal rate" for the underpayment of taxes as set out in the 1986 amendment to 26 U.S.C. § 6621. Interest on amounts accrued prior to January 1, 1987 (the effective date of the 1986 amendment to 26 U.S.C. § 6621), shall be computed in accordance with *Florida Steel Corp.*, 231 NLRB 651 (1977).

289 NLRB No. 20

Naomi L. Stuart, Esq., for the General Counsel.
James P. Willard, Esq. (Spencer, Fane, Britt & Browne), of Kansas City, Missouri, for the Respondent.
Robert L. Dameron, Esq. (Blake & Uhlig), of Kansas City, Kansas, for the Charging Party.

DECISION

STATEMENT OF THE CASE

JESSE KLEIMAN, Administrative Law Judge. On a charge filed on February 20, 1981, by United Food and Commercial Workers Union, Local No. 782 (the Union), the General Counsel of the National Labor Relations Board, by the Regional Director for Region 17, Kansas City, Kansas, issued a complaint and notice of hearing on March 31, 1981, against Woods Chapel United Super, Inc. d/b/a Jerry's United Super (the Respondent), alleging that the Respondent engaged in certain unfair labor practices within the meaning of Sections 8(a)(1)and (5) and 8(d) of the National Labor Relations Act (the Act). The Respondent, by counsel, denied the material allegations in the complaint by answer dated April 8, 1981 .

A hearing was held before me in Kansas City, Kansas, on October 15, 1981. At the close of the General Counsel's case the Respondent moved to dismiss the complaint on the grounds that

> [T]here is no evidence on the record that a demand has ever been made that the Woods Chapel group be added to the Jerry's contract or the Fisher's contract . . . that a demand is a condition precedent to any obligation that hasn't been made . . . .

I denied the motion. All parties were afforded full opportunity to appear, to introduce evidence, to examine and cross-examine witnesses, to argue orally on the record, and to file briefs. Thereafter, the General Counsel, the Respondent, and the Charging Party filed briefs. In its brief the Respondent requests that, "This fatally flawed Complaint should be dismissed for all the reasons set forth in this brief."[1] For the reasons appearing hereinafter, I deny the Respondent's request to dismiss the complaint in its entirety.

On the entire record and the briefs of the parties, and on my observation of the witnesses, I make the following

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[1] As stated by the Respondent in its brief

> Among these reasons the major flaws include (1) there is no single employer status here and even if there were it would be a three-store unit with two existing contracts precluding merger. In any event the Complaint does not name the necessary parties to allow the remedy sought by counsel for the General Counsel. (2) The Union made no demand for merger of the Woods Chapel unit into the Noland Road unit and in fact the Union did not seek or desire such merger. (3) The Union did not have a card majority among the employees in the unit at any relevant time. (4) There was no after acquired store clause in effect at any relevant time.

FINDINGS OF FACT

I. THE BUSINESS OF RESPONDENT

The Respondent, at all times material, has been a corporation organized under and existing by virtue of the laws of the State of Missouri, maintaining its principal office and place of business at 1201 North Woods Chapel Road, and Blue Springs, Missouri, where it is, and has been at all times material, continuously engaged in the retail sale of grocery and related products. In the course and conduct of the Respondent's business operations during the preceding 12 months, these operations, being representative of its operations at all times material, the Respondent purchased goods and services valued in excess of $50,000, directly from sources located outside the State of Missouri, and the Respondent's annual gross volume of business at this store exceeded $500,000. The complaint alleges, the Respondent admits, and I find that the Respondent is now, and has been at all times material, an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

Additionally, the complaint alleges, the Respondent admits, and I find that at all times material, Gerald E. Fisher, the Respondent's president, and Jerry Lee Fisher[2] and Gary Minton, comanagers of the Woods Chapel store, are supervisors within the meaning of Section 2(11) of the Act, and have been and are now agents of the Respondent acting on its behalf within the meaning of Section 2(13) of the Act.

II. LABOR ORGANIZATION INVOLVED

The complaint alleges, the Respondent admits, and I find that United Food and Commercial Workers Union, Local No. 782 is, and has been at all times material, a labor organization within the meaning of Section 2(5) of the Act.

III. THE UNFAIR LABOR PRACTICES

The complaint alleges, in substance, that the Respondent violated Sections 8(a)(1) and (5) and 8(d) of the Act by failing and refusing to recognize and bargain collectively with the Union as the exclusive representative of the Respondent's employees in an appropriate unit. The Respondent denies this allegation.

A. *Background*

The evidence discloses that in May 1965, Gerald E. Fisher opened a United Super Store[3] under the corporate name Jerry's United Super, Inc., located at 3443 South Noland Road, Independence, Missouri (the Noland Road store).[4] Sometime thereafter, "another Fisher family United Super" store was opened under the corporate name Fisher's United Super, Inc., located at 2604 South Chrysler, Independence, Missouri (the Chrysler store).[5] In December 1979, Gerald E. Fisher opened an additional grocery store under the corporate name of the Respondent here, located at 1201 North Woods Chapel Road, Blue Springs, Missouri (the Woods Chapel store).[6]

Gerald E. Fisher is the sole owner of all the stock of Jerry's United Super, Inc. (Noland Road store) and of the Respondent (Woods Chapel store) and "made all capital investments" in Fisher's United Super, Inc. (Chrysler store). Gerald E. Fisher is also the president, treasurer, and director of the Respondent and of Jerry's United Super, Inc., with his wife, Charlene Fisher, being the vice president and secretary. However, his son, Richard Fisher, is president of Fisher's United Super, Inc.[7]

Jerry's United Super, Inc. (Noland Road store) and the Union were parties to a collective-bargaining agreement effective from May 14, 1979, to May 9, 1981.[8] Article II of this agreement is entitled "Bargaining Unit" and Section 2.1 reads as follows:

> 2.1 The Employer hereby recognizes the Union as the sole and exclusive collective bargaining agent with respect to rates of pay, hours, and all other terms and conditions of employment for the appropriate bargaining unit herein established and described as follows: All employees employed by the Employer working in the Employer' s present and future retail establishments situated within Jackson, Clay, Platte, and Cass Counties, Missouri, and Johnson and Wyandotte Counties, Kansas, engaged in handling or selling merchandise or performing other services incidental or related thereto, except supervisory employees within the meaning of the National Labor Relations Act of 1947, as amended, and employees whose work is exclusively and wholly performed within the meat department locations of the retail establishment. For the purpose of this Article, the term "retail establishments" includes only full line grocery stores generally known as supermarkets and does not include free standing specialty stores (e.g., dairy stores, liquor stores, or deli).

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[2] Jerry Lee Fisher is the son of Gerald E. Fisher, and although the Respondent's answer characterizes him as a vice president of the Respondent, the evidence does not confirm this.

[3] Fisher commenced his retail grocery business in or about 1951 when he first opened a United Super grocery store in the Kansas City area. The evidence shows that "United Super" is a trade name for a group of independently owned and operated grocery stores served by the Fleming Food Company, a wholesale grocer or "broker." There are some "twenty to thirty" United Super stores in the Kansas City metropolitan area with Fleming Foods setting the "pricing zones" and performing all the accounting services for these stores.

[4] The Noland Road store was managed by Gary Minton until his transfer, as comanager, of the new Woods Chapel store sometime in October, November, or early December 1979. Thereafter, this store has been managed by Kent Fisher, a son of Gerald E. Fisher.

[5] Another son of Gerald E. Fisher, Richard Fisher, manages the Chrysler store. According to the testimony of Jerry Lee Fisher, his brother, Richard Fisher, "went off on his own and opened" the Chrysler store.

[6] The Woods Chapel store is comanage by Gary Minton and Jerry Lee Fisher.

[7] See Jt. Exh. 3. This agreement is signed by Richard E. Fisher as president of Fisher's United Super, Inc.

[8] See Jt. Exh. 1. This agreement is signed by Gerald E. Fisher, president, on behalf of Jerry's United Super, Inc.

There was also a collective-bargaining agreement in effect from May 7, 1978, through May 9, 1981, between Fisher's United Super, Inc. (Chrysler store) and the Union with the exact same provision as set forth above.[9] At the time these agreements were executed the Woods Chapel store was not yet in existence. In or about the first week of December 1979, however, the Respondent opened its Woods Chapel store for business.

The Woods Chapel store is located about 8 miles from the Noland Road store and some 9 or 10 miles from the Chrysler store. The Noland Road and Chrysler stores are approximately 1-1/2 miles apart.

B. *The Evidence*

Earl G. Davis, president of the Union, testified that sometime in late September 1979, he received a telephone call from Gerald E. Fisher, president of Jerry's United Super, Inc., the owner of the Noland Road store, who advised him that, "You know we' re going to open a new store on Woods Chapel Road in Blue Springs and we'd like to sit down and talk to you about it." Pursuant thereto, on October 2, 1979, Davis met with Fisher at the Noland Road store with Gary Minton, who managed the store at the time, and Richard Fisher, the "owner-manager" of the Chrysler store, also being present. Davis stated that regarding the new Woods Chapel store, the following was agreed to between himself and Gerald E. Fisher: That the "Effective date for bargaining agreement . . . will be 5-4-1980 and the agreement will remain into (sic) effect thru May 9, 1981"; that employees transferred from the Noland Road store to the new Woods Chapel store would continue to have "contribution made" to the Union's health and welfare and pension programs "in their behalf"; that employee David Lindsey, comanager of the Noland Road store with 20 year's credit in the "Company's pension plan" would retain such credit on his transfer to the Woods Chapel store as produce manager; and that these agreed-on terms and conditions were "an [accretion] to the agreements that are in effect with an effective date delayed until May 4, 1980."[10] Davis related that he wrote these items down and the resulting document was then signed by himself and Gerald E. Fisher and witnessed by Richard Fisher and Minton.[11] He added that, subsequently, after receiving a request from Gerald E. Fisher for a copy, on November 1, 1979, he mailed a copy of the "hand-written paper" signed by the parties on October 2, 1979, with covering letter, to Fisher at the Noland Road store.[12]

Davis continued that in November 1979, he received a written request from the Respondent for the Union's acceptance of a waiver, by an employee hired for the Woods Chapel store, of her rights under the "Retail Clerks Union Contract of May 14, 1978" to have past "comparable supermarket experience" credited towards her salary level placement, she having agreed to accept a lesser starting wage. This request was signed by Gary Minton as "Company Officer" of the Respondent, and by the employee, Julia Edgar, and Davis related that he signed it on behalf of the Union and returned a copy to the Respondent on November 27, 1979.[13] At this time the Woods chapel store had still not been opened to the public for business.

The evidence shows that the Woods Chapel store opened for business on or about December 5, 1979. Just prior thereto, however, on December 3, 1979, several employees at the Noland Road store were transferred to the Woods Chapel store permanently. Gary Minton, manager of the Noland Road store, became the Woods Chapel store manager; Jerry Lee Fisher, a son of Gerald E. Fisher, became comanager, with Minton, of the Woods Chapel store,[14] and employees Robert Leiblie, Mary Tignor, Dave Lindsey, Betty Hoy, and Dale Hunt all were transferred to the new store. Moreover, pursuant to the October 2, 1979 agreement, contributions to the Union's health and welfare, and pension funds were made on behalf of Leiblie, Tignor, and Hoy, and additionally union dues deductions were remitted to the Union for these employees and at least one other employee, through the end of April or May 1980.[15]

Davis testified that sometime in late April 1980, he received a telegram from Gerald E. Fisher that stated, in substance, that Fisher had been advised that if the Union considered the "meeting notes dated October 2, 1979 by which Retail Store Employees Union Number 782 claims to represent the employees of Woods Chapel United Super, Inc." to be an agreement between the Respondent and the Union, "such purported agreement would be in violation of the National Labor Relations Act, as amended," since it was agreed to and signed prior to any employees being hired at the Woods Chapel store by the Respondent. Fisher then "repudiate[d] any such purported agreement."[16] Moreover, contributions to the Union's health and welfare, and pension funds, and the withholding and forwarding of union dues for the aforementioned employees that had transferred from the Noland Road store to the Woods Chapel store were discontinued by Jerry's United Super, Inc. (Noland Road store).[17] Davis

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[9] See Jt. Exh. 3.

[10] Davis testified that Gerald E. Fisher had requested an effective date of May 4, 1980, because that was the date "new rates" under the Noland Road store contract were going into effect and this would save "a lot of bookkeeping and time."

[11] See G.C. Exh. 2.

[12] See G.C. Exh. 3.

[13] See G.C. Exh. 4. This document was prepared on the Respondent's letterhead stationery.

[14] Jerry Lee Fisher had been working at the Noland Road store for only about a month when this transfer took place.

[15] See G.C. Exhs. 22-33. G.C. Exhs. 22-27 relate to health and welfare and pension, while G.C. Exhs. 28-33 relate to union dues remittance.

[16] See G.C. Exh. 5. The telegram dated April 29, 1980, also states that should the Union "desire to represent" the Respondent's employees at Woods Chapel store," said representation can only be obtained and granted through appropriate procedures of the National Labor Relations Board under the National Labor Relations Act."

[17] Jerry Lee Fisher's testimony concerning the discontinuance of such payments was contradictory and equivocal in part. He testified that sometime in April or May 1980, he was advised by employee Dale Minton, the son of Gary Minton, the Woods Chapel store manager, that some of the Woods Chapel employees had held a meeting at the store and voted against representation by the Union. Fisher related that based on this, the Respondent decided to "get our own health and welfare set up" and to include all Woods Chapel employees including those who had transferred from the Noland Road store and therefore to discontinue the contribu-

Continued

stated that had he not received the telegram from Gerald E. Fisher repudiating the "purported agreement" of October 2, 1979; the Union, as is normally done, would have prepared a collective-bargaining agreement for Gerald E. Fisher to sign concerning the Woods Chapel store.[18] Davis added that after receiving the telegram, he then called into his office Union Organizer James Hillen and instructed him "to go out and sign the people up."

1. The Union's organizational campaign

James Hillen, employed by the Union as an organizer, testified that the Union commenced its organizing campaign to represent the Respondent's Woods Chapel store employees in or about June 1980. Hillen stated that he distributed union authorization cards to various employees, who signed the card in his presence and returned it to him.[19] The evidence shows that the following employees signed union authorization cards and returned them to Hillen: Donald Gann and Marvin Paul, authorization cards dated June 14, 1980;[20] Betty Hoy, whose card is dated July 1, 1980;[21] Madalene Hunt, whose card is dated July 29, 1980; Robert Leiblie, whose card is dated August 26, 1980;[22] Joan Prine, whose card is dated November 13, 1980; Bernadette Cox, whose card is dated November 18, 1980; Mary Cooper, whose card is dated July 3, 1980; Tim Hicks, whose card is dated January 1, 1981; Cheryl Baker, whose card is dated January 16, 1981; Cindy Kreiser, whose card is dated January 18, 1981; Mary Lou Watters, whose card is dated January 19, 1981; and Ruth Grey, whose card is dated February 3, 1981.[23] The authorization cards of Gann, Paul, Hoy, Hunt, Leiblie, Prine, Cox, and Cooper all have the following heading: "Retail Store Employees Union Local 782 chartered by United Food and Commercial Workers International Union (affiliated with the AFL-CIO & CLC).[24] Those of Hicks, Baker, Kreiser, Watters, and Grey all have the following heading: "United Food & Commercial Workers International Union affiliated with AFL-CIO-CLC."[25]

Hillen testified that at the time he distributed the authorization cards to these employees and solicited their signatures he told them that,

> [W]e had an organizing campaign going. I told them that the cards would be confidential unless we went to a hearing. I told them that the cards could be used in several different ways. I said, "If we get a majority of the employees signed up, that we'll request a card check . . . ." And I said, "Another route we can take is the election route if the Company refuses to grant us a card check. We can file for an election with the Labor Board."

Hillen related that he also told these employees that if the Union "got recognition on a card check or won an election," it would then "sit down with the Employer and would negotiate contracts to cover their wages, hours and conditions of employment" and that any resulting agreement would be submitted to the employees for approval with "a chance to vote on the contract."[26]

Shaun Barclay, employed as a union representative for the United Food and Commercial Workers International Union, Region 10, testified that he was involved in the Union's organizational campaign at the Woods Chapel store in the fall of 1980 and "into part of 1981" distributing authorization cards and soliciting employee signatures.[27] The evidence shows that the following employees signed authorization cards and returned them to Barclay: Sondra Hertzog, whose authorization card is dated August 27, 1980;[28] Sondra Straw, whose card is dated September 9, 1980; Jeanne Hubbard, whose card is dated September 8, 1980; Barbara Robinson,[29] whose card is

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tions being made on their behalf to the Union's health and welfare pension funds and the dues withholding payments.

On cross-examination, however, Fisher testified that their then legal counsel, Rick Noble, had advised him and his father, Gerald E. Fisher, that the payments being made for the transferred employees should cease, which was done. He then changed his testimony, asserting that the basis for the above action was the employees' desires not to be represented by the Union.

It appeared to me that Fisher's testimony was contrived and evidenced a desire on his part to testify in furtherance of the Respondent's position rather than the truth of what actually occurred.

[18] The Respondent in its brief states:

> While the agreement [G.C. Exh. 2] is unclear and incomplete on its face, Union President Davis testified that had the purported agreement not been repudiated he would have prepared a separate contract for Woods Chapel (Tr. 59) consistent with the contracts with the other Fisher family stores (Jt. Exhs. 1 and 3) and consistent with the acknowledgment of two agreements.

Whatever counsel for the Respondent means by this, I agree that Davis' testimony could well be construed to mean that the bargaining agreement to be prepared would have been in physical form, a separate agreement, and one consistent in content with the contracts then in existence covering the Noland Road and Chrysler stores.

[19] Hillen testified that at the time the signed authorization cards were returned to him, he made a notation on each of them indicating the date, from whom he had received it, the place he received it, and that he personally had been given the card.

[20] Hillen testified that these cards were actually signed on June 13, 1980, and his notation lists the date as Friday, June 13, 1980. See G.C. Exhs. 9-10, respectively.

[21] Hillen's notation on the card lists the date as April 1, 1980. He testified that Hoy signed and returned the authorization card to him on July 1, 1980, but that he inadvertently wrote down "4/1/80" instead of "7/1/80." See G.C. Exh. 11.

[22] The notation on Leiblie's authorization card indicates that Representatives Mark Perrone and Shaun Barclay of the United Food and Commercial Workers International Union, the Union's international parent organization, were also present at the time Leiblie signed and returned the card to Hillen.

[23] The notation by Hillen on Grey's card indicates that International Union Representative Mark Peronne was present when she signed and returned her authorization card to Hillen.

[24] See G.C. Exhs. 9-16, respectively.

[25] See G.C. Exhs. 17-21, respectively.

[26] Ruth Gray testified that when Hillen gave her an authorization card to sign he said that, "they were getting a majority of the cards to have a union, you know, in the store." She stated that it was her understanding from what Hillen had said that if the Union got in it would negotiate a "regular contract" with the Respondent on behalf of the employees.

[27] Barclay testified that when the signed authorization cards were returned to him he noted on them the date, time of day, place, and identity of the employee who had signed and given him the card.

[28] The notation on Hertzog's authorization card indicates that International Union Representative Mark Perrone was also present when she signed and returned her card to Barclay.

[29] Robinson testified that when she signed the authorization card on September 10, 1980, Barclay "just said how we needed to get—we were signing the cards to get the majority. And then we could go on from there, you know. We had to get a majority.

dated September 10, 1980; and Mary Tignor, whose card is dated September 10, 1980.[30] The authorization cards of Hertzog, Straw, and Hubbard have the Union's heading while the cards of Robinson and Tignor are entitled, "Retail Clerk's International Union, affiliated with AFL–CIO–CLC."

Hillen testified that, by letter dated January 16, 1981, the Union notified the Respondent that it represented a majority of the Respondent's Woods Chapel employees and requested recognition as the employee's "exclusive bargaining representative, and bargaining."[31] In response, according to the testimony of Union President Davis, the Respondent, by letter dated January 22, 1981, advised the Union that it disbelieved the Union's claim of majority representation, declined to recognize and bargain with the Union, and expressed its position that "only through the process of a [Board] secret election" could the employees' rights under the Act and their wishes concerning representation be "properly expressed."[32]

Hillen testified that on Tuesday, January 20, 1981, subsequent to the Union's receipt of the Respondent's letter refusing to recognize and bargain with the Union, he, Shaun Barclay, and Mark Perrone visited the Noland Road store and Hillen asked Gerald E. Fisher if they could speak to him about the Union's letter demanding recognition and bargaining. Hillen stated that Fisher referred them to his attorney, Rick Noble, who was "handling everything" and stated that he was going on vacation and that they should "Talk to my attorney," whereupon Fisher left the store. Hillen continued that Fisher had indicated that Noble would contact the Union and towards the end of that week, Friday, January 23, 1981, the Union received a telephone call from James R. Willard, an attorney, but since Hillen was not in the office at the time, no discussion ensued. Hillen added that he was successful in contacting Willard by telephone on the following Monday, January 26, 1981, and Willard informed Hillen that he was now representing the Respondent. Hillen related that he told Willard that the Union represented a majority of the Respondent's employees at its Woods Chapel store and asked Willard, "[H]ow about a card check?" According to Hillen, Willard responded, "Well, I won't give you a card check. But I won't fight you too hard if you go to an election."

Hillen testified that the Union filed its "Petition" with the Board on January 30, 1981, seeking an election and certification as the exclusive bargaining representative of the Respondent's Woods Chapel employees in an appropriate unit.[33] On February 13, 1981, the Respondent and the Union, by counsel, executed a "Stipulation for Certification Upon Consent Election." The appropriate bargaining unit stipulated there was,

> All employees employed at the Employer's facility located at 1201 North Woods Chapel, Blue Springs, Missouri, but excluding all meat department employees, office clericals, guards, and supervisors as defined in the Act, as amended.[34]

The evidence also shows that Hillen issued a letter dated February 10, 1981, to the Respondent's employees at the Woods Chapel store in which the employees were notified that a picket line would be instituted "in front of Jerry's United Super in Blue Springs" for "advertising to the public that Jerry's United Super is not providing you with a union contract . . . continued to refuse to recognize Local 782 in spite of the fact that a majority of the employees have signed authorization cards . . . . This picket line, hopefully, will influence Jerry's United Super to give us recognition or at least bring about a speedy election . . . ."[35] Additionally, the Union sent a letter dated Febuary 18, 1981, to the Woods Chapel store employees notifying them that the "Certification Upon Consent Election" stipulation had been approved by the Board and that an election would soon be held negating the need for a picket line. The employees were also informed that the Union had "uncovered some additional information which leads me to believe the store in which you work should already be Union according to the Federal Labor Law," and that the Union had filed an unfair labor practice charge with the Board against the Respondent that might "slow our progress to get an election."[36]

2. The operation of the Woods Chapel, Noland Road, and Chrysler stores

The evidence shows that although the Woods Chapel and Noland Road stores are owned by separate corporations, Woods Chapel United Super, Inc. d/b/a Jerry's United Super and Jerry's United Super, Inc., respectively, Gerald E. Fisher owns all the stock in both corporations, and the corporate officers thereof are the same, with Fisher being the president, treasurer, and director, and his wife, Charlene Fisher, the vice president. Regarding the third "Fisher family United Super" store, the Chrysler store, the evidence discloses that although Gerald E. Fisher contributed all the capital investment needed to open this retail grocery store, his son, Richard Fisher, is the president of the corporate owner thereof, Fisher's United Super, Inc.[37] Moreover, Jerry Lee Fisher, another son of Gerald E. Fisher and "co-manager" of the Woods Chapel store, testified that all the business licenses necessary and required to operate the Woods Chapel grocery store were issued to Gerald E. Fisher and he assumed that this was also true of the Noland Road and Chrysler stores as well.[38] The Woods

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[30] See G.C. Exhs. 34–38, respectively.

[31] This letter is addressed to Gary Minton, the Woods Chapel store manager, and signed by Hillen. See G.C. Exh. 7.

[32] This letter is addressed to Davis, as president of the Union, and signed by Gerald E. Fisher, as the Respondent's president. See G.C. Exh. 6.

[33] See R. Exh. 1.

[34] See R. Exh. 2.

[35] See R. Exh. 3.

[36] See R. Exh. 4.

[37] The record does not disclose the owner of the stock of Fisher's United Super, Inc., nor the other officers of the corporation.

[38] For example, retail liquor and agricultural produce sales licenses.

Chapel store is managed by Jerry Lee Fisher and Gary Minton, the Noland Road store by William Kent Fisher, and the Chrysler store by Richard Fisher.[39] According to the testimony of Jerry Lee Fisher, the Respondent owns the equipment, fixtures, and inventory of the Woods Chapel store and holds the licenses required to operate this grocery store.[40]

3. The role of Gerald E. Fisher in the Woods Chapel and Noland Road stores

The testimony concerning the role of Gerald E. Fisher in the management and operation of these stores tended to be primarily limited to the Woods Chapel store and was somewhat conflicting in nature between the witnesses for the Respondent and the General Counsel. Jerry Lee Fisher, a witness for the Respondent, testified that although his father, Gerald E. Fisher, owns all the stock of the Woods Chapel store, he receives no salary therefrom. He stated, "From mid-1980 up to the present time [Gerald E. Fisher] does very little at Woods Chapel United Super. He does show up there occasionally. He goes up to an office upstairs that we have—that we use jointly."[41] Jerry Lee Fisher continued that Gerald E. Fisher "had nothing to do with the hiring of any employees there at Woods Chapel," nor is his father "involved any longer" in the firing and layoff of employees at Woods Chapel. He recounted that he and Minton set the wage rates for employees and discuss this with Gerald E. Fisher "after we've already made the adjustments, we notify him of what we've done."[42]

Jerry Lee Fisher testified that the Respondent had a hospital insurance program for its employees with Connecticut General but that he became unhappy with it and changed to coverage with Bankers Life of New York, adding disability coverage for the employees under this new plan. He stated that after the change in plans was made, he told his father, Gerald E. Fisher, about it, "I had told him that I felt we needed to do that for the people." According to Fisher his father responded, "[I]f that's what you think we ought to do, then go ahead and do it, you know."[43]

Fisher also related that he had decided to discharge the Respondent's labor counsel, Rick Noble, and on January 22 or 23, 1981, he advised Noble of this decision. He added that he then hired Spencer, Fane, Britt & Browne, Esqs., to represent the Respondent in its labor relations.[44] Although it can be reasonably inferred from the record evidence that Noble represented Gerald E. Fisher concerning labor relations at both the Noland Road and Woods Chapel stores until January 1981, subsequently the law firm of Spencer, Fane, Britt & Browne, Esqs., represented only the Woods Chapel store. Fisher did not know who represented the Noland Road and Chrysler stores thereafter.

In summing up his testimony concerning the role of his father, Gerald E. Fisher, in the operation of the Woods Chapel store, Jerry Lee Fisher testified,

> As far as day to day procedures or, you know, how the store runs, dad doesn't take any active role. I advise him of what decisions Gary and I make. And, you know, I guess if he doesn't like it, he'll let me know he doesn't like it. But, you know, I make the final decisions. He doesn't ever reverse a decision that I've made.[45]

Fisher also acknowledged that his father had the authority to remove him as comanager of the Woods Chapel store if he so desired.

Comanager of the Woods Chapel store, Gary Minton, testified that he reports any "fall-off" of business to Gerald E. Fisher, as well as store damage, major equipment failure, and replacement. He stated that he had reported Cathy Choates' layoff to Fisher when and after this occurred, more about which will be set forth.

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[39] Jerry Lee Fisher used the term "owner-manager" in his testimony describing the relationship of the Fisher brothers to the respective stores that they manage. There is no evidence in the record, however, other than this, that Jerry Lee Fisher or William Kent Fisher have any ownership interest in the Woods Chapel or Noland Road stores, respectively, albeit as previously noted, Richard Fisher is the president of the corporate entity that owns the Chrysler store, Fisher's United Super, Inc. If anything, the evidence clearly shows that the actual owner of the Woods Chapel and Noland Road stores, and possibly the Chrysler store as well, is their father, Gerald E. Fisher. Additionally, almost all of the evidence submitted in this proceeding centered on the operation of the Woods Chapel store and its interaction, actual and/or alleged, with the Noland Road store.

[40] As indicated before, however, Fisher also testified on cross-examination that the required licenses are all in the name of Gerald E. Fisher.

[41] Both Jerry Lee Fisher and Gary Minton testified that they also use this office on occasion, and he, Minton, his father, Gerald E. Fisher, and Robert Leiblie, the Woods Chapel assistant manager, all have keys to the office.

[42] Gary Minton testified that as manager of the Woods Chapel store he reports to Gerald E. Fisher such things as the "fall-off" of business, layoff of employees, store damage, and major store equipment failure and replacement.

[43] Although Fisher maintained that he had effectuated the health plan coverage change before he discussed it with his father, Gerald E. Fisher, a careful reading of his testimony indicates that he may well have sought his father's acquiescence in the change before it was implemented, not after.

[44] Fisher's testimony on cross-examination concerning the hiring of this law firm was evasive and contradictory. He, at first, testified that he had contacted the law firm of Spencer, Fane, Britt & Browne, Esqs. He then testified that he could not recall whether it was he or his father, Gerald E. Fisher, who contacted them. He then changed his testimony when questioned by the administrative law judge, stating that he had made the decision to, and actually did, contact this law firm to retain them as labor counsel. The record reflects that counsel for the Respondent, James E. Willard, Esq., of this law firm, submitted a "position paper" to the Board during the investigative segment of this case and a copy was sent to Gerald E. Fisher, not Jerry Lee Fisher. I am unconvinced that Willard admittedly sent copies of correspondence to the Union, and the Board to Gerald E. Fisher instead of Jerry Lee Fisher, mistakenly or inadvertently, as he asserted at the hearing. Willard impressed me as being intelligent and a highly experienced and able labor attorney, and I believe copies of such correspondence and documents were sent to Gerald E. Fisher because he was still the owner and chief executive officer of the Woods Chapel store, and until the Respondent realized that it might be faced with a "Kroger" type issue in this case, a prerequisite thereof being the "single employer" issue, as will be discussed.

[45] Fisher testified that his father calls the Woods Chapel store "three, four, five times a week" to find out how much money was taken in that day.

Robert Leiblie,[46] assistant manager of the Woods Chapel store and a witness for the General Counsel, testified that Gerald E. Fisher appeared at the Woods Chapel store "many times . . . maybe every other day, once a day. It would just depend on what he comes down there for. He was there a lot though." He stated that Fisher would come to the store during the morning or afternoon hours, would speak to various employees, inquire about the day's business at the "courtesy booth" and then proceed to "his office upstairs right next to the deli eating area," remaining in the store anywhere from "five or ten minutes to a couple of hours." According to the evidence, this office is located on a second floor level above the liquor shop and while Leiblie characterized the office as being that of Gerald E. Fisher's, as did other witnesses, Leiblie acknowledged that Jerry Lee Fisher also uses his father's office at times and that Gary Minton uses it also, but only "Once in a great while."[47] Leiblie continued, "I've seen [Gerald E. Fisher] pay bills before, going over the daily record, you know, what we did yesterday and comparing it with last year or with the Noland Road store. You know, a number of different things." Leiblie added that he had observed Jerry Lee Fisher, Kent Fisher, Richard Fisher,[48] Gary Minton, and the "Fleming representative" talking to Gerald E. Fisher at various times in Fisher's office.[49]

Marvin Paul and Cathy Choate, witnesses for the General Counsel, also testified that they had seen Gerald E. Fisher at the Woods Chapel store. Paul, a former employee,[50] related that Fisher would come to the Woods Chapel store "about every other day in the afternoon," talk to some of the employees, and then "he would go upstairs to his office . . . . And he would pay bills and stuff." Paul stated that he had never seen either Jerry Lee Fisher or Gary Minton use Fisher's upstairs office, although on occasion Gerald E. Fisher would summon Minton to his office over the public address system at the store. Cathy Choate testified that while employed as a checker at both the Woods Chapel and, thereafter, the Noland Road store, and although she usually worked the night shift, she had observed Gerald E. Fisher "a couple of times a week" at these stores when she sometimes worked earlier hours. Choate added that Fisher used the upstairs office at the Woods Chapel store on these occasions and the main office at the Noland Road store. She recounted that she had never seen Jerry Lee Fisher use his father's office at the Woods Chapel store.

Another of the General Counsel's witnesses, Ruth Gray, testified that she had seen Gerald E. Fisher at the Woods Chapel store, "maybe every other day, maybe two or three times a week. Sometimes he's not there for three or four days." She stated that when he is present at the store, "He usually stops by the service desk and then he comes through and picks up bills and he goes upstairs. Well he takes my liquor bills." Gray related that at various times while Gerald E. Fisher was in his office at the store she has observed Richard and Kent Fisher, Gary Minton, and the "Fleming people" up there with him. She added that she has also seen Gary Minton using Fisher's office at times when Fisher was not present at the Woods Chapel store.

Leiblie testified that sometime in February or March 1981, Jerry Lee Fisher told him that consideration was being given to making Gary Minton a "floating manager" to oversee or manage the operations of the Woods Chapel, Noland Road, and Chrysler stores. He stated that Fisher said that if this should happen Leiblie would then become comanager of the Woods Chapel store along with Fisher.[51] Apropos of this, Minton testified that he often visits the other stores owned by Gerald E. Fisher, especially the Noland Road store, and discusses with the other store managers business problems, although he was never instructed to do so by anybody. In this connection, Mary Lee Tignor, employed by the Respondent in its Woods Chapel store bakery and deli departments[52] since December 3, 1979, testified that sometime in February 1981, Gary Minton had informed her that "eventually he would probably become floating manager and go between the three stores."[53]

Additionally, Marvin Paul testified that in or about February 1981, while he, another employee, Ruth Gray, and Gerald E. Fisher were together in the liquor department of the Woods Chapel store, Fisher told them that he had taken $20,000 from the Noland Road store to help finance the new Woods Chapel store and that, "[I]f any department didn't carry its own weight, he would shut them down because he wasn't going to go in the hole for anybody." Ruth Gray testified similarly regarding this conversation.

4. Interrelations of operations

Concerning employee interchange between the Woods Chapel and Noland Road stores, the evidence shows that several employees were transferred from the Noland Road store to the Woods Chapel store to staff the new store when it opened for business on December 5, 1979. Gary Minton was transferred to the Woods Chapel store as manager from his position as manager of the Noland Road store.[54] Robert Leiblie became assistant manager

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[46] Leiblie testified that he was originally hired as a clerk at the Noland Road store prior to December 3, 1979, and that on or about November 26 or 27, 1979, he was offered the assistant manager's position at the new Woods Chapel store in a meeting attended by Gerald E. Fisher, Kent, Richard Fisher, and Gary Minton, effective December 3, 1979.

[47] The evidence shows that there is another office located at the Woods Chapel store in the "courtesy booth," which is used regularly by comanagers Gary Minton and Jerry Lee Fisher as their office.

[48] Leiblie testified that over a period of approximately "six months to a year," he had seen Richard Fisher at the Woods Chapel store with Gerald E. Fisher about "twenty times, maybe less . . . . It's hard telling if he's doing business . . . or if he's in there just as a visit or what."

[49] Leiblie related that when the Woods Chapel store first opened for business, the Fisher's, father and sons, met regularly once weekly and that "later on as the store got going more on itself," they met once monthly.

[50] Paul was hired by Gary Minton as a baker at the Woods Chapel store in April 1980 and worked there until February 28, 1981, when he was laid off.

[51] Although Jerry Lee Fisher testified, he did not deny this testimony.

[52] The Woods Chapel store is operated as a retail grocery store and supermarket with various departments, i.e., bakery, produce, dairy, meat, liquors, and deli.

[53] Tignor testified as a witness for the General Counsel.

[54] Kent Fisher became the manager of the Noland Road store when Minton was transferred to the Woods Chapel store. Moreover, Jerry Lee

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at Woods Chapel from his former position as a clerk at the Noland Road store. Dale Hunt, a butcher employed at the Noland Road store, was transferred to the Woods Chapel store, I assume in the same capacity. Dale Minton, Gary Minton's son, transferred over to the Woods Chapel store from the Noland Road store presumably when his father did so. Noland Road store employees Betty Hoy and David Lindsey were also transferred to the Woods Chapel store along with the others listed above.

Additionally, Mary Lee Tignor was brought over from the Noland Road store to the Woods Chapel store in and around the same time as the other above employees. Tignor testified that during the summer and early fall of 1979 while she was still employed at the Noland Road store, Gerald E. Fisher spoke to her about working at the new Woods Chapel store when it opened for business because he needed experienced employees there. Tignor stated that subsequently, in October 1979, Fisher again urged her to transfer to the Woods Chapel store and when she asked him, "What if I don't want to go down there," Fisher told her that, "I didn't have but one choice because they needed people down there that knew, you know, an employee that knew the bakery and the deli operation."

Cathy Choate[55] testified that she had been hired by Gary Minton, as a "checker" on April 1, 1980, for the Woods Chapel store. She related that subsequently Minton asked her to work at the Noland Road store to fill in for an employee on 90-day leave of absence. Choate related that since the Union represented employees at the Noland Road store and that employees had to join the Union after 30 days, Minton wanted her to work there for 30 days, after which she would return to the Woods Chapel store and another employee would be sent to the Noland Road store for the next 30 days, after which Choate would fill in again at Noland Road for the last 30 days. Choate stated that she began work at the Noland Road store on June 3, 1980, and after the 30-day period was up she was told to continue working there and was instructed to join the Union, which she did, becoming a permanent employee at the Noland Road store, where she is still employed.[56]

Regarding this, Gary Minton testified that Choate was employed at the Woods Chapel store, "about March or April, April or May [1980], she worked about two months," and because "business was down" in and around this time and Choate was "low on the seniority list," Minton considered laying her off. Minton stated that he constantly keeps in touch with employees at the Noland Road store,[57] since he trained and is friendly with some of them, and had learned about a job opening there due to an employee's illness requiring a leave of absence. According to Minton, when he told Choate "probably the day before," that she was being laid off effective May 24, 1980, he also advised her about the job opportunity at the Noland Road store and suggested that she contact Kent Fisher and see if he would hire her. He added that Choate acted on his advice and started working at the Noland Road store, "I would say two or three days at the soonest" after she was laid off at the Woods Chapel store.[58]

Sondra Hertzog,[59] employed by the Respondent as a "checker" at the Woods Chapel store, testified that shortly after the store opened for business in December 1979, a "sacker" working there was transferred to the Noland Road store because "they needed some help up there." However, Hertzog could not remember the employee's name. Hertzog continued that in March or April 1981, an employee named John Pettit, a "sacker," was transferred from the Noland Road store to the Woods Chapel store for "two or three days, the weekend or something" to replace an employee named "Andy." Another of the Respondent's employees, Barbara Robinson[60] testified that Pettit, a "checker" from the Noland Road store, was brought to the Woods Chapel store to work there "just for a few days." Regarding Pettit, employee Ruth Gray also testified similarly relating that in February or March, 1981, a "sacker" at the Woods Chapel store was scheduled to be absent and an employee from the Noland Road store named "John" was transferred to the Woods Chapel store to fill in for the absent employee "for two or three days."

Concerning the above employee transfers, Minton, while acknowledging that the Respondent had employed a "sacker" named "Andy" at the Woods Chapel store and that John Pettit had been employed as a "sacker" at the Noland Road Store, disputed as "unlikely" that Pettit had been temporarily transferred to the Woods Chapel

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Fisher, who had worked at the Noland Road store for approximately 1 month, became comanager with Minton of the Woods Chapel store. Previously, Jerry Lee Fisher had worked for the Kansas City Power and Light Company for "nine and a half years."

[55] Cathy Choate also appears in the record as Cathy McWilliams.

[56] Choate testified that when she transferred from the Woods Chapel store to the Noland Road store she was not required to fill out a new employment application since the transfer was supposed to be temporary.

[57] Minton testified that he visits regularly with Kent Fisher, manager of the Noland Road store, Bill Englebrecht, the assistant manager, and Earl Holland, the meat department manager "probably two or three times a week," and also speaks to them over the telephone "once or twice" weekly. Minton added that he usually talks to Kent Fisher and Englebrecht about business problems and with Englebrecht about personal things since they have been friends for some time.

[58] Choate denied that Minton had ever told her that she was being laid off. However, Choate acknowledged on cross-examination that business at the Woods Chapel store had fallen off in and around the time of her transfer to the Noland Road store, which resulted in a reduction of her hours of work at Woods Chapel from "around 20" hours weekly to 10 hours weekly since she was the "most junior checker" among the employees at the store. Moreover, Choate's payroll records at Woods Chapel (R. Exh. 5) reflect that in May 1980, her weekly work hours for 3 weeks of that month fell to 10 hours from the previous month's weekly work hours, ranging from 14 to 23 hours. In the last week in May 1980, just before she left her Woods Chapel store job, Choate worked 20 hours. Choate's payroll record has written thereon the following, "Laid Off Business Down Low on Seniority List." However, while Minton testified that the writing on this record was not his but "possibly" could be that of Jerry Lee Fisher, Fisher never confirmed this in his testimony. In fact, he was never asked about it. I found Minton's testimony regarding Choate's alleged layoff and about her payroll records equivocal and at times evasively guarded; it just did not seem forthright.

[59] Hertzog commenced her employment with the Respondent at the Woods Chapel store when it opened for business in December 1979. She was called as a witness for the General Counsel.

[60] Robinson commenced her employment with the Respondent also at the time the Woods Chapel store opened for business in December 1979. She testified as a witness for the General Counsel.

store from the Noland Road store to fill in as a "sacker," testifying that it was "unlikely that we would bring another sacker down from some place else." His testimony was similar regarding the "sacker" who was transferred temporarily from the Woods Chapel store to the Noland Road store.[61]

5. Other instances of store interaction

Robert Leiblie testified that sometime in March or April 1980, the Woods Chapel store "started transferring bakery goods over to the Noland Road store and to the Chrysler store. And that continued for approximately a year." He stated that the bakery goods were baked on the Woods Chapel premises with the "bulk of it" being sold at the Woods Chapel store and the rest transferred daily to the Noland Road and Chrysler stores for sale there.[62] Marvin Paul and Mary Tignor[63] testified somewhat similarly. Paul related that the baking was done at the Woods Chapel store and the bakery goods then delivered to the Noland Road and Chrysler stores in the approximate proportion of one-third the production to each store, each day, except Sunday. He stated that this continued until February 28, 1981, when he was advised by Minton that he was being laid off because the Noland Road and Chrysler stores were "discontinuing taking bakery goods." He recounted that Mary Tignor "the deli and bakery supervisor" recommended that he call Gerald E. Fisher to ascertain if "he still wanted to have bakery goods delivered to the Noland Road store" presumably to see if a baker's job might again be available for Paul. Paul added that he called Fisher a few days later and asked Fisher "if he was going to continue the bakery goods and Fisher responded, "No, that there were always problems with delivery."

Regarding this, Jerry Lee Fisher testified that the Woods Chapel store had been producing bakery goods for its own retail trade and also for the Noland Road and Chrysler stores until he and Minton decided that there was insufficient profit in this operation because of the problems involving the transfer and delivery of the baked goods to the other stores, whereupon it was discontinued. He stated,

> Gary [Minton] and I discussed, you know, that things weren't working out the way they should in the best interest of all three stores, you know. It was hurting everybody. We just ceased to transfer bakery goods to other stores.

I noted that while, throughout his testimony, Jerry Lee Fisher sought to create the impression that his father, Gerald E. Fisher, had no input concerning important and significant changes or innovations instituted in the operation of the Woods Chapel store, yet his testimony ensuing after the above quote is instructive, significant, and compelling

> Q. And you're telling the Administrative Law Judge here that you didn't go to your father first, before you implemented that decision?
>
> A. I told him what I would like to do and he said, you know, "If that's what you need to do, fine, go ahead and do it."
>
> Q. And then you implemented it, right?
>
> A. Yes, sir.[64]

Moreover, Fisher testified that the Respondent purchases items from the Noland Road and Chrysler stores for sale at Woods Chapel in instances where the Woods Chapel store has run short, or when one of the other stores is overstocked with an item, i.e., meat or chicken, produce, etc., and the Woods Chapel store will purchase the overstocked item at cost. He continued that the Respondent also makes such purchases from other United Super stores in the area, although such transactions constitute only a small percentage of the Respondent's purchases and sales, less than 1 percent.[65]

Additionally, Leiblie testified that in the early part of 1981 he was told by Jerry Lee Fisher that consideration was being given to the transfer of "cash registers that we've got at our store [Woods Chapel] over to the Noland Road store and Woods Chapel buying scanners." Also, Ruth Gray,[66] the Woods Chapel store's "liquor manager," testified that in March 1981, at Minton's request, she assisted Richard Fisher in "setting up" a liquor department at the Chrysler store. Gray added that Minton had advised her that Richard Fisher would pay her out of Chrysler store funds for the day she had worked there since this had been her scheduled day off.

6. Other evidence

Union President Davis testified that he had negotiated on behalf of the Union a new collective-bargaining agreement with representatives of an "employer's group," which included Jerry's United Super, Inc. (Noland Road store) effective May 10, 1981, through March 1984. Davis related that after the agreement had been signed by all the parties on July 15, 1981, the Union found "some errors in the deli in reference to the rates of pay" and Davis contacted Gerald E. Fisher about this in July 1981. Davis recounted that he met with Fisher at the Noland Road store, at which time Fisher introduced him to his son, William Kent Fisher, and said, "One of these days I'm going to get completely out of it." Rates of pay for two employees, John Woods and Genevieve Jacobs, were agreed on by Davis and Gerald E. Fisher at this meeting.[67] The evidence shows that during these above negotiations the Noland Road store and the Chrysler store were represented by the law firm of Stinson, Mag & Fizzell, Esqs.

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[61] Although Minton maintained that part-time employees at the respective stores would be used to fill in for employees out for one reason or another, it should be noted that he kept using phrases in his testimony such as, "I don't recall him coming down and working" and "It doesn't seem likely," when testifying about the interchange of "sacker" employees between the Woods Chapel and Noland Road stores.

[62] Leiblie testified that the Woods Chapel store kept 50 percent of the baked goods for store sale and sent 30 percent of the bakery goods to the Noland Road store, and 20 percent to the Chrysler store.

[63] Mary Tignor testified that bakery goods were baked at the Woods Chapel store and, starting in the spring or summer of 1980 until February 1981, part of the production was shipped to the Noland Road and Chrysler stores. According to Tignor, the Chrysler store would submit orders regarding how much of the bakery goods it wanted, and the Woods Chapel employees would themselves "guess" at the Noland Road store needs and supply it. Employees at the Woods Chapel bakery department would record what bakery goods were to be shipped and "Gary Minton would take care of it."

[64] Also see fn. 43 as another example of such testimony by Jerry Lee Fisher.

[65] According to Fisher, the Respondent purchases dried flowers for resale at the Woods Chapel store from Raytown United Super.

[66] Gray related that when Minton hired her at the time of the opening of the Woods Chapel store, he stated to her that "within six months there'd probably be a Union."

Furthermore, the General Counsel introduced into evidence a newspaper advertisement from the Kansas City Star dated Sunday, October 4, 1981.[68] "United Super" is prominently displayed in the lower right-hand corner of the advertisement. This advertisement, approximately three-quarters of an average newspaper page in size, features a picture of Kent Fisher, Gerald E. Fisher[69] and Richard Fisher,[70] largely displayed in full length, posing side by side and holding canned goods and produce.[71] Listed in the advertisement are their names and underneath the picture the following: "Jerry's United Super, 35th & Noland Road, Indep., Mo.; Jerry's United Super, 1201 N. Woods Chapel Road, Blue Springs, Mo.; Fisher's United Super, 2604 S. Chrysler Ave., Indep., Mo." There also appears therein a copy extolling the variety and quality of the grocery products obtainable at the "independent United Super store," with the use of the words "we" and "our" throughout the text. Jerry Lee Fisher testified, however, that the Respondent does not usually jointly advertise with the Noland Road or Chrysler stores, but does advertise independently the Woods Chapel store in the "Pony Express," a "separate paper" in Blue Springs, Missouri, in which only the Woods Chapel store appears.

C. *Analysis and Conclusions*

1. The single employer issue

The threshold issue presented is whether the Respondent, Woods Chapel United Super, Inc. d/b/a Jerry's United Super (Woods Chapel store), and Jerry's United Super, Inc. (Noland Road store) together constitute a "single employer" as alleged by the General Counsel and the Charging Party or, as contended by the Respondent, each is a separate, distinct, and individual employer.[72] As will become clear from the discussion of this issue that follows, the question of "single employer" status is a close one based on the facts present in this case.

As the court stated in *United Telegraph Workers v. NLRB*, 571 F.2d 667 (D.C. Cir. 1978), cert. denied 99 S.Ct. 101:

> As in other areas of the law, corporations normally are treated as separate entities under the Labor Act. The Board treats multiple corporations as a single employer only when it is established that the nominally separate corporations are in fact operated as a single integrated business enterprise.[73]

In *Malcolm Boring Co.*, 259 NLRB 597, 600-601 (1981), the Board affirmed the decision of an administrative law judge in which the tests for "single employer" were set forth as follows:[74]

> In *Radio & Television Broadcast Technicians Local Union 1264, IBEW v. Broadcast Service of Mobile, Inc.*, 380 U.S. 255, 256 (1965), the Supreme Court held that in determining whether enterprises constitute a single employer: "The controlling criteria, set out and elaborated in Board decisions, are interrelation of operations, common management, centralized control of labor relations and common ownership."[16] Though the Board and the courts have not always agreed on how to apply the standards enunciated by the Supreme Court, the decision of the Court of Appeals for the District of Columbia in *Local No. 627, International Union of Operating Engineers, AFL-CIO* [*South Prairie Construction Company and Peter Kiewat Sons' Co.*] *v. N.L.R.B.*, 518 F.2d 1040 (1967), appears to be controlling. In that case the court of appeals reversed the Decision of the Board in *Peter Kiewat Sons' Co. and South Prairie Construction Co.*, 206 NLRB 562 (1973). Part of the circuit court's decision was affirmed by the United States Supreme Court in *South Prairie Construction Co. v. Local No. 627, International Union of Operating Engineers, AFL-CIO*, 425 U.S. 800 (1976). The Board had made two separate findings. The first was that two entities did not constitute a single employer and the second was that each entity had a separate appropriate bargaining unit for collective-bargaining purposes. The court of appeals disagreed and found both a single employer and a single unit. On appeal, the Supreme Court affirmed that part of the court of appeals' decision which found that the two entities were a single employer and reversed and remanded to the court of appeals that part of the decision which related to the unit question.[17] As the Supreme Court has affirmed the circuit Courts' decision with regard to the single employer,

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[67] See G.C. Exh. 8. It should be noted, however, that William Kent Fisher signed this document as owner on behalf of Jerry's United Super, Inc., although the letter is addressed to Gerald E. Fisher.

[68] G.C. Exh. 39.

[69] Gerald E. Fisher's name appears as "Jerry" Fisher in the advertisement.

[70] Richard Fisher's name appears as "Dick" Fisher in this advertisement.

[71] Jerry Lee Fisher does not appear in this advertisement.

[72] The Respondent also asserts, however, that if these employers are found to be a "single employer," then consideration must be given to the inclusion of Fisher's United Super, Inc. (Chrysler store) within the scope of this "single employer" status. It should be noted that the complaint makes no mention of Fisher's United Super, Inc. (Chrysler store). Moreover, although the General Counsel stated at the hearing that,

> [T]he Fishers, although they have three stores and the Employer's position is they are all separately run, in fact consult together and that there is common management not only between the Jerry's United Super at Noland Road and Woods chapel but also the other store at Chrysler.

in her brief she maintains that the Respondent, Woods Chapel United Super, Inc. d/b/a Jerry's United Super (Woods Chapel store) and Jerry's United Super, Inc. (Noland Road store) are a "single employer," as does the complaint.

[73] See *Numrich Arms Corp.*, 237 NLRB 313 (1978).

[74] Also see *Blumenfeld Theatres Circuit*, 240 NLRB 206 (1979), enf. 626 F.2d 865 (9th Cir. 1980).

the language of the circuit court is of particular importance. That circuit court held [518 F.2d at 1045–46]:

Guidelines for "Single Employer" Status

In *Radio Union* v. *Broadcast Service of Mobile, Inc.*, 380 U.S. 255 . . . (1965), the Supreme Court, in a *per curiam* opinion affirming "a single employer" holding below, said:

> "The controlling criteria, set out and elaborated in Board decisions, are interrelation of operations, common management, centralized control of labor relations and common ownership."

"The court cited several NLRB decisions including one affirmed in *Sakrete of Northern California, Inc.* v. *N.L.R.B.*, 332 F.2d 902 (9th Cir. 1964), cert. denied 379 U.S. 961 . . . (1965). In *Sakrete*, the Ninth Circuit stated, at 907:

> "[E]ven if the substantial evidence shows interrelationship of operations, centralized control of labor relations, or common management only at the executive or top level, we do not agree that this precludes application of the "single employer"concept."

It pointed out that these three criteria "deal not with power and authority, as such, but with its exercise," and that such criteria, "on any level, are considerations in addition to the factor of common ownership or financial control."[8]

Although the Supreme Court in *Radio Union, supra*, commented that the record in that case was more than adequate to show that all of the four "controlling criteria" were present, it does not appear that all four criteria must be present. In one of the NLRB cases cited, *Canton, Carpets, Inc.*, 125 NLRB 483 (1959), the Board observed that it had on several occasions made a finding of a single employer status in the absence of a common labor relations policy, and even when it had been affirmatively shown that each of two corporations held to be a single employer established its own labor relations policy. In another of the NLRB cases cited, *V.I.P. Radio, Inc.*, 128 NLRB 113 (1960), the Board found that there was little or no employee interchange; but 90 percent stock ownership of the second corporation, the same officers and directors, and centralized control of "general labor policy" and operations resulted in a "single employer" holding. In still another cited NLRB case, *Overton Markets, Inc.*, 142 NLRB 615 (1963), the Board noted, at 619, that the circumstances were not "characteristic of the arm's length relationship found among unintegrated companies."[9] Its conclusion that there was a "single employer" for purposes of the Act rested on consideration of "all the circumstances" of the case.[76]

From the foregoing, we conclude that "single employer" status, for purposes of the National Labor Relations Act, depends upon all the circumstances of the case, that not all of the "controlling criteria" specified by the Supreme Court need be present; that, in addition to the criterion of common ownership or financial control, the other criteria, whether or not they are present at the top level of management, are "controlling" indicia of the actual exercise of the power of common ownership or financial control and that the standard for evaluating such exercise of power is whether, as a matter of substance, there is the "arms length relationship found among unintegrated companies."

Moreover, in *Gerace Construction*, 193 NLRB 645 (1971), the Board stated:

> A critical factor in determining whether separate legal entities operate as a single employing enterprise is the degree of common control of labor relations policies.[1] Thus, the Board has found common ownership not determinative where requisite common control was not shown,[2] and the Board has held with court approval that such common control must be actual or active, as distinguished from potential control.[3]

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[16] See also *Sakrete of Northern California, Inc.*, 140 NLRB 765 (1963), enfd. 332 F.2d 902 (9th Cir. 1964), cert. den. 379 U.S. 961 (1965).[75]

[17] On remand the Board issued a Supplemental Decision reported at 231 NLRB 76 (1977) in which it noted that the Supreme Court had affirmed the circuit court's finding that the two entities were a single employer. The Board reconsidered the single-unit question and concluded that, even though the entities were a single employer, separate units were appropriate.

[8] In a later decision, *N.L.R.B.* v. *Welcome-American Fertilizer Co.*, 443 F.2d 19, 21 (9th Cir. 1971), the Ninth Circuit, citing *Sakrete*, said that no one of the four criteria is controlling.

[9] The "arm's length" test makes meaningful the Board's reference in *Canton, Carp's, Inc., supra* at 484, to "realities of commercial organization." It was applied by this court in *American Fed. of Television & Radio Artists* v. *N.L.R.B.*, 149 U.S. App. D.C. 272, 462 F.2d 887 (1972).

[1] *N.L.R.B.* v. *Condenser Corporation*, 128 F.2d 67, 71. See also *J. Howard Jenks, d/b/a Glendora Plumbing*, 165 NLRB 101; *L & S Construction Company, Inc.*, 155 NLRB 524; *AAA Electric, Inc. and Simms Electric Co.*, 190 NLRB No. 23.

[2] *Joe Robertson & Son, Inc.*, 174 NLRB No. 160; *Bel-Air Door, et al.*, 150 NLRB 481.

[3] *Los Angeles Newspaper Guild, Local 69, et al. (Hearst Corp.)*, 185 NLRB No. 25, enfd. 443 F.2d 1173 (C.A. 9); *Poole's Warehousing, Inc.*, 158 NLRB 1281; *Miami Newspaper Printing Pressmen's Local No. 46* v. *N.L.R.B.*, 322 F.2d 405 (C.A.D.C.).[77]

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[75] Also see *Sakrete of Northern California*, 140 NLRB 765 (1963), affd. 332 F.2d 902 (9th Cir. 1964), cert. denied 379 U.S. 961 (1965).

[76] See also *NLRB v. Burgess Construction*, 596 F.2d 378 (9th Cir. 1979); *NLRB v. Transportation Consultant*, 607 F.2d 290 (9th Cir. 1979).

[77] Also see *Soule Glass & Glazing Co.*, 246 NLRB 792 (1979); *Western Union Corp.*, 224 NLRB 274 (1976), affd. *United Telegraph Workers v. NLRB*, 571 F.2d 665 (D.C. Cir. 1978), cert. denied 99 U.S. 101 (1978).

The record evidence shows that although the Respondent, Woods Chapel United Super, Inc. d/b/a Jerry's United Super (Woods Chapel store) and Jerry's United Super, Inc. (Noland Road store) are separate legal entities with operations at different store locations approximately 8 miles apart, they are commonly owned by Gerald E. Fisher and have the same corporate officers and directors.[78] Additionally, each Company maintains its own separate bank account, account books, and payrolls. Although both use the services of the "Fleming Corporation" for accounting purposes, so do all the other 20 to 30 United Super stores in the metropolitan Kansas City area, and separate records are kept by Fleming for each individual Company serviced.

Moreover, except for the initial transfer of managerial and other experienced employees from the Noland Road store to the Woods Chapel store, when the new store opened for business in December 1979,[79] there has been little employee interchange between the two stores.[80] It also should be noted that Jerry's United Super, Inc. (Noland Road store) continued to make contributions into the Union's health and welfare and pension funds, and to deduct union dues payments on behalf of several of the employees who had been transferred from the Noland Road store to the Woods Chapel store when the latter opened for business in December 1979 until May 24, and March 1980, respectively, although they were now employees of the Woods Chapel store.[81] These employees also retained their seniority when transferred to the new store.

As previously stated, a critical factor in determining whether separate legal entities are in fact a single employing enterprise is the degree of common control of labor relations policies.[82] Although the Respondent admits in its brief that "Gerald E. Fisher was actively involved in labor relations policies at Woods Chapel in the fall of 1979 before the store opened. This is indicated by his October 2 meeting with Earl Davis which produced an 'agreement' involving Woods Chapel," the Respondent also asserts that, "There is no showing, moreover, that this early involvement of Gerald E. Fisher which occurred more than a year before, continued through the critical events in this case." I do not concur with the Respondent's latter assessment of the evidence.

Initially it is clear from the evidence that Gerald E. Fisher maintains ultimate operational control over both the Noland Road and Woods Chapel stores. Furthermore, the record shows that the telegram, dated April 29, 1980, sent by the Respondent to the Union repudiating the October 2, 1979 "'agreement' between them as being unlawful under the Act, was signed by Gerald E. Fisher. The Respondent in its brief asserts that actually Fisher's son, Jerry Lee Fisher, was the moving party behind the repudiation." The evidence, however, does not support this assertion. The fact that the telegram was signed by Gerald E. Fisher and not by Jerry Lee Fisher raises a strong inference that Gerald E. Fisher was the one who made the decision set forth concerning this "agreement." Moreover, while testifying about the meeting between his father, himself, and Rick Noble, "our counsel," during which Noble informed them of the "illegality," of the October 2, 1979 "agreement," Jerry Lee Fisher never actually stated that he had made this decision or influenced its making in any way. He acknowledged awareness that the telegram was going to be sent, but denied sending it himself.[83]

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[78] Gerald E. Fisher owns all the stock of both corporations, with Fisher being the president, treasurer, and director, while his wife, Charlene Fisher, is the vice president and secretary of these companies. The evidence also shows that Gerald E. Fisher contributed all the capital investment in Fisher's United Super, Inc. (Chrysler store) although the record does not disclose whether he owns the stock of that corporation, or is an officer or director there. Richard Fisher, one of his sons, appears to be the president of Fisher's United Super, Inc. (See Jt. Exh. 3.)

[79] The Board has held that such initial transfer of employees in and of itself has "no significance and merely indicates, at most, where potential control might reside." See *Poole's Warehousing*, 158 NLRB 1281 (1966). Also see *Western Union Corp.*, supra; *Gerace Construction*, supra.

[80] Cathy Choate was transferred, ultimately as a permanent employee, from the Woods Chapel to the Noland Road store, and two "sackers" were interchanged between these stores on a temporary basis to fill in for absent employees. Although the testimony of these employee interchanges was contradictory and disputed as between the witnesses for the General Counsel and those called by the Respondent, I credit the testimony of the General Counsel's witnesses as to this. Both Sondra Hertzog and Barbara Robinson were still employed at the Respondent's Woods Chapel store at the time they testified and as employees of the Respondent, their testimony, somewhat adverse to the Respondent's position, was given at risk of possible economic reprisal, including loss of employment or promotion, and thus not likely to be false. See *Parkview Acres Convalescent Center*, 255 NLRB 1164 (1981); *Shop-Rite Supermarket*, 231 NLRB 500 (1977); *Georgia Rug Mills*, 131 NLRB 1304 (1961). Although Cathy Choate was employed by Jerry's United Super, Inc. (Noland Road store) at the time she testified in this proceeding, the fact that Gerald E. Fisher owns both the Noland Road and Woods Chapel stores would reasonably make the foregoing applicable to her as well. Moreover, Minton's testimony concerning this, given on behalf of the Respondent, was equivocal and as a managerial employee of long standing with the Fisher family stores and being considered for a future higher managerial position, that of "floating manager" of all the Fisher stores, he had substantial reason to testify in a favorable manner for the Respondent without regard to the accuracy.

[81] Robert Leiblie, Mary Tignor, and Betty Hoy.

[82] *Soule Glass & Glazing Co.*, supra; *Western Union Corp.*, supra.

[83] Jerry Lee Fisher's testimony concerning his father's involvement in the operation of the Woods Chapel store was at times equivocal, confusing, and contradictory, leading me inexorably to the conclusion that such testimony was given on the basis of supporting the Respondent's allegations and positions rather than as to the actual truth. For example, Fisher testified on direct examination that the Respondent "holds" the licenses required to operate the Woods Chapel store. On cross-examination, however, Fisher admitted that these licenses were acquired by his father and are held in his father's name, Gerald E. Fisher. Additionally, Fisher testified that he and Minton made all the management decisions concerning the operation of the Woods Chapel store without, or before, consulting with his father. However, a careful reading of Jerry Lee Fisher's own testimony casts doubt on this assertion. Regarding the change in the Respondent's employee health insurance program, Fisher testified that he had discussed this with his father, Gerald E. Fisher, after the change had been made, but his testimony reads as follows:

> Q. Did you discuss this with Gerald Fisher?
>
> A. After I'd made the changes I did. I had told him that I felt like we needed to do that for the people.
>
> JUDGE KLEIMAN: And what did he say?
>
> A. He said what—you know if *that's what you think we ought to do, then go ahead and do it*, you know. [Emphasis added.]

Additionally, the whole tenor of Fisher's testimony gives rise to the strong inference that although his father had never disagreed with his major operational proposals, yet Jerry Lee Fisher had first apprised his father thereof before he implemented them. This is reinforced by Minton's testimony to the effect that he brought to Gerald E. Fisher's attention all major actions that are taken at the Woods Chapel store, i.e., fall-

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Moreover, it was Gerald E. Fisher who met with the Union's representatives at the Noland Road store on January 20, 1981, wherein the Union demanded recognition and bargaining as the collective-bargaining representative of a majority of the Respondent's employees at the Woods Chapel store, with Fisher referring the Union to his attorney for further discussion. It was Gerald E. Fisher who, by letter dated January 22, 1981, advised the Union that the Respondent disbelieved the Union's claim to majority representative of the Woods Chapel employees and refused to recognize and bargain with the Union, recommending instead a Board conducted election. It was Gerald E. Fisher who met with Union President Earl Davis in July 1981 to negotiate wage rates of deli employees at the Noland Road store. And it should also be noted that Gerald E. Fisher, not Jerry Lee Fisher or Gary Minton, was "copied" on letters sent by various legal counsel employed by the Respondent in this matter.[84]

Of particular significance in this case is the undisputed fact that Gerald E. Fisher visits the Woods Chapel store at least every other day at which time, utilizing an office provided and maintained for his use when on the premises,[85] he pays the store bills, reviews the daily sales records, consults with the Woods Chapel store managers and employees, and meets with representatives of the Respondent's food distributors. Certainly the above in no way can be construed as "characteristic of the arms length relationship found among unintegrated companies."

Additionally, from March 1980 until March 1981, the bakery department at the Woods Chapel store produced and delivered bakery goods to the Noland Road and Chrysler stores for sale by these stores in their bakery goods departments. Although this in and of itself has limited significance in determining the issue of single employer status, yet the circumstances surrounding the discontinuance of the transfer of such bakery goods at the other stores impacts on this issue through the role of Gerald E. Fisher in the management and operation of the Woods Chapel store. The Respondent maintains that Fisher played no role at all therein. However, consider the following evidence: According to the uncontradicted testimony of employees Marvin Paul and Ruth Gray, Gerald E. Fisher told them sometime in February 1981 that he would "shut down" any department at the Woods Chapel store that "didn't carry its weight"; Jerry Lee Fisher, while asserting that he and Minton had made the decision to discontinue the production of bakery goods for transfer to and sale by the other Fisher family stores, revealingly testified that he and Minton had discussed that "things weren't working out the way they should in the best interest of all three stores, . . . It was hurting everybody. We just ceased to transfer bakery goods to other stores, . . . Well, everybody was losing money." After acknowledging that Gerald E. Fisher owns all three Fisher family stores, Fisher's testimony appears as follows:

> Q. And you're telling the Administrative Law Judge here that you didn't go to your father first, before you implemented that decision?
>
> A. I told him what I would like to do and he said, you know, "If that's what you need to do, fine, go ahead and do it."
>
> Q. And then you implemented it, right?
>
> A. Yes, sir.

Finally, Paul testified that in February 1981 he was advised by Minton that he was being laid off because the Respondent had decided to discontinue baking goods for the Noland Road and Chrysler stores. He stated that soon after his layoff, he telephoned Gerald E. Fisher and inquired, "if [Fisher] was going to continue the bakery goods," whereupon Fisher replied, "No, that there were always problems with delivery and he—that's all, there were problems with delivery." The implication that Gerald E. Fisher made the decision whether to continue the transference of bakery goods to the other stores, implicit in this answer, is too strong to ignore. From all the above, there arises a strong inference that Gerald E. Fisher actually and realistically makes the major policy decisions for both the Woods Chapel and Noland Road stores.[86]

Importantly and applicable to the resolution of the issues here, it should be noted that Gerald E. Fisher did not testify at the hearing. Fisher, being perhaps the person best qualified to testify regarding his role in the management and operation of the various stores, particularly the Woods Chapel and Noland Road stores, it seems clear to me that he is in the nature of an indispensable witness. This being true, the failure of the Respondent to call him as a witness can only be construed to mean that had he testified, his testimony would have

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off of business, replacement of machinery, etc., albeit Minton maintained that he did so only after taking the necessary actions required. The record shows this assertion to be a blatant attempt to bolster the Respondent's position that Gerald E. Fisher had little to do regarding the management and operation of the Woods Chapel store, with the evidence being replete with other instances contradicting this, as will be set forth.

[84] See G.C. Exh. 41. Although the Respondent's legal counsel, Willard, at the hearing offered that he had incorrectly and mistakenly referred to Jerry Lee Fisher as Gerald C. Fisher in correspondence when he actually meant Jerry Lee Fisher, he offered no actual proof thereof other than his unsworn statement thereon.

[85] The Respondent asserts that Gerald E. Fisher maintains his "principal office" at another location, presumably at the Noland Road store.

[86] The Respondent asserts in its brief that "Counsel for the General Counsel faces an even more difficult obstacle to her case because there are three corporations involved here, not two." The Respondent correctly states that the burden of proof on the issue of "single employer" status is on the General Counsel, who alleges the existence thereof. However, once the General Counsel has met this burden by offering sufficient proof to show that, as alleged in the complaint, the Respondent (Woods Chapel store) and Jerry's United Super, Inc. (Noland Road store) constitute a "single employer," then the Respondent has the obligation of proving that the "single employer" is other than as shown by the General Counsel's proof. The Respondent failed to offer any proof regarding Fisher's United Super, Inc. (Chrysler store). The only facts evidenced in the record concerning this corporation are that at least one of the officers is different than those in connection with the Woods Chapel and Noland Road stores, that bakery goods were dispatched to the Chrysler store for sale from the Woods Chapel store, and that Ruth Gray, a Woods Chapel employee, was sent to the Chrysler store to help in establishing a liquor department, for which she received additional compensation from the corporate entity that owns that store.

been adverse to the Respondent's positions on the issues here.[87]

In considering all the above and the close family connection, and the lack of an arm's-length relationship commonly found among unintegrated companies, I find that the Respondent, Woods Chapel United Super, Inc. d/b/a Jerry's United Super, and Jerry's United Super, Inc.[88] were and are a single employer for the purposes of collective bargaining.[89]

2. The additional store clause

Having found that the Respondent, Woods Chapel United Super, Inc. d/b/a Jerry's United Super (Woods Chapel store) and Jerry's United Super, Inc. (Noland Road store) constitute a single employer for purposes of the Act, the next issue to be resolved is whether the "additional store clause" in the collective-bargaining agreement between Jerry's United Super, Inc. and the Union is applicable to the Respondent's Woods Chapel store.

In *Kroger Co.*, 219 NLRB 388 (1975), the Board stated at 388, 389:

> We begin our reconsideration of this case by stating again our acknowledgement, recognized by the court, that the principles of accretion do not resolve the issue presented in this case, inasmuch as the stores in question have a sufficient separate existence to constitute separate appropriate units.[3] We also acknowledge that the Board has held that "additional store clauses" are valid in situations where the Board is satisfied that the employees affected are not denied their right to have a say in the selection of their bargaining representative.[4] . . .
>
> Interpreting these clauses to mean that an employer can voluntarily recognize a union or demand an election renders them totally meaningless and without effect, for unions need no contract authorization to establish their representation status in a Board-conducted election. However, these clauses can be read to require recognition upon proof of majority status by a union. . . .
>
> The court examined these clauses in the context of this case and found that they constituted a waiver by Kroger of its right to demand an election in these circumstances. Upon reconsideration we now adopt this view as the only reasonable interpretation which saves these clauses from meaninglessness or from impinging on functions reserved solely to the Board. . . .
>
> . . . .
>
> As we have interpreted them, these clauses are contractual commitments by the Employer to forgo its right to resort to the use of the Board's election process in determining the Union's representation status in these new stores. To permit the Employer to claim the very right which it has forgone, perhaps in return for concessions in other areas, would violate the basic national labor policy requiring the Board to respect the integrity of collective-bargaining agreements. . . . The Board has held that an employer may agree in advance of a card count to recognize a union on the basis of a card majority,[7] and we can perceive of no reason why it may not contract with the union to do so in advance of the time the union has commenced organization.
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> [3] *Melbet Jewelry Co., Inc. and I.D.S.—Orchard Park, Inc.*, 180 NLRB 107 (1969).
>
> [4] *Retail Clerks Union, Local 870, Retail Clerks International Association, AFL-CIO (White Front Stores, Inc.)*, 192 NLRB 240 (1971).
>
> [7] *Fred Snow, Harold Snow and Tom Snow d/b/a Snow & Sons*, 134 NLRB 709 (1961).

From the foregoing, it is clear that the Respondent, Woods Chapel United Super, Inc. d/b/a Jerry's United Super, and Jerry's United Super, Inc., as a single employer, is obligated to recognize the Union as the exclusive bargaining representative of its employees in an appropriate unit when the Union represents a majority of the employees in that unit.[90]

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[87] From the failure of a party to produce material witnesses obviously within its control without satisfactory explanation, the trier of the facts may draw an inference that such testimony would be unfavorable to that party. See *7-Eleven Food Store*, 257 NLRB 108 (1981); *Publishers Printing Co.*, 233 NLRB 1070 (1977); *Martin Luther King, Sr. Nursing Center*, 231 NLRB 15 (1977); *Broadmoor Lumber Co.*, 227 NLRB 1123 (1977).

[88] The Respondent, in its brief, asserts that any order that may be issued here premised on a finding of "single employer" is unenforceable since Jerry's United Super, Inc. (Noland Road store) was not "named as a respondent or even a party in interest." I do not agree. The complaint itself clearly asserts that the Respondent and "Jerry's United Super, Inc." constitute a single employer, and that the unit appropriate for the purposes of collective bargaining includes employees of both corporate owner's stores, the Woods Chapel and Noland Road stores. Because Gerald E. Fisher is the owner, president, and treasurer of both corporate entities, it would be incredible to suppose that "fair notice and an opportunity to litigate fully" the question of "single employer" status was not had here. See *George C. Shearer Exhibition Delivery Service*, 246 NLRB 416 (1979). It should be noted that in the *Shearer* case, no allegation had been set forth in the complaint regarding the "alter ego" status of the other corporation, while here the complaint distinctly alleges "single employer" status regarding the Respondent and Jerry's United Super, Inc. The Respondent cites the case of *NLRB v. Doug Neal Management Co.*, 620 F.2d 1133 (6th Cir. 1980), in its brief in support of its above contentions. However, a critical distinguishing factor between the cited case and the instant one is the lack of the existence of some connective ownership link that would make notice to one separate corporate entity sufficient notice to the other. In the *Doug Neal Management Co.* case, the owner of the property was not named as a party therein, but only the company managing the property. In the instant case, however, the Respondent and Jerry's United Super, Inc. are commonly owned and have been found to be a "single employer." This finding of "single employer" status also distinguishes this case from the other case cited by the Respondent in its brief to support its contention, *Concrete Haulers*, 106 NLRB 690 (1953).

Although the better procedure would have been to name Jerry's United Super, Inc., as also a party here, as is done in most cases involving separate legal entities regarding a "single employer" issue, the failure to do so does not in this case negate the enforceability of any order imposed for the reasons set forth above. See *Arundel Corp.*, 252 NLRB 397 (1980), wherein "single employer" status was found and only one of the corporate entities involved is named in the heading. Also see *Jacob Wirth Restaurant*, 248 NLRB 191 (1980).

[89] *Jacob Wirth Restaurant*, 248 NLRB 191 (1980), enfd. 646 F.2d 706 (1st Cir. 1981); *Blumenfeld Theatres Circuit*, 240 NLRB 206 (1979). It should be noted that the Respondent and Jerry's United Super, Inc., as a single employer, will also be referred to as the Employer when necessary for purposes of an easier reading of this decision.

[90] Also see *Joseph Magnin Co.*, 257 NLRB 656 (1981); *Arundel Corp.*, supra.

3. The Union's majority representation

In *Joseph Magnin Co.*, 257 NLRB 656 (1981), the Board stated:

> In *Houston Division of the Kroger Co.*,[4] the Board concluded that a contractual clause such as the one by which Respondent is bound constitutes a waiver of an employer's right to insist upon a Board-conducted election when faced with a demand for recognition but that it does not relieve a union of its obligation to provide the employer with proof of its majority status among the employees in the group to be added to the existing unit. By this interpretation of after-acquired-stores provisions, the Board allows parties as much freedom as possible to structure their bargaining relationship through negotiations without permitting them to deny to affected employees the statutory right to select or reject a bargaining representative. Under usual circumstances, therefore, Respondent's statutory duty to recognize the Union as the representative of the Gucci store employees and to apply the current collective-bargaining agreement to the new operation would have arisen only if the Union presented it with concrete evidence of support by a majority of the Gucci store employees.
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> [4] 219 NLRB 388 (1975).

4. The appropriate unit

The complaint alleges that

> All employees employed at the Employer's facilities located at 3443 South Noland Road, Independence, Missouri, and 1201 North Woods Chapel Road, Blue Springs, Missouri, but excluding all meat department employees, office clericals, guards, and supervisors as defined in the Act,

constitute a unit appropriate for the purposes of collective bargaining within the meaning of Section 9(b) of the Act. The Respondent denies this allegation in its answer and affirmatively states that "the only appropriate unit for the employees of Woods Chapel United Super, Inc. is a unit limited to the store employees at 1201 North Woods Chapel, Blue Springs, Missouri."

That the Woods Chapel store has a sufficient separate existence to constitute a separate appropriate unit is clearly evidenced. However, this does not necessarily mean that a unit limited to the employees at the Woods Chapel store is the *only* unit that may be found to be appropriate for the purposes of collective bargaining. It should be remembered that the Respondent and Jerry's United Super, Inc. have been found to be a single employer. With the Noland Road agreement containing an "after-acquired-store" clause, it becomes evident that the *Kroger* case is applicable to the instant case. In *Kroger*, the Board held at 219 NLRB at 389 fn. 6

> While these clauses could be interpreted as an agreement concerning the appropriate unit, we agree with the court that the Board's ultimate right to establish units would render them illusory if they were so construed, since any such agreement which did not coincide with Board Policy would be unenforceable whenever a Board certification was involved.

Therefore, in order that "after-acquired-store" clauses not be rendered totally meaningless and without effect, a unit composed of the employees of an employer's store covered by the collective-bargaining agreement containing the "after-acquired-store" clause and the new store employees must also be appropriate for the purposes of collective bargaining unless contrary to Board law or policy. In this connection, the Respondent failed to introduce any evidence to show that the unit alleged by the General Counsel as appropriate was repugnant or contrary to Board law or policy concerning the appropriateness.

Because of the above, I find and conclude that the unit appropriate for the purposes of collective bargaining within the meaning of Section 9(b) of the Act consists of:

> All employees employed at the Employer's facilities located at 3443 South Noland Road, Independence, Missouri, and 1201 North Woods Chapel Road, Blue Springs, Missouri, but excluding all meat department employees, office clericals, guards, and supervisors as defined in the Act.[91]

5. Unit placement of employees

The parties stipulated at the hearing that there were 33 unit employees at the Woods Chapel store during the relevant period, January 16 through February 13, 1981, these employees being: Cheryl Earlene Baker, Cheri Lynn Borchers, Teresa Borchers, Crysanne Casteel, Michael D. Childs, Cheryl K. Coffman, Mary Kay Cooper, Bernadette Cox, Donald Howard Gann, Ruth Gray, Matthew Hankel, Andy Henry, Sondra Hertzog, Tim Hicks, Betty Hoy, Jeanne Hubbard, Madalene R. Hunt, Brian Kackly, Andy Kreiser, Robert Leiblie; David Lindsey, Dale P. Minton, Marvin Paul, Joan Viola Prine, Barbara Ann Robinson, Jeff Sargent, Donnie Scardino, Sandra A. Straw, Mary Tignor, Greg Warnock, Richard Washburn, Mary Watters and Gregory M. Wochner.[92] Despite this stipulation, the Respondent asserts in its brief that Robert Leiblie is a supervisory and/or managerial employee, and that Mary Tignor and Ruth Gray are managerial employees and they, therefore, should be excluded from the unit appropriate for the purposes of collective bargaining.[93]

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[91] The Respondent and the Union executed a "Stipulation For Certification Upon Consent Election" in Case 17-RC-9193 on February 13, 1981, in which the unit set forth as appropriate for the purposes of collective bargaining was:

> All employees located at the Employer's facility located at 1201 North Woods Chapel Road, Blue Springs, Missouri, but excluding all meat department employees, office clericals, guards, and supervisors as defined in the Act, as amended.

I do not find that this changes in any way my above finding and conclusion. The Union sought alternately to establish its right to represent the Woods Chapel employees by means of a Board-conducted election as authorized under the Act after the Employer unequivocally refused its recognition request.

[92] See Jt. Exh. 4.

a. *Robert Leiblie*

Robert Leiblie is the assistant manager of the Woods Chapel store. Leiblie testified that his duties include, "Well, you close up and . . . you run a certain department if you've got one. You do the books and you cash checks, you know, do all the running. You solve problems, you know. Basically, that's about it." Minton, the Woods Chapel store manager, testified that Leiblie's "main function is the Dairy Department[94] opening and closing up and generally running the store."[95] Minton related that Leiblie has keys to the store, the cash registers, and the offices, and possesses the combination to the safe at the Woods Chapel store. Comanagers Minton and Jerry Lee Fisher, and Leiblie are the only employees who "open and close" the store. Minton stated that when he and Fisher are absent from the store, Leiblie is then in charge.[96] Leiblie is paid on a salary basis and receives no overtime pay for hours worked in excess of 40 hours per week.

Although Minton's testimony concerning whether Leiblie has the authority to discharge and/or discipline employees was at times equivocal,[97] he did testify that he had informed Leiblie that he had such authority and "will take care of" disciplinary matters at Woods Chapel when Minton and Fisher are not present. However, in agreement with Leiblie's testimony, Minton acknowledged that he does all the hiring of employees and that Leiblie "has never disciplined, never issued, say, a written discipline to an employee at the Woods Chapel store," nor terminated any employee therein.

Significantly, Leiblie testified that sometime in the summer of 1980, he had reported to Minton that employee Greg Grace was a "goof-off," taking extensive break periods, and recommended Grace's termination. When Grace appeared for work that day, Minton fired him. Minton testified that he had discharged Grace "within the next two or three minutes" after Leiblie had recommended his dismissal. Concerning this, however, Minton related that Grace "was a problem" employee and that other employees may have complained to him about Grace on prior occasions.

Leiblie also testified that sometime in December 1979, he and Jerry Lee Fisher had questioned employee Rich Washburn about food thefts at the Woods Chapel store and Washburn had apparently implicated other employees involved, whereupon either Fisher or Minton discharged two of these employees with Leiblie having no input in the decision whether to fire the employees or not and which employees were to be discharged.

Moreover Leiblie testified that he never attends any of the management meetings at the Woods Chapel store among Gerald E. Fisher, Jerry Lee Fisher, and Minton. He stated that he brings all his work-related or employee problems to Minton, as do the other employees at the store, "I would say 90 percent of the time it's Gary Minton. You go to him because he makes the schedules out and that's usually what the biggest complaint, you know, you want off or you need a vacation, whatever. But he usually is the one you usually go to." Minton acknowledged that problems concerning the Woods Chapel employees are generally brought to him for resolution.[98] However, Minton also testified, "Well, anytime that we've got a problem with some people that I can't talk to personally when I go home of an evening before they come in or something [Leiblie] takes care of that situation. He'll talk to them and he'll tell them what needs to be done and if there's any discipline. . . . When I'm not there, yes, he will take care of it."[99]

Furthermore, the evidence shows that the collective-bargaining agreement between the Union and Jerry's United Super, Inc. (Noland Road store) includes the position of assistant manager in the wage rate schedule. The record also shows that William Englebrecht, the Noland Road store's assistant manager, performs the same duties at that store as does Robert Leiblie, the assistant manager of the Woods Chapel store, and that Englebrecht is included in the bargaining unit as set forth in that agreement, with the Employer making monthly contributions to the Union's health and welfare and pension plan on behalf of Englebrecht, as well as deducting union dues from his paycheck that are remitted to the Union.[100] Additionally, Jerry Lee Fisher testified

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[93] The Respondent in its brief maintains that "There are at least four distinct circumstances based on the evidence in this case that cause the Union's apparent majority of 18 of 33 employees to disappear. Each of them stands alone and is an independent basis for finding that no card majority exists." The Respondent discusses this particular one in its brief as the "third reason for finding no majority."

[94] According to Minton, Leiblie's duties in "running the Dairy Department" are to order dairy products, set displays, stock the milk, and "put up cheese." Leiblie is the only employee in this department, although at times other employees will assist him in stocking the shelves, and Leiblie spends between 20–24 hours a week "physically in the Dairy Department."

[95] Minton testified that the Woods Chapel store is open 24 hours a day. He stated that "opening the store," usually done at 7 a.m., consists in, "We open the safe. We pull the two night drawers out of the cash register and we put the four—five register drawers in the registers ready for the day's business. Take the cash out of the bottom of the safe, put it in the cash drawers in the office ready for the day's business. . . . Closing the store consists of counting the daily cash drawers down. Putting the night drawers into the registers. Making up the deposit for the next day. Taking all the money out of the cash drawer and putting it into the safe. Putting the day drawers into the safe. Locking the safe."

[96] However, although apparently an unusual occurrence, when neither Minton, Jerry Lee Fisher, or Leiblie are present at the Woods Chapel store, Minton's "office girl" is left in charge of the store.

[97] When Minton was asked if he had told Leiblie about such authority, Minton at first responded that "[Leiblie] realizes that, I believe, yes." When pressed for a more direct response, Minton then answered, "Yes," that he had actually told Leiblie this.

[98] Mary Tignor testified similarly.

[99] Minton related that he generally spends from 10–12 hours daily at the Woods Chapel store, 6 days a week, sometimes being present during the day hours and sometimes during the evening hours depending on need, such as truck deliveries of goods. Minton's testimony concerning this was somewhat equivocal.

[100] See Jt. Exh. 1, G.C. Exhs. 28–33, and the testimony of Gary Minton. Moreover, while Leiblie testified that when he worked at the Noland Road store, Dave Lindsey was the assistant manager and that he believed that Lindsey was not "a member of the unit covered by the Collective Bargaining Agreement," there is much evidentiary confusion concerning this. Union President Davis identified Lindsey as "co-manager" of the Noland Road store with Gary Minton prior to the opening of the Woods Chapel store. Leiblie himself initially was not sure if Lindsey was

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that he had observed a notice posted by Leiblie in the dairy department that stated, "The next clown I catch eating food or drinking milk or whatever in this department, I will fire on the spot."

The Respondent alleges that Robert Leiblie is a supervisor within the meaning of Section 2(11) of the Act and a managerial employee as defined by the Board in case law. The General Counsel and the Charging Party assert that Leiblie is neither a supervisory nor a managerial employee.

Section 2(11) of the Act provides:

> The term "supervisor" means any individual having authority, in the interest of the employer, to hire, transfer, suspend, lay off, recall, promote, discharge, assign, reward, or discipline other employees, or reasonably to direct them, or to adjust their grievances, or effectively to recommend such action, if in connection with the foregoing the exercise of such authority is not of a merely routine or clerical nature, but requires the use of independent judgment.

Supervisors are excluded from collective-bargaining units of rank-and-file employees.[101]

The status of supervisor under the Act is determined by an individuals' duties, not by his title or job classification.[102] It is well settled that an employee cannot be transformed into a supervisor merely by the vesting of a title and theoretical power to perform one or more of the enumerated functions in Section 2(11) of the Act.[103] To qualify as a supervisor, it is not necessary that an individual possess all of these powers. Rather, possession of any one of them is sufficient to confer supervisory status.[104] However, although these enumerated functions in Section 2(11) of the Act are to be read in the disjunctive, that Section also "states the requirement of independence of judgment in the conjunctive with what goes before."[105] Thus the individual must consistently display true independent judgment in performing one of the functions in Section 2(11) of the Act. The exercise of some supervisory tasks in a merely "routine," "clerical," "perfunctory," or "sporadic" manner does not elevate an employee into the supervisory ranks.[106] Further, the existence of independent judgment alone will not suffice; "the decisive question is whether [the individual involved has] been found to possess authority to use [his or her] independent judgment with respect to the exercise . . . of some one or more of the specific authorities listed in Section 2(11) of the Act."[107] In short, "some kinship to management, some empathetic relationship between employer and employee must exist before the latter becomes a supervisor for the former."[108] Moreover, in connection with the authority to recommend actions, Section 2(11) requires that the recommendation must be effective.[109]

The Board has also excluded managerial employees from bargaining units of rank-and-file employees, with approval of the Courts.[110] The Board has defined "managerial employees" as those who formulate and effectuate management policies by expressing and making operative the decisions of their employers, and those who have discretion in the performance of their jobs independent of their employer's established policy.[111] As concerns "managerial employees," the Supreme Court, in *NLRB v. Textron, Inc.*,[112] stated:

> Of course the specific job title of the employees involved is not in itself controlling. Rather, the question whether particular employees are "managerial" must be answered in terms of the employees' actual job responsibilities, authority, and relationship to management.

The Board itself, in *Textron, Inc.*, 219 NLRB at 385, stated:

> . . . managerial status is not conferred upon rank-and-file workers, or upon those who perform routinely, but rather it is reserved for those in executive-type positions, those who are closely aligned

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comanager or assistant manager. Davis' uncontradicted testimony shows that Gerald E. Fisher had arranged to continue forwarding health and welfare and pension benefit payments for Lindsey under the Noland Road store agreement on Lindsey's transfer to the Woods Chapel store in order to ensure Lindsey's continuity of accrued credit for pension benefit purposes and to ensure that no lapse in benefit coverage would occur. Because union dues payments were continued by Jerry's United Super, Inc. (Noland Road store) for all the employees who had transferred to the Woods Chapel store, excepting Lindsey, I am uncertain whether Leiblie might not have said or meant that Lindsey was not a member of the "Union" rather than the "unit" and that the record transcript contains an inadvertent or typographical error that was not picked up by the parties. Lindsey's transfer to the Woods Chapel store as "produce manager" when he was either comanager or assistant manager of the entire Noland Road store tends only to further confuse this. Be that as it may, the above was never clarified by any of the parties here.

[101] See, for example, *Conair Corp.*, 261 NLRB 1189 (1982); *Republic Corp.*, 260 NLRB 486 (1982).

[102] *New Fern Restorium Co.*, 175 NLRB 871 (1969); *Meat Cutters Local 347 v. NLRB*, 422 F.2d 685 (D.C. Cir. 1969); *NLRB v. Bardahl Oil Co.*, 399 F.2d 365 (8th Cir. 1968); *NLRB v. Southern Bleachery & Print Works*, 257 F.2d 235 (4th Cir. 1958), cert. denied 359 U.S. 911 (1959).

[103] *Magnolia Manor Nursing Home*, 260 NLRB 377 (1982); *NLRB v. Southern Bleachery & Print Workers*, supra.

[104] *Kern Council Services*, 259 NLRB 817 (1981); *Penn Industries*, 233 NLRB 928 (1977), and cases cited therein. Also see *NLRB v. Berger Transfer & Storage Co.*, 678 F.2d 679 (7th Cir. 1982); *NLRB v. Joe & Dodie's Tavern*, 666 F.2d 383 (9th Cir. 1982); *NLRB v. Edward G. Budd Mfg. Co.*, 169 F.2d 571 (6th Cir. 1948), cert. denied 335 U.S. 908 (1949).

[105] *Poultry Enterprises v. NLRB*, 216 F.2d 798 (5th Cir. 1954).

[106] *Kern Council Services*, supra; *Complete Auto Transit*, 214 NLRB 425 (1974); *NLRB v. Security Guard Service*, 384 F.2d 143 (5th Cir. 1967); *NLRB v. Lindsay Newspapers*, 315 F.2d 709 (5th Cir. 1963).

[107] *NLRB v. Brown & Sharpe Mfg. Co.*, 169 F.2d 331 (1st Cir. 1948).

[108] *NLRB v. Security Guard Service*, supra.

[109] It should be noted that the burden of proving that one is a "supervisor" rests on the party alleging such status to exist. See *Commercial Movers*, 240 NLRB 288 (1979); *Benson Wholesale Co.*, 164 NLRB 536 (1967); *Risso & Co.*, 127 NLRB 1327 (1960); *Plumbers Local 636 (Detroit Edison)*, 123 NLRB 225 (1959).

[110] *NLRB v. Textron, Inc.*, 416 U.S. 267 (1974); *NLRB v. Yeshiva University*, 444 U.S. 672 (1980).

[111] *Eastern Camera & Photo Corp.*, 140 NLRB 569 (1963). Also see *Lockheed Aircraft Corp.*, 217 NLRB 573 (1975); *General Dynamics Corp.*, 213 NLRB 851 (1974).

[112] 416 U.S. 267, 268 fn. 19 (1974).

> with management as true representatives of management.

The General Counsel asserts that "it is irrelevant whether Leiblie's job responsibilities as assistant manager are supervisory within the meaning of Section 2(11) because *the Union's and the Employer's bargaining history, practice, and agreement is that the assistant manager is included in the bargaining unit.*" I do not agree. The Board, in *Washington Post Co.*, 254 NLRB 168, 169 (1981), held:

> Thus, except in certain limited and well-defined factual situations, the Board, when presented with an appropriate petition or claim, is required to exclude positions from a bargaining unit where the inclusion of those positions would violate the principles of the Act. While it may be that certain of the positions sought to be excluded by a unit clarification petition have long been included under previous contracts, and the job duties of those positions have remained unchanged, nonetheless, if it can be shown that the persons in such positions meet the test for establishing supervisory, managerial, or confidential status, we are compelled to exclude them.[113] . . . Of course, a history of inclusion in the bargaining unit for many years may be evidence that such a classification in fact is properly included in the unit. If there are no changed circumstances in terms of job duties, this, too, may constitute evidence on the status of the individuals sought to be excluded.[12]

In applying all the above to the question of Leiblie's supervisory status, I find and conclude that he is indeed a supervisor within the meaning of Section 2(11) of the Act. As assistant manager, his duties include "opening and closing" the Woods Chapel store, tasks that are performed only by himself and store comanagers Minton and Fisher. He also "does the books, cashes checks, solves problems" and "does all the running of the store," when the comanagers are not present. Since Leiblie spends between 20-24 hours a week attending to duties in the dairy department, he therefore performs the duties enumerated above as assistant manager for anywhere from 40-50 percent of his worktime during which he "solves problems" and sees to the "running of the store" with or without the presence of a comanager on the premises. Along with the comanagers, he has keys to the store, the offices, and the cash registers. He also has the combination to the safe. Leiblie is paid differently than most of the other employees, on a salary basis and he receives no overtime pay for hours worked in excess of 40 hours per week. Although the evidence is contradictory whether Leiblie possesses the right to discharge employees, and although he admittedly has never terminated or disciplined any employee, he has, on at least one occasion, *effectively recommended* an employee's discharge. And despite his own testimony to the contrary, Leiblie must believe, and most likely has been told, that he has the authority to at least effectively recommend discharge, if not terminate employees himself, as evidenced by the sign he posted in the dairy department threatening employees with dismissal if they are found "eating food or drinking milk."[114] Therefore I will exclude Robert Leiblie from the unit of employees found appropriate.

b. *Mary Tignor*

Tignor testified that she works in the bakery and delicatessen department at the Woods Chapel store along with eight or nine other employees.[115] She stated that her duties entail ordering the "bakery stuff," reporting to Minton what bakery goods are on hand, and discussing with Minton what bakery items should be placed on sale. Tignor related that although she works alongside the other employees in the department performing the same kinds of work that they do, she does tell employees what has to be done that day after consulting with Minton regarding the day's bakery needs. On occasion, albeit not occurring often or regularly, Tignor has complained to Minton about an employee's work or conduct, and Minton has spoken to the employee about this.[116] According to the testimony of Tignor, all employee requests for time off and all personnel problems in the department are brought to Minton directly by the employees themselves and not by her. Minton admittedly handles all such problems himself. She added that Minton schedules employees' work hours, including her own, and where they work. The evidence also shows that Tignor performs the same work as the other employees in the bakery and deli departments, baking goods and stocking bakery items on the shelves.

Marvin Paul, a former bakery employee at the Woods Chapel store, testified that Mary Tignor was the "deli and bakery supervisor" and "in charge of the deli and the bakery, seeing that things got done and seeing that people did what they were supposed to do." Paul related that Minton and Tignor would discuss the operation of the department every day, that Tignor orders the supplies for the bakery and deli department,[117] and that any requests for time off by employees and any other personnel problems in the department were handled by Minton. He stated that at the time that Minton had interviewed and hired him for the job, Minton had also introduced him to Tignor, stating that Paul would "be working *with* her" (emphasis added). Paul recounted that Tignor performed the same kind of work as did the other employees in the bakery and deli department, working alongside the other employees.

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[12] See, e.g., *McAlester Hospital Foundation, Inc., d/b/a McAlester General Hospital*, 223 NLRB 589 (1977), where the Board concluded that the disputed employees were intended to be included in the unit, but, in so deciding, placed the burden on the employer, which wanted to exclude the employees, to demonstrate that they were statutory supervisors at the time of the stipulation or that circumstances had changed justifying their exclusion. The employer's prior agreement that the disputed employees were not statutory employees at the time of the stipulation, although not controlling, was found by the Board to be "considerable in assessing any conflict that may arise" out of contrasting testimony. *Id.* 233 NLRB 589, fn. 1. See also *Peerless Publications, Inc.*, 190 NLRB 658 (1971).

[113] Also see *Brotherhood of Locomotive Firemen & Engineers*, 145 NLRB 1521 (1964).

[114] *Valu King*, 206 NLRB 1 (1973); *Food Marts*, 200 NLRB 18 (1972).

[115] Marvin Paul testified that there were about "15-20" employees in this department when he worked there. This could mean over the entire period and include different employees at different times.

[116] Paul testified that he had observed this happen on one occasion.

[117] Tignor testified that Betty Hoy also orders "deli goods" for the delicatessen department.

Minton testified that Tignor was in charge of the bakery and deli department, making sure that the bakery products are available, that the quality of the products is maintained, and that the employees perform their work properly. He stated that he consults with Tignor daily regarding how many employees are needed in the department and what bakery products should be put on "special," with Tignor determining the quantity of the bakery goods needed because of her more extensive experience in bakery goods production. Minton related that Tignor discusses employee problems with him and makes recommendations. He added that in the event Tignor recommends an employee's termination, Minton usually speaks to the employee to ascertain all the facts and, if discharge is necessary, Minton fires the employee. Tignor has no authority to discharge employees.

The Respondent asserts that Mary Tignor is a managerial employee and should be excluded from the unit of employees at the Woods Chapel store. The General Counsel and the Charging Party dispute this. On the facts in this case, I find and conclude that Tignor is neither a managerial nor a supervisory employee as defined by Board law and the Act, respectively. Tignor does not "formulate and effectuate management policies by expressing and making operative the decisions of their employers" and "does not have discretion in the performance of her job independent of her employer's established policy." The record shows that Tignor was transferred from the Noland Road store to the Woods Chapel store to provide an "experienced employee" in the bakery and deli department. Moreover, Tignor has no authority to resolve any personnel problems in her department, has no authority to hire, fire, or discipline employees, and the record does not show that she effectively recommended any of the above.[118] Additionally, while Tignor, apparently as part of her duties, sees that the work is performed properly, she does not schedule the employees regarding their work hours or where they work.

It is clear from all of the above that Tignor is neither a managerial nor supervisory employee but, because of her vaster experience and knowledge of the operation of a bakery and deli department, functions more likely in the nature of a working foreman. In view thereof, Mary Tignor should be included in the appropriate unit of employees at the Woods Chapel store.

c. *Ruth Gray*

Ruth Gray is the "Liquor Manager" at the Woods Chapel store. She is the sole employee in the liquor department. Her duties consist of ordering the stock, checking invoices regarding cost charges, counting the items when liquor deliveries are received, deciding what and how much inventory is needed, and stocking the shelves. However, she does not prepare payment of the invoices; Gerald E. Fisher does. The Respondent asserts that "With this broad power to affect Respondent's business and pledge its credit, she is clearly a managerial employee and should be excluded from the bargaining unit." I do not agree. A careful reading of her testimony concerning her duties does not support the Respondent's contention in any way. A substantial part of Gray's duties entail the kind that would normally be performed by a "head clerk," not requiring the formulation and effectuation of management policies, nor does she exercise the discretion usually associated with an independence in the performance of her job beyond her employer's established policy. Nor is Gray a supervisory employee as defined in the Act.[119] Because of all the above, I find and conclude that Ruth Gray should be included in the unit.

6. The Union's majority status

As indicated, the parties stipulated that there were 33 unit employees at the Woods Chapel store during the relevant period here. My finding that Robert Leiblie is a supervisory employee and should be excluded from this unit decreases this to 32 unit employees. The General Counsel submitted signed authorization cards for the following employees in the unit: Cheryl Earlene Baker, Mary Kay Cooper, Bernadette Cox, Donald Gann, Ruth

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[118] While Minton sought in his testimony to clothe Tignor with at least the authority to effectively recommend such actions, for the reasons noted concerning Minton's testimony, I credit that of Tignor and Paul over his. Besides, Tignor was still employed by the Respondent at the time she testified and, her testimony being somewhat adverse to the position of the Respondent, was given at some risk of possible reprisal and, therefore, not likely to be false. See *Parkview Acres Convalescent Center*, supra, and cases cited therein.

[119] See *Smith's Complete Market*, 237 NLRB 1424 (1978), and cases cited in fn. 6.

The Respondent cites *Parkwood IGA Foodliner*, 210 NLRB 349 (1974), and *Ed's Foodland of Springfield*, 159 NLRB 1256 (1966), in support of its contention that Gray is a managerial or supervisory employee. Both cases are distinguishable from the instant case. In *Parkwood IGA Foodliner*, the "produce manager," unlike Gray, had a part-time employee as an assistant four mornings a week, received a percentage of the profits from the produce department under certain circumstances, received certain fringe benefits provided only for supervisory and managerial employees, and set his own hours of work.

Again in *Ed's Foodland of Springfield*, the "meat department manager" had the authority to hire and discharge or effectively recommend the same." He did all the meat buying and chose the items to be put on the special list each week. He directed the meat department employees in their work and assigned them their work schedules . . . made the primary decision as to the choice of the specials . . . it was his duty and responsibility to see to it that the meat department made a profit." The administrative law judge in the case found on the basis of the above that the "meat department manager" was "a supervisor and that in any event because of his duties of meat buying and thereby pledging the Respondent's credit and because of his duties in making up the ads and the specials in the meat department, he was an employee closely allied with management." Aside from the obvious fact that Gray is not a supervisory employee as was the "meat manager" in the cited cases, regarding her managerial status the apparent differences are: that the "meat department manager" had discretion in the purchasing of meat that would imply the choice of quality, and price, with further discretion about what items to consider as a "special," while it would seem that Gray ordered standard brands on the basis of stock needs, with "specials" dictated by the wholesalers' pricing of the item rather than her independent judgment thereof; under the Respondent's theory, it could be said of anyone who places an order for merchandise, *without more*, that the employee is a managerial employee because he pledges an employer's credit. The Board certainly did not intend such a result when it carefully evolved the case law defining a managerial employee. Circumstances such as nature, scope, discretion, and other duties, must be considered in determining this.

Gray, Sondra Hertzog, Tim Hicks, Betty Hoy, Jeanne Hubbard, Madalene Hunt, Cinda Kreiser, Marvin Paul, Joan Prine, Barbara Robinson, Sandra Straw, Mary Tignor, Mary Watters. Thus, 17 of 32 unit employees authorized the Union to represent them for purposes of collective bargaining, clearly a majority of the employees in the appropriate unit.

However, the Respondent in its brief asserts that statements made by James Hillen, a union organizer, to unit employees at the time he solicited their signatures on authorization cards (12 in number) constituted a material misrepresentation sufficient to negate these cards and that they therefore should "be disregarded" with the result that the Union has no majority representation among the employees in the appropriate unit.[120] The Respondent maintains,

> The critical factor however is that [Hillen] represented to each of these employees that they would have a chance to vote on any contract which might cover them. Such a representation would not offset the validity of the cards in an ordinary 8(a)(5) bargaining order case but this is not an ordinary case. In this case, Counsel for General Counsel contends that the cards should be used to support an order including these employees in an existing collective-bargaining agreement without an opportunity to vote. Respondent does not doubt that Hillen was sincere in making this representation to the employees because, as previously discussed, it was the Union's intention to negotiate a separate contract for Woods Chapel and there is no reason to doubt the Union would have kept the promise. However, the fact is that these cards are not being used for the purpose for which they were signed and under the circumstances the promise of a vote is a material misrepresentation that undermines the validity of the cards. No one can say now if these employees would have signed their cards if they had understood they were to be used to make them junior employees in a two-store unit to be named later with the resulting reduction in their protection against layoffs.

Hillen testified at the hearing that he told the employees when he solicited their signatures on the union authorization cards, in substance, that the Union was conducting an organizing campaign, that "the cards could be used in several different ways," that if the Union obtained "a majority of the employees signed up," it would request a "card check" and if the "Company refuses to grant us a card check," the Union could seek a Board election. Hillen also told them that should the Company recognize the Union as the collective-bargaining representative of the Woods Chapel employees in the appropriate unit, or the Union wins an election, then the Union and the Company would "sit down" and "negotiate contracts to cover their wages, hours and conditions of employment." Hillen acknowledged that he had additionally told them that "they would have a chance to vote on the contract."

The Supreme Court, in *NLRB v. Gissel Packing Co.*, 395 U.S. 575, 606-607 (1969), stated concerning the validity of disputed authorization cards:

> [W]e think it sufficient to point out that employees should be bound by the clear language of what they sign unless that language is deliberately and clearly canceled by a union adherent with words calculated to direct the signer to disregard and forget the language above his signature. . . . We cannot agree with the employers here that employees as a rule are too unsophisticated to be bound by what they sign unless expressly told that their act of signing represents something else . . . .
>
> [F]or cards to be invalidated on the basis of such misrepresentation, it is necessary that the asserted reliance on the misrepresentation be established by objective evidence corroborating or supporting the subjective assertion.

A misrepresentation will be disregarded when it is clear that the employees did not rely on it in executing the authorization cards.[121] And if the card unequivocally and unconditionally gives the union authority, then misrepresentation, to invalidate the card, must have indicated that the card would be used only for a different, more limited purpose than that stated on the card.[122] That the authorization cards given to the employees applicable here were unambiguous is evident from the record. These were single purpose authorization cards. The card states on its face that the signer authorizes the Union to represent the employee for collective-bargaining purposes.[123] Moreover, it is the Respondent who must show clear and convincing evidence of material misrepresentation to invalidate otherwise unambiguous authorization cards, and it has failed to do so.[124]

The Respondent also challenges the Union's majority representation on the grounds that:

> [T]wo cards obtained by Union representative Barclay (G.C. Exhs. 37 and 38) do not designate either Retail Store Employees Union Local 782 or the United Food and Commercial Workers International Union. Instead, Exhibits 37 and 38 designate the Retail Clerks International Union. There is no record evidence explaining what this Union may be and the cards were somewhere in the middle of the time sequence. It is submitted that at best Retail Clerks International Union was non-existent at the

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[120] This is the first of the circumstances set forth in the Respondent's brief as a "basis for finding that no card majority exists."

[121] *Engineers & Fabricators*, 156 NLRB 919 (1966), enf. denied in part 376 F.2d 482 (5th Cir. 1967).

[122] *NLRB v. Gissel Packing Co.*, 395 U.S. 575 (1969).

[123] *WCAR, Inc.*, 203 NLRB 1235 (1973).

[124] *NLRB v. Gissel Packing Co.*, supra; *Cato Show Printing Co.*, 219 NLRB 739 (1975). Although several employees who had signed union authorization cards testified here, not one of them testified that they had signed the card solely in reliance on Hillen's statement to them that "they would have a chance to vote on the contract." The record in this case clearly shows that the employees signed union authorization cards because they wanted union representation.

> time the cards were signed. In any event, in the absence of record evidence that this Union is the same or somehow connected with either Retail Store Employees Union Local 782 or the United Food and Commercial Workers International Union, then these cards cannot be counted.[125]

Again, I do not agree.

Initially, the Board has long held, with court approval, that an authorization card designating a parent labor organization serves as a valid designation of its affiliate.[126] The Union was the sole union seeking to organize and represent the employees.[127] Moreover, there is no evidence that the card signers were, in fact, confused, or believed that they were designating any other union separate from the Union here, which was requesting their signatures. There is no reason to believe in this case that employees were either presented with different possible representatives or were being requested to choose a yet-to-be-determined representative.[128] I, therefore, find the authorization cards in question sufficient to evidence the employees' desire to be represented by the Union.

The Respondent additionally asserts:

> The fourth reason that there was no majority relates to the dates that certain cards were signed, specifically General Counsel Exhibits 19 through 21. The only written demand for recognition and the only demand alleged in the complaint or the petition for an election was the demand mailed January 16, 1981. There is a certain lack of logic to the argument for a "continuing demand" because at least in theory it could run forever and an employer might never know when the actual bargaining obligation attached. The better rule, especially in a *Kroger*-type case, would be to insist that the Union have a majority at the time the formal demand is made. *Gould, Inc., Electrical Components Division*, 263 NLRB No. 35 (1982). However, even under the existing Board cases, a demand does not last forever. If Robert Leiblie is excluded from the unit as a supervisor, the Union has 17 cards in a unit of 32 employees. In *Stoutco, Inc.*, 180 NLRB 178, the Board adopted the determination of Trial Examiner Maurice S. Busch at page 185 that even a continuing demand for recognition terminates when a petition for an election is filed. At the time the petition was filed on January 30 (R. Ex.1), the Union lacked a majority because the final necessary card was not signed until February 3, 1981 (GC Ex. 21). Thus, at the time the Union's demand or demands expired with the filing of the petition, the Union had only 16 cards in a unit of 32 and lacked majority status.

Again, I must disagree with this argument.[129]

As the record clearly shows, Jerry's United Super, Inc. (Noland Road store) and the Union were parties to a collective-bargaining agreement whose term ran from May 14, 1979, to May 9, 1981. The agreement contains what can only be reasonably construed as an "after-acquired store" clause, stating

> 2.1 The Employer hereby recognizes the Union as the sole and exclusive collective bargaining agent . . . for the appropriate bargaining unit herein established and described as follows: All employees employed by the Employer *working in the Employer's present and future retail establishments.*

Thus, at the relevant and material times set forth, the agreement was in full force and effect including the "after-acquired store" clause therein.[130]

Significantly, the Employer itself recognized that there was an "after acquired store" clause in its Noland Road store agreement with the Union that required it to recognize and bargain with the Union about its new proposed Woods Chapel store. What other interpretation could reasonably arise from the actions of Gerald E. Fisher in initially contacting the Union with the information that a new supermarket, the Woods Chapel store, was to be opened, and would the union president meet with Fisher to collectively bargain about the Woods Chapel employees, and in the wording in the October 2, 1979 memorandum regarding the application of the Noland Road store contract to the Woods Chapel store after the meeting between the parties took place.

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[125] This constitutes the second circumstance in the Respondent's brief disputing the Union's asserted majority representation.

[126] *NLRB v. Bradford Dyeing Assn.*, 310 U.S. 318 (1940); *NLRB v. Franks Bros. Co.*, 137 F.2d 989 (1st Cir. 1943).

[127] *Teamsters Local 707 (Claremont Polychemical)*, 196 NLRB 613 (1972); *Texas Electric Cooperatives*, 160 NLRB 440 (1966).

[128] *Cam Industries*, 251 NLRB 11 (1980).

[129] Although disagreeing with counsel for the Respondent consistently, I would be remiss if I did not note, with some admiration, the fertility of his mind regarding his arguments in support of the Respondent's positions on the various issues raised here.

[130] The Respondent contends that the memorandum of October 2, 1979, "effectively rescinded such clause by providing a significantly different procedure for dealing with Woods Chapel. . . . Substitution of a different agreement has the effect of rescinding the prior agreement with regard to after acquired stores." The Respondent asserts that, therefore, no agreement containing an "after acquired store" clause "existed at any relevant time." I do not agree with this contention. At best, the memorandum of October 2, 1979, if valid, would be a modification of the bargaining agreement between the parties, not a rescission thereof as concerns the new Woods Chapel store. No other meaning can be reasoned therefrom in view of the parties' agreement that this was an "accretion" to the agreement already in effect at the Noland Road store. Although the word "accretion" is improperly used, the "after acquired store" clause interpretation and application is evident. Moreover, the case cited by the Respondent to support this contention does not in fact do so. In that case, "*Local Union 1617, United Steelworkers of America, et al. v. GF Business Equipment, Inc.*, 105 LRRM 2762, 2764 (U.S. Dist. Ct. N.D. Ohio, 1978)," the memorandum of agreement between the parties provided for improved benefits to employees by modifying the severance allowance provision of an existing collective-bargaining agreement *specifically*, "in lieu of any commitment" by the employer to continue its operations at a specified location. As the court stated:

> [T]he September 15, 1976 Memorandum of Agreement sets forth in clear and unambiguous language an agreement whereby *for the consideration* of additional severance allowance provided by the defendant, plaintiffs recognized the company had no commitment to continue its operations in Youngstown. If there was any prior contract to build a new facility in Youngstown, it would, by its very nature, have implied additional commitment by the company to its operations in Youngstown. Thus, the 1976 Memorandum of Agreement is inherently inconsistent with any 1972 agreement to build a new facility, and must be viewed as effecting a rescission of any 1972 contract. [Emphasis added.]

In the instant case, however, the modifications made in the October 2, 1979 "agreement," if it had been valid, was not "in lieu" of any obligation contained in the Noland Road agreement and thus cannot be perceived as a rescission of that agreement. Actually the reference in the October 2, 1979 "agreement" regarding the application thereof to the Woods Chapel employees as an "accretion" to the Noland Road agreement would negate any such finding of a rescission.

In late April 1980, by telegram, the Employer informed the Union that it was repudiating the October 2, 1979 "purported agreement" and that union representation of the Woods Chapel employees "*can only be obtained and granted* through appropriate procedures of the National Labor Relations Board under the National Labor Relations Act" (emphasis added). This wording in the Employer's telegram carries the strong indication that thereafter and only by means of the Board's election procedures could the Union hope to secure recognition as the collective-bargaining representative of the Woods Chapel employees. But under the Board's ruling in *Kroger,*[131] the Employer had waived its right to demand an election to determine representation pursuant to the "after acquired store" clause in the Noland Road agreement and was duty bound to recognize the Union when and if the Union presented unequivocal evidence in the form of signed authorization cards that it represented a majority of the Woods Chapel employees in an appropriate unit.

With this as background, the Union now sought to secure signed authorization cards from a majority of the Woods Chapel employees in an appropriate unit. By letter dated January 17, 1981, the Union notified the Employer that it represented a majority of unit employees at Woods Chapel and requested recognition and bargaining. In response, the Employer, by letter dated January 22, 1981, again asserted its refusal to acknowledge or accept any claim by the Union to majority representation outside a Board conducted election, again apparently foreclosing any consideration by it of the possibility of recognition based on a signed authorization card count. The Employer also stated that, "We do not believe you represent the majority of our employees."

Despite the above, the Union again sought to obtain recognition on the basis of what it believed to be its majority representation of the Woods Chapel employees in an appropriate unit as evidenced by signed authorization cards by visiting the Employer's Noland Road store and demanding recognition and bargaining from Gerald E. Fisher, the Employer's owner. The record indicates that Fisher refused to discuss recognition and bargaining with the Union and referred the Union to the Employer's legal counsel for any further discussion or action. On January 26, 1981, in a telephone conversation, Union Organizer Hillen and Willard, the Employer's newly hired legal counsel, the Employer, through Willard, again refused to accept a "card check," but indicated, in effect, its acquiescence to a Board election; whereupon, on January 30, 1981, the Union filed its "Petition" with the Board seeking, by means of the Board's elective processes, recognition as the exclusive bargaining representative of the Employer's Woods Chapel employees.[132]

Under the circumstances presented above, I *cannot* find that the Union's demand for recognition and bargaining did not continue after the filing of its petition with the Board on January 30, 1981. While in fact the Union did not represent a majority of the Woods Chapel employees in an appropriate unit when it made its demands for recognition and bargaining up to the date of the filing of its petition, the *Kroger* case would, of necessity, require the presence of a continuing demand regarding an "after acquired store" clause until the Union obtained a majority of the new store employees or failed to do so at any time, or until the "after acquired store" clause was negated in a subsequent agreement between the parties. Therefore, according to my previous findings, the Union attained bargaining representative status of a majority of the Employer's Woods Chapel employees on February 3, 1981, when it obtained the signed authorization card of Ruth Gray. Since the Union's demand continued in force and effect even after it filed its petition with the Board, the obligation of the Employer to recognize and bargain therewith became effective on that date.

The case cited by the Employer, *Stoutco, Inc.*, 180 NLRB 178 (1969), to support its contention that the Union's demand for recognition and bargaining was made at a time when the Union had not yet attained its majority status and such demand was "exhausted, spent, and unoperative" when the Union finally attained majority status after it had filed its petition with the Board for an election, is clearly distinguishable on the facts. First, it should be noted that the "Trial Examiner" specifically limited his ruling to "the full circumstances of this case." Next, he himself set forth the differences in that case and what, in effect, are the circumstances in the instant case. He stated:

> Counsel for General Counsel also advances the further argument that ". . . even if the original demand were not a continuing one, the Union's processing of its representation petition in itself constituted a continuing demand sufficient to place on Respondent a duty to bargain." . . . *American Compressed Steel Corporation*, 146 NLRB 1463, 1470–71, enfd. 343 F.2d 307. . . . cited by Government counsel in support of these propositions, contain factual situations so entirely dissimilar from here as to be inapposite. In the *American Compressed Steel Corporation*, the Union made written demand for recognition on April 18, filed a petition for election on April 22, but did not attain majority status until

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[131] *Kroger Co.*, supra.

[132] I am not unaware that the Union actually had not as yet obtained signed authorization cards from a numerative majority of such employees at this time. However, the Employer refused and failed to view the signed authorization cards already in the Union's possession and tendered by the Union for review by the Employer, to determine if, in fact, the Union did represent a majority of the Woods Chapel employees. Moreover, under the circumstances in this case, the Union had reason to believe, although incorrectly, that it did represent a majority of these employees since, of 33 employees alleged to be in the appropriate unit, the Union had 17 signed authorization cards, with Leiblie's.

> April 25, 1963. The Trial Examiner in that case whose decision the Board adopted, found a violation of Section 8(a)(5) but only because the Employer in that case had totally ignored the Union's demand letter and thus evinced "an outright refusal of the Union's request without regard to the number of cards here." Under these circumstances, the Examiner in the *American Compressed* case held "it would have been futile for the Union formally to renew its request after April 25." In the instant case, as seen, the Company did reply by letter of June 24 to the Union's request, declining recognition because of a stated honest belief that the Union did not represent a majority of its employees and suggesting that the Union file an election petition. There is no indication in Respondent's letter or any other conduct of the Respondent that it might not have acceded to a later request for recognition based on a card count. The fact that the Union, on June 12, 1968, entered into a stipulation with Respondent for a consent election is an indication that the Union from and after the filing of its petition for an election on June 25 was no longer insisting that the Company recognize the Union as the representative of its employees on the basis of a card count.

That the circumstances in the instant case differentiate the above is obvious. First, as previously indicated, the Employer was obligated under the "after acquired store" clause in the Noland Road agreement to submit to a card count. Second, the Employer foreclosed any consideration of the possibility of recognition based on a card count in its telegram of April 29, 1980, in which it stated that "representation can only be obtained and granted through appropriate procedures of the National Labor Relations Board"; again in its letter dated January 22, 1981, in response to the Union's demand for recognition and bargaining wherein it unequivocally refused to recognize the Union unless the Board' s election procedures were used; and once again in its position conveyed to the Union by its legal counsel Willard on January 26, 1981, that it would not accept a "card check," but also would not oppose an election. That the Employer's actions constituted "an outright refusal of the Union's request without regard to the number of cards here" is evident. Also clear from the above is the fact that "it would have been futile for the Union formally to renew its request" after January 26, 1981, based on the above.

Furthermore, under these circumstances, the fact that the Union filed a petition for an election and on February 13, 1981, executed a "Stipulation for Certification Upon Consent Election" does not have the same effect as similar action by the union in the *Stoutco, Inc.* case where it was construed to mean that the Union was "no longer insisting that the Company recognize the Union as the representative of its employees on the basis of a card count." Faced with the Employer's intransigent position, the Union did what it could under the circumstances and followed Board procedure for an election and subsequently filed an unfair labor practice charge.

Moreover, the Employer's "good-faith doubt" of the Union's majority representation was based on an employee's assertion that several of the Woods Chapel employees had held a meeting during which they agreed that they did not desire union representation, this employee being the son of Gary Minton, a comanager of the Woods Chapel store. A review of the signed authorization cards by the Employer could have ascertained, in fact, whether the Union represented a majority and the Employer was obligated to do this anyway. Unlike the instant case, analogously, in the *Stoutco, Inc.* case, the respondent there experienced "very large labor turnovers, with four out of six employees quitting their jobs shortly after hiring," reasonably giving rise to the respondent's "good-faith doubt" regarding the Union's then majority.[133]

And finally, in its brief, the Employer, in substance, asserts that the Union failed to communicate, in its demand for recognition and bargaining, the fact that it was requiring the Employer to include or "fold in" the Woods Chapel employees into the unit appropriate under the Noland Road contract pursuant to the "after acquired store" clause in that collective-bargaining agreement between Jerry's United Super, Inc. (Noland Road store) and the Union. "Respondent submits that while the January 16, 1981 letter was a sufficiently clear request for individual bargaining by Woods Chapel, it did not put Respondent on notice that something more than bargaining was required." The brief continues:

> The facts of this case demonstrate that the Union did not intend that the Woods Chapel unit be merged with the Noland Road unit, let alone request such a result. The request (GC Ex. 7) was directed to Gary Minton, manager. . . . The language of the request refers simply to bargaining for the Woods Chapel employees and contains absolutely no reference to the Noland Road store. . . .
>
> The Union's course of action for an entire month after the January 16 demand suggested that they sought only recognition and bargaining in the Woods Chapel unit. The other stores were not mentioned. As the Third Circuit has observed, "the acts of the union and the employer at the time the demand is alleged to have been made are not to be viewed in isolation. Events subsequent to the request may be examined in making the determination . . ." *Steel City Transport, Inc.* v. *N.L.R.B.*, 389 F.2d 753, 759 (3rd Cir. 1968).
>
> The petition for an election in Case 17-RC-9193 (R. Ex. 1) and the election agreement (R. Ex. 2) deal exclusively with the Woods Chapel unit and the election agreement contains the express statement that Woods Chapel is the only facility involved. . . .
>
> The Union's true intention and change in plan may be discerned from its communications to the Woods Chapel employees of February 10 and 18, 1981. On February 10 the Union was interested in a "speedy election" (R. Ex. 3) but on February 18 (R. Ex. 4) the Union announced that it has "*uncovered*

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[133] Also for the reasons asserted above, *Gould, Inc.*, supra, cited by the Employer, does not support its contentions.

> *some additional information* which leads it to believe the store in which you work should already be union according to the Federal Labor Law." [Emphasis added.]
>
> The only inference which can be drawn from this course of action, including the communications to the employees, is that it never occurred to the Union that it might be able to insist that Woods Chapel be included under the Noland Road contract at the time the demand was made, at the time the petition was filed or the election agreement was entered into. Since the Union was not aware of that possibility at that time, under no conceivable circumstances could it have made a demand to invoke the after-acquired store clause of the Noland Road contract. Had it made such a demand, even at that late date and given Respondent an opportunity to consider its alternative in view of the type of request, the card check might have been accepted, but instead the Union left it in the posture of a demand to represent the Woods Chapel employees separately and in that situation Respondent was entitled to an election.

Regarding the Court's own finding, as cited by the Respondent, "the acts of the union and the employer at the time the demand is alleged to have been made are not to be viewed in isolation," and it should be noted that the Employer itself was aware that the Woods Chapel employees could fall within the purview of the Noland Road contract's "additional" or "after-acquired store" clause and acknowledged the same when, with the Union, it signed the October 2, 1979 "agreement," although this "agreement" was unlawful under the Act.[134] As indicated above the only possible interpretation and meaning of the October 2, 1979 "agreement" between the Respondent[135] and the Union[136] under the facts and circumstances of this case can be that the terms and conditions of the collective-bargaining agreement between the parties in effect at the Noland Road store would become applicable to the new Woods Chapel store pursuant to the "after-acquired store" clause present therein, but with the modifications worked out by the parties. As set forth above this is clearly evidenced by the following: that Gerald E. Fisher, owner of both the Woods Chapel and Noland Road stores, himself sought out the Union regarding the Union's representation of the Respondent's new Woods Chapel store employees; that the October 2, 1979 "agreement" makes reference to its being an "accretion" to the Noland Road store collective-bargaining agreement already in force and effect, albeit an incorrect usage of the word; that Fisher's request for a concession deferring the effective date and application of the terms of the collective-bargaining agreement to May 4, 1980, and his statement to Davis that this date coincides with the new wage rates going into effect, which would save him a "lot of bookkeeping" and time, clearly referring to the Noland Road bargaining agreement; and the arrangements made to cover employees transferred from the Noland Road to the Woods Chapel store so that there would be no loss of their pension and health and welfare coverage under the bargaining agreement covering the Noland Road store employees for the deferred period.[137]

Subsequently the telegram dated April 25, 1980, and signed by Gerald E. Fisher, again to be noted as the owner of both the Noland Road and Woods Chapel stores, the Employer clearly repudiated the October 2, 1979 "agreement" as being unlawful under the Act. Pointing to its significance again, the telegram states:

> In the event you desire to represent the employees of Woods Chapel United Super, Inc., said representation *can only* be obtained and granted through appropriate procedures of the National Labor Relations Board.

This clear, unequivocal, and final statement of the Employer's position regarding recognition and bargaining, when read in connection with the content and meaning of the entire telegram, could only convey one certain impression, that being that the Employer refused under any circumstances to grant force and effect to the "after-acquired store" clause of the Noland Road agreement regarding its application to the Woods Chapel store employees.

As set forth, the Employer's position was restated in its letter of response to the Union's request for recognition and bargaining dated January 17, 1981, made clear again when the Union's representatives demanded recognition in a face-to-face meeting at the Noland Road store on January 20, 1981, with Gerald E. Fisher, and once more in a telephone conversation with the Employer's legal counsel, Willard, on January 26, 1981.

Because of the foregoing, I neither can credit nor comprehend how the Respondent can now allege unawareness of the Union's intent concerning its demand for recognition and bargaining or the confusion thereof. The Employer had foreclosed its consideration of the Union's demand for application of the Noland Road bargaining agreement to the Woods Chapel store employees on more than one occasion. What other course of action did the Employer leave open to the Union than to proceed as it did. Now the Employer complains about this as resulting in confusion and being misleading. The *Kroger* case mandates that the Union represent a majority of the Woods Chapel store employees in an appropriate unit prior to the Employer becoming obligated to recognize and bargain with the Union. Since, under *Kroger*, that bargaining would entail the application of the Noland Road agreement to the Woods Chapel store employees as is, or with modifications based on the needs of the Woods Chapel store employees, as perceived and agreed on by the Employer and the Union, and since the Employer had previously repudiated the October 2, 1979 "agreement" as unlawful, there having been no employees hired at Woods Chapel at the time, after having initially evidenced knowledge and acceptance of the "after-acquired store" clause in the Noland Road agreement, it could well be argued that the Union's demand concerning the Woods Chapel employees intended compliance with the *Kroger* requirement of majority representation, and to remedy the Employer's previous basis for its refusal to recognize and bargain with the Union thereunder. The Employer was represented by competent legal counsel and had already, once before, acknowledged possible *Kroger* compliance. The Employer cannot now assert it had no knowledge concerning what the Union was seeking when it demanded recognition and bargaining. Under the circumstances in this case, the Union could have validly been seeking either a *Kroger* case result or a Board election without the Employer being entitled to challenge the efficacy of the Union's demand on the basis of conclusion or being mislead. Significantly the Employer never raised this in its contacts with the Union at any time.[138]

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[134] The Woods Chapel store was not even in operation when this "agreement" was entered into, no employees had been hired at that time or "were in place," and under the *Kroger* case rule, the Union did not represent a majority of the Woods Chapel employees at the time.

[135] It should be remembered that Gerald E. Fisher, the owner of both the Woods Chapel and Noland Road stores negotiated and signed the agreement on behalf of the Respondent.

[136] The Union's president, Earl Davis, negotiated and signed the agreement in the Union's behalf.

[137] I find this to be true despite the use of the plural "agreements" in the October 2, 1979 "agreement." None of the circumstances described could possibly refer to the Chrysler store bargaining agreement but only to that affecting the Noland Road store.

From all the above, I find and conclude that the Employer violated Section 8(a)(5) and (1) of the Act when it failed and refused to recognize and bargain with the Union on February 3, 1981, when the Union represented a majority of the Woods Chapel employees in an appropriate unit. As a single employer, this Employer was committed to recognize the Union, under the "after-acquired store" clause, as the exclusive bargaining representative of such employees and to apply the collective-bargaining agreement the new Woods Chapel store operation, and its refusal and failure to do so was violative of the Act.[139]

IV. THE EFFECT OF THE UNFAIR LABOR PRACTICES ON COMMERCE

The activities of the Employer set forth in section III, above, found to constitute unfair labor practices occurring concerning its operations described in section I, above, have a close, intimate, and substantial relationship to trade, traffic, and commerce among the several States and tend to lead to labor disputes burdening and obstructing commerce and the free flow thereof.

V. THE REMEDY

Having found that the Employer has engaged in certain unfair labor pactices, I recommend that they be ordered to cease and desist therefrom and take certain affirmative action designed to effectuate the policies of the Act.

I shall recommend that the Employer be ordered to recognize and bargain with the Union on request as the exclusive representative of the Woods Chapel store employees in the unit found appropriate; on request, to apply and extend the existing collective-bargaining agreement it has with the Union at the Noland Road store with retroactive effect from and after February 3, 1981, the date the Union attained its majority representation of the Woods Chapel store employees; make the unit employees at the Woods Chapel store whole for any loss of pay and benefits resulting from the Employer's failure to apply the terms and conditions of such collective-bargaining agreement to them, the backpay due thereunder shall be computed with interest as prescribed in *Florida Steel Corp.*, 231 NLRB 651 (1977);[140] post an appropriate notice at its Noland Road and Woods Chapel stores as provided for here; and cease and desist from in any like or related manner interfering with, restraining, or coercing its employees in the exercise of rights guaranteed to them by Section 7 of the Act.[141]

CONCLUSIONS OF LAW

1. The Respondent, Woods Chapel United Super, Inc. d/b/a Jerry's United Super, is an employer engaged in commerce within the meaning of Section 2(5) of the Act.

2. Woods Chapel United Super, Inc. d/b/a Jerry's United Super and Jerry's United Super, Inc. constitute a "single employer" within the intendment of Board doctrine.

3. United Food and Commercial Workers Union, Local No. 782, is a labor organization within the meaning of Section 2(5) of the Act.

4. All employees employed at the Employer's facilities located at 3443 South Noland Road, Independence, Missouri, and 1201 North Woods Chapel Road, Blue Springs, Missouri, but excluding all meat department em-

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[138] Regarding its assertion that the Union failed to make proper demand, the Employer in its brief also maintains

> The Board has faced a somewhat similar problem in an accretion context and has imposed upon the Union a duty to make its demands known at the earliest possible stage, observing that:
>
> > Also the Seafarers apparently did not consider the *Siboney* as accreted to the existing unit; inasmuch as the Seafarers failed to raise the accretion issue at the time Respondent requested information as to what type of area contract might be applicable in the contemplated use of the Siboney. Reynolds Metal Company, 219 NLRB 624, 625 (1975).
>
> Before a person can be required to take certain action on the demand of another, that demand must be clear enough to put the person on notice that certain conduct is requested. A demand for recognition and bargaining addressed to the manager of one corporation surely cannot trigger an obligation of an unidentified separate corporation whatever the maximum effect of the single employer doctrine may be.

I find that the Employer's position is untenable because of the facts and circumstances present in this case and my above findings concerning the demand. Moreover, the case cited by the Employer in support of the above, *Reynolds Metal Co.*, supra, is clearly distinguishable from the instant case. Aside from the obvious difference that accretion and *Kroger*-type cases have different principles applicable thereto, in *Reynolds Metal* the existing bargaining agreement was found to have no application to the new ship involved, and the union failed to raise the accretion issue when specifically asked by the employer about "what type of contract might be applicable in the contemplated use of the *Siboney*." In the instant case, the Noland Road agreement was applicable under *Kroger* to the new Woods Chapel store, the Employer was aware that it was that agreement and none other under consideration initially, and though the Union never indicated a change, and in certain terms indicated such in its demand requests, yet the Employer, if confused, never requested clarification or any information.

[139] *Kroger Co.*, supra. Also see *Joseph Magnin Co.*, supra.

[140] See generally *Isis Plumbing Co.*, 138 NLRB 716 (1962).

[141] *Hickmott Foods*, 242 NLRB 1357 (1979). Also see *Joseph Magnin Co.*, supra.

ployees, office clericals, guards, and supervisors as defined in the Act, constitute a unit appropriate for the purposes of collective bargaining within the meaning of Section 9(b) of the Act.

5. The collective-bargaining agreement between the Employer and the Union concerning the store located at 3443 South Noland Road, Independence, Missouri, effective May 14, 1979, through May 9, 1981, contains a valid "after-acquired store" clause.

6. Since February 3, 1981, the Union has been the exclusive collective-bargaining representative of all employees employed in the unit found appropriate in Conclusion 4, above, more particularly those employed at 1201 North Woods Chapel Road, Blue Springs, Missouri, for purposes of collective bargaining within the meaning of Section 9(a) of the Act.

7. By refusing, on or after February 3, 1981, to recognize and bargain with the Union as the collective-bargaining representative of the employees employed at 1201 North Woods Chapel Road, Blue Springs, Missouri, as part of the appropriate unit, the Employer violated Section 8(a)(5) and (1) of the Act.

8. By refusing, on or after February 3, 1981, to apply and extend to the employees in its store located at 1201 North Woods Chapel Road, Blue Springs, Missouri, as part of the appropriate unit, the existing collective-bargaining agreement it has with the Union at its store located at 3443 South Noland Road, Independence, Missouri, the Employer violated Section 8(a)(5) of the Act.

9. The unfair labor practices found above are unfair labor practices affecting commerce within the meaning of Section 2(6) and (7) of the Act.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[142]

ORDER

The Respondent, Woods Chapel United Super, Inc. d/b/a Jerry's United Super and Jerry's United Super, Inc., their officers, agents, successors, and assigns, Blue Springs and Independence, Missouri, shall

1. Cease and desist from

(a) Refusing to recognize and bargain with United Food and Commercial Workers Union, Local No. 782, as the exclusive representative of their employees in their store located at 1201 North Woods Chapel Road, Blue Springs, Missouri, as part of the unit found appropriate here.

(b) In any like or related manner interfering with, restraining, or coercing its employees in the exercise of rights guaranteed to them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) On request, recognize and bargain collectively with United Food and Commercial Workers Union, Local No. 782, as the exclusive representative of their employees in their store located at 1201 North Woods Chapel Road, Blue Springs, Missouri, as part of the appropriate unit.

(b) On request, apply and extend to the employees in their store located at 1201 North Woods Chapel Road, Blue Springs, Missouri, as part of the appropriate unit, the existing collective-bargaining agreement they have with United Food and Commercial Workers Union, Local No. 782, at their store located at 3443 South Noland Road, Independence, Missouri, with retroactive effect from and after February 3, 1981.

(c) Make the employees employed at their store located at 1201 North Woods Chapel Road, Blue Springs, Missouri, in the appropriate unit, whole for any loss of pay or benefits with interest they may have suffered by reason of the unfair labor practices engaged in by the Employer here.

(d) Preserve and, on request, make available to the Board or its agents for examination and copying, all payroll records, social security payment records, timecards, personnel records and reports, and all other records necessary to analyze the amount of backpay due under the terms of this Order.

(e) Post at their stores located at 3443 South Noland Road, Independence, Missouri and 1201 North Woods Chapel Road, Blue Springs, Missouri, copies of the attached notice marked "Appendix."[143] Copies of the notice, on forms provided by the Regional Director for Region 17,after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material.

(f) Notify the Regional Director in writing within 20 days from the date of this Order what steps the Respondent has taken to comply.

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

Section 7 of the Act gives employees these rights.

To organize
To form, join, or assist any union
To bargain collectively through representatives of their own choice

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[142] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

[143] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

To act together for other mutual aid or protection

To choose not to engage in any of these protected concerted activities.

WE WILL NOT refuse to recognize and bargain collectively with United Food and Commercial Workers Union, Local No. 782, as the exclusive representative of our employees at 1201 North Woods Chapel Road, Blue Springs, Missouri, as part of the appropriate unit noted below regarding wages, hours, or any other terms or conditions of employment, to wit:

> All employees employed at the Employer's facilities located at 3443 South Noland Road, Independence, Missouri, and 1201 North Woods Chapel Road, Blue Springs, Missouri, but excluding all meat department employees, office clericals, guards, and supervisors as defined in the National Labor Relations Act.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL, on request, recognize and bargain with United Food and Commercial Workers Union, Local No. 782, as the exclusive bargaining representative of all the employees in the appropriate multistore unit as set forth above.

WE WILL, on request, apply our existing contract with United Food and Commercial Workers Union, Local No. 782 at our store at 3443 South Noland Road, Independence, Missouri, to the employees in our store located at 1201 North Woods Chapel Road, Blue Springs, Missouri, as part of the multistore appropriate unit described above, with retroactive effect from February 3, 1981.

WE WILL make our employees at our store located at 1201 North Woods Chapel Road, Blue Springs, Missouri, whole for any loss of earnings or other benefits resulting from our unfair labor practices, plus interest.

WOODS CHAPEL UNITED SUPER, INC.
D/B/A JERRY'S UNITED SUPER AND
JERRY'S UNITED SUPER, INC.

Southern Foods, Inc. *and* General Drivers, Warehousemen & Helpers Local Union No. 89, affiliated with the International Brotherhood of Teamsters, Chauffeurs, Warehousemen & Helpers of America, AFL–CIO.[1] Case 9–CA–23902

June 15, 1988

DECISION AND ORDER

BY CHAIRMAN STEPHENS AND MEMBERS BABSON AND CRACRAFT

On June 18, 1987, Administrative Law Judge Walter J. Alprin issued the attached decision. The Respondent filed exceptions and a supporting brief.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings,[2] findings,[3] and conclusions and to adopt the recommended Order as modified.[4]

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge as modified below and orders that the Respondent, Southern Foods, Inc., Bowling Green, Kentucky, its officers, agents, successors, and assigns, shall take the action set forth in the Order as modified.

Substitute the following for paragraph 2(e).

"(e) Notify the Regional Director in writing within 20 days from the date of this Order what steps the Respondent has taken to comply."

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[1] On November 1, 1987, the Teamsters International Union was readmitted to the AFL–CIO. Accordingly, the caption has been amended to reflect that change.

[2] The Respondent has excepted to the judge's ruling at the hearing excluding evidence purporting to show that the real reason employees Donnie Thompson and Charles Fulcher were disciplined was not because they responded to a Board subpoena, but because of their intentional and malicious participation in a union scheme to abuse Board processes and disrupt and injure the Respondent's business. After carefully considering the matter, we find no merit in the Respondent's exception. In so finding, we rely particularly on the fact that the January 15, 1987 letter the Respondent sent the employees informing them of their terminations sets forth the Respondent's reasons for discharging them, but makes no mention of the alleged scheme or plot. Therefore, we conclude that this alleged misconduct, even if established, was not a factor in the Respondent's decision to discharge the two employees, and the Respondent's claim now that the employees participated in such a scheme has all the markings of an afterthought. For this reason, we affirm the judge's ruling excluding the evidence in question. Of course, our decision should not be construed as in any way condoning the kind of tactics alleged to have been engaged in here.

We also note that, as the judge observed, the Respondent could have sought to alleviate business inconvenience by at least calling the Regional Office to inquire into the possibility of a postponement that would permit the testimony of employees Fulcher and Thompson to be taken at a time less inconvenient for the Respondent's operations. Instead of making such an effort at accommodation, the Respondent simply discharged the subpoenaed employees.

Member Babson, in affirming the judge's ruling, relies on the reasons set forth by the judge in his decision.

[3] The judge stated in sec. II, par. 2, of his decision that Kenneth Howell, the Union's business agent, did not receive the Board subpoenas until about 8 p.m. at the union meeting on January 8, 1987. Howell testified that he received the subpoenas "around 7 p.m."

In sec. II, par. 6, of the decision, the judge stated that when employees Fulcher and Thompson reported to work the morning after the hearing, their supervisor told them to write an explanation of why they should get their jobs back. The record indicates that Joe Natcher, the Respondent's vice president, not their supervisor, told the employees to write the explanation. These inaccuracies in the judge's decision do not affect the decision in this case.

[4] The judge included a visitatorial clause in his recommended Order authorizing the Board, for compliance purposes, to obtain discovery from the Respondent under the Federal Rules of Civil Procedure subject to the supervision of the United States court of appeals enforcing this Order. Under the circumstances of this case, we find it unnecessary to include such a clause. See *Cherokee Marine Terminal*, 287 NLRB 1080 (1988).

Although the judge found that the Respondent's conduct warranted broad cease-and-desist language, he failed to include this language in his recommended Order. We have considered this case in light of the standards set forth in *Hickmott Foods*, 242 NLRB 1357 (1979), however, and have concluded that a broad remedial order is inappropriate inasmuch as it has not been shown that the Respondent has a proclivity to violate the Act or has engaged in such egregious or widespread misconduct as to demonstrate a general disregard for the employees' fundamental statutory rights.

289 NLRB No. 21

David L. Ness, Esq., for the General Counsel.

Wells T. Lovett, Esq. (Lovett & Lamar), of Owensboro, Kentucky, and *Gerry Moore, Esq.*, of Bowling Green, Kentucky, for the Respondent.

DECISION

STATEMENT OF THE CASE

WALTER J. ALPRIN, Administrative Law Judge. On 14 January 1987[1] General Drivers, Warehousemen and Helpers Local Union No. 89, affiliated with the International Brotherhood of Teamsters, Chauffeurs, Ware-housemen & Helpers of America (the Union) filed a charge, amended on 5 February, alleging that Southern Foods, Inc. (Respondent) engaged in unfair labor practices by discharging Donnie D. Thompson and Charles R. Fulcher because they joined, supported or assisted the Union, and engaged in concerted activities and in order to discourage employees from engaging in such activities, in violation of Section 8(a)(3) and (1) of the National Labor Relations Act (the Act), and with interfering with the processes of the Board in violation of Section 8(a)(4) and (1) of the Act. On 9 February a complaint thereon was issued, and the matter was heard before me at Bowling Green, Kentucky, on 27 March and 2 April. Briefs were submitted.[2]

On the entire record of the case and from my observation of the demeanor of the witnesses, I make the following

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[1] All dates are in 1987 unless otherwise indicated.

[2] Respondent's supplement to its brief is not accepted. It added two points—an appeal and decision of which I was already aware, and emphasis on matters in the record only as offers of proof and not admitted as evidence. Further, the Board Rules, Sec. 102.42, makes no provision for such "supplement."

FINDINGS OF FACT

I. JURISDICTION

Respondent is a Kentucky corporation with an office and place of business at Bowling Green, Kentucky, where it engages in the nonretail sale and distribution of frozen foods and related products. It admits it is and I find it to be an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act. It also admits that the Union is, and I find it to be, a labor organization within the meaning of Section 2(5) of the Act.

II. BACKGROUND

During December 1986 the Union was engaged in a campaign to organize a unit of Respondent's employees consisting generally of drivers and warehouse employees. On 17 December 1986 it filed a petition with the Board for certification as exclusive bargaining representative. The union business agent in charge of the campaign, Kenneth Howell, advised supporting employees that there would probably be a representation hearing before the Board as to inclusion within the unit of certain leadmen and order takers. He told them he would need about three witnesses and asked for volunteers. Three employees, not the alleged discriminatees, volunteered.

On 29 December 1986, notice was issued by the Board of a representation hearing to be held on 9 January. Howell was out of town on vacation and did not learn the date of the representation hearing until his return on 7 January, and the following evening, 8 January, he met with union supporters. At the meeting Howell was told that Thompson and Fulcher would be the witnesses to be subpoenaed by the union to testify on its behalf. Howell did not receive the actual subpoenas until about 8 p.m., at the meeting. The subpoenas were not completed with the names of Thompson and Fulcher, and given to them, until that night. The employer warehouse was then closed, and messages could not be taken from the telephone answering machine until the warehouse opened in the morning. In response to their questions, Howell told Thompson and Fulcher to show the subpoenas to their superior upon reporting for work in the morning, advising him that they would have to leave work at 9 or 9:30 a.m. in order to honor the subpoenas.

Starting time on the next day, 9 January, also the day of the Board hearing, was 5 a.m. Thompson and Fulcher had arrived before the warehouse opened and when admitted made the suggested statement to their supervisor. He took the subpoenas into the then empty office of Willard Atkinson, the Respondent's president. Thompson and Fulcher went to work pulling orders and/or readying their trucks.

About 5:30 a.m. Atkinson arrived at the warehouse, and the supervisor showed him the two subpoenas. Atkinson called Thompson and Fulcher from their work. Because both were scheduled for their regular "long runs," which required that they be out of the warehouse without returning until the end of the day, they would not be able to start their runs if they had to leave midmorning. Atkinson told them that they were needed in order to do their work and could not leave work to testify in response to the subpoenas. Thompson and Fulcher insisted that they were bound by the Board's order to appear and testify, and Atkinson finally told them that they would either take their scheduled runs or, if they were going to obey the subpoena, to "hit the clock" and leave. They both left the warehouse and later attended and testified at the representation hearing pursuant to the subpoenas.

At the representation hearing, Atkinson was asked to name the drivers employed by Respondent. He did so, leaving out Thompson's and Fulcher's names. When asked why he did not name them, on the advice of counsel Atkinson did not reply.

The next morning Thompson and Fulcher appeared at the warehouse at the proper time for work, but were met by their supervisor, who gave each of them pen and paper and told them to write an explanation of why they "should have their jobs back." They pointed out that since they had not been advised that they had lost their jobs they did not understand why they should explain why they should get them back. They were told to go home. The next workday, Monday, 12 January, the same scene was reenacted.

The following morning, 13 January, when Thompson and Fulcher reported for work they were each given an envelope containing a letter from Joe Natchez, an officer of Respondent, stating in full as follows:

> This will confirm what you were told last Friday morning when you refused to perform your assigned duties. You were sent home pending an investigation of the total circumstances.
>
> On Saturday morning I asked you why you should have your job back, and on Monday morning I asked you why you should be entitled to work. Both times you did not give me any reasons whatsoever.
>
> I also asked you to write down for me your reasons. On Saturday morning, you replied, why should we write the reasons down if we have not been fired? On Monday morning, you said you were not going to write any reasons down. Both times I asked if you were refusing to write your reasons down, and both times you said yes.
>
> We are seeking legal counsel, and you should not report to work until further notice. We expect to make a decision within a few days and will notify you. If you have any reasons, please provide them.

That Saturday they each received a letter from Atkinson by certified mail, stating in full as follows:

> After waiting until the end of today to receive from you any statement of reasons why you should be reinstated, considering all factors known to us, and consulting legal counsel, I regret to tell you that your employment at Southern Foods, Inc., is being terminated.
>
> We recognize fully the rights of employees to decide for themselves whether they wish to be represented by the Teamsters' Union or any other

> union. This includes your individual rights to testify at an NLRB hearing. However, your rights must be balanced with the need to serve our customers and operate our business.
>
> The hearing date was scheduled well in advance. We think you must have known several days ahead that you would likely want to be absent from work on that Friday. You testified at the hearing that you learned on Thursday evening, while attending a Union meeting, that there was a subpoena issued for you.
>
> We believe it was your responsibility to notify us as soon as possible of your intended absence. You knew your scheduled route for the day was a long out-of-town one. With advance notice, even as late as Thursday evening we could have made arrangements, which would have minimized the disruption of our business, which was caused by your presenting the subpoena, and refusing to work at the time you were scheduled to leave.
>
> On Friday morning, *after I learned of the subpoena, I told you that you would have to make a choice whether to carry out my direction to perform your usual duties on that day, or to attend the NLRB hearing. I told you that we were fully scheduled and that you were needed to work. You chose not to do so.* [Emphasis added.]

Discussion

The pertinent facts of this matter are simple. Two employees were subpoenaed by the Union to give testimony at a representation hearing the following morning. When they presented the subpoenas to the Respondent and requested to be excused from work to honor the subpoenas, the employer directed them to continue working and not honor the subpoenas. When they questioned his order, the employer gave them a simple option: ignore the subpoena and work for me, or honor the subpoena and "hit the clock." When the employees insisted on honoring the subpoena the employer denied at the hearing that they worked for him, refused to allow them to return to work without a written explanation of why they should "get their jobs *back*" [emphasis added], and eventually officially "terminated" their employment.

The decision is equally simple. These were not employees voluntarily seeking to leave work without authority to attend a Board hearing, as to whom there must be a balancing of their personal desires on the one hand, and, on the other, the damage to the employer's business. These employees had been served with subpoenas *requiring* their attendance. Respondent's attempt to interfere with such subpoenas is a violation of Section 8(a)(4) and (1) of the Act.

Respondent's argument is based on a consistent, though both incorrect and unstated refusal to recognize that the Board, and the courts, distinguish between employees leaving work without permission into those doing so in response to a subpoena, on the one hand, and, on the other, "voluntarily" and without having been served with a subpoena. Thus, its entire position is incorrectly predicated on the decisions relating to unexcused "voluntary" absence, as to which a balancing test measures employee rights versus business needs, though the facts clearly show that the employees involved did not absent themselves voluntarily, but in response to a subpoena.

It was Respondent's primary argument at the hearing that the majority opinion of the Board in *Rich Plan of Western Reserve*, 271 NLRB 1010 (1985), should be reversed in favor of the dissenting opinion of Chairman Dotson. Respondent alleged that the dissent held it is incumbent to balance the requirements of a subpoena served on an employee against the need of the employer for the employees' services at the time. In point of fact the dissenting opinion of Chairman Dotson was adopted by the Sixth Circuit in *Rich Plan of Western Reserve v. NLRB*, 796 F.2d 864 (6th Cir. 1986). Unfortunately for Respondent, the dissent of Chairman Dotson was not as presented by counsel here, and neither it nor the opinion of the court pertains to this case.

The *Rich Plan* case, before the Board and the court, involved the rights of employees to leave work without authority when not yet served with subpoenas when they had been told that subpoenas awaited service at the hearing and they believed themselves subject to penalty if they failed to appear. The Board's majority held that the employees in such circumstances had the status as having already been served. Chairman Dotson could "find no reason for the sudden departure from the universally established and accepted legal requirement of service." *Rich Plan*, supra at 1013. The court agreed, adding that "Although the employees may have reasonably believed they were under a legal obligation to attend the hearing, we do not believe that this is an adequate substitute for actual service in the circumstances of this case." *Rich Plan v. NLRB*, supra at 879.

The case at bar is completely different. Here the employees had already been subpoenaed and the Employer knew it. The Employer even held the subpoenas in his hand when he ordered the employees to remain at work and issued his ultimatum. This is completely different from Chairman Dotson's dissent, which made it abundantly clear he was referring to employees on whom no subpoena had been served, e.g., at 1012 "unless they were subpoenaed," "The rights of these unsubpoenaed employees" and "in the absence of a showing that they had been subpoenaed" and at 1013 his approving quotation from and citing of *Standard Packaging Corp.*, 140 NLRB 628, 630 (1963) that the employees "were under no subpoena to appear," and that "Accordingly, I find that the employees who were not served with subpoenas therefor left work voluntarily . . . ."[3]

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[3] During oral argument in the course of the hearing, counsel for Respondent continually and incorrectly represented that the dissent involved balancing the rights of *subpoenaed* employees. Tr. 37 shows him stating that "It was the position of Chairman Dotson in his vigorous dissent [and impliedly accepted] by the majority, too, that the subpoena must balance [the] need to call this witness to put on the case[,] and the extent to which it will disrupt the employers' business." (Bracketed material makes obvious corrections to the transcript.) Lest one think this a slip of the tongue, at Tr. 43 counsel continues "I wanted to quote where he said 'It must be balanced, must be balanced, *the right of the union to subpoena witnesses* and have them appear with the disruption with the amount of the disruption to the Employer's business.'" (Reporter's mark-

Continued

The "balancing test" and "business justification" are concepts limited to "voluntary," i.e., nonsubpoenaed, attendance at Board hearings or at Board offices to obtain or give information or file charges. "*In the absence of a subpoena*, it is well established, both under appellate authority and Board precedent, that an employee does not have a statutorily protected right to absent himself from work without permission even though he seeks to voluntarily testify at a Board proceeding; rather, a balance must be struck between the interests of the employee in attending the proceeding and the interests of the employer in maintaining production and discipline over his work force." *Rich Plan v. NLRB*, supra at 876, emphasis added. "We note that there are cases which hold that once a subpoena is *served* upon an employee the employer's motivation is irrelevant and the employer's obligation is one of noninterference with the employee's duty to respond to the subpoena." (*Rich Plan v. NLRB*, supra at 873, emphasis added.)

In its brief Respondent finally recognized that the issue in *Rich Plan* related to whether the employees had been subpoenaed. It continued, however, to perniciously confuse the requirements of balancing business justification where employees are *not* subpoenaed with the situation here, where the employees had been subpoenaed, by citing and quoting from *Earringhouse Imports*, 227 NLRB 1107 (1977), and the circuit court's refusal to enforce the Board's Order, *Service Employees Local 250 v. NLRB*, 600 F.2d 930 (D.C. Cir. 1979). That case is also one in which the employees discharged had left work *voluntarily and not subject to subpoena*. No one who read the Board's *Rich Plan* decision, dissent, and appeal, or the *Earringhouse* decision and appeal, could possibly, under any circumstances, ever consider that they applied to the fact situation present here and known to the Respondent, to wit, that subpoenas had already been served on the employees. Respondent must eventually realize that although a business has a recognized right to restrain employees from leaving work for voluntary purposes, it has no right to interfere with the writ of subpoena, one of the great writs of English common law and on which much of our present trial procedure is based.

Respondent's second argument is that the discipline imposed on Thompson and Fulcher was not the result of their testifying at a Board hearing or responding to a subpoena, but because of their failure to follow employer policy to give prior notice of inability to be at work, because of alleged participation in a secret union plot to damage the Employer by subpoenaing the employees most necessary to business operations, and because of their refusal to give written statements asking to be rehired.[4] The issue here is, however, exactly that of *Walt Disney World Co.*, 216 NLRB 836, 837-839 (1975). The following extensive quotation expresses the law on point in full, and is on all fours with the matter herein:

> The Act and the Rules and Regulations of the Board clearly provide that a person served with a subpena is *required* to appear and to give testimony pursuant to the subpena. . . . A respondent employer's "obligation with respect to subpoenaed employee witnesses is one of noninterference, nonrestraint and noncoercion as to such employees' right and obligation to attend scheduled hearings as subpoenaed witnesses, and one of nonreprisal to such employees because they are subpoenaed witnesses." (Emphasis added.) "Once an employee has been subpoenaed," the Supreme Court has said, "he should be protected from retaliatory action regardless of whether he has filed a charge or has actually testified."
>
> Respondent contends that it disciplined Davis and Winkler not because of their attendance at the NLRB hearing or for responding to an NLRB subpena, but because they violated established and recognized company rules concerning the proper procedures for seeking an authorized leave of absence. But Respondent's rules of procedure cannot limit or restrict an individual's obligation to respond to a Board subpena. . . .
>
> . . . .
>
> As this conduct had the tendency to deprive the employees of vindication by the Board of their statutory rights, it violated Section 8(a)(1) of the Act. Moreover, as Respondent's disciplinary action against Winkler and Davis tended to restrain them and other employees from participating in Board proceedings, we find that by such conduct Respondent also violated Section 8(a)(4) of the Act.

Arguing against its own position, Respondent's brief even quotes from *Walt Disney World Co.*, supra, that

> If [the employer] anticipated that the attendance [of the employees] at the hearing would be seriously disruptive of its operations, *the remedy was not to warn the employees not to respond to the subpoenas*, but to work out an accommodation . . . . [216 NLRB at 838, fn. 9, emphasis added.]

Although time was short and accommodation might not have been possible, Respondent made no attempt to do anything but threaten the subpoenaed employees. The fact of the threat, an interference with and restraint, and coercion of not only Thompson and Fulcher but of *all* employees in the exercise of their rights, was of itself a full and complete violation of Section 8(a)(4) and (1) of the Act. The attempt to force Thompson and Fulcher to give written excuses, like schoolboys, before they would be permitted to return to work after obeying the subpoenas, was demeaning in the extreme and whether planned as such was to be an excellent demonstration to all the employees attempting to unionize that their rights are not protected by law but entirely subject to the Employer's dictates.

As in *Walt Disney World Co.*, supra, and other cases, in view of finding violations of Section 8(a)(4) and (1) of the Act, it is not necessary to decide whether, as alleged

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ing of subquotes not as orally stated, but as per counsel's emphasis. Obvious subquote is as to words "must be balanced.") (Emphasis added to both quotations.)

[4] On these points Respondent relies entirely upon matters not admitted into evidence, placed in the record only as an offer of proof, as to which counsel for the General Counsel properly did not raise other valid objections, cross-examine, or present rebuttal.

in the complaint, the foregoing conduct was also a violation of Section 8(a)(3) of the Act, inasmuch as the remedy would be the same even if the additional violations were found.

IV. THE EFFECT OF THE UNFAIR LABOR PRACTICES ON COMMERCE

The conduct of Respondent set forth above has a close, intimate, and substantial relationship to trade, traffic, and commerce among the several States and tends to lead to labor disputes burdening and obstructing commerce and the free flow of commerce.

Conclusions of Law

1. Respondent Southern Foods, Inc. is an employer engaged in commerce and in operations affecting commerce within the meaning of Sections 2(2), (6), and (7) of the Act.

2. Respondent violated Section 8(a)(4) and (1) of the Act by interfering with the process of this Board through threatening and discriminatorily interfering with the employment of Donnie Thompson and of Charles Fulcher for absenting themselves from work without authority in order to attend an NLRB hearing pursuant to subpoena.

3. The unfair labor practices engaged in by Respondent affect commerce within the meaning of Section 2(6) and (7) of the Act.

The Remedy

Having found that the Respondent has engaged in certain unfair labor practices, I find it necessary to order it to cease and desist therefrom. In order to effectuate the policies of the Act, the Respondent must offer Donnie Thompson and Charles Fulcher reinstatement and make each of them whole for any loss of earnings and other benefits from 9 January 1987, computed on a quarterly basis from that date to date of proper offer of reinstatement, less any net interim earnings, as prescribed in *F. W. Woolworth Co.*, 90 NLRB 289 (1950), plus interest as computed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987).[5] Because Respondent's conduct demonstrated a general disregard of the employees' fundamental rights to respond to the Board's subpoena, I find it necessary to issue a broad order, requiring Respondent to cease and desist from infringing in any other manner on rights guaranteed employees by Section 7 of the Act.[6] For the same reasons, and particularly because the violation pertains directly to the integrity of Board process, I find it necessary to include the provision of visitatorial rights for the General Counsel in matters of enforcement.

On these findings of fact and conclusions of law, and on the entire record, I issue the following recommended[7]

ORDER

The Respondent, Southern Foods, Inc., Bowling Green, Kentucky, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Interfering with the right of employees to absent themselves from work without authority in order to attend hearings of the National Labor Relations Board pursuant to subpoena.

(b) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Offer Donnie Thompson and Charles Fulcher immediate and full reinstatement to their former jobs or, if those jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority or any other rights or privileges previously enjoyed, and make them whole for any loss of earnings and other benefits suffered as a result of the discrimination against them, in the manner set forth in the remedy section of the decision.

(b) Remove from its files any reference to the unlawful discharges and notify the employees in writing that this has been done and that the discharges will not be used against them in any way.

(c) Preserve and, on request, make available to the Board or its agents for examination and copying, all payroll records, social security payment records, timecards, personnel records and reports, and all other records necessary to analyze the amount of backpay due under the terms of this Order.

(d) Post at its facility in Bowling Green, Kentucky, copies of the attached notice marked "Appendix."[8] Copies of the notice, on forms provided by the Regional Director for Region 9, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material.

(e) Notify the Regional Director in writing within 20 days from the date of this Order what steps the Respondent has taken to comply. For the purpose of determining or securing compliance with this Order, the Board, or any of its duly authorized representatives, may obtain discovery from the Respondent, its officers, agents, successors or assigns, or any other person having knowledge concerning any compliance matter, in the manner provided by the Federal Rules of Civil Procedure. Such discovery shall be conducted under the supervision of the United States court of appeals enforcing this Order and may be had upon any matter reasonably related to compliance with this Order, as enforced by the court.

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[5] See generally *Isis Plumbing Co.*, 138 NLRB 716 (1982).

[6] *Hickmott Foods*, 242 NLRB 1357 (1979).

[7] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

[8] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

Section 7 of the Act gives employees these rights.

To organize

To form, join, or assist any union

To bargain collectively through representatives of their own choice

To act together for other mutual aid or protection

To choose not to engage in any of these protected concerted activities.

WE WILL NOT interfere with employees leaving work during working hours to attend a Board hearing pursuant to Board subpoena.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL offer Donnie Thompson and Charles Fulcher immediate and full reinstatement to their former jobs or, if those jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority or any other rights or privileges previously enjoyed and WE WILL make them whole for any loss of earnings and other benefits resulting from their discharge, less any net interim earnings, plus interest.

WE WILL notify them that we have removed from our files any reference to their discharges and that their discharges will not be used against them in any way.

SOUTHERN FOODS, INC.

Garrett Railroad Car & Equipment, Inc. ***and*** **United Steelworkers of America and its Local 8089, AFL-CIO-CLC.** Case 6-CA-16116

June 15, 1988

SUPPLEMENTAL DECISION AND ORDER

BY CHAIRMAN STEPHENS AND MEMBERS JOHANSEN AND BABSON

On February 24, 1988, Administrative Law Judge Frank H. Itkin issued the attached supplemental decision. The Respondent filed exceptions and a supporting brief.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the supplemental decision and the record in light of the exceptions and brief and has decided to affirm the judge's rulings, findings,[1] and conclusions and to reaffirm its Order previously issued in this proceeding at 275 NLRB 1032 (1985).

ORDER

The National Labor Relations Board reaffirms its Order previously issued in this proceeding at 275 NLRB 1032 (1985).

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[1] The Respondent has excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions Unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

Donald J. Burns, Esq., for the General Counsel.
John E. Lynchevski and *Charles M. Greenberg, Esqs.*, for the Employer.
Clarence Mannarino, Esq., for the Union.

SUPPLEMENTAL DECISION AND ORDER

FRANK H. ITKIN, Administrative Law Judge. On July 9, 1985, the Board found in the instant case that Respondent Employer had violated Section 8(a)(1) and (3) of the Act by failing and refusing to reinstate certain of its employees engaged in an economic strike on the Union's September 30, 1979 unconditional application on their behalf to return to work, and by instead thereafter hiring four new employees and reinstating one striker out of seniority.[1] The Board's Decision and Order are reported at 275 NLRB 1032. The Employer had argued, inter alia, that the underlying unfair labor practice charge, filed by the Union in the instant case on January 26, 1983, and amended on March 28, 1983, was time-barred under Section 10(b) of the Act. The Board, in rejecting this contention, found:

> Respondent, by refusing from October 1979 until November 1982 to furnish the Union with the requested names of new hires and their dates of hire, unlawfully concealed from the Union the information necessary to put the Union on notice of the *Laidlaw* violations. Once provided with that information, the Union filed the instant charge within the limitations period . . . .

On October 28, 1986, the United States Court of Appeals for the Third Circuit, on cross-applications for review and enforcement of the Board's Order in the instant case, vacated the Board's Order and remanded the case for further proceedings. The court found that substantial evidence supports the Board's finding that the Union had made an unconditional application on behalf of the strikers to return to work on September 30, 1979. The court, in discussing the 10(b) issue, stated: "Whether this is viewed as a case of unlawful concealment or an application of the general rule that the statute of limitations does not begin to run until the moving party discovers or should have discovered the relevant facts, the Union must meet the due diligence requirement"; "there is absent any discussion of the due diligence factor by either the ALJ or the Board"; and

> The ALJ and the Board therefore may have applied an incorrect legal standard in failing to consider whether the Union had exercised due diligence in discovering the operative facts giving rise to its claim of an unfair labor practice when the Company hired replacement employees.

Accordingly, the court remanded this case "in order that the NLRB may ascertain whether the Union exercised due diligence in discovering the facts giving rise to its claim."[2]

On May 19, 1987, the Board issued its Order remanding the instant proceeding to the administrative law judge. The Board noted that it had accepted the court's remand and had notified the parties that it would take appropriate action consistent with the court's remand; that, having considered the entire record, it "finds that the fact-finding desired by the Court cannot be made on the basis of the evidence in the existing record"; and that, consequently, it is remanding the case to the administrative law judge for a further hearing.

On May 27, 1987, the administrative law judge thereupon issued a notice of hearing on remand. A supplemental hearing was held on July 7, 1987, in Pittsburgh, Pennsylvania. On the entire record in this proceeding, including my observation of the demeanor of the witnesses, I make the following

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[1] The four new employees are A. G. Lumley, J. T. Mains, T. G. Farah, and P. E. Martin. The reinstated striker is L. A. Johnson.

[2] Circuit Judge Weis, in his concurring and dissenting opinion, joined in the opinion of the court "explaining the legal error in the standard used by the Board to toll"; however, he would not have remanded the case to the Board.

FINDINGS OF FACT[3]

The Union was certified by the Board as collective-bargaining agent of the Employer's New Castle, Pennsylvania production and maintenance employees in 1973. The parties thereafter entered into a series of collective-bargaining agreements. On February 20, 1979, the parties began negotiations for a new agreement. On April 25, 1979, the employees went on strike in support of their contract demands. There were at the time some 108 production and maintenance employees. On June 25, 1979, the Employer notified the striking employees that it intended to resume operations and would replace strikers who did not return to work. On September 27, 1979, the Employer discharged certain strikers for strike misconduct. On September 30, 1979, the Union made an unconditional application on behalf of the strikers to return to work. The Employer, by letter dated October 5, 1979, withdrew recognition from the Union.

On October 19, 1979, the Union filed unfair labor practice charges in Case 6-CA-12842. An amended charge was filed on December 21, 1979. The General Counsel issued a complaint in that proceeding alleging, inter alia, that the Employer had violated Section 8(a)(1), (3), and (5) of the Act by inducing employees to sign a petition asserting that they no longer wished to be represented by the Union; by discharging three employees for alleged strike misconduct; by refusing to acknowledge, reduce to writing, execute or be bound by the collective-bargaining agreement agreed to by the parties at strike's end; and by withdrawing recognition from the Union. Hearings on this complaint were held before an administrative law judge on April 28 and 29 and May 6, 1980. The administrative law judge issued his decision on October 15, 1980. The Board, on review, issued its Decision and Order on April 6, 1981, reported at 255 NLRB 620. The Board found that the Employer had violated Section 8(a)(1), (3), and (5) of the Act by withdrawing recognition from the Union; by refusing to acknowledge, reduce to writing, execute, and abide by the contract agreed to by the parties at strike's end; by inducing, encouraging, and aiding employees on the Employer's premises during worktime to circulate and sign anti Union petitions; and by discharging strikers for alleged misconduct. On June 29, 1982, the United States Court of Appeals for The Third Circuit, insofar as pertinent here, sustained the Board's findings, in its Decision reported at 683 F.2d 731.

The instant case involves, as noted, the poststrike reinstatement rights of the economic strikers. The earlier proceedings, as demonstrated above, did not involve this issue. For, as the Board explained in 275 NLRB at 1032 fn. 1, the reinstatement rights of the economic strikers were not the subject of the earlier charges; the Union did not make its unconditional application on behalf of the strikers until September 30, 1979; the Employer did not subsequently hire any new employees until commencing on October 8, 1979; and the charge filed on October 19, 1979, "did not raise or encompass any *Laidlaw* violations." Moreover, Howard Grossinger, attorney for the Union, as previously found (275 NLRB at 1033), credibly explained that he was not then aware of the hiring of new employees or reinstatement of strikers "after October 1, 1979"; the earlier charges had no "purpose with respect to any post-October 1, 1979 hirings and reinstatements"; and

> we knew of no post-October 1, 1979 replacements or hires by [Respondent] for those who were on strike or in jobs formerly held by those on strike.

There were some 108 production and maintenance unit employees as of April 25, 1979. As previously found (275 NLRB at 1037–1038), the Employer hired some 50 striker replacements between July 30 and September 28, 1979. On September 17, 1979, James Ferber, the Employer's attorney, gave the Union a document stating generally that 48 striker replacements had been hired. Ferber acknowledged that no "names" of "new employees" were furnished to the Union, " just numbers." As of September 30, when the Union made its unconditional application to return on behalf of the strikers, there were some 38 employees still on strike; approximately 20 strikers had returned to work before strike's end. On October 5 the Employer unlawfully withdrew recognition from the Union. On October 8 the Union "request[ed] the names of the employees who were hired on or after July 30, 1979, the date of hire and the job that they were hired for." On October 8 the employer hired new employee Lumley; on October 9 it hired new employees Mains and Farah; on October 15 it hired new employee Martin; and on or about October 22 it reinstated less senior employee Johnson. On October 16 the Employer—in response to the Union's request of October 8—refused to furnish the Union with the requested information because "the Company has no legal obligation to furnish you with any information . . . ." Later, following issuance of the administrative law judge's decision in the earlier proceeding, the Union, on November 3, 1980, again requested the Employer to provide, inter alia, "a list of all new employees hired since the last day of September 1979 . . . ." On November 10 the Employer again refused because "there is no obligation on the Company's part to recognize, deal with or furnish any information to your organization . . . ." The Board issued its Decision and Order in the initial case on April 6, 1981. The Employer again persisted in its refusal to "meet with" the Union or "comply with any of [its] requests . . . ." Following issuance of the Court's decision in the initial case, the Union, on October 8, 1982, again renewed its request. The Employer first furnished the requested data on November 15, 1982, and the instant charge was filed on January 26, 1983. (See Jt. Exhs. 4–7 and 9–11.)

As previously found (275 NLRB at 1038), Union Attorney Grossinger credibly testified that, during the investigation of Case 6-CA-12842, he never raised "with the investigator the issue of post-October 1, 1979 hires and reinstatements as a possible violation." Grossinger explained that he was "unaware of post-October 1, 1979 hiring by Garrett Railroad in the particular jobs in dispute." Grossinger, "up to and including the time that the hearing took place in April of 1980 in Case 6-CA-12842," "didn't know that any hirings had taken place." Union Representative Clarence Mannarino credibly testified that prior to the receipt of Joint Exhibit 11, dated November 15, 1982, he too had "no information from the Company" that Lumley or Mains or Farah or Martin had been hired or Johnson had been reinstated during October 1979; he had "no information from the Company whatsoever who was hired or when they hired them or whatever"; "Prior to the receipt of that letter [he had] no knowledge whatsoever." Mannarino explained that "during the investigation" of Case 6-CA-12842, he did not "raise with the NLRB any allegation that the Company violated the Act by hiring new employees after October 1, 1979, or reinstating employees after October 1, 1979." Local Union President Richard Luffey credibly testified that prior to mid-November 1982, he too had no knowledge that the Company had hired Lumley or Mains or Farah or Martin or had reinstated Johnson during October 1979. Luffey denied that, "in [his] capacity as president of the Local Union, during the investigation and processing of 6-CA-12842, [he] . . . had any discussions with any representative of the NLRB in which [he] contended that the Company violated the Act by hiring Lumley, Mains, Farah and Martin in October 1979." He also denied "raising any contention that the Company violated the Act by reinstating Johnson." Dennis Boots, head of the union grievance committee, similarly denied such "knowledge." Union Representative Mannarino also credibly noted that, after the 1979 strike commenced, "no Union dues [were] paid." Joint Exhibit 15 shows that some 20 strikers abandoned the strike before its end. And, local union officers were not included in the group of recalled remaining strikers.

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[3] "S.Tr." references are to the supplemental transcript of hearing; "S.G.C. Exh." references are to supplemental General Counsel's Exhibits; and "S.R. Exh." references are to supplemental Respondent's Exhibits. "Tr.," "G.C. Exh," "R. Exh.," and "Jt. Exh." references are to the initial transcript, General Counsel's Exhibits, Respondent's Exhibits, and Joint Exhibits, respectively, in the instant proceeding.

Clarence Mannarino, who has since retired as a union representative, testified again in these supplemental proceedings. He again explained that, prior to receipt in November 1982 of the requested information concerning hires by the Employer since September 30, 1979, he had no independent knowledge that Lumley, Farah, Martin, or Mains had been hired from October 8 to October 15 and that Johnson had been reinstated shortly thereafter. Mannarino was asked whether he had attempted to get this "information from any other source." He explained that "there is no other source of information"; the Employer "did not recall any Union officers to work" following the strike; "the employees that were working in the plant . . . did not support the Union"; "no one was paying any Union dues"; and

> the only thing we did was keeping our ears open to see if we could get any information or rumors, and there were none [concerning the hirings in question.]

He also explained that "there was no basis to file" an unfair labor practice charge before the November 1982 disclosure of the poststrike hires because

> We had no general information or specific information that such hirings took place. Consequently, the Union would not have been in a position with the evidence to be presented [to] support . . . that charge.

Further, he did not ask counsel for the General Counsel during the initial proceedings "to attempt to secure that information" because "such requests would have been fruitless." The Employer had made clear "that they were not going to comply" with the earlier outstanding administrative law judge's and Board's decisions.

On cross-examination, Mannarino acknowledged that, prior to the strike, he "knew a lot of the employees that worked there"; however, "There was a heck of a lot of people I know of by face, but not a name. Mannarino was present periodically at the picket line during the strike, which ended on September 28, 1979. Local Union President and senior employee Richard Luffey was present at the picket line "regularly." Union Officer Jennings Dean was also at the picket line. Further, Mannarino recalled, during the strike,

> We [the pickets and union officials] never seen the employees, the scabs that they hired, the replacements, because the Company transported those people by vans . . . enclosed, they were closed up, no windows . . . . You couldn't see who was going in, how many was going in . . . .

From the strike's end in September 1979 until the Employer furnished the requested information in November 1982, Mannarino admittedly did not go to the Employer's premises "to observe who was going in and out of the plant." Mannarino was questioned if he had asked the local union representatives "to find out the identities of the people that was back at work." He explained that he did ask and was informed "none of the boys would want to say anything. They were strictly—they were just anti-Union."

James Hill, general foreman for the Employer, testified that Johnson was a member of the Union prior to the strike; that Local Union Representatives Luffy and Dean knew Johnson "by sight"; that Johnson drove to work at the plant after the strike and parked on the lot; that Union Representative Luffy never asked Hill "how many people were working at Garrett after September 30, 1979" or "whether any individuals were hired after September 30, 1979"; that Union Representative Dean also did not ask him similar questions; and that he never saw Union Representatives Luffy, Dean, or Boots in the plant parking lot "observing who was coming or going from the plant." It is undisputed that Luffy was seventh on the plant "seniority list" and Johnson was 28th. (See Jt. Exh. 23.)

On cross-examination, Hill was asked "If Mr. Luffy or Mr. Dean had asked you about who had been hired after the strike ended, would you have told them?" Hill replied: "I wouldn't have answered them."[4]

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[4] I credit the supplemental testimony of Mannarino and Hill as summarized above. Their testimony is essentially undisputed. The conflicts, if

Continued

Discussion

The Board has accepted the remand of the court of appeals. The law of the case was stated by the court, as follows:

> Congress has adopted a policy under the National Labor Relations Act "to bar litigation over past events after records have been destroyed, witnesses had gone elsewhere, and recollections of the events in question have become dim and confused . . . and of course to stabilize existing bargaining relationships." *Local Lodge No. 1424 v. NLRB*, 362 U.S. 411, 419 (1960). Section 10(b) of the statute was enacted in response to the complaint that people were being required to respond to stale charges. *Id.* at 424. [Quotation of Sec. 10(b) of the Act omitted.]
>
> Clearly more than six months had elapsed before the Union filed the unfair labor charge in this proceeding, but federal statutes of limitations are subject to the equitable discovery doctrine. This tolling rule provides that a limitation period begins to run when the claimant discovers, or in the exercise of reasonable diligence should have discovered, the acts constituting the alleged violation. *NLRB v. Don Burgess Constr. Co.*, 596 F. 2d 378 (9th Cir. 1979); *NLRB v. Allied Prod. Corp.*, 548 F.2d 644 (6th Cir. 1977).
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> *Holmberg v. Armbrecht*, 327 U.S. 392, 397 (1946), articulated a refinement of the doctrine for cases of fraudulent concealment:
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> > Where a plaintiff has been injured by fraud and remains in ignorance of it without any fault or want of diligence or care on his part, the bar of the statute does not begin to run until the fraud is discovered, though there be no special circumstances or efforts on the part of the party committing the fraud to conceal it from the knowledge of the other party.
>
> The court observed further, "[t]his equitable doctrine is read into every federal statute of limitations." Id.
>
> Subsequent case law confirms that due diligence is an essential constituent of the tolling rule. It is applied even where there has been fraudulent concealment. In those instances, the courts have stated that "merely intoning the word 'fraudulently' is not sufficient to avoid the statute . . . [T]he elements of this counterpoise . . . ." include the exercise of due diligence. *Charlotte Telecasters, Inc. v. Jefferson-Pilot Corp.*, 546 F.2d 570, 574 (4th Cir. 1976). A party's mere ignorance of the circumstances "does not constitute due diligence to discover the operative facts of his claims." *Shapiro v. Cook United, Inc.*, 762 F.2d 49, 51 (6th Cir. 1985); see also *Demars v. General Dynamics Corp.*, 779 F.2d 95, 99 (1st Cir. 1985); *Metz v. Tootsie Roll Indus., Inc.*, 715 F.2d 299 (7th Cir. 1983).

The equitable discovery doctrine, as shown in the court's opinion, has been considered on many occasions by the Board and courts. See also *Ladies Garment Workers v. NLRB*, 463 F.2d 907, 921–923 (D.C. Cir. 1972) ("the company actively concealed from the union its decision to relocate . . . but also the circumstances surrounding the decision"); *ACF Industries v. NLRB*, 592 F.2d 422, 429–431 (8th Cir. 1979) ("fraudulent concealment of vital information" pertaining to subcontracting); *Baskin v. Hawley*, 807 F.2d 1120, 1130–1131 (2d Cir. 1986) ("active concealment" in an action arising out of loss of pension benefits). The court explained in *Baskin v. Hawley*, supra:

> There was evidence of active concealment. Concealing the actionability of a known injury is sufficient to toll the statute of limitations. . . . [See cases cited.]
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> . . . .
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> Nor was the proof of [claimant's] diligence inadequate to support this finding. It is settled that reasonable diligence does not require a person to commence a lawsuit in order to procure court-ordered discovery of concealed facts.

And in *Glazier Steel Corp. v. Toyomenka, Inc.*, 392 F.Supp. 500 (D.C.S.D.N.Y. 1974), the court also observed:

> Defendants' resistance to discovery made it impossible for plaintiff to obtain information regarding its cause of action. It is true that "mere silence, where there is no duty to speak, does not toll the statute" . . . . However, the history of discovery in this case contains several instances in which judges and magistrates held that defendants were under a "duty to speak." In these circumstances, their failure to do so may well have constituted an active concealment.

For, courts have tolled statutes of limitations in cases where, inter alia, a party failed "to disclose information which he had a statutory duty to disclose and such nondisclosure prevented a plaintiff from realizing that he possessed an actionable claim." Cf. *Knight v. Brown Transport Corp.*, 806 F.2d 479, 484 (3d Cir. 1986).

The credible evidence of record in the instant case shows that the Union did not know which employees the Employer may have hired or reinstated following the strike, when they may have been hired or reinstated and for what jobs they may have been hired or reinstated. The Union repeatedly requested such information from the Employer. The Employer, as part of its adamant refusal to recognize and bargain with the Union, refused to disclose this and related information. The Employer was under a statutory duty to disclose such information to the Union. Thus, as the Board found, the Employer,

> by refusing from October 1979 until November 1982 to furnish the Union with the requested names of new hires and their dates of hire, unlawfully con-

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any, arise in the inferences and interpretations to be drawn from their supplemental testimony.

cealed from the Union the information necessary to put the Union on notice of the *Laidlaw* violations.

Union Representative Mannarino, in the initial and supplemental hearings, credibly testified that prior to receipt in November 1982 of the requested information concerning the hires and reinstatements since September 30, 1979, he had no independent knowledge that Lumley, Farah, Martin, or Mains had been hired from October 8 to October 15, 1979, or that Johnson had been reinstated shortly thereafter. He credibly explained that there was "no other source" for such "information"; the Employer "did not recall any Union officers to work" following the strike; the "employees that were working" (including the some 20 persons who had abandoned the strike and 50 striker replacements) "did not support the Union"; "no one was paying Union dues"; and there were no "rumors" concerning such hirings. He credibly recalled asking local union representatives "to find out the identities of the people that was back at work" and he was told that "none of the boys would want to say anything . . . [t]hey were just anti-union." Indeed, General Foreman Hill, a former employee and union official, candidly acknowledged that if local union representatives "had asked [him] about who had been hired after the strike ended," he "wouldn't have answered them." This record makes it clear that any additional requests for such information would have been an exercise in futility.

The Employer suggests in its brief that the Union should have gone to the plant entrance at strike's end and observed who was going to work. The Employer does not adequately explain how, by such observation of some 70 persons going to work including 50 striker replacements covertly transported to and from the plant during the strike, the Union would have been able to determine that new employees Lumley, Farah, Mains, and Martin had been hired after the strike, when they had been hired, and for what jobs they had been hired. The Employer also suggests that the Union, by standing at the plant entrance after the strike, would have ultimately spotted Johnson going to work; he was a more junior employee than senior unreinstated employees; and "thus the Union would have discovered a *Laidlaw* violation. However, the Employer does not adequately explain how, by such observation, the Union would have been able to determine exactly when Johnson was recalled or for what job he was recalled. Significantly, the Employer previously argued in this case that it had made a "commitment," prior to the strike's end, "to reinstate former striker Johnson." 275 NLRB at 1032 fn. 3.

In addition, Union Representative Mannarino credibly explained why no unfair labor practice charges were filed before the November 1982 disclosure of this information. The Union had "no basis to" file such charges; it had no "general information or specific information that such hirings took place"; and, consequently, it would not have been able to support such charges and would have thus risked a dismissal or withdrawal. Moreover, Mannarino credibly explained that he did not ask the General Counsel "to attempt to secure that information" during the earlier proceedings because, in view of the Employer's steadfast refusal to recognize and bargain, such a request would have been "fruitless."

In sum, I find and conclude that the Employer, in violation of its statutory duty, actively and unlawfully concealed from the Union the requested information pertaining to its poststrike hires and reinstatement; this requested information was necessary for the Union to file the instant unfair labor practice charge; the Union, in the exercise of reasonable due diligence, was unable to obtain this necessary information from any other source; and, therefore, under the circumstances of this case, the statute of limitations should be tolled during the pertinent 1979–1982 period. I would therefore recommend to the Board that it again adopt the findings, conclusions, and order as set forth in 275 NLRB 1032.[5]

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[5] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

Amazing Stores, Inc. *and* **United Food and Commercial Workers International Union, Local 1357, AFL-CIO.** Cases 4-CA-15602, 4-CA-15683, and 4-RC-16096

June 15, 1988

DECISION AND ORDER

BY MEMBERS JOHANSEN, BABSON, AND CRACRAFT

On July 27, 1987, Administrative Law Judge George F. McInerny issued the attached decision. The Respondent filed exceptions and a supporting brief, and the General Counsel filed exceptions, a supporting brief, and a response brief.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings,[1] and conclusions and to adopt the recommended Order as modified.[2]

We agree with the judge's finding that the Respondent violated Section 8(a)(3) of the Act by refusing to pay Gail Davis her Christmas bonus and by her subsequent discharge in January 1986. Davis was a long-term employee who had worked with Lieberman and Segal, the owners of the Respondent, for 5 years when she was discharged.[3] The judge found and we agree that during the organizational campaign Lieberman and Segal visited the stores in order to conduct one-on-one interviews with employees in which they repeatedly committed violations of Section 8(a)(1) of the Act. It is clear that when the owners came to the store in which Davis worked in early December 1985 and she was informed by her store manager that the owners wished to discuss the Union with her in the store's backroom, she declined to participate. This action on Davis' part displayed a lack of receptivity to the Respondent's antiunion message, which message as noted above we have found violative of Section 8(a)(1) of the Act. This refusal provided the Respondent with reason to infer that Davis was sympathetic to the Union. It was this very refusal to participate in the antiunion discussion with the owners that her store manager referred to when Davis questioned him about why she was the only employee in her store not to receive a Christmas bonus some 3 weeks later. Davis' understandable reaction to this discriminatory refusal to award her Christmas bonus was to inform her store manager that she would be leaving work early that day. The store manager expressed no problem with Davis' decision to leave early and, thus for the reasons stated in the judge's decision, we agree with his conclusion that Davis had not resigned but rather was discharged in violation of Section 8(a)(3) of the Act.

We also agree with the judge's finding that Ralph Atwell was denied a Christmas bonus and pay raise because of his union activities. The Respondent admitted that it reviewed all employees for pay raises in January 1986. Atwell, whom the judge credited over the Respondent's witnesses, testified that in January 1986 when he requested a pay raise, the only reason Segal gave for denying a raise was that Atwell had given them a difficult time about the Union. Segal had previously confronted Atwell with the allegation that he had heard that Atwell was the ringleader in the Union. Thus, the Respondent's motivation is clearly shown.

We affirm the judge's analysis and conclusion that the Respondent's unlawful conduct warrants a bargaining order under *NLRB v. Gissel Packing Co.*, 395 U.S. 575 (1969). However, in order to require the Respondent to bargain with the Union it is necessary to set aside the election. *Irving Air Chute Co.*, 149 NLRB 627 (1964), enfd. 350 F.2d 176 (2d Cir. 1965). As noted in the judge's decision, a mail ballot election was conducted from December 19 through 30, 1985; the Union filed timely objections to the election which track the unfair labor practice allegations. The conduct found by the judge to be violative of Section 8(a)(1) and (3) is sufficient to warrant setting aside the election and we do so. *Dal-Tex Optical Co.*, 137 NLRB 1782 (1962).

The judge in his remedy recommended that the Respondent be ordered "not to discontinue its operations, at any of its locations." We find that remedy inappropriate. There is no charge, allega-

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[1] The Respondent and the General Counsel have excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

[2] The Respondent filed a motion to reopen the hearing to adduce additional evidence regarding the turnover of employees. The Respondent argues, as it has at the hearing and in its exceptions, that a bargaining order is not warranted because the turnover of the employees would dissipate any lingering effects of its alleged unfair labor practices and thus would not prevent the conducting of a second election.

The motion is denied. The Respondent's unfair labor practices were pervasive and serious and committed by the highest management officials. The misconduct was directed at virtually every employee in the bargaining unit. So extensive were the unlawful acts that it is foreseeable that the Respondent's record of coercion would become known to new employees and the impact of the Respondent's violations would be likely to persist despite any turnover, thus preventing the holding of a fair election.

[3] We think it is appropriate to term Davis a long-term employee in light of the Respondent's repeated arguments that turnover at the stores is significant.

289 NLRB No. 24

tion, or finding that the Respondent discontinued any portion of its operation due to the union activities of its employees. Rather, the allegation is that the Respondent threatened to take such action. Having found that the Respondent violated the Act by threatening its employees with store closure, the judge provided the appropriate remedy, i.e., an appropriate order and the posting of a notice with the requisite language. The judge's proposed remedy goes further and attempts to remedy possible prospective action of the Respondent. In the event the Respondent does close any of its operation because of the activities of its employees on behalf of a union or any other protected activity, charges may be filed, an investigation initiated, and if necessary a complaint issued. At that time, if the allegation is proven, a proper remedy will be ordered. Accordingly, the remedy is modified.

The judge granted a visitatorial provision. Under the circumstances of this case we find it unnecessary to grant such provision. *Cherokee Marine Terminal*, 287 NLRB 1080 (1988).

In accordance with our decision in *New Horizons for the Retarded*, 283 NLRB 1173 (1987), interest on and after January 1, 1987, shall be computed at the "short-term Federal rate" for the underpayment of taxes as set out in the 1986 amendment to 26 U.S.C. § 6621. Interest on amounts accrued prior to January 1, 1987 (the effective date of the 1986 amendment to 26 U.S.C. § 6621), shall be computed in accordance with *Florida Steel Corp.*, 231 NLRB 651 (1977).

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge as modified below and orders that the Respondent, Amazing Stores, Inc., Philadelphia, Pennsylvania, its officers, agents, successors, and assigns, shall take the action set forth in the Order as modified.

1. Delete paragraph 1(b) and reletter the subsequent paragraphs.

2. Reletter current paragraph 2(e) as paragraph 2(f), delete current paragraph 2(f), and add the following as paragraph 2(e).

"(e) Remove from its files any reference to the unlawful discharge and notify the employee in writing that this has been done and that the discharge will not be used against her in any way."

3. Add the following as paragraph 2(g).

"(g) Notify the Regional Director in writing within 20 days from the date of this Order what steps the Respondent has taken to comply."

4. Substitute the attached notice for that of the administrative law judge.

It is further ordered that the election in Case 4-RC-16096 is set aside, and the petition is dismissed.

APPENDIX

Notice To Employees
Posted by Order of the
National Labor Relations Board
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

Section 7 of the Act gives employees these rights.

To organize

To form, join, or assist any union

To bargain collectively through representatives of their own choice

To act together for other mutual aid or protection

To choose not to engage in any of these protected concerted activities.

We will not interrogate our employees concerning their union activities, nor give them the impression that their union activities are under our surveillance, nor threaten our employees with closure or sale of our stores, nor promise increased benefits to our employees or threaten to take away their benefits, because they have engaged in union activities.

We will not terminate any of our employees nor deprive them of bonuses or pay raises to which they are entitled because of their activities on behalf of the Union or any other labor organization.

We will not in any other manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

We will, on request, bargain with the Union and put in writing and sign any agreement reached on terms and conditions of employment for our employees in the bargaining unit:

> All full-time and regular part-time sales personnel, stock personnel, cashiers and truck drivers employed by the Employer at its 816 Chestnut Street, 1124 Chestnut Street, 1621 Chestnut Street, 7140 Frankford Avenue, 5645 N. 5th St., Academy Plaza, Academy and Red Lion Rds., and 139 W. Chelton Ave., Philadelphia, Pennsylvania locations and its Sharon Hill Plaza, Chester Pike, Sharon Hill, Pennsylvania, 734 Hamilton Street, Allentown, Pennsylvania locations, excluding all other employ-

ees, guards and supervisors as defined in the Act.

We will offer Gail Davis immediate and full reinstatement to her former job or, if that job no longer exists, to a substantially equivalent position, without prejudice to her seniority or any other rights or privileges previously enjoyed and **we will** make her whole for any loss of earnings and other benefits resulting from her discharge, less any net interim earnings, plus interest.

We will notify her that we have removed from our files any reference to her discharge and that the discharge will not be used against her in any way.

We will make Ralph Atwell whole for any loss of wages incurred as the result of his being denied a raise by payment of the appropriate sums of money involved, with interest.

We will make Gail Davis and Ralph Atwell whole for any monetary losses they may have suffered by reason of our failure to pay them the 1985 Christmas bonus, with interest.

AMAZING STORES, INC.

Susan L. Stahl, Esq. and *Henry R. Protas. Esq.*, for the General Counsel.

Laurance B. Baccini, Esq. and *Dale P. Schomer, Esq. (Schnader, Harrison, Segal & Lewis)*, of Philadelphia, Pennsylvania, for the Respondent.

DECISION AND REPORT ON OBJECTIONS

George F. McInerny, Administrative Law Judge. This case arises out of several matters filed by United Food and Commercial Workers Local No. 1357, AFL–CIO (the Union), with the Philadelphia Regional Office Region 4. The first matter was a petition filed by the Union on 15 November 1985,[1] in Case 4–RC–16096 seeking an election to be conducted by the Regional Office under the provisions of the National Labor Relations Act, 29 U.S.C. § 151 et seq., and certification of the Union as bargaining representative for a unit of employees of Amazing Stores, Inc. (Respondent or the Company). After a stipulation by the Union and the Company, approved by the Regional Office, an election was held by mail ballot between 10 and 30 December among the company's employees. The Union lost the election and filed a series of objections to conduct by the Company that, it was said, affected the results of the election. On 16 July 1986, the Regional Office referred the matter to an administrative law judge for a report on the objections.

Meanwhile, the Union filed a charge against the Company on 10 February 1986, in Case 4–CA–15602, and on 20 March 1986, in Case 4–CA–15683, containing allegations that the Company had violated Section 8(a)(1), (3), and (5) of the Act. Then, on 31 July 1986, the Regional Office consolidated all of these cases and issued a complaint and notice of hearing on the consolidated matter. Respondent filed a timely answer denying the commission of any unfair labor practices.

Thereafter, on 17, 18, and 19 November 1986, a hearing was held before me at Philadelphia, Pennsylvania, at which the Respondent and the General Counsel were represented by counsel, and had the opportunity to present testimony and documentary evidence, to examine and cross-examine witnesses, to present motions and to make objections, and to argue orally. After the close of the hearing, both the Respondent and the General Counsel submitted briefs, which have been carefully considered.

Based on the entire record, including my observations of the witnesses and their demeanor, I make the following

FINDINGS OF FACT

I. JURISDICTION

The complaint alleges, the answer admits, and I find that the Respondent is a Pennsylvania corporation that maintains retail stores in the city of Philadelphia, and at Sharon Hill and Allentown, Pennsylvania. During the year immediately preceding the issuance of the complaint, Respondent derived gross revenues in excess of $500,000 and purchased goods valued in excess of $50,000 directly from points outside the Commonwealth of Pennsylvania. Respondent is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

II. THE LABOR ORGANIZATION INVOLVED

The complaint alleges, the answer admits, and I find that the Union is a labor organization within the meaning of Section 2(5) of the Act.

III. THE ALLEGED UNFAIR LABOR PRACTICES

A. *Background and Stipulations*

Amazing Stores, Inc. is a chain of nine retail stores selling housewares and giftwares, consisting mainly of closeouts or imports, in the city of Philadelphia and its vicinity. The Company is owned by four individuals, Joseph Lieberman, Jack Segal, Glenn Segal (Jack's son), and Sidney Burezin. It appears from the evidence here that Jack Segal and Joseph Lieberman, referred to respectively as Segal and Lieberman, handle the day-to-day management of the enterprise, assisted by sundry store managers and assistant managers.

It was stipulated by all parties that an appropriate unit for collective bargaining composed:

> All full-time and regular part-time sales personnel, stock personnel, cashiers and truck drivers employed by the Employer at its 816 Chestnut St., 1124 Chestnut St., 1621 Chestnut St., 7140 Frankford Ave., 5645 N. 5th St., Academy Plaza, Academy & Red Lion Rds., and 139 W. Chelten Ave., Phildelphia, PA locations, and its Sharon Hill Plaza,

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[1] All dates are in 1985 unless otherwise specified.

> Chester Pike, Sharon Hill, PA, 734 Hamilton St., Allentown, PA locations, excluding all other employees, guards and supervisors as defined in the Act.

It was further stipulated that the following named employees were employed in the stipulated bargaining unit during the period from 1 October 1985 through 15 November 1985:

- Roger Parker
- Curtis Leroy Bond
- Lisa Huffnagle
- Chander Lewis
- Maurice Monroe
- Robert Young
- Margaret Smith
- John De Marco
- Nancy E. Powell
- Curtis Snyder Jr.
- Debbie Bruner
- Dan Dihert
- Arlene Tolliver
- Atoinette Walker
- Celia Abraham
- Geneva Henry
- Edward Manwiller
- Robert Snyder
- Ralph Atwell
- Jerome Thomas
- Francine Wilson
- Francys Cotto
- Joyce Florence
- Edward Hutton
- Marlo Jackson
- Richardson Jarman
- Bruce Kraskow
- Sandy Giordano
- Kenneth J. Phillips
- Robert Cressman
- Ellen Faragasso
- Sidney R. Parker
- Peggy Russo
- Steven Carl Calhoun
- Gail Davis

It was further stipulated that certain of these employees had signed cards authorizing the Union, Local 1357, to represent them for purposes of collective bargaining; that the signatures on certain authorization cards are authentic and the cards were signed about the dates appearing thereon; and that the authorization cards received in evidence here are authentic. The names of the individuals so stipulated and the dates appearing on their cards are listed below:

Chander Lewis	Oct. 29, 1985
Marlo Jackson	Nov. 5, 1985
Francys Cotto	Nov. 1, 1985
Kenneth J. Phillips	Oct. 4, 1985
Joyce Florence	Nov. 3, 1985
Curtis Leroy Bond	Nov. 3, 1985
Arlene Siers	Nov. 13, 1985
Curtis Snyder, Jr.	Nov. 25, 1985
Sidney R. Parker	Nov. 3, 1985
Richardson Jarman	Nov. 3, 1985
Steven Carl Calhoun	Oct 25, 1985
Jerome Thomas	Nov. 11, 1985
Francine Wilson	Oct. 25, 1985
Marie Barseghian	Nov. 4, 1985
Karen Andrews	Nov. 4, 1985
Ralph Atwell	Nov. 2, 1985
Lisa Huffnagle	Nov. 3, 1985
John De Marco	Nov. 7, 1985
Roger Parker	Nov. 3, 1985
Edward Hutton	Oct. 25, 1985
Robert Cressman	Nov. 13, 1985
Arlene Tolliver	Nov. 2, 1985
Nancy E. Powell	Nov. 8, 1985
Gail Davis	Oct. 29, 1985

The parties agreed not to agree on the status of three individuals, Marie Barseghian, Arlene Siers, and Karen Andrews. The General Counsel and the Union contend that these people were permanent full-time or regular part-time employees who should be included in the above-stipulated unit, the Company arguing that they were temporary employees who should be excluded from the said unit. Karen Andrews testified that she was hired as a full-time, permanent employee. However, Joseph Lieberman testified that Andrews was "seasonal." He said he did not "plan on her" being permanent, but admitted that at no point was Andrews told she was only temporary. Ellen Nancy Faragasso, the manager of the Company's Frankford Avenue Store, testified that Andrews was only temporary. I cannot find on this evidence that Andrews was a permanent full-time employee from October to December 1985.

Barseghian did not testify, but Faragasso and Lieberman testified that she was hired in September or October, and resigned, of her own accord, in June 1986. There is no indication that she could not have continued to work if she had not resigned. I find Barseghian to have been a full-time, permanent employee in October, November, and December 1985.

Arlene Siers did not testify and there was no evidence in this record on her status. I make no finding whether she was a full-time, permanent employee.

Based on these findings, I would add the name of Barseghian to the stipulated list of employees given above, making a total of 36 names. I would then delete the name of Arlene Siers from the list of cardsigners, leaving 23 names. Since a total of 18 persons would constitute a majority of the employees stipulated as being in the unit, I find, referring to the stipulated dates on the cards, that the Union had a majority, in effect stipulated to by the parties, on and after 7 November 1985.

B. *Organization and Request for Recognition*

John Myerson, an organizing representative for the United Food and Commercial Workers Union, testified that he received a telephone call on 27 October from Steven Calhoun, an employee of the Company, indicating an interest in organizing a union at the Company. On 29 October, a meeting was held at a Roy Rogers restaurant in downtown Philadelphia between Myerson and four employees representing the Company's three Chestnut Street stores. Myerson explained what had to be done to organize the stores, and he distributed authorization cards to the employees who were there.

Additional meetings were held on 3 November at the home of employee Ralph Atwell, and on 24 November at the Union's offices. By the second week in November, as stated by Myerson, and as I have already found, the Union had valid authorization cards from a majority of the employees in the bargaining unit.

On Friday, 15 November, Myerson and another union representative went to the Company's office at 4530 Lacony Street and there spoke to Jack Segal. The union representatives presented Segal with a letter demanding recognition and, according to Myerson, told him that they represented a majority of the Company's employees, and requested that he recognize the Union as the bargaining representative for the Company's employees. Segal then asked if they knew how many people were employed at Amazing Stores. When the union representatives told him, Segal accused these people of being "ingrates" and pointed out that he had personally helped many of his employees during the course of their employment and, finally, said he was going to refer the matter to his attorney.

Segal's version of this meeting stated that the union representatives began by telling him that they had, not a majority, but over 30-percent signature cards. Segal asked if he could see the cards and was refused. He then denied that he had used the word "ingrates" to describe his employees, but did say that he told the union representatives that he could not understand why his employees had gone to the Union, emphasizing his generosity and fairness to the employees.

The testimony by Myerson that he requested recognition based on a union majority is much more logical than Segal's statement that the union representatives said only that they had over 30 percent of the people signed up. There would have been no point in Myerson's trip out to the Company's headquarters if all he was going to say was that the Union had over 30 percent of the cards signed. He could have notified the Company of that either directly, by letter, or by filing a petition with the Board's Regional Office. That office, in turn, would have notified the Company. Segal must have been referring in his testimony to something he had heard, somewhere, about an administrative requirement for 30-percent cards signed in order to process an election petition.[2] While I found Segal to be a truthful witness, I think that his testimony shows that he did not have a good memory in recalling individual conversations that occurred in connection with this case. In this instance, as in others, Segal just did not accurately recall the content of the conversation with Myerson and his associate.

C. *The Company's Reaction*

Whether Segal actually used the word "ingrates" in referring to his employees, there is no dispute that he was hurt and upset by the news that the employees had selected, or were going to select, a union to represent them. He had, according to his testimony, never had trouble negotiating with any of his employees. He felt that he had never been unfair to any employee. He did not recall ever turning down an employee for a raise, and did recall many instances where raises were given without even a request by the employee. He had never refused anybody anything within reason, he had helped people buy houses, helped them in times of stress, had lent money constantly at no interest, even though he had to pay interest when he borrowed.

Moreover, Segal testified, he personally felt that if the Company had a union, he just, at this stage in his life,[3] did not want strangers dictating to him. He therefore decided that if they had a union he just could not live with it.

A few days after the 15 November meeting, Lieberman and Glenn Segal returned to Philadelphia from out of town and the three of them sat down to discuss the union situation. Segal told his associates that if the Union came in he would like to take his share of the equity in the Company in stores rather than in dollars. He would then sell these stores for dollars. Two of the three other owners of the business, Glenn Segal and Sidney Burezin, did not testify at this hearing. Leiberman did testify, and stated that he, too, was going to sell the stores if the Union came in.

There is no indication, in this record, of any discussions among management people of any concerted plan of opposition to the Union. Segal and Lieberman both testified that during the union campaign, in November and December, they heard from their store managers that the union activity was upsetting employees and impairing efficiency in the stores. Segal and Lieberman therefore determined to visit the stores and talk to as many individual employees as would talk to them about the Union and its impact on the Company.[4] Segal tried to downplay the fact that he and Lieberman visited all the stores and made efforts to contact, personally, each and every employee with their message of opposition to the Union, but he did not deny that this is what he and Lieberman did.

The procedure followed was for Segal and Lieberman, or one or the other of them, to go to a store and have the manager ask the employees to come to a back room to talk with whichever manager was present.[5] It is the content of these meetings that is alleged by the General Counsel to contain violations of Section 8(a)(1) of the Act.

D. *Alleged 8(a)(1) Violations*

The General Counsel brought in a number of witnesses who testified about matters contained in the complaint. The testimony of these witnesses consisted principally of reports of the meetings held by Segal and Leiberman, together or separately. All the General Counsel's witnesses agreed that they were asked to participate in these meetings either on request of the store managers or by encountering Segal or Lieberman in their stores. After listening to a number of these witnesses relate substantially identical versions of what occurred in these meetings, I declined to allow the General Counsel to adduce further testimony on the proposed sale of the stores or the promises of improved working conditions. Offers of proof made by the General Counsel did not induce me to change my mind. At the most, the additional evidence proposed to be adduced would have been redundant, merely adding additional testimony on the same type of allegations for which this decision will afford adequate relief.

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[2] Lieberman testified that Segal told him that the Union men told him that they had a "majority of our employees signing cards that they wanted a Union."

[3] Segal is not a young man, but he appeared trim and vigorous—certainly not doddering nor incapable of the daily tasks in running a business.

[4] Segal and Lieberman were accustomed to visiting all the stores on a regular basis, but they did not as a rule stop and talk to employees during those visits other than to exchange greetings or pass the time of day.

[5] The evidence is undisputed that Segal did most of the talking, but Lieberman joined in from time to time. Several employees could not remember which of the managers said what at their meeting.

With a single exception,[6] I found the General Counsel's witnesses to be generally credible. Although no one, either the witnesses for the General Counsel or the Respondent, were very precise on dates or details, this is not a case that will turn on the exact day or hour a particular event occurred. The facts as related by the General Counsel's witnesses concerning the threats to close the stores, or to sell out to Korean purchasers were consistent, were mutually corroborated without appearing staged, and were frankly admitted by Segal and Lieberman. Similarly, other complaint allegations including promises of benefits, solicitation of grievances, withholding of bonuses from individuals and from all the employees, were consistently related by employee witnesses and not seriously controverted by the Respondent's witnesses. In other parts of the complaint, including the alleged discharge of Gail Davis and the layoff of Karen Andrews, there are some issues of credibility that I attempt, below, to resolve.

Turning to the specific testimony, Francys Cotto, an employee of the Company's store at 16th and Chestnut Streets, testified that about 2 weeks before the ballots were to be turned in to the Board's Regional Office, her manager, Trace Dribier, told her to go to the back of the store and talk to Segal and Lieberman. According to Cotto, both Segal and Lieberman talked to her. They said that things were going to get better if they did not have a union. They also said that they would sell the store if they had a union. Segal did not deny this last statement, adding, in his testimony concerning this meeting, that he did not want anyone putting a hand in his pocket, and that his plans were to sell some of the stores. Lieberman testified that Cotto told Segal and he that she was being harassed by other employees, but he had no memory of what Segal may have said to Cotto.

Marlo Jackson, an employee at the 11th and Chestnut Streets store at the time of the union campaign, testified that his manager, Joe Giordano, told him that Segal and Lieberman wanted to meet with him in the back room of the store. Jackson went to the back room and met with Segal and Lieberman. Segal did most of the talking, telling Jackson that if the Union got in they would sell the stores, but if not, the employees would get a raise. Jackson further said that the employees discussed their conversations with Segal and Lieberman and the selling of the stores. About 2 weeks after this conversation, Jackson said he saw Sid Burezin, one of the Company's owners, in the store showing an oriental man around the premises. Neither Segal nor Burezin testified about the matter.

Robert Cressman worked at the Frankford Avenue store at the time of the union campaign, and at the time he testified here, almost a year later, he had been promoted to manager at the 1124 Chestnut Street location. Cressman testified that Lieberman approached him in the back room of the Frankford Avenue store in mid-December and asked if he knew anything about the Union. At this time Cressman had signed a union authorization card, had given a card to another employee, Karen Andrews, and had attended at least one union meeting. However, he replied to Lieberman's question by saying no. Leiberman said that he thought Cressman would know about the Union because Ralph Atwell, the company's driver and deliverer, "was going around telling people" about the Union.

A bit later Lieberman again asked Cressman what he thought about the Union. Cressman answered that he did not care. He said that he needed his job, and asked Lieberman for medical coverage and a transfer out of that store. Lieberman responded to this by saying that he would get Cressman out of that store by March, and would see what he could do about medical coverage.

At another meeting, in about the same period, and on a Friday night, Lieberman, together with Jack and Glenn Segal, engaged Cressman in conversation. Cressman said they were all talking, again asking about the Union, and again he said he did not care about it. They told him that if the Union came in they would sell the stores individually to Koreans and that the employees would lose their jobs. After this Cressman stated that he saw Lieberman in the Frankford Avenue store accompanied by a Korean man.

At the time that the employees were preparing the mail ballots to send to the Board's Regional Office, Cressman testified that he overheard Lieberman telling employees Marie Barseghian and Sid Parker[7] that if they brought their ballots in to him he would stamp and mail them.

Lieberman had very little precise recollection about these conversations. He did state that Cressman had told him he did not care about the Union, but could not recall who initiated the discussion about the Union. Lieberman further verified that he told Cressman that "we would be moving him up," and that the Company would sell the stores if the Union came in. Lieberman testified that he told employees to be sure to vote and to get their ballots in. He did say that Barseghian had offered to show her ballot to him, but that he told her that she did not have to prove anything to him. Segal testified that he did not remember much about the interviews with Cressman.

Lisa Huffnagle was working as a cashier at the 11th and Chestnut Streets store in the fall of 1985. She was friendly with Robert Cressman and in November or December went to see him at the Frankford Avenue store. While there she ran into Segal who asked her what she thought of the Union. Huffnagle was afraid for her job and said nothing. Segal then asked what he could do for her, adding that he would give her a "little bit more" money if the Union did not get in. Emboldened by this, Huffnagle asked about medical benefits. Segal said no, but repeated that he would give her more money. Segal told her that he did not want the Union in because he would "have bosses over top of him." At this point in the conversation Lieberman came up to where Segal and

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[6] Employee Roger Parker seemed to me to be a preoccupied witness with only a limited sense of his relation to the subject matter of his testimony. I do not credit his statements regarding the issues herein.

[7] Erroneously referred to in the transcript as "Sue" Parker.

Huffnagle were talking. Segal then said that the stores Would close if the Union got in, that they would sell the stores one by one to Koreans. Huffnagle later saw a person she described as a Korean at the store with Segal, and later with Lieberman. She stated that she had never seen Koreans in that store before.

Huffnagle also testified that Jim Giordano, the manager of the 11th and Chestnut store in the fall of 1985, told her that if the Union got in the stores would close immediately.

Segal testified that he believed he had met with Lisa Huffnagle, but that "that one is a little vague to me." Lieberman did recall that Huffnagle mentioned problems at 11th Street but he was also very vague and general about what was said in his talk with Huffnagle. He did say that she had asked for more money but he and Segal told him they could not give anyone raises at that time.

Giordano, an admitted supervisor, did not testify at all.

Arlene Tolliver is a cashier at the 8th and Chestnut Street store. About a month before she was to mail in her ballot, she was working at the Chelton Avenue store and testified that Jack Segal approached her in the back room of that store. Segal began by asking Tolliver if she had "any gripes." This apparently was repeated, and finally Tolliver told Segal that she was not happy with the fact that she had not received a raise for a year and a half. Segal said he was sorry and that he would see what he could do after the union vote. Nothing could be done right then. He also said that he would close the stores down if the Union got in.

Segal not only did not deny these statements attributed to him, but added that at that meeting Tolliver asked for, and was granted, a day off on Dr. Martin Luther King's birthday, which happened to be the same day as her own birthday.

Francine Wilson is a cashier at 11th and Chestnut and was employed at 8th and Chestnut at the time of the union campaign late in 1985. She had attended union meetings and had assisted in the processing of employee authorization cards. In November 1985, Segal talked to her in the back room of the 816 Chestnut Street store. He said that he had heard Wilson was the secretary for the Union, adding that he would "hate to lose" her, but he would not hold that over her head. He also told Wilson that he had his own business for so long that he could not afford to "let somebody else come in" and he would be forced to sell the stores one by one. Wilson also testified that her manager had previously recommended her for a raise, and that Segal had approved it, but when he came to talk to her in the back room he said that he could not give it then, but would get it after the election was over. She did receive a raise in January 1986, after the election.[8]

In addition to this, there was some conversation about how good Segal had been to Wilson's mother and cousin, giving them jobs and protecting them in those jobs. In fact, as Segal pointed out in his testimony, Wilson changed in the course of that conversation, telling him that she no longer wanted the Union, and that she would inform the employees at the 11th and Chestnut store of this conversation.

John De Marco was employed at the Company's Sharon Hill store from September 1985 to October 1986. He testified that he had signed a card that was given him by Ralph Atwell. About 3 weeks before the election Lieberman called De Marco into the back room at the Sharon Hill store. De Marco's testimony came out a bit garbled in the transcript, but I think it is fair to say from what does appear there, and from my memory of De Marco's testimony, that Lieberman told him that things would get better if the Union lost, and that he was going to sell the store to Koreans if the Union won. Whatever Lieberman said about improvements in conditions at the store De Marco was foggy on the details, but concluded that whatever was said "was really nice, it was great." Lieberman was not asked about this conversation.

Two other employees, Ralph Atwell and Karen Andrews, were named in the complaint as having suffered discriminatory treatment, but they also testified concerning actions that come within the allegations in this section of the decision.

Atwell worked in the Company's warehouse at 4530 Tacony Street from May 1984 to February 1986. His duties involved driving the Company's van or truck making deliveries to the stores scattered around the Philadelphia area, and to Sharon Hill and Allentown. Atwell also acted as a courier for the Union during the campaign, passing out and picking up cards at the stores. He hosted a union meeting at his house, which was attended by "quite a few" employees. He testified that Segal approached him one day after he got involved with the Union, and said he had heard a rumor that Atwell was a "ringleader" in the Union. Segal asked Atwell why he had not come and told him. Atwell replied that Segal would not have believed him anyhow.[9]

Karen Andrews was hired by Amazing Stores on 16 October 1985, and worked through 31 December of that same year at the Frankford Avenue store. Robert Cressman gave her a union authorization card, which she signed and returned, and she attended at least one union meeting. At the beginning of December Lieberman called her into the back room of the store, and he asked her about the Union. She said that she had attended a meeting and Lieberman replied that he knew she was there, it did not matter who told him,[10] but he knew she was at a meeting. Lieberman told Andrews how good he had been to employees, granting raises and days off, and stated that if the Union got in they would probably sell the stores—if they had to pay benefits and higher wages prices would go up and they would lose business. If the Union did not get in they were going to revamp all the stores, and were going to get rid of the people who were not doing their jobs.

When asked about who Lieberman said he was going to sell the stores to, Andrews quoted him as saying he already had a Korean guy coming in, looking at the stores, and if the Korean people got in, they would eventually bring their families in and the current employees would all be let go.

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[8] Wilson had been employed since 1983, and had received a raise every year. Segal agreed that she was clever, a good employee, and had received four raises up to 1986.

[9] Atwell's further dealings with the Company will be related in sec. III,E,1, below.

[10] From Lieberman's testimony it appears that Cressman told him that Andrews was at a union meeting.

Segal then joined them and asked Andrews what the Union had offered her. She said the Union just offered information, and she continued to describe Segal's comments, quoting him as saying that the stores were his livelihood, and if the Union got in it would not be worth it to him (to continue the business).

The testimony of Andrews on this meeting was not denied either by Segal or Lieberman.

I have already found that the testimony of the General Counsel's witnesses was generally credible. In dealing with this section of the complaint, I found that the General Counsel's witnesses to be entirely credible. Moreover, this substantive testimony was either corroborated or undenied in all respects by the testimony of Lieberman and Segal. The latter two made it obvious that they were acting in concert, that they made every effort to carry their message to all of the employees, that their primary message was if the Union was to win the election the stores would be closed or sold to Koreans, that the Koreans would hire their family members to staff the stores, and that whether the stores have closed or sold, the employees would lose their jobs. Segal was candid in admitting that he went to a Korean broker and arranged for a Korean potential buyer to be escorted around to some of the stores.[11] I conclude, in view of these facts, that Segal and Lieberman talked to almost all the employees of all the Amazing Stores, causing widespread concern shared jointly by all the employees and expressed in considerable discussion among themselves. The testimony of Huffnagle, Wilson, Andrews, and Cressman shows that these employees were apprehensive about their jobs. These were not throw-away jobs for these people, but were the employees' means of survival. The employees' fears were exacerbated by the actions of Segal and Lieberman in walking through the stores with Koreans or other oriental persons, who could be taken to be prospective buyers. An additional allegation noted that admitted Supervisor James Giordano told employee Lisa Huffnagle that the stores would be closed if the Union won the election. I find that this occurred as related by Huffnagle. Giordano did not testify. I find these activities by Respondent violated Section 8(a)(1) of the Act. *NLRB v. Gissel Packing Co.*, 395 U.S. 575 (1969); *Seal Trucking Limited*, 237 NLRB 1091 (1978).

I find, further, that Respondent unlawfully gave the impression to its employees that their activities on behalf of the Union were under surveillance. This is alleged in the complaint with respect to Lieberman's remarks to Karen Andrews that he knew she had attended a union meeting, and that it did not matter who told him, but he knew it. This necessarily had a coercive effect on employee union activity, and violated Section 8(a)(1) of the Act. *Edward A. Utlaut Memorial Hospital*, 249 NLRB 1153 (1980); *Brodart, Inc.*, 257 NLRB 380 (1981).[12]

Respondent violated the law through Lieberman's questions to Karen Andrews about her knowledge of the union campaign, and to Lisa Huffnagle on what she thought about the Union. In the circumstances of these interrogations, conducted by the company's highest officials in intimidating circumstances in back rooms with no other employees present the qualifications noted in *Rossmore House*[13] do not apply; *Robins Federal Credit Union*, 273 NLRB 1352 (1985).

With respect to allegations in the complaint concerning promises of benefits by the Respondent to employees if the Union did not win the election, I find that Jack Segal told Marlo Jackson that the employees would get raises if they rejected the Union; Lieberman and Segal promised Francys Cotto that "things would get better" if they did not have a union; and Lieberman's promise of "more money" and unspecified "approvements" to employees John De Marco. All of these incidents constitute violations of Section 8(a)(1) of the Act. *Baker Mfg. Co.*, 218 NLRB 1295 (1975); *Martin City Ready Mix*, 264 NLRB 450 (1982).

The complaint also alleged that the Respondent, through the activities of Lieberman, or Segal, or both, had solicited grievances from an employee (Segal); threatened an employee with less favorable benefits and working conditions (Lieberman and Segal); and threatened to delay, and in fact did delay, the payment of employee Christmas bonuses (Lieberman and Segal). Arlene Tolliver testified that Segal repeatedly asked her if she had any grievances at their meeting in the stockroom of the Chelten Avenue store. When she complained that she could not take off on Martin Luther King's birthday, Segal replied that he did not see why she could not have the day off. He also indicated that he would see about a raise for her as soon as the "union thing" was settled. I find this solicitation of grievance to violate Section 8(a)(1). *Rexair, Inc.*, 243 NLRB 876 (1979).

The allegation dealing with alleged threats to reduce benefits stems, according to the General Counsel's brief, from the conversation between Segal, Lieberman, and Karen Andrews in the stockroom of the Frankford Avenue store. Lieberman pointed out to Andrews in that meeting that the Company had accommodated Andrews' schedule and had given her raises. The implication is obvious. If she continued to support the Union, then those privileges would be withdrawn. I find this, too, to be a violation of Section 8(a)(1). *Rosewood Mfg. Co.*, 269 NLRB 782 (1984).

There is no question here that the Company had, for at least 2 years prior to 1985, distributed a Christmas bonus to employees just before that holiday. In 1985, however, Lisa Huffnagle testified that Lieberman and Segal told her that the employees would not receive bonuses because that would appear to be a "bribe." Francine Wilson testified that she was told by her manager that the reason for the delay in giving bonuses was the employees' union activities. In fact bonuses were given, but were not distributed until New Year's Eve, 31 December 1985. The election was conducted by mail ballot between 10 and 30 December 1985, and the ballots were counted on 16 January 1986. It thus appears from the credible testimony of Huffnagle and Wilson, undenied by Respondent's witnesses, that the bonuses were delayed because of the employees' participation in the election process being conducted under the auspices of the Board. The threat to take this action and the action itself are separate violations of Section 8(a)(1) of the Act; *Franklin Parish Broadcasting*, 222 NLRB 1133 (1976); *National Micronetics*, 277 NLRB 993 (1985).

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[11] I cannot say that this was not legitimate insofar as the prospective buyer was concerned. I am not so sure about Segal's motivation in soliciting such potential purchases. Whatever the motive, I find that the appearance of the Korean in the stores served to emphasize and dramatize the threats to sell or close the stores. The fact that the matter was dropped after the elections shows that the whole idea of a sale was calculated to frighten and intimidate the employees.

[12] Segal made similar remarks to Francine Wilson and Ralph Atwell, but these incidents were not alleged as violations in the complaint.

[13] 269 NLRB 1176 (1984).

As I have noted above, I do not consider the testimony of Roger Parker to be reliable. I therefore cannot find that his testimony about Lieberman's alleged request to employees to bring their ballots in to him and he would mail them to the Board to be credible. Nor do I find that statements alleged by Parker to have been made by Supervisor Sarah Block are reliable enough to base a finding.

E. *Alleged 8(a)(3) Violations*

1. Ralph Atwell

As described above, Respondent became aware of Atwell's union activity early in the campaign. Segal had confronted him with the accusation that he was the ringleader of the union activity. Atwell was not the person who brought the Union into contact with the Company's employees. That person was Steve Calhoun. But Atwell was highly visible in his support for the Union and acted as a courier between union adherents in the scattered stores.

In December 1985 the Company, presumably through the decisions of Lieberman and Segal, determined that Atwell would not be given a Christmas bonus. This decision was made allegedly because of Atwell's poor work performance. Segal claimed in his testimony that he warned Atwell about his work performance late in December. Segal said he called three employees to witness his conversation with Atwell, but none of these "witnesses" were called on to testify in this case. Atwell denied that the incident took place, and I credit his testimony in this regard. The remaining testimony by Segal concerning Atwell reflects, in my opinion, that Segal resented the fact that Atwell's job took him around to the stores where he could and did talk about the Union to the employees. There is no substantial evidence that Atwell disrupted work in the store, or otherwise did not perform in a satisfactory manner.

In addition to its denial of a Christmas bonus to Atwell, the Company also denied him a pay increase when it reviewed its employees' wages in January 1986. The same reasons were advanced for this as for the denial of the Christmas bonus.

There being no legitimate or credible business justification for these actions, I find that Respondent violated Section 8(a)(1) and (3) in denying Atwell a Christmas bonus in 1985, and a pay increase in 1986.

2. Gail Davis

Davis began working for Lieberman and Segal at another store owned by them, called Top Banana, in 1981. In 1983 she moved to the Amazing store at 1124 Chestnut Street. She remained at this last location throughout the union campaign.

In early December, her manager, Jim Giordano, told her that Segal was in the back room and wanted to talk to her. She asked if she had to. Giordano said no, so Davis said she did not want to go back there. According to Davis, everyone else in the store went to the back room to talk to Segal except Steve Calhoun and herself. Calhoun later did talk to Segal about the Union.

On New Year's Eve 1985, Lieberman and Segal came to the 1124 Chestnut Street store about 2:30 or 3 o'clock in the afternoon. Davis and Lisa Huffnagle were both working on separate cash registers, although both testified that it was not busy that afternoon.[14] All the employees who were in the store that day were called to the back room and received a bonus with the exception of Gail Davis. After Lieberman and Segal had left Davis called Manager Jim Giordano over and asked about her Christmas bonus. Giordano replied that she would not go back to see Lieberman and Segal when they wanted to talk to her, so she was to get no bonus. This last was corroborated by Lisa Huffnagle. Giordano did not testify. Segal and Lieberman averred that they did have a bonus for Davis, but the store was so busy that she could not be relieved at the time they were there. They stated that they went to another store further west on Chestnut, then returned later to find that Davis had already left.[15]

In the meantime, after Girodano told her that she would not be receiving a bonus, Davis told Giordano that she was leaving early. She was upset and, in response to Huffnagle's request that she give her a call, replied "what for?" and when Huffnagle asked her if she was coming back, again said "what for?" Davis was not so angry that she did not wish everyone a happy new year before she left. Notwithstanding the strained circumstances of her departure, Davis testified, credibly, that she told Giordano that she was leaving, she did not say that she was quitting, and that Giordano did not say anything to her, merely shrugging his shoulders. The next working day, 2 January 1986, according to Davis, she called Giordano and told him that she would not be in that day. This was the normal procedure for employees who were taking a day off. Giordano said "O.K." Later that day, however, Giordano called Davis on the telephone and said, "Gail, you are being replaced." She asked if she was being fired and Giordano replied, "No, you quit." Davis later went to the Company's office to pick up her check. While she was there she asked Lieberman why she was fired. He said she had quit, but she was given no opportunity to return to the 1124 Chestnut store, or to be reassigned somewhere else. Nor was she given the bonus check that Segal and Lieberman testified they had not been able to give her on 31 December at Chestnut Street.

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[14] Bruce Kreskow testified that he was a relief cashier at the 1124 Chestnut Street Store, but that he was not called to fill in on that day.

[15] They did not attempt to explain why they did not make arrangements to pay the bonus to Davis, or even to send it to her if, as they maintained, she had quit.

On the bonus check, I think the record is clear that Segal and Lieberman had no intention of giving the check to Davis when they visited the 1124 Chestnut Store on 31 December. There is no question that the store was not busy. Huffnagle, the other cashier, was relieved to get her check. Kraskow, the relief cashier was not called to relieve Huffnagle. There is no testimony to corroborate the testimony of Segal and Lieberman that they returned to the store later that evening. In fact both Huffnagle and Kraskow testified that they did not return. Davis' testimony that Giordano told her that she did not get a bonus check because she had refused to talk to Segal and Lieberman earlier, during the union campaign, is both credible and undenied. I find, in these circumstances, that Davis was denied her bonus because of her refusal to meet with her employers, a clear violation of her right to engage in protected activity on behalf of the Union in violation of Section 8(a)(1) and (3) of the Act.

The next question is whether Davis' leaving the store on the afternoon of 31 December constituted a resignation from her employment. I think not. Davis testified, again credibly, that she told Giordano that she was leaving. She had been publicly humiliated by not receiving a check, and Giordano's explanation of why she had not been paid the bonus had been overheard at least by Huffnagle. Giordano's reply was a noncommittal shrug. He did not say she could not or should not go. There is no indication in this record that punching out early was an offense against company rules or policies. At that point, despite what Davis may have said to Huffnagle, even in the presence of Giordano, Davis had not indicated to any responsible company official that she was not coming back. In any event, any ambiguity left in the atmosphere of New Year's Eve should have been clarified for the Company when Davis talked to Giordano on the morning of the next working day 2 January 1986. She told him that she would not be in that day and he agreed with that statement, saying "o.k."

We do not know what happened after that morning telephone call, but the next thing that Davis knew, Giordano called her at 4 or 4:30 on the afternoon of 2 January and told her she had been replaced. The only logical explanation for this is that a decision was made, I infer and find it was made by Lieberman and Segal, to use Davis' angry departure on New Year's Eve as an excuse to get rid of her. This, I find, follows logically from the refusal to pay this troublesome and uncooperative employee a bonus, and her natural irritation at being told that the reason for the refusal to pay the bonus was her exercise of her rights under Section 7 of the Act, to refrain from meeting with Segal and Lieberman. In these circumstances, I find that Davis was, in fact, discharged in further retaliation for her exercise of statutorily protected rights.

3. Karen Andrews

Andrews was hired on 6 October 1986 as a cashier in the Frankford Avenue store. She maintained that she was hired as a permanent, not a seasonal, employee. Robert Cressman testified that he had suggested to Lieberman in the fall that they needed another person at Frankford Avenue for holiday work. Andrews was hired after that, but there does not seem to be a connection between Cressman's recommendation and Andrew's hiring. In any event, she was hired by Store Manager Ellen Nancy Faragasso. Lieberman indicated at one point in his testimony that Andrews was a "seasonal" employee, and at another point he was not so clear about her status, fending off questions about her absenteeism and job performance, saying that at that time they needed all the hours she could give them.[16]

It is accurate to say that Andrews was not the most faithful of workers. She had a problem in that she had to drop her little boy off at school about the time she was scheduled to report for work making her, by her own admission, 10 minutes or so late every morning.[17] Beyond this chronic tardiness, Andrews was marked as being sick for at least 1 day in November, according to the two timecards in evidence. She was described by Faragasso as being sick at other times and not calling in. Andrews also obtained another job in December. This was a daytime waitress position at a local restaurant on Thursdays and Fridays. She testified that she had to begin as a day employee at the restaurant in order to work her way on to the night shift. She was moved to nights at the restaurant in January.

Meanwhile, after Christmas, Andrews noted that she was scheduled for only 1 day in the following week. She asked Lieberman about this and he replied that he was having a hard time finding hours for her. He did say that he would try to find some hours, and asked her if she would work at other stores. She said she would. However, on the next day, 31 December, Lieberman called Andrews and told her he could not find any hours for her and had to lay her off. When she protested he said there was nothing he could do for her when she was coming in late all the time and missing days.

Aside from Lieberman's answer to one question on the layoff of Andrews, the position of the Company is consistent, through the testimony of Faragasso and Cressman, who I found to be credible witnesses, that Andrews was hired as a seasonal employee. The season ended right after the holidays, and she was laid off. I do not believe that the General Counsel has established a prima face case that this layoff was motivated by any reasons other than the seasonal nature of Andrew's employment, and her admitted tardiness and poor attendance. Therefore, I do not find a violation of Section 8(a)(1) and (3) in the Andrews' layoff.

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[16] Faragasso also testified that Andrews was hired as a seasonal employee, and that she was warned constantly about lateness and absenteeism.

[17] Two timecards submitted in evidence by the Respondent show that this statement was substantially accurate, although the cards do not bear out Andrew's assertion that she worked 8 hours a day, 6 days a week; rather they show her working only 3 days in each of the 2 weeks covered.

F. *The Alleged Refusal to Bargain*

I have already found, based on the arithmetical figures represented by the names of employees agreed on by the parties, and by my findings regarding Andrews, Barseghian, and Siers in section III,A, above, the Union held authorization cards for a majority of the employees from 7 November through 15 November 1985.

On 15 November the Union made a valid demand for recognition based on this majority. The Company refused to recognize the Union, instead it began what I find to be a calculated plan of coercion and intimidation orchestrated and implemented by Joseph Lieberman and Jack Segal, through individual meetings with all but one of the Company's employees. The centerpiece of the campaign was the constantly repeated assertion by Lieberman or Segal or both in these meetings where they each applied pressure to the unaccompanied, sometimes frightened, individuals by means of threats that the stores were going to be closed or sold to Koreans who, in turn, would hire their own relatives and discharge the current employees. The threats uttered at the individual meetings were given additional substance by appearances of Lieberman and Segal accompanied by one or more oriental persons, a theatrical device I have found to have been staged by Segal in order to heighten the employees' anxieties.

The critical points that I discerned in all this were, of course, the coercive impact of the threats and the appearances of the Koreans; the other unfair labor practices I have found, the interrogations, promises of improved conditions, denial of bonuses, giving the impression of surveillance; but the fact that both Segal and Lieberman not only admitted that they had threatened employees that they would close or sell the stores, but the fact, from my observation of both Lieberman and Segal while they were testifying, that they meant exactly what they were saying, and that if the Union had won the election they would have sold off the stores, to Koreans, or anybody, and rid themselves of any obligation to bargain collectively with the Union chosen by their employees. Moreover, I discerned not one iota of regret or remorse that they had done these things. I have no doubt that if, as the result of my recommendations in this case, a second election were to be ordered, Lieberman and Segal would find the means to let their employees know that their joint will is unchanged and that the advent of the Union would mean the end of their connection with Amazing Stores.

It is for this last reason, more than the other unfair labor practices, even the mistreatment of Ralph Atwell and the discharge of Gail Davis, that I feel that the ordinary remedies of notice posting, cease and desist, and a new election would not properly protect the rights of the employees here so egregiously disregarded, and that a bargaining order, as requested by the General Counsel, would be the most appropriate remedy.[18] I therefore find that the Respondent has failed to bargain in good faith with the majority representative of its employees in the unit stipulated to by the parties in violation of Section 8(a)(1) and (5) of the Act. *NLRB v. Gissel Packing Co.*, 395 U.S. 575 (1969); *Precision Graphics*, 256 NLRB 381 (1981); *Michigan Expediting Service*, 282 NLRB 210 (1986).

G. *The Objections*

In view of my disposition of the unfair labor practice portion of this case, see section III,F, above, I recommend that the objections to the election be dismissed.

IV. THE REMEDY

Having found that the Respondent has violated Section 8(a)(1), (3), and (5) of the Act, I shall recommend that it cease and desist therefrom and that it take the following affirmative action designed to effectuate the policies of the Act. I will recommend that the Respondent offer to Gail Davis immediate reinstatement to her former position or, if that position no longer exists, to a substantially equivalent position without prejudice to her seniority or other rights and privileges that she had enjoyed, and that she be made whole for any loss of earnings suffered by her as a result of the discrimination against her by the payment of sums equal to those she would have earned, absent such discrimination, with backpay computed in accordance with the formula in *F. W. Woolworth Co.*, 90 NLRB 289 (1950), and with interest compounded in the manner described in *Florida Steel Corp.*, 231 NLRB 651 (1977).

I will recommend that the Respondent pay to Gail Davis and to Ralph Atwell sums equivalent to the bonuses that were unlawfully denied them in December 1985, and to Atwell a sum equal to any pay increase he would have been awarded in January 1986, to the time of his voluntary termination from employment with Respondent together with interest thereon.

I will recommend that the Respondent on request bargain in good faith with the Union as the representative of its employees in the unit heretofore found to be appropriate, concerning wages, hours, and other conditions of employment for the employees in said unit.

Because the unfair labor practices found here are egregious and widespread, going to the heart of the Act, and vitally affecting the livelihood of employees, I shall recommend that a broad order issue in this matter; *Hickmott Foods*, supra, and I shall grant the General Counsel's request for a remedial visitatorial provision.

Because there is a real possibility that Respondent will sell one or more of its retail stores in order to frustrate its employees' wishes, or this recommended order, I shall recommend that it be ordered not to discontinue its operations, at any of its locations.

CONCLUSIONS OF LAW

1. The Respondent, Amazing Stores, Inc., is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

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[18] Indeed, I feel that the possibility of the closing or sale of stores is so real a risk that I am recommending a broad order here to put whatever emphasis I can on the danger of disregard and nullification of the effect of this decision by the Respondent; *Hickmott Foods*, 242 NLRB 1357 (1979).

2. United Food and Commercial Workers, Local 1357, AFL-CIO is a labor organization within the meaning of Section 2(5) of the Act.

3. The following employees of Respondent constitute a unit appropriate for the purpose of collective bargaining within the meaning of Section 8(b) of the Act:

> All full-time and regular part-time sales personnel, stock personnel, cashiers and truck drivers employed by the Employer at its 816 Chestnut St., 1124 Chestnut St., 1621 Chestnut St., 7130 Frankford Ave., 5645 N. 5th St., Academy Plaza, Academy & Red Lion Rds, and 139 W. Chelten Ave., Philadelphia, PA., locations, and its Sharon Hill Plaza, Chester Pike, Sharon Hill, PA., 734 Hamilton St., Allentown, PA., locations, excluding all their employees, guards and supervisors as defined in the Act.

4. By interrogating its employees, by giving them the impression their protected activities were under surveillance, by promising them benefits, coercing and threatening them in order to interfere with their right to choose a representative for collective bargaining, the Respondent has violated Section 8(a)(1) of the Act.

5. By threatening to withhold employees' bonuses and by withholding those bonuses for a period of 1 week, the Respondent has violated Section 8(a)(1) of the Act.

6. By failing and refusing to pay bonuses and pay increases to Gail Davis and Ralph Atwell, the Respondent has violated Section 8(a)(1) and (3) of the Act.

7. By discharging Gail Davis, the Respondent has violated Section 8(a)(1) and (3) of the Act.

8. By refusing to bargain collectively and in good faith with the Union, in the unit set out above, the Respondent has violated Section 8(a)(1) and (5) of the Act.

9. The unfair labor practices set forth above affect commerce within the meaning of Section 2(6) and (7) of the Act.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[19]

ORDER

The Respondent, Amazing Stores, Inc., Philadelphia, Pennsylvania, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Interrogating its employees; giving its employees the impression that their protected activities are under surveillance; threatening its employees with the closure or sale of its stores; promising increased benefits to its employees or coercing or threating them, in order to interfere with their rights to choose a collective-bargaining representative.

(b) Threatening to discontinue its operations or to sell its stores, or discontinuing its operations or selling its stores to retaliate against its employees because of their activities on behalf of the Union.

(c) Terminating any of its employees because of their union activity.

(d) Refusing to pay bonuses or pay raises because of employees' union activity.

(e) Refusing to bargain in good faith with the Union over wages, bonuses, and conditions of employment for its employees.

(f) In any other manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Recognize and on request bargain collectively and in good faith with the Union as the exclusive bargaining representative of its employees in the appropriate bargaining unit described as follows:

> All full-time and regular part-time sales personnel, stock personnel, cashier, and truck drivers employed by the Employer at its 816 Chestnut St., 1124 Chestnut St., 1621 Chestnut St., 7130 Frankford Ave., Philadelphia, PA. locations, and its Sharon Hill Plaza, Chester Pike, Sharon Hill, PA., 734 Hamilton St., Allentown, PA. locations, excluding all other employees, guards and supervisors as defined in the Act.

(b) Pay to Gail Davis and Ralph Atwell the bonuses unlawfully withheld from them in December 1985, together with interest thereon.

(c) Pay to Ralph Atwell the raise in pay unlawfully withheld from him in January 1986, together with interest thereon.

(d) Offer to Gail Davis immediate and full reinstatement to her former or substantially equivalent position, together with backpay to which she may be entitled, because of its discrimination against her, together with interest thereon.

(e) Post at its facility in Philadelphia, Pennsylvania, copies of the attached notice marked "Appendix."[20] Copies of the notice, on forms provided by the Regional Director for Region 4, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material.

(f) Notify the Regional Director in writing within 20 days from the date of this Order what steps the Respondent has taken to comply. For the purpose of determining or securing compliance with this Order, the Board, or any of its duly authorized representatives, may obtain discovery from the Respondent, its officers, agents, successors, or assigns, or any other person having knowledge concerning any compliance matter, in the manner provided by the Federal Rules of Civil Procedure. Such discovery shall be conducted under the supervision of the United States court of appeals enforcing this Order and may be had upon any matter reasonably related to compliance with this order, as enforced by the court.

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[19] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

[20] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

Air Cargo Transport, Inc. *and* **District Lodge 751, International Association of Machinists and Aerospace Workers, AFL-CIO, Petitioner.** Case 19-RC-11058

June 15, 1988

DECISION AND ORDER

BY CHAIRMAN STEPHENS AND MEMBERS JOHANSEN AND CRACRAFT

On a petition duly filed under Section 9(c) of the National Labor Relations Act, a hearing was held before Hearing Officer Ronald J. Knox. Following the hearing, and pursuant to Section 102.67 of the National Labor Relations Board Rules and Regulations, this case was transferred to the National Labor Relations Board for decision.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has reviewed the hearing officer's rulings made at the hearing and finds that they are free from prejudicial error. They are affirmed.

On the entire record in this case, the Board finds:

Air Cargo is engaged in the business of pickup and delivery of air freight at the Sea-Tac Airport in Seattle, Washington. In or about November 1983, Air Cargo entered into an extensive freight agreement with Flying Tigers Transport. Since that time Air Cargo has operated as Flying Tigers' exclusive agent in the Seattle area and it derives 99 percent of its revenues as a result of the agreement with Flying Tigers.

Air Cargo owns and operates seven vehicles to transport the freight and all but two are painted, at Flying Tigers' expense, with the Flying Tigers logo. Flying Tigers also provides uniforms to Air Cargo's drivers; sets the rates that Air Cargo charges for its services; and exercises substantial control over Air Cargo's daily operations, including hiring, firing, and employee discipline.

Air Cargo contends that the petition should be dismissed because jurisdiction is properly with the National Mediation Board under the Railway Labor Act and, therefore, the National Labor Relations Board should not exercise jurisdiction. The Petitioner asserts that jurisdiction is properly with the National Labor Relations Board.

Section 2(2) of the Act provides in pertinent part that the term "employer" as used in the National Labor Relations Act shall not include any person subject to the Railway Labor Act.

Accordingly, we requested the National Mediation Board to study the record in this case and to determine the applicability of the Railway Labor Act to Air Cargo. In reply, we were advised by the National Mediation Board that

> Based on the information provided, it appears that Air Cargo Transport's employees are subject to direct control by Flying Tiger. Moreover, Air Cargo Transport's employees engage in work which is performed by employees in the airline industry. See, *e.g. Crew Transit, Inc.*, 10 NMB No. 21 (1982) and *Allied Aviation Service Company of Texas*, 11 NMB No. 87 (1984). The unique facts of this case viewed in light of Board precedent lead to the Board's opinion, therefore, that Air Cargo Transport, Inc. and its employees are covered by the Railway Labor Act.[1]

In view of the foregoing, we shall dismiss the petition.

ORDER

It is ordered that the petition in Case 19-RC-11058 is dismissed.

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[1] *Air Cargo Transport, Inc.*, 15 NMB No. 202 (1988).

Albertsons, Inc.-Southco Division *and* Retail Clerks Local Union 1557. Case 10-CA-17793

June 16, 1988

DECISION AND ORDER

BY CHAIRMAN STEPHENS AND MEMBERS JOHANSEN AND CRACRAFT

On November 25, 1983, Administrative Law Judge Robert A. Gritta issued the attached decision. The Respondent, the General Counsel, and the Charging Party filed exceptions and supporting briefs and the Respondent and the General Counsel filed answering briefs.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings, and conclusions only to the extent consistent with this Decision and Order.

1. The judge concluded that the Respondent violated Section 8(a)(1) by instituting posted invalid no-solicitation rules.[1] Specifically, the judge found that the rules were facially invalid because the Respondent failed to explain to employees their right to solicit on behalf of the Union during nonwork-time and in nonwork areas. The Respondent has excepted to this finding and for the reasons set forth below we dismiss this allegation of the complaint.

On September 21, 1981,[2] the Respondent opened a combined grocery and drugstore in Huntsville, Alabama. Approximately 150 nonunionized employees man the facility. Although there is a main employee breakroom in the rear of the store, the snack area of the delicatessen department is also designated as a breakroom for off-duty workers. As a requirement of employment, the employees attended orientation sessions at which the Respondent advised them to adhere to posted signs at the stores' two entrances and near the employee timeclock. The three signs were identical and entitled "NO SOLICITATIONS." They stated:

> Solicitation, distribution of literature or use of sound devices on company premises by anyone not employed by the Company is strictly prohibited.
>
> Unauthorized presence of any employee on the interior of the company premises for any purpose is strictly prohibited unless that employee is on duty, scheduled for work or actually engaged in the purchase of goods.
>
> Solicitation by anyone in the selling areas of the store is strictly prohibited.
>
> No employee may engage in solicitation of any kind during working time, or while the person (or persons) he or she is soliciting is on working time. Further, no employee may distribute literature during working time or in working areas.

The rules remained posted at the various locations until November 12. At that time, in response to the Board's decision in *T.R.W. Bearings*, 257 NLRB 442 (1981), the Respondent replaced the above no-solicitation rule with a new rule. The Respondent posted the new rule at the same locations as its predecessor. It contained the identical four paragraphs as the old rule with the addition of a final definitional paragraph regarding working time:

> Working time does not include authorized periods of off-duty times, e.g., mealtime, breaktime, etc.

After the posting of the rule there was no further clarification by the Respondent.

In his decision the judge addressed the two rules as a unitary policy. Apparently the judge relied on *T.R.W. Bearings*, and determined that the rules were invalid because the Respondent did not explain to employees their right to solicit in the delicatessen snack section when off duty.

Contrary to the judge, we find that the posted no-solicitation rules were facially valid. In *Our Way, Inc.*, 268 NLRB 394 (1983), we expressly overruled *T.R.W. Bearings* and stated rules prohibiting solicitations during working times are presumptively valid. We further stated in *Our Way* that proscribed solicitations during worktime implies that solicitations are permitted during nonworktime, i.e., the employees' own time. Here, neither rule prohibits solicitations during nonwork periods. Rather, it is clear that the Respondent did not intend to restrict solicitations during nonworktimes as evident from the posted rules' explicit explanation that the no-solicitation policy did not include off-duty times, mealtimes, and breaktimes. Accordingly, we shall dismiss this allegation of the complaint.[3]

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[1] We agree with the judge's finding that the no-solicitation/no-distribution rule set forth in the Company's personnel policy statement is both invalid and unlawful.

[2] All dates are in 1981 unless otherwise indicated.

[3] The Respondent's no-solicitation rules are facially valid because they proscribe solicitation in working areas during working time. At the hearing, however, the Respondent's store director, Malmberg, testified that he understood the Respondent's no-solicitation rules to prohibit distribu-

Continued

2. The judge also found that the Respondent violated Section 8(a)(3) by discharging employees Bailes and Woodley for violating the posted no-solicitation rules. We agree with the Respondent's exception to this finding and for the reasons set forth below we dismiss this allegation of the complaint.

Employees Bailes and Woodley were employed in the cosmetic and drug departments, respectively. At all times during business hours the cosmetic, drug, and grocery departments are work and selling areas. Although the snack section of the delicatessen serves as a breakroom for off-duty workers, the remaining sections of this department are working and selling areas open to the public.

In mid-November the employees began an organizational campaign and Bailes and Woodley solicited union cards at the store. According to the credited testimony of three employees, Bailes and Woodley solicited for unionization during working time and in selling areas. On November 20, employee McBride was requested by Bailes to sign a union card while both employees were working in the cosmetic department. Later that day Bailes, while stocking shelves in the department, asked employee Deacon how she felt about unions and further advised that a union would alleviate employee mistreatment. A few days later employee Ford, while working in the delicatessen, was approached by Bailes and Woodley and requested to sign a union card. After the three employees reported the solicitations to the Respondent, Bailes and Woodley were discharged on November 23 for violation of the posted no-solicitation rule.[4]

In his decision, the judge found that because Bailes and Woodley were discharged pursuant to an invalid posted no-solicitation rule the discharges themselves were invalid. Although the judge noted that the employees had solicited during working time and in selling areas, he concluded that the Respondent had not rebutted the presumption of the invalidity of the rule by showing that the solicitation had impaired the employees' job performance.

As we disagree with the judge's finding that the Respondent instituted and posted invalid no-solicitation rules, we reject the related finding that the Respondent unlawfully discharged the employees under the rules. Here, the employees solicited union support during the working time and in selling areas of the store. These activities were in clear violation of the Respondent's no-solicitation policy and resulted in their lawful discharges. Accordingly, we shall dismiss this allegation of the complaint.[5]

3. On the day following their discharges, Bailes and Woodley appeared in the Respondent's delicatessen area that is open to the public. They were accompanied by Union Representatives Powers and Norwood. All four wore union jackets displaying a large union logo. They sat down at a table and consumed food and beverages. They did not attempt to solicit or speak to employees about the Union. The purpose of the visit was to demonstrate to the employees that the Union supported Bailes and Woodley. As set forth more fully by the judge, in response to this and subsequent visits to the delicatessen by these individuals to leave the premises and summoned the police when they refused. All four were arrested in connection with their refusals to leave.

The judge found that the threats of arrest and the arrests themselves did not violate Section 8(a)(1). The judge reasoned that Bailes' and Woodley's communication to other employees that the Union supported them following their discharges was unprotected under Section 7 of the Act because to find otherwise "would dilute the basic rights to organize and not to organize" and would reduce Section 7 activity to a "carnival atmosphere of logos, signs, and symbols." We disagree and find that the Respondent violated Section 8(a)(1).

Contrary to the judge, there is no evidence that the conduct of Bailes and Woodley was likely to create a "carnival atmosphere." Instead, it is clear that their activity was undertaken in a manner fully consistent with the normal use of the delicatessen, i.e., the delicatessen was open to the public for food and beverage service, and Bailes, Woodley, and the union representatives sat down at a table and consumed food and beverages. Further, their visit was designed merely to demonstrate to the Respondent's employees that the Union supported Bailes and Woodley and, by inference, supported

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tions in its delicatessen and parking lot. Because the record indicates that a portion of the delicatessen was designated as an employee break area and a section of the parking lot had been set aside for employee use, such an understanding, if acted upon, would invalidate the Respondent's otherwise valid no-solicitation rules. See, e.g., *Harolds Club*, 267 NLRB 1167 (1983), enfd. 758 F.2d 1320 (9th Cir. 1985); *Stoddard-Quirk Mfg. Co.*, 138 NLRB 615 (1962). However, there is no record evidence that the Respondent communicated Malmberg's overboard interpretation to employees, or enforced its no-solicitation rules in the break area in the delicatessen or at any inappropriate time or place in the parking lot. Accordingly, we find that Malmberg's understanding of the Respondent's rules did not render them invalid.

[4] There is no contention that the discharges were effected pursuant to the personnel policy statement. (See fn. 1, supra.) There is similarly no logical linkage between these two discharges and Malmberg's subsequent testimony at the unfair labor practice hearing—testimony that, as we have explained above (fn. 3, supra), did not make unlawful a rule that was valid on its face and not shown to have been unlawfully maintained or enforced. Our order remedies any coercive effects and that statement, however, by requiring its rescissions and giving the customary cease-and-desist direction.

[5] We adopt the judge's finding that the Respondent did not apply its posted no-solicitation rule in a disparate manner because the alleged incidents noted by the judge occurred outside selling areas or were unknown to management or isolated and inconsequential in character.

the Respondent's current employees. Because their activities supported the normal use of the delicatessen and were nonobtrusive, it is immaterial that the conduct took place on the Respondent's property.[6]

Further, we conclude that the Respondent's attempt to eject four individuals and its summoning of the police for that purpose unlawfully interfered with the exercise of Section 7 rights, *Montgomery Ward & Co.*, 263 NLRB 233 (1982). Bailes and Woodley were known to the Respondent as active union supporters, and Powers and Norwood identified themselves to the Respondent as union representatives. As previously noted, all four were wearing jackets with large union logos. The Respondent's employees had a legitimate interest in receiving this message of support. The Respondent admittedly sought to bar Bailes and Woodley from the delicatessen because they were "not welcome." Thus, it is evident that the Respondent singled out these individuals for special treatment, notwithstanding that their outward activities were fully consistent with the normal use of the delicatessen area from which they were ejected.

The Respondent contends that it lawfully barred Bailes and Woodley because they had engaged in disruptive conduct while soliciting employees during their period of employment and that Powers and Norwood lawfully were barred because they attempted to interfere with management's lawful authority to oust Bailes and Woodley. We find no merit in these contentions.

Although the Respondent lawfully discharged Bailes and Woodley for violating a valid no-solicitation rule, it does not follow that irrespective of the circumstances the Respondent permissibly could interfere with the Section 7 rights of its employees to receive a nondisruptive show of mutual support and solidarity. The Respondent's assertion that Bailes' and Woodley's return to its premises soon after their discharge clearly evidenced their intention to create a disruptive scene and that the Respondent therefore was justified in seeking to bar Bailes and Woodley to avoid such an occurrence, is not borne out by the evidence. There is nothing in the record that even remotely suggests that Bailes or Woodley gave the impression of engaging in, or of preparing to engage in, disruptive conduct. There is no evidence, for example, that they sought to solicit on-duty employees regarding the Union upon their visit to the delicatessen. Their breach of a valid no-solicitation rule while previously employed with the Respondent by itself does not establish that their mere physical presence alone likely would be disruptive to the normal activities of the delicatessen.[7]

Thus, the facts of this case, which show a nondisruptive silent communication of legitimate Section 7 interests between employees and union representatives, do not support the Respondent's contention that its conduct was justified by its legitimate business interest in ensuring decorum. Accordingly, we find that the Respondent violated Section 8(a)(1) by effectively threatening and causing the arrest of Bailes, Woodley, Powers, and Norwood. See *Brunswick Food & Drug*, supra.

ORDER

The National Labor Relations Board orders that the Respondent, Albertsons, Inc.-Southco Division, Huntsville, Alabama, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Interrogating its employees about their union sympathies or those of other employees.

(b) Threatening employees with discharge for engaging in protected activities on behalf of a union.

(c) Maintaining, giving effect to, or enforcing its company personnel policy no-solicitation/no-distribution/no-access rules which prohibit employees from engaging in union solicitations and distributions at all times in the store.

(d) Interfering with, restraining, or coercing its employees by threatening the arrest of union supporters and representatives from its delicatessen and causing their arrest.

(e) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Rescind the company personnel policy no-solicitation/no-distribution/no-access rules now existing to the extent that such rules prohibit union solicitations and distributions by employees on company premises at all times.

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[6] *Harolds Club v. NLRB*, 758 F.2d 1320, 1323 (9th Cir. 1985), and cases there cited; *Brunswick Food & Drug*, 284 NLRB 661 fn. 5 (1987).

[7] In this regard, we find no merit to the Respondent's assertion that it justifiably barred Bailes and Woodley because of their alleged repeated acts of intimidation and threats toward employees during their period of employment. We have found that the Respondent lawfully discharged Bailes and Woodley on the basis of their solicitation of union support during working time and in selling areas of the store contrary to the Respondent's legitimate no-solicitation rule. In doing so, however, we do not disturb the judge's finding that "in the last analysis" the Respondent failed to establish that it was reacting not just to a breach of the no-solicitation rule, but also reported alleged threats on the part of Bailes and Woodley.

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(b) Post at its facility in Huntsville, Alabama, copies of the attached notice marked "Appendix."[8] Copies of the notice, on forms provided by the Regional Director for Region 10, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material.

(c) Notify the Regional Director in writing within 20 days from the date of this Order what steps the Respondent has taken to comply.

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

WE WILL NOT interrogate you about your union sympathies or desires.

WE WILL NOT threaten you with discharge for engaging in protected activities in behalf of a union.

WE WILL NOT maintain, give effect to, or enforce a company personnel policy no-solicitation/-no-distribution/no-access rules which prohibit you from engaging in union solicitations and distributions at all times from our delicatessen and causing their arrest.

WE WILL NOT interfere with, restrain, or coerce our employees by threatening the arrest of union supporters and representatives from our delicatessen and causing their arrest.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL rescind the company personnel policy no-solicitation/no-distribution/no-access rules now existing to the extent that such rules prohibit union solicitations and distributions by employees on company premises at all times.

ALBERTSONS, INC.-SOUTHCO DIVISION

Sharon Howard, Esq., for the General Counsel.

Lawrence D. Levien, Esq. and *Richard N. Appel, Esq. (Akin, Gump, Strauss, Hauer & Feld)*, of Washington, D.C., for the Respondent.

George E. Barrett, Esq. and *Michael J. Passino, Esq. (Barrett & Ray)*, of Nashville, Tennessee, for the Charging Party.

DECISION

STATEMENT OF THE CASE

ROBERT A. GRITTA, Administrative Law Judge. This case was tried before me on October 27 and 28 and December 1 and 2, 1982, in Huntsville and Decatur, Alabama, based on a charge filed by Retail Clerks Local Union 1557 (the Union) on January 6, 1982, and a complaint issued by the Acting Regional Director for Region 10 of the National Labor Relations Board on February 25, 1982.[1] The complaint alleged that Albertsons, Inc. Southco Division (Respondent) violated Section 8(a)(1) and (3) of the Act by coercively interrogating, threatening, and discharging employees because they engaged in organizational activities in behalf of the Union. Additionally, Respondent maintained an invalid no-solicitation rule. Respondent's timely answer denied the commission of any unfair labor practices.

All parties were afforded full opportunity to be heard, to examine and cross-examine witnesses, to introduce evidence, and to argue orally. Briefs were submitted by the General Counsel, Respondent, and the Union. All briefs were considered.

On the entire record[2] in this case and from my observation of the witnesses and their demeanor on the witness stand, on substantive, reliable evidence considered along with the consistency and inherent probability of testimony, I make the following

FINDINGS OF FACT

I. JURISDICTION AND STATUS OF LABOR ORGANIZATION—PRELIMINARY CONCLUSIONS OF LAW

The complaint alleges, Respondent admits, and I find that Albertsons, Inc.-Southco Division is a Delaware corporation engaged in the retail sales of drugs, groceries, and sundry items in Huntsville, Alabama. Jurisdiction is not in issue. Albertsons, Inc.-Southco Division, in the past calendar year, in the course and conduct of its business operations in Huntsville, grossed in excess of $500,000 and received at its Huntsville facility goods and materials valued in excess of $50,000 directly from points located outside the State of Alabama. I conclude and find that Albertsons is an employer in commerce and in operations affecting commerce within the meaning of Section 2(2), (6), and (7) of the Act.

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[8] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

[1] All dates are in 1981 unless otherwise specified.

[2] Jt. Exh. 1, a summary of the 141 polygraph examinations, is received into the record by stipulation.

The complaint alleges, Respondent admits, and I conclude and find that the Union is a labor organization within the meaning of Section 2(5) of the Act.

II. THE ISSUES

A. Coercive interrogation of employees by supervisors or agents of Respondent.

B. Threats of discharge for union activity by supervisors.

C. Threats to have employees arrested and having both employees and union representatives arrested.

D. Promulgation and maintenance of invalid written no-solicitation rules.

E. Discriminatory discharges of employees Debra Bailes and Candace Woodley.

III. THE ALLEGED UNFAIR LABOR PRACTICES

George Malmberg testified that he has been employed by Albertsons for 10-1/2 years. For 1 year he was the store director in Huntsville with complete authority. (At present he is grocery manager in an Albertsons' Pensacola store.) Huntsville is a new store which opened September 23. Some hirings of employees for the new store occurred before Malmberg arrived on August 27. The store is designed by departments with each department a selling area of the store. Cash registers line the front portion of the store as an addition to the selling areas in the store. With the exception of the warehouse, stock areas, offices, and breakroom, the entire store, including the delicatessen, is open to the public. Malmberg considers the parking lot a nonselling work area of the store. Employees utilize the breakroom and the delicatessen for nonwork breaktimes. The offices, breakroom, warehouse, and stock areas are nonselling areas of the store. During the hiring procedures, all employees, except the courtesy clerks, are required to take a polygraph test. When hired each employee receives a written list of "company personnel policies" that they are expected to read and sign for acknowledgement. Each employee serves a 30-day trial period before becoming a permanent employee. Employees are disciplined by verbal or written warning depending on the offense; however, several stated offenses are cause for immediate dismissal. In addition to the stated causes, Malmberg testified that within his discretion he can terminate an employee for their conduct. In December 1981 or January 1982 he terminated an employee who pulled advertising signs from the shelves as she left the store after work.

Pat Layne was terminated for insubordination and failure to comply with expressly stated management theories. In late November Malmberg received information from employee Hale that Layne was soliciting employee signatures on union cards. Malmberg called Layne and her immediate supervisor—Bentley—to his office. Malmberg told Layne that as part of management she must back management's wishes and theories or desires as far as the running of the operation, and that she could not actively support the Union. Layne responded that she understood and that there would be no problems. Malmberg decided to explain to Layne rather than discipline her and to have Bentley present also because he had no knowledge that any supervisors understood what their position was to be during a union organizational drive. Following this Malmberg on December 1 received information from employee Barbara Watson that Layne solicited Watson to attend an upcoming union meeting. When Watson resisted with the excuse, "I've got to work tommorrow," Layne suggested that Watson called in sick so she could attend the meeting. Layne ended the conversation by lamenting her lack of authority to hire employees even though she could fire employees, because with both authorities she could stock the front end with union supporting employees. The following day, Malmberg summoned Layne to his office and confronted her with his information. Layne admitted to it and Malmberg terminated her.

Two weeks prior to opening of the store, Malmberg received from his management a no-solicitation poster (G.C. Exh. 4) which he posted in three locations in the store. Later around November 11, via the company produce truck from Orlando, he received a revised poster to replace the original. Malmberg removed the first poster and posted the revised poster in the same three locations. He then returned the acknowledgement of the switch in posters to Orlando.

On only one occasion did Malmberg allow a solicitation by an outside organization on company premises. The American Heart and Lung Association was permitted to park a car on the sidewalk outside the store and sell raffle tickets to the general public. They were not allowed to solicit customers or employees inside the store.

Malmberg did not work Saturday, November 21, or Sunday, November 22; however, several supervisors and employees reported to him on events occurring both days involving Bailes and Woodley soliciting signatures from employees in the store. Supervisors Stevens and Usery reported that Bailes and Woodley were soliciting employees to sign union authorization cards in the store and telling some employees to meet them in the parking lot to sign cards. Several employees reported to Stevens and Usery that they were threatened by Bailes, Woodley, and Supervisor Pat Layne for not signing union cards. Malmberg received the report that Bailes and Woodley told employee Deacon, "If you don't sign one and we form a picket line then anybody that crosses the picket line could get beat up by hit men that we have." A second report he received stated that employee Ford was approached by Bailes and Woodley in the restroom on Saturday, November 21, to sign a union card and again on Sunday, November 22, at her delicatessen workstation while she was working. A third report of employee Ayers stated that Supervisor Layne solicited her signature on a union card in the breakroom and later in the store parking lot. Layne told Ayers that she should sign the card or lose her job.

On Monday morning, November 23, Malmberg was approached individually in his office by employees Deacon, McBride, and Ford. Deacon told Malmberg that Bailes and Woodley did tell her in the store's parking lot that she would be beat up if she tried to cross a picket line and work. Bailes and Woodley also told Deacon that suppliers and truckdrivers would not cross the picket lines. McBride told Malmberg that Bailes had solicited her signature on a union card Friday, November 20, while both employees were working in the cosmetic department. The next day Bailes stopped McBride in the parking lot and told her if she did not sign a union card she would be fired when the union came in. Ford told Malmberg that during worktime on Saturday, November 21, Bailes and Woodley solicited her signature in the bathroom and the following day while she and a coworker were working in the delicatessen Bailes and Woodley solicited the signature of the coworker then asked Ford if she had thought anymore about "it."

Malmberg reported the events to his management in Orlando who affirmed that the employees could be discharged. Approximately 1:30 p.m. Malmberg decided to discharge Bailes and Woodley for no-solicitation violations and intimidation of employees. Malmberg did not confront Bailes or Woodley with his information before deciding to terminate them. That afternoon Malmberg called Woodley to his office. He told her because she had chosen to break the no-solicitation, no-access, no-distribution rule and had intimidated employees while on and off the clock, she was being terminated and was not to return to the store. Malmberg told Woodley to sign her timecards, leave the store, and not return. Malmberg then called Bailes to his office and told her the same thing.

The next day, about noon, Bailes and Woodley came into the store wearing union jackets. Malmberg told them they were not welcome in the store. One of two men who identified themselves to Malmberg as Powers and Norwood, union representatives, said the girls did not have to leave because the store was public and they were going to the delicatessen. The four went to the delicatessen, ordered drinks, and sat at a table. Malmberg called the police. When the police arrived, Malmberg told the officer who came into the store that two terminated female employees in the delicatessen were not welcome in the store. Malmberg and the officer went to the delicatessen. The officer told Malmberg to tell the four that they were not welcome and ask them to leave. Powers spoke up and said, "Why don't you ask him why he wants us to leave." The officer said it did not make any difference, "if the proprietor doesn't want you in the store you have to leave. If you don't leave, I'll have to place you under arrest." Powers then said to the officer, "You, on your own," whereupon the officer arrested Powers and escorted the four outside the store.

That same afternoon at 3:30, the four individuals returned to the store. Malmberg again told them to leave. They said they would not leave and were going to the delicatessen. Malmberg called the police. Malmberg told the policeman of the prior arrest. The policeman told Malmberg to repeat the warning to the four and if they did not leave he would remove them. Malmberg then told the group they were not welcome and would have to leave. The policeman told the group, "this man's the proprietor; Ya'll are all going to have to leave, otherwise you will be guilty of trespassing after warning." They refused to leave, so the policeman arrested all four.

Later that same day, around 6 p.m., Powers and Norwood came into the store. George Hart, the grocery manager, saw them and told them to leave the store. Powers said, "Get the hell out of my way" and headed for the delicatessen. Malmberg went to the delicatessen and told both men that they had been previously arrested for not leaving the store and they should now leave the store. Both men said they would not leave, so Malmberg told them he was going to call the police. The police arrived and told Malmberg that he would have to go downtown and sign a complaint to get the men removed. Malmberg did so and both men were arrested in the store. Malmberg stated that he effected the arrests because Powers and Norwood interfered with his duty as proprietor of the store on the first occasion and he did not want the situation repeated.

At some point during the day a letter to employees expressing Albertsons' opposition to the Union was mailed to all Huntsville employees from division headquarters in Orlando, Florida.

Patricia Layne testified that she was employed by Albertsons from September until December as assistant front-end manager. Her duties included directing the functions of the cashiers and courtesy clerks with the responsibility for discipline of the courtesy clerks. Layne had terminated the employment of the one employee.

During her employment, Layne was not aware of any company policy that prohibited employees from talking about noncompany matters while working. In fact, everyday employees talked about noncompany matters with impunity while working. Layne also was not aware of any company policy against solicitations in the store. She stated it was possible that the Company had posted no-solicitation rules in the store, but she had never seen them. Albeit, Layne attended the new employee orientation, she did not recall any reference to no-solicitation rules. Layne recalled that in October a lady came into the store and told her she was seeking food donations for the church. Layne referred the lady to Malmberg. Later the lady came to Layne's checkout stand with $40 to $50 worth of groceries. Layne asked Supervisor Usery how to handle it, and he said to ring it up and give him the receipt. This same month another lady was seeking a Polaroid film donation and asked Layne about it. Layne sent her to Malmberg. Layne did not hear anymore about it. At the end of October a lady approached Layne looking for donations of halloween decorations for a school festival. Layne referred her to Malmberg. Layne was later instructed to simply bag the decorations for the lady and let her go. The following month Layne and several employees were in the breakroom waiting for their shift time. Sherry Phillips, a cashier, came in, put her purse in her locker, and clocked in. As she left the breakroom, she placed Home Interior folders on the table then went to work. She said to give the brochures back to her and asked the employees if they wanted to buy something after they had looked them over. After Layne clocked out that day and was on her way out of the store, she slipped the brochure in Sherry's pocket as she passed her cash register.

Layne first became aware of the union organizing in late November. The third week in November, Bailes and Woodley solicited Layne's help getting employees to sign union cards. Layne was in the breakroom at the time. Layne told them she would not help. The following Sunday when Layne arrived at work and parked her car she saw Bailes and Woodley sitting in their parked car. Bailes and Woodley shouted to Layne, "We got them." Layne walked to their car and asked, "What do you have." They asked Layne to get in the car and they would discuss it off the property. After getting off the property, Bailes and Woodley showed Layne the union cards and asked if she would sign one. After a short discussion Layne did sign one. Layne was asked again to help get employees to sign cards and she agreed to do so. Bailes and Woodley told Layne not to solicit on company time but she could solicit on the property as long as she was on break or off the clock. She participated in the campaign on behalf of the Union by soliciting employees to sign union cards and asking employees how they felt about the Union and if they had any interest in union activities. Early in the campaign, Malmberg questioned Layne about union solicitations in the store. Layne responded that it had taken place off the property. Malmberg asked Layne about her departure from the store on Sunday, November 22, in Candy Woodley's car with emphasis on the number of people in the car. Before Layne could answer, Malmberg stated that there were two others in the car. Later Malmberg spoke with Layne in his office, in the presence of Kayla Bentley, the front-end manager. Malmberg told Layne that as a supervisor, she was considered part of management and, therefore, could not participate in any union organizing or soliciting. In late November an employee, Susan Ayers, was in Layne's car in the parking lot. Layne had union cards and Ayers signed one in the car. Layne did not recall any conversation with Ayers about damage to employees' cars during this solicitation but she did tell Ayers nor to discuss the Union on company property. On December 4 Layne was fired for violating the no-solicitation rule and insubordination in that Layne, in spite of Malmberg's warning, did thereafter engage in solicitations of employees to sign union cards.

David Eng testified that he has been employed at Albertsons as a stocker for 14 months. He was hired when the store opened but did not get a polygraph until 2 months ago. Eng did receive and sign the Albertsons policy sheet which contained the store policy on no-solicitation. Eng also saw the no-solicitation posters in several locations in the store ever since he was employed. Since his employment, he has had several conversations with supervisors about the Union. In November while stocking the frozen food cooler in the backroom, Assistant Manager Stringfellow approached him and asked, "Do you think this place needs a Union." Eng replied that he had never thought about it then told Stringfellow that he was fired from Raglands Bros. for union activity. Eng told Stringfellow that he had helped the union organize Raglands. Nothing else was said. Three or four days later on the sales floor in the frozen food aisle, while Eng was working, Stringfellow walked up. Eng mentioned the Company letter about unions. Stringfellow then asked him if he was involved with the Union. Eng replied, "No," and Stringfellow walked off. Within 5 or 10 minutes Stringfellow returned and said, "I think you've got a promising future here. I hope you don't get involved with the Union; I'd hate to see you go."

Eng stated that probably everyday employees conversed about noncompany matters while working and were not disciplined for it. Eng was not aware of any policy prohibiting conversations about noncompany matters while working. Eng also saw solicitations in the store. The PepsiCola deliveryman sold raffle tickets for a softball team to Eng and other stockers while Eng was stocking the cola shelves. At this time ther were not any supervisors in the vicinity. On another occasion he was at the timeclock in the breakroom, clocking out, and a group of girls were collecting money for Pam Campbell, an employee who was getting married. Recently, Beverly Nash, the delicatessen manager,[3] was working and a group of stockmen were purchasing breakfast. Nash asked the stockmen to contribute to flowers for Susan Ayers who was in the hospital. Eng did no know that Ayers was in the hospital and gladly contributed to the flower fund.

Barbara Watson testified[4] that she has been employed by Albertsons as a cashier since the store opened. Her supervisor was Pat Layne. Watson attended the orientation session for new employees, which included discussions of what employees should do on the job; what employees should not do on the job; the no-solicitation policy, the insurance policies, the dress code, and employee benefits. A training period of 2 weeks followed with additional explanations of the company policies. Printed posters of the store's no-solicitation rules were posted on the front windows the day the store opened for business. An additional poster was framed and hung in the employees breakroom.

Watson on November 20 was off work but was in the store to do some shopping. While passing the cosmetics counter, Bailes, who was stocking shelves, called her over. Bailes asked Watson if she knew the store was fixing to go union. Watson said she had not heard anything. Bailes said that was the rumor and asked Watson how she felt about unions. Watson replied she did not know because she had never worked with a union. Bailes said she thought the Union would be a good idea because the employees were being mistreated. The conversation lasted about 3 minutes then Watson continued her shopping.

A few days later Bailes and Woodley were in the parking lot asking employees to come over to them and talk about the Union. Bailes and Woodley had several employees with them discussing the Union. Watson was leaving for lunch and Bailes called her over. Bailes and Woodley were not in uniforms. Bailes asked Watson if she would join the Union and sign a card. Bailes said, "the Union's not in and it's going to take a lot to get it in. There's a chance that you can be fired if you join and if the management finds out." Watson was in a hurry to get her lunch so she left.

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[3] The parties stipulated that Nash became a supervisor in August 1982.

[4] Watson testified directly for the General Counsel and Respondent in response to two subpoenas during a single stint on the stand.

On December 1, Watson was working on her register and Layne came to her and said she would like to speak to her about the Union. Watson told Layne she would talk with her. Later Watson had a 10-minute break and met Layne in the delicatessen. Layne asked her how she felt about unions and stated that she (Layne) thought it would be a good idea for the employees. Layne said she had the authority to fire employees and wished she had the authority to hire them also so she could fill the front with union supporters. Layne then asked Watson to sign a union card and encouraged Watson to do so. Watson did not say much, she was just listening. The conversation ended and Watson returned to her register. That evening Watson took her 10-minute break. Layne came over and told Watson that an important union meeting was scheduled for the following morning at a local motel. Watson told Layne that she was scheduled to work and could not attend. Layne told Watson to call in sick or make some excuse so she could attend. The breaktime ended and Watson returned to her register. The next afternoon Layne came into work and gave Watson a hard look as she passed. Watson later went over and apologized to Layne for not attending the meeting. Several times after that while Watson was working on her register, Layne would come over and point to a customer saying, "You need to talk to him; he's a union representative; or it might be a good idea to speak with him," Watson developed a feeling that Layne was pressuring her, so she went to Malmberg and reported the conversations that took place on the job between she and Bailes and she and Layne.

Debra Bailes testified that she was employed by Albertsons before the store opened and attended the store's orientation program on benefits. She was hired to work in the cosmetics department. On September 7, 8, or 9, Bailes was one of several employees to receive a polygraph examination administered by an employee of Albertsons. The examination took about 20 minutes. During the examination, the operator asked Bailes if she was ever affiliated with a union. She responded that she had signed a union card at Food World where she was employed for 3 months and that her husband worked at Kroger and was a member of the Retail Clerks Union. The operator also asked questions about theft, illegal drugs, and about her financial condition. Bailes did not recount the union question during the exam until she was conversing with the union attorneys after the state trespass proceeding.[8]

Bailes stated that the union campaign began on November 21, about noon, when she went to Kroger and spoke to T. C. Smith, an official of the Kroger union. Bailes stated she was unhappy that her hours of work had been reduced. Smith gave her a stack of membership cards for her use in soliciting Albertsons' employees and she signed one and returned it to Smith. Bailes left about 1:15 p.m. and went to Woodley's house. Bailes solicited Woodley and both returned to Kroger where Woodley signed a membership card. Smith told them that soliciting Albertsons' employees could not be done on companytime but any time that was their time, like breaks, was okay. Bailes went to work at 3 p.m. that day and was busy preparing for Sunday's specials. She took her break just before the stockers were due to start work at 10 p.m. Bailes went to the breakroom and the stockers were there. She asked them if they were interested in joining the Union. They replied that they were, so they and Bailes agreed to meet the next morning, Sunday, November 22, at Krystals restaurant at 7 a.m. Bailes and Woodley met the stockers the following morning and secured several signed membership cards. A courtesy clerk who came in Krystals also signed a membership card. Bailes and Woodley left Krystals and went to Albertsons' parking lot about 9 a.m. that day and remained until after dark. As employees came into the store or left the store, Bailes and Woodley solicited their signatures on union cards. Those who agreed to sign would get in Bailes' car and when the car was off company property, the employee would sign. Bailes would then bring the employee back to Albertsons' parking lot. On several occasions Bailes used the store restroom and delicatessen and solicited employees in the breakroom. Bailes recalled signing Pat Layne and Barbara Watson in the parking lot and while in the store's delicatessen asked Linda Deacon to come outside and talk about the Union. Bailes denied any conversation with Watson about the Union prior to Sunday and any solicitations of Carol Ford, Sally McBride, or Pam Campbell. That night Layne called Bailes and said she had two employees wanting to sign cards. Bailes met Layne behind Albertsons with the two employees and the cards were signed. The next day, Monday, November 23, Layne met Bailes at Hardee's restaurant about 10 a.m. with an employee willing to sign a card. The employee signed a card.

Later this same day Malmberg in Usery's presence called Bailes to his office. Malmberg told Bailes that she had violated the no-solicitation rule and was terminated. Malmberg also told Bailes that she was not to come back into the store. Bailes stated that she was not given any other reason for her discharge.

The day following her discharge, Bailes returned to the store accompanied by Woodley and Union Representatives Powers and Norwood (all four wore union jackets) to show the employees that they were supported by the Union. Malmberg met them in the lobby and told Norwood that the girls were not welcome in the store. Norwood asked Malmberg if the store was public, and Malmberg replied, "Yes." The four then walked to the delicatessen and sat down. Norwood and Powers ordered drinks for the group. Malmberg came to the table and asked the four to leave. Norwood asked if he was asking them to leave because the girls were represented by he and Powers. Malmberg said that has nothing to do with it and walked off. Malmberg came over again and asked the four to leave. Powers said "No," and asked if Malmberg was asking them to leave because he and Norwood were union organizers. Malmberg said, "No." A policeman then came to the table and asked the four to leave. Powers told the policeman that he would leave if the policeman was asking him to, but not because Malmberg was asking him to. The policeman placed Powers under arrest and all four left the store. As they were leaving, Norwood told Bailes and Woodley to shout "Go Union" and Woodley began hollering "Go Union" and the policeman told her not to be so loud. Bailes and Woodley then began saying "Go Union" in a speaking voice. Bailes could not recall what else was said during this encounter. Norwood and Powers told Bailes and Woodley to go back to the store and 3 hours later the group returned to the store. Hart, the grocery manager, followed them to the delicatessen and then summoned Malmberg. Within minutes Malmberg and a policeman came up. The policeman asked them to leave. Powers told the policeman they would leave if he ordered them to leave but would not because Malmberg told them to leave. The policeman said they had 60 seconds to leave or he would arrest them. He counted down the seconds and put all four under arrest. As they got to the police car, Woodley told the policeman to search her, but Powers told her to just get in the car. Norwood and Powers made a third entry into the store but specifically told Bailes and Woodley not to accompany them.

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[8] Bailes gave affidavits. The first on December 16, 1981, the second on January 19, 1982. The polygraph examination and the union question were only mentioned in the second affidavit. The parties stipulated that the trespass proceeding occurred on December 28, 1981.

Bailes' only awareness of a company policy prohibiting solicitation was the printed company personnel policy sheet that she read and signed when hired. Bailes never saw a no-solicitation poster in the store or on the front windows. Everyday employees talked about noncompany matters while working and were never disciplined for it. Bailes recalled one solicitation in the store during working hours. Pam Campbell, supervisor of cosmetics, told Bailes that Nancy Heard had gotten married and she would like to take up money for a flower fund for her. This statement occurred while both employees were on the floor working.

Candace Woodley testified that she was hired as a drugclerk by Albertsons in August. Woodley attended an orientation session in which the employee benefits and working conditions were discussed. The session did not include any discussion of the store's no-solicitation policy. However, Malmberg and Valle, her drug manager, did on several occasions tell Woodley that her breaktime was her own time and she could do what she wanted during break. Four or five weeks after she began working, Woodley was summoned to the manager's office to take a polygraph test. During the test the operator asked Woodley if she or any member of her family was a member of a union. Woodley told the operator that her ex-husband was a Kroger employee and a member of the Kroger union in response to a question of where her husband worked.

Woodley participated in the union campaign by helping Bailes solicit employee signatures on union cards. Smith, a union official at Kroger, had told Bailes and Woodley not to solicit while working and not to do it on company property. Smith gave them both a stack of union cards. Woodley accompanied Bailes to Krystals, Hardee's, and employees' homes to get cards signed. Woodley also spent all day Sunday talking to employees as they left work or came in to work. Woodley specifically recalled soliciting Linda Deacon and giving her two union cards but denied talking union with Susan Ayers, Sally McBride, and Carol Ford. Monday morning, while working, Woodley had a question about ordering merchandise and went to Malmberg's office. He was on the phone and had a union card in his hand. Malmberg motioned for Woodley not to come into the office. Woodley waited until Malmberg finished his phone call and then went in the office. They resolved the order problem, and Woodley went back to work. During morning breaktime in the breakroom, Woodley talked with Pam Campbell about signing union cards. Campbell had asked if a union campaign was in progress, and they discussed the Union. After Woodley returned to work following lunch, she was summoned to Malmberg's office. Kayla Bentley, front-end manager, was present. Malmberg told Woodley she was terminated for solicitation. Woodley asked, "For solicitation of what." Malmberg said solicitation is solicitation. Woodley asked, "What was I soliciting." Malmberg said, "You know what you were soliciting." Malmberg then said, "You are terminated, your check will be mailed to you and under no circumstances are you to enter this store again." Malmberg said if she returned to the store again, he would have her arrested. He told her not to talk to any employees, punch the clock, figure the timecard, and sign out. Woodley was not given any reason for her termination other than solicitation.

Woodley stated that the only rule about solicitation that she was aware of was contained in the Employer's personnel policy sheet she read and signed when first hired. She never saw any rules posted on the front windows of the store or upstairs near the store office. Employees always talked about noncompany matters while working, and she recalled several instances where employees were solicited while working. In October a cashier, Lisa Crane, was working at her station and Woodley was in the front of the store. Crane told Woodley that she was selling for Home Interiors and asked Woodley is she was interested. Crane gave a catalog to Woodley so she could look over the merchandise. At another time, Pam Campbell, head of cosmetics, asked Woodley if she would contribute to flowers for Nancy Heard's upcoming wedding. Woodley said she would on payday. Both Campbell and Woodley were looking at the time. Also, shortly after the grand opening, a charitable organization raffled off a new car in front of the store. The car was on the sidewalk adjacent to the drug entrance to the store. All passersby were solicited on the sidewalk.

Woodley was part of a group of four that were arrested in the store the day following her discharge. Woodley recalled that when Malmberg first requested that the four leave the premises, both Powers and Norwood told him that Section 7 of the National Labor Relations Act gave Bailes and Woodley the right to be there. At the time all four in the group were wearing union jackets bearing a large insignia of the Union. Woodley recalled that she and Bailes shouted, "Go Union" as the policeman escorted them from the store. On returning to the store some 2-1/2 hours later, all four were arrested at the behest of Store Director Malmberg under basically the same circumstances. Woodley and the group returned to the store after the discharge so the employees would know of the union backing and on advice by the union attorneys.

John Materni, director of employee relations for Albertsons-Southco Division, testified that all stores are architecturally the same in terms of layout, i.e., the offices and employee breakroom are always on a mezzanine floor. Also all new stores are opened on Wednesday following employee orientations on Monday of the same week. All orientation sessions follow the same format and are given in three sessions by departments: a company history, a visual aid showing store locations throughout the country, a discussion of wage policies followed by an explanation of the local wage structure, identification and explanation of the employee insurance policies that are available, personnel policies including dress code, Federal wage and hour restrictions such as working off the clock, store security, safety on the job, employee grooming standards, and company no-solicitation policies. Materni always uses the framed no-solicitation rule as a visual aid when discussing the no-solicitation rule. If employees have questions about the rule's language, he explains it. If no questions are raised, the language of the rule is not explained. He could not recall what occurred at the Huntsville orientation when the no-solicitation rule was covered. In all stores the attendance of all employees, except courtesy clerks (bag boys and girls), is mandatory. All orientation takes place in the employee breakroom.

The no-solicitation rules are identical corporatewide and are posted in all stores. In November, due to a change in NLRB case law, Respondent changed the legend on its no-solicitation poster. Each store was sent the new posters to replace the old posters. The new posters had an added paragraph explaining "working time" but there was no accompanying oral explanation for employees of the new rule. Materni did not instruct store directors to advise employees of the change. Each set of posters for each store was mailed with a cover letter dated November 10. The store directors were requested to return the cover letter acknowledging that the posters had been exchanged. Materni stated that he received acknowledgements from all the store directors in the Southco Division and filed the letters. At some later date during housecleaning of his files they were discarded. Materni did visit the Huntsville store on several occasions between its opening date and December. However, he was unable to state that he visited Huntsville in November after his office requested that the no-solicitation posters be exchanged.

Albeit Materni has the responsibility to inform new employees, on store openings, of the company policies, he does not become involved in employee disciplines. Albertsons does not have a progressive discipline policy, but rather employee discipline is left to each individual store director. The only written procedures for discipline of employees is contained in the company personnel policies that each employee signs upon hiring.

Sally McBride testified that she was hired by Albertsons in September as a cosmetics stocker. She and Bailes
worked together and Woodley stocked the drug w
On Friday, November 20, around 7 a.m. on the cosm
ics floor while she and Bailes were stocking the shelv
Bailes asked her if she had thought about the store goi
union. McBride responded that she had not given it a
thought. Bailes then asked McBride if she would like
have a union card. Bailes said she had cards with h
and McBride could have one now or could come
Bailes' house and sign one. Bailes also told her that
union meeting was scheduled. McBride told Bailes th
she would have to talk it over with her husband fir
The following night Bailes met McBride in the parkir
lot adjacent to the store and asked again if she wanted
union card. McBride told Bailes that she and her hu
band decided not to sign a card. McBride testified tha
Bailes said, "If I didn't sign a card, that Albertsons wa
definitely going to go union and I would be fired if I di
not sign a union card at that time." McBride told Baile
she would take her chances because she did not want t
sign or go to meetings. McBride reported the Friday an
Saturday incidents with Bailes to Malmberg on Monday
November 23.

McBride stated that the no-solicitation policy of the
store was discussed during the orientation session and
that signs were posted in the store. The same sign tha
was used in orientation is posted beside the timeclock
beside the office door, and at the front of the store or
the glass doors. The employees were told to read the
signs.

Carol Ford testified that she worked for Albertsons from September 1981 to April 1982. She worked in the delicatessen for 6 months then worked in the bakery until her separation. Ford had the responsibility for the meat and cheese section of the delicatessen. Usually she worked with another employee who served the table customers and served hot food or sandwich orders. Ford and her coworkers frequently engaged in personal and noncompany conversations while working. As far as Ford knew there was no rule against talking while working. Ford did have two union conversations with two employees while she was working. The first occurred on Saturday, November 12, with Bailes in uniform. Ford was on her way to the restroom and as she passed the breakroom, Bailes called to her from the breakroom. Bailes asked if Ford had thought about joining the Union. Bailes said her husband was in the Kroger union and had good benefits. Bailes said if the employees can get the Union in then the good benefits would be for Albertsons' employees also. Ford turned and went to the restroom which ended the previous 5-minute conversation. The next day while Ford and coworker Melody were working in the delicatessen, Bailes and Woodley, who were not working, came into the delicatessen. Ford was waiting on a customer and Melody was at the cash register. Bailes and Woodley went to the register and started talking to Melody. When Ford finished with the customer, she walked to the group at the register. Melody said to Bailes and Woodley that she was in favor of the Union and would come outside and sign a union card with them. Woodley turned to Ford and asked if she had thought anymore about what Debra had talked to her about the night before. Ford said she had but was not interested in the Union. Woodley said, "Well, we want you to sign a card. If you feel like you can, it will be outside in the car." Woodley stated to Ford that she only needed a few more signatures in order to have enough to get a vote. Ford left the group to wait on a customer. When she finished with the customer, she rejoined the group at the register and told Melody that they had to get back to work. Bailes and Woodley announced an upcoming union meeting at a local hosterly and left. That afternoon Assistant Store Director Usery came in and Ford spoke to him about the union conversations in the store involving Bailes and Woodley. Usery told Ford if she was concerned to speak to Malmberg. Later Malmberg came in the store and Ford told him she wanted to talk to him about union conversations. Malmberg said they could talk the next day in his office. On Monday morning Ford recounted the events for Malmberg, and he asked her to reduce the events to writing and sign it. Ford did so and gave it to Malmberg. Later Malmberg presented a typed version of Ford's statement to her before a notary, which she did.

Linda Deacon testified that she was hired as a drug-clerk at Albertsons the day the store opened. Deacon attended an orientation session chaired by Materni which included an explanation of the no-solicitation rule. Materni told the new employees that solicitations could not occur while employees were working on the clock except on breaks and lunch. Deacon also saw the store no-solicitation rule posted at each front door and by the office. She worked with Bailes and Woodley handling and stocking the drug wall. (In June 1982 Deacon was promoted to cosmetician in the same department.)

Several months after the store opened, Deacon had two conversations with Bailes and Woodley about the Union. The first occurred either November 19 or 20 at the drug wall while she and Bailes were working. Deacon was stocking and Bailes was walking by the wall on her way to cosmetics. Bailes stopped and told Deacon that she wanted to talk to her about getting the Union in. Deacon said "Okay" and Bailes walked off. The following Sunday, Deacon was in the store to shop around noon, and as she got a shopping cart Bailes and Woodley walked up. One of them said they were trying to get as many employees to sign cards as they could by Monday, the next day. They suggested going to the delicatessen, getting a Coke, and talking about the Union. When purchasing the Cokes from Melody in the delicatessen, either Bailes or Woodley told Melody they wanted to talk to her about signing a union card, outside. Melody told them she would see them on her lunch hour. The three left the delicatessen and went to Bailes' car in the parking lot. Bailes gave Deacon two cards telling her about better pay, better hours, and better working conditions with a union. Deacon said her husband did not agree with unions, and Bailes told her to talk to him. Bailes added that there would be picket lines, joined by Kroger employees, and any Albertsons employee that did not sign would not be allowed to cross the line. The picketing employees would have hit men after the nonsigning employees and there would be a lot of ill feelings. Also the suppliers would not be allowed to cross the picket lines either. Deacon excused herself saying she would talk to her girlfriend, Connie White, about signing a card. Bailes and Woodley told Deacon if she signed the card, they would pick it up at her house because they needed them in by Monday. Deacon went to White's house and talked to her. Deacon told White what Bailes and Woodley had said about the Union and the picket line. Deacon stayed at White's house about an hour. She did not tell White that she was frightened by Bailes' remark about employees who did not sign cards. White did not want to sign a card. Deacon then returned to the store about 2 hours after getting the cards and reported the two conversations with Bailes and Woodley to the drug manager, Stevens, telling Stevens she was scared by the conversation and he said he would handle it. Deacon gave the two union cards to Stevens. The following morning, Deacon talked to Malmberg about the union conversations with Bailes and Woodley. Malmberg asked Deacon to write what happened and sign it. Deacon did as Malmberg requested, and he told her, "It will be okay."

Deacon had been solicited for Tupperware and a baby shower by employees in the breakroom during lunch or employees' breaktimes. She had not been solicited during work hours before or since the Bailes and Woodley union conversations.

Susan Ayers testified that she was hired as a cashier in October after the store had first opened. Her immediate supervisor was Pat Layne, assistant front-end manager. On Sunday, November 22, at midnight after Ayers had been relieved, she went to the breakroom to clock out. Layne was in the breakroom figuring timecards before clocking out. When Ayers entered the room, a courtesy clerk, Brian Taylor, and another cashier, Sandra, were also present. Taylor was signing a union card. Layne asked Ayers to sign a union card. Ayers testified, "She told me that I'd better sign a union card because once the Union came in if I didn't sign one I'd lose my job." After waiting a minute, Ayers asked Layne if she could wait until the next day so Ayers could discuss the card with her parents. Layne said, "No, you are either with me tonight or not at all." At this point Layne and Taylor left the room and walked toward the parking lot. Sandra told Ayers, "you'd better sign the union card because if you don't, you'll lose your job once they come in," as the two walked down the stairs from the breakroom. Sandra called to Layne to stop because Ayers was going with them to the parking lot. Ayers did sign a card in Layne's car. At that time Bailes drove up and Layne gave the cards to Bailes. Over the weekend Ayers talked with her parents and decided she should not have signed the card. Ayer's next scheduled day to work was Tuesday when she arrived at work, to the office to talk to Kayla Bentley. She told Bentley what transpired Sunday night and Bentley told Ayers she would have to talk to Manager Richard Stevens. Bentley called Stevens to the office. Both Stevens and Usery came to the office. Ayers repeated the events of Sunday night to Stevens. Ayers then asked Stevens if she could get her card back. Stevens told her she had such a right. The next day Ayers asked Layne to return the union card, and Layne told her, "Don't worry, you've already signed a union card; you'll be protected." Ayers told Layne she was not worried about protection, she wanted her card back. Layne said, "Well, they've been sent to Nashville and I can't get it back." In January, Ayers was asked by Respondent to reduce her recollection of the events of Sunday, November 22, to writing. She did so, and on January 26, 1982, she signed a notarized statement of the events.

Joseph Brown testified that he has been employed by Respondent for 4 years as a polygraph examiner. He administers approximately 40 examinations per week. In addition to other individuals, he administered the employment examination to Bailes and Woodley. Brown denied that he asked any questions of Bailes and Woodley relating to their past union activity or the union activity of either of their spouses.

Brown stated that pursuant to Alabama stated that pursuant to Alabama law, he pretested individuals by asking questions in several general areas found on the worksheet itself, noted their responses, and, depending on the areas of response, he asks specific questions during the actual test. If he perceives deception during the test, he gives a person the chance to explain the apparent deception. If the explanation is reasonable, he will retest the individual, to verify the previous apparent deception. All information supplied by the individual during the pretest is written down. From this supplied information, Brown chooses which questions to ask during the actual test from the "preemployment questions" section of the test form. The machine's responses to these questions are analyzed to determine whether the individual was deceptive. The individual's responses during the actual test are not recorded.

The question propounded during pretesting that occasionally got an affirmative response of union membership was: "Have you ever belonged to any hobby groups, social clubs, school groups, business or community club?" When individuals responded that they belonged to a union, Brown would not pursue the union inquiry; however, whatever was volunteered was recorded. Brown stated that a union affiliation indicated by an individual would not affect his ultimate hiring recommendation. Failure to recommend individuals is based on theft of money and/or merchandise from previous employers, medical problems that are current and may affect their function on the job applied for, including Respondent's liability for the necessary insurance, use of illegal drugs currently or at anytime on the job, and discrepancies between job applications and information elicited during the polygraph.[6]

Pamela Campbell Gothart testified that she was employed at Albertsons for 10 months as cosmetics manager. She was hired before the store opened and later voluntarily quit. In November she solicited flower money from the other employees in cosmetics for Nancy Head, cosmetics supervisor in Orlando. Gothart testified that she solicited the funds on the selling floor while the department employees were working. When the solicitation was completed, she ordered the flowers by phone from the store pharmacy and had the card read, "From the cosmetics department at 4348." Gothart was later thanked for the flowers and card. At Christmastime, the cosmetics and drug wall employees collected money from each other to buy a Christmas gift for Stevens, the drug manager. When the money was collected, someone went outside the store to purchase the gift, and the following day it was presented to Stevens while he worked at the store safe. Stevens was surprised when the gift was presented to him. When Stevens was presented his gift, he suggested that a gift should be bought for Malmberg. One of the employees collected the money, including a contribution from Stevens, and during lunch hour purchased the gift and later presented it to him in his office. A card was purchased in the store and taken to the back where employees signed the card that was also presented to Malmberg.

Richard Lee Stevens testified that he was drug manager at Huntsville from November 1981 through February 1982. On December 23 or 24 as he walked through the drug department, he was stopped by a group of female employees and presented a Christmas gift card. His gift was a desk plaque and within minutes he took it upstairs to his desk. While he was at his desk, the same group of employees were presenting a gift to Malmberg in his office. Stevens was not aware how the money was collected for either gift and did not contribute to Malmberg's gift or sign the Christmas card. The employees who gave the gifts were cosmetics and drug wall employees.

Analysis and Conclusions

The conduct complained of in this case covers a 2-month period from the prehire polygraph examinations in September to the arrests for trespass in November. Although the General Counsel's complaint alleges an unlawful promulgation of a no-solicitation rule, no evidence was proffered to support either the motivation for publication of the rule or the timing of the promulgation. There remains, however, several issues of facial validity of three separate rules and the lawfulness of their maintenance to be determined in conjunction with other complaint allegations.

A. *Interrogation and Threats*

Bailes and Woodley both testified that Brown, the polygraph examiner, asked questions about their union involvement and that of their spouses. They also testified that they made responses indicating union affiliations for themselves or their husbands. Brown admittedly received some employees, during the examinations, a past union affiliation of the examinee or a member of the family. Of the 141 polygraph reports, 11 contained notations of union affiliation. The reports on Bailes and Woodley did not contain any such notations. Brown stated that he always noted any oral responses made by the examinees during the pretest interview and that the pretest was the only portion of the test in which such responses are noted. During the actual testing, only the examinees' physiological responses are noted and those are printed by the machine itself. Brown's testimony was straightforward and did not appear guarded. He was neither evasive nor listless in his responses but attempted to answer all questions put to him. I credit Brown's denial that he asked union affiliation questions of Bailes and Woodley during the examination. I also discredit Bailes and Woodley in relation to such questions being asked. In addition to the unexplained hiatus in the recall of both witnesses, I found both witnesses much too curt during their testified recall of the events. Additionally, the plausibility of their testimony is contrary to the objective evidence in the record. The General Counsel further contends that the presence of union affiliation notations on the 11 reports in the record in conjunction with the failure to recommend 6 of the employees for hire are probative of coercive interrogation during the examination. Brown's testimony of the question propounded which received the union response was not only plausible and credible but fit logically within the framework of the printed test forms and the various notations shown on the exhibits. As Brown stated, some people volunteer nothing, some a little, and some a lot. I conclude and find that the examinees, including Bailes and Woodley, were not coercively interrogated during the polygraphs. I further conclude and find that the volunteered responses by several employee prospects during the polygraph examinations did not influence Brown's recommendation for hire. Thus, the admitted presence of the union affiliation notations were not used in a manner inconsistent with all other information acquired during examinations. Therefore, I shall recommend dismissal of the allegation relating to the polygraph examinations.

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[6] Respondent, subsequent to the trial, moved to withdraw the originals of R. Exhs. 9 and 10 and submit copies. Because the originals were part of the record I considered, I shall grant Respondent's request of exhibit withdrawal but only after final disposition of the case, including any exceptions and/or appeals.

David Eng credibly testified that he was queried by Supervisor Stringfellow while working. Although, of the three separate conversations, Eng initiated one by mentioning the company letter, Supervisor Stringfellow went beyond any permissible colloquy on the letter by asking Eng if he was involved with the Union. More particularly, since in the first conversation Eng had told Stringfellow of his prior union activity and resulting discharge. As if to cap off the conversations, Stringfellow then uttered an implied threat of discharge to Eng if he became so involved again. Both the questions and the threat were very clear. In addition to Eng's credibility, his testimony is uncontroverted. I, therefore, conclude and find that Respondent, through Supervisor Stringfellow, coercively interrogated and threatened employee Eng in violation of Section 8(a)(1) of the Act and shall order the violations remedied.

The General Counsel alleged unlawful interrogation of employees by Supervisor Pat Layne. The record shows that the interrogations occurred while Layne was soliciting for the Union. She would first inquire of employees how they felt about the Union, then would solicit signatures on union cards. In total, Layne solicited about six employees for the Union. The record evidence clearly shows that Layne solicited several employees in the store while the employees were working although when her supervisor, Malmberg, questioned her union activities, she claimed all the union activity occurred off the property. Layne also expressed ignorance of the company no-solicitation rule and apparently any involvement by a supervisor on behalf of the Union. She did tell Malmberg that it would not happen again, but she lied. No sooner was she out of Malmberg's sight than she began again soliciting for the Union. Layne was a recalcitrant supervisor who was intent on helping the Union contrary to her Employer's wishes. The coercion of employees, who may have wished to remain neutral, by a prounion supervisor was not fully on the record. A prounion supervisor, acting contrary to the employer's interest, can hardly coerce prounion employees during a union solicitation. Moreover, Layne's alleged commission of an unfair labor practice was not beneficial to Respondent whereby Layne's agency status in order to bind Respondent would be supported. In fact, the opposite exists. Layne knowingly went beyond the scope of her agency as a supervisor and intentionally solicited employees against the interest of her Employer. Although Layne feigned ignorance of her accepted role as a supervisor when Malmberg confronted her with her actions, I find that Layne was well aware of her expected procompany stance during the campaign. She simply disregarded what was expected of her to do that which in her mind was paramount; solicit for the Union. I find Layne's remark to cashier Watson instructive of Layne's main purpose while employed as a supervisor for Respondent, "fill the front end [cash register] with union supporters." Layne's support of the Union, itself, bordered on the unlawful and any coercion demonstrated by Layne was beneficial to the Union and those employees soliciting for the Union. Therefore, in view of all the circumstances, I conclude and find that Layne's solicitations of employees did not include coercive interrogation chargeable to Respondent. Accordingly, I shall dismiss the complaint allegation of interrogation by Layne as an agent and supervisor of Respondent.

Woodley's testimony that Malmberg threatened her with arrest if she came back to the store after her discharge I do not credit. Woodley's testimony of the events in November, while not completely untrustworthy, was dotted with suppositions and speculation if not outright fabrications. Woodley appeared to avoid several affirmative responses that she considered injurious to her cause. Thus, she stated she never saw the no-solicitation posters nor heard discussions of the no-solicitation rule when the record evidence establishes convincingly that the rule was discussed during orientation and the rule was posted in three conspicuous places in the store. Woodley stated that she was told on several occasions by Malmberg and her drug manager, Valle, that breaktime was her own and she could do what she wanted, but she avoided any correlation with the no-solicitation rule of Respondent. She chose instead to associate any knowledge she had of a no-solicitation rule to the Kroger employee, Smith, and his admonitions expressed when he gave Woodley and Bailes the union cards. In my view Woodley's recall of the termination conversation as it relates to an arrest was prompted more by the events which subsequently transpired rather than any anticipatory exchange by Malmberg. Bailes, who was terminated at the same time for the same reason, gave no such arrest testimony and indeed both Woodley and Bailes testified that the subsequent incursion back into the store was prompted by the union representatives and the union attorneys. I, therefore, conclude and find that no threat of an arrest was made to Woodley and shall dismiss that allegation of the complaint in regard to employee Woodley.

B. *No-Solicitation/No-Distribution/No-Access Rule*

The record evidence clearly shows that Respondent, on hiring employees, has them read and sign "Company Personnel Policies." In addition, prior to the store opening for business, a no-solicitation poster was posted in three conspicuous places in the store, two upfront on the entrance doors and one framed on the wall upstairs by the timeclock. Due to the Board's change in case law (*TRW Inc.*, 257 NLRB 442 (1981)) a replacement poster originated in November and was distributed to the stores for posting November 10. Malmberg effected the exchange of posters on November 12. Although the latest poster incorporated additional language, there was no specificity communicated to employees on its posting.

Respondent's three no-solicitation rules contain different language. The Company's personnel policy sheet prohibits solicitations during *worktime* and *on store premises at anytime*. It also refers the reader to the rule posted in the store. The posted rule extant from the store opening to approximately November 12 prohibited solicitation in the *selling areas* of the store and distribution of literature during *working time* or in *working areas*. The present rule carries the same language as its predecessor with an addition of a clarifying paragraph for *working time*.

The record evidence shows that the stores delicatessen area is a combination of public area, selling area, and nonselling area. Indeed, the cafeteria area of the delicatessen is expressly designated as a break area for employees off the clock. Thus, employees on break in the delicatessen are free to solicit and be solicited whereas the employees on duty in the delicatessen would not have such freedom. Whether nonemployees have a right to solicit off-duty employees in the delicatessen is not reached because that issue, although parenthetically referred to by the General Counsel and the Charging Party, is not in this case. Additionally, Malmberg referenced the parking lot as a *work area*. The record does sustain the parking lot as a *work area at times* for the courtesy clerks (bag boys or girls) but otherwise the parking lot is a *nonwork* area.

The Board law is clear. No-solicitation rules susceptible to an interpretation that solicitations are prohibited during all business hours, including employees' nonworking mealtimes and breaktimes, are unlawful. An ambiguous rule, however, may be made lawful in the Board's view. An employer that does not intend for its employees to misinterpret the rule against solicitation need only communicate to employees that the restriction of the rule does not apply during break periods and mealtimes or other specified periods during the workday when employees are properly not engaged in performing their work tasks. A successful communication to employees lies in completeness of the clarification. There should be no ambiguity left. Here, Respondent promulgated two rules (company personnel policies and first posted rule) with little or no clarification for employees. Indeed, as Materni testified, any explanation of either rule's language was determined solely by inquiries from employees that may or may not be forthcoming. In addition, any such inquiries could be limited to less than all the employees since the orientation sessions wherein the inquiries would originate were divided into three sessions among the approximately 150 employees. That method or approach to explanation of clarification falls far short of what the Board requires to validate a presumptively invalid rule. With regard to the present rule and its self-contained clarification of *working time*, there still exist unexplained ambiguities. The employees have two main break areas; the employee breakroom and the public portion of the delicatessen. The employees also have a designated parking area in the store's public parking lot. Malmberg's interpretation (the delicatessen is a selling department like all other departments in the store) and resultant enforcement of the no-solicitation rule prohibits employees to solicit one another in the public snack section of the delicatessen. Albeit, Malmberg may never have enforced the rule against employees on break in the delicatessen, employees are restrained in exercising their organizational rights by the printed rule prohibiting solicitations in selling areas.

Absent a specific explanation to employees that off-duty employees can solicit in the delicatessen snack section, both posted rules are invalid. The invalidity of the referenced posted rule likewise fails to validate the "Company Personnel Policies" rule, which is facially invalid. In my view any referenced clarification of a rule must itself be wholly valid to be effective. Malmberg's assessment that the parking lot is a work area is subject to several attacks. As a work area, employees could be confused about their rights in the parking lot when working or when in nonwork status, particularly in the absence of an explanation to employees, other than courtesy clerks, from Malmberg. The identical confusion would exist for any off-duty employee wishing to distribute literature relative to organizational rights to employees to exercise these rights. Any proscription in the parking lot is invalid as an infringement of employees' Section 7 rights.

In summary, the article in "Company Personnel Policies" relating to solicitations is invalid; the two posted no-solicitation/no-distribution/no-access rules are invalid; the snack section of the delicatessen is a nonselling, nonwork area for off-duty employees and the parking lot is a nonwork area except in those instances when courtesy clerks are performing their work function of collecting shopping carts or cleaning up the area.

I conclude and find that Respondent has violated Section 8(a)(1) of the Act by maintenance of three separate no-solicitation rules and shall order a remedy. The no-distribution portions of the two posted rules are likewise facially invalid and shall be remedied.

The several acts offered as solicitations by employees contrary to Respondent's no-solicitation rule are, in my view, not probative of disparate treatment by Respondent. The charity raffle which Malmberg authorized was outside the store and only involved the Respondent's sidewalk. There was no solicitation allowed in the store of either employees or customers. The incidents, wherein employees directed persons seeking charitable donations to Malmberg, are not solicitations coming within the purview of work rules for employees. The "Home Interiors" instance was not substantiated as a solicitation in the selling area of the store, but rather occurred in the breakroom during nonwork time of the participants. The Pepsi Cola deliveryman did in fact solicit an employee on the selling floor, but no evidence was proffered to evince management's knowledge of the solicitation or any resultant condonation. The collection of money for a wedding present was restricted to a very few employees and without knowledge of supervision and certainly at a time when the recipient was not a supervisor. The collection by employees to buy flowers for a hospitalized employee, although not entirely clear, appeared to occur in the proximity of the backroom, a nonwork area of the store. The Christmas presents for Malmberg and Stevens were presented during worktime and, at least, partially solicited during worktime in selling areas of the store; however, no supervisor was involved in the solicitations nor does the credible evidence show that any supervisor had knowledge that the solicitations had taken place. Deacon's testimony of the solicitation for a baby gift was insubstantial to constitute "a solicitation" and further her testimony showed that her knowledge of the fact was based on supposition and guess work rendering the testimony nonprobative of the fact.

An employer's tolerance of a beneficient solicitation, in itself, does not constitute evidence of disparate treatment between union solicitations and other solicitations. Likewise, isolated incidents of digression from a no-solicitation rule, when known to management, do not reflect the type of widespread worktime solicitation indicative of disparate application of the rule. The Board does not use a per se approach to proven solicitations but rather evaluates the quantum of incidents involved to determine whether unlawful discrimination has occurred. Here, the quantum of proven acts of solicitations, known to management, do not evidence disparity in application of Respondent's rule.

C. *Discharges*

Bailes and Woodley were admittedly discharged for violating Respondent's no-solicitation/no-distribution/no-access rule that was posted in three conspicuous places in the store. The credible record evidence shows clearly that both Bailes and Woodley, contrary to their protestations, did solicit working employees in the selling areas of the store. Albeit Malmberg testified that his decision to discharge was based partially on reports from employees accusing Bailes and Woodley of prounion intimidation during their union solicitations, he also testified that he considered the alleged intimidations as the manner in which Bailes and Woodley engage in solicitations. That is to say that Malmberg did not view the alleged intimidations as separate and distinct from the contemporaneous solicitations. As I view the circumstances, it would make no difference whether Malmberg separated or combined the acts of solicitation and the manner in which they were conducted. The undisputed fact is simple, Bailes and Woodley did not engage in union activities within the limits of Respondent's published rule and were discharged for it.

It is well established that if an employee is disciplined pursuant to an invalid no-solicitation rule, then the discipline imposed under the rule is presumptively invalid, notwithstanding that the employee solicited while working. *Flav-O-Rich Inc.*, 234 NLRB 1011 (1978). The presumptive invalidity of the discipline vitiates all actions against the employee including discharge. Respondent can, however, rebut the presumption by demonstrating convincingly that the solicitation impaired the employees' job performance or the performance of other employees, and this impairment was the reason for the discharge.

The General Counsel has sustained her burden of presenting a prima facie case of discrimination in the discharges of Bailes and Woodley.[7] Respondent's burden of going forward with the evidence to rebut the General Counsel's prima facie cases has not been sustained. To put it another way, Respondent has not shown that it would have discharged Bailes and Woodley absent their union activity. At first glance it appears that Respondent, in discharging Bailes and Woodley, was reacting to the reported threats against several employees and thereby sustaining its rebuttal of a discharge under an invalid rule and/or rebutting the General Counsel's prima facie case. In the last analysis, however, that is not the case for Respondent failed to fully investigate the incidents as reported by several rank-and-file employees. Moreover, the threat reported by Deacon is not so curiously subject to a question of credibility. Malmberg acted on reported facts from one side of the conduct only, failing to make Bailes and Woodley aware of the allegations against them and further failed to allow Bailes and Woodley an opportunity to explain or deny the alleged misconduct. Further, Malmberg had considered, at approximately the same time, identical transgressions by a supervisor but, rather than issue discipline, simply explained Respondent's demand that supervisors not engage in prounion activities. I find Malmberg's disparate treatment of identical actions instructive of his intent (no matter how illogical, because in my view a prounion supervisor actively engaged in union solicitations would appear more adversarial than prounion employees engaged in exercising their rights) to rid himself of prounion employees. Malmberg knew from his reports that Bailes and Woodley were the leaders and chose to squelch the organizational drive among employees by eliminating the rank-and-file leaders rather than offering instruction on company policies as he did with Layne. The record is not clear with regard to the locus of the solicitations considered to be outside the work rules; however, it is clear that only Layne's solicitations in the parking lot were considered by Malmberg as infractions of Respondent's rules in relation to the parking lot. Although Malmberg was exercising his delegated discretion as a store director in deciding the necessary discipline, his decision to discharge was not within the Respondent's stated causes for immediate dismissal. Albeit Respondent's animus can be inferred from the record evidence when considered in toto, the timing of the discharges aid in sustaining the General Counsel's case. Thus, the General Counsel's sought after inference of unlawful motivation rises to a certainty in light of the disparity exercised under Respondent's published disciplinary rules. Moreover, such facts (as shown above) have a tendency to establish that Respondent's real reason for the discharge was the nature of the protected activity, and not the violation of a "work rule" or in the alternative that soliciting for the Union was the most serious of "work rule" violations.

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[7] *Wright Line*, 251 NLRB 1083 (1980).

Accordingly, I conclude and find that Respondent's discharges of Bailes and Woodley violated Section 8(a)(1) and (3) of the Act, and I shall order that each be remedied.

D. *Threats of Arrests and Arrests*

The General Counsel's complaint alleges that employees Bailes and Woodley and Union Representatives Powers and Norwood were threatened with arrest and were arrested because of their presence in a public area of the store and because of their membership in, and activities on behalf of, the Union.

Although neither Powers nor Norwood testified, there is little dispute, if any, of the facts surrounding the arrests. Several facts are patently clear. Bailes, Woodley, Powers, and Norwood did not enter the store to engage in any organizational activity; no attempts was made by any of them to solicit any of Respondent's employees; Bailes' and Woodley's stated purpose was to display union support for their two individual causes and was instigated by either the union attorneys or Powers and Norwood; Malmberg's "not welcome in the store" admonition was directed to Bailes and Woodley, whereupon Powers and Norwood interjected themselves proclaiming that Bailes and Woodley had a right to enter a public store; neither the right to access of employees nor nonemployees was raised by the group; Malmberg felt his authority as store director was challenged and the group refused to leave the store; Malmberg did not invoke the no-solicitation rule, either for the employees or the nonemployees; Malmberg called the police who gave the four an opportunity to leave the premises or be arrested; Powers not only refused to leave but challenged the policeman's individual ability and was arrested; all four were escorted from the store; while exiting, Bailes and Woodley, at the instigation of Norwood, began loudly chanting, "Go Union" and continued until the policeman quieted them down; the two additional entries on Respondent's premises that same day were substantially the same and resulted in all four being arrested the second time and Powers and Norwood being arrested the third time.

Further, the General Counsel has not argued access rights to the delicatessen for organizational purposes, nor has the General Counsel sought an affirmative order to give the Union, or its supporters, organizational access to the delicatessen. The General Counsel does contend that the arrests are probative of Respondent's animus toward the union and prounion employees and seeks attorney fees and cost expended in defending the arrests in state court. The General Counsel apparently bases her theory of the arrests as violative of Section 8(a)(1) on the supposition that the group was using the delicatessen in a manner consistent with its purpose and was asked to leave because of their known union support. (Besides Powers and Norwood introducing themselves to Malmberg as union representatives just prior to the first arrest, all four individuals wore union jackets displaying a large union logo.)

The Charging Party argues, "clearly the fact that they did not intend to solicit openly for union membership applications does not change the fundamental objective of the visit." The object of the visit being to display the Union's support for Bailes and Woodley. The Charging Party also contends that the Act was violated because Powers and Norwood were arrested because they were union representatives.

Albeit several cases were cited by each party, I find little aid for my determination other than an inapposite comparison of the case law and the factual foundations therefor. The thrusts of the cases are twofold: the preemption of Section 7 rights over state property law where access is denied and the Board's remedial prerogatives under the statute. As regards preemption, the "trespassers" versus "invitees" circumstance is not presented in this case. For the Federal labor law to preempt state property law, there must be an issue involving communication of information on the right to organize. Any such communication is expressly absent in this record. I do not consider Bailes and Woodley's desire to show the other employees in the store that the Union is supporting them (Bailes and Woodley) as a right protected by Section 7 of the Act. To hold otherwise would dilute the basic rights to organize and lower the correlative right to access to a carnival atmosphere of logos, sign, symbols. In my view, such an atmosphere would constitute prostitution of important and fundamental rights of employee communication. More particularly, I find Bailes' and Woodley's use of the event (notwithstanding the initiative was not their own) to chant "Go Union," instructive of an atmosphere that should be denied in public selling or nonselling areas.

In each of the cited cases the Board was faced with remedying an unfair labor practice involving an affirmative denial of Section 7 rights and the resultant 8(a)(1) violation. Here the General Counsel's theory assumes coverage under the statutory umbrella due to the presence of employees and union representatives in a public store and because of their membership in, and activities on behalf of, the Union. The mere presence in a public place, without more, does not constitute conduct protected by Section 7 of the Act. Thus, the Employer had the right to invoke the state property law and deny access without regard to the manner and means employed. Here, it is clearly, evident that no arrest would have resulted had Powers or Norwood not challenged the police authority and state law. Just as clearly, the second and third entries were made simply to confront the Employer and the state property law again. It is a fact that all four of the group were members of a labor organization, but there is no evidence that such membership was the cause of the arrest. But for, the aforementioned need to test the policeman's authority and individual capability, no arrest would have been made. Union membership was never in issue. Further, there is no evidence of any union activity or the exercise of any organizational rights protected by Section 7 of the Act. Without such activity or exercise, there can be no conduct cognizable by the statute. Federal labor laws does not grant employees or nonemployees an unrestricted right of access even to communicate information on the rights of employees to organize. Obviously, where, as here, the communication desired is not founded on organizational rights of employees, but rather on individual emotions the Federal labor law is unavailing. An employer's legitimate interest in controlling access to its property can only be outweighed by employees' organizational rights as defined in Section 7 of the Act. I, therefore, conclude and find that Respondent has not violated Section 8(a)(1) of the Act by initiating the arrests of Bailes, Woodley, Powers, or Norwood on any of the three occasions under scrutiny here. Further, if any threat of arrest was uttered, it was made by the uniformed policeman of Huntsville, Alabama, and, therefore, is not chargeable to Respondent or its agent, Malmberg.

CONCLUSIONS OF LAW

1. Respondent has, through its supervisor, Jack Stringfellow, interrogated and threatened its employees in violation of Section 8(a)(1) of the Act.

2. By maintaining a no-solicitation/no-distribution/no-access rule in three separate printed forms, each of which fails to clarify for employees their right to solicit in behalf of the Union during nonwork times and in nonwork areas and which prohibits distributions during worktime in work areas without explanation, Respondent has interfered with, coerced, and restrained its employees in the exercise of their Section 7 rights in violation of Section 8(a)(1) of the Act.

3. Respondent's terminations of Debra Bailes and Candace Woodley on November 23 were discriminatory and in violation of Section 8(a)(1) of the Act.

4. The aforesaid unfair labor practices affect commerce within the meaning of Section 2(6) and (7) of the Act.

REMEDY

Having found that the Respondent has engaged in certain unfair labor practices, I find it necessary to order the Respondent to cease and desist therefrom and to take certain affirmative action designed to effectuate the policies of the Act.

The Respondent having discriminatorily discharged employees Debra Bailes and Candace Woodley, I find it necessary to order it to offer them full reinstatement to their former positions or, if those positions no longer exist, to substantially equivalent positions, with backpay computed in the manner prescribed in *F. W. Woolworth Co.*, 90 NLRB 289 (1950), and *Florida Steel Corp.*, 231 NLRB 651 (1977),[8] from November 23, 1981, the date of discharge, to the date of proper offers of reinstatement.

[Recommended Order omitted from publication.]

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[8] See generally *Isis Plumbing Co.*, 138 NLRB 716 (1962).

City Dodge Center, Inc. *and* **Robert J. Cozatt.** Case 18-CA-9798

June 17, 1988

DECISION AND ORDER

BY CHAIRMAN STEPHENS AND MEMBERS BABSON AND CRACRAFT

On January 27, 1988, Administrative Law Judge Claude R. Wolfe issued the attached decision. The Respondent filed exceptions and a supporting brief.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and brief and has decided to affirm the judge's rulings,[1] findings,[2] and conclusions and to adopt the recommended Order.

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge and orders that the Respondent, City Dodge Center, Inc., Minneapolis, Minnesota, its officers, agents, successors, and assigns, shall take the action set forth in the Order.

289 NLRB No. 25

Everett Rotenberry, Esq., for the General Counsel.
David R. Hols, Esq., for the Respondent.

DECISION

STATEMENT OF THE CASE

CLAUDE R. WOLFE, Administrative Law Judge. This proceeding was litigated before me at Minneapolis, Minnesota, on 8 and 9 September 1987 pursuant to charges filed and served on 5 September 1986[1] and complaint issued on 27 July 1987. The complaint alleges that City Dodge Center, Inc. (Respondent) discharged employees Robert Cozatt, Peter Rowland, Michael Ketchmark, Jerome Rosa, Michael Manning, and Mark Elliott because they engaged in protected concerted activities. Respondent denies the commission of unfair labor practices, and affirmatively asserts the employees were not engaged in protected activities and were not discharged.

After considering all the evidence, the demeanor of the witnesses as they testified before me, and the able posttrial briefs of the parties, I am persuaded that Respondent, for the reasons set forth in section III of this decision, has violated Section 8(a)(1) of the Act as alleged.

FINDINGS AND CONCLUSIONS

I. JURISDICTION

Respondent is a Minnesota corporation with an office and place of business in Minneapolis, Minnesota, where it is engaged in the retail sale of automobiles. During the calendar year ending 31 December 1986, Respondent, in the course and conduct of these business operations, derived gross revenues in excess of $500,000, and purchased and received at its Minneapolis, Minnesota facility products, goods, and materials valued in excess of $50,000 directly from points outside the State of Minnesota. Respondent is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

II. SUPERVISORS AND AGENTS

At all times material, the following named persons have occupied the positions set forth opposite their respective names, and are now, and have been at all times material, supervisors of Respondent within the meaning of Section 2(11) of the Act and agents of Respondent within the meaning of Section 2(13) of the Act:

William Hatfield	President
Ruben Przybilla	Controller
Carl Torres	Service Coordinator

III. THE ALLEGED UNFAIR LABOR PRACTICES

In August 1986, Respondent's mechanics discussed their concerns regarding pay scales, shop supplies, and what they considered to be improper treatment by Ruben Przybilla. These discussions culminated in a group decision[2] about 26 August that Robert Cozatt, as the group's spokesman, request Respondent's president, William Hatfield, to meet with all of them to discuss their grievances. They decided not to approach Hatfield until 29 August because Chrysler representatives were visiting the facility and the employees did not want to interrupt Hatfield while the Chrysler people were present.

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[1] The Respondent has excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

[2] We agree with the judge that the facts here do not support a finding that the employees herein participated in either a sitdown or an intermittent strike. Thus, on August 29, 1986, when the employees were directed to leave the facility after stopping work in an attempt to secure a meeting with President Hatfield, they did not remain in the plant en masse. All but a few of the employees left the premises. The remaining employees stayed in the plant for about 2 more hours. They left peacefully after President Hatfield read a prepared statement telling them they could go to work, leave the premises, or remain on the premises and be terminated. The action of these few employees simply does not rise to the level of the disregard of property rights and defiance of law associated with an unprotected sitdown strike as defined in *NLRB v. Fansteel Metallurgical Corp.*, 306 U.S. 240 (1939), cited by the Respondent.

Nor does the action of the employees over the period of August 29 to September 3, 1986, amount to an intermittent strike. When the Respondent determined that the employees had chosen the option of leaving rather than returning to work, the Respondent instructed them to return on the next working day, September 2, 1986. The employees did as they were instructed and returned to work despite the uncertainty created by the help-wanted advertisement placed by the Respondent on August 29, 1986. According to the credited testimony, the employees decided to await an approach from management regarding their request for a meeting. None was forthcoming and consequently the employees did not punch in as scheduled the following day, but instead met and agreed to again request a meeting with President Hatfield. These actions cannot reasonably be construed as a plan to strike, return to work, and strike again. To the contrary, they appear to be a series of reactions to steps taken by the Respondent.

[1] All dates are 1986 unless otherwise indicated.

The mechanics were scheduled to begin work at 8 a.m. on 29 August, but they did not do so. Instead they gathered in the break area and agreed that they would not work until Hatfield agreed to meet with them and discuss their grievances. Accordingly, when their supervisor, Service Coordinator Torres, asked why they were not working, Cozatt, as their spokesman, told Torres they were not going to work until they had a meeting scheduled with Hatfield for the purpose of discussing shop problems. Torres suggested they put their grievances in writing for him to take to Hatfield. The mechanics declined to so do on the ground this had previously been tried and failed to bring results. Torres left and reported to Przybilla that the men were refusing to work until they met with Hatfield. Przybilla consulted with Hatfield via the telephone. Hatfield instructed that the employees be told to go to work or go home. Przybilla and Torres then met with the mechanics in the breakroom about 9 a.m. There is some confusion regarding who said what, but I am persuaded that it was Przybilla, not Torres, who told the employees to go to work or go home. Employee testimony that Torres or Przybilla told them the shop or service area had been closed is denied by Torres and Przybilla. Noting that Michael Ketchmark, parts counterman, credibly testified that he was independently told by Torres, at 9:30 or 10 a.m., that the shop was being closed and Ketchmark should report to work on 2 September. I credit the mechanics that Torres and/or Przybilla told them their workplace was closed and they should return on 2 September. I find it most probable and conclude that this was said after the mechanics clearly indicated they could not take the return to work option, and that it was said for the purpose of persuading the mechanics to leave the premises inasmuch as they were clearly not going to work. All but a few of the mechanics left the premises. About noon, Hatfield read a prepared statement to those mechanics remaining. His message was short and simple. They had the options of going to work, leaving the premises, or remaining on the premises and being terminated. Hatfield refused to respond to Cozatt's inquiry about whether Hatfield would schedule a meeting with the employees. The remaining mechanics then left the premises. That afternoon Respondent placed a help-wanted ad in the local newspaper offering a $500 reward to mechanics.

The following workday, 2 September, all the mechanics and Ketchmark returned to work at the scheduled hour and completed the workday without incident. The mechanics had decided, during a brief meeting before starting, to work and await an approach from management regarding their request for a meeting. None came. This was not, however, the end of the matter. The following day, 3 September, the mechanics did not punch in as scheduled. Their immediate supervisor, McCartney, had been discharged the day before. Cozatt met with Roland, Manning, Rosa, Elliott, and Ellefson outside Respondent's facility shortly before 8 a.m. Cozatt told them of McCartney's discharge, which caused the employees some concern because they had regarded McCartney as a sympathetic intermediary between them and higher management. By this time they had also seen Respondent's newspaper advertisements, which they considered an indication that Respondent was going to replace them with new hires. Shortly after this gathering outside the building, these six employees repaired to a nearby restaurant where they agreed they would again request a meeting for the purpose of discussing (1) the newspaper ad that they feared meant they were going to be replaced, (2) who might be terminated, (3) the pay scale, (4) shop supplies, and (5) Przybilla's attitude. They had no plan to take any action to protest McCartney's discharge. The six of them returned to Respondent's service department between 9:30 and 10 a.m. According to Cozatt, Elliott, and Manning,[3] they were met by Torres who abruptly told them they were terminated, but gave them permission to take their personal tools from the facility. Torres denies saying the employees were terminated, and asserts the conversation was confined to a statement by the employees of intent to or a request for permission to remove their tools, in which he acquiesced. The employees' version is credited. In addition to the inability of Torres to recall whether the employees made a request or statement of intent, I find his version extremely improbable because it is clear the employees entered the shop to repeat their request for a meeting. There is no evidence from which to infer their purpose was to pick up their tools, which required considerable time and the use of pickup trucks, and which they would have to return to the shop in order to work if their request was met. Moreover, Torres' comments as related by the three mechanics in a believable manner were consistent with the contemporaneous conduct of Przybilla who, according to the credible testimony of Ketchmark and Dennis Brown, Ketchmark's supervisor and on 3 September is no longer employed by Respondent, came into the parts department a few minutes after 8:05 a.m. (*before* Torres told the mechanics they were terminated) and asked if Ketchmark was working. When Ketchmark responded that he was not yet working because he was waiting to talk to Brown, who was on the phone at the time, Przybilla ordered him to leave. Przybilla's question and reaction to the answer show he was trying to find out if, and concluded that, Ketchmark was in concert with the mechanics. That Ketchmark was considered to be a striker because he was not working was reluctantly acknowledged by Torres, and is apparent from Respondent's contention he was "replaced." Brown further testified that, about 9 or 10 a.m, on 3 September, Przybilla pulled a number of timecards from the rack,[4] and said either that those employees to whom the cards pertained were terminated, fired, or replaced. Brown does not recall for certain which word Przybilla used, but credibly testified, "Basically he told me that they were done." Whichever word Przybilla used, and I do not believe the word used was "replaced" because none of the alleged replacements had even been interviewed when Przybilla removed the timecards, I agree with Brown that the message was clear, "they were done." Przybilla says he picked up the mechanics' timecards late in the day on 3 September, and did so because they had picked up their tools and he figured they left. He does not claim he picked them up because they had been replaced. I credit Przybilla that he picked up the mechanics' timecards on 3 September, but I do not credit his testimony that he did this in late afternoon, or that he did not talk to Ketchmark on that date, or was not in the parts area during the morning of that day. Brown, who has not been shown to be prejudiced against Respondent and who gave every indication of being an honest witness careful to say no more than what he knew, is credited where his testimony conflicts with that of Ketchmark or Przybilla. Accordingly, I conclude that Przybilla did order Ketchmark to leave within a few minutes of 8:05 a.m., and did communicate to Brown that the employees whose timecards he picked up an hour or so later were no longer employees of Respondent. Torres' statement to Brown later that day to the effect that a replacement for Ketchmark would start work on Monday confirms that Ketchmark was indeed "done" so far as Respondent was concerned, and Respondent no longer considered him an employee.

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[2] Present were mechanics Cozatt, Rowland, Elliott, Manning, Hostetler, and Ellefson.

[3] Rowland, Rosa, and Ellefson did not testify. Elliot's written statement of 5 September 1986 is consistent with his testimony before me.

On the afternoon of 3 September, Torres, and apparently Hatfield in the case of Harold Pederson, interviewed applicants who had responded to the newspaper ad. Torres testified that he hired Allen Potter, William Potter, William Jaskulke, Robert Morris, and Michael Rehling by 6 p.m. on 3 September, and Harold Pederson had been hired as a partsman the same day. Torres testified that Rehling started work on 5 September, and the others started on 4 or 5 September. Jaskulke's application shows him available to start work on 8 August 1986. I conclude this should read 8 September 1986 because the date of the application has been corrected to 2 September 1986. Allen Potter's application shows him available to start work on 8 September. An agreement signed by Hatfield and Harold Pederson on 3 September sets his starting date as 11 September. It is therefore doubtful that Jaskulke, Allen Potter, or Pederson started work on 4 or 5 September. Jaskulke's own records make it improbable that they did. I therefore conclude that Respondent has not proved these three were working on 4 September. Add Rehling to their ranks, and only William Potter and Robert Morris have been shown by any unrebutted evidence, however slight, to have started work before 4 September. According to Torres, William Potter replaced Cozatt, Rehling replaced Elliott, Morris replaced Manning, Allen Potter replaced Rowland, and Rosa and Ketchmark had been replaced. Pederson was the replacement for Ketchmark. Assuming arguendo the correctness of this reckoning, no one was working in place of Elliott, Rowland, or Ketchmark on 4 September. Certainly no one had replaced any of the alleged discriminatees when they were terminated by Torres and Przybilla on 3 September.

On 4 September, Ellefson was permitted to return to work on the ground he had not been replaced. Schultz had returned to work as directed and therefore continued as an employee. Ketchmark and Rosa were denied a return to work on 4 September on the ground they had been replaced.

Respondent directed letters to Peter Rowland, Mark Elliott, Robert Cozatt, and Jerome Rosa in 1986, on 17, 20, 23, and 27 October, respectively, signed by Torres and reading as follows:

> City Dodge presently has a job opening in a position for which you are qualified. You are hereby offered reinstatement to the Service Department of City Dodge. Please report for work within five days of this letter. If you do not report and do not otherwise call in response to this letter, we will assume you are not interested and proceed with other hiring.

Discussion

The employees' 29 August refusal to work unless and until Hatfield agreed to meet with them and discuss their concerns on matters clearly related to wages and working conditions was a protected concerted activity. Respondent, citing *Fansteel*[5] and *Peck, Inc.*,[6] argues that the activity was not protected because the employees occupied the property while refusing to work. I do not agree. Here the employees did not, as in *Fansteel*, seize and hold Respondent's facility for several days, nor did they battle with police officers seeking their eviction, nor did they violate a court order to surrender the premises, nor did they, as did the employees in *Peck*, occupy and refuse to leave a plant area until evicted by police. The 29 August situation before me is more reminiscent of the happenings in *American Mfg. Co.*,[7] which the Second Circuit recited as follows:

> [T]he T.W.O.C. shop committee . . . met to consider the situation at the plant and decided that it had became essential to endeavor to induce the Company to resume negotiations with T.W.O.C. In order to accomplish this, the shop committee determined to have the weavers in the Nu-Art Department temporarily stop work the next morning while it called upon the Company officials concerning the resumption of Union negotiations. Pursuant to this plan, at ten O clock in the morning of June 29, without the use of any force and without any disorder, all the weavers stopped their looms; immediately thereafter

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[4] Elliott confirms that he saw Przybilla "tearing" the timecards from their slots that morning while the mechanics were removing their tools from the shop.

[5] *NLRB v. Fansteel Metallurgical Corp.*, 306 U.S. 240 (1939).

[6] 226 NLRB 1174 (1936).

[7] *NLRB v. American Mfg. Co.*, 106 F.2d 61, 67 (2d Cir. 1939), modified on another issue 309 U.S. 629 (1939).

> the shop committee told Anderson and Fardy, who were in the weaving rooms, that the stoppage had taken place in order to get a promise from the company that it would meet and bargain collectively with the T.W.O.C. representatives. Anderson, who in the absence of Filley and Brown was in charge of the plant, refused to talk to the committee and told the employees to go back to work. A little later, Anderson approached the meeting of the employees with the shop committee which was being held in a back room of the plant and ordered the men either to return to work or to leave the premises. Some of the men returned to work and others stood around in groups talking. At noon most of the weavers went out to lunch and on returning with the intention of going back to work were stopped at one of the entrances and fourteen were discharged. Two others who had not left the building were discharged during the noon hour. The other weavers were admitted.

The Second Circuit said (106 F.2d at 68), regarding the above-described employee conduct:

> We do not regard the action of . . . employees in standing around the premises for a period of not more than two hours, while an attempt was being made to persuade the Company to fix a date for collective bargaining with T.W.O.C., as in the nature of a sit-down strike which would permit the termination of the employee relationship.

The Board, in *Golay*,[8] expressly adopted the Court's language last quoted, and further noted it had long before held in *Cudahy Packing Co.*[9] that where employees engaged in a brief work stoppage, but remained in their parking area, conversing in scattered groups or stood peaceably at or near their work station, there was no sit-down strike or "outlaw enterprise" because the stoppages "did not involve seizure or destruction of, or damage to the Respondent's property with resultant financial loss to the Respondent," and there was therefore no warrant for holding the stoppages were not protected. These precedents and the facts in the instant case persuade me that the employees here involved did not engage in an unprotected sit-down strike or plant seizure, whichever term is used, on 29 October. To the contrary, on that date they engaged in a protected concerted work stoppage in pursuit of an adjustment of pay and work-related grievances.

Respondent also contends the employees engaged in an unprotected intermittent strike. There is no showing the employees had any plan on 29 August to engage in a series of intermittent strikes, nor did the events of that day or the tranquil 2 September day provide Respondent any reason to believe such a plan existed. I am persuaded the employees on 29 August in fact had no idea what they might do if their request was refused. This conclusion is supported by their rather aimless conduct when it was refused. They simply had not thought it through and, when Hatfield gave them the three options, they opted to save their jobs, go home, and return to work the next workday as Torres certainly and Przybilla probably had invited them to do before Hatfield issued his ukase.

The employees did not occupy the shop on 3 September, and I do not believe their remaining in the shop on 29 August was a reason for their discharge. They had selected one of Hatfield's options on 29 August and were solicited to return to work on 2 September, which they did with no disciplinary repercussions or threat of discipline for their 29 August conduct. The mechanics did not go to work on 3 September because they had no preconceived plan of action and were uncertain what course of action to take in the light of Respondent's failure to contact them on 2 September and the help-wanted advertisement. Their failure to punch in was a protected concerted activity because they were gathered together in order to determine what, if anything, they were going to do about their grievances, Respondent's failure to affirmatively respond to their request for a meeting on these grievances, and their apprehension that the advertisement meant they were going to be replaced by new hires. They decided to again request a meeting to discuss their concerns. They also agreed that Cozatt, as their spokesman, would tell Respondent they would not work until they met with management. It was then that they entered the shop for the first time that day. So far as Respondent knew, they may have decided to return to work, but, with no preamble, Torres bluntly told the mechanics they were terminated. There is no evidence Torres had any idea what the mechanics were going to say or do, and I conclude they were discharged because Respondent considered them to be strikers that morning, which in effect they were by withholding their labor. The decision to discharge "strikers" was made earlier that morning as reflected by Przybilla's discharge of Ketchmark shortly after 8 a.m. because Ketchmark was not working, and therefore was considered a striker in concert with the mechanics. That Ketchmark was so considered is further shown by the advice given him by Torres on 4 September that he had been replaced. The fact that Ketchmark was discharged for this reason supports my conclusion that the concerted work stoppage of 3 September was the sole reason for the mechanics' discharge because Ketchmark was not one of the group that originally stopped working on 29 August, and only left work that day because Torres told him the shop was closed and he should return to work on 2 September.[10]

Respondent's contention that the mechanics and Ketchmark were lawfully replaced is without merit. It is true that an employer is free to permanently replace economic strikers who do not return to work, but here the affected employees were unlawfully discharged on the morning of 3 September before any job applicants were even interviewed, much less hired. Unlawfully discharged employees remain employees entitled to reinstatement to their former jobs, or substantially equivalent jobs, and may not be permanently replaced by new hires. Accordingly, the defense of replacement, if it in fact took place, is not applicable to this case and I see no need to decide its merit had the employees not been discharged the morning of 3 September.

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[8] *Golay & Co.*, 156 NLRB 1252 (1966), enfd. 371 F.2d 259 (7th Cir. 1966), cert. denied 387 U.S. 944 (1967).

[9] 29 NLRB 837 (1941), petition for review denied 123 F.2d 63 (8th Cir. 1941).

[10] The refusal of the mechanics to work obviously seriously curtailed or effectively eliminated automobile repair work on 29 August, and therefore the services of Ketchmark, a parts counterman, were probably not needed that day.

Whether the offers of employment issued after the discharges were valid offers of reinstatement is referred to the compliance stage of this proceeding.

CONCLUSIONS OF LAW

1. Respondent is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

2. By discharging Robert Cozatt, Pete Rowland, Michael Ketchmark, Jerome Rose, Michael Manning, and Mark Elliott because they engaged in protected concerted activity, Respondent violated Section 8(a)(1) of the Act.

3. The aforesaid unfair labor practice affects commerce within the meaning of Section 2(6) and (7) of the Act.

THE REMEDY

In addition to the usual cease-and-desist order and the posting of appropriate notices, my recommended Order will require Respondent to offer the six employees discharged on 3 September 1986 unconditional reinstatement to their former jobs, or substantially equivalent positions if their former jobs no longer exist, and make them whole for all wages lost as a result of their unlawful discharge, the backpay to be computed in the manner prescribed in *F. W. Woolworth Co.*, 90 NLRB 289 (1950), with interest as prescribed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987).[11] I shall also order Respondent to remove from its files any reference to the 3 September 1986 discharges of these employees, and to notify them in writing that this has been done and that evidence of their unlawful discharge will not be used as a basis for future personnel actions against them. The visitatorial clause requested by the General Counsel is unnecessary in the circumstances of this case.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[12]

ORDER

The Respondent, City Dodge Center, Inc., Minneapolis, Minnesota, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Discharging its employees, or otherwise discriminating in any manner with respect to their tenure of employment or any term or condition of their employment because they engage in protected concerted activities.

(b) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Offer immediate and full reinstatement to their former positions or, if those jobs no longer exist, to substantially equivalent positions to Robert Cozatt, Peter Rowland, Michael Ketchmark, Jerome Rosa, Michael Manning, and Mark Elliott, and make them whole for any loss of earnings they may have suffered as a result of the discrimination against them, in the manner set forth in the remedy section of this decision.

(b) Remove from its files any references to the discharges of Robert Cozatt, Peter Rowland, Michael Ketchmark, Jerome Mesa, Michael Manning, and Mark Elliott, and notify them in writing that this has been done and that evidence of their discharges will not be used as a basis for future personnel action against them.

(c) Preserve and, on request, make available to the Board or its agents for examination and copying, all payroll records, social security payment records, timecards, personnel records and reports, and all other records necessary to analyze the amount of backpay due under the terms of this Order.

(d) Post at the Respondent's place of business in Minneapolis, Minnesota, copies of the attached notice marked "Appendix."[13] Copies of the notice, on forms provided by the Regional Director for Region 18, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material.

(e) Notify the Regional Director in writing within 20 days from the date of this Order what steps the Respondent has taken to comply.

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

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[11] 283 NLRB 1173 (1987). Interest will be computed at the "short-term Federal rate" for the underpayment of taxes as set out in the 1986 amendment to 26 U.S.C. § 6621.

[12] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

[13] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

WE WILL NOT discharge any of our employees, or in any other manner discriminate against them in regard to their tenure of employment or other term or condition of their employment because they engage in concerted activity protected by the Act.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL offer Robert Cozatt, Peter Rowland, Michael Ketchmark, Jerome Rosa, Michael Manning, and Mark Elliott immediate and full reinstatement to their former jobs or, if those jobs no longer exist, to substantially equivalent employment, without prejudice to their rights and privileges previously enjoyed, and make them whole for any loss of pay they may have suffered by reason of our unlawful discrimination against them, with interest computed thereon, and WE WILL remove from our files any references to their 3 September 1986 discharges, and notify them in writing that we have done so and that evidence of their discharges will not be used as a basis for future personnel action against them.

CITY DODGE CENTER, INC.

Ron E. Savoia Construction Co., Inc. *and* Bricklayers and Allied Craftsmen Local 7 *and* Laborers' International Union, Local 894, AFL-CIO *and* Operative Plasterers' and Cement Masons' International Association, Local 109, AFL-CIO. Cases 8-CA-18771, 8-CA-18881, and 8-CA-18882

June 17, 1988

ORDER REMANDING PROCEEDING

BY CHAIRMAN STEPHENS AND MEMBERS JOHANSEN, BABSON, AND CRACRAFT

On January 6, 1987, Administrative Law Judge Benjamin Schlesinger issued a decision in this proceeding. The Respondent filed exceptions, and the General Counsel filed exceptions and a supporting brief.

On February 20, 1987, the Board issued *John Deklewa & Sons*, 282 NLRB 1375. The Board has decided to remand this case to the administrative law judge for further consideration in light of *Deklewa*,[1] including, if necessary, reopening the record to obtain more evidence on the collective-bargaining representative status of the Unions.

Accordingly, it is ordered that this proceeding is remanded to the administrative law judge for further action as noted above.

It is further ordered that the administrative law judge shall prepare and serve on the parties a supplemental decision containing such resolutions, findings, conclusions, and recommendations as found necessary consistent with the remand. Following service of the supplemental decision on the parties, the provisions of Section 102.46 of the Board's Rules and Regulations shall be applicable.

MEMBER CRACRAFT, dissenting.

Contrary to my colleagues, I would not remand this case to the administrative law judge. The fact that the Board in *John Deklewa & Sons*, 282 NLRB 1375 (1987), provided for retroactive application of that decision does not justify the Board raising an issue no party has argued in this case.

Even though the Board may have the legal authority to act in the absence of exceptions, the general practice, as codified in the Board's Rules, is to limit the scope of review to the issues raised by the parties. See *Anniston Yarn Mills*, 103 NLRB 1495 (1953) ("well-established Board practice" is to adopt a judge's findings to which no exceptions are filed); Section 102.46(b)(2) of the Board's Rules and Regulations. ("Any exception . . . not specifically urged shall be deemed to have been waived.") Consistent with the logic of the Rules, the Board has rejected exceptions that fail to comply with the requirement that an excepting party must set forth with specificity the portions of a judge's decision to which it excepts and the basis for the exceptions. See *Bonanza Sirloin Pit*, 275 NLRB 310 (1985), and cases cited therein. A fortiori when no party has raised an issue, the Board should decline to do so on behalf of any party. See *Springfield Transit Management*, 281 NLRB 72 (1986), in which the Board declined to pass on a jurisdictional issue, despite the recent issuance of *Res-Care, Inc.*, 280 NLRB 670 (1986), because no party raised the matter in its exceptions.

The judge's decision in this case issued in January 1987. The Respondent filed exceptions, and the General Counsel filed exceptions and a supporting brief. Neither party raised the 8(f) issue. *Deklewa* issued immediately after the parties filed their position papers. Throughout the entire proceeding herein and in its exceptions, the Respondent's sole defenses to the complaint allegations that the Unions enjoyed 9(a) status were that the Unions had not been certified and that the bargaining units were inappropriate as they were one-person units. Neither of these defenses would appear to be affected in any way by the issuance of *Deklewa*.[1] No party sought to bring *Deklewa*'s applicability to the Board's attention. Now, more than 15 months after *Deklewa* issued, even though the parties still have not raised the 8(f) issue, the majority does so sua sponte. Under these circumstances, I believe the majority's action is an unjustified departure from the above-cited precedent and an abuse of discretion. I therefore dissent.

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[1] *Deklewa* was decided approximately 2 weeks after the Respondent's exceptions were filed with the Board in this proceeding. While it is true that the Respondent's exceptions do not precisely anticipate the theory, available under *Deklewa*, by which the Respondent would not have a bargaining obligation with the Charging Parties, Exception 2 in part argues that: "At no time did the Respondent formally recognize Local 894 as bargaining agent and in October, 1985 requested certification by the Board. Clearly the Respondent was not willing to recognize Local 894 unless it was certified." This assertion, coupled with *Deklewa's* declaration that its rules shall apply "to all pending cases," supra at 1389, is sufficient to authorize a remand here. We find it unnecessary to comment on what inferences can be drawn on the present record as to the existence or nonexistence of a 9(a) relationship. The parties will be given an opportunity to argue the applicability of *Deklewa* to the present record and the need, if any, to proffer additional evidence. Member Babson agrees that a remand is warranted under the circumstances of this case.

[1] The majority admits the Respondent's exceptions do not relate directly to the issues decided in *Deklewa*. Nevertheless they contend the language of the Respondent's Exception 2, coupled with *Deklewa*'s statement that its revision of 8(f) law will be applied retroactively, justifies a remand in this case. However, as noted above, the Respondent's exceptions to the bargaining order were based on specific allegations about the Unions' 9(a) status, i.e., that the Unions were not certified and that they represented one-person units. The Respondent's Exception 2, quoted by the majority, that the Unions could never be 9(a) representatives without Board certification, had no merit when filed, does not address the area of law restructured by *Deklewa*, and still has no merit. Accordingly, I do not find the Respondent's exceptions broad enough to encompass a specific *Deklewa* issue and put that *Deklewa* issue before the Board.

289 NLRB No. 26

Potters' Medical Center, Inc. *and* **International Brotherhood of Pottery and Allied Workers, AFL-CIO, CLC.** Case 8-CA-15759

June 17, 1988

DECISION AND ORDER

BY CHAIRMAN STEPHENS AND MEMBERS JOHANSEN AND BABSON

On May 18, 1983, Administrative Law Judge Claude R. Wolfe issued the attached decision. The General Counsel, the Charging Party, and the Respondent filed exceptions and supporting briefs and the Respondent filed an answering brief.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings,[1] and conclusions, as modified.

We agree with the judge that the Respondent violated Section 8(a)(5) and (1) by failing and refusing to meet at reasonable times and with reasonable promptness, by impermissibly withdrawing recognition,[2] and by failing to furnish relevant information requested on July 12, 1982.[3] The judge found, however, that the Respondent's bargaining obligation ceased on or after July 28, 1982, following a merger between the certified union, International Brotherhood of Pottery and Allied Workers, AFL-CIO, CLC (the Brotherhood), and another union, the Glass Bottle Blowers Association of the United States and Canada, AFL-CIO (the Glass Bottle Blowers). The merged union became known as Glass, Pottery, Plastics and Allied Workers International Union, AFL-CIO, CLC (the Union). Relying principally on the Board's decision in *Amoco Production Co.*, 262 NLRB 1240 (1982),[4] the judge found that the merger was improper as it pertained to the employees in the certified units because these employees were not afforded an opportunity to select delegates to a special convention approving the merger. Accordingly, the judge found that no bargaining violations continued after the date of the merger and that no affirmative remedial order on behalf of the Union was warranted. We disagree. As explained below, the legal proposition underlying the judge's ruling has since been rejected by the Supreme Court, and there is insufficient evidence that the merger of the Brotherhood and the Glass Bottle Blowers produced a dramatic change in the representative entity that would warrant finding lack of continuity in representation.

On June 15, 1979, the Brotherhood was certified as the collective-bargaining representative of the Respondent's service, maintenance, and technical employees (Unit A) and of its registered nurses (Unit B). As of the date of the July 28, 1982 merger, the parties had not reached agreement on an initial collective-bargaining agreement covering employees in the certified units. The Brotherhood's

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[1] The Respondent argues that the judge erred in failing to find that the allegations added in the second amended complaint and at the hearing are barred by Sec. 10(b) of the Act. The Respondent argues that because these allegations occurred *after* the charge was filed and *more than* 6 months before they were first introduced into the complaint that they are time barred. We agree with the judge, for the reasons he stated, that these allegations are not time barred. Contrary to the Respondent, as the judge did, we find that *NLRB v. Fant Milling Co.*, 360 U.S. 301 (1959), is controlling here. We also find that subsequent to the Supreme Court's decision in *Fant Milling* the reasoning in *NLRB v. Newton Bros. Lumber Co.*, 214 F.2d 472 (5th Cir. 1954), on which the Respondent relies, is no longer apt. Contrary to the Respondent's argument, it is clear that the situations in *Fant Milling* and here are parallel in that each involves incidents that occurred *after* the original charge was filed and *more than* 6 months before they were first introduced into the complaint. (See the Board's decision at 117 NLRB 1277, 1288 (1957), and the court of appeals' decision at 258 F.2d 851, 854 (5th Cir. 1958) in *Fant Milling*, which verify the dates of the allegation and the issuance of the complaint there.) Yet, in *Fant Milling*, for the reasons the judge here has set out, the Supreme Court found the allegations were not time barred. For those same reasons, as the judge elaborates, the allegations here are not time barred. Further, regarding the Respondent's reliance on *Newton Bros. Lumber*, we note that another respondent, in *Proctor & Gamble Mfg. Co. v. NLRB*, 658 F.2d 968 (4th Cir. 1981), made the same argument based on *Newton* and another case as the Respondent does here. The *Proctor & Gamble* court rejected that contention with words equally applicable here, i.e., "these cases were decided before *Fant Milling* and did not apply its test for determining the inclusion of subsequent events; to this extent, they are unpersuasive." 658 F.2d at 985 fn. 19. Accordingly, we reject the Respondent's 10(b) defense.

[2] In finding the withdrawal of recognition unlawful, the judge stated that the Board, in *Lammert Industries*, 229 NLRB 895 fn. 2 (1977), stated its "longstanding disavowal of the dictum in *Telautograph Corp.*, 199 NLRB 892 (1972), that the filing of a decertification petition suspends an Employer's bargaining obligation." We note that the statement was made by a plurality of the Board in *Lammert* and that it did not represent the view of the dissenters nor, necessarily, that of the concurring Board member. Indeed, in *Dresser Industries*, 264 NLRB 1088 at 1089 (1982), the Board treated this statement as the principle of *Telautograph* that it was overruling. We also note that, regardless of the split of the Board on the characterization of the suspension of bargaining issue in *Telautograph*, all five Board members in *Lammert* found that the Respondent violated Sec. 8(a)(5) by refusing to bargain.

[3] We find no merit to the Respondent's contention that the information requested on July 12, 1982—names, dates of hire, wage rates, job title and description, and changes in fringe benefits regarding all bargaining unit employees—was not necessary or relevant for the purposes of collective bargaining. On the contrary, the record shows that the certified union requested such information for purposes of collective bargaining on March 17, 1980, and, as detailed by the judge, was unlawfully denied the requested information. Thereafter, the union again sought such information on December 28, 1981, which it received. On July 12, 1982, it sought an update of the matters previously sought for the purposes of collective bargaining. In these circumstances, where the information sought concerned subjects that had long been the subject of collective bargaining, the union's admitted attempt to pursue an unfair labor practice claim that concerned some of those subjects does not establish that the information was sought solely in support of an unfair labor practice claim to the exclusion of the collective-bargaining process.

[4] *Amoco* concerned the propriety of a "members only" union affiliation vote, which excluded nonmembers from the voting process. The Board held that, under Sec. 8(a)(5) and (1), unit employees, whether union members or not, must be permitted to participate and vote in an affiliation election. This principle was later applied to a merger of local unions in *F. W. Woolworth Co.*, 268 NLRB 805 (1984) (*F. W. Woolworth I*).

289 NLRB No. 28

internal rules provided that employees of a newly organized employer, such as the Respondent, are not enrolled as union members, do not pay dues, and do not have a local union chartered unless and until agreement on an initial collective-bargaining agreement is reached. Because no bargaining agreements had been reached covering the employees of the certified units at the time of the merger, no local union had yet been chartered and no unit employees had yet become union members. When the Brotherhood selected delegates to the special convention to consider the merger, only members of chartered local unions were permitted to send delegates. Accordingly, inasmuch as the employees in the certified units were not as yet members of a chartered local union, they were unrepresented at the special convention and did not otherwise express a preference regarding the merger.[5]

In *F. W. Woolworth Co.*, 285 NLRB 854 (1987),[6] the Board held that, with the issuance of *Seattle-First National Bank*,[7] the failure to permit nonunion employees to vote on the proposed merger of local unions can no longer be grounds for finding the merger to be invalid. In the instant case, the conduct of the merged unions alleged to be impermissible involved only the exclusion of employees because of their nonmembership in the Brotherhood at the time of the merger. Under *Seattle-First National Bank* and *F. W. Woolworth II*, nonmembership of the employees of the Respondent and their lack of participation in the merger decision is not a basis for limiting or denying a bargaining order in this case.[8]

Respondent contends, however, that the merger resulted in substantial changes in the structure of the new union so that the merged union was not a continuation or successor of the certified union, i.e., that there is no continuity of representative.[9] Contrary to the Respondent, we find that the changes in representation produced by the merger of the Brotherhood and the Glass Bottle Blowers were not sufficiently dramatic in their impact on the unit employees to warrant a finding of lack of continuity in representation.

As the judge found, the record shows that the Union assumed all assets and liabilities of both the Brotherhood and the Glass Bottle Blowers. Each of the 85 affiliated local unions of the Brotherhood and the 241 local unions of the Glass Bottle Blowers continued operating in the same manner with the same local officers as before the merger. No Brotherhood local was merged into any local of the Glass Bottle Blowers as a consequence of the merger. Although it appears that there have been some changes in the identity of International union representatives servicing various local unions, Joseph Galvin Jr., former vice president of the Brotherhood and the individual who has negotiated with the Respondent on behalf of the Respondent's unit employees, testified that he remains the official representative of these employees.

Following the merger, the president of the Glass Bottle Blowers became president of the Union. The president of the Brotherhood became assistant to the president of the Union. The secretary-treasurer of the Glass Bottle Blowers became the secretary-treasurer of the Union. The secretary-treasurer of the Brotherhood became the International auditor of the Union. The Union now has four vice presidents, three of whom formerly occupied that position with the Glass Bottle Blowers, and one of whom is a former official of the Brotherhood. The Union's executive board includes 11 former members of the Glass Bottle Blowers' executive board and 3 former officials of the Brotherhood. At the time of the merger, the Brotherhood consisted of about 10,700 dues-paying members and had headquarters in East Liverpool, Ohio, where the Respondent is also located. The Glass Bottle Blowers consisted of about 67,000 dues-paying members and had headquarters in Media, Pennsylvania. The Union now has headquarters in the former headquarters of the Glass Bottle Blowers. Under the provisions of the merger agreement, the Brotherhood agreed to abide by the terms of the constitution of the Glass Bottle Blowers, with certain exceptions pertaining to the term of the office of local union officers, the election of negotiating committee members, dues structure, and the selection of delegates to the 1983 AFL-CIO convention.

The Respondent contends that continuity of representative is absent in this case because unit employees must deal with a union no longer based in their hometown, because the Brotherhood discarded its constitution and agreed to abide by the terms of the Glass Bottle Blowers' constitution, and because the Union did not have unspecified "local individuals" holding key offices. Contrary to the Respondent, we find that there is continuity of representation between the certified union, i.e., the Brotherhood, and the merged union.

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[5] The Brotherhood informed the unit employees of the upcoming merger convention but did not ascertain their desires.

[6] *F. W. Woolworth II.*

[7] *NLRB v. Financial Institution Employees Local 1182 (Seattle-First National Bank)*, 475 U.S. 192 (1986), in which the United States Supreme Court held that the Board exceeded its authority by establishing a rule requiring that nonunion employees be permitted to vote in an affiliation election before the Board would order an employer to bargain with the affiliated union.

[8] The record shows that members of the Brotherhood were notified of the impending merger well in advance of the special merger convention. Delegates to the convention were selected by each local union in representative numbers proportionate to the size of the local union membership. The delegates approved the merger by a vote of 159 to 17. Apart from the absence of participation by the Respondent's employees, there is no contention before us that the merger process was improper.

[9] The judge found it unnecessary to consider or make findings regarding these contentions.

First, it is undisputed that the Union assumed all the assets and liabilities of the Brotherhood and that all local unions formerly affiliated with either the Brotherhood or the Glass Bottle Blowers continued to operate in the same manner with the same local officers as before the merger. Of course, because no local union had yet been chartered on behalf of the Respondent's unit employees and no collective-bargaining agreement yet reached, there were no officers or agreements to continue as before under the terms of the merger. The Brotherhood's former representative, Galvin Jr., testified, however, that he remained the official representative of the Respondent's unit employees, a role he occupied before the merger.

Second, although they occupy new positions, the former principal officers of the Brotherhood continue in a representative capacity with the Union following the merger. The greater number of former officials of the Glass Bottle Blowers in the new hierarchy of the Union is consistent with the ratio of dues-paying members in the merged union and is not so substantial on its face as to constitute a dramatic diminution in the Brotherhood's representative role in the merged union.

Third, we find the factors relied on by the Respondent insufficient to show that the Union is not a continuation of the Brotherhood. The location of the Union's headquarters in a nearby State rather than in the same city where the headquarters of the Brotherhood formerly stood is of little consequence in relation to the fact that the Union has assumed all assets and liabilities of the Brotherhood. Local contacts with the Union undoubtedly will increase and participation of local union officers will arise, if and when a contract is reached and a local union is eventually chartered on behalf of the Respondent's unit employees.

Although the Brotherhood agreed to abide by the constitution of the Glass Bottle Blowers under the terms of the merger agreement, provision was made in that agreement for retention of significant local practices of the Brotherhood, including dues structure, term of office for local union officers, and practices and procedures for the election of contract negotiating committee members. Further, the constitution of the Glass Bottle Blowers contains no provisions limiting the authority of a constituent local union to negotiate, execute, and administer collective-bargaining agreements to any degree significantly different from those contained in the constitution of the Brotherhood. Neither constitution requires International union approval of local agreements and both constitutions require International union approval of local strike action. Thus, the evidence does not show that the degree of local union control will be fundamentally different because of the merger.[10] In these circumstances, we find that the agreement of the merged unions to abide by, in most respects, the constitution of the Glass Bottle Blowers is insufficient to outweigh those factors tending to show that the Union is a continuation of the certified union.

Because we find that the Union is the lawful successor to the Brotherhood, we find that the Respondent was obligated to continue recognition and bargaining on and after July 28, 1982, and that its refusal to do so violated Section 8(a)(5) and (1) of the Act.

AMENDED REMEDY

Having found that the Respondent has engaged in certain unfair labor practices that violate Section 8(a)(5) and (1) of the Act, we shall order that it cease and desist and take certain affirmative action designed to effectuate the policies of the Act.

We shall order that the Respondent recognize and, on request, bargain with Glass, Pottery, Plastics and Allied Workers International Union, AFL–CIO, CLC, through its designated agents, as the successor to the certified union, International Brotherhood of Pottery and Allied Workers, AFL–CIO, CLC, as the exclusive representative of all employees in the units found to be appropriate for the purpose of collective bargaining, with respect to rates of pay, wages, hours of employment, and other terms and conditions of employment, and, if agreements are reached, embody such understandings in writing.

ORDER

The National Labor Relations Board orders that the Respondent, Potters' Medical Center, Inc., East Liverpool, Ohio, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Refusing to recognize and bargain, on request, in good faith with Glass, Pottery, Plastics and Allied Workers International Union, AFL–CIO, CLC as the exclusive representative for purposes of collective bargaining of the employees in the following appropriate units, by failing or refusing to meet with the Union at reasonable times and with reasonable promptness for purposes of collective bargaining, by withdrawing recognition from the Union without lawful cause, and by failing to comply with requests from the Union for information to which it is entitled. The appropriate bargaining units are:

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[10] For these reasons, the instant case is factually distinguishable from *Western Commercial Transport*, 288 NLRB 214 (1988), in which the Board found that the affiliation of the certified union with another labor organization produced such a dramatic diminution in the autonomy of the certified union that there was a lack of continuity in representation of the unit employees and, accordingly, no obligation on the part of the employer to bargain with the organization that emerged from the affiliation.

Member Johansen dissented in *Western Commercial* and he continues to adhere to that dissent. However, in the circumstances of this case, he fully agrees with his colleagues that the Union is a continuation of the certified union and agrees, therefore, that the Respondent was obligated to continue to recognize and bargain with the Union.

UNIT A

All service, maintenance and technical employees employed by the Respondent at its East Liverpool, Ohio medical center including all licensed practical nurses, nurses' aides, other aides, dietary and kitchen employees, maintenance employees, housekeeping employees, X-ray and operating room technicians, ward secretaries, medical records' clerks and bookkeepers, but excluding all business office clerical employees and professional employees, guards and supervisors as defined in the Act.

UNIT B

All registered nurses employed by the Respondent at its East Liverpool, Ohio medical center excluding all other professional employees, guards and supervisors as defined in the Act and all other employees.

(b) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Recognize and, on request, bargain in good faith with the Union as the exclusive collective-bargaining representative of the employees in the appropriate bargaining units with respect to rates of pay, wages, hours, and other terms and conditions of employment and, if agreements are reached, embody such understandings in writing.

(b) On request, furnish the Union information that is relevant and necessary to its role as the exclusive bargaining representative of the employees in the appropriate bargaining units.

(c) Post at its premises in East Liverpool, Ohio, copies of the attached notice marked "Appendix."[11] Copies of the notice, on forms provided by the Regional Director for Region 8, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material.

(d) Notify the Regional Director in writing within 20 days from the date of this Order what steps the Respondent has taken to comply.

IT IS FURTHER ORDERED that except insofar as violations have been found above, the complaint is dismissed.

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

WE WILL NOT refuse to recognize and bargain, on request, in good faith with Glass, Pottery, Plastics and Allied Workers International Union, AFL–CIO CLC, as the exclusive representative for purposes of collective bargaining of the employees in the following appropriate units, and WE WILL NOT withdraw recognition without lawful cause or fail and refuse to meet with the Union at reasonable times and with reasonable promptness for purposes of collective bargaining. The appropriate bargaining units are:

UNIT A

All service, maintenance and technical employees employed by us at our East Liverpool, Ohio medical center including all licensed practical nurses, nurses' aides, other aides, dietary and kitchen employees, maintenance employees, housekeeping employees, X-ray and operating room technicians, ward secretaries, medical records' clerks and bookkeepers, but excluding all business office clerical employees and professional employees, guards and supervisors as defined in the Act.

UNIT B

All registered nurses employed by us at our East Liverpool, Ohio medical center excluding all other professional employees, guards and supervisors as defined in the Act and all other employees.

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[11] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

WE WILL NOT fail or refuse to comply with the Union's requests for information to which it is entitled.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL recognize and, on request, meet and bargain collectively with the Union, through its designated agents, as your exclusive bargaining representative and, if agreements are reached, WE WILL embody such understandings in writing.

WE WILL, on request, furnish the Union information that is relevant and necessary to its role as the exclusive bargaining representative of our employees in the appropriate bargaining units.

POTTERS' MEDICAL CENTER, INC.

Kathy A. Wireman, Esq., for the General Counsel.
Frederick C. Emmerling, Esq., for the Respondent.

DECISION

STATEMENT OF THE CASE

CLAUDE R. WOLFE, Administrative Law Judge. This matter was tried at Steubenville, Ohio, on February 22 and 23, 1983, pursuant to a charge filed by International Brotherhood of Pottery and Allied Workers, AFL–CIO, CLC (the Brotherhood), on May 24, 1982, and a second amended complaint issued February 3, 1983, and again amended at hearing.

The complaint alleges that Potters' Medical Center, Inc. (Respondent) has violated Section 8(a)(5) and (1) of the National Labor Relations Act by (a) refusing to furnish the Brotherhood and its successor, Glass, Pottery, Plastics and Allied Workers International Union, AFL–CIO, CLC (the Union), with information necessary to their performance as collective-bargaining agents; (b) failing and refusing to meet at reasonable times and with reasonable promptness for purposes of collective bargaining; and (c) withdrawing recognition from the Union as representative of certain of Respondent's employees.

Respondent admits some complaint allegations but denies the commission of the unfair labor practices alleged. In its answer to the second amended complaint Respondent asserts as affirmative defenses that (1) certain allegations are time-barred, (2) neither Potters nor the Union represented a majority of the employees in one of the two bargaining units involved in this case, (3) there is a bona fide question of representation in the other unit, and (4) the Brotherhood ceased to exist by virtue of its merger into another labor organization that does not represent a majority of Respondent's employees in either unit.

On the entire record,[1] including my observation of the demeanor of the witnesses as they testified before me, and after considering the oral argument and able posttrial briefs, I make the following

FINDINGS AND CONCLUSIONS

I. JURISDICTION

The pleadings establish that Respondent is a corporation providing medical services, meets both statutory and Board jurisdictional requirements, and is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

II. LABOR ORGANIZATIONS

Respondent concedes and I find that the Brotherhood was a labor organization within the meaning of the Act until it merged into the Union on July 28, 1982. I further find that the Union has existed since July 28, 1982, as a labor organization within the meaning of Section 2(5) of the Act.

III. BARGAINING STATUS AND PREVIOUS LITIGATION

The Brotherhood was certified on June 15, 1979, as the exclusive collective-bargaining representative of Respondent's employees in the following appropriate bargaining units:

> *UNIT A*
>
> All service, maintenance and technical employees employed by the Respondent at its East Liverpool, Ohio medical center including all licensed practical nurses, nurses' aides, other aides, dietary and kitchen employees, maintenance employees, housekeeping employees, X-ray and operating room technicians, ward secretaries, medical records' clerks and bookkeepers, but excluding all business office clerical employees and professional employees, guards and supervisors as defined in the Act.
>
> *UNIT B*
>
> All registered nurses employed by the Respondent at its East Liverpool, Ohio medical center excluding all other professional employees, guards and supervisors as defined in the Act and all other employees.

Thereafter, the parties commenced bargaining. After several negotiation sessions between August 1979 and May 1980 the Brotherhood filed charges[2] in August 1980 that resulted in a complaint and trial before Administrative Law Judge Ries on allegations that Respondent had violated Section 8(a)(5) and (1) of the Act. Judge Ries issued his decision on December 10, 1981,[3] finding Respondent had violated those sections of the Act by failing to furnish relevant information to the Brotherhood, and by unilaterally altering wage rates and modifying its pay classification system. His order required Respondent to cease and desist from this conduct and bargain in good faith with the Brotherhood as the representative of both units. No exceptions were filed to Judge Ries' decision and it was, on January 19, 1982, adopted by the Board. On January 31, 1983, the United States Court of Appeals for the Sixth Circuit issued its order[4] enforcing the Board's Order.

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[1] Certain errors in the transcript are noted and corrected.

[2] Case 8–CA–14141.

[3] JD–605–81

The events on which the allegations before me are premised took place after the issuance of Judge Ries' decision and before the court order, and it is to those events we now turn.

IV. THE ALLEGED UNFAIR LABOR PRACTICES

A. *The Facts*

On December 28, 1981, Joseph Galvin Jr., a vice president of the Brotherhood, wrote to Respondent's attorney, Robert Weaver, advising that in accordance with "the NLRB's decision"[5] he was requesting the name, address, and current hourly wage of each employee in units A and B, together with a sick leave, funeral leave, meals, "etc.," and a list of employees being paid "merit increase, on-call pay, etc." Galvin advised he would be prepared to bargain on receipt of the requested information, would appreciate Weaver giving his dates of availability for bargaining, and would try to make himself available on dates convenient to Weaver.

Weaver replied, by letter of January 4, 1982, that the requested information was being compiled and Respondent would refrain from unilateral changes in wages and other terms and conditions of employment, but Respondent adhered to its position that bargaining would be futile so long as the Brotherhood insisted on a union-security clause.

Judge Ries found, and the parties agree, that they were at impasse over the issue of union security. The parties agree, and I find, that the impasse over the Brotherhood's insistence on a union-security clause continued until it was broken by Galvin's March 22, 1982 letter, which will be discussed in due course.

On January 14, 1982, Weaver wrote to Galvin, "Enclosed is the information which has been compiled in response to your request. Please contact me if you have any questions." Galvin received this letter on January 18, 1982, but he and Weaver dispute the contents of the enclosures accompanying the letter.

Weaver testified that the letter he dispatched was accompanied by (1) a seven-page list of unit employees with their home addresses, rates of pay, and information on call pay and salary increases, and (2) a nine-page extract from Respondent's personnel manual setting forth the fringe benefits, including those specifically requested by Galvin, afforded Respondent's employees.

Galvin asserts that, although he received the cover letter and item (1), he did not receive item (2). Galvin never told Respondent that he had not received information satisfying his December 18, 1981 request.

In his next communication with Respondent, a letter to Weaver dated March 22, 1982, Galvin withdrew the Brotherhood's request for a union-security clause, and asked for several dates when Weaver would be availab for bargaining sessions, but made no reference to the information he had requested or received.

The following day, March 23, 1982, Galvin sent letter to Respondent's employees setting forth a brie chronological resume of his version of the history o Respondent/Brotherhood relationships. After relatin the substance of Judge Ries' decision, he continued a follows:

> The Center had the right to appeal the tria judge's decision, but they did not. Again, I requested certain information they had been instructed to provide and at the same time, I requested meeting dates to begin negotiations. *They did send me the information I requested.*[6]

On March 26, 1982, Weaver wrote acknowledging receipt of Galvin's March 22 letter and stated that he would confer with Woody Miller, Respondent's administrator, regarding negotiation dates, but his (Weaver's) schedule made it unlikely that any meetings in April would be possible. Weaver credibly testified that he had made a prior commitment to deliver a sailboat from Nassau to Fort Myers, Florida, during the first week of April, and had planned his vacation for the third week of April.

According to Galvin, Weaver called him on April 19 and asked if he was available to meet on May 10 regarding unit A. Galvin said he was. Weaver said the May 10 date was not definite because he had to clear it with Miller, but asked Galvin to send the Brotherhood's proposals prior to May 10. Galvin said he would.

Weaver testified that he was in Hilton Head, South Carolina, on April 19 and did not call Galvin on that date, but did have a telephone conversation with Galvin before April 19. He avers that the conversation concerned a convenient date to meet in May, in connection with which he stated a preference not to meet prior to May 10, a week after he would return from Hilton Head. Weaver testified that his reason for this preference was his expectation that there would be work for him stacked up during his absence on vacation that he would like to attend to. There is no evidence he communicated this reason to Galvin. In any case, I am persuaded that he and Galvin were testifying about the same conversation. From the more detailed and credible testimony of Galvin on the matter of the date, I conclude that although Weaver inquired about his availability on May 10, it was not a definite agreed-on date. Galvin could not reasonably have believed it was in view of Weaver's statement that he would have to clear it with Miller, whom Judge Ries found to have authority superior to that of Weaver with respect to negotiations. I am inclined to the belief that Galvin's testimony with respect to Weaver's request for proposals refers to a conversation of May 3 rather than the one in April.

Galvin and Weaver spoke on the phone on May 3, 1982.[7] Galvin asked Weaver if they were going to meet on May 10. Weaver told him that meeting was off because Miller had conflicts. Weaver also requested Galvin send him the Brotherhood's proposal to study before a specific meeting date be agreed on.

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[4] *NLRB v. Potters' Medical Center*, No. 82-1713 (6th Cir. Jan. 31, 1983).

[5] Galvin was obviously referring to Judge Ries' decision.

[6] Emphasis added.

[7] The recitation of the relevant portions of this conversation is a composite of the credible testimony of the two participants.

With a letter to Weaver of May 12, 1982, Galvin enclosed contract proposals "per our telephone conversation of May 3, 1982," again requested Weaver to advise when negotiations could begin, and complained that bargaining had been delayed too long. The text of this letter also states "a slight question has arisen regarding *the new tuition reimbursement Woody sent me*."[8] The information Galvin contends he did not receive with Weaver's January 14 letter contains an entire page devoted to tuition reimbursement.

Weaver replied to Galvin's letter on May 18, 1982. After acknowledging receipt of the Brotherhood's proposals, Weaver stated:

> Because of matters unrelated to the relationship between your union and Potters Medical Center, Inc., it is impossible at this time to propose any firm dates for negotiations. We will be in touch with you when these other matters have been resolved.

Weaver explains that the "matters unrelated" in his letter refers to Miller's advice that he might shortly be leaving Respondent's employment and did not want to schedule negotiation meetings until it was resolved whether he would be representing Respondent in negotiations.

The reasons for Miller's expressed position are explained by the testimony of Dr. Samuelson, president of Respondent, that Respondent contacted a firm specializing in administration, Good Samaritan, in early 1982 to take over the administrative duties of the hospital. Woody Miller resigned as a result of this change, and his duties were taken over the beginning of June 1982 by Keith Minton, an employee of Good Samaritan. Minton left in August 1982. Dr. Samuelson now serves as the chief executive officer to whom department heads report.

Nadena Martinovich, an employee in Unit A, filed a decertification petition with the Board's Regional Office in Case 8-RD-1093 on May 24, 1982. The Brotherhood filed the charge in the instant case on the same day.

Weaver notified Galvin on June 1, 1982, that Minton had assumed Miller's duties, and was reviewing wages, fringe benefits, and personnel policies, after which Respondent would be able to meet. Weaver continued that negotiations would be meaningless until Minton's familiarization with existing conditions was completed in 2 or 3 weeks.

Weaver followed this with another letter to Galvin on June 4 informing that the review would be completed the following week, and requesting that Galvin call to schedule a meeting subsequent to June 13 on the nurses unit, Unit B. Weaver added that Respondent was prohibited by law from negotiating on Unit A[9] while a question concerning representation existed.

On June 8, Betty Woodward, Respondent's associate administrator, found a document on her desk reading as follows:

> We, the undersigned do not want NOW or in the furure [sic], the Local IBAPW to represent us in any form of collective bargaining with the Management of Potters Medical Center.

This statement[10] was signed by 12 of the 13 registered nurses then employed by Respondent. Woodward forwarded it to Weaver immediately. Weaver dispatched a letter to Galvin the same day, stating Respondent could no longer recognize the Brotherhood as the collective-bargaining representative of Unit B[11] because it no longer represented a majority of unit employees. This letter was received by Galvin's office on June 9.

On June 9, Galvin, who had not seen Weaver's June 8 letter, called Weaver in response to his June 4 letter, and told him he was available on June 15 and thereafter to bargain for the nurses. Weaver told him of the nurses' "petition," advised he had sent a letter on it, and said he believed it would be illegal to meet and he would not meet. Galvin has had no further conversations with any of Respondent's representatives, nor have there been any negotiation meetings.

On July 12, 1982, Galvin sent a letter to Weaver requesting an up-to-date list of employee names, addresses, dates of hire, wages, and job titles, plus any changes in fringe benefits "since the last information sent to me." Weaver replied by letter of July 15 that the information would be shortly supplied. Galvin has received no further response to his July 12 letter.

On the day of Weaver's reply, the Board's Regional Director dismissed the decertification petition in Case 8-RD-1093.

On January 19, 1983, Galvin again wrote requesting dates for bargaining sessions in both units.

Weaver responded by letter of January 29 declining to propose any dates for bargaining because of the existing litigation on the question of the existing bargaining obligation.

If the foregoing were all the relevant facts, the resolution of the matters before me would be relatively simple. There is, however, more. On July 28, 1982, the Brotherhood and the Glass Bottle Blowers Association of the United States and Canada, AFL-CIO merged to form the Union. This merger was approved by the AFL-CIO on August 5, 1982. Members of the Brotherhood were informed of the impending merger via notice to all of its affiliated local unions and publication in the Potters Herald, a union newspaper published and dispatched to each of its members by the Brotherhood, in March 1982. The notice was republished in the June 1982 issue of the Potters Herald. The delegates to the special convention called to vote on the merger were selected by each local union in numbers proportionate to the size of their membership. The method of their selection, whether by ballot or appointment, is not in the record. At the Brotherhood's convention the delegates voted 159 to 17 in favor of merger, whereupon a memorandum of agreement was signed by officers of both merging unions.

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[8] Emphasis added.

[9] The parties agree that "Unit B" in the letter is a typographical error, and should be "Unit A."

[10] The General Counsel argues that this document was only admitted into evidence as something sent by Woodward to Weaver, and not for the truth of its contents. It is true that the General Counsel only stipulated the document was sent, and refused to stipulate the authenticity of the signatures. It is also true that when I received it I gave Respondent permission to introduce further evidence in support of it. Respondent did so. The signatures were authenticated by Woodward, based on her familiarity with the signatures that she acquired through observation thereof commencing long before the litigation at hand. See Fed.R.Evid. 901(b)(2).

[11] The parties agree that "Unit A" in the letter is a typographical error and should be "Unit B."

At the time of the merger there were about 10,700 dues-paying members of the Brotherhood and about 67,000 dues-paying members of the Glass Bottle Blowers. The 85 Brotherhood local unions and 241 Glass Bottle Blowers locals, although now locals of the Union, continued operating in the same manner as separate locals with the same officers they had before the merger. The Union assumed all assets and liabilities of the merged unions. The Glass Bottle Blowers International president, secretary-treasurer, 3 vice presidents, and 11 executive board members continued in the same positions in the newly formed union. The remainder of the Union's officials were an International vice president, an assistant to the president, an international auditor, and three executive board members, all of whom were previously officials of the Brotherhood. The new union, Glass, Pottery, Plastics and Allied Workers International Union, AFL-CIO-CLC, is registered with the United States Department of Labor and negotiates collective-bargaining agreements, handles grievances, and otherwise represents employees. None of the employers with whom the Brotherhood has contracts have objected to the merger.

Galvin advised the Board and Respondent of the merger by letter of October 18, 1982.

According to Galvin, employees do not become members or part of a local union until a contract with their employer is reached and, therefore, Respondent's employees did not receive the Potters Herald and were not permitted to select delegates to the merger convention because they were not members of a Brotherhood local. Galvin told Respondent's employees of the upcoming merger convention at a May 3, 1982 meeting, but these employees were never polled regarding their desires with respect to a merger, nor has Galvin met with the employees or notified them of the merger since May 3, 1982. There is no evidence these employees have designated the Union as their collective-bargaining representative.

B. *Conclusions*

1. The limitations issue

The charge filed in this case on May 24, 1982, alleges violations of Section 8(a)(5) and (1) of the Act in the following words:

> Potters Medical Center, Inc. continues to refuse to bargain and has not complied with the Administrative Law Judges decision of December 10, 1981, ordering the center to meet and bargain.

The initial complaint issued August 27, 1982, alleging Respondent had violated Section 8(a)(5) and (1) of the Act by failing, since on or about January 19, 1982, to furnish the Brotherhood with information on fringe benefits, and by failing and refusing to meet at reasonable times and with reasonable promptness for purposes of collective bargaining.

An amended complaint issued December 22, 1982, repeating the allegations of the previous complaint, but adding allegations that the Brotherhood and Glass Bottle Blowers had merged with the result that the Union was now the successor of the Brotherhood and the exclusive collective-bargaining representative of Respondent's employees in Units A & B.

The second amended complaint issued February 3, 1983, repeating the allegations of the amended complaint and adding allegations that Respondent unlawfully withdrew recognition from the Union in Unit B on or about June 4, 1982, and in Unit A on or about June 8, 1982.[12] The General Counsel further amended the complaint at trial to add an allegation that Respondent since on or about July 15, 1982, failed and refused to furnish information requested by the Brotherhood and its successor on or about July 12, 1982, with respect to unit employees' names, addresses, dates of hire, wages, job titles and description, and any changes in fringe benefits.

Respondent contends the allegations in the second amended complaint of unlawful withdrawal of recognition and the allegation added at hearing are time-barred because "An amended violation occurring after the original charge is filed and more than six (6) months prior to the time it is first introduced into the case by way of amendment to the Complaint is barred under Section 10(b).[13] *NLRB v. Newton*, 214 F.2d 472 (5th Cir. 1954)."

NLRB v. Fant Milling Co., 360 U.S. 301 (1959), is dispositive of the issue. In *Fant*, the Union filed a charge on May 20, 1954, alleging the respondent had violated Section 8(a)(5) of the Act by refusing to bargain collectively with the union. After first refusing to issue a complaint, the General Counsel reconsidered and issued an 8(a)(5) complaint on January 29, 1955, alleging, inter alia, that respondent had unilaterally increased wages "on or about October 7, 1954." The Court held that the allegation was proper even though it concerned an event after the charge was filed, reasoning the unilateral wage increase was of the same class of violations set up in the charge, and specifically adhering to its views expressed in *National Licorice Co. v. NLRB*, 309 U.S. 350 (1940), as follows:

> [W]e can find no warrant in the language or purposes of the Act for saying that it precludes the Board from dealing adequately with unfair labor practices which are related to those alleged in the charge and which grow out of them while the proceeding is pending before the Board . . . . The

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[12] The reversal of dates in the complaint reflects the typographical errors in Weaver's letters and is immaterial.

[13] Sec. 10(b) of the Act provides, inter alia, that "no complaint shall issue based upon any unfair labor practice occurring more than six months prior to the filing of the charge . . . .

> Board's jurisdiction having been involved to deal with the first steps, it had authority to deal with those which followed as a consequence of those already taken.

For Board authority to the same effect see *Sequoyah Spinning Mills*, 194 NLRB 1175, 1193 (1972); and *Firch Baking Co.*, 199 NLRB 414 (1972).

Both the withdrawal of recognition and the July 12, 1982 refusal-to-furnish information allegations are species of the genus refusal to bargain, are clearly related to the charge, and are therefore properly alleged in the complaint and not time-barred.

2. The failure to furnish information

The evidence requires a finding that Respondent did send Galvin the information he requested on December 28, 1981, and Galvin received it. Galvin made no protest to Respondent that he had not received what he had asked for, and the statement in his letter to employees of March 23, 1982, that he had received the information he requested plainly relates to events after Judge Ries' decision issued, not to material received in 1980 as he claims. Moreover, his letter to Weaver of May 12 regarding a question on the tuition reimbursement he had been sent, and his letter of July 12 requesting an update on unit personnel and change in fringe benefits "since the last information sent to me" refers, I find, to information he received in response to his December 28 request. Accordingly, the complaint allegation that Respondent failed and refused to furnish the information requested on December 28 is without merit and must be dismissed.

The later failure of Respondent to furnish the information requested by Galvin on July 12, 1982, is an unfair labor practice. The information is relevant and necessary to a labor organization's function as collective-bargaining representative,[14] and a failure to honor a request therefor violates Section 8(a)(5) and (1) of the Act. Respondent was not privileged to withhold it. Even assuming arguendo that the decertification petition filed in Unit A raised a question concerning representation that question dissolved with the withdrawal of the petition on July 15, 1982, and the question of a merger defense never arose, at the earliest, until July 28 when the merger was agreed on. Respondent had ample time to furnish the information on Unit A before July 28 even if the nurses' petition in Unit B provided good cause to suspend bargaining in Unit B.

3. The failure to meet and bargain and the withdrawal of recognition

After the impasse was broken by the Brotherhood's March 22, 1982 withdrawal of its union-security proposals, Respondent was obligated to meet and bargain as the Brotherhood requested. The complaint alleges that since March 22, 1982, Respondent failed and refused to meet and bargain at reasonable times and with reasonable promptness with the Brotherhood and its successor, and further alleges that Respondent unlawfully withdrew recognition of the Union as collective-bargaining representative on June 4, 1982. The General Counsel takes the position that Respondent was unreasonably tardy in meeting its obligation and has no acceptable excuse. Respondent argues that any delays in scheduling meetings were reasonable and not designated to frustrate the Union's bargaining efforts.

Respondent also points to the fact that the Brotherhood delayed negotiations from December 4, 1979, to March 17, 1980, because one of its employee members of the bargaining committee was ill. It is true that the earlier negotiations commenced 2 months after the Board's certification and meetings thereafter were at intervals of 28 days, 21 days, 55 days, 103 days (the period during which the employee was hospitalized), 28 days, and 35 days. This past history does not, however, provide a precedent on which Respondent may rely for justification of its failure to provide any date or range of dates for bargaining after March 22, 1982, in the face of repeated requests by the Brotherhood for such dates. One important difference between the two periods is that there were meetings in 1979 and 1980, presumably on dates agreed on by the parties, where here Galvin kept requesting, and Respondent kept avoiding giving, a specific date or a range of dates. Nor was any meeting in fact scheduled pursuant to Galvin's requests. That Galvin never proposed a specific date to Weaver is of no moment. Respondent plainly knew the Brotherhood was eager to meet and requesting to meet and bargain as soon as possible.

Respondent's failure to furnish a date or range of dates in response to Galvin's repeated requests on and after March 22, 1982, effectively halted any negotiations. Galvin made reasonable efforts to expedite negotiations. That Galvin did not continuously protest the delay, and elected instead to persevere in trying to extract some meeting dates provides no excuse for Respondent's conduct.[15] Similarly, the prearranged schedule of Weaver in April and the conflicts and uncertain position of Miller in May do not excuse the failure to provide possible meeting dates. The Respondent was the party to negotiations with the Brotherhood. Weaver and Miller were but its agents. Respondent, not its agents, had the obligation to bargain and an obligation to furnish bargaining representatives who would devote their time to prompt and continuous negotiations.[16] It is settled that a busy schedule provides no excuse for failing to meet and confer at reasonable intervals.[17] Weaver testified that he made arrangements with another lawyer in his firm to meet with the Brotherhood if Respondent received an explicit demand to meet in April. There is no showing that he advised Galvin of the other lawyer's availability. The very fact that Weaver could readily secure another to meet in his stead erodes any argument that his presence was essential or that his prearranged schedule prevented April meetings. With respect to Miller, he was not the party to negotiations, merely its agent. To conclude that

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[14] *Grand Islander Health Care Center*, 256 NLRB 1255 (1981).

[15] *Insulating Fabricators*, 144 NLRB 1325, 1328 (1963).

[16] *"M" System*, 129 NLRB 527 (1960).

[17] *Teamsters Local 612*, 215 NLRB 789 (1974); *Franklin Equipment Co.*, 194 NLRB 643 (1971).

Miller's quandary, not communicated to the Brotherhood, required a delay in meeting would require a preliminary premise that once Respondent selected Miller as agent his personal dilemmas controlled when meetings could be held. Weaver was every bit as familiar with the negotiations as Miller was, and might well have carried on negotiations without Miller. Necessary consultations with his principal by Weaver could easily have been arranged by telephone or between negotiation meetings. Moreover, if Respondent elected not to permit Weaver to meet alone it could have exercised its prerogative to replace Miller with another agent. Respondent certainly must have known of Miller's indecision on whether he would remain, and could have met its obligation by appointing someone else to supplant him during the meetings as an advisor to Weaver or Weaver's stand-in.[18]

The General Counsel has established by a preponderance of the evidence that Respondent has, since March 22, 1982, violated Section 8(a)(5) and (1) of the Act by failing and refusing to meet at reasonable times and reasonable promptness with the Brotherhood[19] for the purposes of collective bargaining.

Respondent contends that its refusal to meet with regard to Unit A on June 4, 1982, was lawful because a decertification petition had been filed. Respondent relies on *Telautograph*[20] and argues that even though the principle relied on was subsequently overruled in *Dresser Industries*[21] on September 30, 1982, the Board in *Dresser* declined to find a violation of the Act where the employer's conduct was in accord with the existing precedent expounded in *Telautograph*, and the same result should accrue here.

The Board in *Telautograph* held that the timely filing of a decertification petition raises a real question concerning representation preventing an employer from bargaining with an incumbent union, but further held that this rule did not apply "in situations where, because of contract bar, certification year, inadequate showing of interest, *or any other established reason*,[22] the decertification petition does not raise a real representation question." The Board adopted the Trial Examiner's decision that noted that *Telautograph* was distinguishable from *Massey-Ferguson*[23] in which the Board held any loss of majority by the Union would have been attributable to the employer's prior unilateral, and unlawful, wage increases. The Respondent herein has been previously found by Judge Ries, the Board, and the Court to have failed to furnish the Brotherhood with relevant information and unilaterally altered wages and modified its pay classification system, all in violation of Section 8(a)(5) and (1) of the Act. As a result, Respondent was ordered to cease and desist from such conduct and bargain in good faith with the Brotherhood. Respondent has not bargained with the Brotherhood as the Board Order requires. Additionally, I have found that Respondent has unlawfully failed to meet and bargain with the Brotherhood prior to the filing of the petition.

I am persuaded that the Board's comments in *Telautograph* did not purport to overrule longstanding precedent that the mere filing of a decertification petition does not suffice to warrant a refusal to bargain where there are prior unremedied unfair labor practices, and I am further convinced that the Board's reference to "any other established reasons" in *Telautograph* was intended to encompass the situation where unremedied unfair labor practices do exist. This reference and the adopted trial examiner's decision, should have put Respondent on notice that its legal position was probably untenable. Moreover, the Board in *Lammert Industries*,[24] issued 5 years before Respondent declined to bargain in Unit A, explicitly stated its "longstanding disavowal of the dictum in *Telautograph Corp.*, 199 NLRB 892 (1972), that the filing of a decertification petition suspends an Employer's bargaining obligation." *Lammert* had committed numerous other unremedied unfair practices. Respondent thus had additional notice via Lammert that its legal position would not likely stand close scrutiny, and it certainly was well aware that *Telautograph* involved no unfair labor practices, remedied or unremedied. It was also well aware that the Brotherhood had filed new charges alleging Respondent was continuing to refuse to bargain in violation of Section 8(a)(5) and (1).

On the foregoing, I conclude and find that Respondent's refusal to bargain with the Brotherhood, which amounted to a withdrawal of recognition, with respect to Unit A violated Section 8(a)(5) and (1) of the Act.

Respondent's refusal to meet and bargain collectively with the Brotherhood, commencing on March 22, 1982, either standing alone or viewed as a continuation of the earlier unfair labor practices found by the Board, is sufficiently serious to taint the nurses' petition of June 8, 1982, which would have permitted the Respondent to suspend bargaining in Unit B absent the unremedied unfair labor practices, and Respondent is therefore precluded from relying on it as a basis for its June 8, 1982, refusal to bargain with respect to employees in Unit B. Accordingly, the June 8, 1982 refusal to bargain violated Section 8(a)(5) and (1) of the Act.[25]

4. The merger and Respondent's bargaining obligation

The General Counsel contends that the merger between International unions was proper, did not significantly alter the access of Respondent's employees to their union, and did not require that Respondent's nonmember employees be permitted to vote because they were not members because of Respondent's intransigence.

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[18] Woodward, the associate administrator, Dr. Samuelson, the president of the corporation, and Dr. Chaplynsky and Dr. Samuelson's wife, both of whom were part owners of Respondent, presumably were aware, or could have been made aware on short notice, of the course of negotiations and Respondent's position thereon and all were apparently available after March 22, 1982.

[19] I do not mention the Union in this context for reasons later set forth in this decision.

[20] *Telautograph Corp.*, 199 NLRB 892 (1972).

[21] *Dresser Industries*, 264 NLRB 1088 (1982).

[22] Emphasis added.

[23] *Massey-Ferguson, Inc.*, 184 NLRB 640 (1970), enfd. 78 LRRM 2289, 66 LC ¶ 12,060 (7th Cir. 1971).

[24] 229 NLRB 895 fn. 2 (1977).

[25] *United States Gypsum Co.*, 259 NLRB 1105, 1112 (1982).

Respondent argues that the Brotherhood failed to adhere to minimum standards of due process in ascertaining whether Respondent's employees desired the merger, citing *State Bank of India*, 262 NLRB 1108 (1982), and therefore Respondent has no obligation to bargain with the new and different organization.

The merger procedures followed by the unions in this case generally comport with those approved by the Board in *Texas Plastics*, 263 NLRB 394 (1982); *Knapp-Sherrill Co.*, 263 NLRB 396 (1982); *Warehouse Groceries Management*, 254 NLRB 252 (1981); and *Wellman Industries*, 248 NLRB 325 (1980), in finding that the International union resulting from the merger of two International unions succeeded to the representation rights of the merged union, but the local union involved in *Texas Plastics* and *Knapp-Sherrill* was given the opportunity to send delegates to the merger convention, and the unit members in *Wellman* were given the opportunity to vote and ratified the merger. *Warehouse Groceries* does not indicate whether nonmembers were given an opportunity to express their desires regarding the merger.

The Board has held that in affiliation cases all bargaining unit employees must be allowed to vote in any election held on any change in affiliation of the bargaining representative. *Seattle-First National Bank*, 265 NLRB 426 (1982); *Amoco Production Co.*, 262 NLRB 1240 (1982). Whether their votes are determinative of the issue is immaterial. That this principle also applies to merger cases is indicated by the Board's application of the requirements of *Amoco* to a merger in *Laborers Local 652*, 266 NLRB 219 fn. 1 (1983). *State Bank of India* issued 2 days before *Amoco* and focused on "minimal standards of due process in ascertaining whether the employees it represented desired to merge . . . ." The Board has long held that union mergers, "without more, do not operate to alter the representative character of the bargaining agent,"[26] but it has also consistently required that such changes be affected by procedures protecting the right of employees to freely select their own representatives. See, for example, *State Bank of India*, supra; *Fluhrer Bakeries*, 232 NLRB 212 (1977); *Rinker Materials Co.*, 162 NLRB 1688, 1689 (1967). The Board, in short, has consistently required the minimal due process referred to in *State Bank of India*, supra.

The General Counsel's argument that Respondent's intransigence prevented the employees from becoming members and, therefore, removed any necessity that Respondent's employees be permitted to vote is based on *Wellman Industries*, 248 NLRB 325 (1980). *Wellman* involved repeated violations of Section 8(a)(5) over a several year period, including discharges, surface bargaining, unilateral layoffs, transfers, and pay reductions, together with repeated frivolous defenses and a flagrant disregard of previous Board and court orders, including a denial of certiorari by the Supreme Court of the United States. The Board viewed the employer's conduct to be so serious as to require the employer to reimburse the charging party union for litigation and negotiation expenses. In this context, the Board held that the employees' lack of premerger opportunity to express their view on the merger because they were not a chartered local union, and not because there was no collective-bargaining agreement covering them, resulted from the employer's prolonged refusal to bargain in good faith and furnished no defense to the refusal to bargain.

In neither the prior case nor the case before me has Respondent engaged in conduct as flagrant as that found in *Wellman*. Respondent has advanced no patently frivolous defenses, and has in fact prevailed on some issues in both cases. It cannot fairly be said on the evidence before me, including the fact that the impasse occasioned by the Brotherhood's insistence on a union-security clause did not end until March 22, 1982, that the failure to reach a contract was entirely caused by Respondent's unfair labor practices. Judge Ries, and therefore the Board and the Court that adopted his decision, specifically noted that an extension of the certification year was not appropriate "since I have not concluded that Respondent committed any unfair labor practices which appreciably delayed the bargaining."[27] The circumstances of the instant case do not remotely resemble those in *Wellman*, and the General Counsel's contention that the Respondent's conduct prevented its employees from having a voice in the merger is rejected.

The issue before me is not whether unit employees had an opportunity to vote on a change of representation as it was in *Seattle-First National Bank*, supra, and *Amoco*, supra. There was no vote in this case. There was, however, a selection of delegates to convey the desires of local union members to the merger convention. Respondent's employees were not polled on the question, were denied the right to select delegates, and therefore were denied the right to express their views on the merger. The thrust of *Amoco* is not in my opinion limited to its express holding that due process requires that in an affiliation election all unit members must be permitted to participate and vote. The underlying principle on which the *Amoco* holding is grounded is found in the dissent of Members Jenkins and Zagoria in *North Electric Co.*[28] This dissent was specifically adopted by the Board in *Amoco*, and states, in pertinent part:

> It appears basic to the collective-bargaining process that the selection of a bargaining representative be made by the employees in the bargaining unit. In our view, therefore, a cardinal prerequisite to any change in designation of the bargaining representative is *that all employees* in the bargaining unit be afforded the opportunity to participate in such selection.

Respondent's employees had designated the Brotherhood as their collective-bargaining representative. The merger effected a change in the designation of that representative. The employees in Units A and B were not "afforded the opportunity to participate in such selection," and were therefore not afforded the due process to which they were entitled. I do not think it matters at all whether an affiliation or a merger is being dealt with. The principle remains the same. Accordingly, I am persuaded that the merger was improper to the extent it relates to Respondent's employees,[29] the successorship issue regarding representation rights for these employees is moot[30], and Respondent did not violate Section 8(a)(5) and (1) by refusing to bargain with the Union on or after July 28, 1982.

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[26] *Canton Sign Co.*, 174 NLRB 906, 908 (1969), enf. denied on other grounds 457 F.2d 832 (6th Cir. 1972).

[27] *Potters' Medical Center*, 8-CA-14141, JD-605-81 (1981).

[28] 165 NLRB 942, 944 (1967).

CONCLUSIONS OF LAW

1. Respondent is an employer engaged in commerce within the meaning of the Act, and the Brotherhood was a labor organization within the meaning of the Act until July 28, 1982.

2. By, from on or about March 22, 1982, to July 28, 1982, failing and refusing to meet at reasonable times and with reasonable promptness with the Brotherhood for purposes of collective bargaining; and by withdrawing recognition from the Brotherhood as the exclusive collective-bargaining representative of Respondent's employees in Units A and B on June 4 and June 8, 1982, respectively; and by failing to furnish relevant information to the Brotherhood on and after July 12, 1982, Respondent violated Section 8(a)(5) and (1) of the Act.

3. The aforesaid unfair labor practices affect commerce within the meaning of the Act.

4. Other than as above found, Respondent has not violated the Act as alleged in the complaint.

THE REMEDY

A deviation from the normal remedies is required by the evidence and the complaint allegation by the General Counsel that the Brotherhood was dissolved by reason of the July 28, 1982 merger. Respondent has no bargaining obligation with the Union, and an order to bargain with the Brotherhood would be a futile act. I am of the opinion, however, that the unfair labor practices occurring before the merger require a remedy. My remedy will, therefore, require Respondent to cease and desist from its unlawful conduct and to bargain on request with any labor organization hereafter duly designated by a majority of its employees in appropriate Units A and/or B as their exclusive representative for purposes of collective bargaining.

[Recommended Order omitted from publication.]

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[29] This decision does not purport to pass judgment on the merger of the two International unions as it affects employees of other employers. That issue is not before me.

[30] *Amoco Production Co.*, 262 NLRB 1240 (1982).

W. Pat Crow Forgings, Inc., a subsidiary of TIC Investment Corp. *and* **International Brotherhood of Boilermakers, Iron Ship Builders, Blacksmiths, Forgers & Helpers, Local 96, AFL-CIO.** Case 16-CA-12321

June 17, 1988

DECISION AND ORDER

BY CHAIRMAN STEPHENS AND MEMBERS JOHANSEN AND BABSON

On March 17, 1987, Administrative Law Judge Robert A. Gritta issued the attached decision. The Respondent filed exceptions and a supporting brief, and the General Counsel filed a brief in support of the judge's decision.[1]

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings,[2] and conclusions and to adopt the recommended Order.

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge and orders that the Respondent, W. Pat Crow Forgings, Inc., a subsidiary of TIC Investment Corp., Fort Worth, Texas, its officers, agents, successors, and assigns, shall take the action set forth in the Order.

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[1] The Respondent has requested oral argument. The request is denied as the record, exceptions, and briefs adequately present the issues and the positions of the parties.

[2] The Respondent has excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

The Respondent contends in its exceptions that the effective date and duration of the agreement were open issues on August 28, 1985, and, accordingly, that there was no meeting of the minds between the parties on a complete agreement. Union Representative Beauchamp's credited testimony, however, indicates that he began the August 28 meeting by reviewing with the Respondent's representative, Hatley, the Company's outstanding proposals, including the comprehensive initial proposal containing the Company's position on the effective dates of the agreement. Hatley did not claim then or at any time during the August 28 meeting that the initial proposal on the effective dates had been withdrawn or modified. Moreover, Union Representative Bryant's September 6, 1985 letter informing Hatley of the agreement's ratification by the union members cited the effective dates as August 18, 1984, through August 17, 1987. In his response, Hatley did not object to these dates. We also note that Hatley's testimony concerning open issues was discredited by the judge. Therefore, we agree with the judge's finding that the Company's initial proposal regarding the effective date and duration of the contract was on the table and subject to acceptance by the Union on August 28, 1985.

289 NLRB No. 32

J. O. Dodson, Esq., for the General Counsel.
Robert G. Mebus, of Dallas, Texas, for the Respondent.
Michael J. Stapp, of Kansas City, Kansas, for the Charging Party.

DECISION

STATEMENT OF THE CASE

ROBERT A. GRITTA, Administrative Law Judge. This case was tried before me on 6 and 7 May 1986 in Ft. Worth, Texas, based on a charge filed by International Brotherhood of Boilermakers, Iron Ship Builders, Blacksmiths, Forgers & Helpers, Local 96, AFL-CIO (the Union) on 18 September 1985 and a complaint issued by the Regional Director for Region 16 of the National Labor Relations Board on 7 January 1986.[1] The complaint alleged that W. Pat Crow Forgings, Inc., a subsidiary of TIC Investment Corp. (Respondent) violated Section 8(a)(1) and (5) of the Act by refusing to execute a written collective-bargaining contract embodying agreements previously reached in negotiating sessions. Respondent's timely answer denied the commission of any unfair labor practices.

All parties were afforded full opportunity to be heard, to examine and cross-examine witnesses, to introduce evidence, and to argue orally. Briefs were submitted by the General Counsel, Respondent, and the Charging Party. All briefs were duly considered.

On the entire record in this case and from my observation of the witnesses and their demeanor on the witness stand, and on substantive, reliable evidence considered along with the consistency and inherent probability of testimony, I make the following

FINDINGS OF FACT

I. JURISDICTION AND STATUS OF LABOR ORGANIZATION—PRELIMINARY CONCLUSIONS OF LAW

The complaint alleges, Respondent admits, and I find that W. Pat Crow Forgings, Inc., a subsidiary of TIC Investment Corp. is a Delaware corporation engaged in the forging of commercial and military products in Ft. Worth, Texas. Jurisdiction is not in issue. W. Pat Crow Forgings, Inc., a subsidiary of TIC Investment Corp., in the past 12 months, in the course and conduct of its business operations, purchased and received at its Ft. Worth, Texas facility goods and materials valued in excess of $50,000 directly from points located outside the State of Texas. I conclude and find that W. Pat Crow Forgings, Inc., a subsidiary of TIC Investment Corp. is an employer engaged in commerce and in operations affecting commerce within the meaning of Section 2(2), (6), and (7) of the Act.

The complaint alleges, Respondent admits, and I conclude and find that the Union is a labor organization within the meaning of Section 2(5) of the Act.

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[1] All dates are in 1985 unless otherwise specified.

II. BACKGROUND

Respondent and the Union have been parties to collective-bargaining agreements in excess of 30 years. The latest collective-bargaining contract was extant from 18 August 1981 through 17 August 1984. Current negotiations began 28 June 1984. On 28 September 1984 the Union struck Respondent, remaining on strike until 26 April 1985. Of the 20 scheduled negotiating sessions between the parties, the last 2 occurred 10 May and 28 August 1985. A decertification petition was filed 16 September 1985 (16–RD–1088).

Respondent's bargaining committee was composed of Harold Hatley, vice president in charge of personnel and industrial relations. Lee Chambers, vice president of finance, and Karl Arceneaux, vice president of manufacturing and engineering.

The Union's bargaining committee included several rank-and-file employees and, during the 14 months of negotiations, was chaired by Union Representative Lester Boykin for the initial meetings, Union Representative Buddy Bryant for the remainder of the meetings, excepting the last two and union representative, Leonard Beauchamp, for the last two meetings.[2]

III. THE ALLEGED UNFAIR LABOR PRACTICES

Bubby M. Bryant testified that he is business manager and financial secretary of the Boilermakers Lodge No. 96 in Ft. Worth, Texas.

When the Company and the Union sat down to begin negotiations, Lester Boykin, an International representative of the Union, was the spokesman for the Union. He assumed the responsibility as spokesman for two or three of the meetings. At all subsequent meetings Buddy Bryant was spokesman for the Union until Leonard Beauchamp became the representative and spokesman for the Union at the 10 May and 28 August meeting. During negotiations, there was no agreement between the parties for any procedure of adoption of tentative agreements or withdrawal of proposals. The procedure was left to the individual parties.

Bryant recalled in the early negotiating sessions and specifically the meeting of 31 July 1984, the meeting at which the Union received the Company's lengthy proposal, that the Company's position on termination was that they needed a 3-year contract. Bryant said that there was quite a discussion on that proposal. On 21 September 1984 the Company submitted an additional written proposal on safety and health.

No additional written proposals were exchanged between the parties until the 10 May meeting. At the meeting of 7 November 1984, Hatley made an oral proposal for a 3-year agreement, which included the Boilermakers pension plan with a 50-cent contribution per hour. The 13th meeting between the parties was held on 7 November. Bryant has no recall that the term of the agreement was to be anything other than 17 August 1984 through August 1987.

The 10 May meeting began with Beauchamp asking Hatley what the company proposals were. Hatley referred to General Counsel's Exhibits 4, 5, 9, and 10.

Bryant recalled that the 28 August meeting was opened by Beauchamp displaying the company proposals in front of Hatley and asking Hatley if there were any other proposals or anything else that we have to negotiate in regards to. Hatley responded that what was on the table was what had to be negotiated between the parties. Bryant stated that during the course of the negotiating sessions the union proposals were withdrawn piece by piece and the only portion of the union proposal that was viable on 28 August was that concerning the pension. The Union was still making an effort to have a pension included in the contract. A seniority list, roster, and wage rates as of 28 August 1985, had been requested by the Union during the 28 August negotiating session at the end of the meeting.

Bryant conducted the ratification vote on 5 September 1985. He took the agreements to the membership for ratification. The contract that was presented to the membership were the proposals on the table as of the 28 August meeting. It was put to the membership without a pension. The membership accepted the contract proposals as presented and without a pension.

On 6 September 1985 Bryant telephoned the Company and spoke to Lee Chambers at approximately 10:30 a.m. He told Chambers that members of Local 96 had accepted the contract as it was presented to them. Chambers only response was, "Okay." After talking with Chambers, he called for Hatley but had to leave word for him to return the call. At approximately 3 p.m. Bryant called Hatley again. He told Hatley that members of Local 96 had accepted the contract and that the Union and the Company had an agreement and he would like to set up a time when they could get together, finalize the contract, and put it in booklet form. Hatley asked Bryant about the pension information he had requested and Bryant told him that the information would be available within a week. Hatley did not question the existence of a contract. Bryant that same day confirmed the telephone conversation by registered letter. Approximately a week later Bryant called Hatley on 13 September. Hatley was not in and Bryant left word for him to return the call. Bryant did call Lee Chambers that same day and asked Chambers about an updated seniority list, classifications, and the wages that had been requested in the last meeting on 28 August. Chambers replied that he had made up the list and sent it to Hatley for his review and that he would contact Hatley and get it to Bryant as quickly as possible. Having not heard from Hatley, Bryant placed a call to him again on 18 September but Hatley was not available. The following morning he received a call from Hatley. Bryant told Hatley he was still working on the pension information and would get it to him as soon as he could get it. Bryant asked Hatley about the seniority list and the things he had spoken to Chambers about and

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[2] Written contract proposals in the record: G.C. Exh. 2, the expired collective-bargaining agreement; G.C. Exh. 3, R. Exh. 5, the Union's initial proposal for changes in the expired agreement; G.C. Exh. 4, the Company's initial proposal for a complete contract; G.C. Exh. 5, company proposal for safety and health; G.C. Exh. 9, company proposal on production downtime; G.C. Exh. 10 additional company proposal on arbitration; G.C. Exh. 11, Exh. A, 2-page addendum to G.C. Exh. 9 listing machines affected.

Hatley responded he would get them to him. Hatley said he needed the pension information before he could do anything and Bryant told Hatley that they had an agreement whether he got the information on the pension or not and that the Union wanted to get the contract put into a booklet form so they could get it put to bed. During the telephone call Hatley informed Bryant that a decertification petition had been filed. Hatley also told Bryant that he had sent the Union a letter. After the telephone conversation Bryant sent a registered letter to Hatley. Later Bryant received Hatley's 16 September letter that was postmarked 17 September.

Bryant testified that between 6 and 19 September Hatley had not stated that there was not an agreement between the Company and the Union. His first indication that the Company thought that no agreement existed between the Company and the Union was during the telephone conversation on 19 September. In that conversation Hatley stated that he had to have the pertinent information about the pension before he could agree that the Union and the Company had an agreement.

Bryant identified the written marks on General Counsel's Exhibit 3. The notation deleting the additional paid holiday on 7-31-84 is in his handwriting. Page 5, "per expired agreement," means to leave the proposal as it is in the expired agreement. The Union's original proposal for duration of the agreement was 18 August 1984 to 17 August 1985. There is no notation that it was ever dropped. The undated notations at the top of page 2 refer to the fact that the Company's proposal, page 42, will be accepted as the health and safety provision. The notation on schedule A indicates that at the second meeting the Union reduced their wage proposal from 12 to 8 percent.

Leonard G. Beauchamp testified that he is a staff representative for the International and is in charge of research dealing with collective bargaining, arbitration, pension, and health insurance matters. Beauchamp became spokesman for the Union in the bargaining session of 10 May 1985. Hatley was a spokesman for the Company at that meeting. The meeting was scheduled to begin at 9:30 a.m. and actually started about 10:15 a.m. Beauchamp opened the meeting by asking Hatley what proposals were on the table at this point in time. Hatley stated that the Company's proposals were contained in the original proposal presented at the second meeting of 31 July 1984 and the Company's proposal on safety and health that was presented at the 21 September 1984 meeting and in addition a written proposal on the downtime. Beauchamp did not have a copy of that proposal and Hatley said it had been given to the Union in the April meeting. Hatley had a copy of it with him. He made copies for the Union and then everyone had a copy. The parties begin discussion with item 1 on General Counsel's Exhibit 9. The Union wanted a definition of machines and the Company wrote off a list of machines that would be defined under item 1. The parties then moved to item 2 dealing with half pay for certain types of downtime. The Company discussed the possibility of looking at some kind of bonus arrangement and incentive program but there was never a proposal to incorporate such an incentive plan in the contract. The 10 May discussion actually got started during the downtime proposal because Hatley told the Union that the replacement workers were more productive than the strikers. Beauchamp asked him how he made that decision and Hatley said they had made studies. The Union requested the information and ended up in a discussion on productivity. After discussion Beauchamp asked the Company if they were flexible on the proposal. Hatley stated the Company was flexible on that item provided that the Union made what they deemed to be sufficient or significant progress in certain noneconomic areas that the Company was concerned about. Beauchamp asked what areas. Hatley replied, Respondent's no-strike clause, the stewards clause, grievances procedures, and the downtime proposal. The parties moved to item 3, specifically, the inclusion of restrooms. The parties then moved to item 4 dealing with crewmembers being away from work for 5 to 30 minutes. The parties then discussed the no-strike clause and what the Company's problem was with the clause as written in the expired collective-bargaining agreement. Hatley stated that reference to the International in the no-strike clause was something he could not accept. Beauchamp said he could understand Hatley's concern and that he would look at it. The parties then discussed the Company's proposal on stewards and the grievance procedure on arbitration. Beauchamp asked for a union caucus to consider the Company's counterproposals on the no-strike clause, the stewards, and grievance and arbitration clause. After the caucus the Union told the Company that they would remove the reference to the International constitution in the no-strike clause and the Company agreed that the rest of the language was not a problem. The parties continued the meeting discussing the stewards and grievance and arbitration clauses in the Company's proposal. Before the meeting ended Beauchamp asked Hatley if the Company had implemented any of their proposals at this point. The Company said they had not implemented any of the proposals. The meeting adjourned at approximately 7 p.m.

After the meeting ended Beauchamp began reviewing the past negotiations. In early August he contacted Buddy Bryant by telephone. Beauchamp told Bryant that it was his opinion that the Company was not interested in reaching an agreement. They were just delaying negotiations. Beauchamp outlined to Bryant what he thought the union strategy should be. He told Bryant that the strategy consisted of meeting, attempting to make changes, specifically in the downtime proposal, and especially in the more aggressive areas, such as no pay for restroom breaks, that type of stuff. In any event, they would come out of the 28 August meeting with an agreement. They would agree to anything that was on the bargaining table at that meeting. Beauchamp told Bryant to do otherwise was to play into the Company's hands. It was his belief that they were just waiting until the year was up so that the strikers could not vote in the decertification election. Beauchamp told Bryant to talk to the committee about that, and if there was no major problem, to go ahead and set up a meeting in August with the Company. Bryant set a meeting for 28 August. Prior to the meeting Beauchamp reviewed his strategy with the bargaining committee. He told the bargaining committee that the Union would agree to everything that was on the table and that would be our agreement. He wanted them not to blink an eye when he said that. He wanted them to know right up front that "that's what we're going to do." They understood this strategy and they agreed to it.

The meeting was held as scheduled. Beauchamp again was spokesman for the Union, Bryant was present, and Hatley was spokesman for the Company. At the outset Beauchamp asked Hatley specifically what the Company's proposal for an agreement between W. Pat Crow and Lodge 96 were. Hatley replied that the company proposals were General Counsel's Exhibits 4, 5, and 9, including the changes made on 10 May concerning those clauses. Hatley made no objection nor did he point out any specifics in any of the written proposals that would not be considered the Company's position. Beauchamp then asked Hatley whether the Company had implemented any of their proposals since 10 May. Hatley replied they had not. Beauchamp then asked Hatley if the replacement workers were working under the terms and conditions of the expired collective-bargaining agreement. Hatley said, "Yes." The parties then began discussing the downtime proposals. Specifically the reference to restroom breaks in item 3 of the downtime proposals. After discussion the Company agreed to exclude restroom breaks from the downtime proposal. The Union agreed. The parties then discussed item 4 which dealt with the half pay during downtime. Beauchamp alerted Hatley to the fact that with the wage rate under the expired contract, several individuals, if paid half pay, they would be receiving less than the minimum wage. Beauchamp then requested that the Company modify item 4 to provide half pay rate or the Federal minimum wage, whichever was higher. Hatley agreed that it should read that way. With respect to General Counsel's Exhibit 9, the downtime proposal, all the Union was concerned with was that the terms used by the Company in their written downtime proposal was that which was normally understood in the industry. Such as waiting on a heat, setup, trail run. Once it was understood that both the Company and the Union defined the terms the same way, there was nothing more to discuss. The parties then discussed the pension proposal. Hatley asked for explanations of the pension trust that Beauchamp supplied. Some written materials Bryant had were used to help answer his questions. Hatley asked questions referring to another document, the trust agreement. For example, selection of trustees, how they are selected, and the areas it represents. Those items are in the trust document. They are not reflected in the plan document The names of the trustees are in the plan. He also asked about forfeiture and about breaks in service for strikers. He asked whether the replacement employees or the strikers could get their pension contributions back. Beauchamp told Hatley that they could not. Beauchamp explained to Hatley that they could not get their money back because the only way they could receive consideration for those contributions would be if in fact they remained under the plan and did not occur a break in service. Because its multi in nature the employees could conceivably, down the road, work for another contributing employer and not incur a permanent break. Beauchamp explained to Hatley that it was a multiemployer plan. If the people were not vested, they could incur a permanent break. But if, in the period of time they were not under covered employment they then became employed with a contractor who was a contributing employer, they would then be back under covered service and time and the amount of money that was contributed on behalf of those employees while they were employees of W. Pat Crow would be credited to them. If they remained out of covered employment for a sufficient amount of time, they would incur permanent break. And if they were not vested would forfeit all contributions, both from W. Pat Crow or any other employer. Beauchamp did at one point during the discussions make a guarantee that some of the strikers, as a result of being on strike, would not lose anything that was contributed with Pat Crow. The strikers were on a preferential hiring list and would be recalled when openings occurred.

Hatley wanted a listing of the employees who were participants and also the amounts of money that had been contributed on their behalf. He was told the Union could not supply that information because the pension trust would not release it. Hatley also expressed an interest in becoming a trustee in the pension plan. Beauchamp then reminded Hatley that the Company's proposal to eliminate the pension trust could possibly have a negative effect on the replacement employees for whom the Company had been making contributions to the trust. Beauchamp explained the vesting procedures, and how the employees could lose those contributions that were credited on their behalf if the pension plan was eliminated from the contract. In addition, Beauchamp stated that strikers could also lose some benefits if they were not vested and the requirements for maintaining those benefits were discussed. A number of employees still had not returned to work following the strike. After further discussion Hatley said the company position was changed from a definite "no" to a "maybe" on the inclusion of a pension plan. The parties continued discussing the pension trust proposal. There was a discussion about a jointly administered plan for pensions between Local 96 and the Company, that is setting up a separate trust. The Union's position was that a separate trust was an impractical thing for such a small union. The Union had a good plan already in effect and did not see any reason to change it. The Union's position on pension was to maintain the current pension plan. The Company's original position was to have no pension at all in the contract. Since further discussion was getting them nowhere and Beauchamp did not think that a trustee for about 40 employees was worth any further discussion, he turned to Hatley and said, "Look, the Union while we haven't met since May 10, 1985, has reviewed the negotiations, reviewed what progress we made on May 10, reviewed the Company's arguments for their proposals, and we are prepared at this time to agree to the Company's proposals, written proposals, that are on the table." At that point Hatley looked sick, his demeanor changed, his face got pale, and he said, "What do you mean. We've got all these open issues. We can't have an agreement. We've got all these issues outstanding." Beauchamp asked what issues are you talking about. Hatley said, "The pension." Beauchamp said, "What about the pension." Hatley said, "We haven't finished the discussion of the pension." Beauchamp said, "I tried to give you all the information I can on the pension. Have you changed your position on the pension." Hatley said, "No." Beauchamp asked, "Don't you have a position on the table, in writing on the pension?" Hatley said, "Yes we do." Beauchamp said, "Isn't that, no pension." Hatley said, "Yes, that's correct." Beauchamp said, "Fine we'll agree to the contract with no pension." Hatley then stated, "Well, you know, we might at some point consider the pension." Beauchamp said, "We will agree to an agreement with no pension, but if for some reason the Company later on decides, based on review of what we said or whatever you want, to include a pension just give us a call and we'll put it in the new contract." Beauchamp told Hatley he was submitting the Company's proposals to the members without a pension plan. Beauchamp said he would tell the members they would be ratifying the contract without a pension. Hatley still expressed concern about what the members would be voting on and Beauchamp said, "Well, I can't understand what you're so concerned about. Can't you agree to your own proposal. These are your proposals are they not." Hatley replied, "Yes." Beauchamp asked, "You mean to tell me you have a problem agreeing to these proposals?" Hatley said, "Well, we don't really have a problem agreeing to anything we propose." Beauchamp said, "I hope you don't." Hatley expressed that his concern was that, he thought there was some open issues. Beauchamp told him, "As far as the Union I'm telling you right now. We will agree to the proposals on the table." At that point Hatley took a recess and made a phone call to the president of the Company. Shortly thereafter he came back into the room and told Beauchamp and the union committee that he had talked with the president and the president wanted to convey his congratulations that they had finally come to an agreement. Some pleasantries were exchanged and Beauchamp told Hatley that the Union would be conducting a ratification vote and Bryant would be handling those arrangements. Bryant would notify him about the results of the vote. With that the negotiating team shook hands and the meeting ended after lasting all day.

Beauchamp identified General Counsel's Exhibit 10 as a result of the discussion he had with the Company on the arbitration procedure. The Company had proposed changing the location of arbitration proceedings to somewhere off the company property. The Union agreed to that reluctantly but did, in fact, agree to it. Beauchamp stated that General Counsel's Exhibits 9, 10, and 11 were on the table as company proposals at the time that the Union accepted whatever proposals the Company had on the table. Beauchamp identified General Counsel's Exhibits 12 and 13 as notes he took at the 10 May and 28 August meetings. On page 5 of the 28 August notes he wrote, "Agreed to Company's proposal except for items previously agreed to, tentative agreements, all items on the table, and previously agreed to understandings subject to membership ratification." Beauchamp read another note on the exhibit, "The Union will vote for the proposals without a pension. If the Company agrees to include then the Union has no objection."

On cross Beauchamp restated that in the 10 May meeting the "no strike clause" was agreed on by the parties. Beauchamp stated that everything else in the company proposals remained open, unagreed at the conclusion of the 10 May meeting. Beauchamp stated that between the 10 May and 28 August meeting there were no modifications of any proposals, formally or informally.

At some time during the 28 August meeting Hatley did, during the discussion on productivity, make reference to an employee performance recognition program. Beauchamp checked his notes and found that on page 3 of the 10 May notes there was a reference to a bonus reward type system that they had discussed. There was no specific proposal from the Company in regard to the bonus reward type system either oral or in writing.

Beauchamp did not recall any discussion or statements by the Company at the meetings of 10 May or 28 August to the effect that any contract that is retroactive over a year the Company did not want. Beauchamp denies the duration of the contract was discussed with or raised by the Company at either the 10 May or 18 August meetings. Beauchamp did not recall any statement from Hatley to the effect "you can vote on what you want, but until we have agreed on all the contract we don't have any agreement between us."

Beauchamp had no knowledge of any articles or any proposals having been signed off as agreed to by either party prior to the 10 May meeting. Beauchamp did not ask the Company to sign off on anything, nor did the Company ask him to sign off on anything.

Harold Hatley testified that he is vice president of personnel and industrial relations for chemical express company and he was loaned to Pat Crow Forgings just for the purpose of negotiating the contract. Hatley was the spokesman for the Company in all the negotiating sessions, and had the authority to reach an agreement with the Union and enter into a contract. All company proposals were drafted by Hatley. There was no discussion between the parties with respect to any form the bargaining would take or what procedure would be followed when agreements were reached. The only negotiation rule agreed to between the parties was that the Company would not pay the bargaining unit people who were members of the committee while they were negotiating. Hatley had been told by the Union that they had been paid in the past. He had no reason to doubt it but he was not going to do it this time.

Ground rules that were agreed on between Boykin and Hatley was, "We don't have an agreement until we agree upon all open issues and all agreements are tentative pending ratification by the union membership."

The Union introduced at the first meeting on 28 June 1984 their proposal for a new contract. The Company at the second meeting introduced their written proposal for a contract. The Company's bargaining committee was composed of Hatley, Lee Chambers, and Karl Arceneaux. Additional company proposals in writing that were made in the course of the negotiations was the production downtime proposal and the safety program proposals. In addition to these written proposals there were several oral proposals made. One was the employee performance incentive program, another was a locally administered savings retirement plan between Local 96 and W. Pat Crow Forgings.

During the course of negotiations, that is the 20 meetings, very few agreements were reached between the parties. After about seven or eight meetings Boykin finally agreed to a company proposal that anywhere in the contract where it refers to "he" that it should refer to both "he" and "she" or a statement that the masculine gender shall also mean the feminine gender. That agreement on gender was not recorded in any particular fashion that Hatley knows of. He did write on his notes the time and date it was agreed to.

At the end of the 10 May meeting several issues were still unresolved and remained so at the conclusion of the 28 August meeting. They were:

1. Performance incentive program

It was referred to throughout negotiations and was last proposed at the 10 May meeting. Hatley made the offer to the Union to join with the Company and have a mutual performance incentive program for all employees at W. Pat Crow. The Company would base this program on excellent attendance, productivity being above standard, and zero accidents for whatever period they could agree on, whether it would be monthly or quarterly or what; and for such performance they would reward the employees either cash bonus or something material in nature and a color TV or bicycle were used as examples. In the proposal the Company would share half the cost and the Union would share half the cost. The Union did not accept the proposal. The incentive program is not incorporated in any of the written proposals. It was a program that recognized employee performance and perfect attendance. Discussions never got to the point where any specifics were worked out in the program, however. The Company did not make any modification to its original proposal. They simply just raised it again. The last rejection was the 10 May meeting.

2. Duration of labor agreement

It was the company position that a 3-year labor agreement was to be effective at the time it was entered into and signed, without regard to the period covered in the Company's written proposal. The written proposal was modified in the third meeting when Lester Boykin was the spokesman for the Union. The Company has always maintained they wanted a 3-year contract. With regard to duration the Union had always wanted a 3-year contract going back to 17 August 1984. The letter Hatley received on 6 September from Buddy Bryant affirmed that. Hatley stated that the company proposal on 28 August, late in the meeting when the Union had said that they had a contract, was 3 years from the date they enter into a signed agreement going forward.

3. Employee handbook

The handbook had always been a separate book and the Company was proposing that it become part of the contract and be included in one book where both the Union and the Company would share the cost. The Union did not want to do that.

4. Production standards

Production standards, as far as piece-work output, from time and motion studies. The Union rejected that totally. The Company's offer was that standards will be established or increased pursuant to an industrial engineer actually doing time and motion studies to increase or improve productivity in the plant.

5. Work rules

Work rules concerning penalties, infraction of work rules, cost of printing the work rule sheets, and acknowledgement sheets that employees were required to sign. The Union took the position that progressive discipline will apply to all work rule infractions regardless of the severity of the infraction. The Union disagreed with sharing the cost of the printing and was not agreeable to employees signing an acknowledgement sheet once they had been given the work rules.

6. Wages

The Company's position is what was in the original proposal. The rates are listed with the classifications. The proposed reduction is approximately 18 percent. The Union's position was the rates of pay as outlined in the expired labor agreement. That is, the Union was proposing a freeze on wages. The Union's original written proposal asked for an increase but they did modify that position later in negotiations, although they did not do so in writing. In August 1985 the average hourly rate was $10.47.

7. Production downtime

The parties discussed production downtime throughout the progress of negotiations. The Company made an offer to help monitor production downtime. The Company proposed using timeclocks or what is called vibration meters, but the Union refused the timeclock offer and the vibration meters.

8. Dues checkoff

The Union wanted the Company to provide them with dues checkoff or what they referred to as a dues log to get their money. As of 10 May the Company proposed no checkoff. There was a checkoff in the expired contract.

9. Safety and health program

The safety and health program that was proposed in writing.

10. Arbitration

It was evidenced by a handwritten proposal written by Hatley that was offered to the Union on 10 May. (G.C. Exh. 10.) It was discussed and Hatley had made provision for the proposal to be accepted and signed off that particular day. The Union would not accept the proposal and refused to sign. The proposal dealt with the location of grievance and arbitration proceedings and whether employees would be compensated for attending those meetings. The Company had proposed holding the meetings off company property and no longer hold them on company property. Job stewards required to be at the meetings would not be compensated. That proposal is the additional proposal on arbitration made by the Company. All other arbitration is in the original company proposal.

11. Job classifications

The old contract had 16 job classifications, the Company was proposing only 6.

12. Overtime notification

The Union's position was that they wanted the Company to notify the employees 3 days prior to working overtime for the weekend. It was the Company's position that no notice was required. The Company would give employees a reasonable amount of time to help them out but the Company did not want to be tied down to restrictive language that would require the Company to give 3-day notice before there could be any overtime work. Hatley stated that in the expired agreement there was a provision for overtime notification.

13. Contract printing cost

Hatley said the parties were apart on that. The Union's position was that the Company would have it printed and pay for like it did in the past and the Company's position was it was time the Boilermakers took up the cost for it.

Hatley only recalled one agreement on any proposal between the Union and the Company that could have taken place in the 10 May meeting. That was the agreement to delete the reference to the union constitution in the "No strike clause."

At the start of the 28 August meeting Beauchamp held up the Company's 70-page proposal, the safety and health proposal and the production downtime proposal, and asked if these are the only things opened. Hatley answered, "Yes." There was some discussion about General Counsel's Exhibit 11 with the Union saying they did not have it and he proceeded to give them a copy at that meeting. Although his thought was that he gave it at the 10 May meeting.

There were three proposals on pension. One was to delete the pension plan entirely. Another was to guarantee the people would not lose any money in retirement due to their break in service during strike and giving the money back to the employees that they have paid into the plan. The third was the local plan between Local 96 and W. Pat Crow Forgings.

The locally administered plan between Local 96 and the Company for retirement and pension was first proposed at the 28 August meeting. The Company would be the trustee of the plan and would administer the fund. It was to be called the savings plan and keep the moneys local. There was to be no administration cost for the program. The Union did not accept the proposal.

Hatley recalled asking questions about the pension plan, questions like who handles the funds, trust fund agreement, trustees of the plan, breaks in service, effects of the strike, and people being off work.

"The way I interpreted the plan—all employees would lose their money. And we had conversation along that line." Beauchamp answered his questions but it did not help him to understand the program. Hatley did make a request for certain information about the plan—a letter from the Union or board of trustees guaranteeing that none of the employees would lose any money that they have in the plan as a result of the strike. Hatley also requested disbursements of funds from January 1984 to date for each employee based on their amounts in the plan. He also requested an accounting of funds distribution preferably in the Dallas-Ft. Worth area. "So he can actually see or get an idea, does this plan really pay off? He didn't know, And if its—you know, the Company's opinion—if its all approved—I mean, it just didn't—the hand out I looked at just didn't seem like it was the same thing." There was discussion about the administration cost. He was concerned about one article in the plan that stated the trustees could borrow money from the plan. Beauchamp's answer as far as a lump-sum settlement or give the money back, "it's not possible." Local administered plan, "No." Hatley did recall Beauchamp saying the Union would take the contract with or without the plan. But Hatley said that does not take care of the $90,000 outstanding. Beauchamp did make some statements about there being a contract. Beauchamp's first statement was, "We will take it with or without a plan." His closing statement was, "Well, looks like we have a contract." Hatley responded, "No you don't. We don't have an agreement until we agree on all items and what you do at your Union Hall is fine, but we don't have an agreement." Following those statements Hatley took a caucus. When he returned from the caucus he told Beauchamp that the president of the Company would like for him to relay to the committee his appreciation for them trying to get a labor agreement together. Hatley said he requested an itemization of specific pension information before he could go any further on negotiations. The information was disbursements of funds from January 1984 to the present date. How much money employees had in the fund as of 28 August and today. How much they would have in a plan assuming a plan on retirement was active. A letter from the board of trustees of the plan that would guarantee the Company in writing that no employees would lose any money as a result of being out on strike. He has not received any of that information.

Hatley acknowledged that Beauchamp explained to him during the negotiations that the Boilermaker Blacksmith Pension Trust had a billion dollars in assets and was the fifth largest pension trust in the country. Hatley still wanted an accounting of the pension trust to make sure the employees' money was safe. Beauchamp also told him that the individual employees get an accounting of the contributions and what they have in the trust fund although Beauchamp did not know how often they get it.

When asked "What was the Union's offer on 28 August?" Hatley responded, "His opinion was, they just wanted the contract and you fill in the blanks. That was really my opinion."

With regard to the Union's acceptance of the company proposals:

Hatley recalled that Beauchamp announced, "We accept the Company's proposals and we have a contract." Hatley stated that various conversations began between different people in the room and he simply excused himself and left the room and called the president of the Company. Hatley acknowledged that late in the evening hours on 28 August Beauchamp did say, "The Union accepts all the Company's proposals and we have a contract." Hatley at that time indicated that there were open issues, although he did not enumerate those issues. To date, Hatley has had no contact with Bryant or Beauchamp to articulate the open issues or attempt to resolve them or set up further negotiations. Hatley stated he did outline the open issues in a letter dated 16 September to Bryant.

Hatley acknowledged that during negotiations Beauchamp at one point in the discussion said, "What our position is we shall take the Company proposals plus the Company's minutes regarding the proposal of 10 May with or without a pension." Immediately thereafter, Hatley caucused with this group for about 5 minutes and then he made a phone call. Hatley returned approximately 20 minutes later. At that point Beauchamp said, "We tentatively agree on everything on the table with or without a pension." Hatley stated that he understood the agreement was tentative because it was pending ratification by the union membership. Hatley's immediate response to Beauchamp was, "No, we don't."

Hatley's testimony on cross-examination:

> Q. Okay. And Mr. Beauchamp said, "We tentatively agree on everything that's on the table." Is that right?
>
> A. That's . . . .
>
> Q. "With or without the pension. Which ever one you want."
>
> A. That's what he said, yes.
>
> Q. And you wouldn't accept that?
>
> A. That's correct.
>
> Q. Despite the fact he accepted all your proposals?
>
> A. That's correct.

Hatley testified that the meeting adjourned approximately 5 p.m. and there was no attempt to set up any other meeting at that time. Hatley stated that when he left the meeting he did not believe he had a labor contract with Local 96.

Shortly after 28 August he got a call from Bryant, and Buddy told him that the contracts had been ratified and the parties needed to get together to put some books together. Hatley stated he told Bryant "No, we don't have a contract. As I told you before—we don't have a contract until all open issues are resolved." Hatley added, "You're putting your cart above your horse in this matter and if you've got any problem, I want to have your boss call me." Although Hatley did receive correspondence from Bryant subsequent to the telephone call, he did not have any further telephone conversations with Bryant. Specifically, he did not have a telephone conversation with Bryant on 19 September.

Lee Chambers testified he is vice president of finance for W. Pat Crow Forgings, Inc. and has been for the past 9 years. He attended all the negotiating sessions. Chambers' chief function during the course of the last three sets of negotiations in 1978, 1981, and 1984 has been the recording secretary, that is to keep the notes. Chambers said that the Company's proposal on no pension plan was only viable for the first couple of meetings and it was changed sometime after that. At the 28 August meeting when Beauchamp said there was an agreement, Hatley said, "No, we don't." Hatley added we would only have an agreement when all the matters were agreed on. When Chambers left the meeting, he did not think there had been a contract reached between the Company and the Union. Chambers acknowledged that Beauchamp stated that the Union had a contract for the membership to ratify with or without the pension, and an additional comment that there is a contingency the Company will study a pension plan or something along that line. Chambers said that at the close of the meeting on 28 August the issues that remained open were duration, production incentive program, and pension. Those were the three main issues. Chambers said the outstanding proposal on duration of the contract is contained in the Company's original proposal, General Counsel's Exhibit 4. Also there was an outstanding proposal on an incentive plan, but it was verbal. Beauchamp, at the meeting, accepted all the Company's outstanding proposals. Chambers stated that as he recalled that was his statement.

On 6 September Bryant called Chambers. Bryant called to inform Chambers that the committee and membership had met and ratified the agreement. Chambers asked Bryant how many people were present. Chambers recalled Bryant said 40 and it was unanimous. Bryant then changed it and said no it was not unanimous, but the majority accepted it. Chambers states he informed Bryant that none of the company officers or superior management had informed him that there had been an agreement and he would have to check with Harold Hatley, the chief negotiator. The telephone conversation with Bryant lasted approximately 2 to 3 minutes. Chambers stated he did not, during the course of the conversation, agree with Bryant that there was a contract between the Company and Local 96.

Chambers had another conversation with Bryant on 13 September. The Union had asked for some information from the Company at the 28 August meeting and Chambers told Bryant he had completed the list and turned it over to Hatley for his review. Bryant would have to check with Hatley. Chambers estimates the annual savings to the Company on their wage proposal to be between $150,000 and $160,000. Annual savings for the Company based on the downtime proposal would be $15,000 to $16,000. The annual savings for the Company with their no pension proposal is approximately $15,000. Chambers had made a survey of the competitors' wages in the area and a rounded estimate is approximately $2-an-hour difference. The Company had already experienced this with prior quotes because so many of the aircraft people were going out and demanding 3-year, firm, fixed contracts. That was how Pat Crow was getting beat up, because of the difference in the contract cost. Before the union contract expired, the Company had asked the Union for a wage freeze, but the Union turned it down.

Oscar Tibbs testified that he was a member of the employee negotiating committee and that he attended the bargaining session on 28 August 1985. Beauchamp asked Hatley if he still had his proposal and was it still on the table. Hatley said, "Yes it was." Beauchamp then said we accept it and Hatley said, "Okay." They went across the table and shook hands and that was the end of the meeting. Tibbs said that the meeting lasted for approximately 5 hours, and that the point in the meeting when the company proposals were accepted by the Union was late in the meeting. Tibbs did not recall Hatley stating that there were any open issues after the Union had said they accepted the Company's proposals and he was in the meeting for the whole time.

Analysis and Conclusions

The General Counsel's complaint alleges that the parties reached agreement on all substantive terms of a contract on 28 August, but when requested to execute a written contract thereafter Respondent refused.

Respondent contends that no agreement on contract terms was ever reached by the parties due to outstanding open issues and in the strictest sense the Company did not refuse to execute an agreement.

As Respondent argues, the essential allegation of the complaint is that "Respondent and the union agreed on contract terms." If no agreement existed, there is no statutory mandate to reduce the agreement to writing and sign it.

No witness could adequately recall the substance of negotiating sessions. Each witness attempted to reconstruct the meetings and in several cases offered written exhibits into the record. My determination is based on a composite of facts describing what took place between the parties and, particularly, at the last two meetings of 10 May and 28 August 1985.

A review of the record testimony and the objective evidence leads me to the conclusion that an agreement was reached by the parties on 28 August, and Respondent's subsequent refusal to reduce the agreement to writing and execute it as a contract constitutes a violation of the Act. Following is my reconstruction of the negotiations based on uncontroverted and credible record evidence, both subjective and objective.

The parties negotiated for 14 months, during which time 20 meetings were scheduled and held. There were only two procedural ground rules agreed to: (1) there would be no final agreement until all outstanding issues were agreed to, and (2) any agreement reached by the negotiating teams had to be ratified by the Union's membership before it became binding on the parties.

The meetings began 28 June 1984, with the Union submitting their contract proposal in writing and referenced to the changes sought in the preceding contract. At the second meeting the Respondent countered with a complete written contract proposal of its own and with oral references to the preceding contract. Over the course of the next 15 meetings there was very little movement by either party from their original proposals. Hatley recalled only one agreement between the parties that occurred in the seventh or eighth meeting. The parties agreed that the masculine gender, when written, would include reference to the feminine gender, if applicable. Bryant could recall several agreements within the same time period, but only after reference to his copy of the Union's proposal that he used as a work tool during negotiations: At the second meeting, 31 July 1984, the Union withdrew its proposal for a 10th holiday and accepted the Company's proposal that holidays remain unchanged at 9; at a later meeting the Union withdrew their proposal for increased company premium contribution and increased employee benefits and accepted the company proposal that employees health and life insurance remain the same as in the expired agreement; additionally, the Union initially proposed lung and chest X-rays every 6 months for affected employees but, at some point, accepted the company proposal as originally written. The Union's proposal sought a 1-year agreement and the company proposal sought a 3-year agreement. Bryant's notes reflected that, at the 13th meeting on 7 November 1984, Hatley renewed the Company's proposal for a 3-year agreement including the Union's pension plan with a 50-cent-per-hour contribution for each employee. The Union at that time did not accept the proposal.

Although the record contains several references to discussions of items both within and without those clauses previously proposed, there is no substantive evidence that the parties original proposals of 28 June and 31 July were modified or withdrawn to the extent that the parties were negotiating with a new or different base. That is, from the 1st to the 17th meeting, the parties were negotiating from their respective original proposals.

The 18th meeting on 5 April 1985 included a discussion of "production downtime," which ended in a written company proposal that the Union did not accept.

On 10 May 1985 the parties met for the 19th time but with Beauchamp as the union spokesman for the first time. It is undisputed that Beauchamp began the meeting by confirming that the company contract proposals were contained in the initial written proposal of 31 July 1984, the written safety and health committee program proposal, and the written letter of understanding on production downtime originating in the April 5 meeting (G.C. Exhs. 4, 5, and 9). After discussing production downtime, including employee productivity and incentive, Hatley added a written list of machines to the Company's production downtime proposal. The Union's contract proposal sought no change in the grievance procedure or the no-strike clause. The Company's proposal, however, included the no-strike clause within their proposed grievance-arbitrations clause that also recognized the functions of stewards. After discussion, the Company in writing proposed arbitration meetings be held off company property but within the metro area of Dallas-Ft. Worth and that employees and stewards attend uncompensated. Further, discussion on steward functions, including numbers to be appointed, followed based on the Company's original proposal on a stewards' clause. The parties could not agree on the grievance or the stewards' proposal. A discussion of the no-strike provision of the Union's original proposal produced agreement between the parties with deletion of the reference to the members voting in accord with the union constitution. Although further discussion followed, no additional agreements were reached.

The parties next met on 28 August 1985. The record shows that Beauchamp reviewed with Hatley what company proposals were on the table. The outstanding proposals were: The Company's original proposal of 31 July 1984; the written proposal on the safety and health committee; the letter of understanding on production downtime with schedule "A" attached; and the written company proposal on arbitration offered at the 10 May meeting. Beauchamp restated the parties' agreement on the no-strike clause reached on 10 May.

Discussion began on the production downtime proposal centering on items 3 and 4. The Company's original proposal provided for a washup time, as did the expired contract, but the Company's letter of understanding proposed no paid washup time. The Company was concerned about prior abuses of paid break periods and proposed a progressive discipline for abusers. The parties agreed to two 10-minute unpaid breaks each day and an unpaid lunch period of 30 minutes. They also agreed that restroom breaks would be deleted from item 3 and any employee abusing the privilege would be disciplined progressively—a verbal warning, suspension for 3 days, and then discharge. After reference to wage rates in the contract proposal, the parties agreed that item 4 could result in an employee being reduced in pay to a level below the Federal minimum wage. The parties agreed that the reduced wage in item 4 would be either half pay or the Federal minimum wage to give the employee the higher of the two.

Wages as proposed by the Company in Exhibits "A" and "B" of their original proposal on 31 July 1984 was discussed. The proposed wage for grade I of $10.50 an hour was to extend to 1987. Hire-in rates of new hires since August 1984 were reduced with progressive increases to the maximum after 6 months for each classification. The Company's proposal included only 6 labor grades with all 16 classifications of employees within the labor grades. The parties did not agree on wages.

The parties referred to the pension plan brochure and discussed the effect of termination of participation procedures on the striking employees yet to return to work. The status of newly hired employees as of August 1984 was discussed with particular reference to continuous employment and the inactive status of employees on layoff. Discussion thus turned to the Company's original Exhibit "C" proposal on related monetary matters. Paragraph 2 of the Company's letter of understanding on production downtime proposed half the hourly rate for specified downtime, whereas Exhibit "C" proposed the Federal minimum wage. The discussion clarified that the Company's proposal for wages on specified downtime was as shown in paragraph 2 of the letter of understanding and replaced paragraph 1 of Exhibit "C" in the Company's original proposal.

The parties returned to discussion of the Union's pension plan. Hatley expressed interest in the Union's plan and serving in a trustee capacity. Hatley sought information about administration of the Union's plan and suggested the Respondent may continue the plan.

Beauchamp at this point, on behalf of the Union, accepted all company proposals on the table, including the understandings previously agreed to. He stated that there was tentative agreement on all items on the table subject to a ratification vote by the union membership. Hatley questioned whether the parties indeed had an agreement on the pension issue. Beauchamp confirmed with Hatley that the Company's proposal on pension was as contained in the original proposal of 31 July 1984, i.e., *no pension*. Beauchamp accepted the Company's contract proposal with *no pension*.

Hatley and his committee left the room for several minutes to caucus. When Hatley returned, he informed the union committee that the president of the Company expressed appreciation that an agreement had been reached.

Hatley continued showing interest in the Union's pension plan and several points of the plan were discussed. Hatley wanted: the amount of distribution in Texas since 1984, a copy of the trust agreement, the amount each employee had in the pension accounts, the lump-sum settlement provision rules for modification, and a guarantee that the striking employees would have no loss of funds or vesting rights due to their break in service. Hatley specifically requested a letter to the Company explaining the effect of the break-in-service rules on the employees out on strike.

Beauchamp told Hatley that the union membership would vote on the Company's contract proposal of *no pension*; however, if the Company later agreed to include the pension plan for the employees, there would be no objection by the Union.

Neither party requested the other to "sign off" the proposals to express the parties agreement to outstanding proposals. Before the meeting ended Bryant requested a current seniority list with wage rates as of 28 August 1985.

Bryant conducted the ratification vote on 5 September. The members accepted the company proposals for a contract without a pension. Bryant telephoned the results of the vote to the Company. The next day Bryant sent a followup letter to the Company suggesting a meeting to formalize the contract. Bryant made several attempts to reach Hatley by phone but was unsuccessful until September 19. That same day Bryant received Hatley's letter of September 16 denying that any agreement had been reached and referring to the outstanding pension issue.

Bryant countered with a letter reaffirming the ratification vote for a contract without a pension and requesting the Company to execute the contract as agreed on.

Hatley, in his letter to the Union on 16 September, wrote that the pension issue remained outstanding and until it was resolved there was no complete offer for the Union to accept. In his testimony, however, Hatley enumerated 13 proposals that he considered outstanding issues at the conclusion of the 28 August meeting: duration of contract, pension, employee handbook, production standards, progressive discipline, wages, production downtime, dues checkoff, safety and health, arbitrations, job classifications, notification of overtime, and contract printing cost. Hatley, in the same testimony, also stated that several of these outstanding issues were included in the Company's initial written proposal to the Union. Thus, duration, pension, progressive discipline, wages, production downtime, dues checkoff, safety and health, job classifications, notification of overtime, and contract printing cost were on the table at the beginning of the 28 August meeting. There is no evidence to evince withdrawal by the Company of its initial proposal or any portion thereof. The evidence shows the opposite. The parties continued negotiating from the Company's initial proposal. There is record evidence that the Company orally proposed alternative pension programs for the union negotiating team to consider.

Contrary to Respondent's argument, the Union's acceptance of the initial proposal of "no pension" is not made ambiguous by the further proposal that, on reflection, Respondent may agree to continue the union pension trust as before. Moreover, the additional proposal of some future acquiescence was presented after the Union accepted the "no pension" proposal. As Hatley testified, the Company offered the Union several proposals on a pension plan and, as with any optional offer, the subject party can elect that which suits them best. It is undisputed that the Union rejected the option of paying back moneys to employees previously covered, particularly since the Union, as the employees representative, did not control the pension trust moneys, nor would it elect to pay out from its own treasury. It is equally undisputed that the Union rejected the company option of a local pension plan administered by the local union and the Respondent. Thus, the Union accepted one of the three options proposed resolving the pension issue raised by the multiple proposals. Hatley's concern over the $90,000 previously paid into the union pension trust, whether understandable or not, is not relevant to the current negotiations. The payment and use of that money was controlled by past agreements with the Union and cannot now be questioned by Respondent as a condition for reaching a new agreement. Especially where, as here, Respondent's multiple pension proposals did not include the Union's pension trust as before.

The expired contract had a safety and health provision for an employee safety committee. Respondent's initial proposal deleted the safety committee and set forth a basic policy on safety and health. During negotiations, on 21 September 1984, Hatley submitted an additional written proposal on safety and health, which, in effect, made provision for the safety committee originally deleted in the Company's initial proposal. Thus, Respondent's complete proposal on safety and health was contained in two written proposals and both were viable on 28 August. The Union specifically accepted both proposals as the contract term on safety and health at the 28 August meeting, which effectuated a tentative agreement between the parties on safety and health. Therefore there was no "open issue" on safety and health at the close of the meeting.

Hatley's contention, expressed in his testimony, that the parties had not reached agreement on the arbitration clause, is not supported by the record evidence. It is undisputed that the Company made two written proposals on arbitration and nothing more. The initial proposal contains the grievance and arbitration procedure and Hatley's handwritten proposal of 10 May completes the Company's proposals making provision for arbitration meetings to be held off company property with no compensation for employees or stewards attending. Both proposals were on the table on 28 August and were specifically accepted by Beauchamp, according to Hatley's later testimony. Absent additional proposals on arbitration (and there are none) there can be no "open issue" on arbitration.

Hatley's testimony of the "open issue, overtime notification" was in error. The expired contract did *not* contain a provision for notification of overtime, but the Union's initial contract proposal did submit adding a new section to article XIV of the expired contract. The Company's initial proposal on "overtime and premium pay" did not include a provision for overtime notification nor does the record contain any evidence that Hatley made any such proposal to the Union. In the absence of a proposal by the Company on "overtime notification" there can be no outstanding issue based on the Union's proposal. All union proposals lacking tentative agreement were effectively abandoned and/or withdrawn when Beauchamp accepted the open company proposals as the basis for a union contract.

Hatley's reference to open issues on "the employee handbook" and "work rules" is unsupported by the record evidence. The expired contract contained a lengthy management-rights clause that made provision for the Company to supply each employee with a copy of the "employee handbook" and to furnish each employee with a copy of "work rules" as well as posting on the bulletin board. The Company's initial proposal, however, reduced the managements-rights clause to a single short paragraph vesting all rights in management not specifically limited by any arguments reached. There is no evidence of a specific proposal by the Company on "employee handbook" or "work rules" in this record, therefore no "open issues" exist involving "the employee handbook" or "work rules."

Hatley's assertion that "open issues" on "production standards" and "the employee incentive program" existed following both the 10 May and 28 August meeting is unfounded. The record evidence shows that discussion of the written proposal "production downtime" included references to "production standards" and an "employee incentive program" as a means of improving production of the striking employees, if and when they returned to work, and rewarding the replacement employees for their efforts. Beauchamp credibly testified that Hatley, during the discussions, praised the replacement employees for their more efficient production including less downtime and more injury-free employment. Hatley testified that discussions of "production standards" were geared for some future time because any establishment or increase standards would be based on time and motion studies yet to be made by an industrial engineer. Hatley also stated that discussions of "an employee incentive program" never got to the point where any specifics were worked out nor did the Company make any modification to its original proposal or incorporate such a subject in a written proposal. As Hatley testified, "they [company] simply just raised it again." The last such raising and discussion was 10 May. Discussions during negotiations do not make proposals. It is clear that neither the "employee incentive program" nor "production standards" were discussed sufficiently to formulate either into a specific proposal or as an addition to the written production downtime proposal. Thus, neither "production standards" nor "an employee incentive program" were on the table or subject to acceptance as a term of the negotiated contract.

Contract printing cost cited by Hatley as an "open issue" between the parties is clearly "closed." The expired agreement in article XXV made provision for the Company to absorb the cost of printing and distribution to all employees. Respondent's initial proposal of 31 July 1984, article 32, reversed the prior provision making the Union responsible for the printing and distribution cost of any agreement reached between the parties. There is no evidence in the record that Respondent's article 32 was withdrawn, abandoned, or replaced by any subsequent proposal. It was, therefore, included in the company proposals accepted by Beauchamp on 28 August. Having been accepted by the Union as a proposed term for the contract, it cannot now remain an open issue.

Although only referred to by Hatley, inferentially, as a change in Respondent's position I am treating his testimony of "dues checkoff" as his opinion of an "open issue." But for Hatley's bare statement, there is not one scintilla of substantive evidence that dues checkoff was negotiated and much less that Respondent's initial proposal "dues checkoff" was modified. Because Hatley appeared to be building his testimony rather than making a genuine attempt to recall what occurred at the critical meetings, I am discrediting him on his "open issues" testimony. In addition to being somewhat contradictory, Hatley's testimony was confused by injections of personal opinions or mere assertions that certain facts were extant. Without more, his testimony cannot alter the sequence of events evinced by credible testimony of other witnesses and the objective evidence in the record. Further, the union proposals, and the manner employed by the union to modify those proposals, are irrelevant. This is not a case of piecing together a contract from opposing proposals. The contract here is contained entirely within the Company's proposals.

My determination that an agreement was reached between the parties on 28 August is supported by substantial record evidence and the current Board law. Whether parties have reached agreement on a collective-bargaining contract is not measured by the technical requirements of contract law. As Respondent argues in brief, the Board does require that parties to collective-bargaining negotiations have a meeting of the minds on all substantive terms for a final agreement to be constituted. If disagreement over the substance of certain contract terms exist, there is no meeting of the minds. Here, there is no doubt there was a meeting of the minds. Hatley had complete authority to negotiate a contract and to reach a final agreement. To implement that authority Hatley was the single author of all proposals made by Respondent whether oral or in writing. The proposals were in contract form, clause by clause. Beauchamp, in turn, had complete authority to negotiate a contract with final agreement of the Union exercised by the employee members of the Union. The parties were negotiating under the auspices of two ground rules: (1) There would be no final agreement until all outstanding issues were resolved, (2) all agreements on contract terms were tentative pending a ratification vote of the membership. Neither party suggested a signoff procedure on tentative agreements. The failure to use a signoff procedure, however, did not produce disputes over tentative agreements during negotiations. The absence of disputes is partially due to the experience of the negotiators and partially due to the lack of any tentative agreements of substance during the first 17 meetings. Both parties were holding firm to their initial proposals. Hatley then modified, in writing, several of the Company's proposed clauses with additional language. These additions were identified and recognized as proposals by Hatley and formed the basis for negotiations. In only one instance was an oral proposal made by Hatley. That instance was the alternative pension plans proposed by Hatley at the 28 August meeting. The colloquy between the parties and the correspondence between the parties subsequent to the 28 August meeting suggest, only, that Hatley still had questions in his mind about the Union's pension plan. Albeit Hatley testified that several other items were raised orally at many meetings, it is a fact that any proposal representing a change from the expired contract or a concession by the Union was reduced to writing by Hatley. Once the parties understood the meanings of terms used there was little room for disagreements over substance of contract terms. The record evidence shows that such disagreements did not exist. Clearly, therefore, when Beauchamp accepted all written company proposals on the table on 28 August there existed a meeting of the minds. The Respondent's "mind" was memorialized in the written proposals and the Union's "mind" was superimposed on the written company proposals by Beauchamp's unequivocal acceptance. Accordingly, I conclude and find that the parties reached a meeting of the minds on 28 August for a complete and final agreement and that the Union by letters dated 6 and 19 September requested the Company to finalize the agreement. Further, I conclude and find that Respondent's failure to acknowledge final agreement was ever reached is tantamount to a failure to execute the final agreement as requested by the Union. (Contrary to

Respondent's argument in its brief that in the strictest sense, the Company did not, nor has it to this date, ever refused to execute *an* agreement.) By positioning itself to deny execution of the contract as requested, Respondent has violated Section 8(a)(5) and (1) of the Act.

The hiatus of silence between 9 and 16 September, in conjunction with Hatley's single attempt to resurrect a "pension issue" subsequent to the 28 August meeting, serves to enforce my resolution that an agreement had been reached. Further, if Hatley had favored one pension plan over another, he simply would not have proposed the unfavorable or would have withdrawn it with dispatch. Hatley choose to do neither. Further, Respondent's argument that it would be unreasonable to bind the parties to a 3-year contract with an effective date in 1984 because the Company sought wage concessions during the 14 months of negotiations is unavailing. The agreement reached on 28 August does not dictate any retroactivity of wages since the replacement employees are paid at or below the wage level of the agreement.

Conclusions of Law

1. Respondent, by refusing to execute the collective-bargaining agreement reached on 28 August, as requested by the Union on 6 September, has violated Section 8(a)(5) and (1) of the Act.

2. Respondent has not engaged in any other unfair labor practices.

3. The aforementioned unfair labor practice affects commerce within the meaning of Section 2(6) and (7) of the Act.

Remedy

Having found that the Respondent has engaged in certain unfair labor practices, I find it necessary to order the Respondent to cease and desist therefrom and to take certain affirmative action designed to effectuate the policies of the Act.

The Respondent having violated Section 8(a)(5) and (1) of the Act by refusing to execute a collective-bargaining agreement, previously agreed on, shall be ordered to forthwith execute the agreement reached on 28 August 1985.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[3]

ORDER

The Respondent, W. Pat Crow Forgings, Inc., a Subsidiary of TIC Investment Corp., Ft. Worth, Texas, its officers, agents, successors, and assigns, shall[4]

1. Cease and desist from

(a) Refusing to bargain in good faith with the International Brotherhood of Boilermakers, Iron Ship Builders, Blacksmiths, Forgers & Helpers, Local 96, AFL-CIO, by refusing to execute an agreed-on contact.

(b) In any like or related manner interfering with, restraining, or coercing employees in the exercise of rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) On request by International Brotherhood of Boilermakers, Iron Ship Builders, Blacksmiths, Forgers & Helpers, Local 96, AFL-CIO, execute forthwith the contract on which agreement was reached with the Union on 28 August 1985, completed copies of which shall be furnished by the Union.

(b) Post at its offices in Ft. Worth, Texas, copies of the attached notice marked "Appendix."[5] Copies of the notice, on forms provided by the Regional Director for Region 16, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material.

(c) Notify the Regional Director in writing within 20 days from the date of this Order what steps the Respondent has taken to comply.

APPENDIX

Notice To Employees
Posted by Order of the
National Labor Relations Board
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

We will not refuse to bargain in good faith with the International Brotherhood of Boilermakers, Iron Ship Builders, Blacksmiths, Forgers & Helpers, Local 96, AFL-CIO by refusing to execute an agreed-on contract.

We will not in any like or related manner interfere with, restrain, or coerce our employees in the exercise of their rights guaranteed by the Act.

We will, on request by the International Brotherhood of Boilermakers, Iron Ship Builders, Blacksmiths, Forgers & Helpers, Local 96, AFL-CIO, execute forthwith the contract on which agreement was reached with the

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[3] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

[4] The General Counsel, in brief, moved to include a visitatorial provision in my Order. Under the limited circumstances of this case and in view of the long history of bargaining I see no need for such an Order. I therefore deny the General Counsel's motion.

[5] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

Union on 28 August 1985, completed copies of which shall be furnished by the Union.

W. PAT CROW FORGINGS, INC., A SUBSIDIARY OF TIC INVESTMENT CORP.

Red Arrow Freight Lines, Inc. *and* **Perry Wayne Middlebrook.** Case 26–CA–11970

June 20, 1988

DECISION AND ORDER

BY CHAIRMAN STEPHENS AND MEMBERS JOHANSEN AND BABSON

On August 31, 1987, Administrative Law Judge Richard J. Linton issued the attached decision. Red Arrow Freight Lines, Inc. (the Respondent) filed exceptions and a supporting brief; the General Counsel filed cross-exceptions and a supporting brief; and the Respondent filed an answering brief to the cross-exceptions.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings, and conclusions[1] only to the extent consistent with this Decision and Order.

The judge concluded that the Respondent, in violation of Section 8(a)(3) and (1) of the Act, constructively discharged Dennis Spruill after Spruill was assigned to the Respondent's Little Rock to Memphis freight assignment (Little Rock-Memphis run). The Respondent contends that Spruill's decision to resign rather than accept the Little Rock-Memphis run was not foreseeable and, thus, it cannot be held responsible for Spruill's personal decision to terminate his employment. We find merit in the Respondent's exception.

The Respondent is a Texas corporation engaged in the interstate transportation of freight by motor vehicle. It operates a terminal in Little Rock, Arkansas. On November 9, 1986,[2] the Respondent violated Section 8(a)(3) and (1) of the Act when it laid off Perry Wayne Middlebrook in order to remove his pro-Teamsters union influence from the Little Rock terminal.[3] Middlebrook was working the Respondent's Little Rock-Memphis run at the time of the layoff. Once Middlebrook was laid off, it became necessary to assign another employee to handle this run. When no other employee indicated a desire to be assigned to the Little Rock-Memphis run,[4] the Respondent, on November 14, selected Spruill, the junior unassigned driver. The uncontroverted evidence reveals that under the collective-bargaining agreement in effect, a driver can be required to take an assignment and, if he refuses, can be terminated.

Spruill, who lives in Irving, Texas, did not learn of his assignment to take over the Little Rock-Memphis run until November 16, approximately 2 hours before he was scheduled to leave Little Rock for Memphis. Because he could not have traveled from Irving, Texas, where he was located, to Little Rock, Arkansas, in time for the start of the scheduled trip, Spruill told the Respondent's representative to have another driver handle the run. Spruill was told to contact Michael D. Rhodes, manager of Line Haul Operations, the following day.

The credited testimony indicates that Spruill telephoned Rhodes the next day. When Rhodes instructed Spruill to proceed to Little Rock to take over the assignment, Spruill refused, saying that he would quit rather than go to Little Rock. Rhodes asked Spruill to put his resignation in writing and Spruill agreed, but he never did. When Rhodes did not receive the anticipated written resignation, Rhodes sent Spruill a termination letter dated November 19.

In order to prove that an employee was constructively discharged, the General Counsel must establish that the burdens imposed on the employee "must cause, and be intended to cause, a change in working conditions so difficult or unpleasant as to force [the employee] to resign" and that the burdens were imposed because of the employee's union activity. *Crystal Princeton Refining Co.*, 222 NLRB 1068, 1069 (1976). While acknowledging that Spruill's resignation was not a constructive discharge in "the usual sense," the judge in this case relied on *Howard Johnson Co.*, 209 NLRB 1122 (1979), and found that "but for" Middlebrook's illegal layoff, Spruill would never have been assigned to the Little Rock-Memphis run and would not have subsequently resigned. This "domino theory," the judge concluded, established Spruill's "constructive discharge." We do not agree.

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[1] The judge concluded that the Respondent did not effectively repudiate Penfield's unlawful "no solicitation" instructions under the standards articulated in *Passavant Memorial Area Hospital*, 237 NLRB 138 (1978). We agree with the judge. The Respondent's "Notice to Employees," which was not posted until more than 5 months after Penfield's unlawful instructions, was untimely under *Passavant*. Moreover, we note that under *Passavant* the attempted repudiation must be free from other proscribed illegal conduct and must be specific to the coercive conduct. Here, inter alia, the attempted repudiation occurred in the context of other unremedied unfair labor practices, specifically Middlebrook's unlawful layoff, and did not refer to or acknowledge Penfield's unlawful statements. See, e.g., *EPE, Inc.*, 284 NLRB 191 fn. 2 (1987), enfd. 845 F.2d 483 (4th Cir. 1988).

[2] All dates are 1986 unless otherwise noted.

[3] The Respondent has not challenged the judge's conclusion that it violated Sec. 8(a)(3) and (1) of the Act when it laid off Middlebrook.

[4] The Respondent "posted" the assignment to allow other drivers an opportunity to "bid" on it. No employees, other than Middlebrook, bid on the assignment. Middlebrook's bid was determined to be invalid by the Respondent.

289 NLRB No. 23

In *Howard Johnson*, supra, the Board found that the employer violated Section 8(a)(3) and (1) when it laid off four nonunion employees in order to conceal the employer's unlawful motivation in laying off nine other union activists. The Board reasoned that the employer's action in laying off the four nonunion employees was "causally related" to the unlawful discrimination. In that case, however, it was clear the employer took direct action resulting in the employees' loss of their employment. In this case, however, while the record reveals that the Respondent had some difficulty in filling the Little Rock-Memphis run and that the assignment was not an especially profitable one for the driver assigned, there is no evidence to suggest that the assignment was particularly difficult or unpleasant or conditioned on an employee's abandoning rights guaranteed by the Act. Additionally, while called as a witness, Spruill never explained why he resigned rather than accept the Little Rock-Memphis run. Thus, there is no evidence that it was foreseeable that Spruill would resign rather than accept the Little Rock-Memphis run. *Cf. Sure-Tan, Inc. v. NLRB*, 467 U.S. 883, 895 (1984); *Maxi City Deli*, 282 NLRB 742 (1987). We conclude that the Respondent did not violate Section 8(a)(3) and (1) when it accepted Spruill's resignation and we will dismiss that part of the complaint.

AMENDED CONCLUSIONS OF LAW

Delete paragraph 5 and substitute the following.

"5. Respondent did not cause the termination of line driver Dennis Spruill in violation of Section 8(a)(3) and (1) of the Act."

ORDER[5]

The Respondent, Red Arrow Freight Lines, Inc., Little Rock, Arkansas, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Prohibiting employees from discussing the Union at times when they are not actually working.

(b) Laying off or otherwise discriminating against employees because of their activity on behalf of Teamsters Local 878 or any other labor organization.

(c) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Offer Perry Wayne Middlebrook immediate and full reinstatement to his former job of the little Rock-Memphis run, but specifically to the position he would be holding absent the discrimination against him, revoking, if necessary, any conflicting assignments to other drivers or, if that position no longer exists, to a substantially equivalent job, without prejudice to his seniority or any other rights and privileges previously enjoyed.

(b) Make whole, with interest, Perry Wayne Middlebrook for any loss of earnings and other benefits suffered as a result of the discrimination against him in the manner described in the remedy section of the decision.

(c) Remove from its files any reference to the unlawful layoff and notify the employee in writing that this has been done and that the layoff will not be used against him in any way.

(d) Preserve and, on request, make available to the Board or its agents for examination and copying, all payroll records, social security payment records, timecards, personnel records and reports, and all other records necessary to analyze the amount of backpay due under the terms of this Order.

(e) Post at its facilities located in Little Rock, Arkansas, and Dallas and McAllen, Texas, copies of the attached notice marked "Appendix."[6] Copies of the notice, on forms provided by the Regional Director for Region 26, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material.

(f) Notify the Regional Director in writing within 20 days from the date of this Order that steps the Respondent has taken to comply.

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[5] The General counsel requests a visitatorial clause authorizing the Board, for compliance purposes, to obtain discovery from the Respondent under the Federal Rules of Civil Procedure under the supervision of the United States court of appeals enforcing this Order. Under the circumstances of this case, we find it unnecessary to include such a clause. Accordingly, we deny the General Counsel's request. See *Cherokee Marine Terminal*, 287 NLRB 1080 (1988).

We amend the judge's Order and notice to employees to conform to our decision, correct certain inadvertent errors, and more closely address the violations found.

Because Perry Wayne Middlebrook has consulted the bulletin boards in the McAllen and Dallas, Texas terminals, the Respondent shall post the notice to employees at those terminals, plus its Little Rock, Arkansas location, the location where Middlebrook was working when he was laid off. Contrary to the judge, however, we find no reason to order posting at the Respondent's San Antonio general office because no affected employees are assigned there and no unfair labor practices occurred there.

[6] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

IT IS FURTHER ORDERED that the complaint is dismissed insofar as it alleges violations of the Act not specifically found.

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United Stated Government

The National Labor Relations Board has found that we violated the NationalLabor Relations Act and has ordered us to post and abide by this notice.

Section 7 of the Act gives employees these rights.

To organize

To form, join, or assist any union

To bargain collectively through representatives of their own choice

To act together for other mutual aid or protection

To choose not to engage in any of these protected concerted activities.

WE WILL NOT prohibit you from discussing the Union at times when you are not actually working.

WE WILL NOT lay you off or otherwise discriminate against you because you assist Teamsters Local 878 or any other labor organization.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL offer Perry Wayne Middlebrook immediate and full reinstatement to his former job of the Little Rock-Memphis run, but specifically to the position he would be holding absent the discrimination against him revoking, if necessary, any conflicting assignments to other drivers or, if that position no longer exists, to a substantially equivalent job, without prejudice to his seniority or any other rights and privileges previously enjoyed.

WE WILL make Perry Wayne Middlebrook whole, with interest, for any loss of earnings and other benefits resulting from the discrimination against him.

WE WILL notify Perry Wayne Middlebrook that we have removed from our files any reference to his layoff and that the layoff will not be used against him in any way.

RED ARROW FREIGHT LINES, INC.

Bruce E. Buchanan, Esq., for the General Counsel.

Thomas E. Reddin, Esq. (Foster, Bettac & Heller), of San Antonio, Texas, for the Respondent.

Perry Wayne Middlebrook, of Mission, Texas, for himself.

DECISION

STATEMENT OF THE CASE

RICHARD J. LINTON, Administrative Law Judge. We are here because Red Arrow Freight Lines laid off line driver Perry Wayne Middlebrook effective 9 November 1986 and terminated line driver Dennis Spruill 10 days later. The principal question is whether the General Counsel established a prima facie case. Answering that question yes, I find that Red Arrow and the Union of Transportation Employees conspired to lay off Middlebrook in order to remove his Teamsters union influence at Red Arrow's Little Rock, Arkansas terminal, and that the "domino" effect of Middlebrook's layoff resulted in the constructive discharge of Spruill. As alleged, I find that Red Arrow violated Section 8(a)(3) and (1) by the layoff and constructive discharge. I order Red Arrow tc offer Middlebrook and Spruill reinstatement to the jobs they would be holding absent the discrimination against them, revoking, if necessary, interim assignments made to other drivers.

This case was tried before me in Little Rock, Arkansas, on 29–30 April 1987 pursuant to the 6 March 1987 complaint issued by the General Counsel of the National Labor Relations Board through the Regional Director for Region 26 of the Board. The complaint, subsequently amended, is based on a charge filed 27 January 1987 by Perry Wayne Middlebrook (Middlebrook) against Red Arrow Freight Lines, Inc. (Respondent or Red Arrow). Middlebrook filed a first amended charge on 25 March 1987.[1]

In the complaint, as amended before and at the hearing, the General Counsel alleges that the Respondent violated Section 8(a)(1) of the Act by promulgating and maintaining, since 1 October 1986, an overly broad no-union talk on company time, and since 20 April 1987, a rule prohibiting the posting of written material on company property or bulletin boards without the permission of management.

The complaint also alleges that Respondent violated Section 8(a)(3) of the Act on 6 November 1986 by laying off Middlebrook, and on 15 November 1986 by assigning Dennis Spruill to drive the Little Rock to Memphis run, and on 19 November 1986 by constructively discharging Spruill.[2]

The General Counsel alleges that Respondent took these actions in order to discourage its employees from supporting or joining the International Brotherhood of Teamsters.

By its answer Respondent admits certain factual matters but denies violating the Act.

The General Counsel and the Respondent filed posthearing briefs. Attached to the General Counsel's brief are a proposed order and a proposed notice to employees. Thereafter the General Counsel submitted a 24 June 1987 motion to strike portions of Respondent's brief or, in the alternative, "a motion [for leave] to file as a 3-page reply brief." Respondent also submitted a motion for leave to file its eight-page reply brief, dated 25 June 1987. The motions for leave to file are granted and as appears later, I have considered the motions and all briefs. *Fruehauf Corp.*, 274 NLRB 403, ALJD fn. 2 (1985). As discussed in a moment, I grant the General Counsel's motion to strike in a limited respect.

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[1] This manner of setting forth dates complies with the wishes of the Board.

[2] All dates are for 1986 unless otherwise indicated.

Accompanying the General Counsel's brief was a motion to correct three misspellings on four pages of the transcript. That unopposed motion to correct is granted.

On the entire record, including my observation of the demeanor of the witnesses, and after due consideration of the briefs filed by the General Counsel and the Respondent, I make the following

FINDINGS OF FACT

I. JURISDICTION

Red Arrow is an interstate common carrier of freight by motor vehicle. It has its headquarters (general office) in San Antonio, Texas (1:102; G.C. Exh. 4 at 1).[3] A Texas corporation, Red Arrow also has offices or terminals in various cities in Arkansas, Texas, and Oklahoma, including Dallas, Houston, and McAllen, Texas. Respondent has been a wholly owned subsidiary of Carolina Freight Corporation since January 1984 (G.C. Exh. 4 at 1). The terminal involved here is the one at Little Rock, Arkansas. As stipulated by the parties, Respondent opened its Little Rock terminal in July 1986 (G.C. Exh. 3, No. 1).

The pleadings establish that Respondent, during the 12 months ending in July 1987, will have derived gross revenue exceeding $50,000 in the operation of its interstate business from the Little Rock terminal. Respondent admits, and I find, that it is an employer within the meaning of Section 2(2), (6), and (7) of the Act.

II. LABOR ORGANIZATION INVOLVED

Respondent admits by the pleadings, and I find, that International Brotherhood of Teamsters (International Teamsters) is a labor organization within the meaning of Section 2(5) of the Act.

At the hearing Respondent, in answer to an amended pleading, admitted, and I find, that Teamsters Local 878 is a labor organization within the meaning of Section 2(5) of the Act (1:189–190; G.C. Exh. 15).

The parties stipulated, and I find, that the Union of Transportation Employees (UTE) is a labor organization within the meaning of Section 2(5) of the Act (1:12).

III. THE ALLGED UNFAIR LABOR PRACTICES

A. *Overview*

The General Counsel's theory on the principal issue is that Red Arrow unlawfully laid off Middlebrook on 5 November (effective 9 November) when it assertedly discovered he was assisting the Little Rock employees to join Teamsters Local Union 878. Middlebrook's layoff had a "domino effect" on other Red Arrow drivers, and this domino effect caused Respondent to terminate Dennis Spruill on 19 November (1:14–15, opening statement, and 1:196).

Respondent's countering position is that it laid off Middlebrook solely because it agreed with the UTE's interpretation of the collective-bargaining agreement that Middlebrook improperly was recalled in October from layoff and awarded the Little Rock position. Middlebrook's recall assertedly violated the contract's seniority provisions. When the UTE pointed out the discrepancy to Respondent, Red Arrow had no choice but to return Middlebrook to layoff status (1:15–19, opening statement).

The General Counsel concedes that the case as to Spruill stands or falls with that of Middlebrook (1:208–209). Red Arrow argues that Spruill's case should be dismissed even if merit is found to Middlebrook's case for the reason that Spruill refused an assignment to the Little Rock-Memphis run and either quit or was terminated over that superseding event (Br. at 50).

B. *Background*

Since the 1950s Red Arrow and the UTE have had a bargaining relationship (1:41–42). With a term effective from 15 March 1985 through 15 March 1988, the current collective-bargaining agreement (CBA) provides in the first sentence of section 1 of the article on recognition (R. Exh. 3 at 1, art. 1):

> The COMPANY acknowledges the UNION as the exclusive bargaining agent for employees in the following classifications: (1) Line Drivers, (2) Checkers, Pickup and Delivery Drivers, Forklift Operators, Non-Drivers, and Part-Time Employees in this classification, (3) Mechanics, Servicemen, and Part-Time Servicemen.

Joseph M. Chandler Jr., Respondent's vice president of industrial relations, explained that in some other companies the line drivers are called over-the-road drivers and the pickup and delivery drivers are known as city drivers (1:31–32). The latter sometimes are referred to in the record as local drivers or terminal drivers (1:94, 252).

Respondent opened its Little Rock terminal on 21 July 1986 (G.C. Exh. 3). The terminal manager has been Alan Penfield (1:60). In its 25 February 1987 position letter to NLRB Region 26, submitted during the Region's investigation of Middlebrook's charge, Respondent asserts that it and the UTE have interpreted the contractual recognition clause as extending to all terminals owned by Red Arrow, and that it has been their practice to treat new terminals as "accretions to the contractually established bargaining unit." (G.C. Exh. 4 at 3.) The 13-page position letter is signed by Respondent's counsel and verified by Chandler as "true and correct to the best of my knowledge and belief." (G.C. Exh. 4.)

Middlebrook's original charge alleged assistance to the UTE at Little Rock in violation of Section 8(a)(2) of the Act. Respondent's position letter defends on several grounds including accretion and majority status, and that, in any event, the 27 January 1987 charge is time-barred under Section 10(b) of the Act. The first amended charge omits the 8(a)(2) allegation, and the complaint contains no such allegation.

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[3] References to the two-volume transcript of testimony are by volume and page.

As we shall see, Chandler testified that he was unconcerned about the Little Rock employees signing cards for the Teamsters because he viewed the Little Rock terminal as immune from such organizing under the Board's contract-bar rule (1:27, 43). That, in turn, is based on the accretion argument.

Much of Respondent's position about accretion, and its argument on brief, is based on a lengthy treatment of the accretion matter in the 25 February 1987 position letter (G.C. Exh. 4) that Respondent submitted to NLRB Board Region 26 during the investigation of the charge filed in this case. None of the witnesses testified about accretion.

By his motion dated 24 June 1987, counsel for the General Counsel moved to strike those portions of Respondent's brief relying on General Counsel's Exhibit 4 (Respondent's 25 February 1987 position letter) or, in the alternative, moved (for leave) to file his three-page document as a reply brief on the accretion matter. The basis of the General Counsel's motion to strike is that Respondent's position letter (G.C. Exh. 4) was offered by the General Counsel, and received in evidence, for the limited purpose of showing inconsistencies between factual statements in that document and Respondent's evidence at the hearing (1:73, 76). Respondent's reliance, as to accretion, on the detailed statements (facts and argument) in its 25 February position letter is improper, the General Counsel argues, because the statements (the factual ones, at least) are hearsay. I agree, and I grant the General Counsel's motion to strike those references, which appear at pages 9, 10, and 42 of Respondent's brief, to the extent Respondent relies on them to establish the truth of the facts asserted.

I shall consider Respondent's accretion contention for the limited purpose of its argument that Red Arrow was unconcerned about the Teamsters' organizing at Little Rock because of the theory of contract bar. After all, Chandler testified, that was why he was not upset about the contents of Terminal Manager Penfield's Halloween report to Chandler, and why Chandler considered the matter a "non-event." (1:27, 43.) Chandler's testimony about contract bar also is reflected in a 12 November letter from Respondent's law firm denying the Teamsters' 4 November demand for recognition (R. Exh. 7). For this limited purpose, therefore, the accretion contention expressed in Respondent's 25 February 1987 position letter to NLRB Region 26, although it expands on Chandler's contract-bar testimony, adds nothing to the substantive evidence. Accordingly, I also accept the General Counsel's document as a reply brief. I shall return to the accretion subject later.

Larry D. Wright, a business representative for the UTE, testified that in August, shortly after the Little Rock terminal opened, he visited with the newly hired employees, distributed copies of the CBA, and said he would not sign them as members until they had completed their probationary period of 90 days (2:298–299). Although placing the event in September, local driver Roy Jackson confirms the substance of Wright's testimony (1:175, 177). He recalls that UTE President Jeff Saari accompanied Wright. Jackson also testified that when Penfield hired him in August, Penfield showed him the UTE contract, stated that it covered Jackson, and stated that the new employees could sign union cards after their 90-day probationary period expired (1:176).

In several ways Respondent distinguishes between its local and line drivers. One of the pertinent distinguishing features is the different supervisory chain. The local drivers and other terminal employees at Little Rock are under the supervision of Terminal Manager Penfield who in turn reports to Charles Schmidt, vice president of operations (1:63, 70). Schmidt apparently works at Respondent's San Antonio headquarters. Penfield has no authority over the line drivers (2:302–303).

The line haul drivers are under the general direction of Michael D. Rhodes, manager of line haul operations, who works in Respondent's Dallas office. Reporting to Rhodes are several line haul supervisors and dispatchers (1:44, 61, 216–217). Vice President Chandler testified that Respondent has some 139 drivers currently on the seniority list (1:31), and the 14 January 1986 seniority list (R. Exh. 6 at 10–13) names some 161 line drivers. The January 1986 seniority list is the one the parties relied on during the events giving rise to this case.

Another relevant distinction between the local drivers and the line drivers exists under Red Arrow's seniority system. Consistent with the three classification groups in the unit description, the seniority list is divided into those three groups (R. Exh. 6). Line Haul Manager Rhodes confirms this (1:223–224).

Rhodes also testified that although the line drivers have one seniority list for the entire Red Arrow System, the city (local) drivers have location seniority as well as systemwide seniority (1:227, 243, 255). The easiest way to describe or explain the line haul seniority system, Rhodes testified, is that the entire line constitutes one terminal (1:257).

Middlebrook's home is in Mission, 6 miles from Respondent's terminal at McAllen in the Valley area of south Texas (1:82–83, 89, 121). He went to work for Respondent at the McAllen terminal on 17 July 1984 as a part-time city driver. That work, which included breaking and loading freight, proved too much an aggravation on one of his legs which had been wounded while he was serving in the U.S. Marine Corps in Vietnam (1:83–84, 123). Consequently, in April 1985 Middlebrook transferred to the line driver classification working out of the Dallas office while living in Mission, Texas (1:84–85).

By memo dated 22 September 1986 Line Haul Supervisor Claudie Marsh informed Middlebrook that because of "slack business" he was being laid off "effective September 26, 1986." (G.C. Exh. 14.) Marsh concludes the memo by advising Middlebrook that when and if conditions permit, "you will be recalled from layoff." Although the memo had been mailed to Mission, Marsh gave Middlebrook a copy on Thursday, 25 September (1:85).

C. *Perry Wayne Middlebrook*

1. Middlebrook's Little Rock grievance

During the initial months after opening its Little Rock terminal, Red Arrow used its city, or local, drivers at Little Rock to make daily roundtrips to Memphis, Tennessee (1:85, 218; G.C. Exh. 3, No. 2). It appears that Respondent has a related company with a terminal in Memphis (G.C. Exh. 4 at 10). Because Respondent uses the Memphis terminal as an agent only, Red Arrow does not assign drivers there (1:85). The one-way distance between the terminals is about 140 miles (1:86). Article 54, section 3 of the CBA allows Red Arrow to use city drivers for runs within a 65-mile radius of origin (R. Exh. 3 at 126).

Facing imminent layoff, and apparently aware that Respondent was using city drivers for the line haul between Little Rock and Memphis, Middlebrook went to UTE President Jeff Saari on Friday morning, 26 September, to file a grievance.[4] Pointing out that he was entering layoff status that very day, Middlebrook asked Saari whether he would be able to bid on the Little Rock to Memphis run if the grievance proved successful and Red Arrow posted the run for bid. Saari said yes, adding that in a similar situation in 1974 he had successfully bid on a run even though employee Robert Rancher (apparently with more seniority) was still in layoff status (1:85-86, 139-140). Business Representative Larry D. Wright testified that Saari has told him the same story (2:284-285). Although Saari's bid was under a prior contract, there is no evidence that the current contractual provisions were not the same then.

Saari had a grievance typed on the spot (G.C. Exh. 7), Middlebrook and Business Representative Doug Deere signed it, and that very morning, 26 September, Deere and Middlebrook presented the grievance to Rhodes (1:87).

Middlebrook returned to his home in Mission. Every week he would go to the McAllen terminal and check the bulletin board. Middlebrook's grievance was successful, for on 9 October Red Arrow posted ("bulletined") the Little Rock-Memphis run for bid (G.C. Exh. 3a at 2; 1:219, Rhodes). Middlebrook saw the posting and submitted his bid (1:89, 149).

Rhodes testified that Middlebrook was the only employee to bid for the Little Rock-Memphis run (1:220). According to Rhodes, Middlebrook's bid while in layoff status concerned Rhodes. There were other drivers on layoff who were senior to Middlebrook (1:220-221). Rhodes testified that he telephoned Vice President Chandler for clarification. Chandler informed Rhodes that Middlebrook would be the successful bidder because the other and more senior drivers in layoff status did not bid (1:226-228, 253-254).

When the posting period expired, Red Arrow, on 16 October, assigned the Little Rock-Memphis run to Middlebrook effective Sunday, 19 October (G.C. Exh. 3b). Checking the bulletin board at the McAllen terminal, Middlebrook learned that he had been the successful bidder. On Saturday morning, 18 October, he left Mission for Little Rock. Middlebrook stopped at Dallas to make certain he had not been bumped. When Supervisor Marsh said that as far as he could ascertain Middlebrook had not been bumped, Middlebrook continued on to Little Rock where he drove the Little Rock-Memphis run for several days until Rhodes, as we shall see, laid him off effective Sunday, 9 November, "due to business conditions." (1:90-94).

2. Middlebrook and Teamsters Local 878

Although a member of the UTE (1:120, 155), Middlebrook favors the Teamsters and has held a Teamsters card (1:123). He credibly testified that UTE President Jeff Saari and Business Representative Larry Wright have held several discussions on the topic in the past and that Saari and Wright are well aware of his preference and of his reasons (1:122).

After arriving in Little Rock Middlebrook discovered that the city drivers were uninformed about Red Arrow's systemwide bidding procedure and unaware they could be bumped from Little Rock and have to take a position at some other terminal in Red Arrow's system. Since they had not signed with the UTE, Middlebrook suggested that they sign with the Teamsters. Because the city drivers feared they could be bumped to another city under the UTE contract, they told Middlebrook to contact the Teamsters (1:94-95, 171).

Middlebrook contacted B. J. Alexander, an assistant business agent for Teamsters Local 878. Later Middlebrook was assisted in his organizing efforts by Jim DeNote, a line driver working from the pool board out of Dallas (1:96-97, 158). According to plan, on Friday, 31 October, B. J. Alexander arrived on Respondent's parking lot about 25 feet from the terminal. The time was about 6:30 p.m. Alexander began conversing with Middlebrook and the drivers who signed Teamsters cards on the spot. Two of the four or five city drivers present at the time were part-time drivers (1:97-101, 158-160).

Middlebrook observed Terminal Manager Penfield come to the door and look out during the card signing. City driver Roy Jackson was the last to arrive and sign, around 7 p.m. All the drivers, a total of seven or eight, signed cards for Alexander on that occasion (1:100-102, 172). Penfield denies observing any organizing effort (1:62), although he does not deny seeing Middlebrook and Alexander on the parking lot about 25 feet from the building.

After Jackson had signed, Penfield came out and introduced himself to Alexander in Middlebrook's presence. Alexander introduced himself, stated he had all the employees signed, and that he was demanding recognition of the Teamsters. Penfield said he had no authority to grant it. Alexander asked for the names of Respondent's president and vice president so he could correctly address a certified letter, but Penfield, saying he had to call San Antonio, went inside the terminal. Middlebrook sifted through some papers he had in his car, found the San Antonio address, and furnished that to Alexander along with the names of President Ray Powell, Vice

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[4] The layoff was "effective September 26, 1986." Middlebrook interpreted the time to mean at the beginning of 26 September (1:88-89).

President Charles Schmidt, and Vice President Joseph Chandler Jr. (1:102–105, Middlebrook; 160–161, Alexander).

Penfield denies ever speaking with Alexander, and contends that he learned of the card signing only when driver Jackson came in and told him (1:61–62).

Jackson testified that after he signed a card he went inside the terminal and informed Penfield that 100 percent of the (city) drivers had signed cards for the Teamsters. Jackson decided to inform Penfield because he was concerned about (losing) his job (1:173). Penfield confirms that Jackson did come to report this information (1:61–62, 67–68).

Penfield testified unfavorably and I do not credit him. Crediting the General Counsel's witnesses, I find that Penfield did look out, observed the card signing, and eventually came out and spoke with Alexander.

Aside from Penfield's possibly associating Middlebrook with the Teamsters' efforts by virtue of Middlebrook's presence with the group, there is no evidence showing exactly how Penfield gained knowledge that Middlebrook was involved in the Teamsters' soliciting of the city drivers on company premises. Nevertheless the record establishes that Penfield did reach that conclusion. Thus, during the investigation of Middlebrook's charge by NLRB Region 26, Respondent submitted a lengthy position letter dated 25 February 1987 (G.C. Exh. 4). The letter is from Respondent's attorneys, and Chandler signed a verification statement attached to the letter. At page 12 of the letter Respondent addresses an allegation that Penfield, in early November, announced a rule prohibiting union talk on company time and premises. The position statement continues (G.C. Exh. 4 at 12):

> In early November, when Mr. Middlebrook and a Teamster representative began soliciting the pickup and delivery drivers on Company premises . . . .

At the hearing Chandler sought to disavow this by saying he did not gather the information and he had no knowledge that Middlebrook was soliciting for the Teamsters (1:42, 45). I do not credit Chandler.

Jackson testified that after he made his report of the card signing to Penfield, Penfield called San Antonio to obtain the telephone number of Respondent's labor relations person (Chandler). When Penfield placed his next call (to Chandler), Jackson stepped out to the dock and performed some work. When Jackson returned, a few minutes later Penfield was completing a call. On hanging up, Penfield told Jackson not to talk about any union activities on company time, that Red Arrow recognized the UTE until the contract expired in March 1988, and that (in the meantime) Respondent would not recognize any other union, and not to be surprised if the UTE came to Little Rock and talked to the employees (1:173–175). Penfield does not deny Jackson's description. The admonishment not to talk about any union activities on company time is the subject of complaint paragraph 8, discussed later.

Middlebrook testified that after searching through a briefcase at his car, and after furnishing the names and San Antonio address to Alexander, he went inside the terminal (1:105). On arriving at the terminal office, Middlebrook saw Penfield hanging up his telephone. Middlebrook asked what the "G/O" (the San Antonio general office, apparently) had to say. "Joe Chandler hit the ceiling," Penfield replied. Middlebrook asked if there was anything else, and Penfield replied no. Middlebrook then left (1:105–106). Penfield denies talking with Middlebrook after having the telephone conversation with Chandler, and denies saying, "Joe Chandler hit the ceiling." (2:304.)

Neither Jackson nor Middlebrook testified about seeing the other at Penfield's office when Penfield hung up the telephone. Respondent contends that this reflects a discrepancy in their testimony on a material point (Br. at 16). The evidence is ambiguous, for it is quite possible that Jackson, who had been working in the terminal for an unspecified time, returned to the office after Middlebrook had come and gone. The call Penfield was completing is not shown to be the call Penfield completed with Chandler when Middlebrook arrived in the office. Accordingly, I find no discrepancy between the accounts of Middlebrook and Jackson.

Penfield testified that when he reached Chandler, at the latter's home, the evening of 31 October, he told Chandler that he had been informed his Little Rock drivers had signed Teamsters cards. Chandler said not to worry about it because the employees were represented by the UTE, and to tell Jackson not to worry about it. Penfield denies that Chandler was upset (1:64–65, 68). Within the next day or two Penfield reached his superior, Vice President Schmidt, who instructed him not to accept any package from a Teamsters representative and not to accept any registered mail (1:69–70).

Chandler testified that on 31 October he had left work early to go Halloween trick-or-treating with his children. That evening he received a call from Penfield advising that the Little Rock employees had signed cards for the Teamsters. Chandler assured Penfield that his concern was unfounded because the Little Rock employees were represented by the UTE. Denying that he was upset at Penfield's report, Chandler concedes he was somewhat upset that Penfield persisted in talking when Chandler had things to do of more importance to him. Chandler considered the matter a "non event," and when the call ended Chandler went trick-or-treating with his children. He denies that Penfield mentioned Middlebrook's name (1:25, 27, 42–43).

Penfield concedes that at 9 a.m. on Monday, 3 November, he assembled his employees on the dock and told them there must be no union "business" on company time (1:63).[5] Middlebrook's Memphis run was from 11 p.m. to 5:30 a.m. and Penfield did not see him until later that day when he gave him the same admonition (1:63, 68).

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[5] Penfield's actual testimony is that the dock meeting occurred the "next day" after Jackson informed him about the union organizing. Because the next day was a Saturday, and because the terminal employees work Monday through Friday (1:70), I find that Penfield meant Monday, 3 November.

Because Penfield's admissions about his statements to employees are directly related to complaint paragraph 7, which attacks a no-solicitation rule, I shall postpone further discussion of Penfield's admonition until I cover that allegation.

On Monday, 3 November, Teamsters Representative Alexander telephoned Respondent's San Antonio office attempting to reach President Ray Powell. Because Powell was unavailable, Alexander testified, he spoke with Chandler and demanded recognition for the Little Rock employees. According to Alexander, Chandler said he would give Powell the message. In his pretrial affidavit of 6 February 1987, however, Alexander merely states that he identified himself and left someone, unidentified, a call-back message with a "company official" for Powell to call. "I don't recall" the official's name "right now" Alexander wrote in his affidavit. By the time of the hearing, however, his memory was jogged and he remembered that it was Chandler (1:161–162, 165–168, 170).

Chandler denies having any conversation with Alexander (1:28; 2:307). Chandler's explanation offered in support of his denial is significant because of the contrast with his asserted response when Penfield called the evening of 31 October. Thus (2:307):

> Q. Why are you certain that the conversation with Mr. Alexander never took place?
>
> A. If any representative of any labor organization contacted me, and demanded recognition, we would have, one, had a very lengthy conversation, explaining our address, our legal representatives, the address of our legal representatives, and how to address mail to us.
>
> It would have been an *extremely important* conversation that I would have, one, remembered, and, two, I would have been *required to report* to my superiors. [Emphasis added.]

Continuing with his answer, Chandler describes returning from lunch one day and finding a note that a Teamsters representative had called and left a call-back message for anyone at Red Arrow. Chandler testified he threw the message in the trash without returning the call (2:308).

By letter dated 4 November and addressed to Ray Powell, Teamsters Local 878, by President Billy Patrick, demanded recognition of Respondent's Little Rock employees in a unit of "all checkers, drivers, and warehouse employees," excluding guards, statutory supervisors, and all others (G.C. Exh. 11). Patrick advised that a majority of the unit had designated Local 878, and offered to have a card check by a neutral person in order to verify majority status. Alexander testified that Patrick signs all demand letters (1:163).

Responding through its attorney by letter dated 12 November, Red Arrow advised the Teamsters of Respondent's CBA with the UTE and cited the Board's contract-bar rule (R. Exh. 7). Chandler testified that the Teamsters never replied (2:309). Alexander testified, in effect, that Teamsters 878 dropped the matter when Alexander learned that a UTE representative had come to Little Rock in early November, met with the employees, and persuaded them to sign UTE cards (1:164).

Apparently at some time during the day on Wednesday, 5 November, a UTE form notice to members (G.C. Exh. 8) was posted above the timeclock announcing a meeting for that night at 7:30. Middlebrook, a member of the UTE, was not informed of the meeting and did not see the posted notice until he came to the terminal at 10 p.m. in preparation for his usual night run to Memphis (1:106–107).

UTE Business Representative Larry D. Wright met with the Little Rock employees the evening of 5 November, and all the employees signed UTE cards (2:293). Jackson testified that, just as Terminal Manager Penfield had predicted, the UTE came to Little Rock the following week (the week following Halloween) and signed up the employees (1:175). Middlebrook testified that driver Jim Lyons told him all the employees had signed with the UTE (1:108).

3. Middlebrook laid off 9 November 1986

a. *The layoff*

When Middlebrook came to work Wednesday night, 5 November, there was a note for him to see Penfield the next morning. Middlebrook returned from Memphis about 5:30 a.m. on 6 November and waited for Penfield who arrived about 7:45 a.m. Penfield gave Middlebrook an envelope containing a message on a computer printout (1:106–109). The message, dated 5 November and from Michael Rhodes, has for its subject reference, "Layoff," and reads (G.C. Exh. 3c):

> Effective Nov. 9, 1986 you are hereby placed on layoff status due to business conditions.
>
> You have certain rights available to you including the option to pull extra run[s] if you notify this office in writing.
>
> When and if business conditions permit you will be recalled from layoff.

Middlebrook asked Penfield why, but the terminal manager referred him to Rhodes' message. Penfield testified that his total involvement in Middlebrook's layoff was delivering Rhodes' message to Middlebrook (2:303). Penfield complied with Middlebrook's request to call Rhodes so Middlebrook could talk to Rhodes (1:109).

When Penfield handed the telephone to him, Middlebrook asked Rhodes why he was being laid off. Rhodes said the reason was on the notice. To Middlebrook's inquiry about the (Memphis) run Rhodes replied, "Well, it's covered." Middlebrook responded that he could cover the run as an unassigned driver until the run was posted and rebid. Rhodes said that was unnecessary for he already had the run covered. Middlebrook said he would file a grievance. "Go ahead, but I doubt if you'll win it," replied Rhodes (1:110, 143, 151).

On hanging up the telephone, Middlebrook asked Penfield what had gone wrong, that there had been a UTE meeting the day before without notice to him. Middlebrook asked what Powell, Schmidt, or Chandler had to say about the Teamsters. Penfield replied that Powell was (had been) at a meeting elsewhere and that Penfield could not elaborate on what Vice President Schmidt said. Chandler, Penfield reported, said that the UTE is the union for Red Arrow at this time. Penfield added, "I got my wrist slapped," that he was not going to get it slapped again, and that he did not want to hear any more about the matter (1:110–111).

Middlebrook testified that the layoff notice about "business conditions" was the only reason he was ever given by Red Arrow (1:113). As we see in a moment, Supervisor Steve Ellis suggested a specific reason to Middlebrook.

Rhodes, Respondent's manager of line haul operations, testified that he used the phrase "business conditions" in Middlebrook's layoff notice because that is the language in article 66, section 1 of the contract (1:232–233). The provisions of article 6 are pertinent and they read (R. Exh. 3 at 151–152):

> ### ARTICLE 66
>
> ### REDUCTION IN FORCES
>
> Section 1. Any reduction in forces due to slack business or insufficient work will be in accordance with seniority rights.
>
> The COMPANY will notify employees at least four (4) work days in advance of being laid off. If the layoff is due to an official request by the UNION to cut the board, or due to the bidding process outlined in Article 53, Section 2(d), the four (4) day notice is not required.
>
> Section 2. Line employees on layoff may work unassigned at their home terminal. They will not be called to work until all available assigned pool men have been used. If more than one laid off employee is used, they will be offered the remaining loads in seniority order.
>
> Employees on layoff have the option to either accept or reject extra work. Therefore, employees on layoff must notify the COMPANY in writing that he will or will not be available for extra work.
>
> Section 3. Line employees on layoff status may be used as outlined above. It is understood, however, that if his pay is as much as thirty-five (35) hours per week, at the prevailing hourly rate of pay, for two (2) consecutive weeks, such employee will be returned to regular status. If more than one employee is on layoff, the senior employee will be returned to regular status.

Because of his relatively low seniority, Middlebrook has been laid off or bumped on more than one occasion (1:150; 2:321). On two of these occasions, the layoff notices based the layoff on a "decline in business" (G.C. Exh. 17; layoff effective 1 March 1985) and "due to slack business" (G.C. Exh. 14; layoff effective 26 September 1986). That is to say, an actual condition of slack business or insufficient work, the ground specified in article 66, existed.

Here, by contrast, there was no decline in business as far as the Memphis run is concerned. As we see later in more detail, Respondent had trouble finding a driver for the Memphis run. Rhodes concedes that since Middlebrook's layoff Respondent has been forced to assign junior drivers to the Little Rock-Memphis run, and that each one gets out of the assignment after a short period of time (1:249). Moreover, Respondent has added a second Memphis run, this one beginning at 10 a.m. Middlebrook testified that he was not recalled from layoff for the second run, or any other run (1:117).

Some hint as to why drivers do not want the Little Rock to Memphis run lies in Middlebrook's testimony that the short 280-mile roundtrip yields little profit. Indeed, Middlebrook could survive on it only because his mother lives in little Rock and he apparently lived with her to save on expenses when he was in Little Rock (1:86). Too, it would seem that the line drivers (apparently all from Texas) would dislike having to work away from home for long periods of time. Finally, the run is at night (11 p.m. to about 5:30 a.m.), although runs elsewhere may also be all-night trips.

On Saturday, 8 November, as Middlebrook was traveling from Little Rock to his home in south Texas, he stopped at Respondent's Dallas office to see if he could get some clarification about his layoff. From one of the offices there he spoke by telephone with Steve Ellis, a stipulated supervisor[6] (1:57). Ellis framed the bottom line succinctly when Middlebrook asked about bidding on other runs (1:115): "While you're on layoff you can't bid." As we shall see, however, Ellis' "law" is flawed.

b. *UTE representatives meet with Rhodes*

From the bottom-line rule Supervisor Ellis enunciated for Middlebrook on 8 November, we must travel backwards a few days to see how Red Arrow developed the rule that Ellis expressed to Middlebrook. Unfortunately, the description of events is rather tedious.

Previously, I mentioned the asserted concern by Rhodes when Middlebrook, in October (following his grievance), bid on the Little Rock-Memphis run while Middlebrook was in layoff status. Rhodes telephoned Chandler who advised Rhodes that Middlebrook would be the successful bidder, even though junior to others on layoff, if no one else bid. No one else bid, and Middlebrook was assigned to the run.

According to UTE Business Representative Larry Wright, in early November UTE President Jeff Saari told him that two Houston employees in layoff status had called to protest the awarding of the Little Rock-Memphis run to Middlebrook. The two employees, William J. Walker and Robert B. Sharp, supposedly complained that they had seniority over Middlebrook (2:268–270, 272).

After discussing the matter, Saari and Jackson concluded that Respondent had erred in assigning the Little Rock-Memphis run to Middlebrook because Walker and Sharp, also in layoff status, had seniority over Middlebrook (2:270). In fact, Walker and Sharp were working under the shop classification in Houston while on layoff from their line driver classification. But they had the right to bump back into the line driver classification

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[6] Middlebrook described Ellis as his immediate supervisor (1:145).

(1:290, 297, Jackson). The seniority provisions of the contract appear in article 13. Section 8 provides that each of the four classifications (the fourth classification being for part-time employees) shall have its own seniority roster (R. Exh. 3 at 32). Seniority is defined as being "system-wide" under section 1 of article 13.

That same day (about Monday, 3 November, apparently) Saari and Jackson telephoned Rhodes, informed him of their conclusion, and arranged to meet with him. The next day the three met in the office of Rhodes in Dallas (1:228, 2:271–273, 285). Rhodes dates the meeting as being around 4 or 5 November (1:228). Jackson dates the meeting as being the day after the call to Rhodes (2:272–273, 285–286) and 1 or 2 days before his 5 November meeting with the Little Rock employees (2:291–292). It appears that the meeting with Rhodes occurred on either Monday or Tuesday, 3 or 4 November. Assuming that the version of these witnesses is credited, the meeting most likely occurred on 4 November with the telephone call to Rhodes having been made on Monday, 3 November. (As we shall see, I find that it was Rhodes who called the UTE representatives.)

At the 4 November meeting the three (Rhodes, Saari, and Jackson) discussed the situation and the provisions of the CBA. As Jackson and Saari earlier had done, the three concluded that the assignment to Middlebrook was improper (1:229–230, 251, Rhodes). Jackson testified that Rhodes realized an error had been made after the UTE representatives had pointed out the contract article (2:295). Wright asked Rhodes to revoke the assignment and return Middlebrook to layoff and to fill the position from unassigned drivers (1:229; 2:286). As a result of the discussion, Rhodes testified he sent the layoff notice (quoted earlier) to Middlebrook (1:231).

When asked whether he was aware that Middlebrook was attempting to organize the local drivers in Little Rock, Rhodes testified, "I don't believe so." He denies that either Penfield or Chandler told him before Middlebrook's layoff. Conceding that at some point he heard something about it, he thinks that knowledge came at a later date, but he does not know when it was or who told him (1:230–231, 245). Later in his testimony, Rhodes was more positive that when he laid off Middlebrook he was not aware of any such activity by Middlebrook and, in answer to a leading question of whether the decision to lay off Middlebrook was "strictly the result of interpretation and application of the collective-bargaining agreement" responded, "Yes, it was." (1:251.)

Saari did not testify. Jackson testified that nothing was said in the meeting with Rhodes that Middlebrook had been organizing for the Teamsters. Rhodes confirms this, although his first answer is that nothing was said "to the best of my knowledge." (1:230, 257.) According to Wright, he was not told of Middlebrook's organizing activities until he arrived at Little Rock on 5 November and the employees there informed him (3:287–288, 295, 301).

Chandler testified that he had no role in Middlebrook's layoff, was not consulted about it, and made no recommendation concerning Middlebrook's layoff (1:29, 33, 43, 58). According to Chandler, when Penfield called him on 31 October he made no reference to Middlebrook, and as of Middlebrook's layoff Chandler had no knowledge that Middlebrook was involved in union organizing activities (1:27, 42, 45). Before that layoff, Chandler testified, he had no discussion with Rhodes that Middlebrook was involved in union activities (1:45).

Penfield's professed unawareness of any union activities has been mentioned (1:62–63). He likewise testified that he played no part in the decision to lay off Middlebrook from the Little Rock position, and merely served to deliver the layoff message from Rhodes (2:303). Before that time, Penfield testified, he had not discussed Middlebrook's union activities with Rhodes or any other company official because he was not aware of such activity (2:303, 304, 305).

Although Jackson testified that, as of the 4 November meeting with Rhodes, he was aware only of two senior employees (Walker and Sharp) being skipped (2:277), Rhodes testified as if he, on 4 November, became aware that a total of four had been skipped (1:236, 239). Indeed, Rhodes apparently was aware of all four in mid-October, for that was the reason he assertedly consulted Chandler in mid-October before awarding the run to Middlebrook (1:225–226).

Rhodes identified them from the 14 January seniority list (R. Exh. 6 at 12) as all being on layoff at the relevant time (1:225–226). I list the names below. Their positions on the seniority list (for line drivers) appear among the 161 names (my count) on the list as follows. Because Spruill also figures later in the testimony I show him also.

Name	*Seniority Date*	*Location*	*Position*
Dennis L. Spruill	11-5-84	Dallas	141
Edward J. Blaschke	3-11-85	Houston	142
Joe A. Johnson	3-11-85	Houston	143
William J. Walker	3-11-85	Houston	144
Robert B. Sharp	3-11-85	Houston	145
Perry W. Middlebrook	4-22-85	Fort Worth	146

c. *Respondent's basis for the layoff*

As earlier noted, Rhodes testified that he based his decision to lay off Middlebrook strictly on his interpretation (shared by the UTE) and application of the CBA (1:251). According to Rhodes, revoking the assignment earlier made to Middlebrook had the effect of protecting seniority rights (1:238).

Because the arguments expressed by the UTE, and particularly by Wright, to Rhodes on 4 November persuaded Rhodes, I shall cover the essence of Wright's description of his presentation. Wright contended that Respondent's assignment of the Little Rock-Memphis run to Middlebrook violated the seniority concept set forth in article 13, section 4, of the CBA (1:273, 275). The first paragraph of section 1 is the one in issue. As corrected by Wright at the hearing, that paragraph reads (R. Exh. 3 at 30):

> *Section 4.* The rights of seniority shall be recognized in all seniority groups or classifications with respect to runs or job assignments, and in all cases of reduction of forces or recalls to service Layoffs will be made in seniority order at each terminal affected provided bids are not received from a senior laid-off employee from another terminal. The exception to this is outlined in Article 13, Section 5 (System wide bid time).

As the foregoing appears in the printed booklet, the first two sentences above appear as one sentence, for there is no period between "service" and "Layoffs." Wright testified that the absence of a period was an error (2:273-274).

When Wright and Saari complained to Rhodes that the Middlebrook assignment violated the fundamental concept of seniority written into the contract, Rhodes asked how he could get someone else to take the run when only Middlebrook had bid on it (1:255). Wright responded (2:276-280, 286-287), and Rhodes concurred (1:255-257), that Red Arrow had the contractual right under article 53, section 2(d) and section 4 (clarifications), to assign unassigned drivers, in reverse seniority order, to any run on which no bids are received (R. Exh. 3 at 118, 123).

If there are no unassigned drivers, Respondent then could turn to drivers on layoff, recall the most senior, and assign him to the Little Rock-Memphis run. According to both Rhodes (1:241) and Wright (2:278-280), both Respondent and the UTE have always interpreted article 53, section 4 (R. Exh. 3 at 123) as effecting an automatic termination of any driver refusing to accept an assignment. In other words, Rhodes testified, a driver has no choice once an assignment is made (1:241).

Wright urged Rhodes to use these provisions to *force* a driver, through the seniority system, to take the Little Rock-Memphis run (2:276, 287). Rhodes confirms that Wright proposed that Middlebrook be returned to layoff status and the other sections used to force a driver to take the Little Rock-Memphis run (1:229, 255). As we have seen, Rhodes, acting to implement the conclusions he reached with Wright and Saari on 4 November, the very next day sent a computer message to Middlebrook notifying him he was laid off effective 9 November. Rather than informing Middlebrook his earlier assignment had been made in violation of seniority, Rhodes used some of the language of article 66 which covers layoffs "due to slack business or insufficient work."

Wright describes Middlebrook's October bid as "illegal" (2:276). He testified that it is not proper for an employee on layoff, junior to one or more other employees on layoff, to bid for and receive a posted position (2:284). By contrast, the senior laid-off employee may bid for a new position that is posted (2:284). The later statement clearly complies with article 13, section 5 of the CBA which provides for just that. Thus, the terse rule Supervisor Ellis expressed to Middlebrook on Saturday, 8 November, is misleading.

The pertinent clause in article 13, section 5, reads (R. Exh. 3 at 31): "Employees on layoff may, in addition to bidding on bulletined positions, express a preference to remain on layoff at their home terminal."

No provision in the contract states that Respondent is prohibited from accepting a bid from a junior driver on layoff, and assigning a posted run to that junior driver, when there are senior drivers on layoff who have not bid. Wright testified, however, that "several years ago" (predating the current contract, presumably) some city employees were laid off. (Wright did not specify the city.) The senior employees were able to find jobs with other employers during their layoff from Red Arrow. Some of the junior employees were able to work a few hours a day at the Red Arrow terminal. When some permanent jobs were posted for bid, the junior employees bid because they had seen the posting. The senior employees apparently were unaware of the posting. Wright testified that the junior employees were not permitted to get the positions and that Red Arrow had to recall the senior employees (2:284).

By contrast, Wright concedes that UTE President Jeff Saari has told him that Saari himself, in 1974, was recalled from layoff (2:285). And recall Middlebrook's testimony that Saari, in September, assured Middlebrook he could bid from layoff on the Little Rock-Memphis run because he had done so in 1974 some 30 days before Robert Rancher, a senior employee, was recalled from layoff (1:86, 140).

Thus, the evidence as to past practice is limited and conflicting. Although the earlier events occurred under a prior CBA there is no evidence that the relevant language of the early contract was different from that of the current CBA on this point. Neither side objected to the evidence offered by the other on this issue (such as to possible hearsay), and the evidence is part of the record. Even so, I note that the evidence is not well developed. No documentary records were offered, and neither was the language from the earlier contract, In any event, neither party knew of a past practice example which had occurred during the term of the current CBA.

After Middlebrook was notified of his layoff, Respondent on 6 November reposted ("bulletined") the Little Rock-Memphis run for bidding (G.C. Exh. 3d; 1:233, Rhodes). Again Middlebrook bid, and again he was the only driver who did so (1:233-234). Treating Middlebrook's bid as invalid, Respondent, on 14 November, assigned the run to Dennis Spruill effective 15 November because Spruill was the least senior unassigned driver (G.C. Exh. 3e; 1:233-235).

With four drivers senior to Middlebrook on layoff status from their line driver positions, Rhodes testified he felt he would violate the seniority rights of the four if he assigned the run to Middlebrook (1:236). Asked how he would be violating the seniority rights of the four when none had submitted a bid, Rhodes testified that under the contract an employee who is laid off for a period of 9 months forfeits all seniority rights (1:237-238). Wright also relies on this provision (2:286-283). The relevant contract section (from art. 13, Seniority) reads:

> *Section 5.* Employees laid off due to a reduction in forces, if not recalled to service within nine (9)

> months and not having performed service with their COMPANY and will forfeit all seniority rights.

But it is undisputed that the four senior employees who did not bid (Blaschke, Johnson, Walker, and Sharp) had bumped back and were working in the shop at Respondent's Houston terminal while on layoff from their line driver classifications (1:129, 136; 2:290, 297).

It is theoretically possible that one or more of the four senior Houston employees orally grieved to his supervisor, in the presence of a union representative as the contract specifies (R. Exh. 3 at 17) in article 8, section 4, step 1 (2:290). Wright does not know whether that procedure was followed. He testified that UTE President Saari received a call from Walker and Sharp in Houston complaining about the October assignment to Middlebrook and calling for the error to be corrected (2:268, 287).[7] Saari apparently told the two that the UTE would get the matter resolved (2:287). In any event, Wright testified that neither Walker nor Sharp (nor either of the other two) filed a written grievance (2:287), and Rhodes testified that he never received a grievance on the matter (1:245).

As I have described, Line Haul Manager Rhodes and UTE Representative Wright deny there was any discussion at the 4 November meeting in Rhodes' office of Middlebrook's organizing on behalf of the Teamsters. They also testified that as of their 4 November meeting in Dallas they knew nothing of Middlebrook's union activities.

Before resolving the issue of knowledge, I need to summarize some of the evidence also relating to driver Dennis Spruill. A portion of Spruill's testimony bears on the question of Respondent's knowledge as to Middlebrook.

d. *Dennis Spruill's testimony bearing on the question of knowledge*

Dennis Spruill testified that he was hired 1 October 1984 (1:180). As previously noted, the seniority list discloses the date to be a month later on 5 November.

Spruill testified that he was informed on "the 24th" (of October 1986, presumably) that he was being bumped effective "the 27th" from the Oklahoma City terminal (1:180). That left him in the unassigned driver status. No month or year is given for his bumping and the full, correct date does not appear elsewhere in the record. No documentary evidence was introduced covering the point. October 27, 1986, was a Monday. According to Spruill, on "the 27th" he was in the Dallas terminal checking the seniority roster to see where he might be able to get an assignment. He observed that only Middlebrook, who had the Little Rock-Memphis assignment, had less seniority. Supervisor Claudie Marsh told Spruill that he could not bump Middlebrook because the Little Rock terminal was supposed to be negotiating a deal whereby the Little Rock terminal would change unions and go with the Teamsters (1:180–181).

The testimony by Spruill concerning Marsh's remark about the Teamsters and the Little Rock terminal is significant. If Supervisor Marsh in fact said what Spruill attributes to him, then it adds some force to the General Counsel's contention that Vice President Chandler gave more importance to Penfield's call of 31 October than Chandler would have us believe. There is, however, a discrepancy in the dates in that Spruill dates Marsh's comment 4 days before B. J. Alexander signed the Little Rock employees.

On Thursday of the same week (30 October, presumably) Spruill again was in the Dallas terminal. Supervisor Steve Ellis asked why Spruill did not bump Middlebrook. Because, answered Spruill, Supervisor Marsh had said he could not do so. Ellis assured Spruill he could do so because Middlebrook was still an employee of Red Arrow. Spruill, however, decided not to bump Middlebrook and thereafter Spruill continued in his unassigned status. The following week (beginning Monday, 3 November) Spruill remained off for vacation. Although he was on vacation, Spruill was called to take a run (a single trip, apparently) to Jackson (state not given). The week following that (presumably beginning 10 November) he received no notice, sat at home all week waiting for a call, and did not check a bulletin board 1:181, 187).

On Sunday, 16 November, Supervisor Steve Ellis called Spruill at 4 p.m. and asked if Spruill was going to cover the Little Rock-Memphis run scheduled to leave Little Rock in 2 hours. Spruill was at his home in Irving, near Dallas (1:181, 182). As it happens, on Friday, 14 November, Respondent had, posted an assignment of Spruill to the Little Rock-Memphis run (effective Saturday, 15 November (G.C. Exh. 3e; 1:181, 185, 187). Of course, Spruill was unable to accept the assignment and this led to his separation from employment. I discuss later Spruill's separation from employment. Before passing on Spruill's testimony about Marsh's remark regarding the Teamsters, I should observe that a portion of Wright's testimony could be construed as suggesting that Spruill was laid off automatically on the sixth day after he was bumped.

Respondent points (Br. at 49) to Wright's testimony that an unassigned driver has only 5 days to exercise his right to bump a less senior driver. If he fails to exercise his seniority right to bump, he is laid off (2:277). Presumably Wright was referring to the following two paragraphs of article 53, Bulletins and Assignments, section 2 (R. Exh. 3 at 118):

> A senior employee has the right to bump a junior employee whenever he loses his run through no fault of his own provided these rights are exercised within five (5) days, excluding Saturdays, Sundays, and holidays, of the time he loses his assigned run.
>
> If a man has no seniority, or is bumped, or loses his run through no fault of his own, he will be allowed to run off the Pool Board in any terminal where a vacancy exists and is in the process of being bid in. If no vacancy exists, he will be placed on layoff status and used as outlined in Article 66.

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[7] Over the General Counsel's hearsay objection, I received Wright's description for the limited purpose offered—to show course of events, the basis for the action the UTE thereafter took (2:268–269).

Wright's description is misleading, for unassigned drivers are not automatically laid off if they do not exercise their bumping rights within 5 days. Under article 53, sections 2 and 4, bumped drivers become relief drivers who make runs from the pool board in any terminal where there is a vacancy on the pool board open for bid. If no vacancy exists, and only then, a bumped driver is laid off (R. Exh. 3 at 118-119, 123).

We still are left with the discrepancy in dates. A discrepancy exists, in my opinion, because it is unlikely there was talk at Red Arrow in Dallas or San Antonio about the Teamsters before B. J. Alexander signed the Little Rock drivers on 31 October (a Friday) and Penfield, that same evening, telephonically reported the card signing to Vice President Chandler.

Several possibilities exist. First, Spruill's account is false either because he incorrectly thought Ellis made the remark about the Teamsters or because Spruill is lying. If I credit Spruill as to the remark, then I must find Spruill off on his dates. The latter seems possible since the seniority list shows that Spruill recalled his hiring date as being a month before it actually was. Perhaps Spruill, in a similar fashion, placed his conversation with Marsh as being a week earlier than it actually was (assuming he is correct regarding the date he was bumped). That would Place Spruill in the terminal on Monday, 3 November. But that is the week he set aside for vacation even though he did accept a trip that week to a city named Jackson.

Spruill testified in a persuasive fashion. Crediting Spruill, I find that Marsh remarked about the Teamsters as Spruill described. Because of the uncertainty of the timeframe, however, I decline to attach any weight to the evidence.

4. Credibility resolved and conclusions reached

a. *Some evidentiary and procedural rules*

To establish a prima facie case that Respondent unlawfully laid off Middlebrook, the General Counsel must show both knowledge (of Middlebrook's activity on behalf of the Teamsters) and motivation (that the intent to lay him off because of those union activities was a moving factor in the layoff decision).

As I discuss the evidence and resolve credibility, it will be well to keep in mind that these preliminary findings eventually must satisfy certain evidentiary and procedural rules bearing on the question of whether the General Counsel carried the Government's burden of establishing a prima facie case.

The first rule is an evidentiary one: Disbelief of a negative (a denial does not establish a positive. That is, the General Counsel must carry the Government's burden of proof as to knowledge (an element of the General Counsel's prima facie case) with affirmative evidence. Success in persuading an administrative law judge to disbelieve the adversary's denial and to find the opposite to be true does not equal the necessary affirmative evidence. *Garrett Flexible Products*, 270 NLRB 1147, 1148 (1984); *McCormick & Co.*, 254 NLRB 922 (1981); *Council of Bagel & Bialy Bakeries*, 175 NLRB 901, 903 (1969); *Roper Corp. v. NLRB*, 712 F.2d 306, 310, (7th Cir. 1983).

Quoting from an earlier case, the court in *Roper* explained that the reason for the rule is clear, for if the rule were otherwise "a case could be made for any proposition in the world by the simple process of calling one's adversary and arguing to the jury that he was not to be believed." *Roper*, id.

The opinions in *Dyer v. MacDougall*, 201 F.2d 265 (2d Cir. 1952) (majority opinion by Judge Learned Hand; concurring opinion by Judge Jerome Frank) apparently suggest that the rule does not apply to bench trials or, if so, not invariably. Judge Frank expressly stated he opposed any such invariable rule. Judge Frank would allow a plaintiff to win based solely on disbelief of the defendant when otherwise the plaintiff would suffer a "grave injustice." 201 F.2d at 272. If the Board views the rule as being something less than absolute, however, it has not said so.

Second, the Board also has enunciated a related procedural rule regarding the General Counsel's burden to establish a prima facie case in motivation cases. *Wright Line*, 251 NLRB 1083, 1089 (1980). The sufficiency of the General Counsel's prima facie case is tested as of the close of the General Counsel's case-in-chief. *Esco Elevators*, 271 NLRB 1262, 1268 (1984); *Hillside Bus Corp.*, 262 NLRB 1254 (1982).

Thus, even though a respondent proceeds with its own case-in-chief (usually after its motion to dismiss has been overruled), the Government's prima facie case must appear in the evidence it adduced during the General Counsel's case-in-chief. The General Counsel cannot reach into the Respondent's case-in-chief and rely on evidence adduced there, even during cross-examination, to supply one or more vital elements of the Government's prima facie case.[8] By proceeding with its defense, a respondent does not waive this requirement.[9]

A different result prevails in Federal court trials of discrimination cases. When a defendant there elects to proceed, the trier of fact must consider all the evidence in rendering a decision. *Postal Service Board of Governors v. Aikens*, 460 U.S. 711, 31 FEP Cases 609 (1983). The Board has not indicated whether it views *Aikens* as applying to unfair labor practice trials under the Act.

When the General Counsel rested the Government's case-in-chief here, Red Arrow moved for dismissal on the ground the General Counsel had failed to establish, (1) knowledge as to Middlebrook, a vital element in the Government's prima facie case, and (2) a showing of protected conduct by Spruill. I denied the motion and Respondent elected to proceed with its evidence (1:193-

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[8] Under Board law in motivation cases, therefore, admissions made during the Respondent's case-in-chief are unavailable to assist the General Counsel in establishing a prima facie case. Of course, if the General Counsel's evidence establishes a prima facie case, then Respondent's admissions during its case-in-chief are activated and reinforce the Government's case.

[9] In nonmotivation cases resolution of whether a respondent has waived its right to insist that the General Counsel establish a prima facie case may depend on whether the respondent moved to dismiss the complaint when the General Counsel rests at the close of the Government's case-in-chief. Under Sec. 102.41 of the Board's Rules and Regulations, a respondent does not waive its objections by proceeding.

215). By electing to proceed with its own case-in-chief, Red Arrow did not waive its motion to dismiss.

In short, in assessing whether the General Counsel established a prima facie case here, I must view the Government's evidence in isolation, apart from Red Arrow's proffered defense. *Esco Elevators* and *Hillside Bus*, supra. Even though the General Counsel, under Federal Rules of Evidence 611(c), called adverse party witnesses as part of the Government's case-in-chief here, and even though I disbelieve them and find the truth to be that which they deny, my discrediting of them and finding the opposite to be true does not qualify as the affirmative evidence the General Counsel must adduce in order to carry the Government's burden of establishing a prima facie case by a preponderance of the evidence. *Roper*, supra.

Of course, distinguish an admission by a 611(c) witness from an administrative law judge's disbelief of a denial by such witness. An admission is positive evidence, but disbelief of a negative, even when the opposite is found to be true, still leaves a negative. Finding the opposite of a respondent's denial to be true means simply that the administrative law judge credits the Government's affirmative (positive) evidence and inferences reasonably drawn from such evidence.

b. *Credibility findings and preliminary conclusions*

(1) Knowledge

First, Perry W. Middlebrook, B. J. Alexander, and Roy Jackson testified persuasively, and I credit them. In contrast, Vice President Joseph Chandler, Little Rock Terminal Manager Alan Penfield, Line Haul Manager Michael D. Rhodes, and UTE Business Representative Larry D. Wright testified in an unpersuasive fashion and I do not credit any of the four on disputed matters.

The General Counsel's direct evidence of knowledge by Respondent of Middlebrook's link to the Teamsters, while not strong, is established. When Penfield observed his drivers signing cards for B. J. Alexander, he also, I find, saw Middlebrook standing there with them. That evening Penfield, I find, reported his observations—including that of Middlebrook's presence with the group—to Vice President Chandler.

As reported by Penfield through Middlebrook, Chandler "hit the ceiling." Chandler's agitation was caused, I find, not by any irritation with Penfield's timing or persistence in reporting, but with the facts Penfield reported. That does not mean Chandler's ire necessarily focused on Middlebrook.

Also on 31 October, however, Penfield instructed city driver Roy Jackson not to engage in union activities on "company time." On the next business day, Monday, 3 November, Penfield instructed all his city drivers, plus Middlebrook, that they were not to conduct "union business" on company time.

Although the foregoing falls short of indicating that Penfield viewed Middlebrook as having participated in the organizing, Respondent's position letter by 25 February 1987, quoted earlier, states differently. Chandler, as previously mentioned, disavows that portion of the position letter. I do not credit Chandler.

Observing each of Respondent's witnesses testify,[10] I was struck by the untruthfulness I saw in their demeanor. Judge Joseph A. Wapner of television's *The People's Court* describes it this way in an interview given to Michael Ryan which appears in the 5 July 1987 issue of Parade Magazine at 8, 9, *They Tell It To This Judge On TV*:

> What I like about running a court is seeing people, analyzing them to see if they're telling the truth, if they're in this for greed or have an honest claim. Sometimes you have documentary proof and prior statements. Sometimes it gets down to a gut feeling; you look at the demeanor of a person. Sometimes you have to distinguish between people who are nervous because they are in court and people who are nervous because they are lying. Sometimes you tell by looking in their eyes.

I strongly disbelieve Respondent's witnesses, and I find the truth to be that which they deny. Penfield knew. So did the others. But my finding of knowledge does not rest on my disbelief of Respondent's witnesses. First, there is Chandler's "hit the ceiling" reaction on receiving Penfield's report—a report which included Middlebrook's name. Second, there is Respondent's 25 February 1987 admission that Middlebrook was assisting Alexander with the soliciting on 31 October.

Prima facie, therefore, at least Penfield and Chandler were aware of Middlebrook's involvement in the soliciting of Teamsters cards on 31 October. Aside from the General Counsel's argument that such should suffice to impute knowledge to Respondent, we come now to the point raised by Respondent's counsel (1:194; Br. at 36-41) that Penfield's knowledge, even if established, is not shown to have been communicated to Michael Rhodes, the official who made the decision to lay off Middlebrook. As counsel stated during his argument supporting the motion to dismiss (1:194):

> Now, in this case, the evidence reveals that Terminal Manager Alan Penfield apparently had some knowledge of Mr. Middlebrook's organizing activities, but there is not a scintilla of evidence that this knowledge was communicated to Mr. Rhodes.

First, Rhodes admits hearing about Middlebrook's organizing activities, but he "believes" the report (from someone he no longer recalls) came at a later date (1:230-231, 245, 251). I disbelieve his denial as to the timing, and I find that he knew before he decided to lay off Middlebrook. But how did he learn? That is to say, did he in fact learn? Aside from his admission of knowledge gained later (which I find was gained before Middlebrook's layoff), or imputing Penfield and Chandler's knowledge to Rhodes (as the General Counsel argues should be done, Br. at 19-20), there is no direct evidence showing how Rhodes learned. Of course, showing the "how" is relevant only in determining whether he learned, for if in fact he knew then the question of how he learned is immaterial.

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[10] My reference to "Respondent's witnesses" is a shorthand way of naming Chandler, Penfield, Rhodes, and Wright. Two of them, Chandler and Penfield, were called by the General Counsel during the Government's case-in-chief under Fed. R. Evid. 611(c), and the bulk of their testimony was given at that time.

In accordance with Chandler's testimony that he would consider a call from a union representative demanding recognition as extremely important, and a call that he would report to his superior (2:307), I find that no later than early Monday, 3 November, Chandler relayed Penfield's report to his own superior. Penfield's report, I find, included a conclusion that Middlebrook was assisting the Teamsters representative in organizing.

It requires no stretching of reality to find, as I do, that on 3 November the information Chandler reported to his superior (unidentified in the record) was relayed to Rhodes, the person over Middlebrook and all line drivers.

The General Counsel argues, and Respondent denies, there is ample evidence which circumstantially shows that Rhodes was aware of Middlebrook's activities for the Teamsters when Rhodes decided at the meeting of 4 November to lay off Middlebrook. Discussion of the circumstantial evidence carries us into treatment of the reasons advanced for Middlebrook's layoff on 9 November. However, it is settled that the same set of circumstances may be relied on to support both an inference of knowledge and an inference of discrimination. *Abbey's Transportation Service*, 284 NLRB 696 (1987); *A. J. Ross Logistics*, 283 NLRB 410 (1987).

(2) Motivation

The General Counsel lists several items as demonstrating unlawful motive.

TIMING. Certainly the timing factor is significant if it were not for the matter of the UTE representatives. Saari and Wright protested on behalf of the laid-off employees (of whom Saari assertedly named Walker and Sharp). Rhodes, as I have found, learned on 3 November of Middlebrook's activity at Little Rock on behalf of the Teamsters. A day later, 4 November, Rhodes met with Saari and Wright and jointly decided that Red Arrow had erred by permitting Middlebrook, a laid-off employee, to bid successfully on the Little Rock-Memphis run. Rhodes adopted Wright's suggestions: that Middlebrook's assignment be revoked, Middlebrook returned to layoff, the junior unassigned driver assigned to the run, and, if there were no unassigned drivers, the senior laid-off driver assigned to the run.

Did Walker and Sharp complain to Saari? None of those three testified. Wright dates their call to Saari as occurring, apparently, on Monday, 3 November, and Wright and Saari in turn called Rhodes the same day, setting up their meeting of 4 November (2:267–268, 272, 285). Is it sheer coincidence that Walker and Sharp waited over 2 weeks before calling Saari? If they were "upset" when they called, as Wright testified (2:268),[11] why did they wait over 2 weeks before registering their complaint? The line Marcellus spoke seems apropos: "Something is rotten in the state of Denmark." (Hamlet, I, iv, L. 90.)

In short, I find there was no call from Walker, Sharp, or from any laid-off employee. It never happened. It was a "non-event." Aside from my reliance on Wright's unfavorable demeanor, I find it implausible that Walker and Sharp, emotionally "upset," would wait 2 weeks before calling. I also note that none of the three (counting Saari) testified. As a practical matter it is unlikely either Walker or Sharp would complain. This is so because neither would want to place himself in the potential position of being forced to go to Little Rock—and that could happen if there were no unassigned drivers to take the Little Rock-Memphis run.

It is obvious none of the laid-off drivers wanted the run, and they declined to bid on it the repeated times, beginning in September, that Rhodes had to post it. Moreover, the four drivers senior to Middlebrook on layoff had no concern about the need to work for Red Arrow during the 9 months after their layoff—for they already were working in the shop at Houston! But if Walker and Sharp did not telephone Saari, what prompted Wright and Saari to call Rhodes?

What happened, I find, is that Rhodes (having been informed of events by communications within Respondent's management hierarchy) called Saari or Wright on 3 November and described Penfield's report that the Teamsters, assisted by line driver Middlebrook, had persuaded all the city drivers in Little Rock to sign cards for the Teamsters. Saari and Wright then arranged to meet with Rhodes the following day. Wright also arranged to hold a meeting with the Little Rock employees in Little Rock on 5 November. Middlebrook, of course, was not informed of that meeting even though he is a UTE member.

When Saari and Wright met with Rhodes on 4 November, the three discussed the situation for the express purpose of devising a plan for removing Middlebrook from Little Rock because of his influence with the employees there concerning the Teamsters. Wright suggested the revocation plan, Rhodes adopted it and prepared the layoff message that was sent and delivered to Middlebrook the following day. In short, I find that the three conspired to discriminate against Middlebrook because Middlebrook's efforts to persuade the Little Rock employees to join the Teamsters would create a headache for both Respondent and the UTE.

Respondent asserts that the conspiracy angle should carry no weight because the General Counsel did not issue a complaint against the UTE (Br. at 40). Why the General Counsel did not do so is not a matter I need resolve. So far as the record reflects, no charge was filed against the UTE and, of course, a complaint must be based on a charge.

Animus. The General Counsel also argues animus by pointing to Chandler's "hit the ceiling" reaction to the Halloween report from Penfield, plus the promulgation of an allegedly unlawful no-solicitation rule, inconsistencies in Chandler's testimony, and pretextual and shifting defenses. (Br. at 20.) I discuss the no-solicitation rule in a later section.

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[11] The evidence was offered and received for the course of events and not for the truth. In the context of this analysis, however, Wright's assertion is part of the evidence to be reviewed for the purpose of resolving credibility.

Contending there is no showing of animus here, Respondent argues that it was unconcerned by the fact the Little Rock employees had signed Teamsters cards (Br. at 41–42). This contention is based on its belief that the Little Rock employees were covered by the UTE contract because it has been the practice of the parties, by their interpretation of the recognition clause of the CBA, to treat new terminals as accretions to the recognized bargaining unit. Respondent, through its attorneys, expressed this position in its letter of 12 November (R. Exh. 7) denying the Teamsters' demand for recognition, and Chandler expressed it at the hearing when he testified that he was unconcerned about Penfield's report of card signing at Little Rock because of the Board's contract bar doctrine. A "non-event" Chandler described the card signing (1:27, 43).

I need not explore the parties' legal debate over whether the Little Rock employees may be considered an accretion to the contractually established bargaining unit. That exercise is unnecessary for the simple reason I do not believe Chandler. As mentioned earlier, I find that Chandler was upset about the contents of Penfield's report. Even without speculating on Chandler's reasons, the signing by all employees undeniably meant that Respondent was faced with a problem, even though it might be one on which Respondent ultimately would prevail with its contract-bar argument. The problem was twofold. First, that all employees had signed meant the Teamsters would demand recognition, Respondent would have to respond to that, and possibly there would have to be litigation over it. Second, it meant a disruption, of unknown duration, of its apparently stable relationship with the UTE as to the Little Rock terminal. In short, the news Penfield conveyed to Chandler was not good, and it upset Chandler.

I find that Chandler viewed the Teamsters, and Middlebrook, as a disruptive influence for Red Arrow at Little Rock. I find that he conveyed all this to his superior (unidentified in the record) and that Respondent, through Rhodes, acted on this concern. Thus, animus is shown.

Shifting reasons. The General Counsel's shifting reasons argument is this. Respondent's termination notice of "business conditions" is an economic ground, but at the hearing Respondent advanced its assignment-by-mistake argument.

Responding to this in its 25 June 1987 reply brief, Respondent argues it has "never contended that Middlebrook's layoff was due to economic conditions." Respondent contends Rhodes picked the "business conditions" phrase as being similar to the language in article 66 of the CBA, and that the phrase is similar to the "slack business" or "decline in business" used in prior layoff notices (G.C. Exhs. 14, 17) to Middlebrook himself. The General Counsel points to the very same evidence in support of the Government's argument (Br. at 23).

Respondent's reply brief argument overlooks Rhodes' testimony (unsupported by any record evidence) the "workload" dictated that he lay off one driver (1:240). Indeed, in its posthearing brief Respondent points to this testimony of Rhodes in arguing that if Middlebrook had not been laid off then "Respondent would have been required to lay off one additional man based on workload requirements" (Br. at 45). But Respondent switches again in light of Supervisor Steve Ellis's statement to Middlebrook when Middlebrook stopped in Dallas en route to south Texas after his layoff (1:115): "While you're on layoff, you can't bid." Respondent argues that Ellis' statement gave Middlebrook the reason he had been laid off (Reply Br. at 2).

Although Rhodes' use of "business conditions" connotes an economic basis, as the General Counsel argues, I find that was not Respondent's intention. Recall that Rhodes' decision to revoke Middlebrook's assignment was, as I have found, the result of the 4 November conspiracy by Rhodes, Wright, and Saari to deprive Middlebrook of his statutory rights in order to get him out of Little Rock. No economic ground was needed for this. Instead, the contract could be interpreted in a way that would require the assignment revocation in the name of honoring the contractual principle of seniority.

Had Ellis been dictating the layoff notice to Middlebrook, perhaps the notice would have read differently. Rhodes, I find, chose the "business conditions" phrase not only because of its similarity to the article 66 language, but also because it is ambiguous enough to cover the contractual basis Respondent had jointly devised with the UTE. Rhodes gave unsupported testimony of a (business) need to lay off one driver. Rhodes testified with an unfavorable demeanor and I do not credit him.

Respondent appears to have shifted in relation to who initiated the contact between Rhodes and the UTE. In its 25 February 1987 position letter to NLRB Region 26, Respondent wrote that, shortly after the assignment to Middlebrook, Rhodes met with "UTE representatives and expressed his concern that the parties had violated the seniority provisions of the contract by accepting a bid from a less senior laid off employees." At this point (G.C. Exh. 4 at 10), Respondent inserts its footnote 6 reading:

> What called this to Mr. Rhodes attention was the fact that when Middlebrook was recalled, the Respondent, because of lack of available jobs would have been required to lay off one additional unassigned driver. The result would have been this individual, in addition to the three more senior employees already on layoff, each having more seniority than Middlebrook and being laid off while Middlebrook had an assigned position.

Respondent's February 1987 position letter implies that Rhodes initiated the contact with the UTE because Rhodes recognized, when Middlebrook was recalled, that the recall would overstaff the drivers by one. This supposed overstaffing attracted Rhodes' attention to Middlebrook's situation (G.C. Exh. 4 at 10 fn. 6). At the hearing Rhodes does not expressly state that the UTE initiated the contact, but he certainly implies the UTE did so when he testified that Wright asked him to explain how Middlebrook could be holding a bid position with senior drivers on layoff (1:228). Wright, called as a witness by Respondent, contends that it was he and Saari who called Rhodes (2:271–272, 285–286). At page 37 of its posthearing brief, Respondent acknowledges that the UTE initiated the contact.

Aside from the matter of Respondent's shifting positions, Rhodes' testimony, and Respondent's argument about a business need to lay off one driver is unpersuasive. Presumably the business need to lay off a driver did not exist in mid-October when Respondent posted the Little Rock-Memphis run for bid and awarded it to Middlebrook. Apparently the "need" developed after Middlebrook began working the run on 19 October.

Yet in their testimony about their 4 November meeting in Dallas, neither Rhodes nor Wright describes any mention of a business need to lay off one driver in Red Arrow's system. No business records or other evidence was offered to support Rhodes assertion of a "workload" need to lay off one driver. The "need" seems to have conveniently arisen after Penfield's Halloween report to Chandler.

As a witness before me, Rhodes testified in an incredible fashion and I do not credit him. Finding the business need to lay off one driver to be a hoax, I infer that Respondent chose to conceal an unlawful motive. *Shattuck Denn Mining Corp. v. NLRB*, 362 F.2d 466, 470 (9th Cir. 1966).

(3) Contract interpretations

Before passing to other matters, I must discuss the parties' differing interpretations of article 13, section 5, of the CBA. The General Counsel argues that language there authorizes laid-off employees to bid on bulletined (posted) positions (Br. at 23). Respondent describes that interpretation as "the General Counsel's most glaring misconstruction of the contract between the parties." (Reply Br. at 3.) Respondent contends that the section pertains to the occasion when there is systemwide bidding. To evaluate these positions, section 5 must be quoted in its entirety (R. Exh. 3 at 30–31):

> ARTICLE 13
>
> SENIORITY
>
> Section 5. Employees laid off due to reduction in forces, if not recalled to service within nine (9) months and not having performed services to the COMPANY will be considered out of service with their COMPANY and will forfeit all seniority rights.
>
> Employees on layoff who fail to bid at system-wide bid time will be considered to have resigned their employment and will forfeit all seniority rights provided they have been properly notified as specified below.
>
> Employees on layoff may, in addition to bidding on bulletined positions, express a preference to remain on layoff at their home terminal. This preference will be expressed, in order, on the bid form at the time of bidding. If these employees are not assigned to more preferred positions, the bids will be set aside and the assignment of these employees will be made in the following manner.
>
> After all other assignments have been made, if open jobs still exist, these positions will be offered to this group in seniority order unless there are more such employees than there are jobs available. If there are more remaining employees than positions available, open jobs will be assigned in the following manner: All remaining employees will resubmit bids. They may express a preference to remain on layoff, however they must bid all open positions. Assignments will be made so that seniority is respected.
>
> Employees who refuse to accept assignment to an open position under the provisions of this section will be considered to have resigned their employment and will forfeit all seniority.

At page 32 of the contract appears two "clarifications" of section 5. The second clarification is the pertinent one, but they both read:

> CLARIFICATIONS
> Article 13, Section 5
>
> Not having performed services to the COMPANY means the last time employee actually punched the time clock.
>
> At system-wide bid time, employees on layoff will be sent a certified letter or handed a letter in the presence of a committeeman notifying them of the system-wide bids, and if such employee on layoff chooses not to exercise his seniority and bid on a job that his seniority will allow him to hold, then he will forfeit all of his seniority rights and be removed from the seniority roster.

The General Counsel's position is (1) the plain and unrestricted language of the third paragraph of article 13, section 5 states that employees may bid on bulletined positions; (2) under article 53, section 2, no distinction is made between employees and laid-off employees when a run is posted for bidding; (3) Chandler, Respondent's vice president of industrial relations, and the person who personally handles Respondent's labor relations (1:24), interpreted the contract as calling for Respondent to assign the run to Middlebrook even though he was on layoff since the drivers senior to him did not bid, and (4) the past practice. As to the past practice, I earlier found the evidence to be limited, conflicting, and of no help.

Respondent's argument is that the third paragraph of section 5 is a continuation of the second paragraph which sets forth procedures for laid-off employees bidding at systemwide bid time. There is no contention by the General Counsel that Middlebrook bid at systemwide bid time. Respondent writes further (Reply Br. at 4):

> It is interesting to note that at the hearing, the General Counsel did not proffer testimony from any witness that Article 13, section 5 stands for the proposition he is now asserting. Respondent did not

offer testimony regarding that provision because it is irrelevant to the instant case.

Apparently because it deemed the language irrelevant, Respondent chose not to have Chandler, its vice president over labor relations, testify concerning his understanding of article 13, section 5. However, the record contains Chandler's interpretation (given before Penfield's Halloween report) by virtue of the testimony by Rhodes concerning his mid-October call to Chandler for Chandler's advice. On that occasion Chandler advised Rhodes that the Little Rock-Memphis assignment would go to Middlebrook because the senior drivers on layoff had not bid.

The General Counsel asked Chandler, while Chandler was testifying as a witness called under Federal Rules of Evidence 611(c), why Middlebrook was laid off. Chandler testified that Middlebrook was laid off when it was determined he had been recalled from layoff in violation of the seniority provisions of the contract. Chandler added that he played no role in the layoff and was not consulted about it (1:28-29, 43). I interpret Chandler's testimony to be his statement of Respondent's reason for Middlebrook's layoff. Chandler was not asked to give his understanding of article 13, section 5, or whether Respondent's reason for the layoff was, in his opinion, required by the CBA. When Chandler testified during Respondent's case-in-chief he was not asked about this subject.

(4) Conclusions

If I found it necessary to make a finding regarding the interpretation of article 13, section 5, I would adopt the General Counsel's reading. I would find that the systemwide bid time provisions of section 5 require a laid off employee to bid at that time, and that, under the third paragraph he may bid at other times. However, as the interpretation Respondent contends for on brief is not facially frivolous, I see no need to make a finding on the matter. This is so because even if Respondent's interpretation is viewed as possible, or even reasonable, I nevertheless find that Respondent devised it here solely for use as a *pretext* to remove Middlebrook from Little Rock in order to chill the organizing effort there by the Teamsters.

Although Wright was successful on 5 November in persuading the Little Rock employees to sign with the UTE, Rhodes, Wright, and Saari did not know in advance that would be the result of Wright's visit there. Nor could they anticipate that such signing would cause the Teamsters to abandon its organizing effort in Little Rock.

The General Counsel established a prima facie case regarding Middlebrook. I further find Respondent's evidence to be either false (such as a business need to lay off one driver) or fashioned as a pretext (such as its interpretation of the CBA) to justify laying off Middlebrook because of his activities for the Teamsters.

In conclusion, I find that Respondent violated Section 8(a)(3) and (1) of the Act when, effective 9 November 1986, it laid off Perry Wayne Middlebrook.

D. *Dennis Spruill Terminated*

1. Facts

On 6 November, after Middlebrook was notified of his layoff, Respondent posted the Little Rock-Memphis run for bidding (G.C. Exh. 3d). The only bid Respondent received was from Middlebrook. Respondent viewed Middlebrook's bid as invalid because the same set of circumstances prevailed which called for his layoff from the posted position (1:233-234, 246, Rhodes).

With no bids received other than Middlebrook's, which Respondent deemed to be invalid, Red Arrow assigned the Little Rock-Memphis run to Dennis Spruill, the junior unassigned driver (1:234-235, 239-240). Spruill had not bid on the position (1:239). Respondent notified Spruill of the assignment by virtue of a 14 November bulletin board announcement reflecting that the assignment was effective Saturday, 15 November (G.C. Exh. 3e). As previously discussed, Rhodes (1:235, 241, 256), Wright (2:278-280, 286-287), and Chandler (1:53) testified that a driver can be required, under article 53, section 4 of the CBA to take an assignment and if he refuses he can be terminated.

Sunday, 16 November, was the day Spruill was to begin the Little Rock-Memphis run (1:185). The 6 November posting sheet explains that the run begins Sunday night at "2300," or 11 p.m., and operates through the following Friday. Spruill testified that no one had called him the preceding week, that he had not checked the bulletin board, and that he had taken a personal trip that same weekend to Oklahoma City (1:181, 183, 187).

At 4 p.m. on Sunday, 16 November, Supervisor Steve Ellis called Spruill and asked him if he was going to cover his run. Sure, answered Spruill, where is it. Ellis said Spruill was scheduled to leave Little Rock at 6 p.m. for a Memphis "flip." Spruill told Ellis to protect his load (have another driver take it) for there was no way he could get from his home in Irving (Dallas) to Little Rock in 2 hours. Ellis told Spruill to call Rhodes the next day (1:182-183, 185, 187).

The following morning, Monday, 17 November, Spruill called Rhodes and reported the foregoing facts. According to Spruill, Rhodes said he would have to discipline him. Spruill replied Rhodes did not have to worry about any discipline, that he would simply resign. Rhodes said all night (1:182-183, 185-186, 187).

Spruill testified that after thinking over the matter the rest of the day he decided against resigning. It was too late that night to notify Rhodes of his change of mind, and Spruill never informed Rhodes thereafter (1:186). Had he not been assigned to the Little Rock-Memphis run, Spruill testified, he would not have resigned (1:187-188).

Rhodes denies there was any discussion of discipline. He testified he instructed Spruill to proceed that day to Little Rock to assume the run, but Spruill said he would quit before he would go to Little Rock. Rhodes asked Spruill to put his resignation in writing and Spruill said he would but never did (1:242, 248).

Not hearing from Spruill, Rhodes sent Spruill the following termination letter dated 19 November (1:242–243; G.C. Exh. 12):

> On Line Notice 58 dated November 14, 1986 you were assigned to run number 716–7161T. This run was assigned based on your failure to exercise a bid and you being the junior unassigned person in the system.
>
> On Sunday, November 16, 1986 you failed to report to pull the run. On Monday, November 17, 1986 you advised me via telephone you were resigning your position at the Red Arrow Freight Lines. To date you have failed to do so.
>
> Based on your actions, I find it necessary to terminate your employment with Red Arrow Freight Lines.

I credit Rhodes over Spruill in this matter. It seems strange that Spruill, if he is credited, apparently made no contact with Respondent's Dallas office during the next 2 or 3 days before he received Respondent's termination notice. Spruill's conduct in failing to call Rhodes, or to go check the bulletin board if he was interested in other runs, is more consistent with the version of Rhodes than with that given by Spruill.

2. Conclusions

Arguing that Middlebrook's layoff had a "domino effect" which resulted in Spruill's termination (1:14, 208), and citing *Howard Johnson Co.*, 209 NLRB 1122 (1974), and the theory of "causally related," the General Counsel contends that Respondent violated Section 8(a)(3) of the Act when it terminated Spruill (Br. at 27–28).

As amended at the hearing (1:8), the complaint alleges that Respondent "caused" Spruill's 19 November termination by laying off Middlebrook and thereafter attempting to force Spruill to drive the Little Rock-Memphis run (G.C. Exh. 15; 2:263–264). The General Counsel's position is that because of the "domino effect" Spruill was constructively discharged (1:203, 211).

Describing the evidence as showing that the Respondent either terminated Spruill or caused his termination, the General Counsel, at the close of the hearing, moved to conform the pleadings (par. 9) to the proof. The General Counsel explained his theory as being either an outright discharge or a constructive discharge. Respondent objected, and I reserved ruling until this decision (2:330–332).

It is arguable the language alleged is broad enough to encompass both theories. Actual discharge appears not only closely connected to the allegation, but integrally related. In any event, the matter of discharge was fully litigated. I grant the General Counsel's motion to conform.

Respondent sees the initial issue as one of causation. Was Spruill's termination caused by Middlebrook's layoff or by Spruill's voluntary decision that he did not want the Little Rock run or his job with Respondent? Spruill's refusal and resignation, Respondent argues, combine to constitute a superseding or intervening cause of Spruill's termination. Respondent describes the General Counsel's "domino effect" theory as "murky reasoning unworthy of credence." (Br. at 50.)

The Board specifies two elements of a constructive discharge. First, the burdens imposed on the employee must cause, and be intended to cause, a change in the employee's working conditions so difficult or unpleasant as to force him to resign. Second, it must be shown that those burdens were imposed because of the employee's union activities. *Crystal Princeton Refining*, 222 NLRB 1068 (1976).

Although one may initially think of the *Crystal Princeton* rule in connection with an employee assigned to perform unusually heavy, dirty, dangerous, or other physically unbearable work, the elements of *Crystal Princeton* are elastic enough to cover a variety of situations. For example, in *Sure-Tan v. NLRB*, 467 U.S. 883 (1984), the Supreme Court upheld the Board's findings that Sure-Tan had violated Section 8(a)(3) of the Act by constructively discharging its undocumented alien employees through reporting them to the Immigration and Naturalization Service in retaliation for their participating in union activities. See *Sure-Tan*, 277 NLRB 302 (1985).

The concept of a constructive discharge also includes an employer's presenting an employee with the "Hobson's choice" of conditioning employment on the employee's abandoning rights guaranteed by the Act. *CER*, 269 NLRB 1070, 1074 (5th Cir. 1984), enfd. 762 F.2d 482 (1985). The Hobson's choice concept goes at least as far back as the early case of *Atlas Mills*, 3 NLRB 10, 17 (1937).

Although the Hobson's choice cases frequently involve a choice between retaining a job with a firm which is converting to nonunion status, or leaving the job in order to remain union,[12] the concept recently was manifested in a mental anguish situation. *Maxi City Deli*, 282 NLRB 742 (1987). In *Maxi City Deli* the Board found a constructive discharge when an employee quit after becoming emotionally distraught when the employer threatened to expose her daughter's abortion if the employee mother did not cease her union activity.

Was Spruill's resignation a constructive discharge? Not in the usual sense. Although Middlebrook gave some testimony that most drivers would find the job assignment a difficult one on which to survive economically, we must recall that Respondent established the run in response to Middlebrook's grievance of September 1986. The UTE supported that grievance. As the record reflects, drivers can be forced to accept job assignments away from their homes. Spruill gave no testimony describing the run or explaining why he may not have wanted it. Thus, the evidence falls short of showing that the job entailed intolerable working conditions.

Was there a Hobson's choice? Again, not in the usual sense. The choice given did not involve relinquishing statutory rights, and there is no showing that the job assignment was intolerable.

As noted earlier, the General Counsel cites and relies, not on the *Crystal Princeton* line of cases, but on *Howard Johnson Co.*, 209 NLRB 1122 (1974). Spruill resigned, but he did so because he was assigned to the Little Rock run which had been taken from Middlebrook. But for Middlebrook's illegal layoff, Respondent would not have assigned Spruill to the Little Rock-Memphis run.

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[12] As in *Watt Electric*, 273 NLRB 655, 659 (1984).

Does Spruill's refusal and resignation, as Respondent argues, constitute a superseding cause? In *Sure-Tan v. NLRB*, supra, the Supreme Court rejected a similar argument. There Sure-Tan argued that it was the employee's status as illegal aliens that was the "proximate cause" of their deportation. The Supreme Court noted the administrative law judge's conclusion that, but for Sure-Tan's letter to the Immigration Service, the discriminatees would have continued to work indefinitely. 467 U.S. at 894-895.

Similarly, it is apparent here that but for Respondent's unlawfully laying off Middlebrook from the Little Rock-Memphis run, Respondent would not have assigned Spruill to that run, and Spruill would not have resigned or, as here, been terminated in the absence of submitting a written resignation. Thus, the General Counsel's "domino" theory of discrimination is established as, in effect, a constructive discharge. Accordingly, I find that Respondent violated Section 8(a)(3) of the Act when it constructively discharged Dennis Spruill on 17 November 1986.

E. *The No-Solicitation/No-Distribution Rules*

1. The allegations

The complaint contains two allegations on the subject of no-solicitation. Because they are related I shall discuss them together.

As amended at the hearing, complaint paragraph 7 reads (G.C. Exh. 15):

> 7.
>
> (a) On or about October 1, 1986, by issuing a company policy manual, Respondent promulgated and since said date has maintained the following rule:
>
>> Solicitation is permitted only when (1) the product or service being sold is directly related to the business activity of the corporation, (2) the solicitation has been approved by the Executive Policy Committee, and (3) the solicitation does not interfere with the work schedule. All solicitation which does not meet all of these requirements is prohibited.
>
> (b) On or about April 20, 1987, by issuing a new company policy, Respondent promulgated and since said date has maintained the following rule:
>
>> The posting of any leaflets, notices, literature, or other material on Company property or bulletin boards without the permission of management is strictly prohibited.

Moments after he rested his case-in-chief, the General Counsel moved to add paragraph 7(b) to the complaint. Respondent objected on the basis the amendment was untimely, but it could point to no practical prejudice such as a need to call a witness not present. Overruling Respondent's objection, I granted the General Counsel's motion to reopen the Government's case and to amend the complaint (1:197-203). *Mercury Marine*, 282 NLRB 794 fn. 2 (1987).

Appearing in complaint paragraph 8, the second allegation reads:

> 8.
>
> (a) In late October 1986 and early November 1986, the exact dates being unknown at this time, by verbal announcement, Respondent promulgated and since said date has maintained the following rule:
>
>> No union talk on company time.
>
> (b) Respondent promulgated and maintained the rule described above in paragraph 8(a) in order to discourage its employees from joining, supporting, or assisting the Union.

2. Discussion

Although literally accurate, the allegations of complaint paragraph 7 tend to mislead. This is so because the company policies were issued to supervision—not posted on a bulletin board for employees to read. Accordingly, I shall dismiss paragraph 7.

Respecting complaint paragraph 8, the evidence has been described earlier. Terminal Manager Penfield does not deny telling city driver Roy Jackson, the evening of 31 October, not to talk about any union activities on company time (1:175). Penfield admits telling his terminal employees, plus Middlebrook, on 3 November that they must not conduct any union business on company time (1:63, 68).

In its 25 February 1987 position letter to NLRB Region 26, Respondent wrote (G.C. Exh. 4 at 12):

> Finally, with respect to the Charging Party's allegations that Terminal Manager Alan Penfield announced, during the first week of November 1986, a rule prohibiting union talk on Company time, the Respondent would submit as Exhibit "4" a policy statement concerning solicitations while on Company time. This policy, effective since October 1, 1986, prohibits all solicitations on Company time and premises that do not meet the three requirements set forth therein. In early November, when Mr. Middlebrook and a Teamster representative began soliciting the pickup and delivery drivers on Company premises and during the employee's working hours Mr. Penfield (in accordance with this policy) informed the employees that there would be no union solicitations allowed on Company time and property. The same rules were in force at the time the UTE representative came to Little Rock to sign up the drivers and, as stated previously, the UTE conducted its membership activities during the employee's off duty hours and away from Company premises.

Penfield's instructions to Jackson and the other employees was overly broad (the distinction between union talk and union business is immaterial here). The reference to "company" time rather than to "working" time is a material distinction. The former term implies all the time an employee is "on the clock" (being paid) which normally includes breaktimes. Because breaktimes are employees' free time, in which they may discuss union activities or solicit their fellow employees to join or support a labor organization, Penfield's instructions violated Section 8(a)(1) of the Act. *Our Way*, 268 NLRB 394 (1983); *Limestone Apparel Corp.*, 255 NLRB 722 fn. 1 (1981).

Citing decisions by the Board,[13] Respondent, however, contends it effectively disavowed Penfield's remarks when it posted the following notice to employees (R. Exh. 1b). The notice is dated "April 20,1987," but Penfield testified that he did not post it at the Little Rock terminal until a day or two later (1:66–67):

> NOTICE TO EMPLOYEES
>
> The National Labor Relations Act gives employees these rights:
>
> To engage in self-organization
> To form, join or help unions
> To bargain collectively through representatives of their own choosing
> To act together for collective bargaining or other mutual aid or protection
> To refuse to do any of these things.
>
> Accordingly, we give you these assurances:
>
> WE WILL NOT do anything that interferes with, restrains or coerces you with respect to these rights.
>
> WE WILL NOT make, announce or enforce any rule which prohibits only union solicitations.
>
> WE WILL NOT issue any rule prohibiting solicitation without clearly telling employees when they may lawfully engage in such activities. All prior rules regarding solicitation are hereby rescinded.
>
> WE WILL NOT in any other manner interfere with, restrain or coerce you in the exercise of rights guaranteed you by Section 7 of the Act.
>
> /s/ Ray Powell
> Ray Powell
> President
>
> This notice will remain posted for 60 consecutive days from the date of posting and must not be altered, defaced, or covered by any other material.

The General Counsel contends the disavowal is untimely under *Passavant* and, in any event, the violation was integrally related to Middlebrook's layoff (Br. at 31). Countering, Respondent argues the notice was timely because Respondent did not have notice its solicitation rules were being questioned until the complaint issued on 6 March 1987 (Reply Br. at 7). Respondent offers no explanation of the further delay of 6 weeks before the posting occurred even if some allowance is made for consultation with counsel. Of course, Respondent's argument in its reply brief overlooks its own position statement, submitted 25 February during the investigation of the charge. The relevant portion of that statement, quoted above, defends Penfield's remarks as being lawful.

I agree that Respondent's attempted repudiation is untimely. Moreover, I find that the notice fails to comply with the *Passavant* rule because it fails to be clear and "specific in nature to the coercive conduct." Penfield told employees they could not "talk" about union activities or engage in union "business" on company time. Rather than repudiating these statements in a manner which would leave employees with the clear understanding that they were free to engage in such conduct, Respondent loaded its notice with ambiguity and confusion about "solicitation." In one paragraph Respondent even implies that it legally may prohibit union solicitation as long as it also prohibits other types of solicitations. The sentence rescinding all prior rules about "solicitation" does not cure these defects. Accordingly, I find that Respondent's 20 April 1987 notice to employees fails to effectively repudiate Penfield's unlawful instructions to employees.

CONCLUSIONS OF LAW

1. Red Arrow Freight Lines, Inc. is an employer within the meaning of Section 2(2), (6), and (7) of the Act.
2. Each of the following is a labor organization within the meaning of Section 2(5) of the Act: (a) International Teamsters, (b) Teamsters Local 878, and (c) the UTE.
3. On 31 October and 3 November 1986 Respondent violated Section 8(a)(1) of the Act when Alan Penfield, the terminal manager of Respondent's Little Rock, Arkansas terminal, instructed employees they were not to talk about union activities or engage in union business on company time.
4. Respondent violated Section 8(a)(3) and (1) of the Act when it laid off line driver Perry Wayne Middlebrook effective 9 November 1986.
5. Respondent violated Section 8(a)(3) and (1) of the Act regarding line driver Dennis Spruill (a) on 14 November 1986 by assigning Spruill to the Little Rock-Memphis run, and (b) on 17 November 1986 by constructively discharging Spruill.
6. Respondent did not violate Section 8(a)(1) of the Act by adopting or maintaining no-solicitation/no-distribution policies which, even if unlawful if applied to employees, were communicated only to supervision.
7. The unfair labor practices found affect commerce within the meaning of Section 2(6) and (7) of the Act.

THE REMEDY

Having found that the Respondent has engaged in certain unfair labor practices, I find it necessary to order it to cease and desist and to take certain affirmative action designed to effectuate the policies of the Act. Respondent must:

(1) Offer Perry Wayne Middlebrook immediate and full reinstatement to his former job of the Little Rock-Memphis run, but specifically to the position he would

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[13] *Broyhill Co.*, 260 NLRB 1366 (1982); *Passavant Memorial Area Hospital*, 237 NLRB 138 (1978).

be holding absent the discrimination against him revoking, if necessary, any conflicting assignments to other drivers or, if that position no longer exists, to a substantially equivalent job, without prejudice to his seniority or any other rights and privileges previously enjoyed.

(2) Offer Dennis Spruill immediate and full reinstatement to his former position of unassigned line driver, but specifically to the position he would be holding absent the discrimination against him revoking, if necessary, any conflicting assignments to other drivers or, if that position no longer exists, to a substantially equivalent position, without prejudice to his seniority or any other rights and privileges previously enjoyed.

(3) Make whole, with interest, Perry Wayne Middlebrook and Dennis Spruill for any loss of earnings and other benefits each may have suffered as a result of Respondent's discrimination against each. Backpay shall be computed in the manner established in *F. W. Woolworth Co.*, 90 NLRB 289 (1950), with interest computed as prescribed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987). See generally *Isis Plumbing Co.*, 138 NLRB 716 (1962).

(4) Expunge from its files any reference to its unlawful 9 November 1986 layoff of Perry Wayne Middlebrook and its 17 November 1986 constructive discharge of Dennis Spruill, and it must notify each in writing that this has been done and that evidence of such discrimination will not be used as a basis for further personnel action against him.

Because Perry Wayne Middlebrook consults Respondent's bulletin board at the McAllen, Texas terminal, and Dennis Spruill does the same at the Dallas, Texas terminal, I shall order Respondent to post the notice to employees at those terminals, plus its San Antonio, Texas general office, as well as its Little Rock, Arkansas location.

[Recommended Order omitted from publication.]

Presbyterian/St. Luke's Medical Center *and* **St. Luke's Federation of Nurses and Health Professionals AFT, CFT, AFL-CIO, Petitioner.** Case 27-RC-5935

June 20, 1988

DECISION ON REVIEW

BY CHAIRMAN STEPHENS AND MEMBERS JOHANSEN AND BABSON

On December 11, 1979, the Regional Director for Region 27 issued a Decision and Direction of Election in this proceeding. He found appropriate for collective bargaining the petitioned-for unit of registered nurses employed by the Employer at St. Luke's Hospital in Denver, Colorado. The Hospital is one of three facilities that comprise the Presbyterian/St. Luke's Medical Center. In accordance with Section 102.67 of the National Labor Relations Board Rules and Regulations, the Employer filed a timely request for review. The Employer contended that the smallest appropriate unit was an all-professional unit, which included the employees at all three of its Denver-area hospitals, i.e., St. Luke's, Presbyterian Hospital in Denver, and Presbyterian Hospital in Aurora. By telegraphic order dated January 8, 1980, the Board denied the Employer's request for review.

An election was held, and the Petitioner was certified as the exclusive bargaining representative for the Employer's registered nurses at the St. Luke's facility on February 24, 1980.[1] Following the Employer's refusal to bargain, the Board found that the Employer had violated Section 8(a)(1) and (5) of the Act, and issued a bargaining order.[2] On July 8, 1981, the United States Court of Appeals for the Tenth Circuit denied enforcement of the Board's Order and remanded the case to the Board for further consideration.[3] On October 9, 1981, the Board accepted the court's decision as the law of the case.

On August 24, 1984, the Board remanded the case to the Regional Director for further consideration consistent with its decision in *St. Francis Hospital*, 271 NLRB 948 (1984) (*St. Francis II*). Pursuant to the remand, and after a hearing at which further evidence was taken, the Regional Director issued a Second Decision and Direction of Election on June 26, 1985. He found that an overall professional unit was the smallest appropriate unit. The unit included all professional employees (except physicians) at all three of the Employer's facilities. The Petitioner requested review of the decision regarding both issues, and the Board granted review on August 27, 1985.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the entire record in this case, including the Employer's brief on review, and has decided to affirm the Regional Director's determinations regarding the issues of unit scope and unit composition for the reasons stated in this decision.

In 1979, St. Luke's Hospital Association, which operated St. Luke's Hospital, and the Presbyterian Medical Center, which operated Presbyterian Hospital in Denver and Presbyterian Hospital in Aurora, merged and became Presbyterian/St. Luke's Medical Center. Presbyterian Hospital is located 10 blocks from St. Luke's in Denver. Presbyterian Hospital in Aurora, an acute-care institution, is located about 12 miles from Denver.

In his Second Decision and Direction of Election, the Regional Director found that since the merger, a number of centralized policies have been implemented and others strengthened. A single board of directors was established with representatives from the former boards of both of the merged companies. Corporate offices are located in a separate building. Corporate officers include three vice presidents and an administrator for each hospital, who report to the president of the Medical Center. The corporate officers are responsible for the overall centralized management of the three facilities, including a centralized accounting system, budgeting and staffing decisions for each hospital, purchasing and distribution of supplies, and employee educational programs. The hospital administrators have no authority to change corporate policies or to deviate from determinations regarding wages, benefits, and staffing.

The Medical Center is surveyed, reviewed, and accredited as a single entity by the Joint Commission on Accreditation of Hospitals. The record shows that the three "campuses" are functionally integrated. The staff physicians have admitting privileges at all three facilities, and it is a common procedure for patients to be transferred among the hospitals for specialized care not available at the admitting hospital.

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[1] An Intervenor on the ballot was the Colorado Nurses' Association, affiliate of the American Nurses' Association. The Intervenor has indicated that it would not participate in an election in an overall professional unit.

[2] Not reported in bound volumes of Board decisions.

[3] Specifically, the court held that the Board's application of the traditional presumption favoring single facility units failed to consider Congress' directive against unit proliferation in the health care industry. The court, therefore, held that in making unit scope determinations in the health care industry, the factors that the Board traditionally considers must be balanced against the public interest in preventing fragmentation. In this regard, the court directed the Board to specify the manner in which its unit determination implements or reflects Congress' admonition that due consideration be given to preventing proliferation. *Presbyterian/St. Luke's Medical Center v. NLRB*, 653 F.2d 450, 455 (10th Cir. 1981). Further, the court found sufficient evidence to sustain the appropriateness of an all professional unit, focusing on the disparity of interests between employee groups which would prohibit or impede fair representation of the employees' interests. Id. at 456.

289 NLRB No. 30

The Employer's human resources department is responsible for all the standardized personnel policies, including a systemwide employee handbook and a supervisor's manual; wage rates and fringe benefits; and disciplinary and grievance procedures. The Employer has uniform qualifications and hiring standards for jobs. Job openings are posted systemwide and seniority is accrued systemwide. A significant number of transfers have occurred since the merger, and employees of one facility have hiring preference at the other two facilities. We note, however, that the hiring of registered nurses continues to be done at each facility, and that the newspaper advertisements for Presbyterian Medical Center designate which campus or campuses have openings.

The record shows that all applicants for professional positions submit identical job applications, have the same orientation course, are subject to the same disciplinary procedure, and have the same grievance program. In addition, all professional employees have identical benefits, including extra vacation days and continuing education days, which are not extended to the nonprofessional employees. The professional employees, including the registered nurses, are among the Employer's highest paid employees (the majority of these employees are in grades 13-17, and the nurse anesthetists and pharmacists are in grade 22).

The registered nurses are the largest group of professional employees and they work 24 hours a day, 7 days a week. The record shows that a number of other professionals, e.g., pharmacists, dieticians, and respiratory therapists, also work the same schedule. All the Employer's professional employees have specialized skills, training, and education which require post-secondary education. Their common educational background (in certain courses of study) provides for some overlap in qualifications, skills, and duties with the other professionals.

The record also shows frequent contact among the registered nurses and other professional employees. The pharmacists (who also have areas of specialization) participate in inservice education programs, have frequent contact with the nurses regarding medication dosages, and may work at permanent pharmacy units which are being set up on the nursing floors (in addition to the central pharmacy facility). The social workers and clinical dieticians spend over half of their time in the patient care units coordinating patient care with the nurses. Further, the Employer's team approach to health care includes a procedure that necessitates daily contact and substantial sharing of information, in addition to "committee" planning by groups of professionals for total patient care.

Regarding contact between the facilities, the Medical Center has a wide variety of specialization, but not all specialities are available at each facility. Therefore, nursing specialists may "float," or perform work at one of the other facilities. Clinical specialists in the Employer's education division work at all three facilities, as do the inservice educators. There is evidence that a few nurses work at two facilities on a regular basis; that nurses who perform the same job may cover at another hospital for a vacationing nurse; and that on low patient-census days, the registered nurses are given the option of taking the day as a cost-containment day without pay, or of working in one of the other facilities, if needed.

The Regional Director concluded that the degree of integration shown among the three facilities is sufficient to negate both the separate identity of the St. Luke's facility and the appropriateness of a unit limited to St. Luke's employees. Further, he concluded that all the professional employees share a community of interest because they have common concerns and are subject to common policies. Thus, applying the standard set forth in *St. Francis Hospital*, supra, he found there are no "sharper than usual differences" between the registered nurses and the Employer's other professional employees, and that the smallest appropriate unit must include all the Employer's professional employees.

With respect to his conclusion that the smallest appropriate unit must include all three of the Employer's facilities, the Regional Director found that the three facilities are located in close proximity; the administration and management are centralized; all personnel and labor relations policies, wages, and benefits are uniform; there is contact and interchange among the facilities as certain nurses and professional employees may "float" among the three, and may cover for one another on the same job at another facility; and jobs are posted and seniority is honored systemwide.[4] Applying the 10th Circuit's decision as the law of the case, we agree with the Regional Director's conclusion that, based on these facts, the multifacility unit is the appropriate bargaining unit in which the election should be held.[5]

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[4] We note that prior to the 1979 merger, the Board directed an election in a two-facility unit of registered nurses at Presbyterian's Denver and Aurora facilities. See *Presbyterian Medical Center*, 218 NLRB 1266 (1975).

We also agree with the Regional Director that applying the disparity-of-interests standard set forth in *St. Francis II* and mandated by outstanding precedent[6] to the facts set forth above, the smallest appropriate unit must include all the Employer's professional employees.

Accordingly, we shall remand this proceeding to the Regional Director in order that he may conduct the election pursuant to his Direction of Election, issued June 26, 1985, except that the payroll period for determining eligibility shall be that ending immediately before the date of issuance of this Decision on Review.

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[5] In making this determination, we have not applied the presumption favoring single facility units in the instant case because of the strictures of the Tenth Circuit's remand. We note, however, that the Board recently reaffirmed the validity of the presumptive appropriateness of a single facility unit in the health care industry in *Manor Healthcare Corp.*, 285 NLRB 224 (1987), a policy to which we adhere. In *Manor*, the Board found that a consideration of the congressional policy against proliferation in this field does not warrant a health care industry exception to the single facility presumption. Rather, the Board stated that the concern against undue proliferation could best be accommodated by retaining the single facility presumption, and "allowing the party opposing such a unit to rebut the presumption by a showing of circumstances that militate against its appropriateness, including an increased risk of work disruption or other adverse consequences . . . ." 285 NLRB supra at 225. We believe this approach accords with, and is not inherently inconsistent with, the Tenth Circuit's direction that traditional factors be balanced against the public interest in preventing fragmentation. Ibid.

[6] *St. Vincent Hospital*, 285 NLRB 311 (1987). See also *North Arundel Hospital Assn.*, 279 NLRB 311 (1986); *Keokuk Area Hospital*, 278 NLRB 242 (1986). As noted in *St. Vincent*, the Board currently is engaged in the process of rulemaking, which is anticipated to reduce the need for lengthy and costly case-by-case adjudication of bargaining unit issues in the health care field; however, the Board is continuing to process cases under existing law until the final rule has been issued.

Rose Printing Company, Inc. *and* **Graphic Communications Union, Local 241-B, Graphic Communications International Union, AFL–CIO, CLC** *and* **George W. Hayson.** Cases 12–CA–11819, 12–CA–11912–3, 12–CA–11958, 12–CA–12033, and 12–CA–12046

June 20, 1988

DECISION AND ORDER

By Chairman Stephens and Members Johansen and Babson

On October 24, 1986, Administrative Law Judge Hutton S. Brandon issued the attached decision. The General Counsel filed exceptions, a supporting brief, and a Motion for Correction of the Decision of the Administrative Law Judge,[1] the Union filed exceptions, and the Respondent filed exceptions and a supporting brief. Thereafter, the General Counsel and the Respondent filed reply briefs.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings,[2] and conclusions[3] as modified and to adopt the recommended Order as modified.[4]

1. The judge concluded, inter alia, that the Respondent's unilateral decision to require its employees to use their accrued vacation time during a forthcoming 5-day 1985 Christmas shutdown period constituted a unilateral change in employees' working conditions in violation of Section 8(a)(5). He also found that by refusing to arbitrate a grievance filed by the Union concerning this compulsory vacation use requirement, the Respondent had breached its duty to bargain. Although we adopt the judge's conclusion and rationale concerning the unilateral change violation, we affirm the finding that the refusal to arbitrate violated Section 8(a)(5) on the basis of the rationale set forth in *Indiana & Michigan Electric Co.*, 284 NLRB 53 (1987). In that decision we held, inter alia, that the respondent's refusal to arbitrate any grievances after the expiration of the collective-bargaining agreement constituted a wholesale repudiation of its obligation to arbitrate in violation of the Act. Under the circumstances in this case, we find that the Respondent's refusal to arbitrate violated the Act. After denying the Union's grievance concerning the compulsory vacation use, the Respondent stated that it would not arbitrate the grievance because the Christmas shutdown was to occur after the contract had expired. In essence, the Respondent maintained that it had no obligation to arbitrate any grievance involving a matter which would occur after the expiration of its contract with the Union. This refusal to arbitrate thus "constituted an unlawful unqualified abandonment because it encompassed not only grievances for which there may have been no postexpiration obligation to arbitrate under Nolde, but also grievances arbitrable under Nolde." *Indiana & Michigan Electric Co.*, supra. See also *Litton Business Systems*, 286 NLRB 817, 818–819 (1987). Accordingly, we conclude that the Respondent's unqualified refusal to arbitrate violated the Act.[5]

289 NLRB No. 31

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[1] In the motion to correct the judge's decision, the General Counsel contends that the judge inadvertently omitted from his Conclusions of Law his finding that the Respondent violated Sec. 8(a)(1) by unlawfully assisting employee Shivar's decertification petition and that the judge inadvertently referred in sec. II,F of his decision to those strikers named in "Appendices A and B" rather than those strikers named in Appendices B and C. We grant the General Counsel's motion to correct the judge's decision and we shall modify the Conclusions of Law accordingly.

We further correct the judge's inadvertent statement in sec. II,A of his decision that employee Hayson circulated a decertification petition among the bindery employees. Hayson circulated such a petition among the maintenance employees. Finally, we correct the judge's erroneous statements in secs. II,A and E, as well as the Conclusions of Law and the remedy sections, of his decision that the strikes in the bindery and maintenance units began on January 22, 1986. The evidence establishes that the Union called a strike in the bindery unit on January 20, 1986, and that the maintenance unit went on strike on January 23, 1986.

[2] The Respondent has excepted to some of the judge' s credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

[3] The judge found that the Respondent did not engage in bad-faith bargaining with the Union concerning a successor contract in the bindery unit and an initial contract in the maintenance unit. No exceptions to these findings were filed.

Contrary to our dissenting colleague, we agree with the judge that the Respondent violated Sec. 8(a)(1) by unlawfully encouraging or assisting employee Shivar in the filing of a decertification petition. We note that Shivar asked Supervisor Capps only how he could get the Union to stop "harassing" him, not how to remove the Union as the employees' collective-bargaining representative. At that point, there is no evidence that Shivar had independently decided to petition to decertify the Union. Rather, it was Supervisor Capps' suggestion that Shivar file a decertification petition that resulted in the circulation of a decertification petition. Consequently, the Respondent in fact instigated the decertification effort and, as that action has a tendency to interfere with employees' exercise of their Sec. 7 rights, it violates Sec. 8(a)(1). The fact that the Respondent's conduct may not have been as active or prolonged as in some of the cases cited by the judge, in our view, does not negate its unlawful nature. Finally, given the circumstances here, including particularly that it was Capps, not Shivar, who raised the idea of the filing of a decertification petition, we cannot attribute the significance which our dissenting colleague does to the mere fact that Shivar approached Capps.

[4] The judge included in his remedial order a visitatorial clause authorizing the Board, for compliance purposes, to obtain discovery from the Respondent under the Federal Rules of Civil Procedure under the supervision of the United States court of appeals enforcing this Order. Under the circumstances of this case, we find it unnecessary to include such a clause. See *Cherokee Marine Terminal*, 287 NLRB 1080 (1988). Accordingly, we shall modify the judge's recommended Order by deleting this provision.

[5] We find it unnecessary to address whether the underlying grievance was arbitrable. As we have adopted the judge's finding that the compul-

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2. Following unsuccessful negotiations to obtain collective-bargaining agreements in the bindery and maintenance units, the Union called a strike in both units. As noted, the record reveals that the bindery unit employees commenced a strike on January 20, 1986,[6] and the maintenance unit began striking on January 23. Although the judge found that these strikes were economic at their inception, he concluded that they both were converted into unfair labor practice strikes on March 5, the date on which the Respondent unlawfully withdrew recognition from the Union in the maintenance unit.[7] He thus determined that all striking employees in the two units had become unfair labor practice strikers as of that date. The Respondent has excepted to the judge's finding that the strike was converted into an unfair labor practice strike, arguing first that the withdrawal of recognition in the maintenance unit was lawful. Alternatively, the Respondent argues that even if the withdrawal of recognition in that unit was unlawful and the strike was converted into an unfair labor practice strike in the maintenance unit, the strike in the bindery unit remained an economic strike. As we have adopted the judge's conclusion that the decertification petition in the maintenance unit was the product of unlawful assistance and therefore have adopted his conclusion that the withdrawal of recognition in that unit was unlawful, we agree with the judge that the strike in the maintenance unit was converted into an unfair labor practice strike by the unlawful withdrawal of recognition. We find merit, however, in the Respondent's exception to the judge's finding that the strike in the bindery unit was thereby also converted into an unfair labor practice strike.

As the judge noted, an economic strike is converted into an unfair labor practice strike when an employer's unfair labor practices aggravate or prolong the strike. It is well settled that the unlawful withdrawal of recognition from a union prolongs the strike because it deprives the employees of their bargaining representative and thereby precludes the possibility of reaching agreement on a contract and impedes the settlement of the strike. See *Ashe Brick Co.*, 280 NLRB 1383, 1391 (1986); *Wilder Construction*, 276 NLRB 977, 982 (1985), enfd. 804 F.2d 1122 (9th Cir. 1986). Accordingly, the Respondent's unlawful withdrawal of recognition from the Union in the maintenance unit converted the strike in that unit into an unfair labor practice strike. Our reasoning requires a different result, however, with respect to the strike in the bindery unit. The judge found, and as noted, we agree, that the decertification petition filed in the bindery unit by employee Rogers was not tainted by unfair labor practices and that the Respondent lawfully withdrew recognition from the Union in that unit on March 4. Consequently, the withdrawal of recognition in that unit was not an unfair labor practice and could not prolong the strike in that unit because the Respondent no longer had any legal obligation to bargain with the Union in that unit. Nor do we accept the argument that the bindery unit employees were sympathy strikers in support of the maintenance unit strikers. The bindery unit employees went on strike before the maintenance unit employees commenced their strike and no evidence was proffered to establish that the bindery unit employees continued their strike because of unfair labor practices committed against the maintenance unit employees. Accordingly, we find that the strike in the bindery unit was not converted into an unfair labor practice strike and that the bindery unit employees remained economic strikers.

3. Having determined that only the strike in the maintenance unit was converted into an unfair labor practice strike, we find that only those strikers in the maintenance unit who were not replaced as of March 5 are entitled to immediate reinstatement with backpay. We shall amend the recommended remedy and Order accordingly. In all other respects, we adopt the judge's findings concerning the Respondent's refusal to reinstate the striking employees.[8]

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sory use of vacation time constituted an unlawful unilateral change and have ordered the Respondent to rescind this action and to restore accrued vacation leave, the grievance has become moot.

[6] All dates are 1986 unless noted otherwise.

[7] In contrast, the judge found the March 4 withdrawal of recognition in the bindery unit to be lawful and we affirm that finding.

[8] The Respondent excepted to the judge's conclusion that employees Brad Bowman, Richard Frauenthal, Lester Posey, W. E. Posey, and Mike Segler did not permanently abandon their employment with the Respondent when they executed statements of resignation. Alternatively, the Respondent argues that even if these employees are eligible for reinstatement, backpay should be tolled as of the date that the resignation statements were executed. We adopt the judge's finding that the five named employees did not permanently abandon their employment. We further find it unnecessary to address the Respondent's alternative argument regarding backpay because the record does not indicate that any of the five are entitled to backpay in any event. As noted above, we have found that only maintenance unit strikers who were not replaced as of March 5 are entitled to immediate reinstatement with backpay. Of the five named employees, however, only Brad Bowman and W. E. Posey were members of the maintenance unit. The record discloses, however, that before both of these strikers executed their resignation statements on February 12, the Respondent informed them that their jobs had been filled and that they would be placed on a preferential hiring list. Thus, both were replaced before the strike was converted into an unfair labor practice strike. Consequently, they are not entitled to backpay but they "shall be placed on a preferential hiring list in accordance with their seniority or other nondiscriminatory practice utilized by the Respondent, and they shall be reinstated before any other persons are hired or on the departure of their preconversion replacements [citations omitted]. *Ashe Brick Co.*, supra at 1384.

AMENDED CONCLUSIONS OF LAW

Substitute the following for the judge's Conclusions of Law 6, 7, 10, and 11.

"6. By announcing about October 16, 1985, and by implementing its decision to require compulsory vacation use by unit employees for the 1985 Christmas shutdown without notice to or bargaining with the Union and by generally repudiating any obligation to arbitrate grievances arising after the expiration of the collective-bargaining agreement in the bindery unit through its refusal to arbitrate a grievance on this action, the Respondent engaged in, and is engaging in, unfair labor practices within the meaning of Section 8(a)(5) and (1) of the Act.

"7. By encouraging and assisting employees employed in its bindery and maintenance units in the circulation of petitions to decertify the Union, the Respondent engaged in, and is engaging in, unfair labor practices within the meaning of Section 8(a)(1) of the Act.

"10. The Respondent's violations of Section 8(a)(5) and (1) of the Act referred to in paragraphs 7, 8, and 9 above converted the economic strike in the maintenance unit which began on January 23, 1986, into an unfair labor practice strike on March 5, 1986.

"11. By refusing to reinstate those strikers listed in Appendix C to the Board's decision who were not replaced as of March 5, 1986, following the unconditional request of the Union on behalf of the striking employees made on May 5, 1986, and by treating such strikers as economic strikers, the Respondent engaged in, and is engaging in, unfair labor practices in violation of Section 8(a)(3) and (1) of the Act."

AMENDED REMEDY

We amend the judge's recommended remedy as follows: Because the employees named in Appendix C to the Board's decision who participated in the economic strike beginning on January 23, 1986, which was converted into an unfair labor practice strike by the Respondent's violation of Section 8(a)(5) of the Act on March 5, 1986, requested unconditional reinstatement on May 5, 1986, the Respondent shall immediately reinstate them to their former or substantially equivalent positions without impairment of their seniority rights and other privileges. In order to make room for them, the Respondent shall dismiss, if necessary, all persons hired on or after March 5, 1986. If after such dismissals there are insufficient positions available for the remaining strikers, any available positions shall be accorded the strikers on a nondiscriminatory basis in accordance with seniority or other neutral criteria. Former strikers named in Appendix B for whom no positions are immediately available shall be placed on a preferential hiring list in accordance with their seniority or other nondiscriminatory basis, and they shall be reinstated before any other persons are hired or on the departure of their replacements.

Further, those former striking employees entitled to immediate reinstatement shall be made whole for any loss of earnings they may have suffered by reason of the Respondent's refusal to reinstate them in accordance with their unconditional request to be reinstated. Backpay shall be computed in the manner prescribed in *F. W. Woolworth Co.*, 90 NLRB 289 (1950), with interest to be computed in the manner prescribed in *New Horizons for the Retarded.*[9]

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge as modified below and orders that the Respondent, Rose Printing Company, Inc., Tallahassee, Florida, its officers, agents, successors, and assigns, shall take the action set forth in the Order as modified.

1. Substitute the following for paragraph 1(c).

"(c) Refusing to bargain with the Union by generally repudiating any obligation to arbitrate grievances arising after the expiration of the bindery collective-bargaining agreement."

2. Substitute the following for paragraph 2(e).

"(e) Immediately and fully reinstate its maintenance unit employees listed in Appendix C who participated in the strike which began on January 23, 1986, and who unconditionally reapplied for reinstatement on May 5, 1986, to their former or substantially equivalent positions, without prejudice to their seniority or other rights and privileges, discharging, if necessary, any replacements hired in their former jobs on or after March 5, 1986. Make whole these employees for any loss of earnings they may have suffered as a result of the discrimination against them in the manner set forth in the 'Amended Remedy' section above. Place the remaining former strikers on a preferential hiring list in accordance with their seniority or other nondiscriminatory basis and offer them employment before any other persons are hired or on the departure of their replacements."

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[9] In accordance with our decision in *New Horizons for the Retarded*, 283 NLRB 1173 (1987), interest on and after January 1, 1987, shall be computed at the "short-term Federal rate" for the underpayment of taxes as set out in the 1986 amendment to 26 U.S.C. § 6621. Interest on amounts accrued prior to January 1, 1987 (the effective date of the 1986 amendment to 26 U.S.C. § 6621), shall be computed in accordance with *Florida Steel Corp.*, 231 NLRB 651 (1977).

3. Substitute the following for paragraph 2(h).

"(h) Notify the Regional Director in writing within 20 days from the date of this Order what steps the Respondent has taken to comply."

4. Substitute the attached appendices for those of the administrative law judge.

CHAIRMAN STEPHENS, dissenting in part.

I would not hold that the Respondent unlawfully encouraged the circulation of a decertification petition in the context of a conversation between employee Shivar and Supervisor Capps. Shivar expressed to Capps his feeling that he was being "harassed" by the Union and asked the supervisor how this could be stopped. Capps replied that he did not know but would find out. Later, Capps suggested to Shivar that Shivar should consider circulating a decertification petition. When he expressed ignorance about how to go about this, Capps replied he would seek additional information. Subsequently, Capps gave Shivar the name and phone number of an attorney to call.

The judge recommends that we find that the supervisor's initial suggestion was unlawful because it "effectively implanted" in the employee's mind the idea that decertification "was the only alternative available for Shivar's concerns." In the judge's view, the supervisor's comment was, in short, "overkill."[1]

I do not agree with the judge that the supervisor's remark had such a mesmerizing effect on the employee's mind as to constitute interference or coercion under Section 8(a)(1). Nor do I think that Capps' comment in any way parallels the Board precedents on which the judge relied.[2] In those cases, the employer's representatives were engaged in an active course of conduct that encouraged and assisted employees in seeking decertification. The vice of such employer activity is that it interferes with employee free choice in the same way that an unlawful promise of benefits or an unlawful interrogation can. In each situation, the employees are expected to respond in a way favorable to the employer. A failure to make the expected response carries the risk of retaliation.

Here, in contrast, the employee approached the supervisor, posing an open-ended question concerning union harassment. Capps' limited response, notwithstanding the fact that it was given at a later time, was not irrelevant to that question and not outside the bounds of reasonableness. Certainly, had Capps approached Shivar and initiated the suggestion of decertification as part of a strategy to undermine the Union, an entirely different situation would have been presented, one which I would have no trouble finding illegal.

APPENDIX A

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

Section 7 of the Act gives employees these rights.

To organize

To form, join, or assist any union

To bargain collectively through representatives of their own choice

To act together for other mutual aid or protection

To choose not to engage in any of these protected concerted activities.

WE WILL NOT refuse to recognize and bargain collectively in good faith with Graphic Communications Union, Local 241-B, Graphic Communications International Union, AFL–CIO, CLC as the exclusive collective-bargaining representative of employees in the following unit:

> All regular and full time maintenance employees, including maintenance mechanics, plant clericals, baler operator and janitor employed at our Tallahassee, Florida facility; excluding all other employees, office clerical employees, bindery and press room employees and operators, professional employees, guards, and supervisors as defined in the Act.

WE WILL NOT unilaterally change the terms and conditions of employment of our employees in the above unit without the consent of the Union or without a valid impasse in bargaining having been reached.

WE WILL NOT refuse to bargain with the Union by generally repudiating any obligation to arbitrate grievances arising after the expiration of the bindery collective-bargaining agreement.

WE WILL NOT unlawfully encourage or assist employees to circulate petitions to decertify the Union.

WE WILL NOT fail and refuse to reinstate unfair labor practice strikers on their unconditional application to return to work.

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[1] Interestingly, the judge finds no problem with Supervisor Capps' followup recommendation of a particular attorney to explore the possibility of decertification because it was no more than a direct response to a request by an employee for information.

[2] *Weisser Optical Co.*, 274 NLRB 961 (1985); *Placke Toyota*, 215 NLRB 395 (1974).

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL recognize and, on request, bargain with the above-named Union as the exclusive representative of employees in the maintenance unit set forth above regarding wages, hours, and other terms and conditions of employment and, if an agreement is reached, reduce it to writing and sign it.

WE WILL withdraw the requirement of compulsory use of accrued vacation leave for the 1985 Christmas shutdown and we will restore employees any loss of accrued vacation they were involuntarily required to take during that shutdown.

WE WILL restore the maintenance unit employees terms and conditions of employment in existence prior to March 5, 1986, and continue them in effect until an agreement on any changes is reached with the Union or a bona fide impasse exists.

WE WILL make employees whole, with interest, for any losses they suffered as a result of the unilateral changes in working conditions in the maintenance unit on and after March 5, 1986.

WE WILL immediately and fully reinstate all of our maintenance unit employees who participated in the strike which began on January 23, 1986, and who were not permanently replaced as of March 5, 1986, to their former jobs or, if those positions no longer exist, to substantially equivalent positions if available, without prejudice to their seniority or other rights and privileges, dismissing, if necessary, any person hired by us on or after March 5, 1986; WE WILL make these employees whole, with interest, for any loss of earnings resulting from the discrimination against them; and we will place any remaining former strikers on a preferential hiring list and offer them reinstatement before any other persons are hired or on the departure of any striker replacements.

ROSE PRINTING COMPANY, INC.

APPENDIX B

Vickie Barineau
Jean Bartlett
Danny Bloom
Brad Bowman
Gloria Brown
Glory Brown
Anna Bryant
Georgia Busbee
Johnny Clark
Tanner Clark
Pat Coriell
Ray DeGagne
Wanda Duncan
Richard Frauenthal
Larry Grantham
Charles Hildebrandt
Carl Hill
Zelma Hill
David Hunt
Annie Kelly
Sammie Keys
Karla LaGasse
Jackie Lane
John McKinnon
Betty Moats
Peggy Nichols
B. J. Oliff
Leila Pollard
Lester Posey
W. E. Posey
W. T. Posey
Gary Powell
Peggy Powers
Mike Segler
George Stephens
Kim Thomas
Mary Thomas
Joseph Toomes
Doug Wommack

APPENDIX C

Robert Avant

Ted Kline

Eduardo Soto and *Peter J. Salm, Esqs.*, for the General Counsel.

Peggy Nichols, of Tallahassee, Florida, for the Charging Party.

James Blue and *Mark Levitt, Esqs. (Hogg, Allen, Ryce, Norton & Blue)*, of Tampa, Florida, for the Respondent.

DECISION

STATEMENT OF THE CASE

HUTTON S. BRANDON, Administrative Law Judge. These cases were tried at Tallahassee, Florida, 7–10 July 1986.[1] The charges were filed by Graphic Communications Union, Local 241-B, Graphic Communication International Union, AFL–CIO, CLC (the Union or Local 241), in Case 12–CA–11819 on 18 November; in Case 12–CA–11912–3 on 18 February (amended 27 March and 17 and 21 April); in Case 12–CA–11958 on 19 March (amended 17 and 21 April); and in Case 12–CA–12033 on 8 May. The charge in Case 12–CA–12046 was filed by George W. Hayson, an individual (Hayson) on 15 May (amended 22 May). On 22 May, the Regional Director for Region 12 of the National Labor Relations Board (the Board), issued an order consolidating cases and a consolidated complaint based on the charges filed by the Union. Subsequently, on 26 June, an order further consolidating cases consolidating Hayson's charges with the earlier union charges for hearing was issued along with amendments to the earlier consolidated complaint. The complaint, as amended, alleges violations of Section 8(a)(1), (3), and (5) of the National Labor Relations Act, as amended (the Act), by Rose Printing Company, Inc. (Respondent or the Company). The primary issue is whether Respondent bargained with the Union in good faith with respect to a successor contract in its bindery unit and an initial contract in its maintenance unit. A finding that it did not do so creates other issues including: (a) whether a subsequent strike by Respondent's bindery and maintenance unit employees was an unfair labor practice strike, (b) whether Respondent violated Section 8(a)(3) of the Act by refusing to reinstate the strikers following an unconditional offer to return to work, (c) whether Respondent violated the Act in implementing its last bargaining proposal offer in the bindery unit, and (d) whether Respondent unlawfully withdrew recognition from the Union in both the bindery and maintenance units and subsequently unilaterally changed the working conditions of employees in the maintenance unit. Additional issues are presented regarding whether Respondent violated Section 8(a)(1) of the Act by sponsoring a decertification petition among its maintenance employees in March, and suggesting the circulation of an antiunion petition among bindery employees in November. Additional 8(a)(5) allegations raise issues of whether Respondent violated the Act by its unilaterally announced and implemented policy requiring employees to use vacation leave rather than leave without pay during the Christmas plant shutdown and whether it refused to arbitrate a grievance regarding said policy. The complaint further raises an issue of whether Respondent violated Section 8(a)(3) and (1) of the Act by threatening its employee Hayson and retaliating against him for discriminatory reasons. A final issue was presented at the hearing regarding the eligibility for reinstatement of certain strikers who resigned their employment with Respondent during the course of the strike in order to obtain their retirement fund contributions.

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[1] All dates herein are from July 1985 through June 1986 unless otherwise indicated.

On the entire record, including my observation of the demeanor of the witnesses, and after due consideration of the able briefs filed by the General Counsel and Respondent, I make the following

FINDINGS OF FACT

I. JURISDICTION

Respondent is a Florida corporation with an office and place of business in Tallahassee, Florida, where it is engaged in the publishing and binding of books. During the 12 months preceding issuance of the complaint Respondent in the course and conduct of its business operations derived gross revenues in excess of $500,000 and during the same period of time purchased and received at its Tallahassee, Florida facility products, goods, and materials valued in excess of $50,000 directly from points located outside the State of Florida. The complaint alleges, and Respondent admits, that Respondent is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act. The consolidated complaint alleges further, Respondent admits, and I also find that the Union is a labor organization within the meaning of Section 2(5) of the Act.

II. THE ALLEGED UNFAIR LABOR PRACTICES

A. *Background and Overview of Uncontroverted Facts*

Respondent is owned and operated by the Rosenberg family. Prior to June 1985, a 50-percent interest in Respondent was owned by Mrs. Charlotte Rosenberg with the remaining 50 percent owned by her son Charles Rosenberg and two sisters. Charles Rosenberg, for the 1-year period prior to June 1985, was the acting chief executive officer of Respondent. In June 1985, Charles Rosenberg acquired the ownership interest of his sisters giving him a full one-half interest in the ownership of Respondent. Around the time he acquired the additional interest in ownership, Charles Rosenberg became the chief executive officer of Respondent.

In its publishing and bookbinding business, Respondent operates three departments that are relevant to these proceedings: the bindery department whose employees have been represented for several years by the Union,[2] the maintenance department whose employees have been represented by the Union since January 1985, and the press department, whose employees are represented by Local 193-C (Local 193), of the same International union as Local 241. Discussions between Local 241 and Local 193 concerning a merger of the two unions took place in the fall of 1985 and while the members of Local 241 voted in favor of the merger, the members of Local 193 rejected the proposal.

Respondent maintained collective-bargaining agreements with both Local 241 and Local 193, effective from 1 December 1982 to 30 November 1984. Both contracts provided for a wage reopener for the period commencing 1 December 1983. As a result of negotiations at that time, and notwithstanding the fact that Respondent was losing money during the period, Respondent agreed to wage increases of approximately 45 cents for journeymen in both bargaining units.

In 1984 negotiations were undertaken with both Local 241 and Local 193 for new collective-bargaining agreements to succeed the expiring ones. The Company was represented in these negotiations by its labor attorney, Allen Blake, and its comptroller and member of its board of directors Greg Poirier, among others. The end result of these negotiations was an extension of the collective-bargaining agreement in each unit until 30 November with no wage increases.

In late 1984 the Union began organizing Respondent's maintenance employees. Subsequently following a Board-conducted election, Local 241 was certified on 23 January 1985 as the exclusive collective-bargaining representative of Respondent's maintenance employees.[3] Negotiations for a collective-bargaining agreement with the Union covering maintenance employees began in March 1985 with Respondent again represented by its attorney, Blake. During the course of these negotiations, however, Blake was fired and a new labor attorney, James Blue, was hired. Blue attended the first maintenance unit negotiations on 22 April. Negotiations on the maintenance unit dragged on into the fall when negotiations began again between Respondent and Local 241 regarding the bindery unit's collective-bargaining agreement and between Respondent and Local 193 regarding the press department unit.

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[2] The specific bindery unit in which the Union was recognized, which Respondent in its answer admits is appropriate for purposes of collective bargaining, is as follows:

> All employees in Respondent's bindery operation at its Tallahassee, Florida facility; excluding all other employees, guards and supervisors as defined in the Act.

[3] The specific unit for which the Union was certified is as follows:

> All regular full-time maintenance employees, including maintenance mechanics, plant clericals, baler operator, and janitor employed by Respondent at its Tallahassee, Florida facility; excluding all other employees, office clerical employees, bindery and pressroom employees and operators, professional employees, guards, and supervisors as defined in the Act.

On 16 October around the time of the start up of negotiations on the bindery's collective-bargaining agreement, Respondent posted a Christmas shutdown notice stating that the plant would close down for the Christmas period and that employees would be charged 4 or 5 days' vacation during the shutdown. It is undisputed that this announcement was made without prior notice to, or bargaining with, Local 241. The Union protested this action during their bargaining sessions in early November. The Union took the position that employees were entitled to choose whether to take vacation leave or leave without pay during the shutdown as they had done in 1984, when, after bargaining, Respondent had agreed with the Union that employees could choose between using vacation time or time off without pay during the Christmas shutdown. Respondent, expressing uncertainty about the past practice, rejected the Union's contention and insisted employees use vacation leave during the Christmas shutdown. While the Union filed a grievance on the matter on 8 November, the grievance was not resolved and the Union did not seek arbitration of the matter because it was told by Respondent's personnel manager, David C. Goodwin, that Respondent would not arbitrate the grievance since the shutdown would take place after the contract expired on 30 November.

The Union filed a charge with the Board on this issue on 18 November (Case 12-CA-11819) after which Respondent on 18 December announced that the resolution of the matter would be made by the Board or, if the Board so ordered, by an arbitrator. The posted announcement also stated, however, that depending on final resolution employees would either receive their vacation pay during the shutdown or be permitted to schedule their vacations in the future. Employees were directed to advise their supervisors of their preference by 20 December.

The negotiations on collective-bargaining agreements in both the bindery and maintenance units were not successful. On 17 January Respondent through its attorney Blue presented the Union with Respondent's final offer in the bindery unit and announced that it would be implemented at the beginning of the day shift on 20 January. About 22 January the Union called a strike in the maintenance and bindery units. During the course of this strike and during the period of 28 February to 3 March, employee Carrie J. Rogers circulated a petition among the bindery unit employees expressing their desire that the Union no longer represent them for collective bargaining. Rogers delivered this petition to Respondent on 3 March. Also on 3 March employee Hayson circulated a similar petition among the bindery employees and also delivered a copy of that petition to Respondent, while forwarding the original to the Board's Regional Office in Tampa. As a result of the petitions, Respondent by letters to the Union dated 4 and 5 March, respectively, withdrew recognition from the Union in the bindery and maintenance units.

By telegram dated 5 May, the Union made an unconditional offer to return to work "all striking employees." By letter dated 6 May, Respondent acknowledged receipt of the offer to return to work and stated that the replaced striking employees "are now on a preferential recall list and would be offered reinstatement consistent with the law applicable to economic strikers."

It is undisputed that about 5 March after a withdrawal of recognition from the Union in the maintenance unit, Respondent changed the terms and conditions of employees in that bargaining unit.

B. *Respondent's Alleged Intentions in the 1985 Negotiations*

1. William Windham's testimony

The consolidated complaint alleges that Respondent, in both the bindery and maintenance units, bargained with the Union only "with the intent of delaying the bargaining process and not reaching an agreement." The General Counsel predicates these allegations upon the testimony of William Windham, a former official of Respondent, and relies on other conduct of Respondent including its bargaining proposals during negotiations to corroborate Windham.

Windham was hired by Respondent in 1983 and testified he worked as plant manager and later as manufacturing manager after he was replaced as plant manager by George Tabor in the early part of 1985.[4] According to Windham, he participated in negotiations between Respondent and both Local 241 and Local 193 on the wage reopenings in 1983. Those negotiations concluded with a wage increase being given. Charles Rosenberg (Rosenberg) did not personally take part in the negotiations, and subsequently made statements on several occasions in the presence of Windham, Mrs. Rosenberg, and Greg Poirier that he would get it (the wage increases) back in negotiations the following year.

In 1984, still according to Windham, when the contract with Local 241 came up for negotiation, Rosenberg stated more than once at staff meetings or management meetings that if Respondent did not get concessions from the bindery unit he wanted them "on the street." Further, Windham testified with some vagueness that Rosenberg indicated that Respondent could hopefully get a contract with the pressmen's union, apparently feeling that Respondent could still operate if that union did not strike.

Mrs. Rosenberg and Poirier expressed concern about a strike, Windham testified, fearing that Respondent could not afford to take a strike. Windham testified that he sided with Rosenberg stating that if he did not get the concessions he needed to operate, he would rather have a strike. As a result of this internal conflict, Sheldon

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[4] Respondent denies that Windham ever occupied the position of plant manager, apparently basing its position in this regard on the fact that he was not empowered to engage in purchasing for Respondent. While the issue on Windham's status as plant manager is largely academic, it is clear that on at least one occasion in late 1984 Windham signed a notice to employees as plant manager. Moreover, evidence submitted reflects he was listed as plant manager in the minutes of a management meeting in June 1984.

Rosenberg, chairman of the board of directors of Respondent at the time, came to Tallahassee to meet with management. He apparently was unable to resolve the dispute. However, Sheldon Rosenberg did remove Rosenberg from any labor relations authority. That this did in fact occur is indicated by a letter dated 1 February 1985 from Respondent's attorney Blake to Greg Poirier in which Blake responded to the contention by both Unions that the 1984 agreement to extend the collective-bargaining agreements was conditioned on the removal of Rosenberg from any further involvement in labor relations with the unions. Blake conceded in his letter that oral statements were made at the bargaining table that Rosenberg would no longer be in labor relations but rebutted the Union's assertion that that was a condition of agreement. In any event, the 1984 negotiations culminated in an extension of the old agreements with both Unions as a result of Sheldon Rosenberg directing that Respondent accept the Union's proposals in this regard.

Windham also testified Respondent was opposed to union organization by the maintenance employees. After discussions with Rosenberg, and in an effort to thwart union selection by the maintenance employees, Windham hired two new employees in the maintenance unit prior to the January election and after the two gave him assurances they would not vote for the Union. In addition, Rosenberg made arrangements in early 1985 prior to the election to hire an additional cleaning crew. That effort was rejected by Mrs. Rosenberg and Poirier in a shouting match with Rosenberg. Windham testified he witnessed the affair and joined in a discussion with Poirier in an effort to convince Charles that it would be futile to put the new people in as part-time employees to vote in the upcoming election in the maintenance department. As a result the additional cleaning crew was not hired. This aspect of Windham's testimony was not denied by Rosenberg, and neither Poirier nor Mrs. Rosenberg testified in this proceeding.

As further evidence of Respondent's animosity toward union organization in the maintenance unit, Windham testified that Rosenberg and George Tabor, who became plant manager in the spring of 1985, directed him in early June 1985 to lay off Albert Spivey who had been elected as president of the Union and who was a negotiator for the Union in the maintenance unit. Windham acknowledged that the layoff of Spivey was part of an overall layoff of 10 percent of the employees in each department. However, Respondent laid off more than 10 percent in the approximately eight-employee maintenance unit in order to reach Spivey who had seniority over one other employee. Spivey resigned his employment sometime after the layoff and was never recalled. He resigned his office in the Union in August.

Subsequent to Spivey's resignation, the other maintenance employee junior to Spivey was offered recall to work but declined to return. Further, according to Windham's testimony, which is not specifically contradicted in this regard, there were additional hires in the maintenance department. One such hire was a detective who Windham testified was hired by Tabor and Goodwin in the maintenance department. According to Windham, Tabor told him that the detective, who was hired in mid July and who worked through July and approximately 3 weeks in August, was employed to gather evidence on maintenance employee Brad Bowman because Bowman was on the Union's negotiating committee. Windham related that Goodwin had confirmed to him that this was the purpose for hiring the detective.

Windham further testified that following Respondent's loss of the election in the maintenance unit after Windham had given assurances that such a loss was not likely, Rosenberg expressed to Windham his displeasure stating that Windham was "in trouble." Approximately 3 months later, Windham was in fact replaced as plant manager by George Tabor. Windham continued his employment by Respondent, however, as production manager until he was discharged in November.

It is undisputed that Windham was a member of the management negotiating team in bargaining negotiations with the maintenance unit through mid-July. Still according to Windham, Charles Rosenberg made statements to him on three or four different occasions that there would be no contract with bindery employees in 1985, and that Respondent would start negotiating with maintenance people but with no intention of reaching an agreement. Rather, Rosenberg stated he would stretch out the maintenance negotiations until the bindery and pressmen unit negotiations started in the fall. He added that there would be no bindery contract reached with the bindery unit, that they would strike, and the employees would be replaced when they struck, and that Respondent would be rid of the Union in the maintenance and bindery departments. However, with respect to the pressmen unit and Local 193, Rosenberg stated that he would seek concessions from Local 193 but would still try to get a contract that Respondent could live with inasmuch as he felt that Respondent could operate if the bindery went out but not if the pressmen struck. Further, according to Windham, at one of the meetings he attended with management relating to the maintenance unit agreement, Windham asked Tabor what would happen if the maintenance and bindery units accepted a contract. Tabor's reply was there was no way they could accept it. At still other meetings, Tabor had stated that Respondent would not get a contract with the bindery and maintenance departments.

2. Other evidence of Respondent's intent

As other evidence of Respondent's intent to provoke a bindery and maintenance strike, the General Counsel points to Respondent's development of a strike plan in the summer of 1985. The strike plan was admittedly developed by Personnel Manager Goodwin. Goodwin's strike plan included, inter alia, a proposed erection of a fence around Respondent's premises, and a polling of supervisors regarding which of their employees they anticipated would engage in a strike if one was called. In addition, it is undisputed that as part of the strike plan, Windham made visits to other printing facilities during the summer of 1985 to ascertain whether other concerns could handle Respondent's work in the event of a strike.

The General Counsel also relies on the testimony of Joel Tidwell to support the proposition that Respondent intended to avoid agreement with the Union. Thus, Tidwell, the president of Local 193, testified that he had a conversation with Tabor prior to the beginning of negotiations between Respondent and both the bindery and pressmen units. In the conversation that took place in either Tabor's office or the board room Tabor asked if Local 193 would agree to negotiate without the presence of attorneys. Tabor added that Respondent and the bindery unit were so far apart that he did not think they could reach an agreement, but he felt he could reach an agreement with Local 193, because he was able to talk to them. Local 193 subsequently agreed to negotiations without attorney representation and such negotiations were undertaken. Labor attorneys for both sides were subsequently called in after 8 or 10 meetings. During the course of these negotiations, Tidwell testified, both Tabor and Goodwin made statements several times that they were so far apart with Local 241 that they would never get a contract. Further, Tidwell testified that in November during the time when merger discussions between Locals 193 and 241 were taking place, Tabor inquired of Tidwell about the merger. Tidwell replied that there was little possibility and Tabor remarked that he felt like Local 193 would be better off if they did not merge with 241 for if they did, Local 193 would have the same problems as Local 241. Tabor did not specify the "problems."

While the General Counsel does not contend that Respondent's bargaining proposals with respect to both the bindery and maintenance unit in themselves establish an intent to avoid agreement, such proposals are relied on as circumstantially supporting the proposition that Respondent intended to cause the maintenance and bindery units to strike while reaching an agreement with Local 193. Concessions were sought from each union, but the extent of concessions sought from Local 241 appeared to be greater than for Local 193. Thus, Respondent proposed to increase employee contributions to the pension plan from 3 to 4 percent for Local 193 while contributions by employees in Local 241 were proposed to be increased from 3 to 6 percent. No change in the management rights provision was proposed by Respondent with respect to Local 193 but with respect to Local 241 Respondent proposed in its management rights clause to eliminate all past practices as a basis for contract interpretation or application. Under Respondent's proposals, Local 193 would keep a basic workweek of 37-1/2 hours with mandatory overtime of 16 hours after 40 hours per week. But Respondent proposed to increase Local 241's workweek from 38-3/4 to 40 hours per week with mandatory overtime for the first 24 hours per week after 40 hours. Respondent proposed to reduce disability pay from 70 percent for 26 weeks to 60 percent for Local 193 but to 50 percent for Local 241. No change in sick leave was proposed by Respondent for Local 193 but Respondent proposed to eliminate sick leave for new hires for Local 241. Respondent's proposal for vacation leave for employees represented by Local 193 was capped at 30 days while leave for employees represented by Local 241 was capped at 20 days except for those already receiving more than 20 days. With regard to wages, Respondent proposed a wage increase of 45 cents per hour for journeymen in the press department with proportional increases for others while no wage increase was proposed at all for Local 241. Moreover, with manning changes proposed by Respondent along with discretionary authority retained by Respondent to transfer employees to lower rated jobs, some employees represented by Local 241 might suffer an actual decrease in wages.

The proposal of Respondent to the maintenance unit employees largely parallels its proposal to the bindery employees. No across-the-board increase was offered in maintenance, but neither were any proposed cuts in wages.

3. Respondent's evidence

Respondent's evidence with respect to its intentions in the negotiations with Local 241 was expressed largely through Rosenberg, Tabor, Goodwin, and Respondent's labor attorney, James Blue. Rosenberg testified that Respondent had lost money for the past several years, and as a result, Rosenberg instructed his bargaining committee to seek concessions so that Respondent could reduce operating costs, reflect a profit, and maintain a status of solvency. With respect to the maintenance unit, Rosenberg said that Respondent wanted a speedy resolution of the maintenance contract. According to Rosenberg, he did not foresee a strike in his discussions with Respondent's maintenance bargaining committee consisting at that time of Blake, Windham, and Tabor. That Respondent did seek an early resolution on the maintenance bargaining agreement is evidenced by a letter from Respondent's then attorney Blake dated 11 March 1985 to Poirier in which Blake observed that "if the Union insists on their position relative to certain reporting areas, such as overtime, call in and report pay sub-contracting and hours of work and any other areas which take away from management's rights, the goal of a quick contract must [be] secondary to the preservation of the Company's flexibility in running the machine shop."

Rosenberg further testified that he additionally wanted a quick agreement with maintenance because he did not wish to negotiate with three units in the fall. He denied he ever stated that he wanted a strike in either the bindery or maintenance units. He conceded that he needed concessions and if he could not get concessions, Respondent would be prepared to take a strike and told h;s negotiating team for all three units that if he could not get concessions to "let them go." According to Rosenberg, there were three management negotiations strategy sessions held in the fall prior to the expiration of the bindery and maintenance contracts. These were attended by Rosenberg, Blue, Goodwin, and Mrs. Rosenberg. The first such session took place in the early fall while the second took place in November with the third in December. The latter two sessions were attended by Rosenberg, Blue, Tabor, and Goodwin. Rosenberg said that he was encouraged at the prospects of reaching agreement by a proposal suggested by Blue referred to as "red circling" which would have the net effect of allowing employees in certain classifications to maintain their wages while in those classifications. Only new hires or transferred employees then would be affected by the lower rates Respondent was proposing. Rosenberg said he authorized a red circling plan as well as a "buy back" plan on dependent care coverage for health care costs restricted to current employees only.

Other than a demand on mandatory overtime, Rosenberg could recall no specific concessions he sought from the maintenance unit. Still Rosenberg insisted that he wanted a quick contract with the maintenance unit. With respect to the bindery unit, Rosenberg related that Respondent sought a reduction in dependent coverage cost (i.e., employees paying a larger share of such coverage), mandatory overtime, and a "right to man our equipment." Although Rosenberg said the same items were sought from the pressmen unit, he subsequently conceded that there were differences in the proposals but stated he did not know exactly what they were. Nevertheless, he maintained that there was a "continuity" in the packages.

Rosenberg did not specifically deny Windham's testimony regarding Spivey's layoff. However, Tabor testified that Rosenberg was not involved in the layoff decision, that Spivey's presidency in the Union played no part in his selection for layoff, and that while the selection of two out of the maintenance unit for layoff exceeded the 10-percent goal, it was because the maintenance unit represented a nonchargeable cost center (i.e., costs not directly chargeable to customers), and Respondent felt a greater than 10-percent reduction could be accomplished there. Tabor's testimony on the point was corroborated by the testimony of Goodwin who had been employed by Respondent in late May 1985 just prior to the layoff.

Regarding the hiring of a detective in the maintenance unit Goodwin and Tabor related that the purpose was to obtain evidence regarding possible thefts. Goodwin testified that Windham had related to him that he suspected Bowman of stealing, a contention Windham denied on rebuttal. Neither Goodwin nor Tabor advised the detective of the suspicions regarding Bowman. The detective was terminated after 3 to 4 weeks without finding evidence of theft by anyone.

Blue testified for Respondent that he was told by Tabor that the strategy in maintenance was to get a quick contract because the Company did not want negotiations to drag into the fall. The offer made to the maintenance unit reflected that strategy. However, contrary to Rosenberg, Blue related employee dependent coverage was not a reduction sought in the maintenance unit. Blue corroborated Rosenberg regarding the strategy sessions held in the fall, the first being in late September and related to all three bargaining units. That meeting was attended by Tabor, Goodwin, Windham, Rosenberg, and Mrs. Rosenberg. As a result of the meeting, Blue was instructed to get concessions in the negotiations, and there was a discussion about what concessions would be proposed. However, Rosenberg did not detail each of the areas in which concessions were to be sought. According to Blue, in mid-December it appeared that Respondent was not going to be able to reach an agreement with the bindery and maintenance units and therefore he began to make alternative proposals. One of the proposals in this regard was the "red circling" offer to the bindery unit, the effect of which was to obtain concessions from new hires without affecting the older employees. The Union found that unacceptable. In addition, the Union failed to move from its opposition to the Company's proposals on mandatory overtime, insurance, and management's rights. Blue testified Rosenberg never said anything about wanting a strike in any of the units. Rosenberg did say that if he did not get concessions, he did not care if there was a strike. Finally, Blue testified that he was aware of the Respondent's strike plan and had advised Respondent that they could not go into negotiations without a strike plan.

Tabor generally corroborated the testimony of Blue and Rosenberg regarding the general negotiation strategy. With respect to negotiations with the maintenance unit when Blake was representing Respondent, Tabor testified that in March there was a strategy session attended by himself, Blake, and Windham. The strategy determined was to get a quick contract with the maintenance unit, and to that end Respondent did not ask for concessions although they did insist on compulsory overtime, which Respondent was enforcing at that time. Asked if Windham ever questioned him about what would happen if the Union accepted the Company's proposals, Tabor testified only that he told Windham on one or more occasions and not necessarily in reference to the maintenance unit that it "didn't look very promising."

Although Goodwin testified, he was not questioned regarding the strategy sessions or the bindery bargaining sessions. Goodwin was instrumental in the development of Respondent's strike plan, but denied that the erection of a fence around Respondent's parking lot was related to a possible strike. Rather, according to Goodwin, the fence was put up because the parking lot was poorly lighted and women employees working on the night shift had safety concerns in view of the poor lighting. Nevertheless, it is undisputed that Goodwin in a memo accompanying a contractor's low bid on the fence installation enclosing the parking area observed, "This [the fence] is a must if we are going to control access to the shipping area of the plant. Obviously, this would also keep strikers an additional distance from the work area."

4. Contentions and conclusions

Crucial, of course, to the General Counsel's case that Respondent refused to bargain in good faith with Local 241 with the intention of provoking a strike is the testimony of Windham and the circumstantial evidence that the General Counsel contends corroborates Windham. This evidence, the General Counsel argues, is found in Respondent's implementation of the strike plan in the summer of 1985, the polling of supervisors regarding employee strike sympathies, the plan to use security guards with a suggested start up time of 1 October, the elimination of vacations for employees after 30 November because Respondent did not want striking employees to be receiving vacation pay, the erection of a fence around the plant in November, the uncontradicted testimony of Tidwell regarding Tabor's statement before negotiations even started that Respondent and Local 241 were so far apart in bindery negotiations he did not think they could reach an agreement, Tabor's caution to Tidwell about Local 193 merging with Local 241, and Respondent's preferential treatment in its proposals to the press unit as compared to the proposals presented to the bindery unit.

Respondent's disposition to "pack" the maintenance unit prior to the election as admitted by Windham and Rosenberg's attempt to subcontract janitorial work, the layoff of Spivey in the maintenance unit and the hiring of a detective to find a basis for discharging maintenance unit negotiator Bowman are also said to undermine Respondent's present contentions regarding its good faith in the negotiations in bindery and the maintenance units. The General Counsel further argues that Rosenberg's bargaining tactics in 1984 were also designed to provoke a strike, but such intentions were thwarted by his removal from negotiations by Sheldon Rosenberg. Conceding that Respondent may have initially had an intention to reach a quick agreement with the maintenance unit as asserted in Blake's letter to Poirier in March 1985, the General Counsel points out that that goal was established prior to Rosenberg's reacquisition of control of bargaining negotiations. Such reacquisition of control was made possible, according to the General Counsel, after Rosenberg had bought out his sister's shares of the business. The General Counsel further contends that Rosenberg's firing of Blake warrants the inference that Blake was fired because Rosenberg wanted to know how much it would cost Respondent if the Union filed charges concerning Respondent's bargaining conduct when the matter went through the Board and the courts.

Respondent's position is that although it bargained hard to achieve a contract with both units, it nevertheless bargained in good faith. Windham's testimony was attacked by Respondent as being inconsistent, contradicted by his own prior statement given to the Board, and unworthy of belief particularly when considered in light of Windham's status as a former employee "disgruntled" by his discharge in November. According to Respondent, Windham took the results of the 1985 negotiations and made that Respondent's plan, when in truth Respondent bargained to achieve contracts albeit ones that were favorable to Respondent with the concessions sought and designed to make Respondent profitable. In this connection, Respondent emphasizes that the General Counsel has not contested the fact that Respondent had lost money 4 out of the 5 years preceding the negotiations involved here. Finally, Respondent contends that its conduct within the bargaining sessions reflects its intent to reach, rather than to thwart, agreements with the Union.

As the General Counsel's brief points out a determination of whether an employer desires to reach an agreement with a union must be made on the "totality of circumstances" that are indicative of a mental state and not simply on the terms of contract proposals. *Pittsburg-Des Moines Co. v. NLRB*, 663 F.2d 956 (9th Cir. 1981). Parties to negotiations must bargain "in good faith" with a sincere desire to reach agreement. If an employer enters negotiations without "an open and fair mind, and a sincere purpose to find a basis for agreement," he cannot be said to have bargained in good faith. *Globe Cotton Mills v. NLRB*, 103 F.2d 91, 94 (5th Cir. 1939). But, a party to negotiations cannot be required to make a concession on any specific issue or to adopt a particular position. See *Atlanta Hilton & Tower*, 271 NLRB 1600 (1984). On the other hand, the submission of predictably unacceptable proposals by a party in negotiations may provide a basis for the inference that the party offering the proposals does not wish to reach an agreement. See *NLRB v. A-1 King Size Sandwiches*, 732 F.2d 872, 877 (11th Cir. 1984), cert. denied 469 U.S. 1035 (1984). Nevertheless, the Board has more recently ruled that it will not sit in judgment on the substantative terms of bargaining proposals but rather will oversee the process of bargaining to ascertain that the parties have made a sincere effort to reach an agreement. *Rescar, Inc.*, 274 NLRB 1, 2 (1985).

In examining the totality of the conduct of Respondent in this case, one must begin with the testimony of Windham. After carefully considering the demeanor of Windham, the content of his testimony and its context within the case as a whole, and all of the variant factors that a trier of fact must consider in resolving credibility, I conclude that Windham's testimony to the extent it impugned Respondent's intent in negotiations was based, at best, on conjecture, confusion, and faulty recall. Having been discharged by Respondent in November, Windham could not be regarded as unbiased in this case. Moreover, in demeanor, I found Windham unconvincing. His testimony at times was vague as reflected by the fact that he could not provide the approximate times when Rosenberg made the alleged damaging remarks regarding Respondent's intent with respect to the 1984 and 1985 negotiations. Moreover, Windham's inability to accurately relate the basis for the dispute between Rosenberg and Blake that resulted in Blake's discharge in the presence of Windham casts serious doubt on Windham's ability to accurately report other facts. This makes purely speculative the General Counsel's contention that Blake was fired because he was unable to provide Respondent with an estimated cost of defending Respondent on prospective refusal-to-bargain charges.

Contradictions between Windham's testimony and his prehearing statement to the Board also serve to undermine Windham's veracity. Thus, in his prehearing statement given to the Board, Windham stated that Rosenberg had said to the company negotiators during the 1984 negotiations that he wanted to offer the bindery local a contract that he knew they could not accept, so they would be forced to strike and he could get rid of the bindery local, the same position he attributes to Rosenberg in the 1985 negotiations. Nevertheless, in a subsequent portion of the same statement, Windham had related that Rosenberg "didn't care whether or not the bindery Local signed a contract." The General Counsel would excuse this inconsistency on the basis that Respondent did change its bargaining position in 1984 after steps were taken to remove any labor relations authority from Rosenberg. The General Counsel's argument has no appeal. The inconsistency remains, for Windham was not testifying regarding positions of Respondent but rather the specific position of Rosenberg.

There is also a contradiction between Windham's prehearing statement and his testimony before the Federal district court in connection with the General Counsel's unsuccessful attempt to obtain a 10(j) injunction in this case and his testimony here. In his prehearing statement to the Board, Windham related that in the fall of 1985 he, Tabor, Blue, and Goodwin represented Respondent in negotiations. Admittedly, at the hearing on the 10(j) petition, Windham testified that he attended four or five bindery unit bargaining sessions in September and October 1985. While he equivocated about the last date he attended a negotiating session, he was emphatic that he attended the bindery negotiations. At the hearing here, however, Windham conceded that he had not attended any bindery negotiations in 1985. He explained this contradiction as simply a mistake caused by his not having reviewed his notes and by the fact that the union committee on the maintenance negotiations contained some of the same people that he had dealt with the preceding year in the bindery negotiations. He named no one on the maintenance negotiating committee who had been on the previous bindery negotiations other than "he believed" Peggy Nichols. However, Nichols was not elected president of the Union and did not begin attending maintenance negotiations until August, a time after Windham ceased participating in maintenance negotiations. Accordingly, Windham's explanation does not withstand scrutiny, and only serves to further undermine his credibility.

Concerning the circumstantial evidence pointed out by the General Counsel to corroborate Windham's testimony, Respondent's establishment of a detailed strike plan, I conclude, is not inconsistent with its bargaining position. It is clear that Respondent was negotiating for concessions from Local 241. Unquestionably, Respondent was willing to endure a strike if it could not get concessions. Such a position is not in and of itself unlawful. See *Hamady Bros. Food Markets*, 275 NLRB 1335 (1985). A realistic assessment of the likelihood of a strike in light of Respondent's attempts to negotiate significant concessions would support the prudence of strike preparation and the development of a strike plan. Indeed, the Union's membership voted for strike authorization in August before bindery negotiations had even commenced. Such preparation for a strike cannot indicate the Union's intent to bargain in bad faith. Under these circumstances and given Respondent's disposition early on that it would seek concessions in the 1985 agreements just as it had initially determined to seek them in the 1984 negotiations, I conclude Respondent's early preparations for a strike did not reflect an intent to provoke a strike.

The General Counsel asserts that Respondent's removal of labor relations authority from Rosenberg in 1984 confirmed Respondent's recognition that Rosenberg's involvement in bargaining would result in a strike. Accepting the contention that Rosenberg may have been difficult to deal with and adamant on obtaining concessions does not dictate a conclusion that Rosenberg intended to cause a strike. And the argument that Blake was fired because he was unable or unwilling to give Rosenberg an estimate of the costs of contemplated unfair labor practice litigation flowing from any refusal to bargain appears to have no predicate in fact. Rosenberg maintained Blake was fired because of his failure to provide an estimate of costs regarding an arbitration matter. Windham's testimony on this point was too vague, although he was present at Blake's firing, to constitute a credible contradiction of Rosenberg's testimony on this issue.

Windham's claim that Rosenberg intended to drag out negotiations with the maintenance unit is refuted by Blake's 11 March letter to Poirier regarding the intent to reach a quick agreement. But hard and difficult bargaining does not preclude the existence of a desire to reach agreement. Nothing else substantiates Windham's claim and even Windham conceded in his testimony that he had no reason to believe Blake's letter was not an accurate statement of Respondent's goal in bargaining in the maintenance unit. Moreover, Windham admitted he could point to no specific conduct of Respondent in maintenance negotiations tending to show an intent to drag out the bargaining. Any difficulty in arranging meetings was attributable to both sides. And Respondent was not seeking concessions from the maintenance unit that would make agreement more difficult to achieve.[5] On the surface it would also appear that the Union had more to gain than Respondent by extending the maintenance negotiations, for by doing so, the smaller maintenance unit of seven or eight employees would have its strike effectiveness increased by support from the bindery unit employees after their contract expired in November.

The General Counsel asserts Respondent's failure to submit a complete contract proposal for maintenance to the Union substantiates the argument that Respondent intended to drag out negotiations. Tabor conceded that there had been no complete proposal submitted by Respondent to the maintenance unit prior to October.[6] Thereafter, it appears that the maintenance bargaining took a back seat to the bindery unit bargaining. The Union simply did not "push" independent maintenance bargaining. There is no evidence the Union even asked for a complete proposal. Under these circumstances, and because it is not clear that the absence of any "complete" company proposal constituted an obstacle to agreement, I can attach no evidentiary significance to the failure of Respondent to submit a complete proposal.

There is also evidence that Respondent's conduct at the bargaining table was inconsistent with a desire to avoid agreement in the bindery unit. While Respondent did seek concessions in the bindery negotiations in the course of bargaining, it softened its position on the impact of those concessions. Thus, with respect to insurance coverage for dependents of employees, Respondent initially sought to completely eliminate such coverage at its expense, but subsequently offered to pay current employees an hourly rate toward such coverage. Further, a major change in position involved the red circling proposal, which was a departure from Respondent's proposal regarding a reduction in wages for bindery employees. Rather, the plan allowed current employees to maintain their wages and personal premiums with cost reductions to be imposed only on new employees. Although the General Counsel contends the benefits of red circling were illusory because Respondent retained the right to make job assignments that could affect the rates of current employees, the proposal nevertheless has to be regarded as a material step toward agreement. Respondent also upgraded its proposals with regard to reporting pay, sick leave, disability pay, overtime, and mandatory overtime. These actions and proposals, I conclude, serve to show the absence of an intent of Respondent to force a strike by Local 241.

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[5] The fact that Respondent was not seeking significant concessions in the maintenance negotiations undermines Windham's testimony, vague as to time, that Tabor once said in meetings regarding maintenance negotiations that there was no way maintenance people could accept Respondent's contract. Accordingly, I do not credit Windham's testimony in this regard.

[6] On the other hand, Blue's bargaining notes of the 9 July maintenance bargaining suggest that the Union had all of management's proposals. This apparent contradiction of Tabor's testimony is not explained on the record.

The evidence reveals, as the General Counsel contends, that there were differences in the proposals submitted by Respondent to Locals 241 and 193. Thus, on pensions prior employer contributions in both units had been 6 percent of wages with employees contributing 3 percent. In both units Respondent had proposed to reverse those rates, and maintained that proposal for Local 241 while ultimately agreeing with Local 193 for a 4-percent employee contribution. Other differences between what was proposed by Respondent to Local 241 and what it and Local 193 agreed to can be found in the management rights provision, the overtime and workweek provisions, disability pay, sick leave, vacation leave, and, as already related, wage rates. To be sure, these comparisons do suggest a "preference" accorded to Local 193, which tends to support the General Counsel's argument that Respondent intended to avoid agreement with Local 241 while reaching agreement with Local 193. However, it is not clear that the apparently better terms achieved by Local 193 were not a genuine product of the collective-bargaining process. The record reveals that Local 193 did make some concessions sought by Respondent that Local 241 was unwilling to make. Thus, Local 193 agreed to a lower starting rate for new employees, mandatory overtime, a lower employer pension contribution than it previously enjoyed, a lower percentage rate on disability pay, employee pick-up of dependent insurance coverage at essentially the same 35-cent-per-hour rate proposed to Local 241, and the elimination of vision care. On the other hand, based on Blue's uncontradicted and otherwise credible testimony Local 241 refused to accept any form of mandatory overtime, or any change in the employee pension contribution rate. It further refused to accept Respondent's proposal on dependent insurance coverage, and it did not offer a counterproposal on the point except to a very limited and predictably unacceptable extent. Under these circumstances, and keeping in mind that negotiations between Local 193 and Respondent continued after Local 241's strike began, I am unable to, and do not, attach any significance to the difference in terms reached between Respondent and Local 193 and those offered Local 241. I find that such differences do not evidence bad-faith bargaining on Respondent's part in its negotiations with Local 241.

The fact that the agreement with Local 193 was reached after Local 241 went on strike also dispels the existence of a plan by Respondent, as urged by the General Counsel based on Windham's testimony, to reach agreement with Local 193 while provoking a strike by Local 241. If there had been such a plan, its effectuation could be assured only if agreement with Local 193 was reached before Local 241's strike. Although Respondent and Local 193 had initially extended their agreement after 30 November, Respondent on 7 January advised Local 193 it was terminating the agreement as of 6 February because that Local had rejected Respondent's final offer. The new agreement with Local 193 was apparently reached just prior to 6 February and was made effective from 7 February. Therefore, both before and after Local 241 went on strike, there was a period when Respondent could not assure itself that it would not also be struck by Local 193.

Another element supporting Respondent's contention that it did not intend to provoke a strike by Local 241 is Rosenberg's letter to bindery employees dated 17 January. In that letter, Rosenberg explained that Respondent had two goals in negotiation, to increase efficiency at reduced operation costs and to do this with minimum impact on current employees. He further explained Respondent's proposals in the primary areas of concern and related that Respondent's position was dictated by its prior loss of money. He urged the employees to review Respondent's proposal, give it "serious consideration," and let their union representatives know if they found it unacceptable. The letter is admittedly self-serving, but if Respondent desired to avoid agreement with the Union altogether as opposed to an agreement favorable to Respondent, the letter would not likely have been written.

The other evidence relied on by the General Counsel occurring more than 6 months prior to the filing of the first charge and bearing on Respondent's attempt to "pack" the maintenance unit is, I find, immaterial. Accepting as true Charles Rosenberg's efforts to pack the maintenance unit prior to the election, the undisputed fact remains that following the election Respondent made no attempts procedurally to delay the Union's certification or the commencement of bargaining. Instead, as Blake's letter indicates, Respondent sought to reach a "quick agreement" with the Union.

With respect to Spivey's layoff, I find Windham's testimony incredible when weighed against the testimony of Tabor whose manner of testifying was straightforward and generally unequivocal. I find Tabor's explanation, supported by Goodwin, of the circumstances of Spivey's layoff plausible and credible. While the layoff in maintenance exceeded 10 percent, Tabor's testimony that the layoff in the prepress department also exceeded the 10-percent figure was not contradicted. That Respondent had a 20-percent drop in sales in June was not disputed. A corresponding 10-percent layoff under these circumstances does not appear unreasonable. Moreover, the reduction of two people in maintenance appears to have been justified because there is no showing the reduction had an adverse impact on production. Further, if Respondent's motivation had been to rid itself of a union officer, a layoff at best could only be a temporary measure. The record reflects that the junior maintenance employee laid off with Spivey was subsequently offered a recall to work thus warranting the inference that Spivey would have received that recall offer had he not in the meantime resigned. Equally credible was Tabor's testimony, supported by Goodwin, that they did not know which employees would be affected until after the number from each unit to be laid off was ascertained. Tabor's testimony that Spivey's union office played no part in the decision regarding his layoff, I found convincing, as well as his assertion that Rosenberg was not involved in the layoff decision.

Contrary to the General Counsel's arguments, I am unable to attach material significance to the comments attributed to Tabor by Tidwell, which Tabor failed to contradict. Tabor's remark to Tidwell that Respondent and Local 241 were so far apart he did not think they could reach agreement, even before negotiations with Local 241 had started, appears to be an expression of opinion not offered as a statement of fact. Moreover, Tabor had explained his remark by saying he felt better able to talk with Local 193. Indeed, Tabor was willing to negotiate with Local 193 without attorney participation. Similarily, Tabor's remarks to Tidwell regarding the merger of the two unions impressed me as innocuous and far short of a "successful attempt to prevent a merger of the two unions" argued by the General Counsel. Tabor's observation that if the two unions merged Local 193 would have Local 241's problems would appear to be nothing more than a vague offhand remark to a union officer that can in no way be regarded as an attempt to preclude the merger.

Without Windham's testimony, which I have refused to credit, I find little to sustain any conclusion that Respondent intended to avoid agreement in the bindery or maintenance negotiations. Respondent's concession bargaining was obviously very hard bargaining and Respondent intended it to be so. However, overall examination of Respondent's proposals and counterproposals, considered in light of the Union's responses or lack of response, does not reflect that Respondent was making an insincere effort to reach agreement. Accordingly, I find and conclude that the General Counsel has failed to establish by a preponderance of the credible evidence that Respondent intended to delay the bargaining process and not reach agreement with Local 241 in either the bindery or maintenance units. I therefore find Respondent did not violate Section 8(a)(5) of the Act in this regard.

C. *Additional Allegations Concerning Respondent's Bad-Faith Bargaining*

1. Unilateral changes in the bindery unit

The complaint, as amended, alleges that Respondent about 20 January implemented its last bargaining offer to the Union in the bindery unit and changed the terms and conditions of bindery unit employees in the specified respects. That Respondent did implement its last bindery proposal is not disputed. A comparison of Respondent's last proposal with the expired agreement between Respondent and the Union confirms, and Respondent does not dispute, the changes specified in the complaint.[7]

The General Counsel does not contest the existence of an impasse in bargaining at the time of Respondent's implementation of its proposal. However, the argument is made that the impasse was the product of Respondent's bad-faith bargaining and therefore not reached in good faith. I have concluded above that Respondent's overall bargaining on the contractual issues was done in good faith. I therefore conclude that the impasse reached was a legitimate one, and that Respondent was entitled to implement its last proposal. *NLRB v. Katz*, 369 U.S. 736, 745 (1962). Accordingly, I find no violation of Section 8(a)(5) in Respondent's 20 January changes in the bindery unit.

2. Unilateral imposition of compulsory employee use of vacation time for Christmas shutdown

The consolidated complaint alleges that Respondent, without prior bargaining with the Union, announced to employees on 16 October that employees would be charged any accumulated vacation time for the plant's Christmas shutdown rather than being granted leave without pay. The facts on the issue are not in significant dispute. On 16 October, Respondent posted a notice to employees stating that the plant would be closed during the Christmas holiday period and that employees would be charged any accumulated vacation time up to 5 days for the shutdown period. Employees with less than 5 days of accumulated vacation leave were to be charged with whatever vacation days they had accrued and not paid for any remaining days during the shutdown period. Local 241 was not advised of this announcement beforehand and there had been no bargaining on the subject.

Respondent had undergone one prior Christmas shutdown in 1984. In August 1984 Respondent had announced the shutdown, and, as in the 1985 announcement, had stated employees would be required to use their accumulated vacations during the shutdown, which was for a 4-workday period. On that occasion, however, the Union persuaded Respondent to allow employees to voluntarily use vacation time during the shutdown rather than taking it compulsory. During a 1 November negotiating session Local 241 protested Respondent's latest requirement of vacation use during the shutdown claiming it was not in accord with the practice the preceding year. Respondent's negotiators, Blue, Tabor, and Goodwin, who were not employed by Respondent the preceding year, stated they would have to check it out. Subsequently, however, during a bargaining session on 6 November, Respondent reasserted its intention to charge employees vacation time during the shutdown[8] but pro-

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[7] Such changes related to call-in pay, funeral leave, health and welfare provisions, hours of work and overtime, holidays, seniority, vacations, pension plan, wage scale, and manning. While the General Counsel in his brief alluded to a change in the provision on jury duty, a comparison of Respondent's offer with the prior contract fails to disclose any change.

[8] Blue in his testimony conceded that Respondent's negotiators had checked with Windham who reported that employee use of vacations during the 1984 shutdown had been voluntary to his recollection. How-

Continued

posed that for the 1986 Christmas shutdown Respondent would be willing to apply three 1986 holidays to the shutdown with any remaining shutdown time to be charged to employees' accrued vacations. Apparently, the Union neither accepted nor rejected the proposal.

At the 7 November negotiation meeting, Respondent stated its final position on the matter in the absence of any counterproposal from the Union. That position was that vacation time would be charged to employees during the shutdown. On 8 November the Union filed a grievance on Respondent's "Forced use of vacation time at Christmas," and requested as a remedy that vacation use be voluntary as in the past. The grievance was denied by Respondent. Peggy Powers, the Union's bindery head steward, testified that Goodwin stated that the Union would not be able to take the grievance to arbitration because the shutdown would occur after the contract expired. In view of that statement, Powers said the Union did not seek arbitration. It did file the charge in Case 12-CA-11819 complaining of Respondent's "unilateral change." As a result, Respondent on 18 December announced that the issue on use of accrued vacation pay during the shutdown had not been resolved and stated that if any employee did not wish to use their accrued vacation during the shutdown they were to let their supervisors know. The announcement further stated that depending on final resolution "by the Labor Board and if the Labor Board so orders, by an arbitrator," employees would either receive their vacation pay or be permitted to schedule their vacation in the future.

a. *Contentions*

The General Counsel argues that the requirement of use of accrued vacation time constituted a change in working conditions about which Respondent was obligated to bargain citing *Mountaineer Excavating Co.*, 241 NLRB 414 (1979), enfd. 618 F.2d 102 (4th Cir. 1980), cert. denied 449 U.S. 835 (1980). Respondent's subsequent discussions in negotiations with the Union on this subject did not "cure" its prior unilateral action because such discussions reflected no real willingness to reconsider its action. Thus, the unilateral action remained a violation of Section 8(a)(5). The General Counsel further argues that because employee rights to vacation time grew out of the collective-bargaining agreement the grievance filed by the Union was arguably grounded in the contract, and because Respondent announced its decision on the vacation use within the contract period and the grievance was filed by the Union during that period Respondent, under *Nolde Brothers, Inc. v. Local 358 Bakery & Confectionary Workers*, 430 U.S. 243 (1977), had a duty to arbitrate the grievance.

Respondent's brief argues that there was negotiation with the Union on the involuntary vacation use and that after an impasse was reached it was free to implement its preimpasse offer to the union. In this position Respondent relies on the testimony of union negotiator and steward Peggy Powers who answered affirmatively when asked on cross-examination whether the Company and Union had bargained concerning the Christmas shutdown for 1985. Moreover, Respondent asserts that as a result of the negotiations and in order to keep the issue from becoming moot, it preserved the position of the parties by its 18 December announcement regarding the shutdown and vacation use. With respect to the failure to arbitrate the issue, Respondent contends the Union never formally requested arbitration and thus waived its right to arbitration. Further, Respondent asserts that because the Union's grievance involved a dispute arising after the contract's expiration date (i.e., the Christmas shutdown did not take place until after the 30 November contract expiration, the dispute could not be arbitrable under the expired contract. In this respect, Respondent would distinguish the instant case from the facts in *American Sink Top & Cabinet Co.*, 242 NLRB 408 (1979), referred to at the hearing by the General Counsel.

b. *Conclusions*

In agreement with the General Counsel's argument, I conclude the scheduling of employee vacations was a term and condition of employment. Vacations were provided for by the collective-bargaining agreement, and only in the case of vacations in excess of 2 weeks did Respondent reserve the right to designate when the employee could schedule the vacation (G.C. Exh. 2, p. 9). Thus, Respondent's announcement of 16 October was not specifically authorized by the bargaining agreement, and Respondent therefore had a duty to bargain with the Union on the matter. It had not done so prior to the announcement. Notwithstanding Powers' testimony, which I view only as a concession that the parties discussed the Christmas shutdown during negotiations, there was no change of position by either side on the point. While Respondent made a counterproposal regarding the handling of vacations during the 1986 Christmas shutdown, it made no similar proposal with respect to the 1985 shutdown. Respondent failed to deviate from its initial position even after admittedly ascertaining that its position was probably contrary to what had been done during the 1984 Christmas shutdown. Respondent advanced no particular reason or explanation for its position and there was no explanation of why adhering to the plan utilized in 1984 as urged by the Union was unacceptable.

Because Respondent's announcement did constitute a departure from what had been done the preceding year one can only conclude that the purpose of Respondent's action was to insure employee use of as much vacation time as possible in order to preclude the possibility of paying accrued vacation to employees during any subsequent strike. After all, in his strike plan memo, Goodwin had observed, "Rose does not want striking employees to be receiving vacation pay." There was, I conclude, no true bargaining on the subject by Respondent, only a reaffirmation of the position it had already announced without any expression of justification. There was thus no true impasse. Under these circumstances and even though the Union had proffered no counterproposal to the use of vacation time during the shutdown relying in-

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ever, Blue testified that because Windham had not made the final decision on the subject and because Blue was uncertain about the matter, Respondent maintained its position on the involuntary use of vacation for the 1985 shutdown.

stead on past practice to substantiate its position, I find Respondent in its "discussions" with the Union did not "cure" its initial act of bad faith in its unilateral action. I find therefore Respondent violated Section 8(a)(5) of the Act in this regard as alleged.

I find no merit in Respondent's contention that its refusal to arbitrate the grievance on the vacation pay during the shutdown was warranted because the Union had not formally requested arbitration. There is no dispute that Goodwin had stated that Respondent would not arbitrate the grievance because of the expiration of the bargaining agreement prior to the implementation of Respondent's plan. The law does not require the performance of a useless act and clearly a subsequent formal request to arbitrate would have been denied on the same grounds announced by Goodwin and argued presently in this case.

Respondent's defense that there was no obligation to arbitrate because since the implementation of its proposal would take place beyond the contract expiration date requires examination of the arbitration provision itself. That provision, article 16, section 1, is rather broad and makes arbitration available "should a difference arise between the Employer and the Union or any of the employees as to the meaning of and application of the provisions of this Agreement . . . ." Because the contract specifically provided for vacations for employees, with Respondent reserving the right to schedule those vacation days only in excess of 2 weeks, it appears that the Union's grievance is arguably bottomed on the contract. In addition, there appears to be no evidence in the case from which I could conclude that the parties had not intended the arbitration provision not to end with the contract's term. In this respect then, I find *American Sink Top*, supra, and *Digmor Equipment & Engineering Co.*, 261 NLRB 1175 (1982), controlling. In the former case, the Board held that where parties to a collective-bargaining agreement had agreed therein to grievance and arbitration procedures, the parties' duty to arbitrate survived the termination of the contract where the dispute arising subsequent to the contract termination date was one that concerned an obligation arguably created by the expired contract. The latter case applied *American Sink Top* to find unlawful an employer's refusals to arbitrate a grievance filed after the bargaining agreement expired concerning the postcontract discharge of an employee for conduct occurring before the contract expired. I can perceive no basis for the distinction Respondent would draw between the two cited cases and the instant one based on the fact that Respondent's announced compulsory use of vacation time was not to take effect until after the contract's expiration date. The dispute arose during the contract term and arguably involves rights created by the contract even though Respondent's plan was not to be implemented until after the contract expired. Clearly the right to accrued vacation survived the termination of the bargaining agreement, and the dispute concerning the involuntary scheduling of that vacation arose during the term of the contract. Not having been resolved by good-faith bargaining to impasse, as I have found above, the dispute was fully subject to the grievance procedure including arbitration. See *Georgia Kraft Co.*, 258 NLRB 908, 922 (1981). Respondent's refusal to arbitrate the grievances, I find, constituted a breach of its bargaining obligation and a violation of Section 8(a)(5) as alleged.

3. Withdrawal of union recognition in maintenance unit and imposition of changes

a. *The General Counsel's evidence*

The consolidated complaint, as amended, alleges that Respondent through Personnel Manager Goodwin in February and March unlawfully directed employees to initiate and circulate a petition among its maintenance employees to decertify the Union as their collective-bargaining representative, and on 5 March unlawfully withdrew recognition from the Union in that unit. To establish these complaint allegations, the General Counsel relies solely on the testimony of George Hayson, an electrician employed in the maintenance unit on 18 September. Hayson, who had sustained a back injury on 9 April resulting in his receipt of workmen's compensation and an extensive absence from work beginning 28 April and continuing through the hearing, testified in great detail about the involvement of Respondent's representatives in Hayson's preparation and circulation of a petition among the maintenance employees rejecting the Union as their collective-bargaining representative. Hayson had been employed by Respondent on 18 September, had never joined the Union, and had not participated in the strike that began in January. Hayson testified that in February, Goodwin approached Hayson in the plant and asked Hayson to do him a favor. He then asked Hayson to come to his office where they could talk in private. On the way to Goodwin's office they passed the office of Plant Manager Tabor and Goodwin remarked to Tabor as he passed that they were going to "make the call." In Goodwin's office, Goodwin said he wanted Hayson to make one phone call and explained that Respondent could not give the maintenance employees any increase in benefits without having the Union decertified because Respondent was legally bound to negotiate with the strikers. Goodwin then asked Hayson to call the "company's attorney," and produced a business card of an Orlando, Florida attorney saying the attorney would provide him with a word-for-word description of how to file a decertification petition.[9] Hayson inquired why Goodwin could not do "this" and Goodwin replied he was a member of management. When Hayson responded that he was not a member of the Union, Goodwin remarked that Hayson was eligible to be in the Union. Hayson picked up the phone and dialed the number unsuccessfully. Goodwin then dialed the number for Hayson and handed him the phone. Hayson learned that Brown was out but would be back later that afternoon. Hayson said he would call back and thereupon left Goodwin's office.

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[9] Hayson could not recall the name of the attorney supplied by Goodwin. Based on the testimony of Dorothy Greene, an associate attorney in the firm of Richson and Brown, the attorney who Hayson had attempted to call was Jim Brown, a partner in the firm.

It appears that Hayson made no additional attempt to reach Brown that day. The following day Goodwin inquired of Hayson whether he had called Brown back. Hayson replied he had become preoccupied and had not called back. Goodwin stated it was a priority matter that had to be taken care of and again took Hayson to Goodwin's office, again passing Tabor and again telling him they were going to make "the call." Hayson did not have Brown's business card previously given him by Goodwin so Goodwin again supplied Hayson the phone number. Further, Goodwin placed the call for Hayson, and gave him the phone. However, again Brown was not in.

On following days Goodwin made repeated inquiries of Hayson about calling the attorney, but Hayson "stalled" him. On 3 March after lunch Hayson was approached by Goodwin with Hayson's supervisor, Al Patterson. Goodwin told Hayson to leave his tools and come to Goodwin's office explaining that they had to make the call that day and that Tabor had sent Goodwin to get him. Goodwin and Hayson passed Tabor in the hallway and Tabor asked if they were going to take care of "this." Goodwin said they were and Tabor noted that they might need Ethel Friend, executive secretary to Rosenberg, Tabor, and Goodwin. Goodwin summoned Friend and she and Hayson sat in Goodwin's office while Goodwin went to confer with Tabor. Tabor returned, dialed Brown's number for Hayson, and handed him the phone instructing him to get a word-for-word description of what to do repeating it aloud so Hayson and Friend could both take notes on what had to be done. This time Hayson talked to attorney Dorothy Greene who told him how to file a decertification petition, what the wording had to be, the percentage of people needed to support the petition, and where to file the petition. Further, Greene had said that the petition had to be notarized in the presence of all who signed it.

After the call was completed a dispute arose whether Friend, a notary public, would go out into the plant to watch the individual employees sign the petition. Goodwin summoned Tabor into the office, and Tabor stated that Friend would not go into the plant adding that she could notarize the petition after Hayson returned with the signatures. Goodwin noted that the bindery petition[10] he had received that morning was not notarized, and he suggested using the bindery petition language, which he secured from a filing cabinet. Hayson then copied the bindery language on his own petition. He thereafter set about getting signatures of the maintenance employees but not before Goodwin gave him instructions as to exactly who was in the maintenance unit and arguments to be used to encourage employees to sign the petition. Thus, Goodwin told Hayson to talk to each maintenance employee privately, and when Hayson expressed concern that the employees might fear a reduction in benefits if they signed in light of the reduction of benefits earlier in the bindery department, Goodwin told Hayson not to use Goodwin's name but assure them that signing the petition would not affect their benefits package. Hayson asked what to do about the "hard sales" and Goodwin directed Hayson to tell them that if they did not sign the petition the strikers would be back and they would be out of work.

It took Hayson about 30 minutes to secure the signatures of the five other working maintenance employees. He returned the petition to Goodwin and Friend notarized it. Goodwin then made copies and directed that they put a "disclosure" statement on the bottom of the petition saying Hayson had given the petition to Goodwin. Hayson hesitated asking what would happen if he did not. Goodwin replied "something to the effect" that he felt a printing house in Quincy, Florida, was hiring.[11] It is undisputed that Hayson thereupon wrote on the copy, "Given to David Goodwin on March 3rd, 1986 by George W. Hayson." Goodwin supplied a stamped envelope to Hayson for mailing the petition. Hayson addressed the envelope to the Board's Region 12, using the address supplied by Greene, and mailed the petition.

Hayson subsequently received a call from a staff member of the Regional Office who related the petition could not be processed in the form submitted and advised Hayson that a completed and correct form (Form NLRB-502) would be sent to him for signature.[12] Hayson later received the petition but did not execute it or return it to the Regional Office.

On several later occasions, Goodwin asked Hayson if he had heard from the original petition, and Hayson answered that he had not. At one time Goodwin asked if he was sure he had sent the original petition and Hayson replied that he had. Goodwin remarked that Hayson better have because they were counting on it.

Hayson subsequently reported to Goodwin and Tabor that the original petition had not been accepted by the Board. Tabor responded that he should not worry about it, that Respondent's attorney was taking care of the matter, but added that it would not hurt to sign the petition and send it back anyway. Several times thereafter Goodwin inquired whether he had returned the correct petition to the Labor Board.

It is undisputed that Respondent by letter to the Union dated 5 March withdrew recognition from the Union in the maintenance unit based on Hayson's petition. There is no contention by the General Counsel that the employees signing the petition did not constitute a majority of the maintenance employees. It is further undisputed and the complaint alleges that about 5 March Respondent instituted changes affecting the maintenance unit employees including the elimination of double time pay for Sunday work, the elimination of an eyeglass program, an increase in employee contributions to insurance coverage, a reduction in minimum "call back" pay, and the institution of changes in sick leave and vacations.

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[10] As will be detailed infra, Goodwin in the morning of the same day received a petition from the bindery employees saying they no longer wanted the Union to be their collective-bargaining representative.

[11] This statement attributed to Goodwin is also alleged in the complaint as an unlawful threat of discharge in violation of Sec. 8(a)(1) of the Act.

[12] It is clear that Hayson's petition was inadequate under the requirements for decertification petitions set forth in Sec. 102.61 of the Board's Rules and Regulations.

b. *Respondent's evidence*

Six witnesses were arrayed against various aspects of Hayson's testimony by Respondent. First, Tabor specifically denied any involvement in Hayson's petition and even any knowledge of Hayson's intent to circulate one. He denied being told Hayson was going to make a "call" regarding decertification information, denied that he discussed Friend's notarization of Hayson's petition, and denied that he had ever instructed Goodwin to summon Hayson to make any phone calls regarding decertification.

Similarly, Goodwin denied the conduct attributed to him by Hayson. Thus, Goodwin testified that Hayson initiated discussions with Goodwin about getting rid of the Union in early January and then on two occasions after the strike started. The last occasion was in mid-February when Hayson also complained that he and other maintenance employees were sick of having to go out and change employees' flat tires during the strike. Hayson specifically asked if there was something employees could do to get rid of these people. Goodwin said he would check in to it and thereafter supplied Hayson with the phone number of attorney Jim Brown. The next time the matter came up was on 3 March during lunch when Hayson saw Goodwin in the plant and asked if he could use Goodwin's telephone. Goodwin replied affirmatively. Later, after Goodwin returned to his office Hayson came in and initiated the call. Only then did Goodwin realize who Hayson was calling. Goodwin then left the office to call Friend in. After the call was completed, Hayson told Goodwin he had the language for a decertification petition but would need it notarized. Thereafter, Friend and Hayson left Goodwin's office. Goodwin denied that he discussed the notarization process. He further denied Tabor was even aware of what was going on. He specifically denied showing Hayson the bindery petition, and when Hayson brought the maintenance petition in and said it had to be notarized, Goodwin got Friend to do it. Goodwin also denied asking Hayson to write anything on the copy retained by Goodwin and likewise denied any threatening reference to Hayson about job openings in Quincy.

Friend testified she was called into Goodwin's office on 3 March after Hayson was already on the phone. She said she did not take any notes but after Hayson completed his call she discussed with Hayson her notarizing a petition. She left the office when Hayson left, and she testified there was no discussion regarding the names of unit employees between Hayson and Goodwin when she was present. She also denied that Goodwin had shown Hayson a copy of the bindery petition. Finally, when she subsequently came back to Goodwin's office to notarize Hayson's petition, nothing was said about Hayson signing the petition as being given to Goodwin and she corroborated Goodwin's denial of any threatening reference to available jobs in Quincy.

Al Patterson, maintenance engineer and Hayson's supervisor, in his testimony denied ever being present during any discussions between Goodwin on the Union and denied seeing them leave the plant floor to go to Goodwin's office, thereby implicitly corroborating Goodwin's testimony that Goodwin did not "get" Hayson to make the call on 3 March.

Attorney Dorothy Greene testified that on 3 March she had returned Hayson's calls to Jim Brown at Brown's request. Her testimony that she contacted Hayson that morning was supported by telephone bills from her office. She testified that Hayson discussed decertifying the Union with her briefly but indicated he had wanted to call her back after lunch. He did so and at that time she further explained to him the information regarding the filing of a decertification petition as set out in Section 102.60 of the Board's Rules.

Finally, to contradict Hayson's contention that he had not initiated the decertification discussions with Goodwin, Respondent presented maintenance employee Mike King who testified that on four or five occasions prior to Hayson's circulation of the decertification petition Hayson had talked about getting up such a petition to get the Union out of the Company. Hayson never mentioned anyone in management, and specifically Goodwin, supporting or promoting such a move. After the petition was signed by the maintenance employees and their benefits were subsequently cut, the maintenance employees were angry with Hayson, and, according to King, Hayson was "doing good" just to get the other employees to talk to him. King further testified that Hayson circulated another petition saying that by signing the petition the benefits would be restored.

C. *Conclusion*

From the foregoing it is apparent that Hayson's testimony cannot be reconciled with that of Respondent's witnesses. There is little room for misinterpretation or misunderstanding between the versions of the facts related by each side. A credibility resolution is therefore necessitated and if Hayson is credited, it must be concluded that Respondent flagrantly violated the Act. Demeanor is normally a significant consideration in resolving credibility. In assessing credibility here, one is compelled to initially note that Hayson was clearly an uneasy witness. Such uneasiness, however, could well be due to a back injury for which he was receiving treatment and which caused him to express some discomfort while testifying. The injury served to mask any discomfort with the content of his testimony and made less reliable the perception of deception. On the whole, however, I found Hayson no more convincing in demeanor than Respondent's witnesses, Goodwin, Tabor, Friend, and Patterson.

In assessing Hayson's testimony in light of all the record evidence, one must first start from the premise that he was an employee of Respondent at the time of the hearing, albeit absent due to his back injury, and that his employee status put him at risk as a result of his testimony adverse to Respondent. This factor tends to support his credibility. (See, e.g., *Pittsburgh Press Co.*, 252 NLRB 500, 504 (1980); *Georgia Rug Mill*, 131 NLRB 1304, fn. 2 (1961).) On the other hand, Hayson had a clear and substantial motive for testifying against Respondent, for, based on the uncontradicted and credible testimony of Mike King, the other maintenance employees were angry with Hayson for circulation of the petition that enabled Respondent ultimately to cut their benefits. Hayson's testimony herein would serve to restore the benefits both to himself and the other maintenance employees and assuage their anger. Accordingly, Hayson can in no respect be considered as disinterested, and his testimony must be weighed with this in mind.

Greene's testimony provides the initial contradiction of Hayson concerning the events of 3 March. Not only did Greene impress me as more credible than Hayson, she had no monetary or job interests in the outcome of the proceeding and was less likely to be biased. Moreover, her testimony was substantiated by her office telephone bills. And, finally, Hayson did not specifically deny Greene's testimony that on the morning of 3 March he told her he would call her back later in the day. Hayson simply professed a lack of recall on this point. Such lack of recall was uncharacteristic for him in light of his other detailed testimony. Crediting Greene's testimony, I must conclude that Hayson's testimony about Goodwin coming to get him and taking him to the office after lunch on 3 March is improbable and it is more likely that Hayson, as Goodwin contends, approached Goodwin during lunch that day requesting use of Goodwin's phone. Accordingly, I do not credit Hayson on this point, and find Goodwin's contrary testimony to be more credible. Moreover, based on King's credible testimony that Hayson on several occasions, without reference to Goodwin, had talked to King about getting up a petition against the Union, I find reasonable Goodwin's claim that Hayson had originally broached the idea of getting rid of the Union to Goodwin. I therefore credit Goodwin over Hayson on this point also and find that Goodwin's supplying of the name and number of attorney Brown was in response to Hayson's inquiries. Such action by Goodwin under these circumstances did not in itself constitute unlawful assistance in the decertification process. See *Amer-Cal Industries*, 274 NLRB 1046 (1985).

There are other portions of Hayson's testimony that cannot be so easily discredited. His contention that he copied the bindery petition shown to him by Goodwin while contradicted by Goodwin and Friend appears to be supported by the fact that the language on the two petitions is identical. It is true that the petition language was short and simple stating: "We the undersigned employees of Rose Printing, no longer wish to be represented by G.C.I.U., Local 241-B for the purpose of collective bargaining." Nevertheless, chance duplication by unsophisticated employees would appear to be unlikely. However, Hayson in what appears to be a contradiction of his own claim about the source of the language conceded that Greene had given him "the actual wording of how it [the petition] had to be." Greene confirmed that she had given Hayson "basically the contents" of a petition including an allegation that the employees "no longer wished to be represented by the particular union." In view of this, I conclude that the identical language on the petitions is not conclusive and find more convincing the denials of Goodwin and Friend that the bindery petition was shown to Hayson. On the other hand, I do believe that Goodwin told Hayson that the bindery petition was not notarized. Otherwise, Hayson had no way of knowing that undisputed fact. Further, a canvass of the record discloses no specific denial by Goodwin that he told Hayson this.

I also find convincing the mutually corroborative testimony of Goodwin, Friend, and Tabor that Tabor was not involved in any way with Hayson's petition and the events that transpired in Goodwin's office on 3 March. Tabor's denials in particular appeared to be forthright, emphatic, and sincere.

I further credit Goodwin and Friend regarding the absence of any requirement that Hayson indicate on the copy of the petition he gave Goodwin that it was voluntarily "given" to Goodwin, and the absence of any threat to Hayson to make him surrender a copy of the petition. There was no similar language on the bindery unit petition, and no reason appears why Goodwin would find it unnecessary on that petition while requiring it on Hayson's petition. I also note that Hayson's testimony on this issue was somewhat contradictory and was far from being emphatic. Thus, he claimed that Goodwin asked him to use the words "voluntarily given" but Hayson only wrote "given" to suggest he was not doing it voluntarily. In his prehearing statement to the Board investigator, Hayson made the specific claim that he had couched his release of the document to Goodwin in language that would indicate to someone reading it that it had not been surrendered voluntarily. Obviously, it falls far short of accomplishing this purpose, and on the contrary casts serious doubt on Hayson's contention. Moreover, no basis for any reluctance by Hayson to give Goodwin a copy of the petition was explained on the record. Finally, it must also be noted that the threat Hayson attributed to Goodwin to reflect on the petition that it was "given" to Goodwin was prefaced in Hayson's testimony by the equivocal words "to the effect" indicating, at best, Hayson's equivocation and uncertainty if not an attempt to prevaricate. Accordingly, I conclude there was no unlawful threat violative of Section 8(a)(1) issued to Hayson on this point and shall recommend that the complaint allegation regarding such threat be dismissed.

Hayson's contention that following 3 March, Goodwin made repeated inquiries about the status of Hayson's petition with the Board and stated that Respondent was counting on it impresses me as patently incredible. A single inquiry by Goodwin might be credible since Goodwin was well aware that Hayson intended to file the petition with the Board, but repeated inquiries and a statement that Goodwin or Respondent was counting on it just does not square with other facts. Respondent quickly withdrew recognition from the Union in the maintenance unit based on the petition copy provided by Hayson. In view of this it would be illogical for Respondent to urge Hayson to proceed in any manner with the petition. For the same reason, I find incredible Hayson's testimony that Tabor said to go ahead and file with the Board the later petition, corrected as to form and supplied by a Board agent to Hayson. Moreover, Hayson never filed the corrected petition, a fact that lends credence to the absence of any encouragement from Goodwin or Tabor to do so.

Notwithstanding the foregoing, the record shows some subtle assistance accorded Hayson in his preparation and circulation of the petition. Thus, Goodwin allowed Hayson to use his office telephone to make a long distance telephone call to discuss the petition with Greene. The Board has found action such as this to be supportive of a finding of unlawful assistance. See *Cummins Component Plant*, 259 NLRB 456, 461 (1981). And Hayson's testimony that Goodwin gave him a stamped envelope in which to send the original petition to the Board was not contradicted. In the absence of such contradiction, I credit Hayson on this point.[13] An employer's provision of a stamped envelope in similar circumstances has also been regarded by the Board as evidence of unlawful interference. Id. Hayson's testimony that Goodwin supplied him with certain names of unit employees so that he could obtain their signatures was also not specifically denied by Goodwin and is credited. While the supplying of such names in itself may not be unlawful, *Montgomery Ward & Co.*, 187 NLRB 956 (1971), it is clearly a factor for consideration in determining the existence of unlawful assistance.

In addition, it must have been obvious to Goodwin that Hayson was going to secure, and in fact did secure, employee signatures on the petition during worktime. After all, by Goodwin's testimony, Hayson asked to use Goodwin's phone after lunch and came to Goodwin's office around 1 p.m. Hayson subsequently left with his petition and brought it back with signatures at 2:15 p.m. according to a notation on Respondent's copy of the petition. Since according to Hayson it took him about 30 minutes to obtain the signatures, he must have circulated the petition to Goodwin's knowledge on worktime. Yet, there was no admonition by Goodwin beforehand against circulating it on worktime and no reprimand after Hayson returned the petition. Permitting an employee during worktime to circulate antiunion petitions has been held to constitute unlawful assistance. See *Daisy's Originals, Inc.*, 187 NLRB 251 (1970).

Even Friend's presence in Goodwin's office during the Hayson call to Greene appears to have been intended to provide assistance. While Friend, contrary to Hayson, asserted she took no notes, there is no other explanation on the record for her presence than to provide assistance. And, Friend did in fact assist Hayson by providing notarization services with Respondent's condonation, apparently free of charge.

Finally, a search of the record reveals no specific denials by Goodwin of Hayson's testimony that Goodwin told him what to tell "hard sale" employees as well as those who might be concerned about a loss of benefits if the Union were decertified. To be sure, Friend's testimony suggests Goodwin gave Hayson no unit employee names while she was present, but it is to be noted that Hayson and Goodwin were together prior to the time Friend ever came into the room. And while I would be inclined to discredit Hayson where contradicted, it appears to me that his testimony in this instance was not all fabrication. In view of the undisputed acts of assistance set forth above, I find it not unlikely that Goodwin did supply Hayson with arguments to be used on the maintenance employees. Accordingly, and in light of the absence of specific contradiction, I credit Hayson on this point.[14]

"[A]n employer's solicitation, support, or assistance in the initiation, signing, or filing of an employee decertification petition interferes with the employees' Section 7 rights." *Placke Toyota*, 251 NLRB 395 (1974). I conclude that the sum of Respondent's conduct here constituted unlawful assistance to Hayson in the preparation and circulation of the decertification petition. Such conduct of Respondent includes allowing Hayson to use its phone for long distance purposes, its allowing Hayson to circulate the petition on worktime, providing Hayson with a stamped envelope for mailing the petition to the Board, providing him with notarization services at no apparent cost, and giving instructions to Hayson by Goodwin of what to tell employees in securing their signatures on the petition. Accordingly, I find Respondent violated Section 8(a)(1) of the Act in this regard as the consolidated complaint alleges.

Since the petition was a product of unlawful assistance, Respondent was not entitled to rely on the petition as valid grounds for doubting the Union's continued majority status. Respondent was therefore under a continuing obligation to bargain collectively with the Union as the representative of the maintenance employees and its withdrawal of recognition of the Union on 5 March and subsequent refusal to recognize the Union violated Section 8(a)(5) as alleged. *Architectural Woodwork Corp.*, 280 NLRB 930 (1986); *Daisy's Originals*, supra. It further follows that the changes in employee benefits instituted by Respondent in the maintenance unit after the unlawful withdrawal recognition from the Union constituted unilateral changes at a time Respondent was still obligated to deal with the Union. I find such changes violated Section 8(a)(5) of the Act as alleged.

4. Withdrawal of recognition in bindery unit

a. *November conduct of Foreman Capps*

The complaint alleged that Respondent through Supervisor Johnny Capps, foreman in Respondent's folding and stitching department, in November urged its employees to circulate a petition seeking to decertify the Union as bargaining representative of the bindery employees. Evidence on the issue is found in the testimony of bindery employee David Shivar who related that in the fall of 1985, feeling that he was being "harassed" by the Union, he had asked Capps how he "could get the Union from harassing me." Capps responded that he did not know but would find out. Subsequently, Capps returned and told Shivar that if he wanted the Union to stop harassing him he could pass around a decertification petition. Shivar told Capps he did not know about the wording for such a petition. Capps again responded by saying he would get back with him on that. Sometime thereafter Capps gave Shivar the name and number of an attorney[15] to call, and Shivar called the attorney from Capps office, although it is not clear whether Capps was present at the time. The attorney, whose name Shivar could not recall, told Shivar the necessary steps to take in connection with the petition, and later, Shivar prepared and attempted to circulate a petition. However, only about eight people signed the petition and Shivar dropped any further action on it.

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[13] It is clear and not uncommon that a trier of fact where warranted may believe some but not all of what a witness says. See, e.g., *Enterprise Products Co.*, 265 NLRB 544, 546, fn. 2 (1982).

[14] In reaching this conclusion, I also note that Goodwin was vague regarding any discussions with Hayson after Hayson finished his phone conversation with Greene. He testified as follows:

> Q. What happened after he hung up the phone?
>
> A. He told me that he had the wording for a decertification petition and that he would need to have it notarized.
>
> Q. Okay. Give me the whole conversation in your office.
>
> A. Basically that was the end of the conversation.

Such testimony even omits the discussion regarding the notarization process that Friend admits took place.

Arguments and conclusions

Capps did not testify Shivar's testimony was uncontradicted. Such testimony is credited.

The General counsel argues that Capps implanted the idea of decertification in Shivar's mind and therefore went beyond mere "ministerial assistance." The argument is bottomed on the fact that Shivar had inquired about stopping certain unspecified harassment by the Union, not decertification. Respondent in its defense viewed Shivar's testimony as presenting Capps with a request for information on "getting rid of the Union," and asserts Capps did nothing more than give him the name and number of an attorney.

An employer "does not violate the Act by referring an employee to the Board in response to a request for advice relative to removing the union as bargaining representative." *Placke Toyota*, supra. The same can apparently be said when the employer refers the employee to an attorney, rather than the Board, if the attorney is unconnected to the employer as in the case sub judice. On the other hand, any solicitation, support, or assistance by an employer in the initiation, signing, or filing of a decertification petition is unlawful and violates the Act. Id. However, an employer's providing information regarding a decertification petition in direct response to requests by an employee for such information does not violate the Act. See *Amer-Cal Industries*, supra.

The initiation of a decertification petition may result from nothing more than an idea implanted in an employee's mind by the employer. See *Weisser Optical Co.*, 274 NLRB 961 (1985). Here the evidence shows that Shivar complained to Capps about unspecified harassment. Capps' response was to tell Shivar he could pass around a decertification petition, and then provided Shivar with a source for further information. Although decertification may perhaps constitute a "remedy" for certain union "harassment," it could well constitute "overkill" for any immediate and legitimate concerns by Shivar of harassment that could be entirely unrelated to a desire not to have the Union represent him or other employees. On the evidence here, there is no basis for a conclusion that Capps' referral to a decertification petition in his reply to Shivar's question was an appropriate response. Rather, and without more, Capps' reference to a decertification petition, in my opinion, amounted to an unsolicited suggestion that decertification was the only alternative available for Shivar's concerns, whatever they were. Under these circumstances, I conclude Capps effectively implanted the idea of decertification in Shivar's mind. In this regard, I conclude, Respondent violated Section 8(a)(1) of the Act as alleged.

b. *The petition circulated by Rogers*

Carrie Rogers, a 17-year employee of Respondent who worked in the bindery department and who did not join in the Union's strike, testified that she circulated a petition among Respondent's bindery employees on 28 February and 3 March stating they no longer wished the Union to represent them. Rogers, who contended that she had resigned from the Union in October, secured a majority of the unit employees' signatures on the petition. She testified that she gave the petition to Goodwin at 8:15 a.m. on 3 March.

The General Counsel does not contest the facts surrounding Rogers' circulation of the petition asserting only that Rogers' testimony raises "doubts about how she went about circulating the petition." Nevertheless, the General Counsel's position is that Rogers' petition was invalid because it arose in the context of Respondent's unfair labor practices, and that Respondent therefore violated Section 8(a)(5) of the Act when it withdrew recognition from the Union based on Rogers' petition.

As Respondent's brief notes, an employer may refuse to bargain with a union if it has a good-faith doubt of the Union's majority status. Generally, a petition rejecting the Union signed by a majority of unit employees would provide a good-faith doubt warranting withdrawal of recognition in the absence of unfair labor practices on the part of the employer. (See, e.g., *Hemet Casting Co.*, 260 NLRB 437 (1982). However, not all unfair labor practices will serve to preclude an otherwise valid petition from being a legal basis for withdrawal of recognition. (See, e.g., *Carolina American Textiles*, 219 NLRB 457 (1975); *Vernon Mfg. Co.*, 219 NLRB 622 (1975).) I have previously found that Respondent violated the Act in November in implanting the idea of a decertification petition in the mind of employee Shivar. However, Shivar's petition was dropped more than 3 months prior to Rogers' petition and there is no evidence that Rogers had ever been aware of Shivar's petition. It is therefore impossible to conclude that Rogers' petition flowed from, or was in any way related to, Shivar's petition. And there is no evidence that Rogers' petition was a product of independent unlawful suggestion, encouragement or assistance. And it was completed prior to Hayson's petition, discussed supra, which I concluded resulted from unlawful assistance.

As to the occurrence of Roger's petition in the context of other unfair labor practices, I previously found, supra, that Respondent did not lawfully bargain with regard to the compulsory use of vacation time during the Christmas shutdown. It is to be noted, however, Respondent did at least preserve the issue of compulsory use of vacation time so that employees would not be adversely affected until after the Board had ruled on the matter. Respondent's unlawful act in this regard which also occurred at least 2 months prior to Rogers' petition could hardly have influenced the initiation or circulation of the petition and there was no direct evidence connecting the two events. It follows, and I conclude, that Rogers' petition was not unlawfully tainted by the unfair labor practices previously found. Accordingly, and because it is not disputed that Rogers' petition was signed by a majority of unit employees, I find that the petition provided a legitimate basis for doubt as to the Union's majority status, and that Respondent's withdrawal of recognition from the Union in the bindery unit did not violate Section 8(a)(5) and (1) of the Act.

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[15] Respondent's attorney Blue admittedly advised Tabor and Goodwin that during negotiations employees might be displeased with the Union and seek to decertify it. Blue further advised them that it supervisors were asked about decertification they should not talk about it. Blue gave them a number of the law firm of Richson and Brown in Orlando, Florida, unrelated to Blue's firm, to provide employees information on decertification.

D. *Respondent's Actions Against Hayson*

1. The facts claimed by Hayson

The complaint, as amended, alleges that Respondent on 8 April imposed more onerous and rigorous terms of employment on Hayson by transferring him from the day to night shift on 11 April and issued a written warning to him all because of his union or other protected concerted activities. It also alleged that Respondent on 26 April, through Goodwin, violated Section 8(a)(1) of the Act by threatening employees with unspecified reprisals because employees had given testimony under the Act.

To support the allegation, Hayson testified that on 7 April he was switched from his day shift, which ended at 4:15 p.m., to the night shift starting at 11:15 p.m. as a result of Respondent's increase in work volume flowing from the start up of the new state legislative session. Supervisor Patterson advised him of the change and when Hayson pointed out to Patterson that there was a new electrician with less seniority, Patterson simply replied that seniority did not mean anything and he had been told to tell Hayson of the change. Hayson further protested to Patterson that no electrician had previously been assigned the night shift but Patterson answered that it was company policy.

On 11 April, Hayson received a written reprimand from Patterson which Patterson had left in Hayson's locker. The reprimand complained of insubordination by Hayson in failing to comply with instructions regarding (a) preparing circuit boards for shipment for repair, (b) supplying power to the prep department light table, and (c) placing locks on certain cabinets. The reprimand noted that Hayson had a history of not willingly following orders and concluded with the warning that any further insubordination would result in discharge.

Hayson testified that he telephoned Patterson about the reprimand and Patterson stated that Tabor had told him to write Hayson up. Hayson complained that the basis for the reprimand was fictitious and Patterson responded that Hayson had the "higher ups pissed off" at him. Hayson asked Patterson if he thought it had anything to do with the petition, and Patterson answered that he thought it did.

The following day Hayson telephoned Tabor and asked him about the matter. Tabor professed ignorance of the warning, claimed he had never said anything to Patterson about it, but said he would speak to Patterson. Subsequently, according to Hayson, Patterson, about 13 April, called Hayson and inquired about his injured back and then told Hayson that Patterson had "his ass chewed out about the reprimand issued Hayson." Patterson added that Tabor had told him that no disciplinary action was to be taken without Tabor's approval. When Hayson pointed out that Patterson had initially told Hayson that the reprimand was at Tabor's direction, Patterson answered that Tabor was just lying or trying to weasel out of it or "something—to that effect.

Hayson in his testimony denied that he was guilty of the conduct complained of in the reprimand. Specifically, he contended he had been told to repair the circuit boards, not send them in for repair, that he was unable to install the locks without hasps which he had requisitioned, and that he had received no order to supply power to the light table.

Finally, in connection with the alleged threat by Goodwin, Hayson testified that subsequent to 28 April when he was ill at home with his back injury he was telephoned by Goodwin. Goodwin inquired about Hayson's back and then inquired if Hayson had seen the article appearing in a local newspaper on 25 April regarding Respondent's possible violations of the Act. The article referred to comments of a spokesman of the NLRB in the Jacksonville resident office noting that the Board had evidence supporting "the union's charges that [Respondent] had broken labor rules when non-striking workers voted to reject the union after the strike." Hayson acknowledged that he had seen the article and expressed to Goodwin his "wonder at what went wrong." Goodwin replied, still according to Hayson, "Oh, we knew what went wrong and we knew who the traitor is," and "we're taking care of it.

Contrary to Hayson's testimony, Patterson testified that he was told to put an electrician on the night shift by Tabor during the legislative session and would have assigned the junior electrician, Buffo, to the shift except that Hayson volunteered to take the night shift. The advantage to the night shift, Patterson pointed out, was that it paid a shift premium and employees on the shift worked 6 days a week and consequently got 8 hours of overtime. However, Hayson was on the shift a week when he wanted off. Patterson advised him if he came back to day shift, he would have to help out with the "sewing machine." Hayson said he did not want to do mechanical work and opted to stay on the third shift.

Patterson conceded that he had issued the written reprimand to Hayson but insisted the reprimand was warranted. Specifically Hayson had refused to follow orders about preparing circuit boards for shipment, an item of some concern to Tabor who made repeated inquiries to Patterson about the circuit boards. Patterson insisted he had told Hayson for three nights to supply power to a light table, and Hayson had failed to do it. Finally, regarding the installation of locks, Patterson related that Hayson had told him that two could not be installed.

Eight others could be but Hayson failed to install them. Patterson denied that anyone told him to give the warning to Hayson and maintained that neither Tabor nor Goodwin knew about it beforehand. When Tabor learned of the warning he told Patterson he wanted prior notification of all reprimands and issued a memorandum to all department heads to this effect.[16] Patterson specifically denied telling Hayson that the reprimand was directed by Tabor, that management was "pissed off" at Hayson, or that Tabor was trying to weasel out of responsibility for the reprimand.

Tabor's testimony was in full accord with Patterson's. He acknowledged Hayson called him about the reprimand from Patterson but emphatically stated he was not aware of the reprimand beforehand and denied he had told Patterson to issue it. He said the issuance of a reprimand without Tabor's knowledge was contrary to policy, and he so advised Patterson. Tabor added, without contradiction, that after the reprimand he called Patterson and Hayson to his office and told them that each had skills Respondent needed and admonished them to try to get along and work together but also told Hayson that he would have to follow Patterson's instructions.

Goodwin denied in his testimony calling Hayson at his home and making the remark concerning the traitor that Hayson attributed to him. Further, Goodwin testified he had never called Hayson at his home to talk about the Union or anything dealing with unions, and while he acknowledged calling Hayson at his home about the hiring of maintenance employee Mike King,[17] he specifically and emphatically denied calling Hayson at his home after his back injury.

2. Conclusion

In *Wright Line*, 251 NLRB 1083 (1980), enfd. 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982), approved in *NLRB v. Transportation Management Corp.*, 462 U.S. 393 (1983), the Board held that in all 8(a)(3) or 8(a)(1) cases turning on employer motivation, the General Counsel must establish a prima facie showing sufficient to support the inference that protected conduct was a "motivating factor" in the employer's action, and, afterwards once a prima facie case is established, the burden shifts to the employer to demonstrate that the same action would have taken place even in the absence of protected conduct. Here, I am persuaded the General Counsel has failed to establish a prima facie case that any action taken against Hayson was discriminatory. Clearly, Hayson was not engaged in union activity. And while he may well have been engaged in protected conduct in connection with his decertification petition activity, there is absolutely no evidence to establish Respondent was unhappy with his actions in that regard. Further, at the time of the shift change and the reprimand Hayson had not even been contacted by the Board investigators regarding the Union's charge.[18] Under these circumstances, there was no basis for Respondent to be motivated to take action against Hayson for his protected conduct and thus no basis for concluding protected conduct was a "motivating factor" in the alleged discriminatory action against Hayson.

Even assuming that Hayson's testimony established a prima facie case, I would not find the violations alleged because I do not credit Hayson's testimony. Patterson's testimony impressed me as reasonable and his demeanor during his testimony conveyed the impression of honesty and conviction. Weighed against the testimony of Hayson, I find Patterson decidedly more credible. Moreover, it is difficult to perceive how a transfer to a shift which would allow Hayson to make significantly more money, would nevertheless be discriminatory, particularly in the absence of evidence that the work was more arduous or rigorous or that Hayson would encounter transportation or other personal problems that to Respondent's knowledge would make it more difficult for him to man the shift. I find under all these circumstances, it was more likely, as Patterson testified, that Hayson volunteered for the shift and only later decided he wanted to return to the day shift.

I also credit Patterson's testimony supported by Tabor regarding the reprimand of Hayson. Again there appeared to be no logical basis for Respondent's unhappiness with Hayson for union or protected activities or any basis other than those items specified in Patterson's reprimand. Patterson may well have alluded to Tabor's concerns about the circuit boards in his discussion with Hayson, since Tabor admits expressing concern to Patterson and directing him to get the boards shipped. However, Patterson's telling Hayson of this does not establish that Tabor directed issuance of the reprimand. It is more likely that he did not, for, otherwise, it would have been unnecessary for Tabor to subsequently admonish Patterson not to issue reprimands without his knowledge. In addition, Tabor's subsequent issuance of a memo to department heads not to issue reprimands without his knowledge would constitute a rather drastic step for one who is simply trying to "weasel out" of responsibility for Hayson's reprimand. Accordingly, crediting Patterson and Tabor's testimony, which was mutually supportive and entirely plausible and credible, I conclude that the reprimand issued to Hayson was not discriminatorily motivated and that neither Hayson's transfer to the night shift nor his reprimand was violative of Section 8(a)(3) and (1) of the Act.

I do not credit Hayson's testimony over that of Goodwin attributing to Goodwin a reference to Respondent's knowing who the "traitor" was. Goodwin's denial of the remark was emphatic and persuasively delivered. I therefore find Goodwin did not make the remark Hayson attributed to Goodwin and Respondent did not violate Section 8(a)(1) of the Act in this regard.

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[16] Patterson conceded that he had given prior reprimands to employees in the maintenance department without incident, but he was not aware whether Tabor knew of such warnings.

[17] Hayson had been instrumental in King's obtaining employment with Respondent.

[18] It appears Hayson gave his first statement to the Board investigators on 16 April. Even then there is no evidence Respondent was aware of his having given a statement.

E. *Nature of the Strike*

The General Counsel argues as the complaint alleges that the strike that began about 22 January by the bindery unit and the maintenance unit employees was caused by the unfair labor practices of Respondent. It is urged that the bindery employees as well as the maintenance employees struck to protest Respondent's bargaining conduct, which amounted to a violation of Section 8(a)(5) of the Act. Respondent, on the other hand, argues that it committed no violation of the Act so the strike could only be regarded as an economic strike.

It is horn book labor law that a strike caused in whole or in part by an employer's unfair labor practices constitutes an unfair labor practice strike. *NLRB v. Mackay Radio & Telegraph Co.*, 304 U.S. 333 (1938). Conversely, an economic strike is one not caused by an employer's unfair labor practices. *NLRB v. Pecheur Lozenge Co.*, 209 F.2d 393 (2d Cir. 1953), cert. denied 347 U.S. 953 (1954). Unfair labor practice strikers are entitled to reinstatement on their unconditional offer to return to work. Economic strikers are entitled to reinstatement if they have not been permanently replaced at the time of their offer to return to work, and even if replaced, remain employees entitled to reinstatement on departure of replacements. *Laidlaw Corp.*, 171 NLRB 1366 (1968), enfd. 414 F.2d 99 (7th Cir. 1969), cert. denied 397 U.S. 920 (1970).

In establishing the existence of an unfair labor practice strike, a causal connection must be shown between the employer's unfair labor practices and the strike. *Robbins Co.*, 233 NLRB 549 (1977); *Winter Garden Citrus Products Cooperative v. NLRB*, 238 F.2d 128 (5th Cir. 1956). A strike that begins as an economic strike may be converted to an unfair labor practice strike notwithstanding the continuation of the economic issues that constituted the original basis for the strike. See *Giustina Bros. Lumber Co.*, 116 NLRB 700 at 731 (1956). In the case sub judice, I have found that Respondent did not refuse to bargain in good faith in the bindery negotiations. And while I have found that Respondent violated Section 8(a)(5) and (1) in its unilateral action regarding the compulsory use of accrued vacation time by employees for the Christmas shutdown and its refusal to bargain on the matter and arbitrate the issue, there is no evidence of a causal connection between such action and the strike. Further, as already noted, Respondent preserved the issue on the compulsory use of vacation time by allowing the employees to advise it of their desire not to use accrued vacation prior to the shutdown so that the matter could be subsequently resolved by the Board or an arbitrator. The record reflects that only one bindery employee, Peggy Powers, advised Respondent that she did not want to use her vacation time during the Christmas shutdown. Employee concern over the issue, therefore, appears not to have been of great magnitude.

That the Union did not consider Respondent's action on the compulsory vacation use to be a cause of the strike is demonstrated by the fact that although the Union filed a charge on the employer's unilateral action, in Case 12-CA-11819 on 18 November and even though it filed a subsequent charge and amended charge in Case 12-CA-1191-3 on 18 February and 27 March, respectively, it made no contention regarding the unfair labor practice status of its strike until the filing of the second amended charge in Case 12-CA-11912-3 on 17 April. Further, minutes of the union meeting at which the strike vote was taken were received in evidence. Those minutes do not refer to the compulsory vacation time use as an issue or concern. Moreover, the minutes refer to no unfair labor practice claims regarding Respondent's bargaining conduct, and, on the contrary, by reference to Respondent's right to hire permanent replacements during the strike, the minutes reveal the Union's contemplation of the strike as a wholly economic one. Although the Union's telegram to Respondent on 22 January advising Respondent of the strike did refer to the strike being based on Respondent's unfair labor practices, it did not specify what actions it contended were unlawful. Under these circumstances and in the absence of direct evidence of the causation of the strike, I cannot infer or otherwise conclude that Respondent's violation of the Act regarding the compulsory use of vacation time for employees during the Christmas shutdown was a cause of the strike.

The above reasoning also applies to Respondent's violation of the Act in suggesting the decertification petition to Shivar. In fact, the record does not show that any members of the Union or union officials were even aware of Shivar's petition prior to the strike. Absent such knowledge, it can hardly constitute a cause for the strike.

Considering the foregoing, I find that the strike at its inception was not an unfair labor practice strike. This does not, however, preclude its later conversion to such a strike. Respondent was not found responsible for any unlawful action between the beginning of the strike and the unlawful assistance accorded Hayson with the maintenance petition on 3 March. There is no direct evidence that Respondent's unlawful conduct with respect to the Hayson petition converted the strike to one based on unfair labor practices. Respondent's withdrawal of recognition from the Union, however, based on Hayson's unlawfully assisted petition could only have tended to prolong the strike since it deprived the striking employees of services of their representatives in negotiating either an end to the strike or a bargaining agreement in the maintenance unit acceptable to the striking employees. See *Wilder Construction*, 276 NLRB 977 (1985); *Whisper Soft Mills*, 267 NLRB 813 (1983); *Pennco, Inc.*, 242 NLRB 467, 469 (1979). Accordingly, I conclude that the strike was converted to an unfair labor practice strike on 5 March when Respondent unlawfully withdrew recognition of the Union in the maintenance unit. After that date, I conclude, all of the strikers became unfair labor practice strikers.

F. *Refusal to Reinstate the Strikers*

The complaint alleges that Respondent about 6 May refused to reinstate certain strikers set forth in appendices to the consolidated complaint. It is undisputed that the Union on 5 May sent an unconditional offer on behalf of all strikers to return to work "effective immediately." Respondent by letter from Tabor dated 6 May advised the Union that the striking employees "are now on a preferential recall list," and would be recalled to

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work consistent with the law applicable to economic strikers. Further, Respondent in its answer to the consolidated complaint raised the affirmative defense that certain of the strikers named in the strike voluntarily resigned their employment during the strike and were no longer entitled to reinstatement. Because I have found that the strike was converted to an unfair labor practice strike on 5 March, those strikers named in Appendices A and B to this decision and not otherwise specifically treated in this decision who were unreplaced as of 5 March are entitled to reinstatement. The remaining strikers are entitled to be placed on a preferential hiring list to be hired in accordance with seniority or other nondiscriminatory basis. See *Charles D. Bonanno Linen Service*, 268 NLRB 552 (1984).

At the hearing, Goodwin testified that seven employees named in the complaint, Brad Bowman, Richard J. Frauenthal, W. E. Posey, Mike Segler, Lester Posey, Jackie Lane, and Richard Heburn Jr. had resigned during the strike or prior to the hearing. The parties litigated the effectiveness of the resignation for reinstatement purposes of all these employees with the exception of Lane.[19] Bowman resigned on 12 February executing a resignation saying that he was terminating his employment effective immediately, the reason being that during the strike his job was replaced by another employee. His letter requested pay for his unused vacation and for his contributions to the retirement fund. Similar letters were executed by Lester Posey on 18 February and Segler on 19 March. W. E. Posey admittedly resigned on 12 February after being told his job had been filled. His written resignation does not contain a specific request for his retirement contributions but a notation on the resignation reflects he received such contributions. Frauenthal's written resignation is not in evidence but he admittedly resigned on 29 May. All five of these strikers testified they resigned in order to obtain their retirement contributions to alleviate their financial hardships resulting from the strike.[20] All except W. E. Posey, who was not asked, specifically testified they would return to their former positions with Respondent if such positions were offered.

The General Counsel asserting that Respondent has the burden of rebutting the presumption that the strikers have a continuing interest in their jobs claims Respondent has not affirmatively established that the five strikers named above who resigned intended to permanently abandon their former positions. See *Harowe Servo Controls*, 250 NLRB 958, 964 (1980). The execution of the resignations during the strike, according to the General Counsel, citing *P.B.R. Co.*, 216 NLRB 602, 604 (1975), and *S & M Mfg. Co.*, 165 NLRB 663 (1967), did not, without more, reflect a permanent abandonment of employment. Respondent argues the contrary, citing *Beverage-Air Co.*, 185 NLRB 168 (1970).

The Board has held in strike situations that to preclude a finding that a striker has permanently severed his employment by a direct communication to the employer of his intention to quit there must be a showing of some reservation or qualification in the quitting or a showing of continued interest by the striker. See *Drug Research, Inc.*, 233 NLRB 253 (1977); *Roylyn, Inc.*, 178 NLRB 197 (1969); *Dalton Sheet Metal Co.*, 207 NLRB 188, 191–192 (1973); *P.B.R.*, supra. In the instant case, it is clear that no reservations or qualifications were expressed to Respondent by the strikers in their respective resignations. However, Respondent has acknowledged here that termination of employment was the only way strikers could obtain their retirement contributions. All of the strikers indicated that this was their purpose in resigning. Further, there was no showing that at the time of the execution of these resignations, the strikers had employment elsewhere. Nor was there any evidence that the strikers abandoned the strike following their resignations, although Bowman did find other employment shortly after his resignation and possibly as a result of his having resigned. The fact that the strikers did not have jobs at the time of their resignations nor had they expressed to Respondent any immediate prospects of having a job at the time of their resignations are factors that serve to distinguish the instant case from *Beverage-Air* relied on by Respondent. Under these circumstances and because of the existing economic need expressed by the strikers, I conclude that the execution of the resignations did not reflect an intent on the part of the strikers to permanently abandon their jobs. Accordingly, they shall not be stricken from the reinstatement order recommended here.

With respect to Heburn, the uncontradicted evidence shows that shortly after the Union's offer to return the strikers to work, Goodwin telephoned Heburn offering him a job at $7 per hour. When Heburn reported for work, he found that the job was the same one he held prior to the strike at a higher rate of pay. There is no dispute that the $7 rate was the rate proposed by Respondent and imposed on impasse. Heburn rejected the job explaining to the foreman that he could not take the job for less than he was making before the strike. Moreover, he testified he told the foreman that he had learned from the Union that another employee was making $9 per hour on the same job. Respondent conceded that a retired part-time employee who was not covered by the Union's collective-bargaining agreement and who received no fringe benefits had been paid the higher rate for about 12 hours of work over a 2-week period. Notwithstanding his earlier rejection of the job, Goodwin wrote Heburn on 14 May saying that no regular full-time employee in the folding area earned more than $7 per hour and offered the job again to Heburn telling him to report for work on 19 May. Heburn never responded.

The General Counsel's position on Heburn appeared to be that because the wage reduction of Heburn's job flowed from Respondent's unlawful refusal to bargain, the offer made to Heburn to return to work at the lower rate was invalid and Heburn's rejection of the job under these circumstances did not amount to an unequivocal resolve to not accept reinstatement. Because I have found, however, that Respondent did not bargain in bad faith in the bindery unit negotiations, and because the rate imposed by Respondent was consistently rejected by the Union and imposed after impasse, the new rate offered Heburn was not unlawful. The offer to reinstate Heburn was accordingly valid and his rejection of the offer twice reveals an unequivocal resolve not to accept reinstatement. Accordingly, I shall not include him in the reinstatement order provided.

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[19] Because the circumstances of Lane's alleged resignation are not set forth, any entitlement of Lane under the recommended Order here issued shall be left to the compliance stage of this proceeding.

[20] The parties stipulated that under the terms of Respondent's retirement plan, employees could obtain the money vested therein by severing their employment relationship through termination, involuntary or voluntary, or by retirement.

CONCLUSIONS OF LAW

1. Respondent, Rose Printing Company, Inc., is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

2. The Union, Graphic Communications Union, Local 241-B, Graphic Communications Union, AFL–CIO, is a labor organization within the meaning of Section 2(5) of the Act.

3. The following employees of Respondent constitute separate units appropriate for the purposes of collective bargaining within the meaning of Section 9(b) of the Act:

> (a) All employees of Respondent's bindery operation at the meaning of section 8(a)(1) of the Act.
>
> (b) All regular and full time maintenance employees, including maintenance mechanics, plant clericals, baler operator and janitor employed by Respondent at its Tallahassee, Florida facility; excluding all other employees, office clerical employees, bindery and press room employees and operators, professional employees, guards, and supervisors as defined in the Act.

4. The Union has been the duly recognized collective-bargaining representative of all employees in bindery unit described above at all relevant times prior to 4 March 1986.

5. The Union has been, and is now, the certified and exclusive collective-bargaining representative for all employees in the maintenance unit described above.

6. By announcing on or about 16 October 1985 and by implementing its decision to require compulsory vacation use by unit employees for the 1985 Christmas shutdown without notice to or bargaining with the union and by unilaterally disavowing the continuing operation of the prevailing arbitration provision by refusing to arbitrate a grievance on this action, Respondent engaged in, and is engaging in, unfair labor practices within the meaning of Section 8(a)(5) and (1) of the Act.

7. By encouraging and assisting employees employed in its maintenance unit in the circulation of a petition to decertify the Union, Respondent engaged in, and is engaging in, unfair labor practices within the meaning of Section 8(a)(1) of the Act.

8. By withdrawing recognition from the Union about 5 March 1985 and thereafter refusing to bargain collectively in good faith with the Union as the exclusive representative of its maintenance employees, Respondent engaged in, and is engaging in, unfair labor practices within the meaning of Section 8(a)(5) and (1) of the Act.

9. By unilaterally changing the terms and conditions of employment of employees in the maintenance unit about 5 March 1985 without notice to or bargaining with the Union, Respondent engaged in, and is engaging in, unfair labor practices within the meaning of Section 8(a)(5) and (1) of the Act.

10. Respondent's violations of Section 8(a)(5) and (1) of the Act referred to paragraphs 7, 8, and 9 above converted the economic strike that began on 22 January 1986 into an unfair labor practice strike on 5 March 1986.

11. By refusing to reinstate strikers listed in Appendices B and C to this decision following the unconditional request of the Union on behalf of the striking employees made on 5 May 1986 and by treating such strikers as economic strikers, Respondent engaged in, and is engaging in, unfair labor practices in violation of Section 8(a)(3) and (1) of the Act.

12. The unfair labor practices set forth above in paragraphs 6 through 11 affect commerce within the meaning of Section 2(6) and (7) of the Act.

13. Respondent did not violate Section 8(a)(3) and (1) of the Act through the transfer of employee George Hayson to the night shift on 7 April 1986 or in issuing a written warning to him on 11 April 1986.

14. Respondent did not violate the Act by implementing its last offer to the Union in the bindery unit about 20 January 1986, by withdrawing recognition from the bindery unit about 4 March 1986 or in any other manner alleged in the consolidated complaint as amended.

THE REMEDY

Having concluded that Respondent has engaged in certain unfair labor practices, I find it necessary to order it to cease and desist therefrom and to take certain affirmative action designed to effectuate the policies of the Act.

Having found that Respondent violated Section 8(a)(5) and (1) of the Act by unilaterally announcing and implementing its decision to impose on employees the compulsory use of accrued vacation time for the 1985 Christmas shutdown, it will be ordered that Respondent rescind its unilateral action and restore accrued vacation leave to those compelled to utilize such leave for the 1985 plant shutdown. Inasmuch as this recommended action renders the Union's grievance on the matter moot, an affirmative order requiring further processing of the grievance to include arbitration becomes unnecessary. However, Respondent's unilateral disavowal of the effect of the arbitration provision in the then existing agreement with the Union warrants remedial action and a notice provision.

Because Respondent unlawfully withdrew recognition from the Union in the maintenance unit, it will be ordered that Respondent recognize the Union, and on request, bargain with it collectively as exclusive representative of all employees in the maintenance unit, and if an understanding is reached, embody such understanding in a signed agreement. In view of Respondent's unilateral changes in the terms and conditions of the maintenance employees about 5 March, Respondent will be required to restore the status quo ante by restoring the employee working conditions as they existed prior to the unilateral changes and to make employees whole for any losses in pay or benefits suffered by them as a consequence of Respondent's unlawful action. This make whole remedy shall include interest to be computed in the manner prescribed in *Florida Steel Corp.*, 231 NLRB 651 (1977).[21]

Because the employees named in Appendices B and C to this decision who participated in the economic strike beginning on 22 January 1986 and converted to an unfair labor practice strike by Respondent's violation of Section 8(a)(5) of the Act on 5 March 1986 requested unconditional reinstatement on 5 May 1986, Respondent shall immediately reinstate them to their former or substantially equivalent positions without impairment of their seniority rights and other privileges. In order to make room for them, Respondent shall dismiss, if necessary, all persons hired after 5 March 1986. If after such dismissals there are insufficient positions available for the remaining former strikers, any available positions shall be accorded the strikers on a nondiscriminatory basis in accordance with seniority or other nondiscriminatory criteria. Former strikers who were permanently replaced prior to the conversion of the strike and for whom no positions are immediately available shall be placed on a preferential hiring list in accordance with their seniority or other nondiscriminatory basis, and they shall be reinstated before any other persons are hired or upon the departure of their preconversion replacements. See *Charles D. Bonanno Linen Service*, supra.

Those former striking employees entitled to immediate reinstatement shall be made whole for any loss of earnings they may have suffered by reason of Respondent's refusal to reinstate them in accordance with their unconditional request to be reinstated. Backpay shall be computed in the manner prescribed in *F. W. Woolworth Co.*, 90 NLRB 289 (1950), plus interest as computed in *Florida Steel Corp.*, supra.

The General Counsel in the complaint in this matter sought a "visitorial clause" authorizing the Board, for compliance purposes, to obtain discovery from Respondent under the Federal Rules of Civil Procedure subject to the supervision of the United States Court of Appeals enforcing an order in this case. The Board authorized such a clause in *Hilton Inn North*, 279 NLRB 45 fn. 3 (1986), in view of the possible complexity of computing the make whole remedy in that case. The instant case also presents a possibility of complex computations in the make whole remedy provided. Accordingly, I find a "visitorial clause" appropriate here.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[22]

ORDER

Respondent, Rose Printing Company, Inc., Tallahassee, Florida, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Refusing to recognize and bargain collectively in good faith with Graphic Communications Union Local 214-B, Graphic Communications International Union, AFL-CIO, CLC as the exclusive representative of its employees in the following unit:

> All regular and full time maintenance employees, including maintenance mechanics, plant clericals, baler operator and janitor employed by Respondent at its Tallahassee, Florida facility; excluding all other employees, office clerical employees, bindery and press room employees and operators, professional employees, guards, and supervisors as defined in the Act.

(b) Changing the terms and conditions of employment of its employees in the maintenance unit represented by a duly recognized collective-bargaining representative without the consent of that representative or without a valid impasse and bargaining having been reached by that representative.

(c) Disavowing the continuing operation of the arbitration provision in the bindery collective-bargaining agreement by refusing to arbitrate disputes arising prior to the expiration of that agreement.

(d) Refusing to reinstate unfair labor practice strikers on their unconditional offer to return to work.

(e) Unlawfully encouraging and assisting employees to circulate petitions to decertify the Union.

(f) In any like or related manner interfering with, restraining, or coercing its employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action.

(a) Recognize and, on request, bargain with the Union as the exclusive representative of its employees in the following unit:

> All regular and full time maintenance employees, including maintenance mechanics, plant clericals, baler operator and janitor employed by Respondent at its Tallahassee, Florida facility; excluding all other employees, office clerical employees, bindery and press room employees and operators, professional employees, guards, and supervisors as defined in the Act.

(b) Rescind the unilateral imposition of compulsory use by employees of accrued vacation time for Christmas shutdown and restore to employees any accrued vacation leave involuntarily used by them as a result of Respondent's unilateral action.

(c) Restore the maintenance unit employees terms and conditions of employment in existence prior to 5 March 1986 and continue them in effect until an agreement on any changes thereon is reached with the Union or a bona fide impasse exists.

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[21] See generally *Isis Plumbing Co.*, 138 NLRB 716 (1962).

[22] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

(d) Make employees whole, with interest, for any loss suffered by them as a result of the unilateral changes in the maintenance unit on 5 March 1986.

(e) Immediately and fully reinstate its employees who participated in the strike that began on 22 January 1986 and who unconditionally reapplied for reinstatement on 5 May 1986 to their former or substantially equivalent positions, without prejudice to their seniority or other rights and privileges, discharging, if necessary, any replacements hired in their former jobs on or after 5 March 1986. Make whole these employees for any loss of earnings they may have suffered as a result of the discrimination against them in the manner set forth in the Remedy section above. Place the remaining former strikers on a preferential hiring list in accordance with their seniority or other nondiscriminatory basis and offer them employment before any other persons are hired or on the departure of any replacements hired before 5 March 1986.

(f) Preserve and, on request, make available to the Board or its agents for examination and copying, all payroll records, social security records, timecards, personnel records and reports, and all other records necessary to analyze Respondent's obligation to reimburse employees for benefits and wages lost as a result of the above-described unfair labor practices.

(g) Post at its Tallahassee, Florida facility copies of the attached notice marked "Appendix A."[23] Copies of the notice, on forms provided by the Regional Director for Region 12, after being signed by Respodent's authorized representative, shall be posted by Respondent immediately upon receipt and maintained for 60 consecutive days in conspicious places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by Respondent to ensure that the notices are not altered, defaced, or covered by any other material.

(h) Notify the Regional Director in writing within 20 days from the date of this Order what steps Respondent has taken to comply. For the purpose of determining or securing compliance with this Order, the Board, or any of its duly authorized representatives, may obtain discovery from Respondent, its officers, agents, successors, or assigns, or any other person having knowledge concerning the compliance matter, in the manner provided by the Federal Rules of the Civil Procedure. Such discovery shall be conducted under supervision of the United States Court of Appeals enforcing this Order and may be had upon any matter reasonably related to compliance with this Order, as enforced by the court.

IT IS FURTHER ORDERED that the complaint be dismissed insofar as it alleges violations of the act not specifically found.

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[23] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

Amoco Oil Corporation *and* Brenda L. Shaw, Petitioner and Oil, Chemical & Atomic Workers International Union, Local 7-776 AFL-CIO. Case 14-RD-1190

June 21, 1988

DECISION AND ORDER

BY MEMBERS JOHANSEN, BABSON, AND CRACRAFT

The National Labor Relations Board, by a three-member panel, has considered a determinative challenge in an election held January 5, 1988, and the Regional Director's report recommending disposition of it. The election was conducted pursuant to a Stipulated Election Agreement. The tally of ballots shows five for and five against the Petitioner, with one challenged ballot, a sufficient number to affect the results.

The Board has reviewed the record in light of the exceptions and briefs, and adopts the Regional Director's findings and recommendation as modified. The Employer challenged Thomas J. Dixon's ballot, contending that Dixon was no longer employed on the day of the election. The Employer contends that Dixon, whose name was on the *Excelsior* list, was an eligible voter during the payroll period of eligibility ending December 4, 1987, but that his eligibility ended when he ceased working on December 31 pursuant to a November 3 notice of retirement. The Union contends that Dixon was on vacation the month of January 1988 and that his voting eligibility continued until the effective date of his resignation, February 1, 1988. The Regional Director found that Dixon was ineligible to vote because he was not actively employed on the date of the election. We reverse.

Under the parties' collective-bargaining agreement, employees with more than 30 years of service are entitled to 6 weeks' vacation, but the employee must be on active status the 31st day of the preceding calendar year in order to take advantage of the benefit. Dixon, whose service to the Company exceeded 30 years, advised the Employer, who administers the vacation plan, that he intended to use 4 of his 6 weeks of accrued vacation during the month of January 1988 and that his retirement would be effective February 1, 1988. Dixon's last day of active service was December 31, 1987.

In concluding that Dixon was not eligible to vote after December 31, the Regional Director relied on *Roy N. Lotspeich Publishing Co.*, 204 NLRB 517 (1973), which held that an employee must be employed and working on both the payroll ending date for eligibility and the date of the election. However, as also acknowledged in the Regional Director's report, the Lotspeich requirements are limited by four exceptions, including an exception for employees on vacation on either of the critical dates:

> It is well settled that, in order to be eligible to vote, an individual must be employed *and working* on the established eligibility date, *unless absent for one of the reasons set out in the Direction of Election* i.e., illness, vacation, temporary layoff, or economic striker status. 204 NLRB 517 (1973) (first emphasis in original; second emphasis added).

Notwithstanding the fact that Dixon's absence falls squarely within the vacation exception, the Regional Director found the "operative fact" to be that Dixon was not on active status on the date of the election, noting that prior to the election date he had tendered his retirement notice, applied for retirement benefits, trained his replacement, ceased working, had his retirement party, was presented with his retirement gift, and had his exit interview. Although these facts bear on whether Dixon had a reasonable expectancy to return to work when he completed his last day of work on December 31, the "reasonable expectancy of employment test" applies only to eligibility determinations involving laid-off employees—not employees on vacation leave.[1] Dixon unambiguously requested vacation benefits for the month of January 1988 in his retirement notice, and it is undisputed that those benefits were granted. Finally, Dixon's retirement was not effective until February 1, 1988, weeks after the election.

In reversing the Regional Director, we thus rely on the fact that Dixon's effective date of retirement was after the election and the finding that Dixon retained his employee status through the date of the election as an employee on vacation. Accordingly, we find, contrary to the Regional Director, that Dixon was on vacation leave on the day of the election, that he was therefore eligible to vote, and that his ballot should be opened and counted.

DIRECTION

IT IS DIRECTED that the Regional Director for Region 14 shall, within 10 days of this Decision and Direction, open and count the ballot of Thomas J. Dixon, prepare a revised tally of ballots, and have it served on the parties. Thereafter, the Regional Director shall issue the appropriate certification.

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[1] *Red Arrow Freight Lines*, 278 NLRB 965 fn. 5 (1985). *See also NLRB v. Hillview Health Care Center*, 705 F.2d 1461, 1471 (7th Cir. 1983) ("Board's unvarying policy is that any employee may vote, even if he has a fixed intention of quitting immediately after voting.").

International Brotherhood of Electrical Workers, AFL-CIO, Local 103 *and* Comm-Tract Corp. and Communications Workers of America, AFL-CIO. Case 1-CD-822

June 21, 1988

DECISION AND DETERMINATION OF DISPUTE

By Members Johansen, Babson, and Cracraft

The charge in this Section 10(k) proceeding was filed December 14, 1987, by Comm-Tract Corp. (the Employer) alleging that the Respondent, International Brotherhood of Electrical Workers, AFL-CIO, Local 103, violated Section 8(b)(4)(D) of the National Labor Relations Act by engaging in proscribed activity with an object of forcing the Employer to assign certain work to employees it represents rather than to employees represented by Communications Workers of America, AFL-CIO (CWA). The hearing was held February 24, 1988, before Hearing Officer John T. Downs.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board affirms the hearing officer's rulings, finding them free from prejudicial error. On the entire record, the Board makes the following findings.

I. JURISDICTION

The Employer, a Massachusetts corporation, is engaged in the business of the installation of telephone and data system equipment, including the installation of the cabling and connections associated with that equipment, with its principal place of business in Natick, Massachusetts. During the past year, the Employer purchased and received at its Natick, Massachusetts location goods and materials valued in excess of $50,000, directly from suppliers located outside the Commonwealth of Massachusetts. The parties stipulated, and we find, that the Employer is engaged in commerce within the meaning of Section 2(6) and (7) of the Act and that Local 103 and CWA are labor organizations within the meaning of Section 2(5) of the Act.[1]

II. THE DISPUTE

A. *Background and Facts of Dispute*

In December 1987, pursuant to a subcontract with Laantech Inc., the Employer began an installation job with CWA-represented employees at the Dana Farber Cancer Institute, 44 Binney Street, Boston, Massachusetts (jobsite). The employees performing the installation work are covered by a collective-bargaining agreement between CWA and the Employer effective November 8, 1987.

The Employer's project manager, Roland Blair, testified that in response to rumors that Local 103 employees working at the jobsite would walk off the job and picket if the Employer's CWA-represented employees performed the work in dispute, on December 11, 1987, he telephoned Local 103 business agent Charles Monahan. Blair testified that he identified himself by name and told Monahan that he worked for the Employer. Blair further testified that he told Monahan that he "understood that IBEW said that if we came on the jobsite they would walk off the job and picket." According to Blair's testimony, he asked Monahan if that was true and Monahan responded in the affirmative. When Blair asked if there was anything they could do to resolve this matter between themselves, Monahan allegedly responded that "the only thing that [Blair] could do was send [Monahan] a list of IBEW contractors." Monahan denied ever speaking to Blair or receiving a telephone call from him.

The Employer's chief executive officer, John Polmonari, testified that because of rumors of potential jobsite problems he telephoned Monahan and Monahan told him that Local 103 would picket the job if Comm-Tract performed the work with its CWA-represented employees. Polmonari testified that Monahan did speak about community standards during the conversation and a meeting was arranged. There is conflicting testimony concerning what occurred at this meeting. Polmonari claimed that at the meeting Monahan repeated the threat to picket. Monahan testified that the purpose of the meeting was to determine if Comm-Tract was a community standard contractor. Monahan further testified that after reviewing the collective-bargaining agreement, pension program, and health plan, he found the Employer met community standards and indicated to Polmonari that as far as he was concerned there were no problems with Comm-Tract. Monahan claims that he told Polmonari that he would review the matter with his boss and that if in fact there were any problems, Polmonari would hear from Monahan.

As of the hearing date, there had been no work disruption or picketing activity at the jobsite.

B. *Work in Dispute*

The work in dispute involves the installation of telephone and data systems equipment, including installation of the cabling and connections associated with the equipment, at the Dana Farber Cancer Institute, 44 Binney Street, Boston, Massachusetts.[2]

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[1] CWA did not appear or otherwise participate at the hearing.

C. *Contentions of the Parties*

The Employer contends that the testimony of Blair and Polmonari and Local 103's conduct establishes that the actions of Local 103 had an object of compelling the assignment of the disputed work to employees represented by Local 103 rather than CWA. The Employer further contends that the statements by Local 103 witnesses at the hearing in this case that, after review of the Employer's contract with the CWA, they concluded the Employer meets community standards, do not constitute a disclaimer of interest in the disputed work. The Employer also contends that the work should be assigned to the CWA-represented employees, arguing that the collective-bargaining agreement with CWA, economy and efficiency of operations, the skills and work involved, employer and industry practice, job impact, and employer assignment and preference all favor such a result. The Employer asserts that because similar disputes involving the disputed work are likely to recur, the Board should remand this case for further hearing to take evidence to determine whether the jurisdictional award should be expanded to apply throughout the jurisdiction of Local 103 wherever employees of the Employer represented by CWA perform the work in dispute.

Local 103 contends that no jurisdictional dispute exists and that no threat to the Employer was made in violation of the Act. Local 103 contends that it sought information from the Employer to ascertain whether the Employer adhered to community standards and, on its determination that the Employer was a community standard contractor, advised the Employer that it was in conformity with community standards and would have no trouble with Local 103.[3]

D. *Applicability of the Statute*

Before the Board may proceed with a determination of a dispute pursuant to Section 10(k) of the Act, it must be established both that reasonable cause exist to believe that Section 8(b)(4)(D) has been violated and that the parties have not agreed upon a method for the voluntary adjustment of their dispute. Regarding the latter point, the record reveals no agreed-upon method among the parties for the resolution of the dispute.

Testimony was presented in this case that Local 103 threatened to walk off the jobsite and picket if the Employer's CWA-represented employees performed the work in dispute. Conflicting testimony was presented by Local 103 witnesses, but it is unnecessary to resolve the question of credibility in order to proceed to a determination of the dispute. In a 10(k) proceeding the Board is not required to find that the unfair labor practice alleged has occurred, but need only find that reasonable cause exists to believe that there has been a violation of Section 8(b)(4)(D). The Board may consider contradicted testimony in finding reasonable cause.[4]

On the basis of the entire record, we conclude that there is reasonable cause to believe that a violation of Section 8(b)(4)(D) has occurred and that there exists no agreed method for voluntary adjustment of the dispute within the meaning of Section 10(k) of the Act. Accordingly, we find that the dispute is properly before the Board for determination.

E. *Merits of the Dispute*

Section 10(k) requires the Board to make an affirmative award of disputed work after considering various factors. *NLRB v. Electrical Workers IBEW Local 1212 (Columbia Broadcasting)*, 364 U.S. 573 (1961). The Board has held that its determination in a jurisdictional dispute is an act of judgment based on common sense and experience, reached by balancing the factors involved in a particular case. *Machinists Lodge 1743 (J. A. Jones Construction)*, 135 NLRB 1402 (1962).

The following factors are relevant in making the determination of this dispute.

1. Certifications and collective-bargaining agreements

There was no evidence that the CWA or Local 103 had been certified by the Board as the collective-bargaining representative of the Employer's employees. The Employer does not have a collective-bargaining agreement with Local 103. The Employer and CWA have a current collective-bargaining agreement which encompasses the work in dispute.[5] Accordingly, we find that the factor of the collective-bargaining agreements favors an award of the work in dispute to employees represented by CWA.

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[2] The amended charge in this case, filed on December 30, 1987, described the work in dispute as "the installation of telephone and communications equipment at the Dana Farber Institute." The notice of hearing in this case, dated January 28, 1988, described the work in dispute as "the installation of telephone and data cables." At the hearing the Employer moved to amend the description of the work in dispute to include the above-described work. Counsel for Local 103 had been notified prior to the hearing of the Employer's proposed amendment. The Employer excepted to the hearing officer's denial of the motion to amend the description of the work in dispute. We find merit to this exception noting that the record supports such a description of the work in dispute and that Local 103 was not surprised by the amendment at the hearing and had adequate time to prepare its case with respect to the amended language.

[3] Local 103 excepted to the admission of hearsay testimony of Blair as evidence of an alleged threat. Blair testified that the construction manager on the jobsite, McCoy, had informed him that during a visit to jobsite Monahan told McCoy that if the Employer's CWA-represented employees worked on the job, the Local 103-represented employees who were also on the jobsite would walk off the job and picket. In determining whether there is reasonable cause to believe that Local 103 violated the Act, we do not rely on this hearsay testimony, but on the nonhearsay testimony of Blair and Polmonari regarding their resepective conversations with Monahan.

[4] *Carpenters Local 1485 (C. J. Reinke & Sons)*, 254 NLRB 1091 (1981).

2. Employer preference

The record indicates that the Employer would prefer to have the work in dispute which began in December 1987 completed by the employees represented by the CWA because they are specifically trained in this work, are performing the work at an acceptable level of quality, and can more efficiently perform the postinstallation warranty service provided by the Employer. We find that this factor favors the award of the disputed work to the employees represented by CWA.

3. Area and industry practice

The Employer's chief executive officer John Polmonari testified that he was aware of at least seven other companies in the area who are in the same business as the Employer whose installation employes are represented by CWA. Although the record indicates that Local 103-represented employees and CWA-represented employees work side by side on some jobsites, and Local 103 has an industrywide contract with employers in the telecommunications field, Local 103 failed to introduce any evidence that this contract covers the same type of work as the work in dispute or that employees represented by Local 103 have performed the same type of work as the work in dispute. Accordingly, while industry practice is inconclusive, the factor of area practice favors the employees represented by GWA.

4. Relative skills

The record indicates that the Employer trains its employees in the use of its own equipment and in the work in dispute. The record further indicates that the Employer's employees are capable of performing all aspects of the installation work and have performed the work to the Employer's satisfaction. Local 103 presented no evidence that employees it represents have the specific skills that apply to the work in dispute. Rather, the record merely indicates that Local 103-represented employees attend a formal education program certified by the Commonwealth of Massachusetts in the telecommunications field. The subjects taught in this program include math, electronics, blueprint reading, telegraphy, data, alarm signal, sound, cable television, and microwave. Accordingly, this factor tends to favor an award of the disputed work to the Employer's employees represented by CWA.

5. Economy and efficiency of operations

The Employer presented evidence that it is more economical and efficient to assign the work in dispute to its own employees who are represented by CWA than to employees represented by Local 103. By continuing to use its own employees, the Employer can assign the same person who installed the system to perform postinstallation warranty maintenance and service work. The individuals performing the initial installation work know the location of cable routes, how the cable is run, and have general knowledge of the job which can be useful for performing postinstallation warranty service. Accordingly, we conclude that this factor favors the employees represented by CWA.

Conclusions

After considering all the relevant factors, we conclude that employees represented by CWA are entitled to perform the work in dispute. We reach this conclusion relying in particular on the factors of the Employer's collective-bargaining agreement, the Employer's preference, area practice, relative skills, and the economy and efficiency of the Employer's operations. In making this determination, we are awarding the work to employees represented by CWA, but not to that Union or its members. The determination is limited to the controversy that gave rise to this proceeding.[6]

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[5] Art. 16 of that agreement entitled "WAGES AND OTHER BENEFITS" specifies the duties of the various job classification as including, inter alia, "running cable," "reading blueprints with knowledge on how to install, test, and repair terminal and station equipment" and "ability to maintain, update and resolve problems with communication systems."

[6] The Employer requests that this case be remanded for further hearing to take evidence to determine whether this award should be expanded to apply throughout the jurisdiction of Local 103 whenever employees of the Employer represented by the CWA perform the work in dispute. At the hearing the Employer attempted to introduce evidence that Local 103's conduct in violation of Sec. 8(b)(4)(D) at the Dana Farber site in December 1987 was part of a broad pattern of such activity in other worksites in the Boston area. Specifically, the Employer made an offer of proof and alleged that Local 103 engaged in similar activity against the Employer at the Boston University Medical Center site in Boston in 1986 which resulted in actual picketing and was currently engaging in similar illegal activity at another worksite in Boston involving the Employer, the Rowe's Wharf project. The Board has previously held that it will restrict the scope of its determination to a specific jobsite unless there is evidence that similar disputes may occur in the future. *Painters Local 636 (Plaza Glass)*, 214 NLRB 912, 915 (1974). The Board has not previously determined jurisdictional disputes involving the Employer and Local 103. Furthermore, there is no evidence that Local 103 has claimed similar work to be performed by the Employer in the future. Accordingly, even assuming arguendo that the hearing officer should have received the testimony that was the subject of the Employer's offer of proof, we find the evidence insufficient to show that the dispute is a regularly recurring one and that Local 103 has a propensity to engage in

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DETERMINATION OF DISPUTE

The National Labor Relations Board makes the following Determination of Dispute.

1. Employees of Comm-Tract, Inc., who are represented by Communications Workers of America, AFL-CIO, are entitled to perform the installation of telephone and data systems equipment, including installation of the cabling and connections associated with the equipment, at the Dana Farber Cancer Institute, 44 Binney Street, Boston, Massachusetts jobsite.

2. Local 103, International Brotherhood of Electrical Workers, AFL-CIO is not entitled by means proscribed by Section 8(b)(4)(D) of the Act to force Comm-Tract, Inc. to assign the disputed work to employees represented by it.

3. Within 10 days from this date, Local 103, International Brotherhood of Electrical Workers, AFL-CIO shall notify the Regional Director for Region 1 in writing whether it will refrain from forcing the Employer, by means proscribed by Section 8(b)(4)(D), to assign the disputed work in a manner inconsistent with this determination.

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prohibited 8(b)(4)(D) conduct. Therefore, we deny the Employer's request for a remand and limit this determination to the particular controversy that gave rise to this proceeding. *Iron Workers Local 350 (Cornell & Co.)*, 271 NLRB 1182, 1185 (1984).

Construction and General Laborers Local 721, Laborers International Union of North America (J. L. Marshall & Sons, Inc.) *and* **United Brotherhood of Carpenters and Joiners of America, Local 624.** Case 1–CD–811

June 21, 1988

DECISION AND DETERMINATION OF DISPUTE

BY CHAIRMAN STEPHENS AND MEMBERS JOHANSEN AND BABSON

The charge in this Section 10(k) proceeding was filed July 17, 1987, by Carpenters Local 624, alleging that the Respondent, Laborers Local 721, violated Section 8(b)(4)(D) of the National Labor Relations Act by engaging in proscribed activity with an object of forcing the Employer, J. L. Marshall & Sons, Inc., to assign certain work to employees it represents rather than to employees represented by the Carpenters. The hearing was held September 11, 1987, before Hearing Officer John T. Downs.[1]

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board affirms the hearing officer's rulings, finding them free from prejudicial error. On the entire record the Board makes the following findings.

I. JURISDICTION

The Employer, a Rhode Island corporation with its principal place of business in Pawtucket, Rhode Island, is engaged in the general construction business, principally in New England. During the construction of its Carver High School project in Carver, Massachusetts, the Employer purchased directly from points outside Massachusetts building materials valued in excess of $50,000. Accordingly, we find that the Employer is engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

The Carpenters and Laborers are signatories to collective-bargaining agreements with the Employer. We find that the Carpenters and the Laborers are labor organizations within the meaning of Section 2(5) of the Act.

II. THE DISPUTE

A. *Work in Dispute*

The disputed work involves the distribution of wooden doors from a stockpile to their point of installation at the Employer's Carver High School jobsite.

B. *Background and Facts of the Dispute*

The Employer's Carver High School construction job included the installation of approximately 270 wooden doors. The doors were delivered to the jobsite by tractor-trailer in May 1987.[2] They were individually wrapped in polyethylene and stacked, in bundles of 40, on pallets. A forklift operator (represented by a Union not involed in this dispute) unloaded the doors[3] and stockpiled them on the floor of the school gymnasium.

In early July, Laborers' business manager Louis Palavanchi and steward Manuel Miranda visted the jobsite and demanded that Joseph Silveira Jr., the Employer's project superintendent, assign the work of transporting the doors to the Laborers-represented employees. Silveira replied, "Well, we've already discussed this. They're going to be assigned to the Carpenters." After more discussion, and a telephone conversation between Palavanchi and Robert Niles, the Employer's general superintendent, Silveira, heard Palavanchi say to steward Miranda, "If the Carpenters are going to move it, you grab a hammer and damage any door they move."

On a Friday in mid-July, Silveira instructed acting Carpenter Foremen David Delgrande to select two of his men to begin the job of moving the doors out of the gym. Delgrande went over the building plans with carpenters Clifford Leaf and Dale Anderson, and directed them to prepare a list showing each door's point of installation by matching the number on the door with the corresponding number on the floor plans. Shortly after Leaf and Anderson began preparing the list, they noticed that about 10 employees represented by the Laborers were sitting on the doors, preventing them from being moved.

Delgrande reported the incident to Silveira. Silveira thereupon entered the gymnasium and observed some laborers sitting on the doors. He told Delgrande to assign the two carpenters to another job, and ordered the laborers to return to the other trades' work to which they had previously been assigned.

The following Monday, the Employer made a new composite work assignment to avoid a work stoppage or damage to the doors. The composite work assignment required that each door be carried by a laborer and carpenter working together. The carpenters assigned to carry doors with labor-

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[1] By letter of September 9, 1987, Respondent Laborers declined to appear and participate in the hearing.

[2] Unless noted otherwise, all dates are 1987.

[3] The disputed work description in the notice of hearing included "unloading" of doors, however, at the hearing, the word "unloading" was deleted from the description.

289 NLRB No. 43

ers reported ill and ceased work for the day. They returned the next day and agreed to a modification of the composite work assignment under which two carpenters would carry one door and two laborers would carry another door.

The Carpenters' business representative testified that there is no agreed-on method for adjusting the dispute and so he filed the instant unfair labor practice charge.

C. *Contentions of the Parties*

The Employer contends that the work of carrying prefinished doors properly belongs to carpenters who are responsible for their installation and who possess the skills to exercise greater care in moving and not damaging them.

The Laborers states, in the September 9 letter which advised of its refusal to participate in this proceeding, that it has a contractual claim to the work in dispute, but that it acquiesced in the Employer's composite assignment, unlike the Carpenters who engaged in a 2-day strike in protest.

The Carpenters took the position at the hearing that the Employer's initial work assignment is supported by its members' skills, abilities, and the existing contract, and the area practice, economy, and efficiency of operations. The Carpenters contends that the Employer's subsequent composite work assignments should not be given any weight in the Board's determination because they stemmed from the Laborers' illegal threats and coercion.

The Carpenters' brief to the Board urges an award to the carpenters which is broad enough to encompass the mutual geographic jurisdiction of both Unions. Its request for a broad award is based on evidence of the Laborers having engaged in identical conduct to obtain exactly the same work from employees represented by the Carpenters on a different employer's job. That conduct precipitated the filing of an 8(b)(4)(D) charge, which was withdrawn on the eve of the scheduled 10(k) hearing when the Laborers disclaimed the work. Subsequently, the Laborers threatened a "sit down strike" to obtain the same work in the next phase of that project.

D. *Applicability of the Statute*

As noted, when the Laborers' business manager learned from the Employer of its decision to assign the disputed work to employees represented by the Carpenters, he openly instructed his steward to "grab a hammer and damage any door they moved." Thereafter, employees represented by the Laborers sat on the doors and prevented them from being moved.

We find reasonable cause to believe that a violation of Section 8(b)(4)(D) has occurred and that there is no agreed method for the voluntary adjustment of the dispute within the meaning of Section 10(k) of the Act. Accordingly, we find that the dispute is properly before the Board for determination.

E. *Merits of the Dispute*

Section 10(k) requires the Board to make an affirmative award of disputed work after considering various factors. *NLRB v. Electrical Workers IBEW Local 1212 (Columbia Broadcasting)*, 364 U.S. 573 (1961). The Board has held that its determination in a jurisdictional dispute is an act of judgment based on common sense and experience, reached by balancing the factors involved in a particular case. *Machinists Lodge 1743 (J. A. Jones Construction)*, 135 NLRB 1402 (1962).

The following factors are relevant in making the determination of this dispute.

1. Certifications and collective-bargaining agreements

There is no evidence of either Union having been certified as bargaining representative of any of the Employer's employees. However, both Unions are signatories to contracts with the Employer through the latter's membership in the Associated General Contractors of Massachusetts, Inc. The Carpenters' collective-bargaining agreement has been submitted in evidence; the Laborers, who did not participate in the proceeding, quoted in its letter of September 9 relevant portions of its collective-bargaining agreement. As the Employer notes in its brief, however, neither contract specifically provides for work jurisdiction over this particular work. Accordingly, we find that this factor favors neither group of employees.

2. Company preference and past practice

The Employer prefers assigning the distribution of prefinished doors to carpenters who have the responsibility for installing them and because they exercise the skills and meet the Employer's expected standard of care.[4] The testimony further reveals that the Employer's assignment is consistent with its practice over approximately the past 20 years. These factors support an award of the work to the Employer's employees represented by the Carpenters.

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[4] We find merit in the Employer's contention that the coerced composite work assignment made by the Employer is immaterial to our determination of the dispute.

3. Area and industry practice

No evidence was adduced concerning the general practice in the industry. The Carpenters' witnesses who testified specified 14 area projects in which the work in issue was performed by members of the Carpenters Union. We accordingly find that consideration of the factor of area practice favors Carpenters-represented employees.

4. Relative skills

As indicated the disputed work consists merely of picking up prefinished and prewrapped doors and carrying them to the point of installation. The record shows that if the doors are not handled carefully, they can be dented or chipped, thus requiring costly repairs. Although the Employer asserts that carpenters who install doors would be more likely to handle them with greater skill and care, no evidence was presented to show that the laborers cannot carefully transport the doors without causing them damage, or that they have inflicted damage in the past by performing such work. Accordingly, we find the evidence with respect to this factor to be speculative and inconclusive in arriving at our determination.

5. Economy and efficiency of operations

Testimony at the hearing disclosed that the work of carrying a prefinished wooden door from the stockpile to point of installation can be done by the same carpenter who installs the door, that only one carpenter is necessary to perform both these functions, and that assistance by a laborer would be unnecessary and wasteful. There is no testimony to the contrary. Thus, it appears that economy and efficiency is gained by having an employee with the skills to install a wooden door also transport that door from a stockpile to the point of installation. Accordingly, we find that these factors support the Employer's award to employees represented by the Carpenters.

Conclusions

After considering all the relevant factors, we conclude that employees represented by Carpenters Local 624 are entitled to perform the work in dispute. We reach this conclusion relying on the Employer's preference and past practice, area practice, and economy and efficiency of the Employer's operations. In making this determination, we are awarding the work to employees represented by Carpenters Local 624, not to that Union or its members. The determination is limited to the controversy that gave rise to this proceeding.[8]

DETERMINATION OF DISPUTE

The National Labor Relations Board makes the following Determination of Dispute.

1. Employees of J. L. Marshall & Sons, Inc., represented by United Brotherhood of Carpenters and Joiners of America, Local 624, are entitled to perform the work involving the distribution of wooden doors from a stockpile to their point of installation at the Carver High School, Carver, Massachusetts.

2. Construction and General Laborers Local 721, Laborers International Union of North America is not entitled by means proscribed by Section 8(b)(4)(D) of the Act to force J. L. Marshall & Sons, Inc. to assign the disputed work to employees represented by it.

3. Within 10 days from this date, Construction and General Laborers Local 721, Laborers International Union of North America shall notify the Regional Director for Region 1 in writing whether it will refrain from forcing the Employer, by means proscribed by Section 8(b)(4)(D), to assign the disputed work in a manner inconsistent with this determination.

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[8] We deny the Carpenters' request for a broad award to cover all jobs within its mutual geographical jurisdiction with the Laborers. In *Laborers Local 22 (AGC of Massachusetts)*, 283 NLRB 605, 608 (1987), the Board restated the standard for issuing such broad awards:

> [T]here are two prerequisites for a broad, areawide award. First, there must be evidence that the disputed work has been a continuous source of controversy in the relevant geographic area and that similar disputes may recur. Second, there must be evidence demonstrating that the *charged party* has a proclivity to engage in unlawful conduct in order to obtain work similar to the work in dispute. [Emphasis in original, citations omitted.]

Here, the evidence shows only that there was a single similar incident between the two Unions at a different employer's jobsite, and that, after disclaiming the work in dispute, the Laborers made a threat to engage in conduct similar to that which it engaged in here when that construction project resumes. There was no determination of dispute made in that case, however, and the Carpenters have presented no other basis to support their request for a broad award. In such circumstance, we find no warrant for granting a broad award.

Holiday Gifts, Inc. d/b/a Viscount Hotel *and* International Union of Operating Engineers, Local No. 501, AFL-CIO. Case 31-CA-16438

June 21, 1988

DECISION AND ORDER

BY CHAIRMAN STEPHENS AND MEMBERS JOHANSEN AND BABSON

On March 4, 1988, Administrative Law Judge George Christensen issued the attached decision. The General Counsel filed exceptions and a supporting brief, and the Respondent filed a brief in response.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings,[1] findings, and conclusions and to adopt the recommended Order.[2]

ORDER

The recommended Order of the administrative law judge is adopted and the complaint is dismissed.

DECISION

GEORGE CHRISTENSEN, Administrative Law Judge. On February 25, 1988, I conducted a hearing at Las Vegas, Nevada, to try issues raised by a complaint issued on November 27, 1987, based on a charge filed on March 31, 1987, by Local 501.

The complaint alleged the Respondent violated Section 8(a)(1) and (5) of the National Labor Relations Act by refusing to bargain collectively with Local 501 as the exclusive collective-bargaining representative of an appropriate unit of the Respondent's employees. The Respondent admitted the refusal, but denied it violated the Act.

The General Counsel, Local 501, and the Respondent appeared by counsel and were afforded opportunity to adduce evidence and produce, examine, and cross-examine witnesses.

After introduction into evidence of the formal documents, counsel for the General Counsel announced he was unable to produce evidence supporting the complaint allegations because his principal witness (the Respondent's manager) had not appeared in response to his subpoena and requested a continuance to a later date. The Respondent's counsel denied the manager was ever served with process. In response to my inquiry, counsel for the General Counsel was unable to produce any evidence of service of the alleged subpoena on the missing witness.

Counsel for Local 501 supported the motion for a continuance.

Counsel for the Respondent noted he was appearing ready for trial, opposed the continuance, and moved to dismiss the complaint.

Noting counsel for the General Counsel had ample opportunity to perfect service on the missing witness, had no evidence of such service, and that all parties were present and prepared for trial, I deny the motion for a continuance, grant the motion to dismiss, and order the hearing closed, subject to reopening only on production of evidence the missing witness was properly served by subpoena prior to the hearing, accompanied by a representation counsel for the General Counsel is pursuing an action in the United States district court to compel the missing witness to appear and testify in response to that subpoena.

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[1] We grant the Respondent's unopposed motion to correct the transcript.

[2] We note that the judge recommended granting the motion to dismiss and ordered the hearing closed subject to the General Counsel's meeting two conditions and the General Counsel has not asserted in her exceptions to the Board that the conditions set forth in the Order have been met.

Chassis Maintenance, Inc. ***and*** **Sheet Metal Workers' International Assoication, Local Union No. 355 of Northern California.** Cases 32-CA-8370, 32-CA-8526, and 32-CA-8723

June 22, 1988

DECISION AND ORDER

BY CHAIRMAN STEPHENS AND MEMBERS JOHANSEN AND CRACRAFT

On December 23, 1987, Administrative Law Judge Richard J. Boyce issued the attached decision. The General Counsel filed limited exceptions and a supporting brief, and the Charging Party filed an exception.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and brief and has decided to affirm the judge's rulings, findings, and conclusions and to adopt the recommended Remedy[1] and Order as modified.[2]

AMENDED REMEDY

Insert the following as the last paragraph in the remedy section of the judge's decision.[3]

"Having found that the Respondent unlawfully discontinued contractually required contributions into the Union's health care plan since about January 1986, we shall order it to pay into the health care plan all contributions which have not been paid and which would have been paid absent the Respondent's unlawful discontinuance of such contributions. We shall also provide for interest on backpay owing the employees under the judge's limited monetary remedy for the Respondent's failure to bargain with the Union over the effects of the termination of its Oakland operations."

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge as modified below and orders that the Respondent, Chassis Maintenance, Inc., Oakland, California, its officers, agents, successors, and assigns, shall take the action set forth in the Order as modified.

1. Substitute the following for paragraph 2(b).

"(b) Pay with interest the unit employees on the payroll when the Respondent terminated its Oakland operation in the manner set forth in the remedy portion of this decision."

2. Add the following as paragraph 2(c) and renumber the remaining paragraphs.

"(c) Pay in to the Union's health care plan those contributions it has failed to pay as required by the September 1, 1985, to August 31, 1986 collective-bargaining agreement with the Union."

3. Substitute the attached notice for that of the administrative law judge.

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

Section 7 of the Act gives employees these rights.

To organize

To form, join, or assist any union

To bargain collectively through representatives of their own choice

To act together for other mutual aid or protection

To choose not to engage in any of these protected concerted activities.

WE WILL NOT fail and refuse to bargain collectively with Sheet Metal Workers' International Association, Local Union No. 355 of Northern California concerning the effects on the employees in the appropriate unit below of our decision to close our operation in Oakland, California. The unit is:

> All production, warehouse, maintenance, material handling, and truck-driver employees at our operation in Oakland, California, excluding office clerical employees, timekeepers, administrative and professional employees, technical employees, guards, and supervisors.

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[1] Any reference to "this decision" in the remedy section of the judge's decision should be interpreted as referring to the "Board's decision."

[2] The General Counsel requests a visitatorial clause authorizing the Board, for compliance purposes, to obtain discovery from the Respondent under the Federal Rules of Civil Procedure subject to the supervision of the United States court of appeals enforcing this Order. Under the circumstances of this case, we find it unnecessary to include such a clause. Accordingly, we deny the General Counsel's request. See *Cherokee Marine Terminal*, 287 NLRB 1080 (1988).

[3] Any interest or other additional amounts with respect to these contributions shall be calculated in the manner set forth in *Merriweather Optical Co.*, 240 NLRB 1213 (1979).

Although in the remedy section of his decision the judge does not discuss the Respondent's withholding of required health care plan contributions or the unlawful layoffs of employee Miguel Dimas, he has provided appropriate provisions for remedying those violations in his recommended Order. In adopting those portions of the judge's recommended Order, backpay owing any employees as a result of the Respondent's failure to make contributions to the health care plan shall be computed in the manner prescribed in *Ogle Protection Service*, 183 NLRB 682 (1970), while the backpay owing to Dimas shall be computed in the manner prescribed in *F. W. Woolworth Co.*, 90 NLRB 289 (1950).

289 NLRB No. 35

WE WILL NOT fail and refuse, during the term of a collective-bargaining contract between us and the Union covering employees in the above unit, to recognize the Union as the exclusive representative of those employees, to honor the terms of such contract (including those requiring contributions to the Sheet Metal Workers' of Northern California Health Care Plan and prescribing procedures to be followed when hiring and laying off employees), and to enter into the negotiation of a successor contract when timely requested by the Union to do so.

WE WILL NOT make inducements to employees to withdraw their support of a labor organization with whom we have a collective-bargaining contract by telling them that we do not want another contract and that their benefits will be the same without a contract or without a union.

WE WILL NOT tell employees we will give them more work only if they achieve the withdrawal of unfair labor practice charges against us that have been filed on their behalf with the National Labor Relations Board.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce employees in the exercise of the rights guaranteed them by Section 7 of the Act.

WE WILL, on request, bargain collectively with the Union concerning the effects on the employees in the above unit of our decision to close our operation in Oakland, California, and WE WILL reduce to writing any agreement resulting from such bargaining.

WE WILL pay, with interest, the unit employees on the payroll when we terminated our Oakland operation in the manner required by the National Labor Relations Board.

WE WILL pay into the Union's health care plan those contributions we have failed to pay as required by the collective-bargaining agreement covering our unit employees.

WE WILL make whole our unit employees, with interest, for any monetary loss occasioned by our unlawful withholding of contributions to the above health care plan.

WE WILL make Miguel Dimas whole, with interest, for any losses of wages and benefits he suffered because of our disregard of his seniority and other contractually bestowed rights in connection with our two layoffs of him in August 1986.

CHASSIS MAINTENANCE, INC.

Elaine Climpson, Esq., for the General Counsel.

Mark Santos, Business Manager, of Oakland, California, for the Union.[1]

DECISION

STATEMENT OF THE CASE

RICHARD J. BOYCE, Administrative Law Judge. This consolidated matter was tried in Oakland, California, on 15 September 1987.[2] The consolidated complaint in Cases 32-CA-8370 and 32-CA-8526, based on charges filed by Sheet Metal Workers' International Association, Local Union No. 355 of Northern California (Union)[3] alleges that Chassis Maintenance, Inc. (Respondent) violated Section 8(a)(5) and (1) of the National Labor Relations Act as follows.[4]

(a) In March 1986, ceasing to make fringe benefit contributions as required by its contract with the Union.

(b) Since about 16 June 1986, ignoring the Union's requests that they undertake the negotiation of a successor contract.

(c) In July 1986, failing to submit a "report of hire" form to the Union as prescribed by the contract.

(d) In August 1986, twice laying off unit employee Miguel Dimas without observing contractually specified procedures; and its conduct in totality, withdrawing recognition from the Union.

The same complaint alleges that Respondent additionally violated Section 8(a)(1) by the following:

(a) In June, July, and/or August 1986, through Operation Manager Hisidro Carralez, telling an employee that it would not negotiate or sign a new contract with the Union, and that it would maintain existing benefits without need for the Union.

(b) In November or December 1986, through Hisidro Carralez, threatening to deny work to an employee because the Union had filed an unfair labor practice charge on his behalf.

The complaint in Case 32-CA-8723, also based on a charge filed by the Union,[5] alleges that Respondent violated Section 8(a)(5) and (1) by the following.

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[1] Respondent, although formally answering the two complaints, did not appear at the trial. Attorney David Rosenfeld, of San Francisco, California, entered an appearance for the Union after the hearing.

[2] This manner of setting forth dates comports with the wishes of the Board.

[3] The charge in Case 32-CA-8370 was filed on 10 September 1986. The charge in Case 32-CA-8526 was filed on 17 November 1986 and amended on 21 January 1987. The consolidated complaint issued on 27 January 1987.

[4] Sec. 8(a)(5) prohibits an employer from "refus[ing] to bargain collectively with the representatives of his employees, subject to the provisions of section 9(a)." Sec. 9(a) states in relevant part:

> Representatives designated or selected for the purposes of collective bargaining by the majority of the employees in a unit appropriate for such purposes shall be the exclusive representatives of all the employees in such unit for the purposes of collective bargaining in respect to rates of pay, wages, hours of employment, or other conditions of employment . . . .

Sec. 8(a)(1) prohibits an employer from "interfer[ing] with, restrain[ing], or coerc[ing] employees in the exercise of the rights guaranteed in section 7" of the Act. Sec. 7 guarantees employees "the right to self-organization, to form, join or assist labor organizations, . . . and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection . . . ."

[5] The charge in Case 32-CA-8723 was filed on 19 February 1987 and the complaint issued on 24 March. An order consolidating all matters for trial also issued on 24 March.

(a) In November or December 1986, terminating its Oakland operation without notifying the Union and giving it an opportunity to negotiate concerning the effects of that action on unit employees.

(b) Since about 12 February 1987, ignoring the Union's request that they bargain over those effects.

I. JURISDICTION

Respondent, a California corporation, maintains and repairs oceangoing equipment, chassis, and containers. One of its facilities, until late 1986, was in Oakland. In 1986, it admittedly realized revenues exceeding $50,000 from customers meeting the Board's direct inflow or outflow jurisdictional standards.

I conclude that Respondent is an employer engaged in and affecting commerce within Section 2(2), (6), and (7) of the Act.

II. LABOR ORGANIZATION

Respondent admits in one answer and denies in the other that the Union is a labor organization within Section 2(5) of the Act.

The record establishes that the Union is an organization in which employees participate and which deals with employers concerning the terms and conditions of employment of employees it represents. I conclude, therefore, that it is a labor organization under Section 2(5).

III. THE ALLEGED MISCONDUCT

A. *Background*

Respondent came into existence in the summer of 1985. On 9 September of that year it and the Union entered into a labor contract to run from 1 September through 31 August 1986. The unit, as defined in the contract, included "all production, warehouse, maintenance, material handling and truck-driver employees," and excluded "office clerical employees, timekeepers, administrative and professional employees, technical employees, guards and supervisors."[6]

B. *The Incidents in Issue*

1. Facts

a. *The allegedly unlawful cessation of contributions*

Article XIII of the contract required that Respondent "pay the sum of one dollar nine cents ($1.09) per hour for each hour worked into the Sheet Metal Workers' of Northern California Health Care Plan." The contributions were due "on or before the tenth (10th) day of the month following the month in which the work was performed," and were deemed delinquent "if not paid by the twenty-fifth (25th) day of the month."

After complying with the contract for hours worked through December 1985, Respondent stopped making contributions. Mark Santos, the Union's business manager, called Respondent President John Carralez about this in early 1986. Admitting the delinquency, Carralez said Respondent was "having some financial problems, but it [the delinquency] would be taken care of." Respondent, however, never did cure the delinquency or resume compliance.

Respondent's answer to this allegation admits that it stopped making contributions before the contract expiration date.

b. *The allegedly unlawful disregard of the Union's requests to negotiate*

Anticipating the 31 August expiration of the contract, Santos informed Respondent by letter dated 16 June 1986 that the Union "wish[ed] to reopen [the] agreement in its entirety for negotiations" and would be contacting Respondent "in the near future in regard to setting up a meeting for the purpose of entering into negotiations."

Santos thereafter attempted to reach John Carralez by telephone several times. He was told in each instance by Respondent's secretary, Julie,[7] that Carralez was not "in." Santos left word that he wished to "set up negotiations meetings" and asked that Carralez call him back.

On 6 August, none of his calls having been returned, Santos hand-delivered to Julie a copy of the Union's proposals, together with a proposed agreement "to extend the current bargaining agreement thru September 14, 1986." Santos told Julie at the time that he "would like to have John [Carralez] call [him], because [he] wanted to set up some negotiations," and she said she would pass on the materials and that message.

On 8 August, still receiving no word from Respondent, Santos hand-delivered this letter to Carralez:

> Dear John:
>
> I am presenting the following dates to you for the upcoming negotiations. August 13th, 14th, 15th, 20th and 21st, at your convenience, I will meet at any time with you.
>
> If you have any questions, please feel free to call.

On delivering the letter, Santos spoke with Carralez' brother Hisidro, Respondent's operation manager. Hisidro reported that John would be out of town until 11 August. Santos said he would "appreciate" John's calling on his return "so we can line up some of those negotiation sessions." Hisidro replied that he would convey the message.

On 13 and 14 August, after still no word from John, Santos tried twice to telephone him. Julie told him both times that John was not in, and Santos asked that she "have John call [him] back to set up some meetings." Santos also said in the second call that he was about to go to Chicago for a convention, and that Carralez should call Arnold Sales, another union representative, in his absence.

On 21 or 22 August, Santos called Sales from Chicago. When told that Carralez had not called, Santos directed

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[6] The complaints allege, the answers admit, and I conclude that this is an appropriate unit.

[7] Julie is John Carralez' daughter.

Sales to refer the matter to the Union's attorney, who filed the first of the charges on 10 September.

Neither Carralez nor anyone else on behalf of Respondent ever responded to Santos' efforts to initiate negotiations.

Respondent's answer to this allegation admits that it has refused to bargain with the Union since about 16 June 1986. The same answer admits that Respondent withdrew recognition from the Union.

c. *The allegedly unlawful failure to submit a "Report of Hire" form*

Article III, section 3, of the contract stated in part:

> In order for the parties to complete their obligations under the agreement, the employer shall direct the new employee to the office of the Union with a *REPORT OF HIRE FORM*. The Union will then dispatch the employee with two (2) copies of an *INTRODUCTORY CARD*, one (1) copy going to the Company and the other to the Shop Steward having jurisdiction.

In the summer of 1986, Respondent hired Larry Field to perform unit work without complying with this provision. Santos, when first seeing Field on the job, told Hisidro Carralez to have him "go down to the union hall and clear." Carralez did not comply.

Field apparently was the only unit employee hired during the contract's 1-year term.[8]

d. *The allegedly unlawful failure to observe contractually prescribed procedures anent the layoffs of Miguel Dimas*

Article XVI, section 1(b)(1), of the contract stated: "In the event that work becomes slack and the Company deems it necessary to reduce the working force, the last employee hired shall be the first employee laid off . . . ."

Section 1(b)(2)(B) of the same article stated: "Employees will have to option to [accept] the lower classification (rate of pay) or take layoff until they are called back at that classification."

Section 3 of this article stated: "When employees are laid off for lack of work, the Union shall be notified in writing of the names of all employees laid off and the date such layoff occurred."

In early August 1986, returning to his job after a week's illness, unit employee Miguel Dimas was told by Hisidro Carralez that work was "slow" and that he should stay home "for another week." Field and Mark Bocage, both less senior than Dimas, worked during his resulting layoff.

About 2 weeks later, Dimas was laid off again. Hisidro explained to him this time that work was slow; that "it wasn't good for the Company to have to pay [Dimas] $10 per hour just to be connecting lights in the chassis"; and that Respondent was "going to let Mark [Bocage] work, because he was only getting paid $5." Field also stayed on.

Beyond laying Dimas off out of seniority, Respondent failed to give him the option of accepting a lower rate of pay in lieu of layoff. It also failed to notify the Union of the layoffs.

e. *The allegedly unlawful remarks by Hisidro Carralez in the summer of 1986*

Hisidro Carralez, as mentioned, was operation manager at Respondent's Oakland facility. The answer to the complaint containing this allegation admits that he was a supervisor and an agent of Respondent at relevant times.

Carralez had several conversations with Dimas in May–June 1986 regarding the Union. Carralez stated variously: (a) That the union contract was soon to expire and John Carralez "doesn't want to have another contract with the Union"; (b) that "it would be okay even without a contract, because the benefits would be the same, just as if the Union was there"; and (c) that John Carralez' reason for not wanting to negotiate with the Union was that "the Union promised a lot of things and then didn't carry them out."

f. *The allegedly unlawful remarks by Hisidro Carralez in November–December 1986*

The charge in Case 32–CA–8526 alleges that Respondent "discriminated in regard to . . . Dimas' tenure of employment . . . ." Shortly after the 17 November filing of this charge, Hisisdro Carralez made a telephone call to Dimas, telling him that Respondent "wouldn't give [him] any more work" if he was "fighting with" Respondent. Carralez explained that he had "a letter" from the NLRB with Dimas' name on it, then declared that Respondent "would give [him] more work" if he "went to the Union and they withdrew all the charges," but otherwise "would not give [him] more work."

Dimas was not on the payroll at the time, having been laid off in August.

g. *The allegedly unlawful failure to give the Union an opportunity to negotiate concerning the effects on unit employees of the termination of the Oakland operation*

About the end of 1986, Santos heard from Dimas' wife, an employee of the Union, that Respondent had closed its Oakland facility. Santos consequently visited the site early January 1987, finding that the trailer office and all the equipment were gone and, indeed, that only the sign remained. Santos thereupon sent this letter, dated 12 February, to John Carralez at Respondent's address in Long Beach, California:

> We request that you sit down and negotiate the effects of the plant closure located at 1170 5th Street, Oakland, CA 94607.
>
> I will be waiting for your reply.

Respondent did not reply. Nor did it ever communicate with the Union concerning the termination of the Oakland operation.

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[8] Two other unit employees, Miguel Dimas and Mark Bocage, had been hired previously.

Respondent's answer to this allegation admits that it terminated its Oakland operation in November or December 1986 "without prior notice to the Union and without having afforded the Union an opportunity to negotiate and bargain . . . concerning . . . the effects of such acts and conduct." The answer further admits, by its silence, that Respondent "has failed and refused to meet and bargain . . . with regard to the effects of" that termination since 12 February 1987.

2. Conclusions

a. *The alleged violations of Section 8(a)(5) and (1)*

The foregoing recitation of facts, in combination with the noted admissions by Respondent in its answers, establishes beyond doubt that it quietly and unilaterally repudiated its bargaining obligation and underlying contract months before contract expiration; and that, as a concomitant of that repuidation, it:

(a) Stopped making contributions to the Sheet Metal Workers' of Northern California Health Care Plan as prescribed by the contract.

(b) Flouted the Union's entreaties that it enter into the negotiation of a successor contract.

(c) Failed to direct new hire Field to the Union with a report of hire form as required by the contract.

(d) Ignored seniority and otherwise overlooked contractually mandated procedures in connection with the layoffs of Dimas in August 1986.

(e) Failed to give the Union an opportunity to negotitate over the effects on unit employees of its termination of the Oakland operation.

I conclude that, by its repudiation of its bargaining obligation and underlying contract without any stated, let alone proper, justification, and by each of the itemized concomitants thereof, Respondent violated Section 8(a)(5) and (1).

b. *The alleged additional violations of Section 8(a)(1)*

I conclude that Respondent made an improper inducement to Dimas to discard the Union, violating Section 8(a)(1), when Hisidro Carralez told him in May or June 1986 that Respondent did not "want another contract with the Union" and that, even without a contract, his benefits "would be the same, just as if the Union was there."

I conclude that Respondent, by Hisidro Carralez, also violated Section 8(a)(1) in November or December 1986 by telling Dimas that Respondent "would give [him] more work" only if he "went to the Union and they withdrew all the charges," thus conditioning employment on the surrender of rights under the Act.

IV. REMEDY

I shall recommend that Respondent cease and desist from that conduct found to be unlawful, and that it take certain affirmative action to effectuate the policies of the Act.

Regarding Respondent's unlawful failure to give the Union an opportunity to bargain over the effects of its termination of the Oakland operation, a bargaining order alone would not provide an adequate remedy. To impart to Respondent some incentive to enter into meaningful bargaining, and to make the affected employees whole for losses they may have suffered as a result of its prior failure to do so, I will impose a limited monetary sanction along lines of *St. Marys Foundry Co.*, 284 NLRB 221 (1987); *Garwood-Detroit Truck Equipment*, 274 NLRB 113, 116 (1985); and *Transmarine Corp.*, 170 NLRB 389, 390 (1968).

Thus, Respondent shall pay a wage equivalent to each unit employee on the payroll when operations ceased, based on his/her normal pay rates at the time of cessation, from 5 days after the date of this decision until the occurrence of the earliest of the following conditions: (1) the date Respondent bargains to agreement with Union on those subjects pertaining to the effects of the cessation on its unit employees; (2) a bona fide impasse in bargaining; (3) the failure of the Union to request bargaining within 5 days of this decision, or to commence negotiations within 5 days of Respondent's notice of its readiness to bargain; or (4) the subsequent failure of the Union to bargain in good faith. In no event, however, shall any employee's entitlement exceed the amount he/she would have earned as wages from the date of cessation to the time the employee secured equivalent employment elsewhere, or the date on which Respondent should offer to bargain, whichever occurs first; provided further that in no event shall that entitlement be less than the employee would have earned for a 2-week period at the aforesaid normal pay rate when last in Respondent's employ.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[9]

ORDER

The Respondent, Chassis Maintenance, Inc., Oakland, California, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Failing and refusing to bargain collectively with Sheet Metal Workers' International Association, Local Union No. 355 of Northern California (Union) concerning the effects on the employees in the appropriate unit below of its decision to close its operation in Oakland, California. The unit is:

> All production, warehouse, maintenance, material handling, and truck-driver employees at Respondent's operation in Oakland, California, exlcuding office clerical employees, timekeepers, administrative and professional employees, technical employees, guards, and supervisors.

(b) Failing and refusing, during the term of a collective-bargaining contract between it and the Union covering employees in the above unit, to recognize the Union as the exclusive representative of those employees, to honor the terms of such contract (including those requiring contributions to the Sheet Metal Workers' of Northern California Health Care Plan and prescribing procedures to be followed when hiring and laying off employees), and to enter into the negotiation of a successor contract when timely requested by the Union to do so.

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[9] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

(c) Making inducements to employees to withdraw their support of labor organization with whom it has a collective-bargaining contract by telling them that Respondent does not want another contract and that their benefits will be the same without a contract or without a union.

(d) Telling employees it will give them more work only if they achieve the withdrawal of unfair labor practice charges against Respondent that have been filed on their behalf with the National Labor Relations Board.

(e) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) On request, bargain collectively with the Union concerning the effects on the employees in the above unit of Respondent's decision to close its operation in Oakland, California; and reduce to writing any agreement resulting from such bargaining.

(b) Pay the unit employees on the payroll when Respondent terminated its Oakland operation in the manner set forth in the Remedy portion of this decision.

(c) Make the unit employees whole, with interest, for any monetary loss occasioned by Respondent's unlawful withholding of contributions to the above health care plan.[10]

(d) Make Miguel Dimas whole, with interest, for any loss of wages and benefits he suffered because of Respondent's disregard of his seniority and other contractually bestowed rights in connection with his two layoffs in August 1986.

(e) Preserve and, on request, make available to the Board or its agents for examination and copying all payroll records, social security payment records, timecards, personnel records and reports, and all other records necessary or useful to analyze the amounts owing under the terms of this Order.

(f) Mail copies of the attached notice, marked "Appendix,"[11] in both English and Spanish, to the Union, to Miguel Dimas, and to all unit employees on the payroll when Respondent terminated its Oakland operation. Copies of the notice, on forms provided by the Regional Director for Region 32, after being duly singed by Respondent's authorized representative, shall be mailed immediately upon receipt thereof as herein directed.

(g) Notify the Regional Director in writing within 20 days from the date of this Order what steps it has taken to comply.

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[10] Interest, where specified, shall be computed in accordance with *New Horizons for the Retarded*, 283 NLRB 1173 (1987). Under *New Horizons*, interest is computed at the "short-term Federal rate" for the underpayment of taxes as set out in the 1986 amendment to 26 U.S.C. § 6621. Interest accrued before 1 January 1987 (the effective date of the amendment) shall be computed as in *Florida Steel Corp.*, 231 NLRB 651 (1977).

[11] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

Larsen Supply Co., Inc. *and* **General Warehousemen, Local No. 598, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, AFL–CIO.**[1] Case 21-CA-20622

June 22, 1988

DECISION AND ORDER

BY CHAIRMAN STEPHENS AND MEMBERS BABSON AND CRACRAFT

On September 23, 1982, Administratve Law Judge Frederick C. Herzog issued the attached decision. The Respondent filed exceptions and a supporting brief.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings,[2] and conclusions and to adopt the recommended Order.

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge and orders that the Respondent, Larsen Supply Co., Inc., Santa Fe Springs, California, its officers, agents, successors, and assigns, shall take the action set forth in the Order.

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[1] On November 1, 1987, the Teamsters International Union was readmitted to the AFL–CIO. Accordingly, the caption has been amended to reflect that change.

[2] In adopting the judge's finding that the Respondent's showing of objective considerations was insufficient to establish a good-faith doubt of the Union's majority status, we have considered the cumulative impact of the factors advanced by the Respondent. In this connection, we find that, even assuming arguendo the judge should have received the testimony of one of the Respondent owners, Ray Larsen, to the effect that eight or nine employees told him that other employees did not desire union representation, such "unverified assertions of disenchantment conveyed to Respondent secondhand" are insufficient to establish a reasonable good-faith doubt of the Union's majority status. *Cornell of California*, 222 NLRB 303, 306 (1976), enfd. 577 F.2d 513 (9th Cir. 1978). Further, we agree with the judge's reliance on *Arkay Packaging Corp.*, 227 NLRB 397 (1976), but only for the limited proposition for which he cited that case.

Lana Hill Parke, Esq., for the General Counsel.

A. Patrick Nagel and *David McVey, Esqs.*, of Newport Beach, California, for the Respondent.

DECISION

FREDERICK C. HERZOG, Administrative Law Judge. Based on a charge filed by General Warehousemen, Local No. 598, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, AFL–CIO (the Union) that Larsen Suply Co., Inc. (the Respondent) has engaged in unfair labor practices in violation of Section 8(a)(5) and (1) of the Act, a complaint was issued on October 31, 1981, by the Regional Director for Region 21 of the National Labor Relations Board.

Accordingly, this case was tried before me at Los Angeles, California, on June 17, 1982. At the trial all parties were afforded the right to participate, to examine and cross-examine witnesses, and to adduce evidence in support of their positions. All parties were also afforded the right to make oral argument and to file briefs at the conclusion of the trial. The General Counsel chose to argue orally on the record, but waived the filing of a brief.

Based on the record, plus my consideration of the brief filed by the Respondent, I make the following

FINDINGS OF FACT

I. THE BUSINESS OF THE RESPONDENT

The Respondent is a corporation engaged in warehousing and distrubuting plumbing supplies at its facility located in Santa Fe Springs, California. In the course and conduct of its business it annually purchases and receives goods and products valued in excess of $50,000 directly from suppliers located outside the State of California.

The Respondent is, and at all times material has been, an employer engaged in commerce and in a business affecting commerce within the meaning of the Act.

II. THE LABOR ORGANIZATION

The Union is now, and at all times material has been, a labor organization within the meaning of the Act.

III. THE ALLEGED UNFAIR LABOR PRACTICES

A. *The Fact*

On June 21, 1979, the Board conducted a secret-ballot election among the Respondent's employees based on a petition filed by the Union in a unit described as follows:

> All warehousemen, including order fillers, packers, stockmen, checkers, and truckdrivers employed by Respondent at its facility located at 12055 Slauson Avenue, Santa Fe Springs, California, excluding all other employees, office clerical employees, guards and supervisors as defined in the Act.

Of 32 eligible votes, 28 cast ballots, with 14 voting in favor of representation by the Union, 12 voting against the Union, and 2 ballots being challenged. While the details are unclear, it is conceded that one or both of the challeged ballots were resolved[1] and that the Union won the election. As a result, and apparently with no objections to conduct affecting the results of the election being filed, the Union was certified as the exclusive collective-bargaining representative of the employees in the unit described above on August 6, 1979.

Following the Union's certification the parties met in negotiating sessions on December 1, 1980, and January 13, 16, and 26, March 3 and 12, April 7, and May 18, 1981. They failed to reach a collective-bargaining agree-

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[1] As speculated by Respndent's counsel at the trial, perhaps by the Union withdrawing its challenge to the one ballot it had challenged.

289 NLRB No. 41

ment. Jerry Stephens, a business agent and organizer for the Union, testified that he became involved with the Respondent's employees in November 1980, over a year after the election and certification. The first negotiating session came about only a month or so later. According to Stephens, negotiations continued until May 18, 1981, at which time the Respondent's attorney, Nagel, promised to submit the Respondent's "final proposals" within a week or two thereafter. Stephens went on to state that the Union's repeated efforts since then to secure such proposals from the Respondent have proven fruitless.

Instead of a proposal for a contract, the Union received a letter from the respondent's attorney on August 28, 1981. The letter read as follows:

> My client, Larsen Supply Co., has just advised me that only 11 employees out of a total of 42 currently in the bargaining unit were employed at the time of the NLRB election in June, 1979. I am further informed by Larsen Supply that it has strong good faith doubt that your union currently represents that majority of the 42 employees in the bargaining unit. Based on the conviction that Teamsters Local 598 does not represent the majority of Larsen Supply's employees in the unit, Larsen Supply cannot as a matter of law engage in any further collective bargaining with you.

At the trial the Respondent offered to prove that it met and bargained with the Union after the certification, but that it was continually frustrated by what it regarded as the Union's ineptness, such as repeated attempts to cause the Respondent to agree to a standard form of agreement used in the area, by changes in the Union's negotiating team, and by the Union's lack of preparation for negotiating sessions, etc. Moreover, the Respondent asserted that on December 19, 1979, it announced that it would not meet again with the Union until the Union responded to prior proposals by the Respondent, and stopped treating each negotiating session as an opportunity to begin negotiations anew, with the Union's standard area contract being used as a starting point for the bargaining. The Respondent also offered to prove that the Union was advised at the last bargaining session, on May 18, 1981, that the Respondent would await the Union's submission of "bottom line proposals" before the Respondent would make a "last and final offer."

Finally, one of the Respondent's owners, Ray Larsen, testified that prior to August 28, 1981, he was approached individually and at various times by eight or nine unit employees,[2] and that each of them told him they "did not want the Union in there," and that they had "had enough of it" at the time the Union started its organizing campaign. The Respondent offered, but was not allowed, to prove that the eight or nine employees mentioned above had been told by other employees that they did not desire the Union's representation.

At no time did the Respondent file a charge with the Board concerning its perception that the Union's conduct in negotiations amounted to bad-faith bargaining. Nor was a decertification petition ever placed on file.

B. *Conclusion*

For many years it has been the law that a certified union enjoys an irrebuttable presumption of continuing majority status for 1 year after its certification. *Ray Brooks v. NLRB*, 384 U.S. 96, 98–102, 104 (1954). In the interests of stability in labor relations, the presumption of majority representative status continues after the first year (or, in the case of a voluntarily recognized union, after a "reasonable time") until it is rebutted by the employer's proof that (1) at the time it withdrew recognition the union, in fact, no longer enjoyed majority status, or (2) that the employer's refusal to bargain further was predicated on a reasonably grounded doubt as to the Union's continued majority status asserted in good faith, based on objective considerations, and raised in a context free of employer unfair labor practices. See *U.S. Gypsum Co.*, 157 NLRB 65 (1966); *Terrell Machine Co.*, 173 NLRB 1480 (1969).

It is clear that the Respondent has neither succeeded nor offered to demonstrate that its asserted "strong good faith doubt" was based on the sort of objective considerations that should be recognized by the Board or the courts as valid excuses for refusing to bargain further.

The evidence presented or proffered by the Respondent fails completely to reach the question of whether the Union had lost majority support as of the date that recognition was withdrawn. That eight or nine employees told their employer that they remained firm in their conviction that they opposed union representation serves the Employer not at all. Assuming for the sake of argument that as many as nine[3] unit employees in fact came to Larsen and told him that they opposed the Union it remains true that these eight or nine constituted scarcely 22 percent of the employee complement. And even had their numbers been greater, it must be remembered that Larsen never testified that these employees told him that they had changed their minds, or that they no longer supported the Union. Instead, so he testified, they said they adhered to the same views they had held about the Union since before the election. Under these circumstances, it seems most probable that the 8 or 9 employees who spoke to Larsen were among the 12 employees who voted against union representation. Thus, their views, as recounted by Larsen, create no doubt at all, good faith or otherwise.[4]

The Respondent argues that the question of an employer's "good faith" in asserting a doubt is not to be determined solely on the evidence available to the employer at the time it asserts that a doubt exists. Indeed, the Respondent's brief goes so far as to claim that the fact that "actual knowledge" was not in existence until subsequent to August 28, 1981, is immaterial. However, as has been stated, "when the Board makes this determination [as to the basis of the employer's doubt] it is not controlled, or even guided, by the later ascertained facts of union adherence or non-adherence. It is father the quesiton of fact whether the company had a reasonable basis *at the time of its refusal to bargain* for believing that majority support of the bargaining union no longer existed." *Bartenders Assn. of Pocatello*, 213 NLRB 651, 653 (1974), citing and quoting *Gulfmont Hotel*, 362 F.2d 588, 589 (5th Cir. 1966); *Holiday Inn of Dayton*, 212 NLRB 553 (1974), on remand from *NLRB v. Holiday Inn of Dayton*, 474 F.2d 328 (6th Cir. 1973); *Arkay Packaging Corp.*, 227 NLRB 397 (1976).

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[2] Only three of whose names he recalled fully, though he also did recall a fourth employee's first name.

[3] Given Larsen's inability to recall more than three or four names, I find this a large assumption indeed.

[4] *Golden State Habilitation Convalescent Center*, 224 NLRB 1618, 1619 (1976), enf. denied 568 F.2d 77 (1st Cir. 1977).

It is obvious that progress in negotiations has been, to say the least, less than reasonable people might hope for. But the precise cause of the lack of progress is not so clear. Whether it was due to some failing of the Union's negotiators or to intransigence on the part of the Respondent's negotiator seems largely irrelevant to the question of whether the Respondent acted lawfully on August 28, 1981, in withdrawing recognition. For, even if there has been established a sudden change in the Union's bargaining posture, it is settled law that vagaries in a union's tactics do not constitute "objective considersations" sufficient to justify withdrawing from bargaining. *Peoples' Gas System*, 238 NLRB 1008 (1978).

Finally, while I doubt the adequacy of this record to support a finding that "turnover" in the employee complement has occurred, I am, for the sake of argument, assuming to be true the statement asserted in the August 28, 1981, letter, i.e., that only 11 of the 42 then employed were employed there at the time of the election. Nonetheless, I find this inadequate to justify the Respondent's withdrawal of recognition. In this, I rely on the presumption that newly added employees support the Union in the same proportion as was shown by the election. *Laystrom Mfg. Co.*, 151 NLRB 1482 (1965); *Peoples' Gas System*, supra.

In sum, I conclude that, "[I]n refusing to bargain because of an alleged decline in union adherents, the employer is acting as a vicarious champion of its employees, a role no one has asked it to assume." *Sahara-Tahoe Corp. v. NLRB*, 648 F.2d 553 (9th Cir. 1980), enf. denied 241 NLRB 106 (1979). By such actions the Respondent failed and refused to bargain collectively in good faith, and thereby violated Section 8(a)(5) and (1) of the Act.

Conclusions of Law

1. The Respondent is an employer within the meaning of Section 2(2) of the Act and is engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

2. The Union is a labor organization within the meaning of Section 2(5) of the Act.

3. The following employees of the Respondent constitute a unit appropriate for the purposes of collective bargaining within the meaning of Section 9(b) of the Act:

> All warehousemen, including order fillers, packers, stockmen, checkers, and truckdrivers employed by Respondent at its facility located at 12055 Slauson Avenue, Santa Fe Springs, California, excluding all other employees, office clerical employees, guards and supervisors as defined in the Act.

4. At all times since June 21, 1979, the Union, by virtue of Section 9(a) of the Act, has been, and is, the exclusive representative of employees in the unit described above in paragraph 3 for the purpose of collective bargaining with respect to rates of pay, wages, hours of employment, and other terms and conditions of employment.

5. The Respondent violated Section 8(a)(5) and (1) of the Act by withdrawing recognition from the Union on August 28, 1981, and, thereafter, failing and refusing to bargain collectively in good faith.

6. The aforesaid unfair labor practices constitute unfair labor practices affecting commerce within the meaning of Section 2(6) and (7) of the Act.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[5]

ORDER

The Respondent, Larsen Supply Co., Inc., Santa Fe Springs, California, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Refusing to recognize and bargain collectively with General Warehousemen, Local No. 598, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, AFL–CIO as the exclusive bargaining representative of the employees in the unit described below, concerning rates of pay, wages, hours of employment, and other conditions of employment:

> All warehousemen, including order fillers, packers, stockmen, checkers, and truckdrivers employed by Respondent at its facility located at 12055 Slauson Avenue, Santa Fe Springs, California, excluding all other employees, office clerical employees, guards and supervisors as defined in the Act.

(b) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) On request, bargain collectively with the above-named Union, as the exclusive collective-bargaining representative of all the employees in the unit described above, concerning rates of pay, hours of employment, and other conditions of employment and, if an understanding is reached, embody such understanding in a signed agreement.

(b) Post the attached notice marked "Appendix" at its Santa Fe Springs, California place of business.[6] Copies of this notice, on forms to be provided the Regional Director for Region 21, after being duly signed by Respondent or an authorized representative, shall be conspicuously posted immediately upon receipt and maintained for 60 consecutive days thereafter in all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material.

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[5] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes. All outstanding motions inconsistent with this recommended Order are denied.

[6] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

(c) Notify the Regional Director in writing within 20 days from the date of this Order what steps the Respondent has taken to comply.

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

Section 7 of the Act gives employees these rights.

To organize
To form, join, or assist any union
To bargain collectively through representatives of their own choice
To act together for other mutual aid or protection
To choose not to engage in any of these protected concerted activities.

WE WILL NOT do anything that intereferes with these rights. More specifically.

WE WILL NOT refuse to recognize and bargain collectively with General Warehousemen, Local No. 598, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, AFL-CIO as the exclusive bargaining representative of the employees in the unit described below, concerning rates of pay, wages, hours of employment, and other conditions of employment. The bargaining unit is:

> All warehousemen, including order fillers, packers, stockmen, checkers, and truckdrivers employed by the Respondent at its 12055 Slauson Avenue, Santa Fe Springs, California, excluding all other employees, office clerical employees, guards and supervisors as defined in the Act.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce employees in the exercise of rights guaranteed them by Section 7 of the Act.

WE WILL bargain collectively, on request, with the above-named Union, as the exclusive bargaining representative of all the employees in the unit described above, with respect to rates of pay, wages, hours of employment, and other conditions of employment and, if an understanding is reached, embody such understanding in a signed agreement.

LARSEN SUPPLY CO., INC.

Canonie Transportation Company ***and*** **District 2-Marine Engineers Beneficial Association-Associated Maritime Officers, AFL-CIO, Petitioner.** Case 7-RC-18255

June 22, 1988

DECISION AND DIRECTION

BY MEMBERS JOHANSEN, BABSON, AND CRACRAFT

The National Labor Relations Board, by a three-member panel, has considered objections to and determinative challenges in a mail ballot election held from Febraury 13 until March 17, 1987, and the hearing officer's report recommending disposition of them. The election was conducted pursuant to a Stipulated Election Agreement. The tally of ballots shows seven votes for the Petitioner and eight votes for the Intervenor, Local 486, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, AFL-CIO. There were two determinative challenged ballots.

The Board has reviewed the record in light of the exceptions and brief and has adopted the hearing officer's findings[1] and recommendations as modified by this Decision and Direction.

The hearing officer recommended overruling the Employer's challenges to the ballots of Paul Brown and Mark Mather. The Employer alleged that Brown and Mather were ineligible to vote because, before the election, each spent a regular and substantial portion of his working time substituting as a temporary relief captain, a supervisory position.[2] The hearing officer recommended overruling the challenges on the ground that neither Brown nor Mather spent 50 percent of his working time as a supervisor during the year preceding the election.[3]

For the reasons stated below, we agree with the hearing officer that the challenge to Brown's ballot should be overruled. Contrary to the hearing officer, however, we find that the challenge to Mather's ballot should be sustained.

289 NLRB No. 44

The Employer provides tugboat and barge inland waterway services within the Great Lakes. The Employer's season commences in April and ends in December. A tugboat crew consists of a captain, first mate, engineer, assistant engineer, and deckhands. The crew is split so that crewmembers alternate 6-hour shifts, 24 hours a day. The captain and first mate alternate assuming command of vessel. The Employer has also instituted a relief program whereby crews are rotated off a tugboat and replaced by a relief crew.

The relief captain assumes command of a vessel in the absence of a full-time captain.

The hearing officer found that Brown and Mather were hired as first mates in 1983.[4] Brown did not sail as relief captain in either 1983 or 1984. In 1985, Brown worked less than 50 percent of his time as relief captain and spent less than 80 hours as relief captain in 1986.[5] Mather was a relief captain for approximately 7 weeks in 1984 and was not a relief captain in 1985. In 1986, Mather spent less than 50 percent of his working time as a relief captain.

The hearing officer found that Brown and Mather possessed supervisory authority only when acting as relief captain and this authority was sharply demarcated from their rank-and-file duties. Additionally, Brown's and Mather's time spent as relief captain was measurable and continuous with a sharp distinction from nonsupervisory time. Relying on *Great Western Sugar Co.*, 137 NLRB 551 (1962); and *Westinghouse Electric Corp.*, 163 NLRB 723 (1967), affd. 171 NLRB 1239 (1968), enfd. 424 F.2d 1151 (7th Cir. 1970), cert. denied 400 U.S. 831 (1970), the hearing officer held that Brown and Mather were not statutory supervisors at the time of the election because they spent less than 50 percent of their working time performing supervisory duties. The hearing officer found that *Great Western* and *Westinghouse* are applicable to situations where, as here, employees fulfill distinct supervisory duties during portions of the year and these duties are sharply demarcated in function and time from rank-and-file responsibilities.

We disagree with the hearing officer's application of the "50 percent" rule in determining the supervisory status of both Brown and Mather. Examination of subsequent cases reveal that *Great Western* and *Westinghouse* are not applicable to the instant situation.

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[1] The employer has excepted to some of the hearing officer's credibility findings. The Board's established policy is not to overrule a hearing officer's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Stretch-Tex Co.*, 118 NLRB 1359, 1361 (1957). We find no basis for reversing the findings.

We also find no merit in the Employer's contention that it was unable to properly cross-examine Board Agent Chet Byerly concerning any written documentation of his conversation with employee William Yager. The record indicates that neither the hearing officer nor counsel for the Region restricted the cross-examination. We also agree with the hearing officer's finding that the Employer did not make a clear request for any written documentation of the Byerly conversation with Yager.

[2] The hearing officer found that a relief captain performs supervisory duties. No party excepted to his finding and the record fully supports the hearing officer's determination.

[3] The hearing officer specified that a prevailing union would only represent Brown and Mather concerning their rank-and-file duties.

[4] The unit consists of mates, chief engineers, assistant engineers, and deckhands employed at the Employer's Muskegon, Michigan facility.

[5] The record shows that Brown broke his arm in the fall of 1986 and performed nonunit dispatcher duties for the remainder of the year. The record also indicates that the time Brown spent in 1986 as relief captain before the injury covered approximately 11 days.

In *Great Western*, the Board held that employees in seasonal industries who perform supervisory duties for a portion of the year and unit functions for the remainder of the year may be represented with respect to their rank-and-file duties. The Board noted that seasonal supervisors may be represented because their supervisory and unit responsibilities are clearly demarcated and are performed during different periods of the year. The Board, however, did not indicate whether the seasonal supervisors in *Great Western* supervised other unit employees or nonunit personnel.

In *Westinghouse*, the Board, citing *Great Western*, held that the employees who spend at least 50 percent of their working time performing nonsupervisory duties would be eligible to vote. In *Westinghouse*, a group of engineers was assigned to specific projects located on customer sites away from the workplace. Some of the engineers had supervisory authority, but only for particular projects. The period of time when these engineers possessed supervisory authority was measurable and clearly demarcated. However, the Board specifically noted that their supervisory authority extended only to nonprofessional craft employees hired for the project; no supervisory authority was exercised over the unit employees.

In *Doctor's Hospital of Modesto*, 183 NLRB 950, 951 (1970), affd. 193 NLRB 833 (1971), enfd. 489 F.2d 772 (9th Cir. 1973), the Board placed certain limits on the application of the "50 percent ' rule. Specifically, the Board stated:

> The . . . eligibility criteria enunicated in *Westinghouse* do not apply to circumstances . . . wherein the disputed individuals are performing both their allegedly supervisory and nonsupervisory jobs during the same workweek, in the same department with essentially the same complement of employees.

Subsequenlty, in *Aladdin Hotel*, 270 NLRB 838, 839-840 (1984), the Board held that *Westinghouse* is inapplicable to situations in which temporary supervisors exercise authority over unit employees and perform both supervisory and nonsupervisory duties during the same work period. The Board stated that in these circumstances the appropriate test is whether the part-time supervisors spend a regular and substantial portion of their working time performing supervisory tasks or whether such substitution is merely sporadic and insignificant.

We agree with the hearing officer's finding that there is a clear demarcation between Brown's and Mather's supervisory duties and their rank-and-file duties. We also agree that the time Brown and Mather spent as relief captain is measurable and continuous with a sharp distinction from nonsupervisory time. Unlike the engineers in *Westinghouse*, however, and like the individuals in issue in *Aladdin Hotel*, relief captains here exercise supervisory authority over fellow unit employees in the same workplace where they perform rank-and-file duties.[6] Accordingly, we conclude that the "50 percent" rule is inapplicable to the present case.

In applying the "regular and substantial" test to the instant case, we find, contrary to the Employer's assertions, that Brown's fewer than 80 hours served as relief captain in 1986 did not constitute spending a regular and substantial portion of his time working as a relief captain in the year preceding the election. The Employer in its exceptions argues that Brown would have spent approximately 2 to 3 months as relief captain had he not broken his arm. Such an assertion, however, is merely speculative and cannot support a finding of supervisory status. We also reject the Employer's argument that because Brown spent time in a nonunit desk position during his injury, his ballot should not be counted. The record indicates that his dispatcher duties were temporary due to injuries. Accordingly, Brown shares a sufficient community of interest with the other unit employees and his ballot will be counted.

We find, however, that Mather spent a regular and substantial portion of his working time as a relief captain in 1986. Mather credibly testified that he spent approximately 17 weeks as relief captain from April through December 1986,[7] a substantial period of time. Although there are no specific patterns to the entire 17-week period,[8] the Employer's uncontroverted testimony shows that any irregularity was not caused by the Employer's scheduling, but rather from the variability of the workflow in the tugboat service industry.[9] Accordingly, we sustain the Employer's challenge to Mather's ballot.

DIRECTION

IT IS DIRECTED that the Regional Director for Region 7 shall, within 10 days from the date of this Decision and Direction, open and count the ballot of Paul Brown. The Regional Director shall then serve on the parties a revised tally of ballots and issue the appropriate certification.

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[6] We note that Mather's testimony, which was generally credited by the hearing officer, indicates that he worked as relief captain and mate on each of two tugboats during separate assignments.

[7] We find that Mather's hours worked as relief captain during those 17 weeks ranged from 8 to 40 hours per week.

[8] Mather did testify, however, that he regularly rotated approximately every 2 weeks as relief captain and mate from July until December 1986.

[9] It is undisputed that the Employer produces a regular relief schedule before a season commences, but the schedule changes due to circumstances beyond the Employer's control.

Westvaco Corporation *and* International Brotherhood of Electrical Workers and Local Union 1753, International Brotherhood of Electrical Workers, AFL-CIO. Case 11-CA-11872

June 22, 1988

DECISION AND ORDER

BY CHAIRMAN STEPHENS AND MEMBERS JOHANSEN AND BABSON

On July 29, 1986, Administrative Law Judge Lawrence W. Cullen issued the attached decision. The Respondent filed exceptions and a supporting brief, the Charging Party and the General Counsel filed briefs in response, and the Charging Party filed a cross-exception with a supporting brief.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings,[1] and conclusions[2] and to adopt the recommended Order.

289 NLRB No. 45

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge and orders that the Respondent, Westvaco Corporation, North Charleston, South Carolina, its officers, agents, successors, and assigns, shall take the action set forth in the Order.

Ann B. Wall, Esq., for the General Counsel.
George P. Smith, Esq. (Constangy, Brooks & Smith), of Atlanta, Georgia, for the Respondent.
Robert D. Kurnick, Esq. (Sherman, Dunn, Cohen, Leifer & Counts), of Washington, D.C., for the Charging Party.

DECISION

STATEMENT OF THE CASE

LAWRENCE W. CULLEN, Administrative Law Judge. This case was heard before me in Charleston, South Carolina, on 28 April 1986. The original charge was filed by International Brotherhood of Electrical Workers and Local Union 1753, International Brotherhood of Electrical Workers, AFL-CIO (the Unions or the Charging Parties or designated separately as the International or Local 1753) on 23 December 1985 against Respondent Westvaco Corporation (Westvaco or the Respondent) and the complaint was issued by the Regional Director for Region 11 of the National Labor Relations Board (the Board) in this case on 3 February 1986 and alleged that Westvaco had violated Section 8(a)(5) and (1) of the National Labor Relations Act (the Act) by, since on or about 23 June 1985, refusing to bargain collectively with the Union by insisting to impasse over its maintenance and operator performance improvement plan (MOPIP) and has further violated Section 8(a)(5) and (1) of the Act by, since on or about 18 November 1985, unilaterally without notification or consultation with Local 1753, implementing its MOPIP. Respondent by its answer filed on 18 February 1986 has denied the commission of any violations of the Act.

On the entire record, including my observations of the demeanor of the witnesses and after due consideration of the briefs filed by the parties, I make the following

FINDINGS OF FACT[1]

I. JURISDICTION

The complaint alleges, Respondent Westvaco Corporation admits, and I find that it has been at all times material a New York corporation with a facility located at North Charleston, South Carolina, where it is engaged in the manufacture of pulp, paper, and by-products, that during the 12 months prior to the filing of the complaint, which period is representative of all times material, Respondent received at its North Charleston, South Carolina facility goods and raw materials valued in excess of

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[1] In sec. IV of his decision the judge inadvertently stated the abbreviation for the United Paperworkers International Union as "I.P.I.U." instead of "U.P.I.U."

[2] The Respondent excepts to the judge's conclusion that it was clear that the International president of the IBEW had the right to approve or reject the proposed contract which the members of Local Union 1753 had ratified. This proposed contract basically copied the parties' 1982 labor contract, but with certain modifications. Those modifications, however, did not make any change in the provision "Parties to Agreement," which states, in part: "This agreement is to become effective when signed by the Company and the Union and approved by the International President of the International Brotherhood of Electrical Workers." The Respondent argues that any requirement that the International approve the contract was waived because no such approval was required in previous years. However, the evidence regarding the parties' previous labor contracts shows that the International uniformly either approved the contract or in fact signed as a party to the contract. The International president rejected the proposed 1985 contract, and thus the contract, by its own terms, never became effective.

The Respondent also argues that the Union is estopped or barred by laches from asserting that the proposed 1985 contract did not become effective. The Respondent failed, however, to submit evidence sufficient to warrant such a finding. There was no evidence on the parties' past practice regarding the time between membership ratification of a proposed contract and the International's approval of the contract. Thus we cannot say, based on past practice, that the 2-1/2 months between membership ratification of the proposed 1985 contract and the International's rejection of the contract was an unreasonable period of time. Nor can we say that this was such a long period of time that the International must be deemed to have unreasonably delayed its decision, regardless of the parties' past practice. Futhermore, we note that there was no evidence that the Respondent made any effort to learn whether the International had approved or rejected the contract while the matter was pending before the International. Accordingly, we cannot agree that the Union is either estopped or barred by laches from asserting that the proposed 1985 contract did not become effective. In any event, we note our further agreement with the judge's conclusion that the Respondent had unlawfully bargained to impasse as of November 4, 1985, and implemented its proposals on November 21 or 22, 1985, only 10 days after the proposed contract was sent to the International for its approval.

Finally, in adopting the findings and conclusions of the judge, we rely on *Boise Cascade Corp.*, 283 NLRB 462 (1987).

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[1] The findings of fact include a composite of the credited testimony of the witnesses, stipulations entered into by the parties, and admitted exhibits.

$50,000 directly from points outside the State of South Carolina, and shipped from its North Charleston, South Carolina facility products valued in excess of $50,000 directly to points outside the State of South Carolina, and that it is now and has at all times material been an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

II. THE LABOR ORGANIZATIONS

The complaint alleges, Respondent admits, and I find that the International and Local 1753 are labor organizations within the meaning of Section 2(5) of the Act.

III. THE BARGAINING UNIT

The complaint alleges, Respondent admits, and I find that the following employees of Respondent constitute a unit appropriate for the purposes of collective bargaining within the meaning of Section 9(b) of the Act.

> All electricians, power and boiler house employees, and instrument department employees of the Employer at its Charleston, South Carolina plant, excluding electrician leadmen and shift engineers, all other production and maintenance employees, office clerical employees, plant clerical employees, professional employees, technical employees, guards, watchmen, and supervisors as defined in the Act.

IV. THE ALLEGED UNFAIR LABOR PRACTICES

The facts in this case are essentially undisputed. The Respondent operates a paper and pulp manufacturing plant with the end products of various cardboard wrappings and other products and also operates as part of the same facility, a small chemical operation. The plant is approximately 50 years of age. Respondent, according to the unrebutted testimony of its Industrial Relations Manager Jack Flynn, became concerned over a period of years of its disadvantages in competing with other newer and more efficient plants that require fewer man-hours per unit of product. One of the problems perceived by management was the organization of the work force along "strict craft lines." There are approximately 800 to 900 hourly employees and a similar number of salaried employees. The hourly workers are represented by four unions, including two locals of the United Paperworkers International Union (IPIU), one of which represents employees in the pulp mill operation and the other of which represents employees in the paper mill. The International Association of Machinists (IAM) represents employees generally referred to as maintenance mechanics. Local 1753 represents the electrical workers composed of employees set out in the appropriate unit, supra. Local 1753 represents approximately 125 employees including 60 electricians who install conduit, wire, and cable, and test and maintain pole lines and fixtures, lighting circuits and equipment, power feeders, motors, generators, alternators, and other electrical equipment and devices. Local 1753 also represents 18 instrument technicians who install, repair, and calibrate process control instruments, and 39 powerhouse operators who operate boilers and 11 powerhouse repairmen who repair boilers and turbines.

Over a period of the prior several years, Respondent had designated a committee of its management employees who were assigned to study operations of other pulp and paper mills in the United States and in other countries to determine how to improve the efficiency of its operations in order to effectively compete with other pulp and paper mills, many of which were of relatively recent vintage with modern equipment. One of the central conclusions of the committee was that it would be necessary to eliminate strict adherence to craft lines among the hourly employees in order to facilitate workflow and efficiently operate the plant by permitting employees of one craft (represented by one union) to perform the work of other crafts (represented by other unions) on an as-needed basis in order to avoid delays and downtime in the large plant operation.

The collective-bargaining agreement between Local 1753 and the Respondent was effective on 1 July 1982 and continued through 30 July 1985 and contained a 60-day notice provision for modification and also contained a provision that it would remain in force and effect after the expiration date until either party gave the other a notice of its intent to terminate the agreement in not less than 10 days beyond the date of the notice. In the fall of 1984 the Respondent made an unsuccessful attempt at early negotiations with all the unions at the premises by presenting a comprehensive proposal of work rule changes that would eliminate craft line barriers to assignment of work. This attempt was abandoned prior to the close of 1984.

The contracts of all the unions on the premises were to be negotiated in 1985 and the Respondent made a comprehensive proposal to the unions' MOPIP, which it introduced into its negotiations with the four unions in 1985. The plan would eliminate the contractually designated craft lines by training members of one craft represented by one union in a skill of another craft represented by another union and permit them to perform the work previously performed by the other craft as required by management. In the case of the IBEW group, employees who were not covered by the IBEW agreement would be trained in the field of electricity and would perform work previously performed exclusively by the electricians. Employees in the IBEW group would be trained to perform work previously performed exclusively by the other crafts (i.e., welding or maintenance and repair work). These changes would also require that the second paragraph of article I, Recognition, be removed from the agreement. That paragraph stated:

> The Company will not habitually assign work normally performed by employees in the established unit to employees outside the unit as long as employees in the unit are available, either on the job or from the overtime roster, and qualified to do the work involved. Employees are available if they are on the job even though they may be otherwise occupied, provided they can be released, or if they can be called in from the overtime roster.

Under MOPIP the employees' job classifications would also be changed with electricians and instrument technicians becoming I/E mechanics, powerhouse repairmen becoming general mechanics. Several other classifications of other unions would also be designated as general mechanics. The powerhouse operators would be designated as operators. Under MOPIP each union would continue to represent the same percentage of general mechanics as they had prior to its implementation, and newly hired employees would be assigned to one of the bargaining units as required to maintain appropriate percentages of employees.

The negotiations to replace the collective-bargaining agreement commenced on 7 May. Local 1753 was represented by IBEW International Representative E. H. Massey Jr., who served as chief spokesman, Local 1753 President Allen Wall, and other members of the Local's bargaining committee. Respondent was represented by Industrial Relations Manager Jack Flynn, Supervisor Julius Guerard, and others. Massey testified as follows: At the 7 May meeting, the parties exchanged proposals but MOPIP, although included as a proposal, was not discussed because a joint meeting had been set for 17 June to enable Respondent to address all four unions concerning MOPIP and to answer their questions. Massey testified that although the parties met on 3 and 4 June, there was little progress as Respondent held off on discussions of most areas contending they would be discussed or resolved by MOPIP. Respondent met with all four unions on 17–20 June and explained the MOPIP program. The meeting was commenced by Respondent's industrial relations manager, Flynn, who told the Unions' representatives that Respondent expected to have an agreement by 30 June, that they would make a presentation of MOPIP, listen to the Unions' concerns, and address what areas they could, and then give the Unions their final positions as to what MOPIP would entail. On the second day Respondent's representatives responded to questions and told Local 1753 representatives that it was important to it that the employees of other bargaining units perform work on energized lines, and that they would not change their position on this although each of the Unions indicated opposition to crossing the energized lines. The Respondent responded "that they had to have that issue," according to the unrebutted testimony of Massey. During the joint meeting the Respondent committed that members of Local 1753 would continue to have responsibility for voltages of above 440.[2] Massey testified further that on 17 June Flynn informed the representatives of the four unions that responses would be made to the matters raised by the Unions on 18 June and that these responses would be encompassed into a single package as part of the 17 June offer and this would be the Respondent's offer. The Respondent's proposal remained the same on 20 June as on 17 June with minor modifications according to the testimony of Massey. No agreement was reached on MOPIP at this series of meetings. Local 1753 informed the Respondent it was willing to cross lines between its own instrument technicians and electricians, but was unwilling to cross the craft lines of other unions to perform other crafts' work or to have them perform its work. After the Respondent's final offer following the 20 June meeting, Massey wrote Flynn on 25 June and indicated those areas of MOPIP Local 1753 would and could not accept. After the 20 June meeting, Respondent entered into negotiations with the Paperworkers local unions and Local 1753 was unable to set up another meeting until at the request of Local 1753 the Federal Mediation and Conciliation Service mediator was able to set up a meeting for 19 July. At that meeting Respondent maintained that MOPIP had to be settled or Local 1753 must accept it in order to obtain an agreement. The Respondent caucused at this meeting and then presented another proposal through the mediator dated 25 June, which was essentially the same proposal as that presented previously by Respondent during the 17–20 June meetings. The Local 1753 committee caucused and reviewed this offer and did not accept it. Massey advised Flynn of this by letter and also requested a meeting on 4 September to resume negotiations. Flynn responded to this letter and stated in his letter response that MOPIP must be resolved to reach an agreement and agreed to the 4 September meeting date. The parties met on 4 and 5 September and Local 1753 withdrew a number of its bargaining demands but according to Massey, Respondent remained firm on most items and made it clear that MOPIP would remain on the table.

Massey testified further that the parties met again on 7 October and at that meeting Respondent advised Local 1753 that the Paperworkers locals had ratified their labor agreements and that Respondent was willing to go through all outstanding items and give the Union its final position, but that there were no changes in the Respondent's proposal on MOPIP. The next day Flynn presented Respondent's typed offer, which still contained the MOPIP proposal. The Union's committee was not satisfied with the proposal and did not present it to the membership. On 31 October the Respondent gave the Union a 10-day notice as provided in the agreement to terminate the agreement effective 9 November and forwarded a copy to Massey and also sent a letter to the employees. Massey was contacted by the Federal mediator to meet on 31 October with the Union. At that meeting the parties examined various outstanding items such as the mill provision, vacation sellbacks, refusals of temporary or permanent promotions, and MOPIP. Respondent was not agreeable to any of the Union's proposals except the refusal-to-promote proposal. At the 31 October meeting the Union offered to leave the existing meal allowance as it was and permit employees to sign meal tickets at the cafeteria to eliminate Respondent's cash-flow problem. On vacation sellback, the Union proposed that an employee could sell back only 2 weeks of his vacation. The Union accepted the Respondent's proposal on freezing of promotions. The Respondent offered a $750 lump-sum payment in the second year of the contract, and the Union proposed a 3-percent general wage increase. The Union asked the Company to agree to the Union's letter proposal of 25 June, and the Respondent rejected this offer and restated its 8 October offer to be effective the first Monday following ratification. At no point in the negotiations did Respondent make changes in its written proposals with respect to what voltages of electricity employees could be assigned to work on, but maintained that any voltages 440 or under could be worked on by any employee at the supervisor's discretion. It did commit that voltages over 440 would continue to be worked on only by I/Es and other crafts would not be assigned this work. At this meeting Respondent also stated that article XXII[3] of the existing labor agreement must be eliminated to comply with MOPIP.

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[2] Ninety percent of the electrical work performed by Local 1753 bargaining unit members involved voltages of 440 or below according to the subsequent testimony at the hearing of Local 1753 Business Manager Allen Wall.

On 4 November the parties met again and Massey presented a longhand proposal to Respondent to resolve all issues except MOPIP and to put MOPIP on hold to let the Board decide whether it was a nonmandatory subject of bargaining as the Union had filed a charge with the Board alleging that Respondent was insisting to impasse on a nonmandatory subject of bargaining and was awaiting the answer of the Board. This was one of several similar charges filed by the Union against the Respondent during the course of negotiations. The Respondent rejected the offer of the Union and negotiations were concluded on that date. The union negotiation committee decided to submit the Company's proposal to the membership in view of the termination date of 9 November pursuant to the 10-day notice sent to the Union by the Respondent. The members voted on 8 November to accept the Respondent's proposal. Wall informed the Respondent of the result. Subsequently the Region informed Massey that he should withdraw the charge as the Respondent had not implemented the proposal as yet. Massey withdrew the charge on 20 or 21 November. On 25 November Massey was informed by Wall that MOPIP was being implemented and filed the charge on 29 November, which is the basis for this complaint. This labor agreement provides as have others in the past that it is subject to approval by the International. Massey was informed on 23 January 1986 by the International's vice president that the International would not approve the agreement and this was confirmed in writing by the International's letter of 27 January 1986. Massey called Guerard in Flynn's absence on 24 January 1986 and informed him of the International's decision to refuse to approve the agreement and that "it looked like we needed to get back to the table." Flynn called Massey the following Tuesday and told Massey to submit any further communications in writing to the Respondent.

Massey testified further that the Union objected to MOPIP as it was certified to represent electricians, instrument, powerhouse operators, and instrument repairmen, and the unit would lose its identity under MOPIP. Additionally, under the Respondent's proposal the Union's members designated as general mechanics were not assured of any proportional number of their members being retained to perform work that could be performed by members of other crafts in the bargaining units under MOPIP. Safety was a concern as the members were concerned about inadequately trained personnel handling energized electrical equipment. Money was also a factor in the Union's reluctance to agree to MOPIP. The members also objected to doing other crafts' work.

Massey testified further that on several occasions during the course of negotiations Respondent through its spokesman Flynn stated it had made its final offer on MOPIP. Initially at the 19 or 20 June meeting, Flynn informed the union representatives, "We've gone through it all, we've answered all your questions and we're ready to put together our final offer on MOPIP. "In every proposal made by Respondent, MOPIP was a part. Throughout the course of negotiations Respondent insisted that MOPIP was essential to reaching an agreement. Massey testified there were no meetings between the Union and the Respondent between 7 and 31 October as the Union was awaiting a decision from the Board on its charge filed against the Respondent concerning MOPIP. Massey acknowledged that the International had been apprised by him that the local committee disapproved of MOPIP and that the International acted to disapprove the contract at the request of the local committee. On 31 October four items in addition to MOPIP were still unresolved. They were vacation sellbacks, freezing of promotions, wages, and meal allowances.

Local 1753 Union President Allen Wall testified that on 29 October the Union's bargaining committee was called into a meeting with Dr. Thomas, Respondent's president, and Flynn, and given the 10-day notice. Wall testified that the Union was not striking and were concerned about a possible lockout by Respondent. The parties met again on 31 October and the meeting broke up with Respondent giving the Union its final offer in writing. The parties met again on 1 November and the Respondent told the Union that the recognition clause must be eliminated as a result of MOPIP. He asked Flynn whether it was true if the Respondent locked out the employees, no employee could cross the line, and Flynn told him this was correct. Wall testified further that on 8 October when the Respondent had given the Union until 18 October to finalize the agreement, Massey had inquired whether there was any significance to the 10-day notice and Flynn replied, "No, I'm not locking you out. I'm giving you a 10 day notice." At the 29 October meeting with Dr. Thomas, Wall told Flynn, "I was under the impression you weren't going to give us a 10 day notice with the intentions of . . . putting pressure on us to lock us out," and that Flynn responded, "That was on that offer." The membership ratified the agreement on 8 November and Wall notified Massey and Flynn of this. The agreement was signed on 11 November and a copy was provided to Massey for the International for approval. Shortly after the International disapproved the agreement, Wall was to meet with Julius Guerard concerning some grievances, and Guerard told him he (Guerard) understood that the International had disapproved the agreement, and Wall told Guerard he could not respond as he had not seen anything in writing on it. Subsequently, a month before the instant hearing he met informally with Guerard on a few matters and told Guerard that Respondent should save its money and not print up the agreement since the International had disapproved it, but Guerard said the Respondent was going to go ahead and get it ready. MOPIP was implemented on 21 or 22 November when Respondent assigned powerhouse repairmen to welding classes and on 6 January the employees received wage adjustments for unrestricted flexibility. On 7 January, Respondent commenced training the I/E group of employees. Since that time members of the bargaining unit have been assigned to work with members of other bargaining units such as pipefitters and outside machinists and to perform the work traditionally performed by the other crafts.

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[3] This article sets out requirements for two electricians or one journeyman electrician and one apprentice electrician to work on jobs involving 440 and above voltages. It also provides that the Union's work will not be habitually assigned to other than bargaining unit members.

On 1 November Wall had a second meeting with Flynn who had called him to his office to tell him that Respondent was firm on MOPIP and the 10-day notice and to give him a copy of the letter sent to the membership, which urged the membership to vote for the labor agreement including MOPIP and which stated in part:

> Lastly, and this is very important, the action taken in giving the Union a 10-day notice is of the utmost seriousness. The Company's intent is to bring the parties together and focus on settlement before 8:00 a.m., November 9, 1985. That remains our intent but you must recognize that if this does not occur, the contract terminates at that time. In that event there are three possibilities:
>
> 1 The Company extends the ten-day notice
> 2 Local 1753, IBEW strikes
> 3 The Company locks out employees represented by Local 1753, IBEW.

Wall testified that Flynn told him at this meeting that Respondent would not let the Union stand in the way of MOPIP and that they did not want to lock the Union out but said, "If you think this is going to be a three-week hunting and fishing trip like 1982 . . . you're sadly mistaken." Wall told Flynn that the Union wanted a continuing working agreement and was not going to strike. Wall testified that the proposal was submitted to the membership because the committee felt a lockout would occur if no agreement was reached, and he was aware of the posting of security guards around the mill as a result of a notice on the bulletin board. He had also seen security guards at two locations around the plant.

John Flynn, Respondent's industrial relations manager, testified as follows: The I/E group was not incorporated into the proportional representation portion of MOPIP as it was contemplated that the I/E group would stay the same or increase in number as a result of the plant's becoming high tech and more computerized, which would require greater sophistication and skill and that the I/E group would not be subject to the reductions as much as the mechanics and service portions of the maintenance group. Respondent thus anticipated that the IBEW Union would benefit by increases in numbers as a result of these factors, but was not adverse to according proportional representation to the IBEW group if they had raised this as an issue. To eliminate safety concerns, the Respondent agreed that the operators, including the two UPIU groups and the powerhouse operators, would not work on energized equipment and mechanical craftsmen would only work on energized equipment alone after they were trained for 8 hours and had worked with I/E mechanics for 2 years and they would not work on starters or switch gears unless accompanied by an I/E mechanic. Over the years the approval of the International has not been crucial to the implementation of the agreement and on at least one occasion was not forthcoming.

Flynn conceded on cross-examination that nothing in the MOPIP agreement guarantees there will be any new apprentices once the current group completes its training or that would prevent a reduction in the I/E mechanics in the future or that would prevent the assignment of I/E work to other crafts when it is 440 or less in voltage with the exception of requiring other craftsmen to work with IBEW I/E mechanics on switch gears and some other equipment. He does not recall that Wall told him that the Union was pursuing its unfair labor practice charge on the night when he called to tell him the Union had ratified the agreement. He acknowledged that at the 3 October meeting the statement was made by the Respondent that "the company was ready and willing to negotiate an agreement; but if there was no movement, continued discussions would be useless."

Wall testified on rebuttal that he had informed Flynn that the Union "had ratified the agreement but that the charges remained active."

V. CONTENTIONS OF THE PARTIES

The General Counsel and Charging Party contend that MOPIP is a nonmandatory subject of bargaining and would blur the craft lines between the unions and thus effect changes in their certifications by allowing the Respondent to change the unit description and to allow the Respondent unfettered control in assigning work on jobs to employees at its whim with the power to decimate the bargaining unit and that it would thereby remove the employees' rights to representation of their own choosing as encompassed in Section 9(a) of the Act. They contend further that Respondent insisted to impasse on 4 November 1935 (and on several prior dates according to the Charging Party's view) up to the time of the acceptance of the agreement under the threat of lockout by Respondent and that this impasse was reached regarding this subject as the principal subject of disagreement between the parties. They thus contend that Respondent violated Section 8(a)(5) and (1) of the Act by its insistence to impasse on MOPIP, a nonmandatory subject of bargaining, as a requisite for reaching agreement on the other mandatory subjects of bargaining and that it also violated Section 8(a)(5) and (1) of the Act by its implementation of MOPIP following the ratification of it by its members and by subsequently refusing to return to the bargaining table to negotiate following the disapproval of the International of the agreement in January 1986 and the verbal request of Massey to negotiate.

The Respondent contends that MOPIP related to work jurisdiction and task and work assignments rather than to the Union's certification and thus did not involve a representational matter, that it was necessary to effect efficiencies and improvements in its operations in order to enable it to compete, and that the Union's concern was with not having to perform maintenance work rather than with matters of safety as professed by the Union. It further contends that assuming arguendo MOPIP was found to be a nonmandatory subject of bargaining, it did not insist to impasse on MOPIP but rather MOPIP was only one of several clearly economic items on the table up to and at the time of its submission of its final offer to the Union relying on *Taft Broadcasting Co.*, 274 NLRB 260 (1985). It also contends that the parties reached no impasse as the agreement was signed. It further contends that the Union did not act in good faith by the refusal of the International to approve the agreement, and that the agreement is binding.

VI. ANALYSIS AND CONCLUSIONS

In reviewing all the above, I find that MOPIP was a nonmandatory subject of bargaining as it would have given Respondent the unfettered right to remove work from the bargaining unit at its whim, thus affecting the composition of the unit and the certification itself. This was not the right to assign a mere specific task out of the bargaining unit. Rather it was the right to redesignate employee classifications and transfer entire work groups out of the unit by totally eliminating their work and altering the scope of the unit and the certification of the Union to represent the employees. The Board has consistently held that such proposals are nonmandatory subjects of bargaining. *Newspaper Printing Corp.*, 250 NLRB 1144 (1980), enf. denied 692 F.2d 615 (6th Cir. 1982); *Newspaper Printing Corp.*, 232 NLRB 291 (1977), enfd. 625 F.2d 956 (10th Cir. 1980), cert. denied 450 U.S. 911 (1981); *Columbia Tribune Publishing Co.*, 201 NLRB 538, 551 (1973).

I further find that the Respondent insisted to impasse on the Union's acceptance of its MOPIP proposal as a requisite for its agreement to other mandatory subjects of bargaining. Throughout the course of the bargaining up to and including the final offer prior to the ratification of the agreement by the employees, the Respondent set out its MOPIP agreement as an absolute it must have in order to reach agreement. Although there were some modifications of the proposal made by Respondent during the current negotiations, the MOPIP proposal stood out as the single significant impediment to reaching an agreement as asserted by Respondent's representative Jack Flynn on several occasions and as set out by Respondent in its 10-day notice of termination of the agreement and in the letter to the employees. The Board in *Douds v. Longshoremen ILA*, 241 F.2d 278 (2d Cir. 1957), has held it immaterial that impasse may have been reached on mandatory subjects of bargaining as well as nonmandatory subjects of bargaining in finding a violation of Section 8(a)(5) and (1) of the Act had occurred by the Employer's insistence on a nonmandatory subject of bargaining to impasse. It is rare indeed for all items to be resolved save a single nonmandatory subject of bargaining. In the more common situation there may be several unresolved issues. In the *Taft Broadcasting Co.*, supra, cited by the Respondent, the Board did not reject the premise that an employer may unlawfully insist to impasse on a nonmandatory subject of bargaining although there may be several other mandatory subjects of bargaining as yet unresolved that may also be contributing to the impasse. Rather the Board in *Taft Broadcasting*, supra at 261 stated:

> The existence of several unresolved items at the point impasse is reached, however, does not necessarily mean that each of the unresolved items caused the impasse. Thus, in evaluating whether parties have insisted to impasse on a particular nonmandatory subject of bargaining, the Board and the courts have looked to whether agreement on the mandatory subjects of bargaining are conditioned on agreement on the nonmandatory subjects of bargaining.

Applying this test to the facts in this case, I find that the Respondent's MOPIP proposal was the central focus of disagreement between the parties throughout the course of the negotiations. See *Bozzuto's, Inc.*, 277 NLRB 977 (1985). The evidence was virtually undisputed that the Respondent had throughout negotiations informed the union representatives that MOPIP was critical to reaching an agreement. I find that the Respondent insisted to impasse on the acceptance of MOPIP by the Union at the final substantive meeting when it rejected the Union's proposal to resolve all issues but MOPIP and that it thereby violated Section 8(a)(5) and (1) of the Act by its insistence to impasse on a nonmandatory subject of bargaining as a condition for reaching agreement on mandatory subjects of bargaining. Although wages and other mandatory subjects of bargaining had not been resolved, the evidence demonstrates that these were not the cause of the impasse. I find the evidence is insufficient to demonstrate that impasse was reached prior to this during the course of bargaining from June to October as there appears to have been ongoing efforts at negotiations by both parties that were interrupted by other matters including ongoing negotiations by Respondent with the three other unions at the plant. I further find that Respondent violated Section 8(a)(5) and (1) of the Act by its implementation of MOPIP in November and by its continuation of its implementation of MOPIP in January after it had been advised of the International's refusal to approve the agreement and by its failure to return to the bargaining table as requested by Wall. It is clear that the International had the right to approve or reject the agreement that the union membership had ratified in the face of a threatened lockout. Following the rejection of the agreement by the International, the Respondent had the obligation to return to the bargaining table as requested by Wall.

VII. THE EFFECT OF THE UNFAIR LABOR PRACTICES ON COMMERCE

The unfair labor practices of Respondent as found in section VI, above, in connection with the business of Respondent as found in section I, above, have a close, intimate, and substantial relationship to trade, traffic, and commerce among the several States and tend to lead to labor disputes obstructing the free flow of commerce.

Conclusions of Law

1. Respondent, Westvaco Corporation, is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

2. International Brotherhood of Electrical Workers and Local 1753, International Brotherhood of Electrical Workers, AFL–CIO are labor organizations within the meaning of Section 2(5) of the Act.

3. By its insistence to impasse on and by its implementation of its maintenance and operator productivity improvement plan (MOPIP), a nonmandatory subject of bargaining, and by its refusal to return to the bargaining table, Respondent violated Section 8(a)(5) and (1) of the Act.

4. The aforesaid unfair labor practices affect commerce within the meaning of Section 2(6) and (7) of the Act.

The Remedy

Having found that Respondent has engaged in certain violations of Section 8(a)(5) and (1) of the Act, it will be ordered to cease and desist therefrom and take certain affirmative action designed to effectuate the purposes and policies of the Act, and post the appropriate notice. The Board does not require that employees suffer losses of increases in wages and benefits under circumstances such as have occurred in this case in order to effectuate the policies of the Act, and I do not recommend that the increases in wages and benefits implemented by Respondent be rescinded. *Kendall College*, 228 NLRB 1083 (1977); *Dura-Vent Corp*., 257 NLRB 430 (1981); and *Pace Oldsmobile*, 256 NLRB 1001 (1981). I do, however, recommend that all other terms and conditions of the collective-bargaining agreement be reinstated to the status quo ante prior to 9 November 1985 when the agreement was ratified by the membership under threat of a lockout by the Respondent in support of its insistence to impasse on the nonmandatory subject of bargaining until Respondent fulfills its obligation by bargaining, on request, with Local 1753 as the collective-bargaining representative of its employees in the appropriate unit, and executes a written agreement with Local 1753 or until a valid impasse occurs, and that Respondent make its employees whole for any losses of earnings or benefits they may have sustained by the implementation of Respondent's proposal. Interest on the losses of earnings or benefits shall be applied in accordance with the manner prescribed in *Florida Steel Corp*., 231 NLRB 651 (1977).[4]

In the absence of any special circumstances asserted or argued in this case, I do not recommend the inclusion of a visitatorial clause as requested by the General Counsel to allow the Board to engage in discovery under the Federal Rules of civil procedure in order to monitor compliance. See *O. L. Willis, Inc*., 278 NLRB 203 (1986); *United Cloth Co*., 278 NLRB 583 (1986). Compare *Hilton Inn North*, 279 NLRB 45 (1986).

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[5]

ORDER

The Respondent, Westvaco Corporation, North Charleston, South Carolina, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Bargaining to impasse over its MOPIP proposal, a nonmandatory subject of bargaining.

(b) Instituting unilateral changes in the employees' terms and conditions of employment by implementing its proposal on its MOPIP until such time as it has bargained the agreement by Local 1753.

(c) Refusing to bargain in good faith with Local 1753, International Brotherhood of Electrical Workers, AFL–CIO.

(d) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative actions necessary to effectuate the policies of the Act.

(a) On request, bargain in good faith with Local 1753, International Brotherhood of Electrical Workers, AFL–CIO.

(b) Make whole its employees for any losses they may have sustained as a result of Respondent's implementation of the aforesaid unilateral changes contained in its contract proposal.

(c) Reinstitute the existing terms of the labor agreement to the status quo ante prior to 9 November 1985 until such time as the parties have bargained in good faith and have executed a new agreement or, in the alternative, have reached an impasse.

(d) Preserve and, on request, make available to the Board or its agents for examination and copying, all payroll records, social security payment records, timecards, personnel records and reports, and all other records necessary to analyze the amount of backpay due under the terms of this Order.

(e) Post at its Charleston, South Carolina facility copies of the attached notice marked "Appendix."[6] Copies of the notice, on forms provided by the Regional Director for Region 11, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material.

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[4] See generally *Isis Plumbing Co*., 138 NLRB 716 (1962).

[5] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

[6] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

(f) Notify the Regional Director in writing within 20 days from the date of this Order what steps the Respondent has taken to comply.

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

Section 7 of the Act gives employees these rights.

To organize

To form, join, or assist any union

To bargain collectively through representatives of their own choice

To act together for other mutual aid or protection

To choose not to engage in any of these protected concerted activities.

WE WILL NOT refuse to bargain in good faith with Local Union 1753, International Brotherhood of Electrical Workers, AFL-CIO as the exclusive representative of the employees in the following appropriate unit:

> All electricians, power and boiler house employees, and instrument department employees of the Employer at its Charleston, South Carolina plant, excluding electrician leadmen and shift engineers, all other production and maintenance employees, office clerical employees, plant clerical employees, professional employees, technical employees, guards, watchmen, and supervisors as defined in the Act.

WE WILL NOT insist to impasse on our maintenance and operator productivity improvement plan (MOPIP) proposal, a nonmandatory subject of bargaining.

WE WILL NOT institute unilateral changes in the terms of the 1982-1985 collective-bargaining agreement by the implementation of our MOPIP proposal or otherwise unilaterally institute changes in existing terms and conditions of employment of our employees in the bargaining unit without notifying Local 1753 and bargaining collectively in good faith concerning such proposed changes, provided that nothing here shall require us to rescind any increases in wages or benefits that we have previously granted.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL rescind the MOPIP put into effect in November 1985 and will return to the status quo ante prior to 9 November 1985.

WE WILL, on request, bargain collectively with International Brotherhood of Electrical Workers, Local 1753, as the exclusive representative of employees in the appropriate bargaining unit described above with respect to rates of pay, wages, hours, and other terms and conditions of employment and, if an understanding is reached, embody such understanding in a signed agreement.

WE WILL make whole the employees of Respondent in the above-described bargaining unit for any losses they may have sustained by the implementation of unilateral changes contained in our contract proposal with interest.

WESTVACO CORPORATION

United Press International *and* United Telegraph Workers Division 47, AFL-CIO. Case 2-CA-21016

June 22, 1988

DECISION AND ORDER

By Chairman Stephens and Members Babson and Cracraft

On December 18, 1986, Administrative Law Judge Eleanor MacDonald issued the attached decision. The General Counsel filed exceptions and a supporting brief, and the Respondent filed cross-exceptions and a supporting and answering brief.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions[1] and briefs and has decided to affirm the judge's rulings, findings, and conclusions and to adopt the recommended Order.

1. We agree with the judge that the bargaining history in this case shows that the Union knew the Respondent planned to create new nonunit jobs with duties similar to those performed by unit employees when it agreed to broad contract language permitting the Respondent to eliminate all unit jobs, to transfer unit work to other employees or locations, and to determine what work the unit and nonunit employees would perform. Thus, we note that the entire contract package, including this broad language allowing the Respondent total discretion over the assignment of work and over the elimination of unit jobs, was not ratified by the Union's members until November 1984, after the Respondent had posted the new jobs for bidding and after the November bargaining sessions where the parties had discussed the nonunit status of these new jobs. Further, the bargaining history also shows that the Union knew before the contract was presented to its members for ratification that the Respondent planned to offer unit employees the opportunity to bid on these new nonunit jobs. Thus, Union General Counsel Groner admitted that during the November negotiations the Union had asked whether its members could bid on the new jobs and that the Respondent had said they could. By agreeing to such broad contract language when it knew of the Respondent's plans to create new nonunit jobs encompassing some unit work and to employ some former unit employees in these new nonunit jobs, the Union waived any right it had to bargain over the Respondent's actions here. The Union clearly believed it had waived its right to bargain on this point because it never requested any further bargaining over this issue after the November negotiations. Moreover, it waited until late May 1985 to make any further protests about the assignment of unit work, when it merely filed a grievance under the current contract.

2. We also agree with the judge's conclusion that the Respondent did not violate Section 8(a)(3) and (1) of the Act. In adopting this dismissal, however, we find it unnecessary to rely on the judge's waiver rationale, because we find the General Counsel has not established that any discrimination based on union membership or activity occurred in the unique circumstances of this case. The General Counsel argues that, by offering some laid-off unit employees the opportunity to continue working in the new nonunit jobs, the Respondent was conditioning their employment on the abandonment of union membership and thus violated Section 8(a)(3) and (1) of the Act. There is no evidence, however, that the Respondent asked the former unit employees to give up their membership in the Union or in any other way conditioned their continuing employment on the abandonment of union membership. Nor is there any evidence that the Respondent selected particular unit employees for layoff based on their status as union members or their activities on behalf of the Union or that the Respondent decided which unit employees to offer the new nonunit jobs based on their lack of union membership or their lack of support for the Union. Although the Respondent did eliminate all the unit jobs, it only did this after reaching an agreement with the Union specifically allowing it to abolish the unit. The Union deemed it advantageous for the employees to make this agreement in return for immediate wage increases and generous severance benefits when the layoffs occurred, because the Respondent's financial condition was so poor it seemed likely that the Respondent would close and thus the employees would lose their jobs anyway. The employees apparently agreed that they were better off with some guaranteed benefits in hand now than with the chance of continuing in their current jobs, because they ratified the Union's agreement. The fact that the Respondent was able to continue operations after the unit was eliminated does not make the Union's judgment in agreeing to the loss of the unit any less valid. Moreover, both the Union and the unit employees knew of the Respondent's plans to create the new nonunit jobs and

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[1] In its cross-exceptions, the Respondent contends that the complaint here should be dismissed because certain allegations are barred by Sec. 10(b) of the Act and because the General Counsel should not be permitted to relitigate issues previously raised in a related 8(a)(5) charge that was dismissed on the merits. As we are dismissing the complaint in this case, we find it unnecessary to pass on these procedural issues.

289 NLRB No. 46

to employ some former unit employees in these new nonunit jobs when they agreed to the elimination of the unit. In view of these unusual circumstances, we find that the Respondent's offer to hire some former unit employees into the newly created nonunit jobs does not establish that it was discriminating against employees because of their union membership or activity.

ORDER

The recommended Order of the administrative law judge is adopted and the complaint is dismissed.

David Pollack, Esq., for the General Counsel.
Thomas O. McCarthy, Esq. and *Alan I. Berger, Esq. (McMahon, Berger, Hanna, Linihan, Cody & McCarthy)*, of St. Louis, Missouri, for the Respondent.

DECISION

STATEMENT OF THE CASE

ELEANOR MACDONALD, Administrative Law Judge. This case was tried in New York, New York, on 5 and 6 March 1986. The complaint alleges that United Press International (Respondent), in violation of Section 8(a)(1), (3), and (5) of the Act, has laid off its employees, hired employees in a newly created job classification, failed to apply the collective-bargaining agreement to the new employees, failed to offer United Telegraph Workers Division 47, AFL-CIO (the Union) an opportunity to negotiate, and has repudiated its collective-bargaining agreement with the Union. Respondent denies its actions were unlawful and asserts that it bargained with the Union and obtained the right to take the actions alleged in the complaint.

On the entire record, including my observation of the demeanor of the witnesses, and after consideration of the briefs filed by the General Counsel and the Union in May 1986, I make the following

FINDINGS OF FACT

I. JURISDICTION

Respondent, a New York corporation, provides news services to customers in the newspaper industry. The parties agree, and I find, that Respondent is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act and that the Union is a labor organization within the meaning of Section 2(5) of the Act.

II. THE ALLEGED UNFAIR LABOR PRACTICES

It is undisputed that the Company and the Union, aware of the Company's longstanding and increasingly severe financial problems, entered into a collective-bargaining agreement that had the following "Preamble:"[1]

> As was fully discussed during contract negotiations for the 1984 Agreement, the Employer intends to initiate, facilitate, automate and conclude a reorganization of its communications operation, its maintenance and other work presently performed in the UTW unit. This reorganization may include, but not be limited to, the sale or other disposal of the communication system, subcontracting of bargaining unit work, automation, relocation of bargaining unit jobs to locations other than where presently located, or to employees other than UTW employees, elimination of certain jobs, and measures such as joint venture ownership of certain UPI presently owned assets.
>
> The parties agree, anything to the contrary in the Agreement, notwithstanding, that:
>
> 1. The Employer shall, at its sole discretion, be permitted to select what work shall be performed by bargaining unit personnel and what work shall be performed by a subcontractor or subcontractors, or by non-UPI personnel, or by UPI non-bargaining unit personnel.
>
> 2. The Employer shall, at its sole discretion, be permitted to relocate a job or jobs from one location to another location and/or to cease performing any job or job function, in whole or in part.
>
> 3. If the Employer sells or otherwise disposes of the work (through joint venture ownership or otherwise), subcontracts bargaining unit work: relocates a bargaining unit job, or discontinues the performance of a job, and said Employer action causes an employee to lose his/her job then UPI shall offer the dismissed employee one of the following options.

The options include certain provisions if the Company finds a job for the employee and other provisions for the payment of dismissal indemnity to those employees not placed by the Company.

Various Company witnesses testified, and the General Counsel's witnesses did not dispute the assertion, that during the negotiations the Company told the Union that the unit would cease to exist by 31 July 1985. The preamble provides that "staff reductions . . . shall be accomplished before July 31, 1985."

The instant controversy arises from the fact that the Company created a new position called technical support coordinator (TSC) with duties substantially similar to those performed by the technicians represented by the Union. By the time of the instant trial, eight TSC employees had been hired and three of these were former UTW unit members.[2] The General Counsel does not challenge the Company's right to discharge the unit members pursuant to the contract. The General Counsel asserts, however, that the contract and the Act do not permit the Company to discharge UTW-represented technicians and give their work to nonunion TSC employees. The General Counsel makes three arguments: The contract language does not permit the discharge of unit members and transfer of their work to TSC employees; the contract language is ambiguous and the bargaining history shows that the parties did not intend this result; in any case, the Act prohibits the action taken by the Company.

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[1] The contract was negotiated from January to November 1984 and had a term from 1 February 1984 to 31 July 1985. The Union represents technicians and operators employed by the Company.

[2] The employment of TSC employees began 2 February 1985.

It seems to me that the contract language is clear and unmistakable and that it permits the result achieved. The plain language of the contract says that the Employer intends to reorganize the work performed by the UTW unit and that the "reorganization may include, but not be limited to, relocation of bargaining unit jobs to employees other than UTW employees . . . ." The language further specifies that the parties agree that the Company "shall, at its sole discretion, be permitted to select what work shall be performed by . . . UPI non-bargaining unit personnel." This clear and unqualified language permits the Company to give the technicians' work to anyone not in the UTW unit. There is no language preventing the Company from giving the work to former UTW unit members or to anyone else it may choose in its sole discretion. Based on this language, I find that the Union waived any objection to the Company's course of conduct and that there has been no refusal to bargain.

Moreover, the bargaining history supports the Company's position.[3] Negotiations between the Company and the Union began in early January 1984 for a contract due to expire on 31 January. Bobby Ray Miller, vice president for labor relations and editorial development, and Alan Berger, Esq., testified about the negotiations on behalf of the Company. Isaac Groner, Esq., general counsel of the UTW, and David Axelrod, a unit member, testified on behalf of the General Counsel.

On 4 and 5 April 1984, the Company proposed an 18-month contract retroactive to 1 February with a provision "to reduce the entire staff and have the Union give up its jurisdiction." UPI wanted to get out of the communications business and remain only in the news business. The Company was trying to sell its communications business; it expected all UTW unit members to go either to a new company or to a nonunion job at UPI or to a new joint venture. The Company wanted flexibility in the UTW unit so it could have flexibility to negotiate with other companies for disposition of its communications business. The Company showed the union language in its proposed preamble to the collective-bargaining agreement. The Company explained to the Union that the proposal meant the Company "could exercise its sole judgment in determining who would do the work that at that time was done by UTW people, and that we anticipated that every UTW person would lose his job by the end of that contract."

The financial difficulties of UPI were discussed and the fact that these difficulties adversely affected the Company's payments to the pension fund, reimbursement of travel expenses to employees, and employee insurance claims. The Union expressed a willingness to give up its jurisdiction if it could take care of its people. The parties discussed the possible effects on employees if a deal to sell the communications system was consummated, the possibility of unit work being given to the wire service bargaining unit, the fact that subcontracting would be increased, and the fact that there might be a small amount of work left similar to that done by unit members. In this last event, the Company said that these jobs would evolve from requiring employees to perform work similar to unit work into jobs that involved coordinating the work of subcontractors.

When the parties reconvened on 19 April, the Union agreed to the proposal. There was language in it covering employees who might be placed with a subcontractor or joint venture partner and employees who might be placed on permanent layoff and given dismissal indemnity. The Union asked for and received a salary increase over the 18 months of the contract. After 18 months, the unit would be eliminated, and the Company retained the right to select employees for layoff based on merit rather than in inverse order of seniority. The Union agreed that the dismissal indemnity could be paid over time and not in a lump sum. Dismissed employees would be provided with extended medical coverage. Finally, the Company agreed that the dismissal indemnity would be paid to unit members who quit when they found a new job, not merely to employees who were dismissed. In effect, UPI was paying an indemnity in exchange for an employee's resignation.

This agreement was still being drafted when, in July 1984, the Company encountered further financial difficulties and it negotiated concessions with its other union, the Wire Service Guild.

Further negotiations took place with the UTW in September 1984. The UTW agreed to some wage reductions and it agreed that 16 technicians were to be dismissed immediately. The agreement was incorporated into a memorandum of understanding dated 20 September 1984. The UTW submitted it for ratification and the Company sent layoff notices for 20 October. However, the September agreement was not ratified, and the layoff notices were rescinded. The Union told the Company informally that the failure of the membership to ratify was because the layoffs were not going to be based on seniority and the Company and the Union agreed to delay the layoffs until an agreement was ratified by the membership.

On 6 November 1984, the Company posted a number of new positions, designated TSC. The job description read

> Understanding of FDM, TOM and communications networks, videos, printers, modems, etc. Ability to troubleshoot and repair above.

There is no dispute that this was substantially the work performed by the technicians represented by the Union.

The parties next met on 13 and 14 November.

According to Miller, on 13 November, the meeting began about 2 p.m. and the Union opened with a question from Local UTW Chairman Raleigh Brown about the TSC jobs posted a week or so earlier. Brown asked for a detailed job description. The Company responded that it was not prepared to discuss the subject, that "we had already reached an agreement in April about that" and then the Company representatives caucused. When they returned from the caucus, they told the Union "that we believed that under the agreement we had reached with them in April . . . and because these jobs would eventually become supervisory and managerial jobs, it would be improper to include them in the bargaining unit." The Union replied that the jobs should be in the unit and it requested a more detailed job description. The Company maintained that "the TSC jobs immediately would be virtually the identical jobs that UTW technicians were doing at that time, but that as (subcontractors such as) RCA took over more and more areas of the country . . . the TSC jobs would become supervisory and managerial." In response to the Union's question whether its members could apply for the TSC jobs, the Company told the Union how this could be done. According to Miller, on the morning of 14 November, the Union again asked to have jurisdiction over the TSC positions and the Company replied that the April agreement excluded those jobs from coverage. The Union also asked for further information to help its members decide whether to apply for the new jobs. Finally, after the parties had reached agreement to proceed with the layoffs by seniority by bureau instead of merit, Groner said that if the membership again rejected the contract, the Union might seek grievance arbitration over the question whether the TSC jobs would be in the unit.

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[3] There is substantial agreement as to much of what was said during the negotiations for the contract. Wherever there is a disagreement, I will indicate this fact in the narrative.

Berger testified that on 13 November the parties met at 2 p.m. Groner said the membership had rejected the agreement. Raleigh Brown asked about the 20 TSC jobs posted by the Company. The Company's representatives then caucused and when they returned, they told the Union that the jobs would initially consist of troubleshooting, maintenance, and repair and that in a few months they would become supervisory or managerial. Beyond this, the Company said, it was not prepared to discuss the jobs. The Union said the jobs belonged in the bargaining unit and the Company said, "no they don't. There's not going to be a bargaining unit in 7 or 8 or 9 months, so why put them in now." On 14 November, the TSC jobs were discussed in the morning. A union representative stated that the TSC job description was similar to UTW unit work. UPI Vice President Bob Brown said, "We know that. We don't know to what extent these jobs are going to change and when, but . . . they're going to go from hands on over to an interface kind of job." The Union said it wanted the TSC jobs in the unit and the Company continued to maintain that the jobs would not be in the unit.

According to Berger, at the end of the meeting Groner said, "I just want to make sure that our position is perfectly clear. We have not waived our position with respect to your untimely opening of the contract, and . . . I hope you understand that if this contract is rejected again by our membership we may have to file a grievance and arbitrate the issue of whether those new jobs, the technical service coordinator jobs are properly in or out of the bargaining unit." Berger replied, "have at it."[4]

Groner testified that on the morning of 14 November before the start of the negotiations, the Company said "these jobs would be non-union because they would be supervisory or managerial." Groner then asked for additional information and job description. The Company responded that there was no additional information and no job description. Groner testified that he then told the Company

> That whether or not these jobs were bargaining unit . . . positions, was clearly a matter which would depend on the facts that the employer could not unilaterally designate what was supervisory or managerial . . . . That the union firmly opposed and denied any such right on the part of management and . . . the facts under Labor Board law would determine the appropriate placement of these positions.

According to Groner, the Company responded that it understood the Union's position and would provide additional information when it became available.

Groner said no agreement was reached about the TSC jobs at the negotiations. Groner testified that he told the Company the question whether a job was supervisory or managerial was a question of fact to be determined under Board law; there was insufficient information to determine the status of the TSC jobs, but he referred to Board law as the way of resolving the issue. He never said the Union would seek to arbitrate the placement of the new jobs.

Groner stated that the Company position was that when the TSC jobs were filled, they would not be inside the unit because they would be supervisory or managerial. Groner did not recall that the Company asserted any right "to make positions non-bargaining unit merely by proclaiming them non-bargaining unit."

Axelrod testified that immediately after introductions were made on 13 November, he asked "whether this list of jobs that they had posted on the Company bulletin board a few days previously . . . which . . . looked to be the same as the jobs currently being performed . . . were intended to be union or non-union jobs." The Company requested a caucus and when it returned to the table it said that all the new positions were intended to be nonbargaining unit positions. Local UTW Chairman Brown remarked that he could not understand how the Company could propose to lay off 16 technicians while at the same time post 15 to 20 jobs covering the same work. Then union officer Carriero or Johnson asked "what in the job descriptions made these jobs management or non-union, and what the pay rates would be." The Company responded that management would get back to the Union. The Union asked whether its members could bid on the new TSC jobs and it asked for a more complete job description. The Company said there was no job description yet and that UTW members were free to bid on those jobs. The subject of TSCs was never raised again by either side during the 2 days of negotiations. Axelrod summed up this exchange as follows:

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[4] The issue of untimely reopening was discussed during the negotiations but is not relevant to the instant case.

> The end results of the discussion was a disagreement between the company's position and the union's position, which was to be then determined when more specifics about how this was to be implemented came out.
>
> In order to secure ratification of the agreement, the Company said it would agree that the layoffs would be accomplished according to seniority by bureau. The Union accepted this after a caucus and said "we had an agreement."

The contract was ultimately ratified in November 1984 by the membership and executed on 10 February 1985. Layoff notices were mailed to unit members beginning in November 1984.

This summary of the bargaining history makes it clear that the TSC positions were discussed by the parties during the negotiations for their contract. The Company disclosed that although the UTW technicians were to be phased out, the new TSC employees would be doing similar work when they were first hired. The Union took the position that the TSC positions should be in the unit but the Company refused to include them. Then, the Union agreed to the contract as proposed by the Company with full knowledge that the unit would cease to exist by the end of the contract term and that the Company would hire new TSC employees. Thus, the Union did not gain any concession from the Company on this point. Although the General Counsel's witness testified that the Union orally reserved its rights under "Labor Board Law," this does not affect the conclusions to be drawn from the bargaining history. The Union had knowledge of the Company's intentions but it nevertheless agreed to and executed the contract including language permitting the Company to take the actions it took with respect to the TSC employees. Thus, it agreed to the actions taken by the Company. *Citizens National Bank of Willmar*, 245 NLRB 389 (1979), enfd. 644 F.2d 39 (D.C. Cir. 1981).

Finally, the General Counsel urges that the language of the contract permits "the displacement of unit employees solely because of their status as union members" and by its terms violates Section 8(a)(1) and (3). It is well established that statutory rights may be waived by the clear and unmistakable language of a contract. *Mastro Plastics Corp. v. NLRB*, 350 U.S. 270 (1956); *Columbus Electric Co.*, 270 NLRB 686 (1984). The General Counsel recognizes this rule but urges that the considerations expressed in *Gale Products*, 142 NLRB 1246 (1963), enf. denied 337 F.2d 390 (7th Cir. 1964), and *NLRB v. Magnavox*, 415 U.S. 322 (1974), supersede the Union's waiver. The General Counsel urges that the Union has attempted to waive the employees' rights to invoke the Board's processes. I cannot find any merit to the General Counsel's position. In *Gale* and *Magnavox*, the employees' rights which the union attempted to waive were such that they might be exercised contrary to the union's position and interests. In the instant case there is no such actual or foreseeable divergence between the union's and the employees' rights and positions.

Because I have found no merit to the complaint, I need not deal with Respondent's assertion that portions of the complaint are barred by Section 10(b) of the Act.

CONCLUSIONS OF LAW

1. The General Counsel has failed to prove that Respondent violated Section 8(a)(1), (3), and (5) of the Act.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[5]

ORDER

The complaint is dismissed.

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[5] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

Gold Star Mining Corporation *and* **Teddy Bragg** *and* **Sam Hawkins** *and* **Walter Lovejoy** *and* **Hassel Price.** Cases 9-CA-23816-1, 9-CA-23816-2, 9-CA-23816-3, and 9-CA-23816-4

June 23, 1988

DECISION AND ORDER

BY CHAIRMAN STEPHENS AND MEMBERS BABSON AND CRACRAFT

Upon charges filed separately by Teddy Bragg, Sam Hawkins, Walter Lovejoy, and Hassel Price on December 9, 1986, the General Counsel of the National Labor Relations Board issued an order consolidating cases, consolidated complaint and notice of hearing against Gold Star Mining Corporation, the Respondent, alleging that it has violated Section 8(a)(1) and (3) of the National Labor Relations Act. Although properly served copies of the charges and consolidated complaint, the Respondent has failed to file an answer.

On December 30, 1987, the General Counsel filed a Motion for Summary Judgment. On January 5, 1988, the Board issued an order transferring the proceeding to the Board and a Notice to Show Cause why the motion should not be granted. On January 19, 1988, the Respondent replied by letter to the Notice to Show Cause. The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

Ruling on Motion for Summary Judgment

Section 102.20 of the Board's Rules and Regulations provides that the allegations in the complaint shall be deemed admitted if an answer is not filed within 14 days from service of the complaint, unless good cause is shown. The complaint states that unless an answer is filed within 14 days of service, "all the allegations in the complaint shall be deemed to be admitted to be true and shall be so found by the Board."

According to the General Counsel's Motion for Summary Judgment, the order consolidating cases, consolidated complaint and notice of hearing was served on the Respondent, by certified United States mail, return receipt requested, at its Woodville, West Virginia minesite and its corporate offices in Beverly Hills, California, where the Respondent had previously received and acknowledged correspondence with respect to the instant cases.[1] The documents mailed to both addresses were returned to the Board's Regional Office marked "unclaimed." Notations on the returned receipt indicate that the Respondent was given notice on August 4 and again on August 12, 1987, of such certified mail addressed to it. On October 5, 1987, pursuant to West Virginia Code, Chapter 31, Article I, Section 15, the Secretary of State for the State of West Virginia (Secretary of State) accepted service of the order consolidating cases, consolidated complaint and notice of hearing as well as the order withdrawing approval of settlement, and forwarded them to the Respondent at the address used by the Board by certified mail, with a return receipt requested. The documents were returned to the Secretary of State marked "unclaimed." Thereafter, the General Counsel caused a visit by Board personnel to be made to the most recent offices of the Respondent in Beverly Hills, California, and made telephonic inquiries to ascertain the whereabouts of the Respondent and/or its officers and representatives. These efforts were unsuccessful.

In response to the Notice to Show Cause, the Respondent, under its Beverly Hills, California address, states that it has not been in receipt of any correspondence from the Board since May 1987. It encloses signed copies of a settlement agreement and notice to employees concerning the instant cases that, it asserts, were returned as requested to the Board and all parties to the proceeding the week of May 4, 1987.[2] The Respondent alleges it has not yet been informed of the acceptance or nonacceptance of the settlement agreement by the complainants. The Respondent further asserts that due to the precarious financial condition of the Company and a long delay in the funding of a loan commitment to the Company, the Respondent was not able to finalize the payment of $5400 as prescribed in the settlement agreement. The Respondent states that it intends to make payment as soon as a financial restructuring can be effected. Finally, the Respondent states that as soon as it can pay the money, it will do so, but summary judgments of this type would make it far more difficult to raise money or start up again.

In deciding this matter we note that in its response, the Respondent does not address the issue of its failure to file an answer to the consolidated complaint, even though the Notice to Show Cause sets forth the General Counsel's assertion that the Respondent failed to file an answer to the consolidated complaint as required by Sections 102.20 and 102.21 of the Board's Rules and Regulations, and that therefore all allegations of the consolidated complaint should be deemed to be admitted as true and summary judgment be granted on the pleadings. Thus, even assuming the Respondent had previously been unaware of the issuance of the consolidated complaint, it now acknowledges awareness but does not file an answer, seek an extension of time to file an answer, or in any manner address the allegations of the complaint. Similarly, with regard to the settlement agreement, even assuming the Respondent received no further communication from the Board after returning its signed copies of the agreement, the Respondent does not allege that it complied with the agreement or is presently prepared to comply with it. Instead, the Respondent concedes that it was not able to comply with the agreement in May 1987, that it cannot comply at the present time, and that it will comply only at some indefinite future time when it can afford to make the required payments.

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[1] The Regional Director's order withdrawing approval of settlement agreement which issued on July 31, 1987, was also served in the same manner to the same addresses.

[2] The agreement provides, inter alia, for a total of $5400 in backpay.

Assuming the truth of all the Respondent's assertions, they do not show good cause for the Respondent's failure to file a timely answer to the complaint.[3] In the absence of good cause being shown for the failure to file a timely answer, we grant the General Counsel's Motion for Summary Judgment.[4]

On the entire record, the Board makes the following

Findings of Fact

I. JURISDICTION

The Respondent, a West Virginia corporation, has been engaged in the mining and sale of coal at its facility in Julian, West Virginia, where it annually sold coal valued in excess of $50,000 directly to Hatfield Terminals, Inc. and Hatfield Dock and Transfer Co. Hatfield Terminals, a Delaware corporation, with an office and place of business in Cincinnati, Ohio, has been engaged in buying and selling coal, and has annually shipped and sold, from its West Virginia facilities, coal valued in excess of $50,000 directly to points outside the State of West Virginia. Hatfield Dock and Transfer Co., a Florida corporation, with an office and place of business in Marmet, West Virginia, has been engaged in buying and selling coal and has annually sold and shipped, from its West Virginia facilities, coal valued in excess of $50,000 directly to points outside the State of West Virginia. Accordingly, we find that the Hatfield Terminals, Inc. and Hatfield Dock and Transfer Co. are employers engaged in commerce within the meaning of Section 2(6) and (7) of the Act, that the Respondent, through its business operations with Hatfield Terminals, Inc. and Hatfield Dock and Transfer Co., is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act. The Union is a labor organization within the meaning of Section 2(5) of the Act.

II. ALLEGED UNFAIR LABOR PRACTICES

In late November or early December 1986,[5] Secretary-Treasurer Hugh Elder[6] informed an employee that he was being discharged for engaging in union activities.

In August 1986, the Respondent, acting through Mine Manager Carl Bragg,[7] threatened employees with the shutdown of the Respondent's mine if the Union was successful in its efforts to represent the Respondent's employees.

In September Bragg threatened to discharge employees who engaged in union activities.

About October 23, Bragg, at a location approximately one-quarter mile from the Respondent's minesite, informed employees that if they did not cross a picket line and return to work, they would be discharged. About November 6, Bragg threatened employees with unspecified reprisals if they did not cease their support for, and activities on behalf of, the Union.

From mid-October through mid-November, the Respondent's employees, including Teddy Bragg, Sam Hawkins, Walter Lovejoy, and Hassel Price, concertedly complained to the Respondent regarding the late payment and nonpayment of wages. From about October 14 to about October 22 and again from about November 11 through about November 13, employees Bragg, Hawkins, Lovejoy, Price, and other employees of the Respondent ceased work concertedly and engaged in a strike.

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[3] Member Cracraft does not assume the truth of the Respondent's assertions or rely on the reasoning of the preceding paragraph. In her view, the General Counsel's submission establishes that the Motion for Summary Judgment should be granted based on the Respondent's failure to file an answer to the July 31, 1987 consolidated complaint. As the General Counsel points out, it is well established that a respondent's failure or refusal to claim certified mail will not serve to defeat the purpose of the Act. *Michigan Expediting Service*, 282 NLRB 210 (1986). In these circumstances, the Respondent's unsworn assertion that it has not received any correspondence from the National Labor Relations Board since May 1987 other than the Notice to Show Cause does not warrant denial of the General Counsel's motion. See Rule 56(e) of the Federal Rules of civil Procedure. Thus, in Member Cracraft's opinion, the Respondent's failure to attach a supporting affidavit to its response precludes finding a genuine issue as to any material fact.

[4] The General Counsel requests that the Order include a provision for a visitatorial clause authorizing the Board, for compliance purposes, to obtain discovery from the Respondent under the Federal Rules of Civil Procedure under the supervision of the United States courts of appeals enforcing this Order. Under the circumstances of this case, we find it unnecessary to include such a clause. *Cherokee Marine Terminal*, 287 NLRB 1080 (1988).

[5] All dates are in 1986 unless otherwise indicated.

[6] Elder is a supervisor within the meaning of Sec. 2(11) of the Act and an agent of the Respondent within the meaning of Sec. 2(13) of the Act.

[7] Bragg is a supervisor within the meaning of Sec. 2(11) of the Act and an agent of the Respondent within the meaning of Sec. 2(13) of the Act.

About November 14, the Respondent discharged the four above-named employees because they concertedly complained about the late payment and nonpayment of wages, because they engaged in a strike, and because they joined, supported, or assisted the Union, and engaged in concerted activities for the purpose of collective bargaining or other mutual aid or protection. The Respondent otherwise endeavored to discourage these and its other employees from engaging in such activities or other concerted activities for the purpose of collective bargaining or other mutual aid or protection.

CONCLUSIONS OF LAW

1. By informing an employee that he had been discharged for engaging in union activities; threatening employees with the shutdown of the mine if the Union is successful in its efforts to represent the employees; threatening to discharge employees who engaged in union activities; threatening employees with discharge if they did not cross a picket line and return to work; threatening employees with unspecified reprisals if they did not cease their support for, and activities on behalf of, the Union; and discharging employees Teddy Bragg, Sam Hawkins, Walter Lovejoy, and Hassel Price for concertedly complaining about the late payment and nonpayment of wages, engaging in a strike, and joining, supporting, or assisting the Union and engaging in concerted activities for the purpose of collective bargaining or other mutual aid or protection, the Respondent has engaged in unfair labor practices affecting commerce within the meaning of Section 8(a)(1) and Section 2(6) and (7) of the Act.

2. By discharging employees Teddy Bragg, Sam Hawkins, Walter Lovejoy, and Hassel Price because they joined, supported, or assisted the Union, the Respondent has engaged in unfair labor practices affecting commerce within the meaning of Section 8(a)(1) and (3) and Section 2(6) and (7) of the Act.

REMEDY

Having found that the Respondent has engaged in certain unfair labor practices, we shall order it to cease and desist and to take certain affirmative action designed to effectuate the policies of the Act.

Having found that the Respondent has unlawfully discharged employees Teddy Bragg, Sam Hawkins, Walter Lovejoy, and Hassel Price, we shall order it to offer these employees immediate and full reinstatement to their former positions or, if those positions no longer exist, to substantially equivalent positions without prejudice to their seniority and other rights and privileges previously enjoyed, and to make these employees whole for any loss of earnings they may have suffered as a result of the Respondent's unlawful discharges. Backpay and interest shall be computed in the manner prescribed in *F. W. Woolworth Co.*, 90 NLRB 289 (1950), with interest to be computed in the manner prescribed in *New Horizons for the Retarded.*[8]

We shall also order the Respondent to remove from its files any reference to the unlawful discharges and notify the employees in writing that this has been done and that it will not use the discharges against them in any way.

ORDER

The National Labor Relations Board orders that the Respondent, Gold Star Mining Corporation, Julian, West Virginia, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Informing employees that they have been discharged for engaging in union activities.

(b) Threatening employees with the shutdown of the mine if the Union is successful in its efforts to represent the employees.

(c) Threatening employees with discharge if they do not cross the picket line.

(d) Threatening employees with reprisals if they do not cease their support for, and activities on behalf of, the Union.

(e) Discharging employees for joining, supporting, or assisting the Union, concertedly complaining about the late payment and nonpayment of wages, engaging in a strike, and otherwise engaging in concerted activities for the purpose of collective bargaining or other mutual aid or protection.

(f) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Offer Teddy Bragg, Sam Hawkins, Walter Lovejoy, and Hassel Price immediate and full reinstatement to their former jobs or, if those jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority or any other rights or privileges previously enjoyed, and make them whole for any loss of earnings and other benefits suffered as a result of the discrimination against them, in the manner set forth in the remedy section of the decision.

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[8] In accordance with our decision in *New Horizons for the Retarded*, 283 NLRB 1173 (1987), interest on and after January 1, 1987, shall be computed at the "short-term Federal rate" for the underpayment of taxes as set out in the 1986 amendment to 26 U.S.C. § 6621. Interest on amounts accrued prior to January 1, 1987 (the effective date of the 1986 amendment to 26 U.S.C. § 6621), shall be computed in accordance with *Florida Steel Corp.*, 231 NLRB 651 (1977).

(b) Remove from its files any reference to the unlawful discharges and notify the employees in writing that this has been done and that the discharges will not be used against them in any way.

(c) Preserve and, on request, make available to the Board or its agents for examination and copying, all payroll records, social security payment records, timecards, personnel records and reports, and all other records necessary to analyze the amount of backpay due under the terms of this Order.

(d) Post at its facility in Julian, West Virginia, copies of the attached notice marked "Appendix."[9] Copies of the notice, on forms provided by the Regional Director for Region 9, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material.

(e) Notify the Regional Director in writing within 20 days from the date of this Order what steps the Respondent has taken to comply.

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

WE WILL NOT inform our employees that they have been discharged for engaging in union activities.

WE WILL NOT threaten our employees with the shutdown of our mine if the Union or any other labor organization is successful in its efforts to represent our employees.

WE WILL NOT threaten our employees with discharge if they do not cross the picket line.

WE WILL NOT threaten our employees with unspecified reprisals if they do not cease their support for, and activities on behalf of, the Union or any other labor organization.

WE WILL NOT discharge our employees for joining, supporting, or assisting the Union, concertedly complaining about the late payment and nonpayment of wages, engaging in a strike, or otherwise engaging in concerted activities for the purpose of collective bargaining or other mutual aid or protection.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL offer Teddy Bragg, Sam Hawkins, Walter Lovejoy, and Hassel Price immediate and full reinstatement to their former jobs or, if those jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority or any other rights or privileges previously enjoyed and WE WILL make them whole for any loss of earnings and other benefits resulting from their discharge, less any net interim earnings, plus interest.

WE WILL notify each of them that we have removed from our files any reference to his discharge and that the discharge will not be used against him in any way.

GOLD STAR MINING CORPORATION

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[9] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

New Jersey Bell Telephone Co. *and* Local 1022, Communications Workers of America, AFL–CIO and Local 1024, Communications Workers of America, AFL–CIO and Local 1023, Communications Workers of America, AFL–CIO. Cases 22–CA–12078, 22–CA–12316, 22–CA–12450, 22–CA–12362, and 22–CA–12439

June 24, 1988

DECISION AND ORDER

BY CHAIRMAN STEPHENS AND MEMBERS JOHANSEN AND CRACRAFT

On March 23, 1984, Administrative Law Judge Raymond P. Green issued the attached decision. The Respondent filed exceptions and a supporting brief, the General Counsel filed exceptions and a supporting brief, and the Charging Party filed an answering brief to the Respondent's exceptions.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions[1] and briefs and has decided to affirm the judge's rulings, findings,[2] and conclusions as modified, but not to adopt the recommended Order.[3]

1. This case involves numerous allegations that the Respondent violated Section 8(a)(5) of the Act by refusing to provide the Union with information necessary for, and relevant to, the Union's performance of its function as collective-bargaining representative of the employees in the involved units. The Respondent claims that its refusals were justified by its 1980-instituted Employee Privacy Protection Plan, which states that the Respondent will not release personal information regarding employees to outsiders without employee authorization. The plan specifically provides:

> If you are a union-represented employee, personal information about you will not generally be available to a collective bargaining representative without your written permission. However, it may occasionally be necessary to disclose certain relevant information, when such information is requested by the bargaining representative and, in the opinion of the Company's Legal Department, is relevant to a matter in collective bargaining. In such instances, notification of the disclosure to the bargaining representative will be given to you.

In arguing that the information sought need not be released to the Union absent employee authorization, the Respondent relies on *New Jersey Bell Telephone Co. v. NLRB*, 720 F.2d 789 (3d Cir. 1983), which involved the Respondent, one of the Charging Parties, and records of the same general nature as in this matter. The court reversed the Board and found that the privacy plan was not instituted to frustrate the Union in its role as employee representative. The court also found that the employee absence records contained highly personal information. The court concluded that the Union must obtain employee consent for the release of the records; and that the Company's refusal to provide the information absent consent did not violate the Act. The judge in the instant case distinguished *New Jersey Bell Telephone Co. v. NLRB*. We agree that the cases are distinguishable.

In *New Jersey Bell Telephone Co. v. NLRB*, supra, the Union directed the employees not to sign the release forms, that the Respondent required. The court quoted with approval the following finding from the underlying judge's decision:

> [By directing the involved employees not to sign releases, the Union] intentionally placed itself in the way of attaining its own legitimate objective for there is no evidence in the record that the employees had any real objections to

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[1] The Respondent filed a motion to receive into evidence a letter from counsel for the Charging Party to the judge. The motion is denied. Its purpose was to support the Respondent's contention that the judge erred in considering arguments contained in certain articles published in medical journals. Although the judge did not err in considering the articles sent to him by the Charging Party's counsel, we find it unnecessary to rely on those articles in reaching our decision.

[2] The Respondent has excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

The Respondent also argues that the charges in this proceeding are barred by Sec. 10(b) of the Act because the Respondent's employee privacy plan was published more than 6 months prior to the filing of a charge. The plan specifically states, however, that information may be disclosed to the bargaining representative when it is relevant to collective-bargaining matters. The plan itself did not put the Union on notice that the Respondent intended to withhold relevant and necessary information. Accordingly, Sec. 10(b) did not begin to run until the Respondent refused to provide the information, and the charges in this proceeding are timely.

[3] For reasons discussed in the text, employee records need not be furnished with employee identification where (1) the Union has agreed already to receive such records without employee identification, or (2) the Respondent proves (i) that an employee's medical records contain highly intimate medical information, e.g., a mental disorder, a miscarriage, or infection with a venereal disease, (ii) and that the Union does not need the employee identity information to perform its representation functions. For the reason set forth in fn. 5, infra, Member Cracraft does not agree with the second qualification.

In the judge's remedy section, par. 7, L. 4, we correct an inadvertent error by substituting "Mosco" for "McAllister." We also note that the judge inadvertently omitted mention of employee Dobish in the remedy, recommended Order, and notice, despite his finding that the Respondent's failure to provide information pertaining to the Dobish grievance violated the Act. To remedy this violation the Respondent shall be ordered to turn over the requested documents concerning Dobish's grievance.

289 NLRB No. 55

> the Union representative gaining access to the material in question and *it would have been a simple matter for the Union* to obtain releases, *to gain access to the materials it needed* and to pursue the grievance procedure to a proper conclusion. Instead, it preferred to play games, to challenge the employer's *Employee Privacy Protection Plan, a policy which, on its face, appears to be legitimately concerned with employees' right to privacy and not in any way discriminatorily motivated.* (Emphasis added.)

Id. at 792, quoting *New Jersey Bell Telephone Co.*, 265 NLRB 1382, 1387 (1982).

In this case the Union did not direct employees to refuse to sign the release forms. In fact, several grievants signed release forms when requested to do so by the Respondent. Contrary to the assumptions of the administrative law judge and the court in the prior case (which, of course, were not tested there), it was not a simple matter for the Union to obtain the information it needed, at least with respect to those employees whose records were needed for comparison with those of the grievants.

Furthermore, unlike the proof offered in the prior *New Jersey Bell* case, there was no showing here that absentee records contained information of an "intimate and highly personal nature." Rather, the judge found here that the absentee records proffered for his inspection contained merely information concerning a "garden variety of common ailments."

Most significantly, however, in the present case the Respondent actually obtained employee releases in some instances, and in others the Union offered to accommodate privacy interests by agreeing to accept records with employee identifications omitted. Yet the Respondent still either refused to provide any of the requested information or provided records that omitted information needed by the Union for the performance of its representational duties. Thus, in the case of the Mosco grievance, even after Mosco signed a release, the Respondent refused to allow the Union to make copies of any records and did not even allow the Union to inspect certain portions of the records that were relevant to the grievance. In three instances, offers by union representatives to accept records with employee identifications omitted were met with footdragging and continuing refusals to provide all the requested relevant information. Thus, in the case of information requested for the Mananian and Marotta grievances, the Respondent produced only its own summaries of its records, omitting some of the relevant information requested by the Union; in the case of the request related to the Dobish grievance, the Respondent shifted to the excuse that the parent International had not yet appealed the pending grievance; and in the case of the request related to the Tiernan grievance, the Respondent simply relied on the lack of employee consent.[4]

In short, the record in this case reveals that the Respondent was using its privacy plan as a pretext for denying the Union information to which it was clearly entitled and shifting to other grounds when the privacy claim was stripped of even colorable validity. For these reasons, among others, we do not regard the decision in *New Jersey Bell Telephone Co. v. NLRB*, supra, as controlling.

Regarding to the Respondent's position generally that it should be entitled to deny requests for relevant information from personnel records simply because its privacy plan requires an employee consent, we find no support in *Detroit Edison Co. v. NLRB*, 440 U.S. 301 (1979), on which the Respondent also relies, for any such blanket claim of confidentiality. See *Pfizer, Inc.*, 268 NLRB 916, 919 (1984), enfd. sub nom. *NLRB v. Electrical Workers IBEW Local 309*, 763 F.2d 887 (7th Cir. 1985); *Oil Workers Local 6-418 v. NLRB*, 711 F.2d 348, 362 and fn. 36 (D.C. Cir. 1983). Certainly an employer should not be able to "bootstrap" a confidentiality claim as a barrier to disclosure of information to the bargaining representative simply by relying on a plan through which employees, including bargaining unit employees, are promised that a broad range of personal information will remain confidential. Moreover, the mere fact that an employee does not give formal consent—or might even object—to the disclosure of information does not *in itself* constitute grounds for refusing to provide such information when it is relevant to the bargaining representative's performance of its representational duties. As the Eighth Circuit, in *WCCO Radio, Inc. v. NLRB*, 844 F.2d 511 (1988), recently observed with respect to information concerning the terms of certain unit employees' personal contracts with the employer (844 F.2d at 515; citations omitted):

> One of the consequences of collective bargaining is that it subordinates the particular interests of individual employees to the collective interest of the unit. Hence, a preference for confidentiality on the part of some WCCO em-

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[4] In addition, on one occasion the Respondent advised the Union that no records would be released until a grievance actually was filed. Moreover, the Respondent consistently refused, citing the cost factor, to allow union representatives to photocopy voluminous records that need examination. Yet in one instance in which the Union responded by requesting a cost estimate, the Respondent then offered a different reason for refusing access to the information and provided no cost estimate.

> ployees does not nullify [the Union's] right to the information.

We do, however, make one minor modification to the judge's order with respect to information for which the Respondent makes a particularized showing that the specific records requested contain highly intimate information, medical or otherwise. We note that the Union has indicated in several instances, through its offer to accept records with employee identifications deleted, that the Union can sometimes accomplish its representational task without knowing the identities of employees for whom requested records are furnished for purposes of showing, for example, the pattern of discipline for particular kinds of conduct. Thus, with respect to records for which the Union has already agreed to such conditions, our Order will not require that the records be furnished with employee names included. Furthermore, as to any other records at issue in the compliance stage, similar conditions may be imposed if it is shown (1) that personal privacy interests would be invaded by disclosure *and* (2) that the Union could carry out its representational functions without knowledge of the identities of the employees to whom the information pertains. This is in keeping with the accommodative approach that properly governs such requests. *WCCO Radio, Inc. v. NLRB*, supra, 844 F.2d at 515. See generally *Oil Workers Local 6-114 v. NLRB*, supra, 711 F.2d at 363.[5] As our discussion above reveals, however, the Respondent thus far has, by either refusing requests entirely or by refusing to accept reasonable offers of accommodation by the Union, failed to satisfy its basic obligation under Section 8(a)(5) of the Act.

2. The judge concluded that the Respondent's failure to disclose the requested information pertaining to employee Therese Brill's grievance violated the Act. The judge based this conclusion on his finding that the Respondent's policy of not releasing medical records directly to an employee regardless of the employee's medical condition was paternalistic. The Respondent has excepted to the judge's finding that its policy is violative, and the General Counsel has excepted to the judge's failure to find further that the Respondent violated the Act by not abiding by its existing policy in a timely manner. We find the Respondent violated Section 8(a)(5) of the Act regarding the Brill grievance for the reasons that follow.

Before taking medical leave beginning in December 1981, Brill was referred by the Respondent to a pyschiatric consultant, Dr. Schwed, who diagnosed depression. Brill consulted her own psychologist while on leave. When Brill decided to return to work, the Respondent sent her to Dr. Schwed, who in June 1982 recommended part-time work. After 1 month of part-time employment, the Respondent informed Brill that she must work full time and that her disability pay was being discontinued retroactive to her part-time return.

Brill filed a grievance, which was denied at step 1 of the grievance procedure. The Union requested the Company's medical records on Brill, particularly Dr. Schwed's reports, at the step 2 meeting. The Respondent advised the Union that Brill must sign a release; the Union agreed to obtain one. On November 8, 1982, Brill wrote a letter requesting her medical records including the Schwed reports, and on November 10, 1982, she signed the Respondent's form to examine her personnel records. At the step 3 meeting[6] on December 1, 1982, the Union asked why Brill had not received her records. The Respondent advised the Union that a meeting would be arranged at its medical department. Brill arrived at the subsequently arranged meeting on December 6, 1982, with a union representative. The company doctor with whom Brill met refused to allow the union agent to accompany Brill to the meeting in the doctor's office and refused to show Brill copies of Dr. Schwed's reports. The Respondent advised Brill that she could get the reports only by authorizing the transmittal of the reports to her own doctor. Brill agreed and signed the form. On January 6, 1983, a copy of Dr. Schwed's June 1982 report was sent to Brill's own doctor. Brill's doctor gave her the report, and she gave it to the Union.

The Respondent knew that both the Union and Brill were seeking her medical records in connection with a pending grievance. Despite this fact and the Respondent's own policy of promptly releasing validly requested information, the Respondent took no action in the first 3 weeks following Brill's initial authorization, forcing Brill and the Union to face the step 3 meeting without the necessary documents. Almost 2 months elapsed from Brill's first request until some of the records finally were released to her doctor. Given the Respondent's policy of prompt release, its knowledge of the reason for Brill's and the Union's requests, and its delay in transmitting even part of the records, we find the Respondent has violated Section 8(a)(5) of the Act.[7]

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[5] Where, as here, the Board has found the Respondent was using the privacy claim as a pretext for denying the Union information to which it was entitled, Member Cracraft finds it inappropriate to allow the Respondent to make further privacy claims in the compliance stage of this proceeding.

[6] Under the parties' contract this particular grievance could not be taken past stage 3.

ORDER

The National Labor Relations Board orders that the Respondent, New Jersey Bell Telephone Co., Newark, New Jersey, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Refusing to bargain in good faith with Locals 1022, 1023, and 1024 of the Communications Workers of America by refusing to furnish to the Union information and records relevant to the processing of grievances or the administration of the collective-bargaining agreement.

(b) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) On request forthwith furnish to the Union copies of Laura McAllister's absentee records including an unexpurgated copy of her G-661 record.

(b) On request forthwith furnish to the Union copies of Patricia Zipf's absentee records.

(c) On request forthwith furnish to Therese Brill's doctor copies of her medical records to the extent it has not already done so.

(d) On request forthwith furnish to the Union copies of the cumulative sales records of the employees in the Respondent's Pascack Valley office.[8]

(e) On request forthwith furnish to the Union copies of the job performance records of employees in Helen Dobish's office.[9]

(f) On request forthwith furnish to the Union copies of Hartent Dunston's absentee and job performance records.

(g) In circumstances where the Union requests photocopies of records relevant to the administration of the collective-bargaining agreement or to process grievances, the Respondent and the Union shall negotiate as to the circumstances in which the Union should bear the costs of photocopying and the costs thereof.

(h) Post at its New Jersey facilities copies of the attached notice marked "Appendix."[10] Copies of the notice, on forms provided by the Regional Director for Region 22, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material.

(i) Notify the Regional Director in writing within 20 days from the date of this Order what steps the Respondent has taken to comply.

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

WE WILL NOT refuse to bargain in good faith with Locals 1022, 1023, and 1024 of the Communication Workers of America by refusing to furnish to the Union information and records relevant to the processing of grievances or the administration of the collective-bargaining agreement.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL, on request, furnish to the Union copies of Laura McAllister's absentee records, including an unexpurgated copy of her G-661 record.

WE WILL, on request, furnish to the Union copies of Patricia Zipf's absentee records.

WE WILL, on request, furnish to Therese Brill's doctor copies of her medical records to the extent we have not already done so.

WE WILL, on request, furnish to the Union copies of the cumulative sales records of the employees in our Pascack Valley office.

WE WILL, on request, furnish to the Union copies of the job performance records of employees in Helen Dobish's office.

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[7] In finding the Respondent violated the Act for failing to comply with its own policy, we find it unnecessary to pass on whether the Respondent's medical record release policy itself violates the Act. Thus, we are not prepared to say that prompt release of the records through the employee's physician would have left the Respondent in default of its bargaining obligation. Accordingly, we find it unnecessary to rely on the judge's discussion of patient rights; and we modify the remedy, and substitute a new Order and notice to eliminate any requirement that the Respondent change its policy on medical records.

[8] See fn. 3, supra.

[9] Ibid.

[10] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

WE WILL, on request, furnish to the Union copies of Hartent Dunston's absentee and job performance records.

WE WILL, on request, make photocopies of relevant information and records requested by the Union for use in administering the collective-bargaining agreement. In this respect, we will negotiate with the Union as to the circumstances in which the Union should bear the costs of such photocopying and the costs thereof.

NEW JERSEY BELL TELEPHONE CO.

Hope Singer, Esq., for the General Counsel.
James F. Brady, Esq., for the Respondent.
Amy Gladstein, Esq. (Gladstein, Reif & Meginniss), of Brooklyn, New York, for Locals 1022 and 1024, Communication Workers of America.

DECISION

STATEMENT OF THE CASE

RAYMOND P. GREEN, Administrative Law Judge. These consolidated cases were heard by me in Newark, New Jersey, on July 7, 8, 18, and 19 and August 5, 1983. The charge in Case 22-CA-12078 was filed by Local 1022 on December 10, 1982. The charges in Cases 22-CA-12316 and 22-CA-12450 were filed by Local 1024 respectively on March 31 and May 5, 1983. The charges in Cases 22-CA-12362 and 22-CA-12439 were filed by Local 1023, respectively, on April 19 and May 19, 1983. Thereafter, on June 20, 1983, the Regional Director for Region 22 of the National Labor Relations Board issued a consolidated complaint. In substance, the complaint alleged that Respondent on various occasions failed and refused to furnish to the local unions certain records and information that they had requested in connection with the processing of contractual grievances.

Based on the entire record in this proceeding, including my observation of the demeanor of the witnesses and on consideration of the briefs filed, I make the following

FINDINGS OF FACT

I. JURISDICTION

The parties agree, and I find, that the Company is engaged in interstate commerce within the meaning of Section 2(6) and (7) of the Act. There is also no dispute, and I conclude, that the Charging Parties are labor organizations within the meaning of Section 2(5) of the Act.

A. *The Prior Case*

On December 16, 1982, the Board issued a decision involving New Jersey Bell Telephone Co. and Local 1023, 265 NLRB 1382 In that case, three employees who had been marked tardy filed a grievance with their local union, which then requested to see the employees' absence and tardiness records. The Employer, relying on its "Employee Privacy Protection Plan" (described below), refused the Union's request, unless the three grievants authorized their release. The Union instructed the employees not to authorize release of the records believing that it had an absolute right to this information without being required to obtain employee consent. The Board, in disagreement with the administrative law judge, held that the records involved were not confidential in nature as they merely reflected the reasons the grievants themselves had given to the Company at the time of their absences and therefore did not constitute medical records. The Third Circuit Court of Appeals, 720 F.2d 789 (3d Cir. 1983), disagreed with the Board because in its view the records did contain highly personal and sensitive information regarding the employees' health. It therefore concluded that the information sought was confidential in nature and that it was the Union's instructions to its members to not authorize release, which prevented the Union from obtaining the data.

B. *The Collective-Bargaining Relationship*

For many years the Company has recognized and bargained with the Communication Workers of America (CWA). The collective-bargaining agreements have been between the Respondent and the CWA, and the most recent agreement prior to the hearing ran from August 10, 1980, to August 6, 1983. The CWA in turn, is comprised of a number of constituent local unions. The agreement covers the nonsupervisory employees of the Company's commercial and marketing departments in which the employees are members of five different local unions. The local unions involved in this case (Locals 1022, 1023, and 1024) represent specific segments of the overall bargaining unit and it is clear from the record that by custom and practice they have been delegated the responsibility of administering the collective-bargaining agreement at the local level at the first two steps of the contractual grievance machinery.[1] Thereafter, representatives of the CWA are responsible for handling grievances at the third step and at arbitration. Although the labor agreement is between the Company and the CWA, it is apparent that local union representatives, through their presidents or agents, execute the agreement on behalf of the CWA. (See p. 24 of the contract.)

In light of the above, I reject as without merit Respondent's assertion that the local unions involved were not the majority representatives of their respective constituencies and that they did not have the authority to request the information sought. It has been shown that insofar as grievance handling under the contract, the Company and the CWA have historically recognized and acceded to the function of the local unions in carrying out the administration of the contract at the local level through the first two steps of the grievance procedure. Therefore, it seems to me that the parties to the contract (the Company and the CWA) have agreed, at least implicitly, that it is to be the local unions that carry out this important function where, in all probability, the vast majority of grievances are disposed of. In this respect, it seems obvious that over a substantial period of time and by virtue of custom and practice, the Company has recognized and acceded to the delegation of authority by the CWA to its local unions, of the function of processing grievances at the first steps of the grievance procedure.

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[1] The grievance procedure is set forth at art. 12 of the collective-bargaining agreement. It provides for a step 4 procedure, the last step being arbitration. The record shows that after a grievance is processed through the first two steps, it is only then that a representative of the CWA will ordinarily become involved at the third step.

C. *The Company's Employee Privacy Protection Plan*

It appears that in 1980, the Company instituted its Employee Privacy Protection Plan, which provides that the Company will not release certain personal information regarding its employees to noncompany people without employee authorization.[2] It also appears that this plan was not instituted as a result of any negotiations with the Union and therefore was not implemented as a consequence of any agreement with the Union. Although the plan is designed to preclude disclosure of certain information concerning employees, without their consent, it is noted that the plan also states:

> If you are a union-represented employee, personal information about you will not generally be available to a collective bargaining representative without your written permission. However, it may occasionally be necessary to disclose certain relevant information, when such information is requested by the bargaining representative and, in the opinion of the Company's Legal Department, is relevant to a matter in collective bargaining. In such instances, notification of the disclosure to the bargaining representative will be given to you.

1. The Laura McAllister grievance

Laura McAllister, a member of Local 1024, is a service representative employed at the Company's Harmon Cove office. Initially, in January 1982 she was discharged because of excessive tardiness, but was reinstated in March 1982 as a result of the settlement of a grievance processed by Local 1024. As part of the settlement, she was placed on final warning.[3]

On March 1, 1983, McAllister received a letter in lieu of suspension based on her absenteeism since her reinstatement. She then contacted her shop steward, Tom O'Rorden, who filed a grievance on her behalf. During the first-step meeting, O'Rorden asked for McAllister's absence records and the Company's representative, Mark Drew, stated that they would only be released if McAllister gave her consent. O'Rorden responded by stating, in effect, that under the National Labor Relations Act the Union was entitled to the information without the employee's consent. (Indeed, as the employee filed the grievance, it could be argued that she gave her implied consent to the release of her own records.) At the same time, O'Rorden handed over a letter from Local 1024's president, dated March 24, which read

> In our capacity as Collective Bargaining Agents for the members of CWA Local 1024, we are requesting, on behalf of Laura McAllister, that the Company provide records which are relevant and material to the representation of Miss McAllister.
>
> Specifically, we are requesting the absence record G-520 and associated C 4014, for Miss McAllister, and any other documentation relevant to her history of absence, to date. In your refusal to provide this information to Tom O'Riordan, Union Steward, you sited [sic] the Company's Privacy Protection Plan. I would like to point out that there is a provision in the Plan regarding information relevant and material to the Union's performance of its Collective Bargaining and Grievance Handling functions.

In response, Drew, by letter dated March 22 stated:

> It is our understanding that the Employee Privacy Protection Plan still governs the release of Employee Records and we are so guided by this plan.

In connection with the information request, the union witnesses testified that they believed that in assessing absences, the supervisors are given certain discretion in excusing absences and therefore not counting them for disciplinary purposes. They also testified that they asked for the specific forms listed (forms G-520 and C-4014) because to their knowledge these were the forms used by the Company.

On March 29, Respondent's representative, Regina Von Aln, tendered to the Union a handwritten list, which set forht the dates, reasons, and number of days that McAllister had been absent after her reinstatement in March 1982. This list did not, however, set forth the various "discussions" that McAllister had with her supervisor. These "discussions" are generally set forth by the supervisor on a separate form (G-661) and in addition to recording his or her conversation with the employee, also sets forth the supervisor's evaluation of the employee's excuses for being absent. The record of discussions are referred to in the form C-4014 and are sometimes physically attached to that form.

A second-step meeting was held on April 12. At this time Union Agent Massa indicated that the Union wanted to look at the official records on which the tendered summary was based. Von Ahn refused, citing the Employee Privacy Protection Plan.

On April 22, the Union wrote to Sabo, the Company's director of labor relations, as follows:

> Regarding our grievance on behalf of Laura McAllister, Service Representative in the Harmon Cove AIC, we have requested information that is

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[2] There are, however, a number of exceptions. For example, certain information will be divulged for law enforcement purposes or in connection with "any proceeding or action affecting the Company's interest including its defense to any employment related matter."

[3] Respondent has a system of progressive discipline for absenteeism and lateness. The steps include (1) a "welcome back" by the employee's supervisor; (2) a notification to improve; (3) a notification that good attendance is a condition of continued employment; (4) a notification that the employee's job is in jeopardy; (5) the issuance of a warning in lieu of suspension; (6) dismissal. The warning in lieu of suspension has the same weight as a suspension and is, in effect, a step short of discharge.

> relevant and material to the representation of Miss McAllister. This request was presented to Mr. Mark Drew, manager of the Harmon Cove AIC.
>
> Specifically we asked for copies of the G520 and C4014 from Miss McAllister's personal file. These records were denied to us by Mr. Drew.
>
> We appealed our grievance to second level in order to state our request to Miss Regina Von Ahn, District Manager of the Harmon Cove AIC. At this level we were provided with a hand written list of dates and reasons for absence, not the records requested.
>
> In accordance with our duty to represent, we have appealed this grievance to third level in order to protect the time limits specified in the Contract. However, we are unable to present a proper grievance without the information we have repeatedly requested.
>
> By denying the Union copies of Miss McAllister's G520 and C4014, the Company has not allowed the Union the opportunity to determine whether or not the Company acted properly in giving Miss McAllister a letter equivalent to a three day suspension. The Union cannot perform its duty as collective bargaining agent without the material requested.

In response to the Union's letter of April 22, Respondent's representative, William Wilson, called Union Agent Dellavia and asked if the Union would agree to having McAllister give her consent before releasing the information. Dellavia said that she did not agree and argued in effect that employee consent was not a proper condition for releasing these types of records. (Dellavia reiterated her position in this regard by letter dated May 4, 1983.) There is no evidence, however, to suggest that the Union either directed or requested McAllister to refuse to give her consent to the release of the documents.

On May 10, Drew asked McAllister if she would agree to the release of her records to the Union and she said she would have to ask her shop steward. As a consequence of this conversation, Respondent apparently construed McAllister's failure to object as a consent, and it thereupon released some, but not all of McAllister's absentee records to the Union. Thus, on May 18 the Respondent tendered to the Union copies of McAllister's records designated by forms G-520 and C-4014.[4] Also tendered was an expurgated copy of form G-661, which contained the record of discussions by her supervisor. What in fact was deleted from the form G-661 were several of the discussions concerning McAllister's absences.

Respondent asserts that it had no duty to furnish the form G-661 because the Union did not specifically request it. However, it appears that the Union's agents were not aware that such a form designation existed (also unknown to some of Respondent's managers), and in any event, the record shows that this form was incorporated, as a matter of practice, with the form C-4014. Clearly, as the Union expressed the desire to review all documents relevant to McAllister's absence record (by letter dated March 24) the Respondent was on sufficient notice to furnish not only forms G-520 and C-4014, but also the form G-661. It also is evident that by heavily editing the form G-661, Respondent did not furnish the information requested. Indeed, it is my opinion that given the nature of the grievance, the form G-661, in its entirety, would have been the record most relevant to her grievance. That is, it is only by viewing this particular form that the Union would have been able to determine if some or all of McAllister's absences had been excused by her supervisor.

2. The grievance of Therese Brill

Therese Brill is a longstanding employee who works in Respondent's Asbury Park office. In December 1981 she went on a medical leave of absence. Before leaving, she was examined by Dr. Margaret Fitzpatrick who is employed in Respondent's medical department. She also was referred to an outside psychiatric consultant, Dr. Schwed (now deceased) who diagnosed her condition as a form of depression. (This diagnosis is contained in a report to the Company dated December 29, 1981.) While on medical leave, Brill was seen by her own private psychologist, a Dr. Hanson.

In the spring of 1982 Brill expressed to Dr. Fitzpatrick a desire to return to work on a part-time basis. In order to determine if she was fit to return, Brill was again referred to Dr. Schwed. By report dated June 10, 1982, Dr. Schwed informed the Company that Brill's condition had abated and he recommended that she go back to work on a part-time basis. Accordingly, on June 23, Brill returned to work and informed her supervisor, Cooper, that she wanted to work 2 to 3 days a week.

After working for about a month on a part-time schedule, Brill was told on July 15 that she was to return to work on a full-time basis. She also was notified that her disability payments had been terminated retroactive to the time she returned to work. Thereafter, Brill filed a grievance relating to the termination of her disability pay.

In relation to the grievance, it is noted that the Company has a plan for providing disability pay for employees who cannot work for medical reasons.[5] Although parties agree that disputes involving eligibility to receive disability pay are not arbitrable under the collective-bargaining agreement, they do agree that such disputes are subject to the grievance procedure, short of arbitration. In essence, Brill's grievance rested on the contention that, notwithstanding her return to work on June 23, she still was eligible for disability pay for those days that she did not work.

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[4] The G-520 form is a calendar on which latenesses and absences are recorded. The C-4014 form lists the dates, lengths, and reasons for an employee's absences. It also shows if any disciplinary action was taken and what, if any, discussions were held between the supervisor and the employee regarding a particular incident. As noted above, the supervisors may make extended notes of their discussions, including an evaluation of an employee's excuse on form G-661 or on any other piece of paper and these notes are, in effect, incorporated by reference into the form G-4014.

[5] Respondent maintains a benefit committee that decides whether a particular employee is eligible for disability pay. The physicians of the medical department make recommendations to the benefit committee in borderline cases.

On September 3, Respondent denied Brill's grievance and it was appealed by the Union to the second step. On November 4, 1982, a second-step meeting was held and the credible evidence shows that Union Representative Lynn Buckley asked Respondent to produce Brill's medical records, particularly Dr. Schwed's reports. Company Representative Moulineaux responded that these records were confidential and could only be released if Brill signed a release. Buckley then turned to Union Agent Huber and asked him to have Brill sign a release. As a result, Brill was asked by Huber to make a written request for her records from the medical department. On November 9, Brill wrote to Dr. Bisgeir, the head of the medical department, as follows:

> Kindly send me copies of all the medical reports pertaining to my recent illness including the report of the consulting psychologist, Dr. Schwed.
>
> I would appreciate you doing this as expeditiously as possible.

Also on November 10, Brill executed a company form, at Respondent's request, entitled, "Request to Examine Personnel Records."

On December 1, a third-step meeting was held in which Pat Niven, a CWA District staff representative, asked why Brill's medical records had not been forthcoming. Moulineaux and Company Representative Wilson responded that it was company policy to set up a meeting at the medical department (located in Newark) where the employee could review her records. Subsequently, Brill was informed that a meeting had been set up for her for December 6. On that date, Brill, accompanied by Union Representative Huber, visited the Newark office where Brill spoke to Dr. Fitzpatrick, who at that point, was aware that Brill had filed a grievance. Brill credibly testified that she asked if she and Huber could obtain her medical records and that Dr. Fitzpatrick refused. In essence, Dr. Fitzpatrick refused to allow Huber to accompany Brill into her office and she refused to turn over or read the medical reports to Brill. What she did do was to read a small portion of Dr. Schwed's June 10 report and indicated to Brill that the Company would only send the reports to Brill's private physician if so desired by Brill. Brill thereupon signed a release for the Company to transmit the records to her private physician. At the conclusion of the meeting, Dr. Fitzpatrick asked Brill to sign a form indicating that she had been given an adequate opportunity to review her medical records. Brill refused to sign the form as written, as she concluded that she had not been afforded an opportunity to adequately review her records. On December 7, Brill wrote another letter to Dr. Bisgeir complaining of Dr. Fitzpatrick's refusal to turn over her medical records.

On January 6, 1983, a copy of Dr. Schwed's June 10, 1982 report was sent to Brill's private physician. He promptly turned it over to Brill who, in turn, gave it to the Union.

The Company asserts preliminarily that Brill never authorized or consented to the release of her records to the Union. Although this is technically correct, it seems clear that as these records were being sought by Brill and the Union to justify her grievance, Respondent was fully aware that she intended to turn them over to the Union. Moreover, on December 6, she arrived at the medical office, accompanied by Union Agent Huber, and requested that Huber assist her in reviewing her records. In any event, the Company not only refused to turn over the records to the Union, but also refused to turn them over to Brill.

The Company also asserts that it should not be compelled to turn over medical records directly to employees (except for hard data such as blood tests) because such action might be harmful to the employee's health or mental condition. Indeed, this appears to be the current policy of the medical department, which will only release such records to an employee's private physician if so requested by the employee. As to Dr. Schwed's reports relative to Brill, Respondent additionally notes that these reports are stamped:

> Confidential
>
> This report is for employment suitability.
>
> It may adversely affect the mental health of the subject if indiscriminatorily shown to him.

However, the record shows that all reports received from Dr. Schwed have been stamped in the above fashion as a routine matter. There was no adequate showing by Respondent that Dr. Schwed's reports, if shown to Brill, would have adversely affected her mental health and, although I am not a physician, I simply cannot imagine how they could have done so. On the contrary, it would seem to me that disclosure of Dr. Schwed's reports to Brill, and particularly his second report, could only have been beneficial to her mental condition as it expresses the opinion that her depression had largely abated. I also note in this regard that when Brill's private physician received the report he apparently had no difficulty about releasing it to her.

Based on the record as a whole, it is evident that Dr. Fitzpatrick simply applied a blanket company policy, which is to refuse to disclose to any employee his or her medical diagnostic records (apart from hard data), irrespective of the illness involved, and to make such records available only to the employee's private physician. It also is clear to me that in carrying out this policy, the Company's physicians do not, in fact, make any independent medical judgment whether the disclosure of the records would adversely affect an employee's health. In short, it seems to me that this policy essentially is a manifestation of an outdated paternalism, which seemingly assumes that patients are ill equipped to deal with medical information concerning themselves. To my mind it is a policy which, except perhaps in extreme circumstances not present here (e.g., terminal illness or suicidal depression), has little or no justification.[6] It is my opinion that it is axiomatic that any patient, except perhaps in extreme circumstances noted above, should have the right to know information concerning his own body and to have that right honored by any physician with whom he consults. Indeed, it may be argued that the refusal by Dr. Fitzpatrick to turn over the medical reports to Brill was also contrary to the laws of New Jersey, which require physicians, including company-employed physicians, to release on request employees' medical records or a summary report thereof. In a letter to the Company from Charles A. Janousek, executive secretary of the New Jersey Board of Medical Examiners, he stated:

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[6] See *The Right to Know: Giving the Patient His Medical Records*, 57 Arch. Phys. Rehabilitation 78 (1976); *Giving The Patient His Medical Records. A Proposal To Improve The System; The New England Journal of Medicine*, Sept. 27, 1973.

> The New Jersey State Board of Medical Examiners, in 1978, promulgated the enclosed Patient Records Rule. That rule requires that a physician, upon written request and within 30 days, submit a copy of his physician's record or a summary report of such record, and/or copies of all pertinent, objective data and papers to the patient, designated physician or a duly authorized representative.
>
> This Board, when promulgating the rule, determined that it was the physician's prerogative whether to copy the entire record for release or make a summary report of such record. The Board has determined, since the rule has been promulgated, that the submission of a summary report complies with the intent of the rule, although the patient or another designated individual may have wanted a copy of the full record.
>
> With regard to the release of the complete record or summary report, the patient has the right to receive the material directly, request that it be sent to a specific physician, or the request can be made on behalf of the patient by an attorney, who the Board has determined is the duly authorized representative. The rule also allows the physician the discretion, while in his professional judgment, to withhold certain records that the physician considers would be deleterious to the patient's best interests. I know of no instance where the Board has been asked to determine whether a physician has withheld information that is not deleterious. I know of no previous case where the Board has made inquiry into a complaint, that a physician has edited a summary report for any reason.[7]

3. The grievance of Cheryl Sistrunk

Cheryl Sistrunk is employed as a service representative in Respondent's New Brunswick, New Jersey office. In April 1982 Local 1023 filed a grievance on her behalf alleging that she had been passed over for a promotion to a drafting position. In this regard, another employee, Serone, who had less seniority than Sistrunk, had been given the position.

On April 20 a first-step grievance meeting was held in which the Company was asked why Serone rather than Sistrunk had received the promotion. On April 22 the Company responded that Serone had had 6 months' experience in drafting and that she had a physical handicap, which gave her priority pursuant to the Company's affirmative action program. The Union then requested a copy of Serone's upgrade and transfer application, indicating that it wanted to see her drafting experience and to see if, in fact, Serone had a handicap. On April 28, Company Representative Kesselmeyer denied the Union's request, relying on the employee privacy protection plan.

The record shows that the Union did not attempt to seek Serone's consent for the release of her application and that it was never furnished to the Union. The record also shows that the grievance ultimately was settled at the third step. I do not know what information was contained on Serone's application, as I was not shown this document and I am unaware of the nature of the settlement.

4. The grievance of Kim Mosco

Kim Mosco is also employed at Respondent's New Brunswick office as a service representative. There are about 39 employees at this office who are represented by Local 1023. In April, Mosco received a letter in lieu of suspension because of excessive absenteeism. Thereafter, she informed Union Agent Hutchins that she wished to file a grievance.

About April 5, 1983, Hutchins told Company Representatives Kesselmeyer and John Bradway that she wanted to see the attendance records of all the employees in the office before filing a formal grievance on Mosco's behalf. Bradway responded that the Company would only release such records if the employees signed releases.

On April 8 Hutchins told Bradway that it was the Union's position that it had a right to the records without employee releases and that if the request was refused, Local 1023 would take the matter to the NLRB. Thereafter, on April 12, Kesselmeyer offered to show the Union the records of the three worst offenders, without employee identification, if the Union paid for the cost of duplication. Hutchins refused, stating that she wanted to see all the records.

On April 25, Mosco at the request of the Company signed a release authorizing the Union to review her absence records. That afternoon, Hutchins was taken to Kesselmeyer's office and shown certain records in Mosco's binder. She, however, was denied her request to make photocopies and had to make notes by hand. She also was not shown the record of discussions relative to Mosco, which, as noted above, would contain, inter alia, the supervisor's evaluation of Mosco's excuses for being absent.

On May 2 a first-step grievance meeting was held. At one point, Hutchins asserted that in her opinion Mosco was being treated differently from other employees who had absences excused in similar circumstances. When the company representative challenged Hutchins to substantiate the claim, she replied in effect that she had no proof because the Company was denying her access to the employees' records.

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[7] I do not construe the allowance of a summary report as permitting the deletion of pertinent medical information. Rather, it seems to me that what is intended is to allow a physician to reduce lengthy medical reports to shorter reports containing language understandable to a layman.

On May 11, Respondent denied the Mosco grievance and thereafter the grievance terminated because the Union did not meet the contract's time limitations for appealing to the third step.

5. The grievance of Patricia Zipf

Patricia Zipf, a member of Local 1023, is employed as a service representative in the South River, New Jersey office. On May 11, 1983, her shop steward, Bruce Heyer, was told by Joan Kelley (manager of the office) that Zipf was about to receive a letter in lieu of suspension because of her absences. Heyer told Kelley that a grievance would be filed and asked for Zipf's absentee records. Kelley replied that Sipf's consent was required for release of her records, and also told Heyer that the records would only be made available, assuming Zipf signed a release, if a grievance was filed.

On May 16 Heyer filed a grievance on Zipf's behalf and again requested that Kelley photocopy Zipf's absentee records at the Union's expense. Kelley refused. Sometime later, but before the first-step grievance meeting, Zipf signed a release and Heyer, on May 20, was taken to the manager's office in the late afternoon where he was allowed to review Zipf's records and make handwritten notes in Kelley's presence. His request to use the Xerox machine in the office was denied and he testified that he spent about 2 hours reviewing and copying the records by hand.

6. The grievances of Diane Mananian and Michael Marotta

Diane Mananian and Michael Marotta are sales representatives at the Pascack Valley office and both are shop stewards for Local 1024. In February 1983 each received performance ratings and although each was rated satisfactory overall, they both received unsatisfactory sales ratings. Thereafter, the Union filed grievances on behalf of both employees with respect to their sales ratings.

In connection with the grievances, it is noted that the sales rating is only one portion of an employees' overall rating and it is the overall rating that effects his or her job. Regarding the sales rating, the employees involved in sales are generally given a $300-per-month quota although some employees such as "off-line" or "backline" employees, who have less contact with the public, are given lower quotas. There are about 20 employees in this office. It was the Union's contention in these grievances that (1) as shop stewards spend part of their time on union business, their quotas should be lower, and (2) some of the other employees who met the quota did so by selling items to their friends and families. It is noted that previously the Company had published the sales results of its employees, a practice that was discontinued because the Union had objected.

On March 1 at the first-step meeting, the Union requested the cumulative sales records for all the employees in the office. The Company responded that it would only tender the information if the employees consented to its release. The cumulative sales records consist of a one-page document for each employee that list his or her quota and the number of items sold.

On March 10, the Union wrote a letter to the Company in connection with the grievance of Mananian. This letter stated:

> Specifically, we are requesting the sales performance records of all other Service Representatives of the Pascack Valley Residence Service Center. We have been advised that you are concerned about violating the Company's Privacy Protection Plan by providing this information. Although we do not agree with your position on this, for the purposes of this case only, the records requested may be provided with the names of the individuals deleted.
>
> I would however, like to point out that there is an exception to the plan with regard to information relevant and material to the Union's performance of its Collective Bargaining and Grievance handling functions.

On March 22, the Union again requested the information and the Company refused, citing the employee privacy protection plan. Respondent did offer, however, to show the Union the sales figure of the three lowest producers who were rated satisfactory, without identifying the employees by name.

About April 3, Company Representative Lutz called Local 1024 Vice President Dellavia and asked her to clarify her request for information. She stated that the Union was interested in knowing what the quotas were, how they were determined, how sales were broken down, and if the quotas were the same for all employees. She told Lutz that she wanted the information for all the employees so that the Union could compare, "and see if all employees were treated the same." She also told Lutz that the Union was willing to receive the information with the employees' names replaced by alphabetical listing.

On April 8, the Company sent a summary to the Union, in lieu of the actual records. This summary set forth each service representative designated by letter, his or her average monthly sales revenues, and whether the particular employee was full time, part time, backline, or on disability leave. The summary also indicated which employees had unsatisfactory sales ratings, although their names were not revealed. By letter dated May 4, Dellavia wrote to Director of Labor Relations Frank Sabo, as follows:

> I am writing in reference to requests for records on behalf of Diana Mananian and Michael Marotta. In my letter to Mr. Lutz, (see Enclosed) I requested the sales performance records of all Service Representatives of the Pascack Valley RSC.
>
> In a conversation with Mr. Lutz on April 8, 1983 he agreed to provide the sales objectives and actual sales results of each Service Representative, the reason why one individual objective would be lower than another and what formula was used to determine each objective.

> Enclosed is the response I received. As you can see all of my requests were not met.
>
> Mr. Lutz subsequently explained in a telephone conversation on April 22, 1983 that the office objective was $300 and that anyone who's [sic] objective was less than $300 was explained on the list. Without a detailed explanation of how each objective below $300 was arrived at and on what it was based, we can not make an informed decision as to the fair and equal treatment of Michael Marotta and Diana Mananian. Therefore we are again requesting copies of the actual sales records of all the Service Reps. in the Pascack Valley RSC.

Thereafter, on May 11, Sabo responded by letter, which read:

> This is in response to your letter of May 4, 1983 concerning your grievances on behalf of Helen Dobish, Diana Mananian and Michael Marotta.
>
> Inasmuch as these grievances are still in the grievance procedure and have not been appealed to me by your International Union Representative in accordance with the Agreement, I cannot comply with your request and suggest that you continue to negotiate the grievance at the present step where I hope a satisfactory resolution can be reached.

7. The grievance of Helen Dobish

Helen Dobish is employed at Respondent's Bergen Mall office. In November 1982, she was given a satisfactory rating but this was changed to an unsatisfactory rating in 1983 by her district manager. Local 1024 filed a grievance. The evaluation is a one-page document with blocks for ratings and a space for explanation.

The first-step meetings were held on March 2 and 8. In connection with the grievance, Dobish specifically authorized the Union to receive a copy of her evaluation. The Union was allowed to inspect it, but not to photocopy it.

On the basis of the evaluation shown to the Union, it decided to proceed further with Dobish's grievance in the belief that her evaluation did not warrant an unsatisfactory rating. Accordingly, on April 13 the Union wrote a letter to Von Ahn, requesting the job performance records of all similar employees in the office "from May 1982 to the present." On April 25, Von Ahn told Dellavia that the Company would not furnish these records without the consent of the employee involved. Dellavia then contacted Frank Sabo and reiterated her request for the records. Sabo told her that the Union would have to pay for the cost of copying the records and she asked how much this would be.

On May 9, Dellavia wrote to Sabo, as follows:

> In response to our telephone conversation of April 27, 1983, with regard to the grievance on behalf of Helen Dobish, I wish to again make a request for the following:
>
> Job performance records of all SSA's in the typing unit of the Bergen Mall SOEC, for the period from May 1982 to the present. These records may, if necessary, be provided exclusive of the individual employees names, for the purposes of this grievance only.
>
> We wish to stress that we require photocopies of the actual records not a prepared synopsis of the material contained within the records. We require this information in order to make an informed decision as to the fair and equal treatment accorded Ms. Dobish in the preparation of her job performance appraisal.
>
> During our conversation you mentioned the expense involved in preparing this material for the Union. If you will provide us with a cost estimate for the supervisors time spent in xeroxing the records and the cost of the copies, the Union will advise you as to our decision to bear these costs. As I'm sure you must realize, if the Company finds these costs burdensome, we will also have to review our Budget to determine if the Local can cover the expense. This consideration will apply in this case only and is not to establish a precedent.

On May 11, Sabo denied the Union's request stating that the grievance had not yet been appealed to him by the CWA. He did not state that the records would be made available if the Union paid the cost of copying and he did not indicate what the cost might be.

8. The grievance of Cathy Tiernan

Cathy Tiernan is employed as a service representative at the Palisades, New Jersey office where there are about 20 to 25 other employees. In April 1983, she received a final warning for poor job performance and a grievance was filed on her behalf by Local 1024. In connection with her grievance, the Union was given Tiernan's records after she signed a release. However, as the Union asserted that Tiernan was being treated in a disparate manner from other employees, it also requested the job performance records of the other service representatives employed in the Palisades office. In this regard, the Union stated that it did not need the records identified by employees' names. This request was denied by the Company.

On May 4, 1983, Local 1024 President Gilbert Snowden sent a letter to Respondent District Manager Norman LeGeaux, which stated:

> In our capacity as collective bargaining agents for Cathy Tiernan, Service Representative in the Palisades RSC, we have requested records that are relevant and material to our grievance on Ms. Tiernan's behalf. (see our letter of April 13th 1983) The records requested have been denied to us by Mrs M. Hiboki, Manager of the Palisades RSC. Without these records it is impossible for the Union to determine if Ms. Tiernan was given fair and equal treatment when she was advised by her supervisor Luann Mallock, that her job was in jeopardy due to poor performance.
>
> We are unable to provide proper representation at a grievance meeting on this subject and therefore

> Chief Steward Noreen Scanlon has requested that the time limits on this grievance be protected at first level until the matter of the records can be resolved.
>
> This request was also refused by Mrs. Hliboki on April 22, 1983. We are now being forced to advance a grievance to second step without having had a proper first step grievance hearing. We cannot see how the tenets of collective bargaining can be served by this method of action.
>
> We again request that this grievance be held at first level until such time as the Union is able to obtain all the information necessary to determine if we in fact have a grievance worthy of a second level hearing.

On May 22, a second-step meeting was held at which Union Representative Noreen Scanlon requested the job performance records of the office service representatives without name identification. Respondent refused, stating that employee releases would be necessary before these records could be turned over. It appears that subsequently the grievance was settled when the warning to Tiernan was withdrawn by the Company.

9. The grievance of Hartent Dunston

Hartent Dunston is employed as a service representative at Respondent's East Orange, New Jersey facility. On April 4, 1983, she was given a letter in lieu of suspension for walking off the job. On April 20 she received a 5-day suspension for poor work performance, the Company asserting that she was intoxicated while at work. Dunston then filed a grievance with Local 1023, which was heard at the first step on April 22, 1983. At this meeting the Company's representative told the Union the reasons for Dunston's disciplinary actions. The Union did not at this time request any records.

About 3 weeks after the first-step meeting, Local 1023 requested Dunston's absence and job performance records. The Company advised that Dunston's release was required before it would turn these records over to the Union. Dunston did not sign a release and the records were not sent to the Union. As a consequence, Dunston's grievance was left pending at the first step of the grievance procedure, which is its current status.

II. ANALYSIS

A. *General Principles*

Pursuant to Section 8(a)(5) of the Act, an employer has an obligation to comply with a union's request for information that is relevant to the processing of grievances unless there is a showing that the information is unduly burdensome, legitimately confidential, privileged in nature, or has been waived. *NLRB v. Acme Industrial Co.*, 385 U.S. 432 (1967); *Detroit Edison Co. v. NLRB*, 440 U.S. 301 (1979); *LaGuardia Hospital*, 260 NLRB 1455 (1982). In determining the parameters of relevance, the criteria used is a broad discovery type of standard;[8] namely, whether the information requested is probably or potentially relevant. Therefore, it need not be shown that the information will result in the union winning an arbitration, so long as it is relevant to the disputed subject matter. Indeed, the fact that the information may even tend to show that a grievance or potential grievance is without merit, equally serves a legitimate purpose of collective bargaining because such disclosure would enable a union to determine which grievances it will pursue to arbitration and which it will not. In this latter connection, the Court in *NLRB v. Acme Industrial Co.* stated at 438:

> Arbitration can function properly only if the grievance procedures leading to it can sift out unmeritorious claims. For if all claims originally initiated as grievances had to be processed through to arbitration, the system would be woefully overburdened.

The Board has consistently held, as a general rule, that an employer's refusal to turn over relevant information may not be excused because the information requested may be available from the employees represented by the union or from other sources. *New York Times Co.*, 265 NLRB 353 (1982). See also *Chesapeake & Potomac Telephone Co. v. NLRB*, 687 F.2d 633, 638 (2d Cir. 1982). Indeed, such a rule makes eminent practical sense. For example, a union may seek, in relation to an employee's grievance, information about many other employees in an effort to discover whether the grievant has been treated in a disparate manner. The simplest, most expeditious, and error free source of such information would normally be the employer's records. To allow a company to refuse the information request and thereby compel a union to seek the identical information from the employees would likely take a good deal longer and be more prone to error even assuming that all the employees responded affirmatively and accurately to the union's request. Indeed, the potential for error and delay could be extremely prejudicial to a grievant where, as here, the contractual grievance procedure has time limitations for moving a grievance from one step to the next. Moreover, it is conceivable that in certain grievances an employee or employees might not want to furnish information to the union, whem the outcome might be adverse to them. This situation could arise, for example, in a circumstance similar to the Sistrunk grievance, in which the issue is which of two competing employees is entitled to a promotion. In short, it is clear from the case law that an employer may not refuse to furnish information relevant to a grievance on the grounds that the union has alternative means of obtaining the information. Thus, as stated by the Board in *Kroger Co.*, 226 NLRB 512, 513 (1976):

> Absent special circumstances, a union's right to information is not defeated merely because the union may acquire the needed information through an independent course of investigation. The union is under no obligation to utilize a burdensome procedure of obtaining desired information where the employer may have such information available in a more convenient form. The union is entitled to an

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[8] See *NLRB v. Acme Industrial Co.*, 385 U.S. at 437. See also *Proctor & Gamble Mfg. Co. v. NLRB*, 603 F.2d 1310, 1315 (8th Cir. 1979).

> accurate and authoritative statement of facts which only the employer is in a position to make.

It is of course possible for a union to waive its right to relevant information. Where this contention is raised, however, the burden is on the employer to establish a "clear and unmistakable" waiver on the part of the union. *NLRB v. Perkins Machine Co.*, 326 F.2d 488 (1st Cir. 1964); *Timken Roller Bearing Co. v. NLRB*, 325 F.2d 746 (6th Cir. 1963). In the present case, I certainly do not consider the Employer's unilateral promulgation of its employee privacy protection plan as amounting to a waiver by the Union as there is no evidence to suggest that this plan was the result of any agreement or negotiations with the Union. Moreover, I note that pursuant to the provisions of the plan, it explicitly exempts from nondisclosure, information requested by the bargaining representative that is relevant to a matter in collective bargaining. Since the processing of grievances under the contract is part and parcel of the collective-bargaining process, it seems to me that the authors of that privacy plan were aware and recognized the legal requirements for disclosing employee information, without the employees' consent, when such information is relevant to grievance handling.

Notwithstanding a union's request for relevant information, there can also exist rare circumstances whem a company may lawfully refuse to furnish information because of its confidential nature. Thus, in *Detroit Edison v. NLRB*, 440 U.S. 301 (1979), the company refused to comply with a union's request for copies of aptitude tests, the answers to the tests, and employee scores that were used by the company for purposes of promotion. The Supreme Court (440 U.S. at 317-320), in refusing to enforce the Board's Order, stated:

> [W]e agree with the Company that its willingness to disclose these scores only upon receipt of consents from the examinees satisfied its statutory obligations under § 8(a)(5).
>
> The Board's position appears to rest on the proposition that union interests in arguably relevant information must always predominate over all other interests, however legitimate. But such an absolute rule has never been established, and we decline to adopt such a rule here. There are situations in which an employer's conditional offer to disclose may be warranted. That we believe is one.
>
> The sensitivity of any human being to disclosure of information that may be taken to bear on his or her basic competence is sufficiently well known to be an appropriate subject of judicial notice. There is nothing in this record to suggest that the Company promised the examinees that their scores would remain confidential in order to further parochial concerns or to frustrate subsequent Union attempts to process employee grievances. And it has not been suggested at any point in this proceeding that the Company's unilateral promise of confidentiality was in itself violative of the terms of the collective-bargaining agreement. Indeed, the Company presented evidence that disclosure of individual scores had in the past resulted in the harassment of some lower scoring examinees who had, as a result, left the Company.
>
> Under these circumstances, any possible impairment of the function of the Union in processing the grievances of employees is more than justified by the interests served in conditioning the disclosure of the test scores upon the consent of the very employees whose grievance is being processed. The burden on the Union in this instance is minimal. The Company's interest in preserving employee confidence in the testing program is well founded.
>
> In light of the sensitive nature of testing information, the minimal burden that compliance with the Company's offer would have placed on the Union, and the total absence of evidence that the Company had fabricated concern for employee confidentiality only to frustrate the Union in the discharge of its responsibilities, we are unable to sustain the Board in its conclusion that the Company, in resisting an unconsented-to disclosure of individual test results, violated the statutory obligation to bargain in good faith.

B. *Additional Grievances*

1. The grievances of McAllister, Mosco, and Zipf

Each of these employees had filed grievances relating to disciplinary actions taken against them because of excessive absenteeism. In each instance, the local union representing them made requests for certain company records relating to the absences of the grievants or to other similarly situated employees. The Company's responses varied in each case.

In the case of McAllister, Local 1024 requested her absence records during the first step of the grievance procedure. It did so orally and by letter. The letter asked the Company to produce certain of McAllister's records by form G-520 and C-4014 and "any other documentation relevant to [McAllister's] history of absence to date." Respondent rejected this request, citing its employee privacy protection plan. It asserted that McAllister would have to consent to the release of her records. Subsequently, the Company did tender to the Union, notwithstanding the fact that McAllister had not given her consent, a handwritten summary setting forth the dates and durations of her absences since March 1982. The summary also set forth the reasons that McAllister had given for her absences. (I.e., flu, weak and nauseous, upset stomach, sunburn, and virus.) When the Union indicated that it still wanted to see the official records on which the summary was based, the Company refused, again citing the privacy plan.[9] Thereafter, the Union reiterated its request in writing and the Company took the position that McAllister's consent was a necessary precondition for release of her records.

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[9] The processing of a grievance under a collective-bargaining agreement is, to some degree, analogous to a trial. In the latter instance, while summaries may be offered by one party into evidence, it must make available to the other side the records on which the summary is based. Fed.R.Evid. 1006.

On May 10, the Company asked McAllister if she would consent to the release of her records and she said she wold have to discuss this with her shop steward. Apparently, the Company construed her answer as a consent and gave the Union some, but not all, of McAllister's absence records. Thus, although it tendered copies of her forms G-520 and C-4014, it furnished her G-661 record in an expurgated fashion. although Company argues that it had no obligation to furnish the G-661 record because the Union did not explicitly request that form, the evidence shows that the Union's representatives, and indeed some of the Company's representatives, were not aware that the form G-661 was a separate form. In any event, it also is evident that as a matter of practice, the form G-661, on which the supervisor may record his evaluation of an employee's absence excuses, is incorporated by reference into the form C-4014 and is part of an employee's absence records. Also, the Union while designating the forms G-520 and C-4014 in its initial request for information additionally requested any other documentation relevant to McAllister's history of absences.

As the grievance involved McAllister's receipt of discipline for her absences, it is axiomatic that all of her absence records, during the relevant period of time, would be relevant to her grievance and therefore discoverable by the Union. Moreover, the form G-661 was probably more relevant to her grievance than the other information furnished by the Company because it contained the supervisor's evaluation of McAllister's excuses, and a record of the discussions and/or warnings that preceded the particular disciplinary action. As the evidence shows that the Company did not turn over all of McAllister's absence records, but rather turned them over with substantial deletions, I conclude that it violated Section 8(a)(1) and (5) of the Act.

In reaching this conclusion, I am mindful of the Third Circuit's earlier opinion in *New Jersey Bell Telephone Co. v. NLRB*, 720 F.2d 789 (3d Cir. 1983). In this respect, I believe the facts are distinguishable.[10] Unlike the facts of the earlier case, the facts here do not disclose that the Union directed McAllister to withhold her consent to the release of her records or that she at any time expressed any concern that their release would infringe on her privacy. Also, unlike the earlier case in which the absence records showed medical reasons for being absent that were highly intimate and personal, the excuses given by McAllister, which were in fact turned over to the Union before she gave her "consent," were of the garden variety of common ailments.

With respect to the Mosco grievance, the Union initially asked to see the attendance records of all the employees in the New Brunswick office, of which there are about 39. The Company refused, asserting that employee releases would have to be secured. On April 12, after the grievance was filed, the Company offered to show the Union the records of the three worst offenders if the Union paid for the cost of duplication. The Union refused this offer, asserting that it wanted to see all the records.

On April 15, Mosco signed a release for her own records, but when Union Representative Hutchins asked to make photocopies of Mosco's records this was refused and Hutchins was forced to copy the records by hand. Also, Hutchins was not shown that portion of Mosco's records containing the record of discussions (i.e., the G-661 form).

On May 2, at the first-step grievance meeting, Hutchins asserted her opinion that Mosco was being treated differently from other employees who had similar types of absences excused. When the Company challenged her to prove this allegation, she said that she could not because of her inability to obtain the requested records. Subsequently, Mosco's grievances terminated because the Union did not meet the contractual time limits for appealing to the next step.

In relation to the Mosco grievance, it seems to me that her own absence records were clearly relevant to her grievance, which involved discipline for her excessive absenteeism. As in the case of McAllister, there was no showing that the Union directed Mosco to withhold her consent for release of her records and, in fact, she did sign a release. Accordingly, I can only conclude that when Respondent failed to tender the entirety of her absence records, it violated Section 8(a)(1) and (5) of the Act. Also, it is my conclusion that when Respondent refused to allow Hutchins to make photocopies of the records, that it further violated Section 8(a)(1) and (5) of the Act. Thus, in *Communications Workers Local 1051 v. NLRB*, 644 F.2d 923, 926–927 (1st Cir. 1981), the court stated:

> The evidence establishes that the "no photocopy" rule made it expensive and time-consuming, if not impossible, for the union to obtain the reliable copies it required to discharge its duties as bargaining representative. The rule plainly disadvantaged the union in evaluating and prosecuting grievances and was likely to discourage resort to the grievance process at all in some cases.
>
> In view of the company's vigorous defense of its ban on photocopies, we find it perplexing, to say the least, that it has neglected even to assert a legitimate business justification for its policy. Despite repeated inquiries by the ALJ, the company declined during the hearing to disclose the reason for its rule, and has continued on appeal to rely on its bare legal right to determine as it chooses, how information will be disclosed to the union. As we said in *NLRB*

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[10] Even assuming that the facts were indistinguishable from the earlier case, I would nevertheless be constrained to follow the Board's precedent. Thus, in *Insurance Agents*, 119 NLRB 768, 773, the Board stated:

> It has been the Board's consistent policy for itself to determine whether to acquiesce in the contrary views of a circuit court of appeals or whether, with due deference to the court's opinion, to adhere to its previous holding until the Supreme Court of the United States has ruled otherwise. But it is not for a Trial Examiner to speculate as to what course the Board should follow where a circuit court has expressed disagreement with its views. On the contrary, it remains the Trial Examiner's duty to apply established Board precedent which the Board or the Supreme Court has not reversed. Only by such recognition of the legal authority of Board precedent, will a uniform and orderly administration of a national act, such as the National Labor Relations Act, be achieved.

See also *Typographic Service Co.*, 238 NLRB 1568, 1573 fn. 13 (1978); *Charles D. Bonanno Linen*, 229 NLRB 624 (1977).

> *v. Borden, Inc., Borden Chemical Division*, 600 F.2d 313, 318 (1st Cir. 1979), management's prerogative to determine the form of information disclosure is not a license to put the union "through the hoops": "The union is under no obligation to utilize a burdensome procedure of obtaining desired information where the employer may have such information available in a more convenient form" (*quoting The Kroger Company*, 226 NLRB 512, 513 (1976)). We held in *Borden* that management could not refuse to supply the union with insurance cost data because the same information could be had by polling the employees. We see no reason to accord greater deference to management prerogative, if any exists, when, as here, the employer supplies information in the requested form (original documents) but seeks to limit the means by which the union may make copies. We affirm the Board's decision that application of the "no photocopy" rule in these cases unnecessarily impeded the grievance process.

Finally, regarding the Mosco grievance, it is my opinion that the Union's request for the attendance records of the other employees in her office was a valid one. The Union asserted its belief that Mosco was being treated in a disparate manner from other employees. Whether this belief was correct is not really the point, as an examination of the records, even if establishing that the claim was without merit, would have aided the grievance process. This is so because such disclosure might have convinced the Union to withdraw the grievance and thereby cause itself and the Company to cease spending time and effort on an invalid claim. As noted by the Court in *NLRB v. Acme Industrial Co.*, supra, a union's need for information is not dependent on a showing that the information will aid the union in winning the grievance. Of equal importance, is the need of a union to sift out nonmeritorious claims that would bog down the grievance-arbitration process.

With respect to the Company's defense that it legitimately required employee releases before releasing these records, I conclude that this defense is without merit for the same reasons stated above. That is, there was no showing that the Union directed any of the employees to refuse to sign releases, there was no evidence that any employees objected to the release of such information, and there was no showing that these particular records contained information of a medical nature that was highly intimate or personal. However, in light of the Third Circuit's opinion in the prior case, the Board may want to consider whether to allow the Company in the future to furnish these types of absence records without employee identification.

To the extent that the Company asked the Union to pay for the cost of copying the records, this may be a reasonable request where, as here, numerous documents need to be photocopied. Therefore, it seems appropriate for the parties to bargain about the circumstances in which the Union will pay for the cost of copying company records and the costs involved. *Communications Workers Local 1051 v. NLRB*, supra at fn. 3.

With respect to the grievance involving Zipf, the record shows that when Shop Steward Heyer asked for Zipf's absentee records, he was told that Zipf's consent was needed and that her records would only be released after a formal grievance was filed. When the Union did file a formal grievance, it again requested Zipf's records and offered to pay for the costs of photocopying. After Zipf signed a release, the shop steward was allowed to review Zipf's records but was required to make notes by hand in the presence of a supervisor.

It is my opinion, for the reasons expressed above, that the Company violated the Act by conditioning release of the records on Zipf's consent. Also, I conclude that Respondent violated the Act by additionally conditioning release of Zipf's records on the filing of a formal grievance. See *Tom's Ford, Inc.*, 253 NLRB 888, 894 (1980). Finally, I conclude that the Company violated the Act by refusing to allow the Union to make photocopies of Zipf's records after Zipf had signed a release and after the Union offered to pay for the cost of copying.

2. The Brill grievance

In this instance, the Union requested from the Company Brill's medical records including the reports made by consulting psychologist, Dr. Schwed. The records were clearly relevant to Brill's grievance as the issue was whether her present medical condition warranted her continued eligibility for disability pay after her return to work following a medical leave of absence.

Recognizing that disclosure of Brill's medical records required her consent, the Union asked her to send a letter to the medical department, requesting her records. She did this on November 9, 1982. On December 6 when Brill, accompanied by Union Agent Huber, went to the medical department, he was not allowed to review her records and Brill was told that the psychologist's reports would not be turned over to her. Rather, she was told that the Company would send these reports to her private physician. Brill objected to no avail and it was not until a month later that these records were transmitted to Brill's physician. When he got them, he turned them over to Brill and she turned them over to the Union. In the meantime, her grievance was pending.

Under Board law, medical records are accorded a high, if not absolute degree of confidentiality even if relevant to the bargaining process. *Minnesota Mining & Mfg. Co.*, 261 NLRB 27 (1982), enfd. 694 F.2d 1289 (D.C. Cir. 1982); *LaGuardia Hospital*, 260 NLRB 1455 (1982); *Johns-Manville Sales Corp.*, 252 NLRB 368 (1980); *Colgate Palmolive Co.*, 261 NLRB 90 (1982). Nevertheless, even assuming in a particular case that the need for confidentiality outweighs the need for medical records, the Board has noted that the "privilege in question, of course, belongs to the employees and not to the Respondent." *Johns-Manville Sales Corp.*, supra. Therefore, it is plain that the assertion of a confidentiality privilege may not be asserted as a defense, if the employee whose records are sought has consented to their release.

It is true, in the present case, that Brill did not explicitly, in writing, authorize the release of her medical records to the Union. Nevertheless, considering all the circumstances, it seems to me that the Company was aware that Brill wanted these records furnished to her and that she intended to give them to the Union in support of her grievance. Indeed, when she went to the medical department on December 6 to pick up her records, she asked that the shop steward be allowed to accompany her into the interview with Dr. Fitzpatrick. Nevertheless, the Company not only refused this request, but refused to turn over the records to Brill. Also it refused to allow her to look at her records or even to be read the full contents.

It appears that the Company's policy is to refuse to honor any employee's request for direct release of medical records (apart from hard test data), irrespective of the employee's medical condition. The Company makes a blanket assertion that such direct release would be harmful to an employee's health. I do not accept this generalized assertion, which assumes that under any circumstance the release of medical records directly to employees would be detrimental to them. As stated above, it is my belief that such a position is outdated at best, and appears to be contrary to the laws of the State of New Jersey. It is my opinion that a person, if he or she so desires, is entitled to have information concerning his/her own body and mind. It is recognized that there may be extreme circumstances (such as terminal illness or suicidal depression) that might justify a physician in refusing to furnish medical records if it is demonstrated, on an objective basis, that such disclosure would be harmful to the health or mental condition of a patient. However, I am satisfied that no such showing has been made in the present case as I do not believe that either of Dr. Schwed's reports, if disclosed to Brill, could conceivably have been detrimental to her health or mental condition.

Based on the above, it is concluded that Respondent violated Section 8(a)(1) and (5) of the Act when it refused the requests of the Union and Brill to turn over her medical records to be used in connection with her grievance.

3. The grievance of Mananian and Marotta

When Mananian and Marotta received unsatisfactory sales performance ratings, Local 1024 filed grievances on their behalf even though they had received satisfactory ratings regarding their overall performance. Both of these indididuals were shop stewards, and as such spent part of their time doing union work. As the rating for sales performance is based on a quota, the Union argued, in part, that the Company should have taken into account the fact that both individuals spent part of their time in union business. In this regard, it was shown that other employees who work on other functions have lower sales quotas.

In support of its grievance, the Union requested from the Company the cumulative sales records of all the employees in the office and the Company responded that this information could not be turned over absent employee consent. Previously, these records, which consist of a single page for each employee listing their sales and quotas, had been published by the Company. However, when employees complained that their publication was divisive, the Company ceased that practice.

On March 10, the Union repeated its request for the records although it indicated that the records could be provided with the names of the individuals deleted. The Company, while refusing this request, did offer to furnish the sales figures of the three lowest sales producers, without identification, who received satisfactory ratings. This offer was rejected by the Union.

On April 8, the Company, instead of sending copies of the actual records to the Union, sent a summary that set forth each employee by letter designation, and set forth his or her average monthly sales revenues. The summary also set forth whether the employee was engaged in sales on a full-time or part-time basis, and whether the employee had an unsatisfactory sales rating. The Union responded that the summary tendered was not sufficient for its needs and again requested copies of the actual sales records.

It is my opinion that the information sought was relevant to the grievances involved. In this regard, it seems to me that the Union had a colorable claim that whem sales quotas are lowered for other employees who do not work full time in sales, the shop stewards who are required to spend some of their time in union business should be treated in a similar fashion. (This does not mean, however, that I conclude that the Union's grievance ultimately would have been successful.)

The Company's claim that the sales records were confidential and required employee consent for their release is rejected. I do not see any rational basis for asserting that such sales figures, if released to the Union (and not generally published) would have invaded a legitimate privacy interest of the employees. Any concern employees might have regarding the release of such records is, in my opinion, outweighed by the Union's need for information relevant to grievances handling. Moreover, the Union indicated that it was willing to receive the information without employee identification.

Where, as here, the records involved were readily available and not particularly voluminous, I also do not understand why the Company simply did not turn them over as requested. Thus, in the absence of any evidence showing a justification for a refusal to tender copies of the actual records, it is my opinion that tender of a summary is not sufficient to meet the Company's obligation to furnish relevant information.

4. The Sistrunk grievance

Local 1023 filed a grievance on Sistrunk's behalf when she did receive a promotion to a drafting position. It did so because another employee, Serone, received the promotion notwithstanding her lower seniority.[11] The Company, in response to the grievance, asserted that Serone was given the promotion over Sistrunk because she had previous drafting experience and because she had a handicap, which gave her a priority under the Company's affirmative action program. When the Company gave these reasons, the Union asked to see Serone's upgrade application to verify the Company's assertions regarding Serone. The Company refused citing its privacy plan and asserted that Serone would have to authorize release.

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[11] The contract at art. 9 states, in substance, that in promotion to non-management positions within the bargaining unit seniority shall be controlling, where "all other qualifications including ability, knowledge of the job to be filled, attendance record, dependability and availability for the assignment are substantially equal."

Clearly, the information requested was relevant to the grievance because of the Company's asserted reasons for promoting Serone over Sistrunk. Simply stated, the Union should be entitled to verify, through appropriate records, the facts asserted by the Company instead of being compelled to accept the Company's word. In this case it is my opinion that the Union's need for the information outweighed any claimed right of privacy. I also think the facts are distinguishable from the facts in the Third Circuit's earlier opinion. First, the Union did not direct Serone to refuse to sign a release. Secondly, the Union made no request for any information disclosing the precise nature or extent of Serone's handicap. Finally, the Company did not demonstrate that Serone's application contained information of a medical nature that was highly intimate or personal. I also note that although the Union did not seek to obtain Serone's consent for release of her application, there is no assurance that she would have given her consent in view of the fact that the Union's position regarding the grievance was adverse to her. If Serone had refused to give her consent, would the Union then be compelled to process the grievance without the necessary documentation?

5. The grievances of Dobish, Tiernan, and Dunston

Each of these employees received unsatisfactory performance ratings and in the case of Tiernan, she received a final warning. A grievance was filed in each instance and the Union requested certain information in relation to the grievances.

With respect to Dobish, the Union requested receipt of her performance evaluation. After Dobish signed a release, a union representative was allowed to review this document, but the request for a photocopy was refused. After reviewing the evaluation, the Union decided to process Dobish's grievance further and requested the job performance records of the other employees in the office. On April 25, the Company notified the Union that it would not furnish these records without employee consent. When the Union contacted Frank Sabo, the Company's director of labor relations, he stated the Union would have to pay for the cost of duplicating the records. On May 4, the Union wrote to Sabo reiterating its request for the records and asking for a cost estimate for copying. On May 11, Sabo replied, asserting that he could not comply with the Union's request because the grievance had not yet been appealed to the third step of the grievance procedure.

Obviously the records of Dobish were relevant to her grievance and I conclude that Respondent violated Section 8(a)(1) and (5) of the Act by refusing the Union's request to have photocopies made of her records. *Communications Workers Local 1051 v. NLRB*, supra. I am also of the opinion that the request for the performance records of the other employees was relevant to the grievance because the Union was entitled to discover whether Dobish was treated in a disparate manner. As the information involved was not of a medical nature or, in my opinion, otherwise confidential in nature, I reject the Company's claim that it could legitimately condition their release on the employees' consent.

Based on the above, I therefore conclude that the Company violated Section 8(a)(1) and (5) of the Act. As in the case of the Mosco grievance, it seems appropriate for the parties to bargain about the circumstances in which the Union will bear the cost of copying and the costs involved.

Regarding the Tiernan grievance, Local 1024 was given Tiernan's records after she signed a release. When the Union asserted that it believed that Tiernan was being treated in a disparate manner from other employees, it requested the job performance records of the other service representatives in the same office. In making this request, the Union indicated to the Company that it did not need these records identified by employee names. Nevertheless, the request was denied. On May 4, the Union wrote to Respondent reiterating its request and setting forth its reasons. When the Union again repeated its request for the records (without employee identification) on May 22, the Company refused, stating that employee releases were necessary. Thereafter, it appears that Tiernan's grievance was settled when the warning was retracted.

For essentially the same reasons set forth above, I conclude that the information requested was relevant to the grievance under the broad discovery standard applicable to these cases. I do not conclude that the information sought was confidential or otherwise privileged from disclosure by virtue of a claimed right of privacy. Therefore, I conclude that the Employer violated Section 8(a)(1) and (5) of the Act by conditioning release of these records on employee consent.

Concerning the grievance of Hartent Dunston, who was disciplined for poor work performance, I conclude that the records requested by the Union (Dunston's absence and job performance records) were relevant to the grievance. As there is no showing that the Union requested Dunston to refuse to sign a release, and because there is no evidence that Dunston objected to their release, I conclude that Respondent, by refusing to turn them over unless she signed a release, violated Section 8(a)(1) and (5) of the Act.

CONCLUSIONS OF LAW

1. New Jersey Bell Telephone Co. is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

2. Communications Workers of America and its Locals 1022, 1023, and 1024 are labor organizations within the meaning of Section 2(5) of the Act.

3. All nonsupervisory employees of Respondent's commercial and marketing departments constitute a unit appropriate for the purposes of collective bargaining within the meaning of Section 9(b) of the Act.

4. At all times material the Communications Workers of America has been the exclusive collective-bargaining representative of the employees in the aforesaid appropriate unit within the meaning of Section 9(a) of the Act.

5. At all times material, the Communications Workers of America, with the assent of Respondent, has delegated to its Locals 1022, 1023, and 1024 the administration of the collective-bargaining agreement at the local level and the processing of grievances at the first two steps of the contractual grievance procedure.

6. By failing to provide certain information and records to the Union and by failing to provide photocopies of certain records to the Union, when such records were requested for the purposes of administering the collective-bargaining agreement, Respondent has violated Section 8(a)(1) and (5) of the Act.

7. The aforesaid unfair labor practices affect commerce within the meaning of Section 2(6) and (7) of the Act.

THE REMEDY

Having found that Respondent has engaged in certain violations of the Act, I shall recommend that it be ordered to cease and desist therefrom and that it take certain affirmative action to effectuate the policies of the Act.

Insofar as the denial of information relating to the McAllister grievance, I recommend that Respondent furnish to the Union copies of all of her absentee records including an unexpurgated copy of the record designated form G-661.

Regarding the Mosco grievance, as this grievance terminated, the information requested has no current utility. I, therefore, shall not recommend that the information requested be turned over to the Union. This does not mean, however, that I conclude that the entire issue is moot so as to warrant dismissal of the charge in question. To the contrary, it is apparent that the Company's refusal to furnish relevant information in these cases was part of an overall pattern of nondisclosure that, unless ordered to cease, will continue in the future. *C-B Buick Inc. v. NLRB*, 506 F.2d 1086, 1092–1093 (3d Cir. 1974); *Boyer Ford Trucks*, 254 NLRB 1389, 1394 (1981). Accordingly, I recommend that Respondent be ordered to cease and desist in the future from violating the Act in similar respects.[12]

With respect to the Zipf grievance, I recommend that Respondent be ordered to turn over copies of Zipf's absentee records because I have concluded in the circumstances that Respondent unlawfully conditioned release of her records on her consent and on the filing of a formal grievance. I also recommend that the question of who will bear the cost of copying records is properly a subject for negotiations between the parties.

In connection with the Brill grievance, I will recommend that an order be issued directing the Company to turn over to Brill a copy of her medical records to the extent that they are not already in her possession. (It is not clear from this record whether she had obtained both of Dr. Schwed's reports.) Further, in future cases whem an employee's medical records are relevant to the employee's grievance, I recommend that such records be turned over to the Union on that employee's consent, or directly to the employee if such employee requests them from the Company's medical department. When such employee medical records are furnished to the Union, however it should be understood that the Union, its officers, agents, members, and attorneys shall not divulge such information, absent the employee's consent, to any other persons who are not involved in or necessary to the resolution of the grievance in question. Further in such rare and extreme circumstances (such as terminal illness or severe mental disorder), where, in the exercise of medical judgment, the disclosure of an employee's medical records is objectively judged to be harmful to an employee's health or mental condition, Respondent may fulfill its obligation by promptly transmitting such records to any physician designated by the employee.

Regarding the grievances of Mananian and Marotta, I recommend that Respondent furnish to the Union the cumulative sales records of the employees in the Pascade Valley office as requested by the Union without conditioning their release on the employees' consent. As noted above, the question of the cost of copying is a matter that the parties should negotiate.

Regarding the Sistrunk and Tiernan grievances, as those matters ultimately were settled in the grievance procedure, the information requested has no current utility. Accordingly, as in the case of the McAllister grievance, I shall not recommend that Respondent furnish this information. Since I have concluded that Respondent has violated the Act in these incidents, however, I do not consider these cases moot and I shall recommend that Respondent be ordered to cease and desist from similar violations in the future.

In connection with the Dunston grievance, I shall recommend that the Respondent furnish to the Union her absence and job performance records without conditioning their release on Dunston's consent.

[Recommended Order omitted from publication.]

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[12] In light of the Third Circuit's opinion in the prior case, *New Jersey Bell Telephone Co. v. NLRB*, supra, the Board may wish to consider modifying this order to provide that in grievances whem absence records are sought, such records of employees other than the grievant, may be furnished without employee identification unless such employees give their consent.

Kenmore Contracting Co., Inc. and Sloan Steel Erectors and Equipment Rental, Inc. ***and*** **International Association of Bridge, Structural and Ornamental Iron Workers, Local No. 6, AFL-CIO.** Case 3-CA-11787

June 24, 1988

DECISION AND ORDER

BY CHAIRMAN STEPHENS AND MEMBERS JOHANSEN AND BABSON

On September 12, 1984, Administrative Law Judge Winifred D. Morio issued the attached decision. The General Counsel filed exceptions and a supporting brief, and the Respondents filed cross-exceptions and supporting briefs.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings,[1] and conclusions only to the extent consistent with this Decision and Order.[2]

The judge found that Kenmore and Sloan are not alter ego corporations and do not constitute a single employer. She concluded, therefore, that they did not violate Section 8(a)(5) and (1) of the Act by failing to apply the terms of the collective-bargaining agreement between Kenmore and the Union to Sloan's employees. For the reasons set forth below, we disagree with the judge's determination, and we find that Sloan is the alter ego of Kenmore and that they have violated the Act as alleged.[3]

The facts, which are largely undisputed, are detailed in the judge's decision. Kenmore is a steel erection company that performs construction work using its own cranes and equipment. It also leases cranes and related tools, such as welders, to other construction contractors. Kenmore has been owned since 1966 by Jacqueline Hanley and her husband, Hugh Hanley Jr. They are the Company's only officers. Kenmore is a member of the Construction Industry Employers Association, Inc. (CIEA) and, through CIEA, has been party to a series of collective-bargaining agreements with the Union, the most recent of which was effective from June 1, 1981, through May 31, 1984. The Building Trades Council (BTC), of which the Union is a member, prohibits union employers such as Kenmore from performing construction work at sites where nonunion contractors perform work, and the CIEA-union agreement prohibits ironworkers from working for nonunion contractors.

On November 4, 1981, two of the Hanley's children, Cherub and Patrick, then 27 and 21 years old, respectively, formed Sloan, a nonunion steel erection and crane rental company. Cherub is Sloan's president and Patrick is its vice president; they are Sloan's only officers and shareholders. Sloan performs steel erection work in western New York State, the same geographic area that Kenmore services. Sloan rents all the construction equipment it uses from Kenmore, and but for a pickup truck purchased on credit through a friend of the Hanley family, Sloan owns no field equipment. Sloan subleases cranes and other tools it rents from Kenmore to third parties. No other Kenmore customers are permitted to engage in third-party rentals. Additionally, unlike other Kenmore customers, Sloan is not required to lease the services of Kenmore crane operators when it uses Kenmore cranes[4] and, accordingly, is able to sublease Kenmore equipment to third parties using Sloan operators. Sloan's employees—who numbered 14 on its largest job—are paid approximately one-third of the union wage rate and do not receive fringe benefits. The parties stipulated that both companies share many of the same customers.[5]

Sloan's office is an 8- by 10-foot area located within the Kenmore office. Pursuant to an unwritten agreement, it rents this space from Kenmore for $100 a month, a figure unilaterally set by Kenmore. Although Sloan has been as much as 6 months late in rent payments, Kenmore has never required that it pay interest or penalties. Sloan owns no office equipment and uses without additional charge Kenmore's adding machine, typewriter, and office supplies. It maintains its own payroll, bank account, books, and records.

At the time of the formation of Sloan and continuing through the date of the hearing in these proceedings, Cherub and Patrick Hanley were fi-

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[1] The General Counsel has excepted to the judge's failure to resolve a conflict in the testimony of Fitzpatrick and Hugh Hanley Jr. concerning whether the latter said he was paying Sloan employees $7 an hour. In view of the decision we have reached, we find it unnecessary to resolve this question of credibility.

[2] We affirm the judge's finding that the Charging Party Union first acquired specific knowledge of the existence of Respondent Sloan approximately 1 month prior to the filing of the charge. We further affirm her conclusion that the charge was timely filed.

[3] In view of our finding that the Respondents are alter egos, we find it unnecessary to pass on the General Counsel's alternative allegation that the corporations constitute a single employer.

[4] Hugh Hanley Jr. testified that Kenmore once leased a crane without a crane operator to a contractor named Stimm.

[5] Pursuant to the stipulation, G.C. Exh. 8 indicates that Sloan's only customer in 1981 was also a Kenmore customer, and that in 1982 five of eight Sloan customers were Kenmore customers. In 1983 and 1984, respectively, 8 of 12 Sloan customers and 12 of 18 Sloan customers were or had been Kenmore customers.

289 NLRB No. 56

nancially dependent on their parents. Cherub and her son live in a condominium apartment owned by her parents, for which half the mortgage, fees, and utilities are paid by her parents. Her parents also pay her son's school tuition and approximately half the cost of his clothing. Patrick lives with his parents when not residing on campus at the Rochester Institute of Technology, and his parents pay his tuition and expenses. Additionally, both Cherub and Patrick were employees of Kenmore at the time of Sloan's formation. Cherub worked as a receptionist for Kenmore until July 1983 at a salary of $150 a week. Patrick was employed as a yardman. He testified that his employment with Kenmore ceased when Sloan was formed. Although neither Cherub nor Patrick has any previous experience in the industry, Cherub is Sloan's office manager and bookkeeper, and Patrick, whose title is field superintendent, estimates and bids Sloan jobs and supervises work at Sloan construction sites.[6] Cherub used the proceeds ($1400) from the sale of a car her parents had given her to capitalize Sloan.[7] Patrick testified that he contributed $1200 to capitalization, money from a student loan he secured for college but did not use for that purpose because his parents financed his education.

The judge correctly stated that in determining alter ego status, the Board considers whether the companies have substantially identical ownership, management, business purpose, operations, customers, equipment, and supervision.[8] As she pointed out, no one factor is controlling. The judge found, and the record establishes, that Kenmore and Sloan exist for the same business purpose, use some of the same equipment,[9] and share the same premises.[10] She also found, however, that this evidence is insufficient to outweigh what she deemed to be a lack of common ownership, management, and control over labor relations policy. Contrary to the judge, we find that the evidence establishes that Kenmore and Sloan are commonly owned, operated, and managed and that the record as a whole warrants a finding that the two corporations are alter egos.

First, we note that a finding of common ownership may be made where, although the same individuals are not shown to be owners of each corporation, the corporations are solely owned by members of the same family. *Watt Electric Co.*, 273 NLRB 655, 658 fn. 17 (1984); *E. G. Sprinkler Corp.*, 268 NLRB 1241, 1244 (1984), enfd. sub nom. *Goodman Piping Products v. NLRB*, 741 F.2d 10 (2d Cir. 1984). Granting that the existence of a close family relationship between owners of two companies will not always establish the common ownership element in an alter ego inquiry, we see no impediment to such a finding here, given the record evidence of Cherub's and Patrick's financial dependence on their parents and the less than arm's-length dealings between Kenmore and Sloan in the course of the latter's founding.[11]

Patrick and Cherub were able to provide the minimal capitalization of Sloan ($2600) only by virtue of aid from their parents. Specifically, Jacqueline's and Hugh's payment of Patrick's tuition enabled him to divert his student loan to the capitalization of Sloan; and Cherub's initial investment was made possible by the opportunity, immediately on the sale of her car, to lease a car from Kenmore, at a rate set by Kenmore with sporadic rental payments made through Sloan.

Concerning Sloan's operations, Kenmore and Sloan share the same premises, office equipment, and supplies and have open access to telephones and workspace. As the record establishes that Sloan owns no equipment except a pickup truck, uses Kenmore cranes for its own erection work, and subleases Kenmore property to third parties, it is clear that Kenmore and Sloan share substantially the same equipment. Further, although the Hanleys describe the two corporations as competitors, Sloan's ability to provide equipment to third parties is dependent on its having access to Kenmore equipment without operators. In this regard, Sloan subleases Kenmore equipment to third parties at the same cost it is charged by Kenmore, but derives its profits from the amount it charges for also providing an operator. Moreover, Sloan is the only Kenmore customer permitted to engage in third-party rentals.[12] On two occasions Sloan was awarded jobs it could not perform, and it subcontracted both to Kenmore without seeking or inviting other bids. On one of those jobs, the Walden job in August 1983, Kenmore earned $800 or more as the subcontractor while Sloan received only $100. On the Iroquois Central School project that was subcontracted to Kenmore, Sloan made no profit at all.

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[6] As a yardman for Kenmore, Patrick helped to load trucks, did odd jobs, and generally kept the yard clean. Patrick never operated a crane. His only experience estimating a job was for a school project.

[7] Immediately after selling her car, Cherub, through Sloan, rented a car from Kenmore for $150 a month. As with the office rental, the figure was unilaterally set by Kenmore and although the rent payment was as much as 9 months in arrears, no interest or penalty was charged.

[8] See *Leslie Oldsmobile*, 276 NLRB 1314 (1985); *Advance Electric*, 268 NLRB 1001 (1984); and *Crawford Door Sales Co.*, 226 NLRB 1144 (1976), cited with approval in *Goodman Piping Products v. NLRB*, 741 F.2d 10, 11 (2d Cir. 1984). As explained below, the Board has also considered employer motivation in assessing alter ego status.

[9] As explained, infra, we find that the Respondents use substantially more than "some" of the same equipment.

[10] We agree with the judge that Hugh's instructing Sloan employees in the proper use of a crane and proper hand signals on August 1, 1983, at the National Fire Adjuster jobsite was too isolated an incident on which to base a finding of common supervision.

[11] We find the instant case distinguishable from cases in which the Board found that alter ego status was not established between corporations in which the owners were members of the same family. In *Best Mechanical Contractors*, 273 NLRB 83 (1984), in which the closing of the business of M. H. Best was followed by the opening of a business by his son and son-in-law, the new business did not engage in the same kinds of projects as the old one and its purchases of equipment and other transactions with the old corporation were all at arm's length. These same circumstances—different markets and arm's- length dealings between the two family-owned corporations—were also present in *United Constructors*, 233 NLRB 904 (1977). In *Hillsamer Painting Contractors*, 272 NLRB 1366 (1984), the assistance of the father (who owned Hillsamer) to the son (who owned Commercial Decorating) was minimal (use of a telephone and some clerical assistance for a brief period). The evidence of financial dependence and subsidizing of the formation of the new enterprise did not approach what was shown in the present case.

Likewise, the instant case differs from *Victor Valley Heating & Air Conditioning*, 267 NLRB 1292 (1983), in that in *Victor Valley*, although the father gave advice and training at the start of the business formed by the son and the son's friend, the son contributed the entirety of the capital (from his own funds and a gift from a grandmother who had no demonstrated connection with the other corporation), and the new corporation paid cash for equipment it received from the father's business. Id. at 1293, 1297. *Victor Valley* is distinguishable also for reasons discussed infra at fn. 18.

In addition to this evidence concerning Sloan's manner and method of doing business, the record reveals that Jacqueline and Hugh Hanley and Kenmore employee Tina Kasinski are integrally involved in Sloan's everyday affairs, including answering telephones, noting records, bookkeeping, and preparing job estimates and specifications, tool lists, and payroll. In this regard, we note that Kasinski completed substantial portions of Sloan's individual payroll records, including those pertaining to Cherub's and Patrick's earnings, for the 23-week period from July through December 1983.[13] Her entries and calculations, as well as those made by Jacqueline, also appear frequently in Sloan's cash disbursement/payroll journal for the months of March through December 1983. A review of Sloan invoices for that year reveals that Jacqueline took a customer order (invoice 8438) and twice wrote in notations instructing that no tax should be charged Sloan customers (invoices 8427 and 8431).[14] Attachments to Sloan invoices 8432, 8410, 8411, and 8412 are price specifications drawn up by Hugh. Invoices 8432 and 8411 also have attachments in Patrick's handwriting. It is noteworthy that while Patrick and Hugh's figures for invoice 8432 are the same, the price actually billed on invoice 8411 is the one calculated by Hugh. Significantly, those invoices that reflect Jacqueline's, Hugh's, and in one instance Hugh III's[15] input account for more than half of Sloan's income from erections and rentals for 1983.

Also relevant to our analysis is Cherub's salary as a Kenmore receptionist, which was nearly three times that of her Sloan salary between November 1981 and August 1983, even though, she testified, she divided her workday equally between the two companies. She earned $150 a week from Kenmore and $55 a week from Sloan until the pay period ending July 31, 1983, when she purportedly ceased working for Kenmore and began earning $150 a week from Sloan.[16] What is most salient about Cherub's salary is that Sloan records show that Cherub's first paycheck at the higher salary was written on August 3, 1983, 2 days after Union Representative Fitzpatrick encountered Hugh at a Sloan jobsite. Patrick's salary likewise increased, from $55 to $140, on August 3.

We find it relevant, too, under the circumstances, that Patrick painted the exterior of the Kenmore building at a time when he was no longer a Kenmore employee. Patrick testified variously that he received only his regular Sloan salary for this work, that he "imagine[d]" Kenmore paid Sloan but "to be perfectly honest" he did not know, and that Sloan was compensated but the price was left "to the owner of the building."[17]

In our view the foregoing evidence, particularly Sloan's unique and total reliance on Kenmore for equipment rentals and the day-to-day input of Kenmore personnel in Sloan's affairs, establishes that the operations of Kenmore and Sloan are so interrelated and symbiotic as to be substantially identical.[18]

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[12] Sloan is also the only Kenmore customer permitted to select the actual cranes and tools it desires, and frequently rents them without executing the customary Kenmore paperwork.

[13] Kasinski's weekly entries account for nearly all the entries for all employees for August.

[14] Notwithstanding Cherub's explanation that Sloan was "new in the business" and uncertain about some tax matters, we note that the invoices noted "no tax" are dated November 1983 and involve equipment rentals, a service that Sloan had provided for 2 months and that Kenmore had provided Sloan for 2 years. Regarding invoice 8416, which bears Jacqueline's instruction to "continue billing Spancrete," Patrick testified that although he could not actually explain the notation, he believed he may have asked his mother to mark the invoice on an occasion when he telephoned the office while Cherub was out.

We also note that Patrick was away at school during the fall of 1983 and that Cherub attended office courses during the summer and fall of that year. Although Sloan hired Linda Longobardi on September 29 to help around the office, she was laid off on November 8 and worked only 56 hours in the 7 weeks she was employed, usually 3.5 hours on Monday and Tuesday of each week. In light of these facts, it appears that there were frequent and substantial periods of time when no Sloan personnel were present in the office at all.

[15] Hugh Hanley III is another of Jacqueline and Hugh Jr.'s children. He is an ironworker and has been employed by Kenmore.

[16] Cherub did not articulate any reason for her ceasing to work for Kenmore, nor did she indicate that her termination resulted in her ceasing, for example, to answer Kenmore phone calls or to perform other receptionist's duties.

[17] We note, but find no need to base our finding of common operations on the fact that Patrick painted a 35-ton Kenmore crane. Cherub denied knowing that any equipment was painted but stated that the equipment needed it and surmised that the improvement would make for a better impression. Kenmore employee R. Barry Miller, who is Jacqueline and Hugh's nephew, testified that Patrick often selected equipment that did not bear the Kenmore name and acknowledged that his cousin painted a crane. Patrick admitted painting over Kenmore's name on the crane, but stated that he did so to avoid the equipment's being vandalized by persons unhappy with a nonunion company's presence at construction sites.

Even apart from its bearing on the substantial identity of operations between the two companies, Jacqueline and Hugh's involvement in Sloan affairs, as described above, evidences that they were vested with decision-making authority. Thus, Jacqueline and Hugh quoted prices to Sloan customers, Jacqueline resolved a Sloan customer's complaint and a dispute a Sloan employee had with his paycheck, and Hugh estimated Sloan jobs and prepared tool lists while Patrick was away at school. Moreover, Cherub testified that she was not aware of her father's price quoting or whether he was authorized to do so and that in an instance in which her mother made a notation in Sloan's records about a problem with a customer, Cherub did not know what the discussion between her mother and the Sloan customer related to or what the notation meant.[19] The extent of this authority, we find, is a manifestation of common management in the two corporations.

Finally, Patrick testified that although he never discussed the matter with his father, he knew from working with Kenmore and from reading articles about a decline in unionism in the United States that former Kenmore customers which were previously union shops had become nonunion and that they would seek nonunion companies such as Sloan to perform steel erection.[20] It thus is evident from Patrick's testimony that Sloan was created at least in part to do business with nonunion customers and to perform work at sites at which Kenmore was prohibited by the BTC from working. The intent to operate a nonunion company and to build a customer base of nonunion companies does not, without more, manifest an unlawful purpose or indicate antiunion animus. However, where the nonunion corporation's operations are so interrelated with its union counterpart as to be substantially identical, and the corporations share a common business purpose, customers, management, and owners, such a stated intent is further evidence of alter ego status.[21]

In view of all the foregoing, we find that Kenmore and Sloan are alter egos. As the record establishes that Sloan failed to apply the terms of the union contract to its ironworker employees, we find further that Kenmore and Sloan have violated Section 8(a)(5) and (1) of the Act by their failure to do so.

REMEDY

Having found that Sloan and Kenmore unlawfully failed to apply the terms of the collective-bargaining agreement between Kenmore and the Union to Sloan's ironworker employees, we shall order that they cease and desist and that they maintain and give full force and effect to the 1981-1984 CIEA-union contract retroactive to February 26, 1983,[22] and amendments and subsequent agreements covering the unit employees,[23] to which Kenmore is a party. Kenmore and Sloan will be required to take the actions necessary to fulfill their contractual obligations, including but not limited to: (1) reimbursing their former and current employees for any loss of wages and benefits they may have incurred since February 26, 1983, because of the Respondents' failure to apply the established terms and conditions of the agreement, with interest;[24] (2) making all required payments to the various trust funds established by the collective-bargaining agreements;[25] and (3) reimbursing their employees for actual costs they incurred (such as payments to health care providers and to third-party insurers) by reason of the Respondents' failure to make required contributions to agreed-on health care and insurance plans, with interest.[26] Additionally, in view of the nature of employment in the construction industry, we find that posting notices at the Respondents' place of business is inadequate to inform the Respondents' present and former employees of their rights under this Decision and Order. Therefore, we shall order that in addition to posting the attached notice at their place of business, the Respondents will post copies of the notice at their jobsites, and furnish signed copies of the notice to the Union for posting at the Union's office and meeting places.[27]

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[18] Sloan's near total dependence on Kenmore further distinguishes this case from *Victor Valley Heating*, supra. From its formation, Concord, the nonunion business established by the son, had its own offices, equipment, and tools. The trucks that it leased from Victor Valley were essentially surplus since Victor Valley had gone into a different kind of business, and there was no evidence that the monthly lease payments by Concord (which included a 10-percent profit for Victor Valley) represented less than the market rate. 267 NLRB at 1293, 1297.

[19] Cherub's testimony in this regard strains credibility, given the office arrangement and the fact that she is Sloan's highest-ranking officer and the custodian of its records. The judge did not discredit the testimony, however. Assuming its veracity, Cherub's ignorance about such matters gives rise to an inference that her parents held considerable decision-making authority in Sloan.

[20] Hugh testified that Kenmore had lost a lot of jobs because of BTC restrictions on union contractors.

[21] See *Advance Electric*, 268 NLRB at 1004.

[22] The normal remedy for violations of this nature is limited to the 10(b) period, in this case 6 months prior to the filing of the charge on August 26, 1983, and no basis has been shown in the present case for a departure from this rule. See *Al Bryant, Inc.*, 260 NLRB 128 fn. 3 (1982).

[23] The appropriate unit is ironworkers and ironworker apprentices employed by Kenmore Equipment Contracting Co., Inc. and Sloan Steel Erection and Rental Equipment, Inc.

[24] In accordance with our decision in *New Horizons for the Retarded*, 283 NLRB 1173 (1987), interest on and after January 1, 1987, shall be computed at the "short-term Federal rate" for the underpayment of taxes as set out in the 1986 amendment to 26 U.S.C. § 6621. Interest on amounts accrued prior to January 1, 1987 (the effective date of the 1986 amendment to 26 U.S.C. § 6621), shall be computed in accordance with *Florida Steel Corp.*, 231 NLRB 651 (1977).

[25] Interest, if any, on trust fund contributions, shall be determined at the compliance stage of this proceeding in the manner set forth in *Merryweather Optical Co.*, 240 NLRB 1213 (1979).

[26] Interest on these sums shall be computed in the manner set forth in fn. 24, supra.

ORDER

The National Labor Relations Board orders that the Respondents, Kenmore Contracting Co., Inc. and Sloan Steel Erectors and Equipment Rental, Inc., Cheektowaga, New York, their officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Failing or refusing to recognize and bargain collectively in good faith with International Association of Bridge, Structural and Ornamental Iron Workers, Local No. 6, AFL-CIO as the exclusive bargaining representative of their employees in the appropriate unit, and failing or refusing to honor collective-bargaining agreements applicable to those employees.

(b) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Maintain and give full effect to the 1981-1984 collective-bargaining agreement between Iron Workers Local No. 6 and the Construction Industry Employers Association, Inc. retroactive to February 26, 1983, and any amendments and subsequent agreements covering the unit employees, retroactive to February 26, 1983, including but not limited to: (1) making whole all unit employees for any loss of wages and benefits they may have incurred since February 26, 1983, because of the Respondents' failure to apply or maintain the established terms and conditions of such agreements; (2) making required payments to the various trust funds established by the collective-bargaining agreements; and (3) reimbursing their employees for any actual expenses they incurred which ensue from the Respondents' failure to make such contributions; all as set forth in the remedy section of the decision.

(b) Preserve and, on request, make available to the Board or its agents for examination and copying, all payroll records, social security payment records, timecards, personnel records and reports, and all other records necessary to analyze the amount of backpay due under the terms of this Order.

(c) Post at their place of business and at each of their jobsites copies of the attached notice marked "Appendix."[28] Copies of the notice, on forms provided by the Regional Director for Region 3, after being signed by the Respondents' authorized representative, shall be posted by the Respondents immediately upon receipt and maintained by them for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondents to ensure that the notices are not altered, defaced, or covered by any other material.

(d) Sign and return to the Regional Director sufficient copies of the notice for posting by the Union, if it is willing, at its office and meeting halls, including all places where notices to members are customarily posted.

(e) Notify the Regional Director in writing within 20 days from the date of this Order what steps the Respondents have taken to comply.

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

WE WILL NOT fail or refuse to recognize and bargain collectively and in good faith with International Association of Bridge, Structural and Ornamental Iron Workers, Local No. 6, AFL-CIO as the exclusive representative of our employees in the appropriate unit, or fail or refuse to honor collective-bargaining agreements applicable to those employees. The appropriate unit is:

> All ironworker and ironworker apprentice employees employed by Kenmore Contracting Co., Inc. and its alter ego, Sloan Steel Erectors and Equipment Rental, Inc., excluding all other employees, professional employees, guards and supervisors as defined in the Act.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

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[27] See generally *Apex Decorating Co.*, 275 NLRB 1459 (1985).

[28] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

We will maintain and give full effect to the collective-bargaining agreement between Local 6 and the CEIA and its employer-members which was effective by its terms from June 1981 through May 1984, and any amendments and subsequent agreements covering the unit employees, retroactive to 26 February 1983, and including but not limited to

(1) Making whole all unit employees for any loss of wages and benefits they incurred because of our failure to apply or maintain the established terms and conditions of such agreements, with interest,

(2) Making required payments to the various trust funds established by the collective-bargaining agreements,

(3) Reimbursing our employees for any actual costs they have incurred which ensued from our failure to make required contributions to contractually established trust funds, with interest.

Kenmore Contracting Co., Inc. and Sloan Steel Erectors and Equipment Rental, Inc., Alter Egos

Doren G. Goldstone, Esq., for the General Counsel.

Joseph L. Randazzo, Esq. (Flaherty, Cohen, Grande, Randazzo & Doren, P.C.), of Buffalo, New York, for Respondent Kenmore.

Mario J. Rossetti, Esq., of Buffalo, New York, for Respondent Sloan.

DECISION

Statement of the Case

Winifred D. Morio, Administrative Law Judge. This case was tried before me from January 16–18, 1984, in Buffalo, New York. The complaint, which was issued by the Regional Director for Region 3, on October 7, 1983, alleged, in substance, that Kenmore Contracting Co., Inc. (Respondent Kenmore) and Sloan Steel Erector and Equipment Rental, Inc. (Respondent Sloan) are either alter ego corporations or constitute a single employer within the meaning of the Act and that Respondent Sloan, since on or about January 1983, has failed to apply the terms and conditions of employment, contained in the collective-bargaining agreement in existence between Respondent Kenmore and International Association of Bridge, Structural and Ornamental Iron Workers, Local No. 6, AFL–CIO (the Union), to its employees and has failed to recognize and bargain with the Union as the exclusive bargaining representative of the employees of both Respondents in a combined unit. The answers filed by Respondent Kenmore and Respondent Sloan deny that the corporation are alter egos or constitute a single employer within the meaning of the Act and also deny that the combined employees of Respondent Kenmore and Respondent Sloan constitute an appropriate unit as defined in Section 9(b) of the Act. The answer filed by both Respondents also claim that the Union has not demanded that Respondent Kenmore or Respondent Sloan apply the collective-bargaining agreement in existence between Respondent Kenmore and the Union to the employees of Respondent Sloan. Finally, the answer filed by both Respondents allege that the complaint is time barred by Section 10(b) of the Act.

All parties were given a full opportunity to participate in the proceedings, to cross-examine witnesses, to argue orally, and to file briefs. Briefs were filed by all parties.

On the entire record in the case and my observation of the witnesses and after careful consideration, I make the following

Findings of Fact

I. JURISDICTION

At all times material, the principal place of business of Respondent Kenmore has been located at 1560 Harlem Road, Cheektowaga, New York, where it is and has been engaged in the steel erection and equipment rental business. During the past year Respondent Kenmore, in the course and conduct of its business operations, provided services valued in excess of $50,000 for Morton Salt Co., an enterprise directly engaged in interstate commerce. The parties admit, and I find, that Respondent Kenmore is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act. The record fails to disclose jurisdictional facts with respect to Respondent Sloan. It is the position of counsel for the General Counsel that the jurisdiction over Respondent Sloan is based on "whether the Respondents are alter egos or in the alternative single employers."

II. THE LABOR ORGANIZATION

The parties admit, and I find, that the Union is a labor organization within the meaning of Section 2(5) of the Act.

III. THE ALLEGED UNFAIR LABOR PRACTICES

Respondent Kenmore was established in 1919, and in 1966 its outstanding stock was purchased by Hugh Hanley Jr. and Jacqueline Hanley, who are presently, respectively, vice president and president.[1] Respondent Kenmore is and has been a member of the Construction Industry Employers Association, Inc. (CIEA), and as such, has been a party to collective-bargaining agreements with several labor organizations, including the Union. The most recent agreement between Respondent Kenmore and the Union was effective between June 1981 and May 1984. Hugh Hanley Jr. has been a member of the negotiating committee for CIEA for over 12 years and is a trustee for the Iron Workers Health Care and Pension Fund. According to Hanley, Respondent Kenmore and other members of CIEA have been advised by the Building Trades Council, of which the Union is a member, that union contractors cannot bid on a job if there is a nonunion contractor on the job. Hanley testified that Respondent Kenmore lost "quite a few jobs" as a result of that directive.

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[1] These are the only officers of the corporation.

In November 1981, Cherub and Patrick Hanley, who are the children of Jacqueline and Hugh Hanley Jr. formed the corporation, Respondent Sloan, with Cherub as president and Patrick as vice president.[2] The corporation was formed to perform essentially the same type of work performed by Respondent Kenmore, in basically the same geographic area, in the western part of New York State. At the time they formed the corporation Cherub and Patrick were, respectively, 27 and 21 years of age and both were receiving financial assistance from their parents. Thus, Cherub Hanley, although living with her son in her own residence, received approximately one-half of her expenses for rent, utilities, and her son's clothes and education needs from her parents.[3] Patrick Hanley, both at the time of the formation of the corporation and at the time of the hearing, resided with his parents when not attending school and received financial assistance from them for his education and living expenses. Both individuals claim that they formed Respondent Sloan to gain financial independence and because they saw a limited future if they continued with their employment with Repsondent Kenmore. Cherub Hanley was employed in November 1981 as a receptionist for Respondent Kenmore and Patrick Hanley was employed as a yardworker. Although both individuals contend that they had considerable knowledge about the steel erection and equipment rental business by virtue of their relationship with their parents, the record fails to reveal that these individuals had performed the type of work involved in the steel erection industry, or had supervised the performance of such work. There is also no evidence that either Cherub or Patrick Hanley had submitted bids for steel erection jobs or estimated such jobs prior to the formation of Respondent Sloan. It also appears that both Cherub and Patrick Hanley had limited education backgrounds in the business area. Cherub Hanley, at the time of the formation of Respondent Sloan, had some bookkeeping courses while in high school and Patrick Hanley had received an associate degree in construction technology from Erie Community College (ECC) and had commenced his freshman year at Rochester Institute of Technology (RIT).[4]

According to the testimony of Cherub and Patrick Hanley, the formation of Respondent Sloan was funded by $1400 from Cherub and $1200 from Patrick. These moneys, apparently, were used for incorporation fees, for letterheads, and for the salaries of Cherub and Patrick. Cherub Hanley testified that she secured her moneys from the sale of her car, which had been a gift from her parents. Patrick Hanley testified that he secured the money he put into the corporation from a loan he had secured for school purposes, but which he did not apply to that purpose because his school tuition was paid by his parents. Cherub Hanley testified that when she sold her car in November 1981 Respondent Sloan leased a car, which she began to use in November 1981, from Respondent Kenmore. The car was leased for the sum of $150 per month, a figure that was determined by Respondent Kenmore. However, it does not appear that Respondent Sloan began to make the payments for leasing the car until some months after November 1981.[5]

Commencing in November 1981, Respondent Sloan rented office space from Respondent Kenmore. The space rented was in a building owned by Respondent Kenmore and was on the same floor where the office of Respondent Kenmore was located and where other tenants, who rented desk space from Respondent Kenmore, also were located. The area rented by Respondent Sloan, approximately 8 by 10 feet, was separated by a partition from the area used by Respondent Kenmore and the other tenants and it contained a desk and phone, both of which were used by Cherub and Patrick Hanley. There was no written lease for the use of office space between the two Respondents or, apparently, between Respondent Kenmore and other tenants. Initially, according to C. Hanley, Respondent Sloan had planned to use the 25 Gratton Street entrance as the address for the new corporation rather than 1560 Harlem Road address used by Respondent Kenmore. However, that plan was not followed because the space near the Gratton entrance was leased to another tenant. Respondent Sloan agreed to pay the sum of $100 a month to Respondent Kenmore as a rental fee.[6] However, Respondent Sloan was frequently late in making these monthly payments, sometimes for periods as long as 6 months, and it was not required to pay either interest or late payment penalties. C. Hanley testified that this same courtesy was extended to other tenants by Respondent Kenmore due to the difficult financial conditions in the area. The younger Hanleys did not purchase office equipment when they formed Respondent Sloan but used Respondent Kenmore's office equipment and they had free access to the entire area outside the space occupied by Respondent Sloan. It also appears that C. Hanley used office supplies of Respondent Kenmore, including timesheets and scratch pads, without reimbursing Respondent Kenmore for the use of the material.[7] C. Hanley testified that she received permission to use the office equipment and supplies and she "assumed" that the use of these supplies was included in the monthly rental fee, although the matter was not discussed when the fee for the office space was negotiated.

After the formation of Respondent Sloan, C. Hanley continued her employment with Respondent Kenmore as a receptionist. She was paid $150 a week by Respondent Kenmore for that work, which included typing duties and answering phones. She was also paid $50 a week by Respondent Sloan and her duties included preparing paychecks, distributing them at the jobsites,[8] paying taxes and other bills and in general maintaining the financial records for Respondent Sloan. On at least one occasion she authorized a Respondent Kenmore employee to purchase equipment, however, it is unclear when this occurred. The record reveals that during the period between November 1981 and July 1983, C. Hanley divided her hours of work equally between the corporations, although there was a substantial difference in the moneys she received from the corporations. It does not appear that C. Hanley was required to or did work specific hours for either corporation. In July 1983, C. Hanley ceased working for Respondent Kenmore and about the same time her salary for Respondent Sloan was increased to $150 a week.

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[2] Cherub and Patrick are the only officers of this corporation.

[3] She was receiving the same type of assistance at the time of the hearing.

[4] It appears that sometime after the formation of the corporation, Cherub Hanley took an adult education class in bookkeeping and an accounting course at ECC. Patrick was scheduled to receive his degree from RIT in May 1984.

[5] Cherub Hanley testified that she knew "some time went by" before Respondent Sloan began to make payments for the lease of the car, although she was uncertain as to the length of time. She also testified that at the time of the hearing she was "caught up" with the car payments.

[6] Hanley testified that, initially, rent was paid to Jacqueline C. Hanley and then it was paid to Respondent Kenmore.

[7] Respondent Sloan, however, did have its own forms, including invoices.

As noted, part of the duties C. Hanley performed for Respondent Sloan included maintaining the books of that corporation. It is conceded that prior to her employment with Respondent Sloan, C. Hanley had limited actual experience in bookkeeping duties. The record reveals that C. Hanley received assistance with respect to these duties from Tina Kazinski, an employee of Respondent Kenmore. This assistance was not limited to the time when Respondent Sloan began its operations but continued through 1983. In fact, in many instances it was Kazinski who actually prepared the records for Respondent Sloan. Thus, C. Hanley testified that Kazinski wrote the names and addresses of Respondent Sloan employees on compensation forms and entered the number of exemptions for each employee on these forms. An examination of Respondent Sloan's payroll and timesheet records[9] for 1983 discloses that, although C. Hanley made entries on these records, numerous entries were made also by Kazinski and to a lesser degree by Jacqueline Hanley.[10] The parties stipulated that in the instances where Kazinski's handwriting appeared it was she who computed the figures that appeared in the record. C. Hanley testified that she requested Kazinski to prepare the payroll when she was not available[11] and "she does it as part of the rents which I pay Kenmore, the hundred dollars a month." At another point, C. Hanley testified that she did not pay wages to any Respondent Kenmore employee for work done in connection with Respondent Sloan's payroll. C. Hanley did not know if she asked her parents whether she could use the services of Kazinski to assist her in preparing Respondent Sloan's records.[12]

In addition to these records, an examination of the invoices of Respondent Sloan reveals that entries were made on these documents by Jacqueline Hanley, Hugh Hanley Jr., and Hugh Hanley III, who is a son of the senior Hanleys and an employee of Respondent Kenmore. On an invoice for a project for a company, National Fire Adjusters,[13] the words, "Pat call Obersheimer if you disagree" appear and they were written by Jacqueline Hanley. C. Hanley testified that it was her mother who received the call from the customer because neither she nor her brother Patrick was in the office. She did not know what, if any, discussion her mother had with the customer, and she did not know what the notation meant. There was also a document bearing a Respondent Kenmore's letterhead attached to an invoice for a company, G. A. Dyce, dated November 30, 1983.[14] On the document, bearing Respondent Kenmore's letterhead, there is a notation, about a customer's order, in the handwriting of Jacqueline Hanley. C. Hanley explained that her mother also took this order because she and her brother were not in the office. The record reveals that several documents attached to an invoice for another company, Norcan Steel Corp., dated November 7, 1983,[15] are in the handwriting of Hugh Hanley Jr. and Hugh Hanley III and these documents described both the type of work to be performed and the price to be charged for this work.[16] C. Hanley was unable to explain the involvement of her father and brother in this project, which was a Respondent Sloan job, and she was unable to state whether they were paid by Respondent Sloan for their services. An invoice for a company, Spancrete Northeast, dated November 19, 1983,[17] contains a notation in Jacqueline Hanley's handwriting, "contract price, no tax." C. Hanley testified that it was her brother who received the call about this order but her mother reviewed the order because it involved a question about whether tax should be paid. According to C. Hanley, she did seek her mother's advice about tax questions because she was new in the business and unfamiliar with tax matters.[18] Another invoice for Norcon Steel Corp., dated November 30, 1983,[19] also has attached to it, in the handwriting of Hugh Hanley Jr., the work to be performed and the price to be charged for the job. C. Hanley could not explain why her father was involved in making this estimation of the job but she did note that in another document attached to this invoice, her brother Patrick also quoted the same price for the job. Finally, an invoice for a company, CJS Sign, dated November 7, 1983, has a document attached to it, in the handwriting of Hugh Hanley Jr., which describes the work to be performed and the price to be charged. C. Hanley admitted that the job was performed at the price quoted by her father to the customer. However, she testified that she did not know whether her father had the authority, generally, to quote prices to customers for work to be performed by Respondent Sloan.

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[8] She had on occasion brought paychecks to a jobsite for Respondent Kenmore's employees.

[9] G.C. Exhs. 3 and 4. The parties agreed that with respect to these exhibits and also G.C. Exh. 7, a red marking pen was used to identify Kazinski's handwriting; a black marking pen was used to identify Jacqueline Hanley's handwriting; a blue ball pen was used to identify C. Hanley's handwriting; entries made by Hugh Hanley Jr. are identified by the words "Hugh Jr."; Patrick Hanley's handwriting is identified by the word "Pat"; the handwriting of Respondent Sloan employee Linda Longobardi is identified by the word "Linda"; the handwriting of Respondent Kenmore's employee Hugh Hanley III is identified by the word "Hugh III."

[10] An entry made by Jacqueline Hanley indicated that an employee was owed moneys. C. Hanley testified that neither she nor her brother was in the office when the employee called and her mother took the message, noted it on the payroll record, and subsequently the employee was paid.

[11] C. Hanley attended school after July 1983 during the day. However, C. Hanley had hired another employee in October 1983, Linda Longobardi, to assist in the office work.

[12] C. Hanley testified that employees of Respondent Kenmore assisted other tenants with the maintenance of records. In fact, Respondent Kenmore's secretary, Shelly Schintsius, prepared the payroll for one of Respondent Kenmore's other tenants.

[13] G.C. Exh. 7, invoice 8313.

[14] G.C. Exh. 7, invoice 8438.

[15] G.C. Exh. 7, invoice 8412.

[16] C. Hanley claimed that the paper with Respondent Kenmore's letterhead was borrowed from that company and she assumed that it was paid for by the moneys paid for the rent.

[17] G.C. Exh. 7, invoice 8431.

[18] C. Hanley was unable to explain why her mother did not respond verbally to her inquiries.

[19] G.C. Exh. 7, invoice 8432.

The record establishes that after Respondent Sloan commenced its operations it had 1 job in 1981, 7 jobs in 1982, and 13 jobs in 1983, and during this period it employed as few as 3 employees[20] in 1981 and as many as 12 to 14 employees in the summer of 1983. Respondent Sloan was engaged in basically the same type of business as Respondent Kenmore, i.e., construction work and the rental of crane equipment. However, Respondent Sloan did not own the crane equipment it rented to third corporations but, rather, it rented this equipment from Respondent Kenmore.[21] There was no verbal or written agreement between the two Respondents that permitted Respondent Sloan to rent Respondent Kenmore's equipment to third corporations, and it does not appear that Respondent Kenmore had permitted corporations, other than Respondent Sloan, to rent its equipment to third parties. Respondent Sloan charged these third corporations the same rental fee it had been charged by Respondent Kenmore and, thus, did not make a profit on the rental of the equipment. The profit, according to C. Hanley, was made from the moneys that were charged for the services of Respondent Sloan's employees who operated the equipment. Respondent Sloan's employees were nonunion. Respondent Kenmore, prior to this time, had not rented its equipment to other companies without an operator, who was a member of the Union. The record fails to establish that the extra moneys derived by Respondent Sloan from the rental of Respondent Kenmore's equipment was shared with Respondent Kenmore.[22] C. Hanley testified that representatives of Respondent Kenmore were aware that their equipment was being rented by Respondent Sloan to other corporations.

In addition to the crane equipment, which it rented, Respondent Sloan also rented toolboxes from Respondent Kenmore. These toolboxes contained the smaller tools needed on a job. Patrick Hanley testified that the type of job determined the type of tools needed and, generally, he was able to prepare the tool list for the job for his company, although on occasion he sought his father's assistance, and his father gave him advice without charging him for the services. However, another witness, R. Barry Miller, who was Hanley's cousin and an employee of Respondent Kenmore, testified that he had observed Hanley Jr.'s handwriting on Respondent Sloan tool lists when Patrick was at school. He did not know, however, if Patrick had called in the list of tools he needed for a job to his father. Miller, further, testified that when Patrick Hanley rented equipment he would specify which particular equipment he wanted and, usually, he preferred the equipment that did not have the Respondent Kenmore's name on it.[23] According to Miller, Patrick Hanley told him he wanted the unmarked equipment because he did not want other people to know that he used Respondent Kenmore's equipment on the jobs his company was doing.[24]

As noted, Patrick Hanley was 21 years old when he formed Respondent Sloan with his sister. During the period of time from November 1981 until about June 1983, Hanley worked for Respondent Sloan on weekends and during school recess. Hanley testified that he was familiar with the steel erection industry at the time of the formation of his company due to his family background. However, the record establishes that his actual knowledge about construction work was limited to some courses he had when he attended school. His prior work experience, as a Respondent Kenmore employee, did not involve actual construction work but involved the duties of cleaning the yard and fixing tools. Hanley admitted that he was not "a very good mechanic" and that he had been at jobsites only when he drove to work with his father and his father stopped to check the site. Notwithstanding this lack of experience in the field, Patrick Hanley claimed that he secured and estimated jobs for Respondent Sloan,[25] performed actual construction work, and supervised the other employees of Respondent Sloan, who performed steel structure work. According to Hanley, in order to secure customers he checked phone books for companies in the steel sales business and he spoke to employers with whom his father had done business and he tried to convince them to do business with his company. The first job he secured was from a prior customer of Respondent Kenmore who he knew "was getting more into an open shop area."[26] Hanley explained that he was aware that employers in the area were interested in doing business with a nonunion or open-shop employer and he had observed that companies who had agreements with unions "switched" and became nonunion and were unable to get more work. Hanley claimed that he did not discuss this issue with his father but he was aware of these changes from his observation and from what he heard at school or read in magazines. He testified, "I could give you all kinds of references on magazines, articles, such as that show the decline of unionism in the United States, thus pushing, making the open shop the better way to go."

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[20] This number did not include Cherub and Patrick Hanley.

[21] Patrick Hanley testified that it was usual for a company renting Respondent Kenmore equipment to sign for the equipment, although some did not, including Respondent Sloan. He also testified that when he rented the equipment he preferred to take equipment that did not have the Kenmore name, because he did not want to worry "about people trying to destroy the Kenmore equipment because they are upset renting to a non-union company."

[22] At least one-half of Respondent Sloan's income was secured from the rental of equipment.

[23] Miller stated that Patrick took whatever equipment he wanted and was not required to sign a rental form, although other companies were required to do so.

[24] The only equipment owned by Respondent Sloan was a pickup truck that was used for jobs and as a mode of transportation for Patrick. This truck was purchased from a friend of the Hanley family and was financed by a bank loan.

[25] Hanley's only prior experience in estimating a job involved work he did for school projects.

[26] The job involved the erection of steel joists and a metal deck.

Patrick Hanley testified that he was able to secure sup- lies for jobs for his company without paying money, gning a purchase order, without collateral, and without credit rating. In one instance Hanley was able to pur- hase a fire escape, which cost $2800, in such a manner, e attributed his ability to make such purchases without dvancing money or signing a loan for them to "an onest face or trusting or whatever." There is no evi- ence that his parents or their corporation vouched for is honesty or guaranteed that these supplies would be aid.

Patrick Hanley claimed that his first priority was to ecure jobs for Respondent Sloan. However, he admitted hat when he went to a company to bid on a job and he ecured their drawings to prepare a bid, he allowed his ather to examine the drawings he had borrowed, and at imes his father made a bid on the same job. According o Hanley, he also subcontracted two jobs, on which he ad been the successful bidder, to Respondent Kenmore. Prior to subcontracting to Respondent Kenmore, Hanley id not seek bids from other companies, although on one f the jobs Respondent Sloan did not gain any financial enefit.[27] Respondent Kenmore also extended courtesies o Respondent Sloan that it did not extend to other companies. Thus, Patrick Hanley was permitted to store his crap material at Respondent Kenmore's yard without any charge, and he was assisted by Respondent Kenmore employees in loading his truck or the equipment he rented.[28]

When Patrick Hanley began to work for his company his salary was $50 per week, but it was increased to $140 per week in late July or early August 1983. It is unclear from this record whether Hanley continued to receive a salary from Respondent Kenmore after November 1981, but he did continue to work for that company as a yardman, he helped to load and unload trucks, and on one occasion he painted the Respondent Kenmore building. Patrick Hanley's testimony about whether he was paid for this work is contradictory: at one point he could not recall if he was paid, and at another point he testified that he "must" have been paid.

Patrick and Hugh Hanley Jr. both testified that Patrick sought advice on several occasions from his father and other Respondent Kenmore employees about how to estimate a job and about other problems that arose on Respondent Sloan jobs.[29] The record does not reflect whether Patrick always followed this advice, although it does appear from Miller's testimony that the two Hanleys did not always agree about a problem. Respondent Sloan did not pay for this assistance. Hugh Hanley Jr. admitted that a bid based on an incorrect estimation could cause serious problems for a company and that, usually, the individual who did the estimation work had to have experience in such a job, although it was not necessary for the experience to be gained from doing actual construction work. In fact, the employee who did the estimations for Respondent Kenmore did not have prior field experience, although he did have experience as an estimator in the fabrication field, which is not fieldwork.

The record reveals that Respondent Sloan is a member of the National Association of Women in Construction and the Construction exchange. It is not a member of CIEA. The record also establishes that the two corporations maintain separate payroll records, have separate telephone numbers, are listed separately in the telephone book, and maintain separate financial records. It fails to reveal any direct payment of moneys from Respondent Sloan to Respondent Kenmore. The employees of Respondent Kenmore are paid according to the Union's collective-bargaining agreement and they receive fringe benefits. The employees of Respondent Sloan are paid at a lower wage level and do not receive fringe benefits. There is no evidence that Patrick Hanley or Cherub Hanley hired, disciplined, or discharged any Respondent Kenmore employee. Nor does the record reflect that Hugh Hanley Jr. or Jacqueline Hanley hired, disciplined or discharged any Respondent Sloan employee. There is, however, one instance that counsel for the General Counsel contends establishes that Hugh Hanley Jr. supervises and directs the work of Respondent Sloan employees. In late July or early August 1983 Respondent Sloan commenced work at the National Fire Adjuster jobsite. The income for this job was the largest received by Respondent Sloan to that date. It is significant, the General Counsel asserts, that at the start of this job, Patrick painted over the name of Respondent Kenmore on the crane rented by his company, the name of Cherub Hanley was removed from Respondent Kenmore's payroll, and Patrick Hanley received a substantial pay increase.[30] In early August 1983, Michael Fitzpatrick, the Union's business agent, went to the jobsite and observed Hugh Hanley Jr. giving hand signals to the crane operator, which the operator followed. Hugh Hanley Jr. testified that he did give signals to the operator but denied that he was supervising the job. He testified that as he passed the jobsite he observed a dangerous condition because the "choker" that was hauling the steel was twisted. He directed the operator to lower the steel to correct the condition. Hanley Jr. maintained that it was obvious he was not working on the job because he was not dressed in work clothes. Fitzpatrick did not dispute this testimony about the clothes. Fitzpatrick claimed that he spoke to Hanley Jr. at the time and during the course of the conversation Hanley Jr. said he was paying the employees $7 an hour. Hanley Jr. denied that he said that he was paying the employees $7 an hour but he admitted that he told Fitzpatrick that the employees were receiving one-third of the union rate of pay, which at that time was about $22 an hour.[31]

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[27] It does not appear that any representative of Respondent Sloan went to the jobsite to examine the work that had been subcontracted.

[28] Miller testified that he assisted Hanley, and the representatives of other companies, to load material on equipment rented for Respondent Kenmore.

[29] There is no evidence of employee interchange, nor does it appear that employees of one corporation were transferred to the payroll of the other corporation.

[30] It appears to be counsel's position that the increase in Patrick's salary was to compensate Cherub for her loss of salary as a Respondent Kenmore employee.

[31] Fitzpatrick testified that he had heard rumors about the new corporation in April or May 1983, but the first actual knowledge he had about

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The parties stipulated that the two corporations had similar customers. In 1981 Respondent Sloan had 1 customer who was also a Respondent Kenmore customer, in 1982 Respondent Sloan had 4 customers who were or had been Respondent Kenmore customers, in 1983 there were 8 such customers, and in 1984 there were 11 such customers.

Discussion

The determination of whether one company is the alter ego of the other is difficult to make under any set of circumstances. It becomes more difficult when the individuals involved in the two companies are related. That relationship creates appearances that are suspicious. However, the courts and the Board have outlined certain criteria to be considered in making a determination whether companies are alter egos. These criteria include whether the companies have substantially identical ownership, business purposes, management, operations, equipment, customers, and supervision.[32] It does not appear that any one of these factors is controlling.[33] Counsel for the General Counsel cited several cases in support of his position that the Respondents meet the criteria outlined and, therefore, Respondent Sloan should be considered the alter ego of Respondent Kenmore.

In *Hageman Underground Construction*, 253 NLRB 60 (1980), cited by counsel for the General Counsel, the facts were substantially different from those existing in this case. That case involved four enterprises in which one individual, George Hageman, was involved. The first enterprise, Hageman Backhoe Service or (Backhoe), was established to rent and did rent equipment to other companies for several years until it went out of business in 1975. In that year George Hageman formed a second company, Hageman Underground (Underground), to install underground utility lines, and Backhoe transferred all its equipment to Underground. Underground installed lines for Pacific Telephone & Telegraph Company (PT&T) and rented the equipment, which had been transferred from Backhoe, to other companies. Underground had a collective-bargaining agreement with a union. In 1978 George Hageman formed a third company, Hageman Construction (Construction), to construct underground utility lines for PT&T, and he testified that he formed Construction to operate as a nonunion company. Construction leased equipment from Underground and hired all the construction workers who had been employed by Underground. After the formation of Construction, Hageman received a visit from union representatives during which they demanded that he apply the terms of the Underground contract to the Construction employees. Hageman decided after this visit to set up a forth company, Hageman Engineering (Engineering), also to install underground utility lines for PT&T and to operate under nonunion conditions. Engineering commenced performing the type of work that had been performed by Construction, and Hageman transferred Construction's employees to Engineering's payroll. Thus, the record in that case established that Underground, Construction, and Engineering had the same officers, the same employees, and that the labor relations policies for all three companies were set up by one person, George Hageman. It is significant that George Hageman testified that he established Engineering to operate as a nonunion entity because of the efforts by the union to have the terms of Underground's collective-bargaining agreement applied to Construction's employees.

In *J. M. Tanaka Construction*, 249 NLRB 1238 (1980), also cited by counsel, in which the Board found alter ego status, the two corporations had similar officers, similar supervision, and similar control of labor relations policies. Thus, in that case Raymond Tanka was president of both corporations; the supervision of all jobs, including the supervision of manpower, equipment, and supplies for both corporations was vested in the same person, Takeo Wakido, who was an uncle of Raymond Tanka; Raymond Tanka formulated the labor relations policy for the original corporation while he shared the responsibility for that policy for the newly formed corporation with his uncle, Takeo Wakido. In addition, after the formation of the new corporation, the original corporation phased out its operation and laid off its employees because it could not continue to pay fringe benefits required by the collective-bargaining agreement. These laid-off employees, subsequently, were hired by Raymond Tanka and Takeo Wakido, as employees for the new corporation.

In *McDonald's Ready Mix Concrete*, 246 NLRB 152 (1979), at least one member of the same family was an officer in both corporations. Thus, in that case the evidence established that McDonald's Ready Mix was owned and operated by Bill McDonald, his wife, and son. The son, Jim, effectively, controlled the operations of this corporation for about a year before a new corporation, Jim's Ready Mix, was established. The new corporation purchased the ready mix portion of the McDonald's business and the son, Jim, became president of the new corporation. The record in that case established that both corporations used the same premises, had the same customers and suppliers, and interchanged employees.

It is apparent from an examination of these three cases that, although, there are some similarities to the present case, there are crucial differences. In all three cases, at least one individual was an officer in both corporations, a situation not present in the instant case. Thus, in this case the record establishes that Hugh and Jacqueline Hanley are the sole stockholders and officers of Respondent Kenmore. The stockholders and officers of Respondent Sloan are Cherub and Patrick Hanley. Although they are members of the same family, Cherub and Patrick are not the same individuals as their parents and, thus, the two corporations do not share common ownership or control. Further, in the three cases cited by counsel, the same individual exercised control over the day-to-day operations of the two corporations and the labor relations policy for the two corporations was formulated by the same individual. The record fails to reveal that Hugh Hanley or

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Respondent Sloan was when he saw Hugh Hanley at this jobsite in August 1983.

[32] *Ski Craft Corp.*, 237 NLRB 122 (1978); *Crawford Door Sales Co.*, 226 NLRB 1144 (1976).

[33] *Blake Construction Co.*, 245 NLRB 630, 634 (1979), enf. denied in part on other grounds 663 F.2d 272 (D.C. Cir. 1981).

Jacqueline Hanley controls the operations of Respondent Sloan or is involved in the formation of its labor relations policy, nor does it appear that Cherub and Patrick control the operations of Respondent Kenmore or are involved in the formation of its labor policy. Finally, there is no evidence in this case that two corporations interchanged employees, transferred employees, or have hired similar employees.

Counsel has cited one case, *Ramos Iron Works*, 234 NLRB 896 (1978), where an alter ego status was found and where there are some similarities to the instant case. In that case, as in the present one, a young son of the president of the original corporation formed a new corporation, allegedly to develop a solar-heating structure. The record revealed that the son, in that case, also had limited construction or business experience. However, the differences between the present case and the *Ramos* case are greater than the similarities. In *Ramos* the administrative law judge found that Ramos Sr., the father, and Ramos Jr., a brother, were involved in the original corporation, which had a collective-bargaining agreement with a union. Prior to the formation of the new corporation, Ramos Sr. openly stated his opposition to the union, and after the new corporation was formed the employees of the original corporation worked for the new corporation. These employees continued to work on projects for the new corporation that they had worked on for the original corporation. In addition, Ramos Sr. worked "intensively" on projects of the new corporation, and a vice president of the original corporation spent a considerable amount of time at the project of the new corporation. As noted, the employees of Respondent Kenmore and Respondent Sloan are not the same, and the only evidence of Hugh Hanley's presence at any jobsite of Respondent Sloan was on one occasion, at the National Fire Adjusters jobsite.

A close family relationship will not establish the alter ego status.[34] Counsel for the General Counsel contends, however, that factors other than the family relationship exist in the instant case. He asserts that but for the indirect financial assistance from their parents, Cherub and Patrick Hanley could not have funded Respondent Sloan. However, financial assistance from one corporation to another will not establish the alter ego status. In *Shellmaker, Inc.*, 265 NLRB 749 (1982), the record revealed that William Boland was president of a company, Shellmaker, which had a collective-bargaining agreement with the Union. This agreement provided that new dredges had to have a four-man crew. Boland planned to operate a new dredge with a two-man crew. A second corporation, Bayside, was formed by Boland, his wife, and his nephew, who had worked for Shellmaker, to operate as a nonunion shop. The initial capital for Bayside came from personal loans made by Mrs. Boland and Boland's nephew. The loans were repaid when Bayside borrowed $50,000 from Shellmaker's profit-sharing plan. This loan by Shellmaker to Bayside was unsecured. The direct financial assistance did not cease but continued when Bayside renegotiated its loan. Notwithstanding the suspicion surrounding the formation of the new corporation and the extensive financial assistance given to it with unsecured loans, the Board did not find the companies to be alter egos. In the instant case, as noted, the officers are not the same, and there is no evidence of any direct financial assistance given by Respondent Kenmore to fund the formation of Respondent Sloan.

A further factor relied on by the counsel for the General Counsel to support his assertion that the corporations are alter egos is the assistance that Hugh Hanley gave to Patrick Hanley in estimating jobs. Counsel, to some degree, relied on the testimony of Miller to establish this fact. An examination of Miller's testimony establishes that Miller basically "assumed" that Patrick was receiving such assistance, not only about estimating jobs but about how to perform the work. However, I am convinced from the testimony of the Hanleys that Patrick did discuss, with his father, both how work was to be performed and how to estimate a job. The Board has failed to find corporations to be alter egos because of this type of assistance. In *Victor Valley Heating & Air Conditioning*, 267 NLRB 1292 (1983), the record established that the president of Victor Valley, the original company, taught an employee of the new corporation formed by his son, how to estimate and bid jobs and for the first few months the father came to the new corporation's workshop approximately once a week to assist the employee to learn these functions. In addition, the father signed bids for the new corporation, gave advice about jobs, and referred suppliers and customers to the new corporation. In that case there was evidence, also, that the bookkeeper of the original corporation maintained the books and records of the new corporation and did so without being reimbursed. Notwithstanding this type of assistance, the Board did not find one corporation to be the alter ego of the other corporation.

It is obvious that representatives of Respondent Kenmore did show favoritism to the representatives of Respondent Sloan. Thus, they allowed rent bills and car bills to go unpaid for months, they permitted their office supplies to be used without reimbursement, and they rented equipment to Repondent Sloan at low fees. However, even blatant favoritism in the day-to-day operations, standing alone, does not necessarily make one corporation the alter ego of the other.[35] As was true in *Victor Valley* the favoritism exhibited to Cherub and Patrick showed the concern of the parents that their children should be given the opportunity to succeed.

This record fails to establish that the two corporations have common ownership, common management, common control over labor relations policies, the same employees, or the same supervisors. There is evidence that the two corporations are engaged in the same type of business, use some of the same equipment, and share the same premises. However, these factors are insufficient to outweigh the lack of common ownership, common management, and common control over labor relation policies. Accordingly, I find that Respondent Kenmore and Respondent Sloan are not alter egos.[36]

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[34] *Contris Packing Co.*, 268 NLRB 193 (1983)

[35] *Victor Valley Heating & Air Conditioning*, supra.

[36] *Shellmaker*, supra.

Counsel for the General Counsel argues, in the alternative, that the two corporations constitute a single employer within the meaning of the Act. The criteria for determining that status was set forth in *Radio Union Local 1264 v. Broadcast Service*, 380 U.S. 255, 256 (1965), and includes the interrelation of operations, common management, centralized control of labor relations, and common ownership. Although no one factor appears controlling, the Board stresses the first three criteria, with particular emphasis on centralized labor relations.[37] This record fails to establish that the operations of the two corporations are interrelated. There is no evidence that either Cherub or Patrick Hanley was involved in the operations of Respondent Kenmore except in their capacity, respectively, as receptionist and yardman. They were not involved in making decisions of formulating policies for that corporation and the evidence is insufficient to establish, affirmatively, that their parents made decisions of formulated policies for Respondent Sloan. Based on my discussion set forth above with respect to the other criteria, I find that Respondent Kenmore and Respondent Sloan do not constitute a single employer within the meaning of the Act.[38] Accordingly, I find that the General Counsel has failed to sustain the burden of proof as required.[39]

Respondents assert that the Union had knowledge of Respondent Sloan in April or May 1983, but at no time did it make a request that the collective-bargaining agreement of Respondent Kenmore be applied to the employees of Respondent Sloan. Therefore, they contend that the complaint is time barred by Section 10(b) of the Act. Although I have recommended dismissal of the complaint, I do not agree with the contention that the complaint is time barred. The record does not support the assertion that the Union had knowledge of Respondent Sloan in April or May 1983. Rather, the record establishes that in that time period the union representatives had heard rumors about the existence of Respondent Sloan but they did not gain specific information until Fitzpatrick saw Hugh Hanley at the National Fire Adjusters jobsite. It is obvious, in view of the position of the Respondents about their separate status, that none of the Hanleys informed the Union about the existence of Respondent Sloan. Further, in view of that position it is also obvious that any demand by the Union that the collective-bargaining agreement of Respondent Kenmore be applied to Respondent Sloan's employees would have been rejected.

Conclusions of Law

1. Kenmore Contracting Co., Inc. is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

2. International Association of Bridge, Structural and Ornamental Iron Workers, Local No. 6, AFL-CIO is a labor organization within the meaning of Section 2(5) of the Act.

3. The General Counsel has failed to establish by a preponderance of the evidence that Respondent Kenmore and Respondent Sloan, as alleged in the complaint, are alter egos and/or constitute a single employer within the meaning of the Act and violated Section 8(a)(5) of the Act.

[Recommended Order for dismissal omitted from publication.]

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[37] *NLRB v. Al Bryant, Inc.*, 711 F.2d 543, 551 (3d Cir. 1983), cert. denied 104 S.Ct. 699 (1984).

[38] *Victor Valley Heating & Air Conditioning*, supra.

[39] In view of my finding that the two corporations are not alter egos and do not constitute a single employer, I do not find that a unit consisting of both groups of employees constitutes an appropriate unit for purposes of collective bargaining.

University of Dubuque, Petitioner *and* Faculty Association of the College of Liberal Arts. Case 33–UC–98

June 27, 1988

DECISION AND ORDER

BY CHAIRMAN STEPHENS AND MEMBERS JOHANSEN AND BABSON

On a petition filed by the Employer, a hearing was held before Hearing Officer Robert W. Chester. At the hearing, the Union moved that the petition be dismissed. The hearing officer referred this motion to the Board for disposition, and the Regional Director transferred this proceeding to the National Labor Relations Board for decision pursuant to Section 102.67 of the Board's Rules and Regulations. Both the Union and the Employer have filed briefs in support of their respective positions.[1]

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has reviewed the rulings of the hearing officer made at the hearing and finds that no prejudicial error was committed. The rulings are affirmed.

On the entire record in this case, the Board makes the following findings.

1. The Employer is a private university affiliated with the Presbyterian Church, USA and is located in Dubuque, Iowa. The University consists of the College of Liberal Arts and the Theological Seminary. Only the College of Liberal Arts is involved in this proceeding.[2] The parties stipulated that the Employer is engaged in commerce and that "[d]uring the past calendar year, a representative period, gross annual revenue exceeded $1,000,000, of which more than $50,000 was received from directly outside the State of Iowa."

On these facts, we find that the Employer is engaged in commerce within the meaning of Section 2(6) and (7) of the Act and that, as stipulated by the parties, the Union is a labor organization within the meaning of Section 2(5) of the Act.

2. Since 1973 the Employer has recognized the Union as the collective- bargaining representative of certain employees of the College of Liberal Arts. During that time, the parties have entered into a series of collective-bargaining agreements.[3] The latest relevant agreement was effective from August 15, 1981, through August 15, 1984, and provided, inter alia, that negotiation for a new agreement would begin about February 15, 1984. The parties stipulated that the unit, as set forth in the collective-bargaining agreement, consists of:

> All full-time faculty and those part-time faculty teaching six or more academic hours per semester in the College of Liberal Arts, including department chairpersons. The unit shall also include the Director of the Learning Assistance Center. Those excluded from the unit are non-academic employees, division chairpersons, faculty of the seminary, administrative and clerical employees, guards and supervisors as defined in the National Labor Relations Act, as amended.

On November 9, 1983, the Employer filed the instant petition seeking to clarify the unit to exclude, in addition to those already excluded, "all managerial and supervisory full-time faculty (including department chairpersons) and part-time faculty teaching six or more academic hours per semester in the College of Liberal Arts, and the Director of the Learning Assistance Center." As noted above, the Regional Director transferred these proceedings, including the Union's motion to dismiss the petition, to the Board for disposition.

The Union argues that the petition should be dismissed because (a) there are no grounds for clarifying the unit in the absence of evidence that the duties of the faculty have changed; and (b) the Board's policy is not to entertain unit clarifications during the term of a collective-bargaining agreement, which contains a clear recognition clause. Thus, the Union argues that this petition should not now be entertained because it was filed more than 300 days before the agreement's expiration.[4] The Union contends that the entertainment of the petition at this time would disrupt a stable bargaining relationship and that, therefore, processing the petition is contrary to Board policy.

We have carefully considered the Union's arguments. We, however, find it appropriate to entertain the petition for the following reasons.

First, in light of the Supreme Court's decision in *NLRB v. Yeshiva University*, 444 U.S. 672 (1980), it is appropriate to clarify a unit composed of faculty to exclude those who are managerial and, therefore, not "employees" within the meaning of the Act. *Lewis University*, 265 NLRB 1239 (1982), revd. on other grounds 765 F.2d 616 (7th Cir. 1985).

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[1] The Union's motion to file a substitute brief page and the hearing officer's unopposed motion to correct the transcript are granted.

[2] The College of Liberal Arts requires no particular religious affiliation or allegiance from its faculty members or students.

[3] The Employer recognized the Union pursuant to a recognition agreement entered into with the Union. The Board has not certified the Union as the collective-bargaining representative of the Employer's employees.

[4] The petition actually was filed 280 days prior to the agreement's expiration.

289 NLRB No. 34

Thus, clarification is appropriate here even absent evidence of any change in faculty duties since the unit's formation. *Washington Post Co.*, 254 NLRB 168 (1981).

Second, we find it appropriate to process this petition even though it was filed during the term of the latest relevant agreement. Although the Board has dismissed clarification petitions filed midway through the term of an agreement,[5] the Board has entertained such petitions when they are filed shortly before the agreement's expiration as the parties are preparing for negotiations. See *Shop Rite Foods*, 247 NLRB 883 (1980), and cases cited therein. The petition here was filed on November 9, 1983, some 280 days prior to the agreement's expiration. As specified in the agreement, however, negotiations for a new agreement were to begin on February 15, 1984, just 98 days after the petition was filed. In these circumstances, as the petition was filed just about 3 months before negotiations were to begin, we find it appropriate to process the petition. Accordingly, we deny the Union's motion and we shall consider the merits of the petition.

3. As noted above, the Employer seeks to exclude from the unit all managerial and/or supervisory employees. The positions at issue are full-time and certain part-time faculty, including department chairpersons and the director of the Learning Assistance Center at the College of Liberal Arts. This college is comprised of five academic divisions, each headed by a division chairperson. The divisions are further subdivided into a total of 19 departments. The chain of command at the college, in order of ascendance, consists of: faculty, department chairpersons, division chairpersons, dean, president, board of directors, and its executive committee. All levels above the department chairpersons previously have been excluded from the unit.

The faculty as a whole and as members of various committees participates in the formulation and effectuation of the college's academic policy. For example, the collective-bargaining agreement provides that the faculty has the exclusive right to set student grading and classroom conduct standards; set degree requirements; recommend earned degree recipients; "initially receive and consider" new degree programs; and develop, recommend, and approve curricular content and course offerings. The agreement also gives the faculty the right to recommend admission standards and departmental staffing needs. The president appoints three faculty members to sit on the nine-member Admissions and Retention Committee that sets admission policies and determines whether students on academic probation will be dismissed or retained.[6] Also, the president appoints three faculty members to sit on the seven-member Financial Aid Committee that establishes the policies concerning the distribution of financial aid to students. The faculty elects 5 faculty members to sit on the 16-member Educational Policies Committee. This committee reviews recommendations of the various divisions regarding the addition or deletion of courses; studies academic policies and standards; considers all matters affecting the curriculum and degree programs; and makes recommendations on these matters to the full faculty.

The faculty also participates in formulating and effectuating policy in certain nonacademic areas. In this regard, the Institutional Development Committee, comprised of six faculty members elected by the faculty, advises the administrators and the board of directors on major budgetary matters affecting employment; significant capital improvement programs; and proposals regarding financial exigency or substantial modifications or discontinuance of a program or department. Three of the six members also serve on the University Planning Cabinet along with board members, administration, and seminary faculty members. This committee reviews the total University budget prior to its submission to the University Administrative Cabinet,[7] and is responsible for long-range planning for the University.

The faculty participates in the selection of the dean, the division chairpersons, and the department chairpersons. With respect to the selection of the dean, two faculty members elected by the faculty sit on the five-member Search Committee, which conducts the search, screens and interviews candidates, and seeks the concurrence of the faculty for its recommended nominee. On approval of at least four of the five committee members, the committee selects a nominee to be recommended to the board of directors for appointment. The faculty of each division and department recommends to the dean its choice for the individual to be appointed division chairperson and department chairperson. Although it is the dean who makes the appointment,

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[5] *Wallace-Murray Corp.*, 192 NLRB 1090 (1971).

[6] There are some 14 committees on which the faculty participates. We have discussed here only some. The other committees are: Nominating Committee, Campus Hearing Board, Athletics Committee, Teacher Education Committee, Continuing Education Committee, Off-Campus Semester Committee, and Human Rights Committee.

[7] The University Administrative Cabinet (UAC) is composed of the president, the two deans, the business manager, the development officer, and the Title III coordinator. The UAC executes policies of the board of directors, sets budgetary guidelines, and authorizes all full-time positions at the University.

Dean Stewart testified that he always has followed the faculty recommendations in this regard.

The faculty also elects the five members who sit on the Promotions and Tenure Committee. This committee evaluates the qualifications of individual faculty members for promotions and/or tenure. The committee reports its findings and recommendations to the dean, who, along with the president, makes the decision. Faculty members who are denied promotions or tenure may appeal to the Executive Committee of the board of directors, which makes the final decision. In the years 1981 through 1983, the president and dean followed all the recommendations of the Promotion and Tenure Committee except for one individual whom the Employer contends was ineligible for the recommended promotion because her contract had not been renewed.[8]

The faculty elects the three faculty members who comprise the Hearing Committee, which reviews certain adverse personnel actions such as dismissals for cause and nonrenewals during the probationary period. The committee collects evidence and makes a recommendation. It is the president who makes the final decision with respect to nonrenewals. With respect to dismissals for cause, there is a right of appeal to the board of directors, which makes the final decision. The faculty also elects the four faculty members who comprise the Professional Development Committee, which reviews and makes recommendations to the dean concerning all matters regarding leave for professional development, experience or advanced study, the distribution of funds for faculty development, and "exceptions for promotion eligibility."

Faculty members who function as department chairpersons perform certain duties in addition to teaching. In this regard, they chair department faculty meetings and prepare the department's list of course offerings and teaching assignments, which are subject to the dean's approval. Department chairpersons also prepare and administer a budget for their respective departments. The budget is reviewed by the dean, who may revise it, and it is subject to final approval by the board of directors. The department chairpersons also participate in the hiring of faculty for their respective departments. Thus, after the University Administrative Cabinet authorizes the filling of a position, the department chairperson, along with the dean, reviews employment applications and draws up a priority list of candidates for interviews. The hiring decision normally is jointly made based on recommendations of the dean, department chairperson, and the faculty. Dean Stewart testified that he has never vetoed any of the recommendations and has hired 27 people based on the recommendations of the faculty. Professor James Wright, however, testified that he is aware of "a couple of occasions" when the dean has hired individuals contrary to the recommendations of the faculty and department chairpersons. The department chairperson and the division chairperson evaluate the performance of the nontenured faculty and make recommendations whether their contracts should be renewed. After reviewing their recommendations, the dean decides the matter. If the dean denies renewal contrary to the recommendation of the division or department chairperson, his decision may be appealed to the Faculty Hearing Committee, composed entirely of faculty, which then makes a recommendation to the president, who makes the final decision.

The Union argues in essence that the faculty are not managerial employees within the meaning of *Yeshiva*, supra. Thus, the Union contends that the faculty has little input into the decision-making process at the University and that the faculty cannot make effective recommendations on policy because actual control lies not with the faculty, but with the University's administrators and management hierarchy. The Union contends that the University's curriculum is exclusively controlled by the board of directors and notes that in 1972 and 1975 the board of directors eliminated certain academic departments contrary to the faculty's recommendations. The Union also notes that the dean can overrule faculty recommendations on hiring and the selection of department and division chairpersons. The Union further argues that it is the board of directors that effectively controls terminations, sabbaticals, and budget matters.

The Employer contends that the faculty are managerial employees within the meaning of *Yeshiva*. The Employer notes that the faculty controls virtually all academic matters and makes effective recommendations concerning student admission policies, student retentions and dismissals, sabbaticals, leaves, grants, and hiring, including the hiring of the dean. The Employer notes that by virtue of their numbers on the Search Committee, the faculty can effectively veto any candidate for the position of dean. The Employer also notes that the faculty makes effective recommendations with respect to the promotion and tenure of faculty members and the renewal of contracts for probationary faculty. Finally, the Employer notes that the faculty makes effective recommendations concerning the budget within the guidelines set by the University Administrative Cabinet.

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[8] In its motion to submit additional evidence, the Union contends that in February 1985 the Employer's president rejected four of the six recommendations on tenure made by the Promotion and Tenure Committee. Assuming this contention to be true, this would not affect our decision, as explained infra.

We agree with the Employer that the faculty members are managerial employees. As noted by the Court in *Yeshiva*, managerial employees are those who "formulate and effectuate management policies by expressing and making operative the decisions of their employer."[9] The Court noted also that managerial employees "must exercise discretion within, or even independently of, established employer policy and must be aligned with management" and normally must represent "management interests by taking or recommending discretionary actions that effectively control or implement employer policy."[10]

Applying these principles to the facts of the instant case, we find that the faculty members here, as in *Yeshiva*, play a major and effective role in the formulation of academic policy. We note first that under the collective- bargaining agreement the faculty as a whole has the exclusive right to set general student grading and classroom conduct standards, and degree requirements; recommend earned-degree recipients; "initially receive and consider" new degree programs; and develop, recommend, and ultimately approve curricular content and course offerings.[11] Under the agreement and/or through their participation in the various committees noted above, the faculty makes effective recommendations concerning course schedules, admission standards, student retention, the distribution of financial aid to students, and the modification of programs or departments. Although the board of directors may have eliminated certain academic departments some years ago contrary to the faculty's recommendation, this does not detract from the significant control exercised by the faculty over the academic policies in the remaining departments. Cf. *American International College*, 282 NLRB 189 (1986). Finally, as we emphasized in *Livingstone College*, 286 NLRB 1308 (1987), under *Yeshiva* it is the faculty members' participation in the formulation of academic policy that aligns their interest with that of management. Having found that the faculty members in the present case have substantial authority in formulating and effecting policies in academic areas, we conclude that they are managerial employees.

Although of less significance in ascertaining managerial status, we note that the faculty here also can effectively recommend discretionary actions with respect to the implementation of Employer policy in nonacademic areas. In this regard, the faculty makes recommendations concerning budget matters, capital improvements, department staffing needs, and the University's long-range planning. In addition, it makes recommendations regarding the promotion and tenure of faculty members, dismissals for cause and nonrenewals of contract for probationary employees, the granting of leave, and the distribution of funds for faculty development.[12] The faculty recommends the individuals to be appointed department and division chairpersons, and even participates in the selection of the dean. Faculty members who function as department chairpersons prepare and administer their department budget and are directly involved in the hiring of department faculty. Although ultimate authority in certain of these areas may reside with the board of directors or upper levels of management, who occasionally may reject faculty recommendations, it is clear that the faculty here plays a significant role in the operation of the University. *Thiel College*, 261 NLRB 580, 586 (1982); *American International College*, supra.

Our dissenting colleague finds several deficiencies in the Board's approach in this and other *Yeshiva* cases. First, the dissent counts the number of areas in which faculty at various institutions have input and compares these figures to the number of such areas found in *Yeshiva*. Noting that the Yeshiva faculty had absolute authority in academic matters, the dissent finds "nothing significant" in the Dubuque faculty's less than absolute authority on such matter. The dissent acknowledges that the Dubuque faculty makes effective recommendations in other, nonacademic areas but finds that after "examining the entire picture," the Dubuque faculty does not exercise the degree of authority exercised by the Yeshiva faculty and thus is not managerial within the meaning of *Yeshiva*. Finally, our dissenting colleague finds fault with the majority's mode of analysis and proposes that his analytical framework, based on but apparently not limited to the 18 criteria highlighted in *Yeshiva*, is the appropriate one.

Although it cannot be gainsaid that, as our dissenting colleague states, the Yeshiva faculty exercised a greater degree of authority than does the Dubuque faculty, in our view Dubuque is not sufficiently "unlike" Yeshiva to remove it from the range of institutions covered by the holding in that case. Indeed, it appears to us that our colleague's quarrel is essentially with the Court's opinion in *Yeshiva* itself inasmuch as that opinion virtually dictates the result we reach here. Our colleague accuses us of applying *Yeshiva* "too restrictively." We think that, on the contrary, it is his interpretation that is too limited and thus misses the thrust of the Court's opinion entirely.

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[9] 444 U.S. at 682, quoting *NLRB v. Bell Aerospace Co.*, 416 U.S. 267, 288 (1974).

[10] Id. at 683.

[11] Although there is some conflict in the record testimony as to the extent of the faculty's role in setting degree requirements, the collective-bargaining agreement explicitly grants the faculty the exclusive right to set degree requirements, and there is no evidence that anyone other than the faculty has exercised this right at any time. See *College of Osteopathic Medicine & Surgery*, 265 NLRB 295 (1982).

[12] The Union in its motion to submit additional evidence contends that the president has rejected a majority of the recommendations made by the Promotion and Tenure Committee in February 1985. Even assuming the truth of this contention, this would not affect our decision given the substantial indicia of managerial status noted above. *Livingstone College*, supra.

In this regard, there is no indication in *Yeshiva* that the Court intended its holding to reach only institutions with faculties having as much or nearly as much input as the Yeshiva faculty. In fact, the implication is quite the opposite. Thus, the Court engaged in a lengthy discourse on the nature of institutions of higher learning in general. The Court noted that:

> The "business" of a university is education, and its vitality ultimately must depend on the academic policies that largely are formulated and generally are implemented by faculty governance decisions.

Yeshiva University, 444 U.S. at 688. In its discussion, the Court clearly focused on the faculty's role in academic matters although other factors were also considered. The Court made numerous statements about institutions of higher learning that, going beyond the facts of *Yeshiva* itself, were general in nature.[13] significantly, although the Court found that the Yeshiva faculty's authority in academic matters was absolute, it expressly found absolute authority is not a prerequisite for managerial authority.[14]

Only at the conclusion of its discussion did the Court suggest that some institutions of higher learning might be excepted, in whole or in part, from its holding. At that juncture, the Court offered two illustrations of faculty "unlike" that in *Yeshiva*, neither of which is applicable here. Thus, the Court stated at footnote 31:

> We recognize that this is a starting point only, and that other factors not present here may enter into the analysis in other contexts. It is plain, for example, that professors may not be excluded merely because they determine the content of their own courses, evaluate their own students, and supervise their own research. There thus may be institutions of higher learning unlike Yeshiva where the faculty are entirely or predominantly nonmanagerial. There also may be faculty members at Yeshiva and like universities who properly could be included in a bargaining unit. It may be that a rational line could be drawn between tenured and untenured faculty members depending upon how a faculty is structured and operates.

The faculty at Dubuque clearly have input into academic decisions that have impact reaching beyond merely their own courses, students, and research. Nor does the record here support a finding that junior, untenured faculty should be treated differently from senior faculty under *Yeshiva*.

Contrary to our colleague, we do not believe that the issue of managerial status can properly be decided simply by counting and comparing the number of areas in which faculty at a given institution have input with the number of such areas found in *Yeshiva*. Although this approach may measure the scope of areas in which faculty members exercise influence, it fails to measure the extent of that influence and consequently fails to take into account the many different combinations and permutations of influence that render each academic body unique. Such a mechanical formula may be analytically straightforward, but, in our view, it falls short of meeting the Court's concerns as expressed in *Yeshiva*.

Further, our mode of analysis seems to differ from that of our dissenting colleague not so much as to the factors to be considered but as to the weight to be accorded them. As set forth above, we have examined all the factors in this case that are relevant to managerial authority as it was defined by the Court in *Yeshiva*. Admittedly, the list of such factors is not as extensive as the list in *Yeshiva*. Nevertheless, what seems inarguable to us is that the faculty does have significant authority and makes effective recommendations in areas that the Court manifestly said in *Yeshiva* were managerial in nature. These areas are not insignificant. Whether any of us might be inclined under other circumstances to find that these factors fall short of establishing managerial status, in our view, *Yeshiva* leaves little choice as to the outcome. Accordingly, consistent with *Yeshiva*, we find that the faculty here are managerial employees.[15] We, therefore, shall clarify the unit accordingly.

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[13] See, for example, 444 U.S at 689 in which the Court stated, "The university requires faculty participation . . . because professional expertise is indispensable to the formulation and implementation of academic policy." (Citation omitted.)

[14] See, e.g., id. at fns. 21 and 27.

[15] The Employer further contends that department chairpersons, the director of the Learning Assistance Center, the athletic director, and the director of Foreign Student Services are supervisors and for this reason

Continued

ORDER

It is ordered that the collective-bargaining unit of all full-time faculty and those part-time faculty teaching six or more academic hours per semester in the College of Liberal Arts, University of Dubuque, including department chairpersons, and the director of the Learning Assistance Center, represented by the Faculty Association of the College of Liberal Arts is clarified to exclude all faculty members, department chairpersons, and the director of the Learning Assistance Center.

MEMBER JOHANSEN, dissenting.

Contrary to my colleagues, I find that the faculty members at the University of Dubuque are not managerial employees, but are statutory employees. I find that they are properly included in the unit.

Depriving a group of employees of protection under the National Labor Relations Act is a serious matter. My colleagues have applied the Supreme Court's decision in *NLRB v. Yeshiva University*, 444 U.S. 672 (1980), too restrictively and have wrongfully deprived the Dubuque faculty of the protection of the Act.

In *Yeshiva* the Supreme Court discussed certain areas over which the Yeshiva faculty exercised authority. There were 18 such areas, 13 in the academic sphere and 5 in the nonacademic sphere.[1] In the present case the majority finds that the Dubuque faculty possesses some degree of authority in five academic areas—grading, graduation requirements, curriculum, admission standards, and student retention. The faculty also possesses some degree of authority in three nonacademic areas—promotion, tenure, and termination. The Dubuque faculty therefore possesses some degree of authority in 8 of the 18 *Yeshiva* criteria, less than half. The Yeshiva faculty exercised authority in all. In another faculty-unit case, *University of New Haven*, 267 NLRB 939 (1983), the Board determined that the faculty exercised authority in 12 of the 18 criteria.[2] The New Haven faculty were found to be managerial. In *Boston University*, 281 NLRB 798 (1986), the Board determined that the faculty exercised authority in 12 of the 18 areas.[3] These faculty members were also found to be managerial.

A comparison of the Supreme Court's findings in *Yeshiva* with the Board's findings in the present case discloses a significant disparity in the authority of the two faculties. Dubuque is clearly a school "unlike Yeshiva." I further note that the Yeshiva faculty exercised a greater degree of authority than does the Dubuque faculty. The Supreme Court found that the Yeshiva faculty had absolute authority in academic matters and that they played a predominant role in faculty hiring, tenure, sabbaticals, termination, and promotion. They also effectively decided which students would be admitted, retained, and graduated.

The Dubuque faculty's authority in academic matters is not absolute. The five areas in which the faculty exercises authority are in the routine pedagogical areas. In *Yeshiva* the Supreme Court noted that "[i]t is plain, for example, that professors may not be excluded merely because they determine the content of their own courses, evaluate their own students, and supervise their own research."[4] I find nothing significant in the authority exercised by the professors in this case.

In the nonacademic area, the faculty makes effective recommendations in the areas of tenure, promotions, and terminations. The faculty thus exercises authority in three of the five criteria, which is a significant and indicative amount.

After examining the entire picture, the authority exercised in the academic sphere, the authority exercised in the nonacademic sphere, and the amount and degree of authority, I conclude that the Dubuque faculty lacks the depth and breadth of authority possessed by the Yeshiva faculty. I do not find that the Dubuque faculty exercises the degree of authority exercised by the Yeshiva faculty.

The majority disputes my figures, but offers none of their own, and misconstrues my analysis. The majority dismisses the attempt to formulate some meaningful framework for analysis and provide some measure of predictability in this area as "a mechanical formula." The faculties of mature universities, however, display certain common characteristics that the Supreme Court recognized and

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must be excluded from the unit. We note that the unit does not specifically include the athletic director and the director of Foreign Student Services. However, these two positions as well as the position of director of the Learning Assistance Center are held by faculty members. Because we have concluded that the faculty, including department chairpersons, are managerial employees, we find it unnecessary to determine whether these individuals are also supervisors within the meaning of the Act.

[1] The General Counsel Memorandum, No. 81-19 (April 10, 1981), Subject: Guidelines for cases arising under *NLRB v. Yeshiva University*, 444 U.S. 672 (1980), lists the following areas: (1) curriculum (course content and course schedules), (2) teaching methods, (3) grading policies, (4) matriculation standards, (5) admission policies, (6) retention policies, (7) graduation policies, (8) size of student body, (9) tuition, (10) location of a school, (11) teaching loads, (12) student absence policies, (13) enrollment levels, (14) faculty hiring, (15) tenure, (16) sabbaticals, (17) terminations, and (18) promotions.

[2] The areas were curriculum, admission, graduation requirements, teaching methods, teaching loads, size of student body, facilities planning, hiring, tenure, sabbaticals, terminations, and promotions.

[3] The areas were curriculum, teaching methods, grading policies, matriculation, admission policies, retention, graduation requirements, size of student body, hiring, tenure, terminations, and promotions.

[4] 444 U.S. at 690 fn. 31.

analyzed in *Yeshiva*. It is these characteristics which we should examine. I start with the areas of common authority exercised by faculty at mature universities, but I am not limited to them. Once these factors are identified and the degree of faculty authority gauged, additional areas of faculty authority, such as the awarding of scholarships, can be examined.

Since the issuance of *Yeshiva University* on February 20, 1980, the Board has found faculty members to be managerial employees in eight cases.[5] In all of these cases the Board's approach to the question whether the school's faculty members were managerial employees has been tentative. In these eight cases the Board has found determinative faculty authority in certain areas in certain cases and in different areas in other cases. The majority defends their approach based on "the many different combinations and permutations of influence that render each academic body unique." But the bottom line is that the Board has failed to develop an integrated body of law.

The Board has been criticized for its lack of a consistent approach to the faculty managerial issue.[6] The 18 *Yeshiva* criteria provide a valid and valuable starting point for Board analysis. The Supreme Court highlighted the 18 criteria for a reason, the reason being to examine the entire gamut of faculty authority. The Yeshiva faculty possesses authority over 100 percent of this range, while the Dubuque faculty possesses authority over 44 percent of this range. The Yeshiva faculty were managerial employees, the Dubuque faculty are not. Accordingly, I would dismiss the unit clarification petition as to the faculty members.

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[5] *Ithaca College*, 261 NLRB 577 (1982); *Thiel College*, 261 NLRB 580 (1982); *Duquesne University*, 261 NLRB 587 (1982); *College of Osteopathic Medicine*, 265 NLRB 295 (1982); *University of New Haven*, 267 NLRB 939 (1983); *Boston University*, 281 NLRB supra. *American International College*, 282 NLRB 189 (1986); and *Livingstone College*, 286 NLRB 1308 (1987).

[6] See generally Lee, *Collective Bargaining and Employee Participation: An Anomalous Interpretation of the National Labor Relations Act*, 38 Lab. L.J. 274 fn. 79 (May 1987), and Lee and Begin, *Criteria for Evaluating the Managerial Status of College Faculty: Applications of Yeshiva University by the NLRB*. 10 J. Coll. & U. L. 515 (1983–1984).

Tri-State Transportation Co., Inc. *and* **Teamsters, Chauffeurs, Warehousemen and Helpers of America Local 25, a/w International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, AFL–CIO,[1] Petitioner.** Case 1–RC–18975

June 27, 1988

DECISION AND DIRECTION

BY CHAIRMAN STEPHENS AND MEMBERS BABSON AND CRACRAFT

The National Labor Relations Board, by a three-member panel, has considered determinative challenges in an election held November 6, 1987, and the hearing officer's report recommending disposition of them. The election was conducted pursuant to a Stipulated Election Agreement. The tally of ballots shows five for and five against the Petitioner, with two challenged ballots.

The Board has reviewed the record in light of the exceptions and brief and adopts the hearing officer's findings and recommendations only to the extent consistent with this decision.

The Board agent conducting the election challenged the ballots of Brian Berlo and Rocco Sarno on the ground that their names did not appear on the eligibility list furnished by the Employer. The Employer contends that these employees are casual employees and not entitled to vote in the election.[2] The Petitioner asserts that they are regular part-time employees entitled to vote. The hearing officer found both employees to be casual employees and excluded them from the unit.[3] We disagree.

The Employer is a trucking company engaged in the transportation of garments operating in Norwood, Massachusetts.[4] The Employer employs drivers who make pickups and deliveries locally within the Norwood area and over-the-road drivers who transport garments to and from its facility in Little Falls, New Jersey. In local runs the garments are usually hung in the trucks, a practice requiring driver training.[5] At the time of the election there were seven full-time local drivers and three full-time over-the-road drivers. The Employer also employs spare drivers who usually are assigned over-the-road runs, which do not require training, although spare drivers may perform local runs when the garments are packed in containers.

All drivers who perform over-the-road runs are paid a flat fee for each round trip, and those drivers performing local runs are compensated on the basis of an hourly rate. The spares who do either over-the-road runs or local runs receive the same wages as the full-time drivers. Spares and full-time drivers report to the same supervisor and both classes of employees are subject to the same hiring procedures. Spares have become full-time employees on several occasions since the Norwood terminal opened in September 1985.

The full-time drivers receive paid vacations (1 week after 1 year and 2 weeks after 2 years), 5 paid sick days annually, a $1000 individual IRA payment a year, and a fully paid health insurance plan. The spares are not entitled to receive any of the above-mentioned benefits and receive a paid holiday only if they work the day before or after a holiday.

Sarno averaged one over-the-road run a week between July 26, 1987, when he was hired, and October 17, 1987, the eligibility cutoff date. Berlo made six over-the-road runs to New Jersey and worked 22 hours as a local driver between August 16 and October 17, 1987. In excluding both Sarno and Berlo from the unit as casuals, the hearing officer found that although both Berlo and Sarno met the 4-hours-a-week average eligibility test traditionally used by the Board to determine the inclusion of employees in a unit as regular part-time employees, their lack of community of interest with the full-time drivers precluded their inclusion in the unit. The hearing officer emphasized the differences in fringe benefits between the full-time drivers and the spares as well as the spares' ability to reject work and have full-time jobs elsewhere.

The test for determining whether an employee is a regular part-time employee or a casual employee takes into account factors such as regularity and continuity of employment and similarity of work duties. *Pat's Blue Ribbons*, 286 NLRB 918 (1987). In that case the Board stated, "[T]he individual's relationship to the job must be examined to determine whether the employee performs unit work with sufficient regularity to demonstrate a community of interest with remaining employees in the bargaining unit." Here, in concluding that both Sarno and Berlo were casual employees, the hearing officer failed to give proper weight to the similarities in working conditions between the spares

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[1] On November 1, 1987, the Teamsters International Union was readmitted to the AFL–CIO. Accordingly, the caption has been amended to reflect that change.

[2] The stipulation sets forth the appropriate unit as:

> All full-time and regular part-time truck drivers, helpers and warehousemen employed by the Employer at its 655 Pleasant Street, Norwood, Massachusetts facility but excluding office clerical employees, managerial employees, guards and supervisors as defined in the Act.

[3] The Stipulated Election Agreement is silent as to the intended application of the term "regular part-time drivers." We agree with the hearing officer that by "regular part-time drivers" the parties' intended a definition identical to that used by the Board in making original unit determinations.

[4] The Employer also has facilities in Little Falls and Belmont, New Jersey, Reading, Pennsylvania, and Baltimore, Maryland.

[5] Occasionally the garments are transported in containers as in the over-the-road runs.

289 NLRB No. 38

and the full-time drivers. Both groups receive the same wages, have the same supervision, and perform the same work. Spares do over-the-road runs as well as local runs and receive the same compensation for their trip as the full-time employees. Further, spares remain employed as long as they choose and have even become full-time employees. Additionally, both Sarno and Berlo have worked continually and regularly for the Employer since their hire and have the expectation of continued employment.

The differences in employment conditions between the spares and the full-time employees are insufficient to justify the exclusion of spares from the unit. Part-time employees frequently receive less in fringe benefits than full-time employees. Similarly, the spares' ability to reject work is not determinative of their employment status so as to exclude them from the unit. *Pat's Blue Ribbons*, supra. Nor is the fact that spares may have regular employment elsewhere sufficient to justify their exclusion. *V.I.P. Movers*, 232 NLRB 14 (1977). In sum, the differences here do not warrant a finding that the spares lack a community of interest with the full-time employees.

The hearing officer also found that the Petitioner's failure to protest the exclusion of spares from the *Excelsior* list provided by the Employer was further evidence that the spares did not share a community of interest with the full-time drivers.[6] There is no requirement, however, that the omissions from the *Excelsior* list be protested, and we are unwilling to draw any inference from the Petitioner's failure to challenge the exclusion of these two employees from the *Excelsior* list.

We find that the Employer' s spare drivers, specifically Rocco Sarno and Brian Berlo, both shared a community of interest with the Employer's full-time drivers. As both Sarno and Berlo worked with sufficient regularity between the date of their employment and the end of the eligibility period on October 17, 1987, they are both regular part-time employees eligible to vote in the election. Accordingly, we shall direct the Regional Director to open and count the ballots of Rocco Sarno and Brian Berlo.

DIRECTION

IT IS DIRECTED that the Regional Director for Region 1 shall, pursuant to the National Labor Relations Board Rules and Regulations, within 10 days from the date of this decision, open and count the ballots of Rocco Sarno and Brian Berlo. The Regional Director shall further prepare and cause to be served on the parties a revised tally of ballots and thereafter issue the appropriate certification.

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[6] The hearing officer stated that, if the Petitioner knew of the existence of spare drivers prior to the election and failed to protest their exclusion, this constitutes evidence that the spares were not included within the unit description of the Stipulated Agreement. The hearing officer further stated that, on the other hand, if the Petitioner was unaware of the existence of spares, this would highlight the lack of community of interest between the spares and the full-time employees.

Johns-Manville Sales Corporation *and* International Association of Machinists and Aerospace Workers, AFL–CIO, District Lodge No. 115, Local Lodge No. 1549. Cases 32–CA–4012 and 32–CA–4377

June 27, 1988

DECISION AND ORDER

BY CHAIRMAN STEPHENS AND MEMBERS JOHANSEN AND BABSON

On September 30, 1982, Administrative Law Judge David G. Heilbrun issued the attached decision. The General Counsel, the Charging Party, and the Respondent filed exceptions and supporting briefs, and the Respondent filed an answering brief.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings,[1] and conclusions only to the extent consistent with this Decision and Order.

The complaint alleges that the Respondent violated Section 8(a)(5) and (1) of the Act by withdrawing recognition from the Union on August 26, 1981,[2] and by failing and refusing to bargain with the Union since October 5. The complaint also alleges that the employee strike of April 13 was prolonged by the Respondent's unfair labor practices and was converted to an unfair labor practice strike on October 29. The complaint further alleges that the Respondent violated Section 8(a)(5), (3), and (1) by refusing to pay to striking employees in 1982 accrued vacation benefits, which were earned during the period of January 1 through April 13. The judge dismissed the complaint in its entirety. First, he found that the Respondent could lawfully withdraw recognition from the Union and that the strike was not an unfair labor practice strike. Second, he found that the Respondent could withhold the strikers' 1982 vacation pay. We disagree with the judge's first finding because the evidence offered in support of the Respondent's asserted good-faith doubt is insufficient to rebut the presumption of the Union's continuing majority status. Thus, we conclude that the Respondent violated Section 8(a)(5) and (1) of the Act and that the strike became an unfair labor practice strike. While we adopt the judge's conclusions on the vacation pay issue, we do so only for the reasons set forth below.

1. *Withdrawal of recognition*: The Respondent is a Delaware corporation engaged in the nonretail manufacture of water pipe and related products at Stockton, California. Since 1958 Machinists District Lodge 115, Local Lodge 1549 has been the exclusive collective-bargaining representative of the Respondent's production and maintenance employees at its Stockton facility. The parties' last collective-bargaining agreement covering these employees expired April 12. Negotiations for a successor contract began in March. The Respondent's final contract offer was rejected by the union membership and a strike commenced on April 13. Approximately 230 employees engaged in the strike. Over the next several weeks, the Respondent hired permanent strike replacements. This resulted in a total work force on May 1 of approximately 301 employees, including 290 strike replacements, 9 returning strikers, and 2 individuals returning from their layoff status. By May 10 the total work force had diminished to approximately 279 employees, thus making a total of approximately 509 employees in the unit. There is no indication from the record that this total of unit employees changed from May 10 through August 26, the date of the Respondent's withdrawal of recognition.

On May 1 the Union and the Respondent conducted a negotiation session with a Federal mediator. During this meeting, the Union stated that it would accept one of the Respondent's two alternative final offers if the Respondent would return the strikers to work, giving recognition to their seniority, and lay off as many of the permanent replacements as necessary to do so. The Respondent rejected the Union's proposal and so notified the replacements by posting a plantwide notice. Then, in late May and early June, the Union requested further negotiation sessions with the Respondent. The Respondent declined to continue bargaining. No further negotiation sessions were held and the topic of striker reinstatement was not discussed further or pursued by the Union.

On May 11 one of the replacements filed with the Board a decertification petition accompanied by a list of 211 employee signatures dated from April 30 through May 5 (R. Exh. 15). In mid-May a copy of this list was provided to the Respondent by employee Theresa Anderson, the petitioner in the decertification case. Although on its face the

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[1] The Charging Party has excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

The judge stated that even under the Respondent's view of the contract, the vacation pay paid in 1981 prior to the beginning of the strike was based on 1981 earnings. The judge was incorrect in this respect. In the Respondent's view, all vacation pay paid in 1981 was calculated on 1980 earnings.

[2] All dates are in 1981 unless otherwise indicated.

289 NLRB No. 40

list does not indicate its purpose, uncontroverted evidence reveals that Anderson told the Respondent that the document was a list of employees who signed the decertification petition. In addition, the General Counsel does not contest the authenticity of the document as the employee list accompanying the decertification petition. A few weeks prior to the instant hearing of June 3, 1982, the Respondent, for the first time, checked the list of signatures for authenticity. Each signature on the list is numbered beginning with 1 through 211. Kelly Garrett, the Respondent's employee relations supervisor, testified that approximately seven signatures (numbered 14, 17, 25, 54, 125, 128, and 182), which she marked with question marks, were illegible. Thus, the Respondent could rely on, at most, 204 signatures as evincing repudiation of the Union.

In addition, during this period several replacements and returning strikers made disparaging comments about the Union to the Respondent's plant manager and two supervisors, Gene Karr and Glen Frisk. Joe Bird, the plant manager, testified that prior to the filing of the decertification petition he spoke individually with three employees: Kay Hallmark, Bob Harrison, and Theresa Anderson. Each asked him how the employees could get rid of the Union. Both Anderson and Hallmark later signed the employee list for the decertification petition (signatures numbered 4 and 116 respectively). Bird also testified that the Respondent held communications meetings for the replacements and returning strikers during the last week of April or the first week of May. Bird testified that each meeting was attended by approximately 30 or 40 employees, and questions were asked about how to get rid of the Union. Bird only identified certain supervisors and Theresa Anderson by name as having attended those meetings. Thus, the record does not establish how many, if any, of those employees attending the meetings were other than those who the record shows signed the employee list for the decertification petition, submitted union membership resignations, or were involved in the conversations with certain supervisors discussed below.

Plant Engineer Karr, a supervisor, testified that in May he had individual conversations with five replacements: William Dart, James Farmer, Robert Morris, John Parker, and Bill Constant. According to Karr, each replacement said that he did not want or need a union. William Dart and James Farmer also spoke with the foaming department supervisor, Glen Frisk, and indicated to him the same disaffection with the Union. Frisk also overheard Bill Constant telling other employees that he did not want the Union. Frisk further testified that during the period of May through July he had separate individual conversations with eight other replacements, all to the effect that they did not want or need a union. Those replacements involved were James Butlers, Michael Dayton, Bill Rivera, Mike Wood, Darrell Bonds, Jim Swanson, Bill Green, and Charles Hughes. Only Michael Dayton had signed the employee list for the decertification petition (the signature numbered 2). To summarize, the Respondent, through Karr and Frisk, identified by name 12 replacements who expressed opposition to the Union and whose signatures were not also included on the employee list for the decertification petition.

In addition, seven employees submitted to the Respondent copies of written resignations from their union membership. These letters of resignation, dated from April 22 through July 28, were from Frederick J. Valenzuela, Jesse Ramsey, Sam H. Ramsey, Sharon Galleys, Jim Valentine, Jack L. Fetters, and Aaron E. Holloway. Jesse Ramsey, Sam H. Ramsey, Jim Valentine, and Jack L. Fetters indicated in their letters that their resignations were due to financial problems.[3] In their letters, Sharon Galleys and Aaron E. Holloway did not give a reason for their resignations. In his letter, Frederick J. Valenzuela indicated that he had resigned his membership and could no longer support the Union due to a "personal belief that the act of violence, harassment [sic] and overall conduct of the labor dispute are negative to any meaningful negotiation." Frederick J. Valenzuela, Jesse Ramsey, and Sam H. Ramsey later signed the employee list for the decertification petition (signatures numbered 84, 144, and 145, respectively).

During the first 4-5 months of the strike, strikers harassed job applicants and new employees as they crossed the picket line; strikers temporarily blocked their cars, shouted at them, made obscene gestures, and called them "scabs." In addition, a dummy with the word "scab" on its chest was hanged by its neck near the plant entrance. At least 70 cars owned by employees sustained some combination of smashed windows, slashed tires, or body damage. Most of this vandalism occurred while the cars were parked on the Respondent's premises. The home of one employee was burglarized, the word "scab" written on the wall, and furniture stolen. The Respondent paid employees over

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[3] Jesse Ramsey indicated that he resigned because he was buying a new home and had other financial and family obligations. Sam H. Ramsey indicated that he resigned because he "had a son and another baby on the way." Jim Valentine indicated that he resigned because he did not support the strike and was "having a lot of family tension as [his] Dad is fighting for his life with brain tumors and [his] wife has a heart condition." Although Valentine indicated he did not support the strike, he did not indicate rejection of the Union as the bargaining representative.

$20,000 in compensation for damages related to the strike.

At the August 26 hearing on the decertification petition, the Respondent's counsel informed the hearing officer that the Respondent no longer recognized the Union. This was the first announcement to the Union that the Respondent had withdrawn recognition. At the instant unfair labor practice hearing, the Respondent claimed that it doubted that the Union had majority status as of May 1 and that subsequent events merely reinforced this doubt.

In early September the Union made a formal request, based on California's OSHA regulations, for access to employee medical files and other medical data collected by the Respondent. By letter dated September 16, the Respondent refused to provide this information and reiterated its refusal to recognize the Union.

On October 29 the Union distributed union handbills to approximately 180 to 200 strikers at the picket line at the Respondent's facility. The handbills stated that the Respondent withdrew recognition from the Union on May 1 and that the strike was "to protest this and other unfair labor practices."

In dismissing the complaint, the judge found that the Respondent did not have sufficient objective factors to support a good-faith doubt of the Union's majority status, but concluded that under *Telautograph Corp.*[4] the Respondent's withdrawal of recognition was lawful because it occurred subsequent to the filing of the decertification petition on May 11. In light of this conclusion, the judge found that the Respondent did not have an obligation to bargain with the Union and that the strike had not been prolonged by any unlawful conduct by the Respondent.

In her exceptions the General Counsel contends, inter alia, that the judge erroneously applied *Telautograph* to conclude that the withdrawal of recognition was lawful. The General Counsel argues that the Respondent's reliance on the pending decertification petition is insufficient, alone or in combination with the other factors asserted by the Respondent, to establish a good-faith doubt concerning the Union's majority status. The General Counsel further contends that, as evidenced by the Union's notice of October 29, one of the purposes of the strike was to protest the Respondent's unlawful withdrawal of recognition and, thus, the strike was converted to an unfair labor practice strike on October 29.

We agree with the General Counsel's contention that the judge misapplied *Telautograph*. Contrary to the judge's analysis, the Board in *Telautograph* did not privilege an employer to withdraw recognition from a union solely based on the existence of a pending decertification petition. The Board there held that an employer must refuse to engage in further contract negotiations until the question concerning representation has been settled by the Board, but the employer remained obligated to deal with the collective-bargaining representative in all other respects, including contract administration and grievance processing.[5] Thus, the Respondent here was not privileged to withdraw recognition based solely on the pending decertification petition, although the petition may be relied on as a factor in assessing whether the Respondent had a good-faith doubt concerning the Union's majority status. In this connection, we find that the record evidence on which the Respondent relied to support its doubt of the Union's majority status was insufficient to justify withdrawal of recognition for the reasons below.

In *Station KKHI*, 284 NLRB 1339 (1987), the Board recently reaffirmed the essential principles controlling here:

> Absent unusual circumstances, there is an irrebuttable presumption that a union enjoys majority status during the first year following its certification. On expiration of the certification year, the presumption of majority status continues but may be rebutted. An employer who wishes to withdraw recognition after a year may do so in one of two ways: (1) by showing that on the date recognition was withdrawn the union did not in fact enjoy majority status, or (2) by presenting evidence of a sufficient objective basis for a reasonable doubt of the union's majority status at the time the employer refused to bargain.

As previously indicated, the Respondent's defense of its withdrawal of recognition is based on this second method, i.e., reasonable doubt of the Union's majority status prior to August 26. The objective factors presented by the Respondent at the trial to support its reasonable doubt were: its hire of strike replacements; the property damage and harassment of the replacements during the strike;

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[4] 199 NLRB 892 (1972).

[5] In *Dresser Industries*, 264 NLRB 1088 (1982), the Board overruled *Telautograph*, but only prospectively. Accordingly, the Board found that the employer in *Dresser* had acted lawfully when it relied on *Telautograph*, which was the current law at the time it ceased negotiations. Because the Respondent here has similarly relied on *Telautograph* before that case was overruled, we find that it did not violate Sec. 8(a)(5) and (1) by refusing to engage in further contract negotiations pending an election. See *Alexander Linn Hospital Assn.*, 288 NLRB 103, 107 fn. 16 (1988).

the decertification petition supported by the employee list of 211 signatures; certain comments by replacements to the plant manager and two supervisors rejecting union representation; the seven union membership resignations; the Union's May 1 contract proposal demanding the reinstatement of the strikers, after discharging the replacements, if necessary; and the Union's lack of attempts to organize the replacements.

We note at the outset that in *Station KKHI*, supra the Board overruled *Pennco, Inc.*, 250 NLRB 716 (1980), on which the judge relied here. In *Station KKHI* the Board held that it would no longer apply a presumption that strike replacements support the union in the same ratio as those shown to have been replaced. The Board also declined, however, to adopt the contrary presumption, urged by the Respondent here, that strike replacements willing to cross a picket line to go to work repudiate the union as their collective-bargaining representative. The Board stated that it will not apply any specific presumption concerning the union sentiments of strike replacements, but will review each case on its facts considering whether the employer has proffered evidence of employees' expressed desires to repudiate the union sufficient to overcome the overall presumption of continuing union majority.

Turning to the facts here, the record falls short of supporting the Respondent's affirmative defense in that it establishes only that prior to August 26 the Respondent was aware that, at most, 217 employees out of a combined total of approximately 509 strike replacements, returning strikers, and strikers had repudiated the Union. For the reasons set forth below, this figure is based solely on the statement from employee Morrison to Plant Manager Bird, the comments repudiating the Union made by the 12 employees identified by Supervisors Karr and Frisk, and the 204 employees who legibly signed the list for the decertification petition.

In arriving at this figure of 217 employees, we reject the other factors relied on by the Respondent. First, in *Station KKHI*, supra at 1344, we held that

> [T]he hiring of permanent replacements who cross a picket line, in itself, does not support an inference that the replacements repudiate the union as collective-bargaining representative. . . . [A]n employee may be forced to work for financial reasons, or may disapprove of the strike in question but still desire union representation and would support other union initiatives. . . . [To hold that replacements can be presumed to disfavor the union] would disrupt the balance of competing economic weapons long established in strike situations and substantially impair the employees' right to strike by adding to the risk of replacement the risk of loss of the bargaining representative as soon as replacements equal in number to the strikers are willing to cross the picket line.

Consistent with *Station KKHI*, supra, we will not permit the Respondent to rely on its hiring of replacements but we "will require 'some further evidence of union non-support'"[6] before concluding that the Respondent had a good-faith doubt of the Union's majority status.

Second, we reject the Respondent's contention that further evidence of union nonsupport emanated from the purported strike violence that occurred here.[7] The Respondent asserts that various kinds of harassment by the strikers, including the vandalism to the unattended parked cars described above, justify a conclusion of employee rejection of the Union. In support of its contention, the Respondent relies, inter alia, on *I T Services*, 263 NLRB 1183 (1982), in which the Board considered several factors, including strike violence, to conclude that the employer had an adequate objective basis to support a good-faith doubt of the union's majority status.

We find the instant case distinguishable from *I T Services* in two significant respects. In the instant case, the circumstances surrounding the picketing[8] do not rise to the level of the outrageous conduct exhibited in *I T Services*.[9] More importantly given the crucial significance of the Respondent's decision to withdraw recognition, we note that the Respondent here had available other, more reliable factors, including the list for the decertification petition and the statements from identified employees, which could have indicated more tangibly majority employee dissatisfaction with the union and with the alleged violence, but, as we have found, fell short of doing so.[10]

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[6] *Station KKHI*, supra, quoting *NLRB v. Pennco, Inc.*, 684 F.2d 340, 343 (6th Cir. 1982).

[7] We note in this regard that in *NLRB v. Randle-Eastern Ambulance Service*, 584 F.2d 720 (5th Cir. 1978), the court determined that the employer had sufficient objective considerations to support a reasonable doubt of the union's continued majority status. Although the court noted that several returning strikers submitted union resignation letters after crossing the picket line in a fairly acrimonious strike and that the employer claimed that six replacements had indicated disinterest in the union or had been victims of picket line violence, the court's decision does not appear to have turned on the mere existence of a purportedly violent picket line as an indication of a lack of union support.

[8] We would reach the same conclusion even if we were to accept as true the additional purported violent acts perpetrated by strikers described in the Respondent's offers of proof, which the judge rejected.

[9] The judge in *I T Services* set forth in detail the "pervasive" violence that attended the strike there. He noted that some of the violence occurred in the presence of the union president or was committed by union picket captains and also noted the apparently racial character of much of the invective. The judge concluded that "the level of violence was so high" that employees subjected to it could, in effect, be presumed to reject any association with their perceived "tormentor."

Third, contrary to the Respondent's position, the Union's striker reinstatement demand on May 1 does not automatically prove that the Union abandoned the replacements or that the replacements do not have any desire for union representation. In this regard, the Board noted in *Station KKHI*, supra at 1344, that the incumbent union's primary concern, at least for the duration of the strike, is for the striker's welfare, rather than that of the replacements, and that the replacements are typically aware of this. The Board, however, refused to impute a lack of union support to the replacements. In this regard, inasmuch as at least an initial demand that all the strikers be reinstated is to be expected in the typical strike situation, to hold that such proposals establish the antiunion sentiments of the replacements and thus support an employer's doubt of union majority would invariably "substantially impair the employees' right to strike by adding to the risk of replacement the risk of loss of the bargaining representative." *Station KKHI*, supra.[11] Such a result would fly in the face of the purposes and policies of the Act.[12]

Fourth, we observe that six of the membership resignations relied on by the Respondent here indicate that they were submitted for financial reasons or do not indicate any particular reason. Valenzuela's resignation appears to be the only exception. It indicates a possible repudiation of the Union, but Valenzuela also signed the employee list accompanying the decertification petition and thus already has been counted among those rejecting the Union. Regarding those indicating financial reasons, the Board has held that membership resignations, which may be submitted for financial reasons, do not establish a renunciation of union representation. For example, in *NLRB v. Mar-Len Cabinets*, 659 F.2d 995, 999 (9th Cir. 1981), enfg. 243 NLRB 523 (1979), the court agreed with the Board's conclusion that employee resignations from the union did not support the employer's asserted good-faith doubt since

> the employees resigned from the union to avoid potential fines, not to oust the union as a bargaining representative, and . . . they crossed the picket line and returned to work as a means of preserving a continuity of income because of economic necessity, and not because they rejected union representation.

We, therefore, conclude that the Respondent's reliance on the membership resignations was an insufficient basis for supporting an alleged good-faith doubt of the Union's majority status.[13]

Finally, we reject the asserted comments made in the presence of unidentified employees at the communication meetings described above by Plant Manager Bird. Such comments involved questions from speakers who, except for Theresa Anderson, were unidentified, asking how to get rid of the Union. We decline to speculate on the union sentiments of the 30–40 employees attending those mandatory meetings solely on the basis of their attendance at the meetings. There simply is insufficient evidence to establish that the employees attending, except possibly for Anderson, wanted to repudiate the Union.[14] Moreover, even assuming the unidentified employees actually shared Anderson's views, they may have already been considered by the Respondent if they signed the employee list for the decertification petition. Accordingly, we find that the evidence does not meet the Board's standards for objective considerations sufficient to support a reasonable doubt of the Union's majority.[15] We, therefore, find that the Respondent violated Section 8(a)(5) and that the strike to protest this unlawful withdrawal of recognition converted to an unfair labor practice strike as of October 29.

2. *Vacation pay*: Regarding the issue of the striking employees and vacation pay, the clause concerning vacation pay in the parties' expired contract was as follows:

> Employees participating in the vacation plan for the first time shall not be entitled to a vacation until their anniversary date. Thereafter

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[10] As may be evident elsewhere in this decision, although we need not reach this matter here, the weight we choose to accord to *other* factors, such as statements from unidentified employees and the request by the Union for the discharge of strike replacements, differs from the weight accorded those factors in *I T Services.*

[11] We note additionally that it is our experience that such union demands are often modified as strike settlement negotiations progress.

[12] See *Fall River Dyeing Corp. v. NLRB*, 482 U.S. 27 (1987), in which the Supreme Court noted the policy basis for the Board's continuing presumption of majority status.

[13] See also *Randle-Eastern Ambulance Service*, 230 NLRB 542, 552 (1977). We note also that it is well established that the lack of union membership does not establish a lack of union support. See *NLRB v. Pioneer Club*, 546 F.2d 828 (9th Cir. 1976); *Retired Persons Pharmacy v. NLRB*, 519 F.2d 486, 490 (2d Cir. 1975); and *Terrell Machine Co. v. NLRB*, 427 F.2d 1088, 1090 (4th Cir. 1970).

[14] See *Cain's Generator & Armature Co.*, 237 NLRB 1198, 1199 fn. 7 and 1201 (1978), enfd. 628 F.2d 933 (6th Cir. 1980); *Lucas County Farm Bureau Cooperative Assn.*, 218 NLRB 1150, 1151 (1975), enfd. 557 F.2d 1227 (6th Cir. 1977).

[15] See, e.g., *Cain's Generator & Armature Co.*, supra (the employer unlawfully withdrew recognition from the union based on statements from no more than 9 of the 23 unit employees that they no longer wished to be represented by the union); *Dy-Dee Wash*, 228 NLRB 389, 390 (1977) (The employer's reliance on a showing that only three of the seven unit employees expressed their dissatisfaction with the union was an insufficient basis for supporting an alleged good-faith doubt of the union's majority status.)

> employees shall be entitled to a vacation in the calendar year in which their vacation falls, provided that they work sometime during the calendar year for which the vacation is due, or through the month of December of the previous year. An employee's first vacation shall be calculated at 2% of total earnings during their first year of employment. Pay for subsequent vacations shall be calculated at 2% of total earnings during the calendar year prior to the vacation, for each week of vacation, for which the employee is eligible.

On May 7 the Respondent paid approximately $200,000 in vacation pay to the striking employees with the notification that such payment represented "all monies due you by the company" under the expired contract. The Respondent's officials testified that the money distributed on May 7 represented a fringe benefit which accrued by virtue of employment in 1980. An additional $52,000 had previously been paid during 1981 to employees requesting vacation pay before the strike began, again assertedly based on 1980 earnings. On February 26, 1982, the Union's business representative sent to the Respondent 168 requests "for payments for vacation earned for . . . members/employees . . . currently on strike." The Respondent did not respond to this request.

At the hearing, the Respondent claimed that under its interpretation of the contract provision discussed above, no further payments were due the strikers because they had not worked in December 1981 or, as of yet, in 1982. Uncontroverted evidence showed that during 1979 and 1980, 70 or 80 individuals voluntarily terminated their employment, 11 more individuals were laid off, and none of these individuals received vacation pay during the year of his termination or layoff. The General Counsel advanced a different interpretation of this contract provision and asserted that, by February 1982, further payments to the strikers were indeed due because they had worked during 1981. The General Counsel relied on the disposition of a 1970 employee grievance involving Harold Lewis to show that an employee was entitled to vacation pay if he had worked during the year prior to his request. Lewis, who had been laid off in November 1968, sought vacation pay in 1970 because he had received a holiday pay advance in 1969. His grievance was denied by the Respondent because he had "performed no work in December 1968 and he performed no work in the plant at any time during the calender year of 1969."

The judge concluded that the Respondent did not violate the Act by refusing to comply with the requests made for vacation pay in February 1982. In so doing, the judge distinguished *Vesuvius Crucible Co.*, 252 NLRB 1279 (1980), concluding that there the Board had found a violation because the employer had the punitive objective of denying fringe benefits to employees because they went on strike whereas here no such motivation is present. The judge went on to find that the impact on employee rights of the Respondent's actions was, under the mode of analysis set forth in *NLRB v. Great Dane Trailers*, 388 U.S. 26 (1967), comparatively slight as opposed to inherently destructive, and the Respondent had sufficiently justified its action by asserting that it was relying on its interpretation of a contract that was, at best, ambiguous. We agree with the result reached by the judge for the reasons set forth below.

In determining whether an employer's refusal to pay benefits to strikers violates Section 8(a)(3) and (1) of the Act, we have recently applied the principles articulated in *Great Dane* in *Texaco, Inc.*[16] In *Texaco*, supra, the Board set forth the following analytical scheme for application of the *Great Dane* test in this context:[17]

> Under this test, the General Counsel bears the prima facie burden of proving at least some adverse effect of the benefit denial on employee rights. The General Counsel can meet this burden by showing that (1) the benefit was accrued and (2) the benefit was withheld on the apparent basis of a strike. . . .
>
> Once the General Counsel makes a prima facie showing of at least some adverse effect on employee rights the burden under *Great Dane* then shifts to the employer to come forward with proof of a legitimate and substantial business justification for its cessation of benefits. The employer may meet this burden by proving that a collective-bargaining representative has clearly and unmistakably waived its employees' statutory right to be free of such

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[16] 285 NLRB 241 (1987). See also *Bil-Mar Foods*, 286 NLRB 786 (1987).

[17] In *Great Dane*, supra at 34, which also involved an employer's refusal to pay vacation benefits to strikers, the Supreme Court set forth the following mode of analysis:

> First, if it can reasonably be concluded that the employer's discriminatory conduct was "inherently destructive" of important employee rights, no proof of antiunion motivation is needed and the Board can find an unfair labor practice even if the employer introduces evidence that the conduct was motivated by business considerations. Second, if the adverse effect of the discriminatory conduct on employee rights is "comparatively slight," an antiunion motivation must be proved to sustain the charge *if* the employer has come forward with evidence of legitimate and substantial business justifications for the conduct. Thus, in either situation, once it has been proved that the employer engaged in discriminatory conduct which could have adversely affected employee rights to *some* extent, the burden is upon the employer to establish that he was motivated by legitimate objectives since proof of motivation is most accessible to him. [Emphasis in original.]

> discrimination or coercion. . . . If the employer does not seek to prove waiver, it may still contest the disabled employee's continued entitlement to benefits by demonstrating reliance on a *nondiscriminatory* contract interpretation that is "reasonable and . . . arguably correct" [emphasis in original, footnote omitted and thus sufficient to constitute a legitimate and substantial business justification for its conduct. Moreover, as under *Great Dane*, even if the employer proves business justification, the Board may nevertheless find that the employer has committed an unfair labor practice if the conduct is demonstrated to be "inherently destructive" of important employee rights or motivated by antiunion intent.

Applying this analytical scheme to the facts here, we find that the General Counsel has made a prima facie showing of a violation of Section 8(a)(3) and (1). In this regard, the General Counsel relied on the vacation pay provision in the expired collective-bargaining agreement. This provision, as set forth above, states that "employees shall be entitled to a vacation in the calendar year in which their vacation falls, provided that they work sometime during the calendar year for which the vacation is due." The record reveals that the Union considered this provision to mean that an employee is entitled to vacation payment for a given year, e.g., 1982, provided that the employee worked sometime during the prior year, e.g., 1981. The record also reveals that the employer's stated reasons for rejecting Harold Lewis' grievance for vacation pay support the Union's interpretation of the vacation pay provision. The General Counsel showed that the vacation benefits were due and payable to the striking employees and had accrued in 1982 when the Respondent withheld payment of them.[18] In addition, it is undisputed that the Respondent withheld vacation benefits for strikers while paying such benefits to employees who crossed the picket line and returned to work sometime in 1982. The benefit, therefore, was withheld on the apparent basis of a strike. Consequently, the burden shifts to the Respondent to prove a legitimate and substantial business justification for the denial of these vacation benefits to the strikers.

The Respondent's asserted reasons for denying the benefits were its interpretation of the applicable contract provisions and its past practice regarding employees who were absent for reasons other than being on strike. Reliance on such reasons for denying benefits to strikers has been held to be a substantial business justification by at least two courts of appeals.[19] Moreover, the Respondent's construction of the contract "is reasonable and . . . arguably correct"[20] and nondiscriminatory. The record reveals, as set forth above, that the Respondent had applied the contract in the same manner on numerous past occasions to employees absent for reasons other than participation in a strike.[21] Accordingly, we find that the contractual language and past practice provided the Respondent with the necessary proof of a legitimate and substantial business justification for its denial of vacation benefits to its striking employees in 1982.

Having found that the Respondent established a legitimate and substantial business justification, we must further consider whether the Respondent's denial of vacation benefits can reasonably be found to be "inherently destructive" of important employee rights. The Supreme Court in *Great Dane* described "inherently destructive" conduct as that which carries with it "'unavoidable consequences which the employer not only foresaw but which he must have intended' and thus bears 'its own indicia of intent.'"[22] Such conduct has been described as having "far reaching effects which would hinder future bargaining, or . . . discriminated solely upon the basis of participation in strikes or union activity,"[23] or that it created "visible and continuing obstacles to the future exercise of employee rights."[24] Here, as noted above, the Respondent paid a large sum of vacation pay to striking employees in May 1981. At that time, the Respondent informed the Union and the employees of its position that no further payments were due under the terms of the expired agreement. Furthermore, the Respondent's evidence establishing that it had applied the contract in the same manner in the past to employees absent for reasons other than striking is essentially uncontradicted.[25] Because of the Respondent's earlier payment of benefits to strikers, its expressed reliance on the contract for its later denial of similar benefits, and its denial of such benefits to nonstriking employees in the past, we find that there has been no broad and obvious impact on employee rights as envisioned by the Supreme Court in fashioning the term "inherently destructive."

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[18] This does not signify that the Respondent's interpretation that, according to the contract's provisions, no further vacation benefits accrued to the striking employees, who had not worked either during December 1981 or at all during 1982, is any less tenable.

[19] *Vesuvius Crucible Co. v. NLRB*, 668 F.2d 162 (3d Cir. 1981); *NLRB v. Borden, Inc.*, 600 F.2d 313 (lst Cir. 1979).

[20] *Texaco, Inc.*, supra, quoting from *Vesuvius Crucible Co. v. NLRB*, supra at 168.

[21] See *Bil-Mar Foods*, supra.

[22] 388 U.S. at 33.

[23] *Bil-Mar Foods*, supra, quoting from *Portland Willamette Co. v. NLRB*, 534 F.2d 1331, 1334 (9th Cir. 1976). Accord: *Amoco Oil Co.*, 285 NLRB 918 (1987).

[24] *Bil-Mar Foods*, supra, quoting from *Inter-Collegiate Press v. NLRB*, 486 F.2d 837, 845 (8th Cir. 1973).

[25] The grounds for *denial* of the 1970 grievance of Howard Lewis, *presumably* under the same contract language, are too tenuous a basis for negating the Respondent's evidence of past practice under the contract operative here.

The final issue that must be resolved regarding this complaint allegation is whether the General Counsel proved an antiunion motivation for the Respondent's denial of the vacation benefits despite the presence of a business justification for the denial. We conclude that no such motivation has been established. Thus, the Respondent based the denial of benefits on its interpretation of the vacation benefits provision of a contract negotiated well before the strike commenced. Further, there is no evidence that the Respondent was motivated by discriminatory considerations when it agreed to those provisions, which are facially neutral, or when it arrived at its interpretation of those provisions. Moreover, as noted above, the Respondent paid approximately $200,000 in vacation benefits to its employees after the strike began. Indeed, such payments tend to militate against a finding that the Respondent's subsequent denial of benefits had an unlawful motivation.

In these circumstances, we conclude that the Respondent did not violate Section 8(a)(3) and (1) of the Act by denying vacation benefits to strikers in 1982.[26]

CONCLUSIONS OF LAW

1. By withdrawing recognition from the Union on August 26, 1981, the Respondent has engaged in unfair labor practices affecting commerce within the meaning of Section 8(a)(5) and (1) and Section 2(6) and (7) of the Act.

2. The strike, which commenced on April 13, 1981, was prolonged by the Respondent's unfair labor practices, described above, and was converted to an unfair labor practice strike on October 29, 1981.

REMEDY

Having found that the Respondent has engaged in certain unfair labor practices, we shall order it to cease and desist and to take certain affirmative action designed to effectuate the policies of the Act. We shall order the Respondent to recognize the Union as the exclusive representative of its employees in the appropriate unit.

Having found that the Respondent's unlawful withdrawal of recognition of the Union converted the strike to an unfair labor practice strike on October 29, 1981, we shall order that all striking employees who were not permanently replaced prior to that date be reinstated, on their unconditional request, to their former jobs or, if such positions no longer exist, to substantially equivalent positions, without prejudice to their seniority or other rights or privileges previously enjoyed, discharging, if necessary, any replacements hired after October 29; and that the Respondent make such strikers whole for any loss of earnings and other benefits resulting from its failure to reinstate them within 5 days of the unconditional request, with interest, to be computed in the manner prescribed in *F. W. Woolworth Co.*, 90 NLRB 289 (1950), and *New Horizons for the Retarded*.[27] Such employees for whom employment is not immediately available shall be placed on a preferential hiring list for employment as positions become available and before other persons are hired for such work. Priority for placement on that list is to be determined by seniority or some other nondiscriminatory test.

ORDER

The National Labor Relations Board orders that the Respondent, Johns- Manville Sales Corporation, Stockton, California, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Refusing to recognize International Association of Machinists and Aerospace Workers, AFL–CIO, District Lodge No. 115, Local Lodge No. 1549 as the exclusive bargaining representative of the employees in the following appropriate unit.

> All full-time and regular part-time production and maintenance employees employed by the Respondent at its Stockton, California fa-

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[26] Chairman Stephens agrees with his colleagues that the Respondent's denial of vacation benefits to strikers in 1982 was not unlawful. He would find, however, that the General Counsel failed to establish, prima facie, an adverse effect of the benefit denial on the employees' rights because, in his view, the General Counsel did not show that the vacation benefits were accrued. *Texaco, Inc.*, supra. In the first place, as noted above, the contractual eligibility criteria for those benefits were facially neutral—i.e., they were defined without reference to the exercise of any Sec. 7 right, including the right to strike. Second, unlike the majority, Chairman Stephens is persuaded that the Respondent's interpretation of the eligibility criteria was correct, and that the strikers were not entitled to vacation benefits in 1982 because they had not worked either during that year or through December 1981. Thus, under the correct application of facially neutral eligibility criteria, the strikers in this case had not accrued the vacation rights in question. Because the General Counsel has not established a prima facie case under *Texaco*, Chairman Stephens would dismiss the 8(a)(3) allegation without pursuing the *Texaco* analysis further. However, assuming that the vacation benefits can properly be regarded as having accrued, Chairman Stephens agrees with the majority that the Respondent set forth a legitimate and substantial business justification for denying those benefits to the strikers, and that the denial was not inherently destructive of the strikers' Sec. 7 rights. See his concurring footnote in *Amoco Oil Co.*, supra, 285 NLRB 918 fn. 9.

[27] 283 NLRB 1173 (1987). Interest on and after January 1, 1987, shall be computed at the "short-term Federal rate" for the underpayment of taxes as set out in the 1986 amendment to 26 U.S.C. § 6621. Interest on amounts accrued prior to January 1, 1987 (the effective date of the 1986 amendment to 26 U.S.C. § 6621), shall be computed in accordance with *Florida Steel Corp.*, 231 NLRB 651 (1977).

> cility; excluding all engineering, research, accounting, and office clerical employees, professional employees, guards, and supervisors, as defined in the Act.

(b) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Reinstate, on their unconditional request, all strikers who were not permanently replaced before October 29, 1981, to their former jobs or, if such positions no longer exist, to substantially equivalent positions, without prejudice to their seniority or other rights or privileges previously enjoyed, discharging, if necessary, any replacements hired after October 29, 1981; and make such strikers whole for any loss of earnings or other benefits resulting from its failure to reinstate them within 5 days of their unconditional request in the manner set forth in the remedy section of the decision.

(b) Preserve and, on request, make available to the Board or its agents for examination and copying, all payroll records, social security payment records, timecards, personnel records and reports, and all other records necessary to analyze the amount of backpay due under the terms of this Order.

(c) Post at its Stockton, California facility copies of the attached notice marked "Appendix."[28] Copies of the notice, on forms provided by the Regional Director for Region 32, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material.

(d) Notify the Regional Director in writing within 20 days from the date of this Order what steps the Respondent has taken to comply.

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

WE WILL NOT refuse to recognize International Association of Machinists and Aerospace Workers, AFL-CIO, District Lodge No. 115, Local Lodge No. 1549 as the exclusive bargaining representative of our employees in the bargaining unit:

> All full-time and regular part-time production and maintenance employees employed by the Company at its Stockton, California facility; excluding all engineering, research, accounting, and office clerical employees, professional employees, guards, and supervisors, as defined in the Act.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL reinstate, on their unconditional request, all strikers who were not permanently replaced before October 29, 1981, to their former jobs or, if such positions no longer exist, to substantially equivalent positions, without prejudice to their seniority or other rights or privileges previously enjoyed, discharging if necessary any replacements hired after October 29, 1981; and WE WILL make such strikers whole for any loss of earnings or benefits resulting from our failure to reinstate them within 5 days of their unconditional request, plus interest. Such employees for whom employment is not available shall be placed on a preferential hiring list based on seniority, or some other nondiscriminatory test, for employment as jobs become available.

JOHNS-MANVILLE SALES CORPORATION

Charles H. Pernal Jr., for the General Counsel.

John D. O'Brien, of Cleveland, Ohio, and *James H. Berry*, of Los Angeles, California, for the Respondent.

Jonathan Siegel, of Oakland, California, for the Charging Party.

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[28] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

DECISION

STATEMENT OF THE CASE

DAVID G. HEILBRUN, Administrative Law Judge. This case was heard at Stockton, California, on June 3, 4, and 7, 1982, based on a consolidated complaint alleging that Johns-Manville Sales Corporation, (Respondent), violated Section 8(a)(1), (3), and (5) of the Act by refusing to bargain with International Association of Machinists and Aerospace Workers, AFL-CIO, District Lodge No. 115, Local Lodge No. 1549 (Union) as the exclusive collective-bargaining representative of employees in an appropriate production and maintenance unit through its withdrawal of recognition from the Union and insistence that it no longer represented a majority of employees in that unit, followed by a refusal to tender payment of assertedly accrued vacation entitlement of striking employees contrary to past practice and because the strikers joined, supported, or assisted the Union and engaged in concerted activities for the purpose of collective bargaining or other mutual aid or protection, and in order to discourage employees from engaging in such activities or other concerted activities for the purpose of collective bargaining or other mutual aid or protection. The consolidated complaint further alleged that since on or about October 29, 1981, a strike described as commencing April 13, 1981, had been in protest of, and then prolonged by, such withdrawal of recognition and, in consequence, the employees engaged in striking became unfair labor practice strikers as of that latter time.

On the entire record, my observation of witnesses, and consideration of posthearing briefs, I make the following

FINDINGS OF FACT AND RESULTANT CONCLUSION OF LAW

Based on a collective-bargaining relationship that has existed since 1958, the applicable labor contract of these parties was last effective from April 10, 1978, to and including April 12, 1981. Renewal negotiations began in March 1981 with 12 sessions following over approximately the next 30 days.[1] Crucial sessions were held on both April 8 and 9, the former occasion being one at which Respondent made a proposal offering the choice between two economic options. This presentation, as described by James Owens, Respondent's labor relations manager and chief negotiator, was termed a final offer. Option 1 retained a COLA feature with a proposed general wage increase of 3 percent annually over a 3-year term, while option 2 contemplated folding the accumulated $4.17 hourly COLA into the payroll and setting 14-10-10 as annual hourly rate increase percentages under a new contract. Numerous other features were also included, the chief of which, as described by Manuel Joaquin, union president and negotiating committee member, was a retirement plan deemed highly inadequate for the membership.[2] The parties met again on April 9 at Stockton for a day-long session that was entered by Federal Mediator Sherman Warady in the early evening. During the course of this meeting, Respondent clarified that its final option 1 had inadvertently failed to show a proposed continuation of existing dental plan benefits and, following this, the Union made a counterproposal, which was rejected. As had been true the day before, principal spokesmen for the parties were DeMattei and Owens, with the latter reiterating that pending options represented a final offer and management intended to operate the plant with or without the then-present work force.

On April 10, Joaquin presided over a membership meeting at which contract rejection resulted, primarily because of the distressingly viewed retirement plan offer. A strike ensued on Monday, April 13, at which time the unit's active complement was 228 employees. Another approximately two dozen persons were on layoff at the time. On April 14 Respondent sent union officials and each member of the striking unit a letter reading:

> Due to the continuing bargaining impasse and the strike, this is to inform you that the company intends to implement the company's Option II, first year final offer in its entirety, which was given to the Union on April 8, 1981. Accordingly, the first year offer of a 14% increase on job rates and other language changes will be effective April 21, 1981, and benefits on May 1, 1981 with the exception of any Dental Plan.
>
> In addition, the company intends to hire permanent replacements for the Stockton, California plant effective on April 21, 1981 unless we have a signed contract by noon on April 20, 1981.
>
> If you have any question, please let us know.

The following Monday a full-length advertisement was placed under "Employment Opportunities" in the classified section of area newspapers, in which "Permanent Jobs" were prominently announced to be "Available Now" with various maintenance and operating titles and associated hourly rates shown. Other benefits were listed to reflect what, in fact, was Respondent's option 2 offer. The advertisement stated that a labor dispute was in progress at the plant. During the balance of that week approximately 1500 persons were interviewed, and hiring commenced on April 24 in consequence of which 290 persons were newly employed by May 1. Kelly Garrett, labor relations supervisor, testified that under Cain's direction she had organized and carried out this hiring process, establishing an initial screening interview phase and a final interview phase between staff members at the plant and "people that we felt we would want to hire." Garrett testified that she had personally interviewed only about five or six applicants, and that she told them, recalling particularly having done so with Gerald Thornhill and Karen Cox, that the positions were permanent. By May 1, nine strikers had returned to work and two individuals also did so from their former layoff status.

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[1] All dates are in 1981, unless shown otherwise.

[2] Principal union spokesman for the primary course of bargaining was Business Representative Lawrence DeMattei, with Joaquin, Chief Steward Leonard Moreno, and certain rank-and-file employees also present on this negotiating team. Other persons comprising Respondent's bargaining committee included Plant Manager Joe Wayne Bird and Stockton Manager for Employee Relations Fred Cain.

This resulted in a total work force on May 1 of 301 persons. By May 10, this total had diminished to 279, including another prestrike employee who returned to work in early May. On this basis Respondent had resumed production operations as traditionally performed here, and had augmented scheduling of work because a strike was then in progress at a sister facility in Long Beach, California.[3]

The parties' bargaining committees had met again under FMCS auspices at Sacramento, California, on May 1, at which time Directing Business Representative Ray Gable served as principal union spokesman, with Owens in his customary role as chief management representative. Gable sought to then accept the option 2 package, provided Respondent would supplant its replacement work force with striking members of the Union. Owens answered this by saying there were no jobs that remained available because the striking work force had been replaced "in its entirety." Gable argued unavailingly that all newly hired personnel should be viewed as probationary employees with job rights subordinate to strikers' seniority.[4]

The next significant event was filing of a refusal-to-bargain charge by the Union. It was docketed as Case 32-CA-3594 on May 5 and, following investigation, was ultimately dismissed on July 8. Another proceeding close in time was a petition docketed as Case 32-RD-314, filed on May 11 with 211 employee signatures appended in support. The hearing ensued on August 26, in the course of which Respondent's counsel voiced a declination to recognize the Union. Subsequently there was a blanket request by the Union for information from employee medical records and health monitoring data, to which Cain responded by letter dated September 16 that such would only be divulged directly to employees on their authorization. Cain's letter added that his approach was taken because of "challenge" to the Union's representative status, and that no waiver of a previously stated position on the subject should be construed from disclosure to individuals. The initiating letter on this matter, that of DeMattei, dated September 1, had forwarded approximately 120 individual requests of strikers for the same information as he was seeking, and by letter dated September 17, Cain sent individual answers to each of these employees. The transmittal letter cautioned each recipient to rethink what use they might put the "confidential[ly]" based medical information to, and reemphasized that the Union was "in no way" still recognized as the collective-bargaining representative at the Stockton plant.

On October 5 the Regional Director issued a Decision and Direction of Election respecting the RD petition in which certain routine contentions were disposed of, and on this impetus a preelection conference was conducted with the parties on October 25. The projection was to vote all active employees, plus those on strike, in an election set for November 5. On October 22, however, the Union had filed the charge on which this proceeding is in part based, the result of which was to block further proceedings on the RD case. On October 29 the Union distributed a notice to all its striking members that read:

> Johns-Manville has engaged in unfair labor practices by their withdrawal of recognition from Machinist District Lodge 115 and Local Lodge 1549 on May 1, 1981. Our strike at Johns-Manville is to protest this and other unfair labor practices.

A second branch of this case concerns the matter of vacation pay entitlement because this might be assured from contract language taken in conjunction with other circumstances and applicable law. On May 7 Respondent had paid approximately $200,000 in vacation pay to those employees who struck effective April 13, and the transmittal of such payments individually notified that it represented "all monies due you by the company" in terms of the recently expired collective-bargaining agreement.[5] Article 13 of this agreement prefaced the subject of vacation pay by language referring to the salutory benefits of "an annual period of rest [being] desirable for the health and well-being of people steadily employed," and then set forth certain operative phrasing in a section 63 as follows:

> Employees participating in the vacation plan for the first time shall not be entitled to a vacation until their anniversary date. Thereafter employees shall be entitled to a vacation in the calendar year in which their vacation falls, provided that they work sometime during the calendar year for which the vacation is due, or through the month of December of the previous year. An employee's first vacation shall be calculated at 2% of total earnings during their first year of employment. Pay for subsequent vacations shall be calculated at 2% of total earning during the calendar year prior to the vacation, for each week of vacation, for which the employee is eligible.

Respondent's Stockton Plant Controller William Bixby testified that the amounts distributed on May 7 represented payment of a fringe benefit accrued by reason of employment during 1980. This explanation was identical to that of Cain, who had himself expressly termed the compensation as "based on 1980 earnings."

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[3] Respondent is a Delaware corporation engaged at Stockton, California, in the nonretail manufacture of water pipe and related products, annually selling and shipping goods valued in excess of $50,000 directly to customers located outside California. On these admitted facts I find Respondent to be an employer engaged in commerce within the meaning of Sec. 2(6) and (7) of the Act, and otherwise that the Union is a labor organization within the meaning of Sec. 2(5). On October 29 certain business changes had resulted in Respondent being wholly owned by the entity called Johns-Manville Corporation, which in turn was wholly owned by a parent corporation newly titled Manville Corporation.

[4] This description of the May 1 meeting synthesizes testimony of Moreno, Joaquin, Owens, Bird, and DeMattei, but in doing so I credit the actual recollections of Owens and Bird. The three other witnesses named were vague, evasive, and unconvincing in their description of how and why the Union pressed such a rather unrealistic position during this May 1 meeting. I also emphasize that by Owens' credited version the Federal mediator had first broached the subject of an employer's entitlement to secure permanent replacements for strikers, but coupled that with his concern as a neutral about the fate of "long service employees."

[5] An additional $52,000 had previously been paid during 1981 to employees requesting vacation pay before start of the strike.

On February 26, 1982, the Union's then-business representative Robert Elsholz wrote to Cain enclosing "168 requests for payment for vacation earned for . . . members/employees . . . currently on strike." Taking guidance from superiors Cain made no response to this letter, and when Elsholz telephoned him 2 weeks later to inquire about status of the request, Cain said there would be no response. Cain testified that at the time his influencing motivation was the employer's position that no further vacation moneys were due, and that he wished to avoid corresponding with the Union since this seemed to lead to further accusations of unfair labor practice conduct. Case 32-CA-4377 represents the charge that was promptly filed on this subject.

In this context the General Counsel and the Union argue that Respondent has been without objective bases on which to decline continued recognition of the established collective-bargaining representative for its plant employees, and that the most prominent indicator of this failing is actual testimony of management's industrial relations functionaries. The most highly placed of these, Corporate Vice President of Labor Relations Michael Tappin, testified that he was the chief architect of contingency planning when negotiations reached their crisis/impasse stage in April, and had determined it was vital for the Stockton facility to remain in production because of the impact of strikes at other west coast locations. Tappin testified that when the strike replacement program at Stockton resulted in a viable work force by very early May, he began to sense or conclude that the Union could not truly still represent a majority of the production and maintenance unit as then constituted. His perspective was formed from total circumstances, including what was reported to him concerning hostility between strikers and strike replacements at a picket line respecting the persons of those appearing for work from late April onward, plus the repudiatory position assumed by Gable toward the strike replacements as voiced during the May 1 meeting. Tappin explained that his belief was an inchoate sort of conclusion that gained reinforcement over summer months as the RD petition underwent processing, numerous strike replacements expressed objections to management officials about ever having the Union as their representative, and a generally polarized antipathy arose between strike replacements because of vehicle damage and incessant unpleasantries. From this Tappin believed that the legal position voiced by Counsel John D. O'Brien in the course of RD case hearing procedures on August 26 was simply a reflection of what had become evident from the entire circumstances of several previous months. This was also the tenor of Owens' testimony. He, too, described the employer's belief as based on the inherent realities of a numerically superior work force displaying near-unanimous disdain for the Union, versus the numerically lesser group of strikers who still adhered to the Union by their picketing and other activities.

Respondent counters with a contention that objectively viewed good-faith doubt factors were in truth present, and that more importantly the issue is controlled by *Telautograph Corp.*, 199 NLRB 892 (1972). On this basis Respondent argues that a superior rationale is present where under policies of the Act are better fulfilled by permitting a Board-supervised secret ballot election to decide the question whether continued exclusive representation should be accorded the Union in poststrike circumstances.

On the separate vacation pay issue, the General Counsel confines itself to an assertion that applicable contract language requires prorata payment for time worked in 1981, viewed in the context of *NLRB v. Great Dane Trailers*, 388 U.S. 26 (1967). The Union adopts reliance on *Great Dane*, and looks to the particular evidence of a grievance filed by Harold Lewis in 1970 in which this individual claimed vacation pay based on income received in early 1969 as a "hardship" case advance of such holiday pay as might be earned by Lewis on a recall to work from layoff. Ultimately Lewis never returned from layoff, in consequence of which his last actual day of work at Respondent's plant was November 15, 1968. A third step disposition denying this grievance was written August 31, 1970, by then Industrial Relations Manager J. E. Gilmore, in which he noted that under presumably identical contract language Lewis had "performed no work in December of 1968 and he performed no work in the plant at any time during the calendar year of 1969." Thus the rejection of Lewis' grievance was plainly because while money was paid to him in 1969, it was an isolated special case and not within the intendment of contract language as viewed by the Company. The Union analogizes from this sole past illustration to argue that here the actual active employment by 168 requestees during 3-1/2 months of 1981 is exactly the sort of qualifying status that Lewis lacked in losing his 1970 grievance. Stated otherwise, the Union takes the phraseology of why Lewis' grievance was rejected, and applies it to this situation in contending that a prorata entitlement to vacation pay had vested by the time the April strike commenced, and that it was premature to claim this until at least January 1, 1982, had arrived. In briefing this issue the General Counsel contends that 8(a)(1), (3), and (5) violations have occurred both because of the "inherently destructive" principles of *Great Dane*, and because *Vesuvius Crucible Co.*, 252 NLRB 1279 (1980); *Knuth Bros., Inc.*, 229 NLRB 1204 (1977); and *Elmac Corp.*, 225 NLRB 1188 (1976), are holdings that illustrate why a violation should be found in this situation. The General Counsel emphasizes further that in any event a breach of residual obligation to negotiate in good faith on the subject has been shown, citing *Sherwin-Williams Co.*, 260 NLRB 1231 (1982), and *Stokely-Van Camp, Inc.*, 259 NLRB 961 (1982).

Respondent's countering argument is that the Lewis grievance was of such unique and frivolous character that it is meaningless to any resolution of this issue, particularly because the vacation pay clause has never been viewed as entitling an employee to prorata vacation pay when separation from employment occurs in the same calendar year as the active employment. Respondent enlarges on this theory by pointing to contract language saying that the most remote type of qualifying employment requires it to be *through* the previous December, a standard that is tantamount to saying a hypothetical employee would be one continuing his or her employment into the new calendar year for which a new annual vacation benefit would then start. Respondent emphasized that its distribution of money in May included the advice that it represented all that could ever be construed as due strikers from that point in time onward, and Bixby testified without contradiction that during the years 1979 and 1980 approximately 70 or 80 individuals voluntarily terminated their employment and received no vacation pay for earnings received during the calendar year of such termination. Bixby gave one specific example of Steve Botiller, who terminated December 5, 1979, and received no vacation pay for 1979 earnings, having neither claimed such nor had a grievance filed on his behalf. He made the same point that the Union did not grieve any of the described 1979 and 1980 cases, nor did it do so for a particular group of 11 individuals laid off during calendar year 1980 and to whom no vacation pay was tendered based on the actual earnings of that same year.

It is evident that the Union's fundamental survival turns on resolution of the chief issue in this case concerning consequences of Respondent's admitted refusal to accord further recognition. Given the settled principle of a rubuttable presumption that the Union's established majority status continues,[6] analysis proceeds directly to the rule that new employees in a strike situation are presumed to support the incumbent labor organization in the same ratio as those they replace.[7] The *Pennco* case recently and fully set forth rationale for this principle, dealing expressly with both the instances of strike replacements who must cross a hostile picket line and strikers who return to work. The Board believes that a multiplicity of personal reasons could influence particular individuals, and these are undiscernible without supporting evidence to qualify the behavior. It was even noted in *Pennco* that the occurrence of some picket line violence is merely a factor "weakening the presumption of majority status but not alone rebutting it."

As a threshold mechanistic view of the situation it must, therefore, be presumed that 226 (the same ratio) replacement employees are in the Union's column, leaving only 75 against out of the original 301. Allowing further for 7 written resignations or indications of disaffection with the Union, plus the 14 different individuals testified to by Supervisors Gene Karr and Glen Frisk as verbally expressing opposition to the Union, the working arithmetical configuration is still no better than a presumed 205 for and 96 against. With the final adjustment of an estimated 40 persons, at most, described by Bird as having spoken vociferously in group gatherings against the Union, and assuming none of these to be in the 21 adjustees above, the relationship changes to only 165 presumably for the Union, at any time after May 1, and 136 opposed.

These calculations, however, were not even consciously involved among Respondent's officials, for Tappin himself, as head theoretician, testified to the belief that majority status had departed the Union on May 1, and circumstances at that point in time "obviously" led to "good faith doubt" on the matter. A similar feeling was harbored by Bird, who echoed the May 1 date as that on which an obligation to recognize the Union expired. Owens stopped short of expressly fixing May 1 as the date he believed the Union lost its majority status, but did testify that replacement of a work force was "a pretty good indication" of this consequence. He was not, however, aware of a "conscious" management decision along the line until actually voiced by Counsel O'Brien on August 26.

Had Respondent proceeded with typical overt position-taking consistent with what its functionaries *now* testify was their belief, this case would have an entirely different complexion. The issue requires more searching attention, however, for this was not done, and the eventful period before and after May 1 was actually dominated by other considerations. As of April 9 the situation was a classic bargaining confrontation compounded by an employer's keen awareness that an effective strike at the facility would cripple its pipe-producing capacity. This was the critical danger facing Respondent as it adhered to an offer notwithstanding imminent strike action. By April 13 the plantwide strike necessitated a project of replacing the work force or seeking an accommodation through bargaining. The former course was chosen and from that point onward the mainstream of labor relations activity was to operate a plant, not necessarily negotiate a contract. In essence the last, best, and final offer had been, albeit in option form, just that, and the strike gauntlet was determinedly picked up. Tactically the first step was notification of intent to replace, with a short period for the Union to react. On other fronts the replacement hiring program was quickly structured and picket line activity anticipated. Notably Tappin made the expectable point that he kept Respondent's pipe division general manager and production manager informed of things,[8] and when Respondent chose to seek injunctive restraint against picket line interference with its hiring program, it was equipped to do so as early as April 27, when it secured a certain temporary restraining order.[9]

The significant point is that just as the Union had every right to commence the strike, Respondent, too, had the concomitant right to operate with replacements as long settled by *Mackay Radio & Telegraph Co.*, 304 U.S. 333 (1938). Once the strike replacement program was underway the only significant dealings between the parties soon thereafter was the May 1 meeting, and here Respondent did nothing more actionable than adhere to its earlier bargaining position.[10] I recognize that Respondent seeks some advantage from remarks of Gable, which by crediting the testimony of Bird and Owens, I find to have been those of directly pressing for a reversal of the replacement hiring effort by restoring strikers to work. The fact that seniority provisions of the expired contract were looked to in justification of this request is immaterial, for the newly constituted work force was one that arose from a definite program of hiring *permanent* replacements for strikers. The newspaper advertisements prominently offered this characteristic, and I accept Garrett's uncontradicted testimony that it was explained with each person so hired. In an expired contract situation it is debatable that the former 45-day probationary period even applied to the replacements, but it can be conceded this particular character of such employment was in the nature of a condition subsequent to permanence. Thus, without any job or job-related dereliction, the individuals would achieve full status in terms of being the sort of replacements contemplated and authorized under *Mackay Radio*.

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[6] *Celanese Corp.*, 295 NLRB 664 (1951).

[7] *Laystrom Mfg. Co.*, 151 NLRB 1482 (1965); *Windham Community Memorial Hospital*, 230 NLRB 1070 (1977); *Pennco, Inc.*, 250 NLRB 716 (1980).

[8] Bird picked up this pattern of communication, testifying to daily contact with Pipe Division Production Manager G. C. Eggleston during all of May.

[9] On that date a courthouse conversation ensued between Bird and DeMattei, with the former quoting the latter as pining over loss of a local affiliate because of the "mess" occasioned even after the Company's "very good offer." DeMattei covered this exchange in his own testimony, recalling how he told Bird that Respondent had been grossly shortsighted in his overall economic package in a way amounting to bad-faith bargaining. I credit Bird respecting this episode, but find it inconsequential as establishing an objective basis to have doubt concerning the Union's majority, because the entire episode presents nothing more than DeMattei's wistful ruminations.

The critical change in complexion to this situation came with the RD petition, and I am satisfied that on the basis of what followed Respondent is correct in arguing that *Telautograph* controls here. Significantly no request for resumed bargaining was raised during the May-August period, and disposition of Case 32-CA-3594 left Respondent shown as free of unfair labor practice conduct. By the time the RD hearing occurred, there was really no other position to take than that voiced by Counsel O'Brien, for even under newly decided *RCA Del Caribe, Inc.*, 262 NLRB 963 (1982), the overruling of *Shea Chemical Corp.*, 121 NLRB 1027 (1958), in situations of competing unions, does not, in itself, create that much impact on an RD situation. The test here is not, as in traditional *Mid-West Piping*[11] and *Shea Chemical* situations, whether an employer should continue bargaining with one union in the face of a rival claim, but whether greater policy and institutional interests are served by fulfillment of direct, demystified procedures of an RD petition processed to completion. By late August, and more obviously by mid-September when Cain responded as he did to the health data requests, a crystallized situation was extant in that plant operations were at near-normal levels with an outside surplus group of employees retaining full rights of permanently replaced economic strikers.

Much is made of the fact that *Telautograph* has not been vigorously expanded in the years since it was decided; however, it is equally valid to note that the General Counsel may have found no previous vehicle to test its outer limits. Although *Telautograph* alluded to *Shea Chemical*, its "clarify[ing]" thrust was to obviate delays in "properly supported decertification petitions" when a violation-free environment was present. Notably in *Traub's Market*, 205 NLRB 787 (1973), former Chairman Miller enlarged on *Telautograph* by projecting its salutary purpose as allowing "prompt action" through "orderly election processes" and freeing a nonviolating employer from the "harassment" of an 8(a)(5) proceeding. This thrust was also found in special footnoted clarification by two members of a Board panel in *Cantor Bros., Inc.*, 203 NLRB 774 (1973), who wrote of an employer "relieve[d]" of the duty to bargain with an incumbent labor organization when an adequately supported decertification petition was filed in a context free of employer unfair labor practices.[12] Such views fully harmonize with a now-discernible trend to "definitive results which are both predictable and speedy while incentive for protracted litigation is greatly reduced, as is the possibility of disagreement between the Board and the courts" as voiced in *Midland National Life Insurance Co.*, 263 NLRB 127 (1982).

For these reasons I hold that Respondent's otherwise imperfect and premature good-faith doubt of the Union's continued majority status was erroneously lacking objectively based factors of proof, but that this free-floating smugness did not have actionable characteristics. To gloat is one thing and to act another, and here the Union idly permitted time to pass with the RD petition winding towards fulfillment while it relied exclusively on Case 32-CA-3594 to extricate it. When this failed a new policy reason for elevating the RD proceedings to a controlling plane had materialized. Absent the unfair labor practice of unlawfully withdrawing recognition, there could be no change in character to the strike, and I hold that it was not, as alleged, converted to an unfair labor practice strike on or about October 29 nor has it been prolonged by unlawful employer conduct of any kind.[13]

On the vacation pay issue of this case I am satisfied that the General Counsel has misplaced reliance on *Vesuvius Crucible* and related cases, for there the denial of fringe benefit pay by an employer was *because* employees went on strike or the holdings are clearly distinguishable on their facts.[14] This directly punitive objective is not

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[10] Immediately following that meeting Bird had posted a plantwide notice to employees reading:

> A meeting was held in Sacramento in the office of the Federal Mediation and Conciliation Services between the company and the union.
>
> The union demanded that the new employees be replaced by the strikers.
>
> The company *rejected* this demand in its entirety.

Contrary to assertions by the General Counsel and the Union, I consider this notification a privileged informational item that does not tend to establish animus or any other component of allegations, against Respondent.

[11] *Midwest Piping & Supply Co.*, 63 NLRB 1060 (1945).

[12] This exact thought finds extension in dictum of *Sahara-Tahoe Hotel v. NLRB*, 648 F.2d 553, 556 (9th Cir. 1980), in which the court's opinion reads:

> Thus, the filing of a decertification petition with the requisite 30% showing alone might justify an employer's refusal to bargain with the union.

[13] It is questionable that a "top-down" declaration of strike characteristics as distributed by the Union on October 29 could in any event show an actual positive link to changed strike nature. This is particularly true when the claim is given stilted meaning, as embodied in the original charge in Case 32-CA-3594 in which, as filed May 5, the text of the Union's charge stated that from "its inception" the strike had been "to protest the employer's unfair labor practices." (Tr. 583.)

[14] *Vesuvius Crucible* was denied enforcement by the Third Circuit, 668 F.2d 162 (1981). In its reported opinion the court believed "the Board overstepped its authority and seriously misperceived its role," pointing out that the employer's refusal to accord disputed vacation pay to strikers was "reasonable and at least arguably correct."

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present here. Similarly it does not assist Respondent to argue that numerous other individuals had not received vacation pay for earnings of the year in which they voluntarily or involuntarily terminated because strikers only withhold services; they do not terminate employment. This leads the analysis squarely to *Great Dane*, and without requisite evidence showing antiunion animus the question must be whether "inherently destructive" conduct has occurred, or even if "comparatively slight" impact on Section 7 rights are present, has the employer come forward with legitimate business justification. The situation lacks inherently destructive characteristics, for major strike action was anticipated, ratified, and commenced without even consideration of the factor. There is, of course, some impact on the strikers by withholding further vacation pay, for this tends to increase the economic pressure that might permit the strike to last longer than it otherwise might. Respondent, however, has explained, and satisfactorily so in my opinion, that its position is solely one of contract interpretation as to which it believes nothing further is due. I accept the legitimacy of this explanation, largely because of the very contract language itself. Fundamentally it is of ambiguous construction, particularly the key central language in which the entitled "calendar year" is qualified by the identical phrase "calendar year." It is a classic infirmity of composition when some meaning to a phrase is attempted by using that very same phrase, and the awkwardness, or worse, of this contractual passage is highlighted by the fact that the General Counsel could not even manage to accurately quote it, having left out the portion "in the calendar year" from the second sentence (G.C. br. at 8).[15] More specifically, the *purpose* of this fringe benefit is to provide respite from the rigors of steady year-round work, a condition no longer present for those who strike. I recognize that about 20 percent of all vacation pay granted even under the Respondent's view of 1981 eligibility was based on 1981 earnings of those astute enough to request it in advance. This is but a reflection of the inequities that can arise in a work setting, as with Lewis who in 1969 was bold enough to obtain what others similarly situated did not enjoy. In the last analysis, chosen language is a major controlling factor in a contract interpretation dispute,[16] and here the clause in question is so lacking in coherence that it may legitimately be resisted, without leading to a result whereby the action constitutes an unfair labor practice as opposed to rather crass rejection of a respectably arguable claim and relegation of the issue to other forums of contract dispute.

[Recommended Order for dismissal omitted from publication.]

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[15] Cf. *Seeburg Corp.*, 192 NLRB 290, fn. 1 (1971).

[16] The point is illustrated in an arbitral proceeding whereby an employer violated contract provisions stating that "employee's gross earnings for the 52 weeks prior to January 1 of the vacation year shall be the basis for computing vacation pay" by excluding a prior year's vacation pay in computing that fringe benefit for a current year. Although this employer had computed vacation pay in such a manner for 10 years, the contract language was clear and unambiguous, thus not permitting it to be overridden by extensive past practice in which that union had not acquiesced. *Huffman Mfg. Co.*, 49 LA 357 (P. Di Leone).

Staff Builders Services, Inc. *and* Local 880, Service Employees International Union, AFL-CIO-CLC. Case 13-CA-27124

June 27, 1988

DECISION AND ORDER

BY CHAIRMAN STEPHENS AND MEMBERS JOHANSEN AND BABSON

Upon a charge filed by the Union August 12, 1987, the General Counsel of the National Labor Relations Board issued a complaint September 11, 1987, against Staff Builders Services, the Respondent, alleging that it has violated Section 8(a)(5) and (1) of the National Labor Relations Act.

The complaint alleges that on December 10, 1986, following a Board election in Case 13-RC-16435, the Union was certified as the exclusive collective-bargaining representative of the Respondent's employees in the unit found appropriate. (Official notice is taken of the "record" in the representation proceeding as defined in the Board's Rules and Regulations, Secs. 102.68 and 102.69(g); *Frontier Hotel*, 265 NLRB 343 (1982).) The complaint further alleges that since June 3 and August 31, 1987,[1] the Company has refused to bargain with the Union, and since August 7, 1987, the Respondent has refused to provide the Union with requested information that is relevant and necessary for collective bargaining. On September 28, 1987, the Respondent filed its answer admitting in part and denying in part the allegations in the complaint and setting forth affirmative defenses.

On November 2, 1987, the General Counsel filed a Motion for Summary Judgment. On November 9, 1987, the Board issued an order transferring the proceeding to the Board and a Notice to Show Cause why the motion should not be granted. On December 15, 1987, the Respondent filed a response. On January 28, 1988, the Respondent filed an amendment to its answer.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

Ruling on Motion for Summary Judgment

The Respondent's answer attacks the validity of the Union's certification and amended certification on the basis that the Board lacks jurisdiction over it and that the Union is not a labor organization. We agree with the General Counsel.

The record, including the record in Case 13-RC-16435, reveals that a Decision and Direction of Election issued in Case 13-RC-16435 on May 10, 1984. On June 5, 1984, the Respondent timely filed a request for review of the Regional Director's Decision and Direction of Election, on the grounds that the Regional Director erred in finding (1) that the Board has jurisdiction over the Respondent, (2) that the United Laborers Union Local 880 was a labor organization "within the meaning of Section 2(5) of the Act"; (3) that the Certified Nursing Assistants (CNA) and Companions were not irregular or casual employees, (4) that the appropriate unit included all CNAs, and (5) that the unit was not limited to the Respondent's Chicago, Illinois facility.

On June 28, 1984, the Board granted the Respondent's request for review solely as to the Board's assertion of jurisdiction over the Respondent. On June 29, 1984, an election was held among the Respondent's unit employees and the ballots cast were impounded.

On June 30, 1986, the Board issued an Order remanding Case 13-RC-16435 to the Regional Director for further consideration of the jurisdictional issue consistent with *Res-Care, Inc.*, 280 NLRB 670 (1986), and *Long Stretch Youth Home*, 280 NLRB 678 (1986). The record in Case 13-RC-16435 was reopened for submission of additional evidence and filing of briefs by the parties. On September 8, 1986, the Acting Regional Director issued a Supplemental Decision and Order adopting and reaffirming the May 10, 1984 decision and ordered that the ballots from the June 29, 1984 election be opened and that a tally of ballots be issued.

On September 22, 1986, the Employer timely filed with the Board a request for review. On November 19, 1986, the Board issued an order denying the request for review.

On December 2, 1986, the ballots cast August 17, 1984 in the election in Case 13-RC-16435 were opened and a tally of ballots issued. A majority of the valid ballots were cast for the Petitioner and on December 10, 1986, the Acting Regional Director issued a Certification of Representative.[2]

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[1] Par. IX(b) of the complaint alleges that the Respondent refused to recognize and bargain with the Union since August 31, 1987, rather than August 7, 1987. In her Motion for Summary Judgment the General Counsel notes that the letter (attached to the motion) from the Respondent's attorney, R. Clay Bennett, to the Union refusing to bargain and to supply information is dated August 7, 1987. Therefore, the General Counsel states the complaint should have alleged that the Respondent refused to bargain on August 7, 1987. The Respondent raises no issue concerning the authenticity of the letter.

[2] United Labor Unions Local 880 (ULU) filed the petition in Case 13-RC-16435. However, on August 17, 1985, ULU conducted an election among its dues-paying members to determine whether the members wished to affiliate with the Service Employees International Union, AFL-CIO-CLC (SEIU). A majority of valid ballots were cast for affiliation, and the Union changed its name to Local 880, SEIU to reflect the affiliation. On December 1, 1986, ULU filed with the Regional Director a motion to change the name of Petitioner (in Case 13-RC-16435) on all

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289 NLRB No. 49

By letter dated June 1, 1987, the Union requested the Respondent to bargain. In its June 3, 1987 letter to the Union, the Respondent refused to recognize and bargain with the Union. On August 4, 1987, the Union sent the Respondent another letter in which it requested recognition and an opportunity to bargain and also requested the Respondent to furnish it with the following information:

> 1. A list of all active full-time and regular part-time chorehousekeepers, homemakers and other bargaining unit personnel including their date of hire, length of service, rate of pay, hours of work, and any and all information relating to wages, hours and working conditions.
>
> 2. Copies of all work rules, agreements employees are required to sign, management policies and procedures, disciplinary or grievance procedures and any or all policies that are relative to the workforce.

By letter dated August 7, 1987, and since that date, the Respondent has refused to provide the Union with the requested information or to bargain with the Union.[3]

The Respondent contends in its affirmative defenses to the complaint and in its opposition to the Motion for Summary Judgment that its refusal to bargain and to provide the Union with the requested information is justified by the invalid certification of the Union based on the Regional Director's erroneous findings that the Board has jurisdiction over the Respondent and that the Union is a labor organization within the meaning of the Act and by the Acting Regional Director's erroneous amending of the Union's certification by substituting a different union's name for that of the Union. In addition, the Respondent raises for the first time affirmative defenses that contend special circumstances have arisen that affect the appropriateness of the bargaining unit and that previously unavailable evidence would be grounds for the Board to decline jurisdiction over the Respondent.

The Respondent alleges that since the hearing in Case 13-RC-16435 the duties of the contract representative have been fully merged into the coordinator and field supervisor positions and that these positions now have greater supervisory authority, including authority to hire, discipline, discharge, and direct employees, and to evaluate employees using independent judgment. This additional authority with which the coordinator and field supervisors are now endowed, the Respondent contends, are special (or unusual) circumstances that justify its failure to bargain with the Union. Assuming arguendo that the coordinator and field supervisors would be supervisors under Section 2(11) of the Act and no longer unit employees, such an occurrence would not constitute special or unusual circumstances within the meaning of *Ray Brooks v. NLRB*, 348 U.S. 96, 98–104 (1954), which would relieve the Respondent of its obligation to bargain with the Union.

The Respondent further alleges that since the hearing in the underlying representation case the Illinois Department on Aging (IDOA), a state agency and one of its three primary sources of income, has imposed a requirement that the Respondent expend a minimum of 73 percent of the IDOA reimbursement on direct service costs, i.e., wages and benefits paid to employees.[4] The Respondent contends that by this action significant control over the labor relations formerly exercised by the Respondent has been transferred to the IDOA and thus the Board should decline jurisdiction.

Assuming arguendo that the IDOA requires the Respondent to allocate a minimum of 73 percent of its IDOA reimbursement to employee wages and benefits, this would not deprive the Respondent of significant control over its labor relations. The Respondent would remain free to determine specific salary levels for all unit employees and could exceed the 73-percent requirement without IDOA restriction or approval. We find therefore that the existence of the IDOA requirement even considered with the other factors present here would not deprive the Respondent of significant control over its labor relations and would not be grounds for us to decline jurisdiction. See *Community Living*, 285 NLRB 312 (1987).[5]

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formal papers to its current name. On December 3, 1986, the Employer filed a response to the ULU's motion and on December 10, 1986, the Acting Regional Director issued an Order denying the motion. On March 31, 1987, the Union issued an Order denying the motion. On March 31, 1987, the Union filed a petition in Case 13-AC-56 to amend its certification in Case 13-RC-16435. On May 22, 1987, the Acting Regional Director issued a Decision and Amendment of Certification in Case 13-AC-56 and the certification in Case 13-RC-16435 was amended to substitute "Local 880, Service Employees, International Union, AFL-CIO-CLC" as the name of the Union. On June 4, 1987, the Respondent timely filed with the Board a request for review of that decision, which was denied by the Board on July 30, 1987.

[3] In its answer, the Respondent denies that the information requested is necessary for and relevant to the Union's performance of its function as exclusive representative of the unit employees. It is well established, however, that the employees' wage and employment information sought by the Union is presumptively relevant for purposes of collective bargaining and must be furnished on request. See, e.g., *Mobay Chemical Corp.*, 233 NLRB 109 (1977). The Respondent has not attempted to rebut the relevance of the information requested by the Union. We therefore find that no material issues of fact exist regarding the Respondent's refusal to furnish the information sought by the Union.

[4] The alleged IDOA regulations would permit the Respondent to expend the remaining 27 percent at its discretion on administrative costs.

[5] Chairman Stephens notes that the Regional Director recognized in his Supplemental Decision and Order the pending status of the IDOA

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It is well settled that in the absence of newly discovered and previously unavailable evidence or special circumstances, a respondent in a proceeding alleging a violation of Section 8(a)(5) is not entitled to relitigate issues that were or could have been litigated in a prior representation proceeding. See *Pittsburgh Plate Glass Co. v. NLRB*, 313 U.S. 146, 162 (1941); Secs. 102.67(f) and 102.69(c) of the Board's Rules and Regulations.

All issues raised by the Respondent were or could have been litigated in the prior representation proceeding. The Respondent does not offer to adduce at a hearing any newly discovered and previously unavailable evidence, nor does it allege any special circumstances that would require the Board to reexamine the decision made in the representation proceeding. We therefore find that the Respondent has not raised any issue that is properly litigable in this unfair labor practice proceeding. Accordingly, we grant the Motion for Summary Judgment.

On the entire record, the Board makes the following

FINDINGS OF FACT

I. JURISDICTION

The Company, a corporation, provides health care services at its facility in Chicago, Illinois, where, during the 12 months ending December 31, 1986, a representative period, the Respondent, in the course of its business operations, derived gross revenues in excess of $500,000 and purchased and received at its Chicago facility goods and materials valued in excess of $10,000 from other enterprises, located within the State of Illinois, each of which other enterprises are engaged in interstate commerce and meet the Board's jurisdictional standards. We find that the Respondent is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act and that the Union is a labor organization within the meaning of Section 2(5) of the Act.

II. ALLEGED UNFAIR LABOR PRACTICES

A. *The Certification*

Following the election held June 29, 1984, the Union was certified December 10, 1986, as the collective-bargaining representative of the employees in the following appropriate unit:

> All full-time and regular part-time homemakers, chorehousekeepers, companions, certified nurses aides, contract representatives, and field supervisors employed by the Employer; excluding registered nurses, licensed practical nurses, casual employees, professional employees, technical employees, office clerical employees, Contracts Manager, Health Care Administrator, Home Health Care Coordinator, guards, and supervisors as defined in the Act.

The Union continues to be the exclusive representative under Section 9(a) of the Act.

B. *Refusal to Bargain*

Since June 1, 1987, the Union has requested the Respondent to bargain, and since August 4, 1987, the Union has requested the Respondent to bargain and to supply it with information necessary and relevant to its function as the exclusive bargaining representative of the unit employees, since June 3 and August 7, 1987, the Respondent has refused to bargain, and since August 7, 1987, the Respondent has refused to supply the Union with the requested information. We find that this refusal constitutes an unlawful refusal to bargain in violation of Section 8(a)(5) and (1) of the Act.

CONCLUSIONS OF LAW

By refusing on and after June 3 and August 7, 1987, to bargain with the Union as the exclusive collective-bargaining representative of employees in the appropriate unit, and to supply it with the requested information necessary for and relevant to its function as the exclusive representative of unit employees, the Respondent has engaged in unfair labor practices affecting commerce within the meaning of Section 8(a)(5) and (1) and Section 2(6) and (7) of the Act.

REMEDY

Having found that the Respondent has violated Section 8(a)(5) and (1) of the Act, we shall order it to cease and desist, to bargain on request with the Union, and, if an understanding is reached, to embody the understanding in a signed agreement. We shall also order the Respondent to provide the

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action at issue here, that the evidence proffered by the Respondent at this time was in fact "previously unavailable" within the meaning of Sec. 102.65(e)(1) of the Board's Rules and Regulations, and that in his view this evidence involves a matter of statutory jurisdiction. See his concurring and dissenting opinion in *Res-Care, Inc.*, 280 NLRB 670, 675 and fn. 1 (1986). Thus, he would grant the Respondent's motion to reopen the record in the underlying representation proceeding. He also notes that the Respondent contends that the previously unavailable evidence is conclusive regarding the jurisdictional issue. On review of this evidence, and assuming its reliability, the Chairman finds, as before, no basis in the record to conclude that the Respondent is exempt from the Board's jurisdiction.

Union the information it requested on August 4, 1987.

To ensure that the employees are accorded the services of their selected bargaining agent for the period provided by law, we shall construe the initial period of the certification as beginning the date the Respondent begins to bargain in good faith with the Union. *Mar-Jac Poultry Co.*, 136 NLRB 785 (1962); *Lamar Hotel*, 140 NLRB 226, 229 (1962), enfd. 328 F.2d 600 (5th Cir. 1964), cert. denied 379 U.S. 817 (1964); *Burnett Construction Co.*, 149 NLRB 1419, 1421 (1964), enfd. 350 F.2d 57 (10th Cir. 1965).

ORDER

The National Labor Relations Board orders that the Respondent, Staff Builders Services, Inc., Chicago, Illinois, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Refusing to bargain with Local 880, Service Employees International Union, AFL–CIO–CLC as the exclusive bargaining representative of the employees in the bargaining unit.

(b) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) On request, bargain with the Union as the exclusive representative of the employees in the following appropriate unit on terms and conditions of employment and, if an understanding is reached, embody the understanding in a signed agreement:

> All full-time and regular part-time homemakers, chorehousekeepers, companions, certified nurses aides, contract representatives, and field supervisors employed by the Employer; excluding registered nurses, licensed practical nurses, casual employees, professional employees, technical employees, office clerical employees, Contracts Manager, Health Care Administrator, Home Health Care Coordinator, guards, and supervisors as defined in the Act.

(b) On request provide the Union with necessary and relevant information, including a list of all active full-time and regular part-time unit employees, their dates of hire, length of service, rate of pay, and hours of work, and copies of all work rules, agreements that employees are required to sign, management policies and procedures, disciplinary or grievance procedures and any or all policies that are relative to the unit employees.

(b) Post at its facility in Chicago, Illinois, copies of the attached notice marked "Appendix."[6] Copies of the notice, on forms provided by the Regional Director for Region 13, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material.

(c) Notify the Regional Director in writing within 20 days from the date of this Order what steps the Respondent has taken to comply.

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[6] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

WE WILL NOT refuse to bargain with Local 880, Service Employees International Union, AFL–CIO–CLC as the exclusive representative of the employees in the bargaining unit.

WE WILL NOT refuse to provide the Union with requested information necessary for and relevant to the Union's performance of its duties as the exclusive bargaining representative of the unit employees.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL, on request, bargain with the Union and put in writing and sign any agreement reached on terms and conditions of employment for our employees in the bargaining unit:

> All full-time and regular part-time homemakers, chorehousekeepers, companions, certified nurses aides, contract representatives, and field supervisors employed by the Employer; excluding registered nurses, licensed practical nurses, casual employees, professional employees, technical employees, office clerical em-

ployees, Contracts Manager, Health Care Administrator, Home Health Care Coordinator, guards, and supervisors as defined in the Act.

WE WILL, on request, provide the Union with necessary and relevant information, including a list of all active full-time and regular part-time unit employees, their dates of hire, length of service, rates of pay, and hours of work; and copies of all work rules, agreements that employees are required to sign, management policies and procedures, disciplinary or grievance procedures, and any or all policies that are relevant to the unit employees.

STAFF BUILDERS SERVICES, INC.

Lustrelon, Inc. ***and*** **Solidarity of Labor Organizations International Union.** Cases 22-CA-14639 and 22-CA-14688

June 27, 1988

DECISION AND ORDER

BY CHAIRMAN STEPHENS AND MEMBERS JOHANSEN AND BABSON

On August 4, 1987, Administrative Law Judge James F. Morton issued the attached decision. The Respondent filed exceptions and a supporting brief and the General Counsel filed cross-exceptions and a supporting and answering brief.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings,[1] and conclusions and to adopt the recommended Order as modified.[2]

We agree with the judge's conclusions that the Respondent violated Section 8(a)(5) and (1) by failing to supply the Union with financial information the Union had requested and by failing to bargain generally in good faith with the Union. In so doing, we agree with the judge's finding that the Respondent claimed an inability, rather than an unwillingness, to meet the Union's economic demands and thereby became obligated to support this claim by providing the Union with the supporting financial data the Union had requested. In this regard, we note that the Union presented its economic proposals to the Respondent at the parties' first bargaining session on March 3, 1986.[3] Thereafter, the Respondent's negotiator, Cole, responded to that proposal at the parties' third bargaining session on March 27 by reading aloud a prepared statement of the Respondent's position. As more fully set forth in the judge's decision, the statement indicated, inter alia, that the Respondent was engaged in "a highly competitive industry and large profits per piece are practically non-existent." The statement characterized the Union's demands as the sort that "would make any company in this industry unprofitable," and suggested that the Union "withdraw all of your demands from the table and come back with a new set of demands which take into account a wage freeze." Cole, in reading the statement, further indicated that the next bargaining session scheduled for March 31 was canceled as nothing could be accomplished "until after you have removed these outrageous demands . . . and begun to negotiate in a more reasonable fashion." After reading this statement, Cole presented the Respondent's economic proposal, which called for, inter alia, a 3-year wage freeze, the discontinuance of the 3 days per year personal leave, and the freezing of the Respondent's contributions to medical coverage at the then-current level. The Union's negotiator, Perez, responded that he would be able to go along with the freeze proposal provided that the Respondent produced its books and records justifying this type of proposal. Cole denied the request.

Thereafter, there was a 3-month hiatus in bargaining. Bargaining resumed, and at the fifth bargaining session on July 23, the Respondent presented new economic proposals. The new proposals included, inter alia, a wage increase of 1 percent per year for employees with 1 year seniority. Perez, in response, told Cole "you got to be kidding me" and Cole said "no . . . this is a legitimate offer, that this was more than the company could afford." Perez again requested the Respondent's books and records and Cole again denied the request.

Based on the above, we find that the Respondent claimed an inability to meet the Union's economic demands and was therefore obligated to supply the Union with the requested financial data to support that claim. In so doing, we note that an inability to pay need not be expressed with any particular "magic words" so long as the words and conduct are specific enough to convey such a meaning. *Atlanta Hilton & Tower*, 271 NLRB 1600, 1602 (1984); *Monarch Machine Tool Co.*, 227 NLRB 1265 (1977). See also *Nielsen Lithographing Co.*, 279 NLRB 877 (1986). We find that the Respondent's conduct and statements, noted above, are tantamount to a claimed inability to pay. We particularly note that the representations in the Respondent's prepared statement must be read in the context of Cole's later characterization of the Respondent's economic offer, which was less costly than that proposed by the Union, as being "more than the company could afford." Accordingly, we agree with the judge that the Respondent violated Section 8(a)(5) and (1) by failing to provide the Union with the financial data it requested.

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[1] The Respondent has excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

[2] The judge inadvertently omitted reference to the unlawful discharge of Diego Fernandez and the unlawful suspension of Rolando Fernandez from the expunction provision of his recommended Order. We shall modify the provision accordingly.

The General Counsel has requested a visitatorial provision authorizing the Board, for compliance purposes, to obtain discovery from the Respondent under the Federal Rules of Civil Procedure subject to the supervision of the U.S. court of appeals enforcing the Order. In the circumstances of this case, we find it unnecessary to include such a clause. See *Cherokee Marine Terminal*, 287 NLRB 1080 (1988).

[3] Hereafter, all dates refer to 1986 unless noted otherwise.

289 NLRB No. 52

As noted, we further agree with the judge's finding that the Respondent violated Section 8(a)(5) and (1) by failing to bargain generally in good faith with the Union. In this regard, applying the criteria set out in *Atlanta Hilton & Tower*, supra, we conclude that the totality of the Respondent's conduct throughout the course of its bargaining evidences an intent to frustrate the bargaining process rather than a sincere purpose to reach agreement. See also *Houston Country Electric Cooperative*, 285 NLRB 1213 (1987). Thus, we note particularly the discriminatory warnings issued to all employee-members of the negotiating committee and the discriminatory treatment of union activists Diego and Rolando Fernandez. We further note that at the bargaining session of March 27, the Respondent's negotiator, Cole, canceled the next scheduled bargaining session and conditioned further bargaining on the Union's withdrawal of its demands. Finally, as set forth above, the Respondent refused to provide relevant financial data despite a claimed inability to meet the Union's demands. We conclude that by the above conduct the Respondent evidenced an intent to frustrate the bargaining process and failed to meet its obligation to bargain in good faith with the Union.[4]

The General Counsel has excepted to the judge's failure to include in his recommended Order a provision extending the Union's certification year for a 1-year period. We find merit in this exception. It is well established that when a party refuses to bargain during the certification year, the Board will extend the certification year to prevent that party from gaining an advantage from its failure to fulfill its bargaining obligation, and the extension normally given is for the period that will provide the aggrieved party with a full year of actual bargaining. See generally *Colfor, Inc.*, 282 NLRB 1173 (1987), enfd. 838 F.2d 164 (6th Cir. 1987); *Golmac Plastics*, 234 NLRB 1309 fn. 4 (1978), remanded 592 F.2d 94 (2d Cir. 1979), enfd. per curiam 600 F.2d 3 (2d Cir. 1979). In the present case the record shows that the Respondent was engaged in overall bad-faith bargaining essentially from the outset of the certification year. We therefore find it appropriate to extend the certification year for a 1-year period running from the date that the Respondent begins to bargain in good faith. We shall modify the judge's recommended Order accordingly.

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge as modified below and orders that the Respondent, Lustrelon, Inc., Edgewater, New Jersey, its officers, agents, successors, and assigns, shall take the action set forth in the Order as modified.

1. Substitute the following for paragraph 2(c).

"(c) On request, bargain in good faith with the Union as the exclusive bargaining representative of the employees in the following appropriate unit on terms and conditions of employment and, if an understanding is reached, embody it in a signed agreement. The Union's certification year shall extend 1 year from the date that such good-faith bargaining begins. The appropriate unit is:

> All production and maintenance employees, including shipping and receiving employees, but excluding all office employees, clerical employees, administrative employees, executives, guards, maintenance men, professional employees, supervisors as defined in the Act and all other employees of Respondent."

2. Substitute the following for paragraph 2(d).

"(d) On request, provide the Union with the financial data it requested to enable it to verify the Respondent's assertion that it was financially unable to meet the Union's bargaining demands."

3. Substitute the following for paragraph 2(e).

"(e) Remove from its files any reference to warnings given employees on SOLO's bargaining committee and to the separate warnings given Diego and Rolando Fernandez and all references to the unlawful discharge of Diego Fernandez and to the unlawful suspension of Rolando Fernandez, and notify all these employees in writing that this has been done and that evidence of the unlawful acts will not be used against them in any way."

4. Substitute the attached notice for that of the administrative law judge.

CHAIRMAN STEPHENS, dissenting in part.

I would find all the violations found by my colleagues with the exception of the refusal-to-produce-information violation and the overall surface bargaining violation. I recognize this to be a very close case, and I agree that there is no one set of "magic words" through which a claim of inability to pay might be expressed; but I cannot conclude that, in context, the particular expressions on which my colleagues rely amount to such a claim. Without that violation, I would not find that the Respondent's conduct amounted to overall surface bargaining, i.e., an intent not to reach an agreement.

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[4] In these circumstances, we find it unnecessary to pass on the judge's finding that the Respondent's proposals were of a regressive nature or to rely on his citation to *Reichhold Chemicals*, 277 NLRB 639 (1985). But see *Reichhold Chemicals*, 288 NLRB 69 (1988).

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

WE WILL NOT issue warnings to any of our employees in order to discourage them from supporting Solidarity of Labor Organizations International Union (SOLO).

WE WILL NOT discharge or suspend any employee to discourage support for SOLO.

WE WILL NOT discharge any employee to discourage the filing of any unfair labor practice charges with the National Labor Relations Board.

WE WILL NOT refuse to bargain collectively with SOLO and WE WILL NOT refuse to provide it with needed financial data it requested.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL offer Diego Fernandez his job back and make him whole, with interest, for all losses of earnings and of other benefits he suffered as a result of our having unlawfully discharged him.

WE WILL make whole Rolando Fernandez, with interest, for all losses of earnings and of other benefits he suffered as a result of our having unlawfully suspended him from our employ for 1 week.

WE WILL, on request, bargain in good faith with SOLO, as the exclusive bargaining representative of the employees in the following appropriate unit on terms and conditions of employment and, if an understanding is reached, embody it in a signed agreement. The Union's certification year shall extend 1 year from the date that such good-faith bargaining begins. The appropriate unit is:

> All production and maintenance employees, including shipping and receiving employees, but excluding all office employees, clerical employees, administrative employees, executives, guards, maintenance men, professional employees, supervisors as defined in the Act and all other employees of Respondent.

WE WILL, on request, provide SOLO the financial data it requested to enable it to verify our assertion that we were financially unable to meet SOLO's bargaining demands.

WE WILL remove from our files all references to all unlawful warnings issued to members of SOLO's negotiating committee, to Diego Fernandez and to Rolando Fernandez, and all references to the unlawful discharge of Diego Fernandez and the unlawful suspension of Rolando Fernandez, and WE WILL notify them that this has been done and that evidence of the unlawful acts will not be held against them in any way.

LUSTRELON, INC.

C. John Cicero, Esq. and *Debra J. Cosgrove, Esq.*, for the General Counsel.

Larry M. Cole, Esq. (Cole & Cole), of Jersey City, New Jersey, for the Respondent.

DECISION

STATEMENT OF THE CASE

JAMES F. MORTON, Administrative Law Judge. The complaint in these cases, which were consolidated for hearing, alleges that Lustrelon, Inc. (Respondent) has violated Section 8(a)(1), (3), (4), and (5) of the National Labor Relations Act (the Act). Respondent's answer denies these and also the underlying factual allegations. The specific issues raised in the pleadings are whether Respondent (1) issued warnings to employees and discharged two of them because of their union activities, (2) discharged one of those employees also because he said he would file an unfair labor practice charge, and (3) refused to bargain collectively with Solidarity of Labor Organizations International Union (SOLO).

The hearing was held in Newark, New Jersey, on 2 and 3 March 1987. On the entire record, including my observation of the demeanor of the witnesses, and after due consideration of the briefs filed by the General Counsel and Respondent, I make the following

FINDINGS OF FACT

I. JURISDICTION AND LABOR ORGANIZATION STATUS

The pleadings establish, and I find, that Respondent manufactures lamps, and that in its operations annually it meets the Board's nonretail jurisdictional standard. I also find, based on the fact that SOLO had been certified in Case 22-RC-9536 as the exclusive collective-bargaining representative for Respondent's production and maintenance employees, that SOLO is a labor organization as defined in Section 2(5) of the Act.

II. THE ALLEGED UNFAIR LABOR PRACTICES

A. *Background*

About 350 production and maintenance employees are employed by Respondent at its plant in Edgewater, New Jersey. Until January 1986, they had been represented for many years by a labor organization, referred to in the record in this case as Local 298. One of the General Counsel's witnesses, alleged discriminatee Rolando Fernandez, testified that Respondent's plant manager had, about 1984, spoken to him about his becoming a Local

298 delegate and that Fernandez then became the delegate.

The last contract negotiated by Respondent and Local 298 became effective in 1983, for a 3-year term. About the same time, new owners took over Respondent's business. In late 1985, SOLO petitioned for an election in Case 22-RC-9536, seeking to replace Local 298 as bargaining agent. Diego Fernandez, one of the alleged discriminatees in this case, testified without contradiction that he was one of the original and most active supporters of SOLO and that he had been told, during the course of SOLO's organizational effort by two of Respondent's supervisors, Joe Violante and Pasquale Rose, that he and the other SOLO supporters were wasting their time as Respondent has always done pretty much what it wanted to do. In its answer, Respondent admitted that Joe Violante and Pasquale Rose are supervisors and its agents. The statements attributed to them by Diego Fernandez had been made more than 6 months before the first unfair labor practice charge in this case was filed and are not alleged as independent violations of the Act.

An election was held on 10 January 1986 pursuant to an agreement of the parties approved by the Regional Director of Region 22. SOLO won and, as noted above, was certified on 22 January 1986 as exclusive representative of Respondent's production and maintenance employees. All dates hereafter are for 1986 unless stated differently.

B. *Warnings Given to Employees on SOLO's Negotiating Committee*

After SOLO's certification as representative, its president, Edmundo Perez, and Respondent's attorney, Larry Cole, agreed to hold the first negotiation session on 3 March. Cole also agreed to Perez' request that Respondent release five employees from work to assist him in the negotiations. Perez agreed that when they were finished on 3 March these employees would return to work. They were not to be paid by Respondent while serving on SOLO's committee.

The first session was held on 3 March at a Holiday Inn near Respondent's plant. Cole and Respondent's vice president, Walter Weil, were present for Respondent; Perez, assisted by the employee committee, negotiated for SOLO. The negotiations were in English. Perez translated them into Spanish for the benefit of the employees of SOLO's negotiating committee. As discussed further below, SOLO presented its economic and other demands. One of the alleged discriminatees, Diego Fernandez, served on the negotiating committee. He brought up, through Perez, safety issues for discussion at the session. Respondent agreed to set up with SOLO a safety committee and that provision therefor would be included in a collective-bargaining agreement, "subject to language." The meeting ended about noon. The members of SOLO's committee did not return to work then, but stayed with Perez to discuss the negotiations and to prepare for the next session.

Perez testified without contradiction that later on 3 March, Cole telephoned him to state that he thought the employees would be returning to work that day. Perez informed Cole that he was reviewing proposals with the employees to see how flexible SOLO would be in subsequent sessions.

Negotiations resumed on 13 March. The meeting between Respondent's representatives, Weil and Cole, with SOLO's president, Perez, and the employee committee ended that day before noontime. Perez then told Weil and Cole that the employees on SOLO's negotiating committee would remain with him to review the progress of the negotiations. The parties agreed on 13 March to meet again on 27 and 31 March. The employees on the committee stayed with Perez on the afternoon of 13 March and did not return to work.

The parties met again on 27 March. As discussed in further detail below in another section, Respondent had on 27 March proposed a 3-year wage freeze, informed SOLO that there was no reason to meet on 31 March as earlier scheduled, and that it was canceling that session. Respondent informed SOLO that it expected SOLO will take into account Respondent's demand for a wage freeze. Perez asked for financial data, as discussed in further detail below, and his request was denied. The meeting ended about noontime. Again, the employees on SOLO's committee remained with Perez and did not return to work. No further sessions were scheduled or held until 27 June. SOLO and Respondent exchanged correspondence respecting SOLO's request for financial data.

On 16 May, alleged discriminatee Diego Fernandez was given a written warning by his immediate supervisor and was asked to sign it. The warning was for excessive absenteeism. He refused to sign the warning as, in his view, the dates on which he was absent from work were dates on which he had been excused from work, either because he was participating in negotiations as a member of SOLO's committee or because he was receiving medical treatment. Fernandez wrote Respondent that same day to protest the warning, asserting in his letter that the warning was nothing more than harassment because of his activities on behalf of SOLO. He noted in that letter that 4 of the days cited in the warning were spent on contract negotiations. There is no evidence that he received a response to his letter.

The General Counsel called Vice President Walter Weil as a witness. He testified that Diego Fernandez and the other employees on SOLO's negotiating committee were issued warnings for absenteeism for the days they attended bargaining sessions and that he authorized the issuance of those warnings because he had understood that those employees were to return to work at the end of each meeting.

On 20 October, Respondent's attorney, Cole, wrote SOLO's president a letter, reading in relevant part as follows:

> Some time ago you filed an unfair labor charge with the National Labor Relations Board which alleged in part that written warnings for attendance had been given to members of your Committee. These warnings included days that the Committee was negotiating. You may recall that the individuals concerned did not return to work in the afternoons

> of the negotiating sessions despite the fact that the sessions had concluded in the morning. Since the appropriateness of the warning was not clear, the warnings were removed from the files of the Committee members unilaterally by the Company. Apparently you were never notified of this.
>
> Please be advised that warnings have been removed and no action has been taken based upon absences on the days that the Committee was negotiating and that the Committee members were present at the negotiations.

None of the employees who served on SOLO's committee and who received warnings, as Weil testified, were ever notified by Respondent that those warnings had been removed from their personnel files or that the warnings were rescinded.

The evidence presented by the General Counsel establishes prima facie that Diego Fernandez and other employees on SOLO's negotiating committee were issued written warnings to discourage their support for SOLO. The warnings were not issued until after the negotiations between SOLO and Respondent had become badly strained. They were issued without prior notice to the employees or to SOLO's president. They were issued at Vice President Weil's direction, notwithstanding that he was one of the two principal negotiators for Respondent and was aware that the employees on the committee were with Perez and that Respondent had not on any of those days indicated to Perez that the employees on SOLO's committee were subject to discipline. The inference to be drawn from all the evidence before me is that Weil was sending SOLO a clear message by these warnings that its insistence on financial data and its overall bargaining position were not to Respondent's liking. Respondent thus had issued these warnings because these employees supported SOLO. Respondent suggests that the warnings were issued because of a misunderstanding and notes that, in any event, it notified SOLO in substance that they would not be given effect.

In *Hanlon & Wilson Co.*, 267 NLRB 1264 (1983), the Board adopted a finding that the employer there had unlawfully rejected doctors' excuses proffered by an employee to justify his absences from work. In the instant case, Respondent took no action against these employees until it became clear that SOLO was not going to abandon its demand for financial data. Respondent's actions in issuing the warnings were a reversal of its earlier decision to go along with Perez' keeping the SOLO committee members with him after the conclusion of the meetings with Respondent's representatives. In effect, Respondent was rejecting its earlier excusals. In sum, Respondent's actions in warning these employees were not oversights. Nor are they to be excused on the basis of Cole's letter to Perez in October. That recantation, if it could be called that, was not timely, clear, or specific; it contained no assurances and was not sent to any of the employees. It did not begin to meet the test referred to in *Passavant Memorial Area Hospital*, 237 NLRB 138 (1978), to constitute an effective disavowal. See also *Hollander Home Fashion Corp.*, 255 NLRB 1098 at fn. 3 (1981).

C. *Warning Issued to, and Discharge of, Diego Fernandez on 23 May*

The General Counsel alleges that Respondent, on 23 May, issued a warning to Diego Fernandez in order to discourage him from continuing his support of SOLO and discharged him that same day because he continued his support of SOLO and also because he advised Respondent of his intent to file an unfair labor practice charge with the Board. Respondent denies these allegations and asserts that it discharged Diego Fernandez solely because he punched in another employee's timecard.

Diego Fernandez began working for Respondent in August 1980. He was employed as a machine operator at the time of his discharge, about 23 May 1986.

The uncontroverted testimony establishes that he was an active, perhaps the most active, supporter of SOLO among Respondent's employees. Thus, he participated in its organizational effort, having distributed 30 to 40 authorization cards to his coworkers; he attended SOLO's meetings; he was told, as earlier noted, by two of Respondent's supervisors that he and other SOLO supporters were wasting their time because Respondent would continue to have its own way; and he was a member of SOLO's employee committee, participating actively at the negotiation sessions.

He arrived at work about 7:15 a.m. on his last day of work and was accompanied then by his brother Rolando. As they approached the timeclock, Respondent's plant manager, Rafael Ricciardi, was standing about 10 to 15 feet from it and was looking at them while talking to Supervisor Guiseppe (Joe) Violante. As work was scheduled to start 15 minutes later, Rolando Fernandez went for coffee for himself and Diego. Diego then punched in his own timecard and also Rolando's.

The foregoing factual recited is based on the accounts of Diego Fernandez and Joe Violante. Their respective accounts differ as to what occurred after Diego Fernandez had punched in the timecards.

Diego Fernandez' account is as follows. Later on that morning, his immediate supervisor, Pasquale Rose, approached him while at work and informed him that he would have to sign a warning that was being given him for having punched in his brother's timecard. Diego Fernandez (Diego, to distinguish him from his brother, Rolando) responded that he would not sign the warning as he had not done anything out of the ordinary when he punched in his brother's card. Suddenly, Joe Violante appeared and told Diego to come to the office with him. Diego did so. They went to Plant Manager Ricciardi's office. Ricciardi asked Diego why he punched Rolando's card. Diego responded that, what he did, he had done many times and that his brother was in the plant with him. Diego then told Ricciardi that if "they" continued to harass him, he would go "to the U.S. Labor Department (to) complain." Ricciardi became angry and discharged him.

Diego Fernandez also testified that he had never been told of any rule against punching in another employee's timecard and that there never had been any sign posted that pertained to any such rule. He related too that he had, on prior occasions, punched in his brother's card in the presence of Respondent's supervisors, and that they had never said anything to him about his having done so.

Guiseppe Violante's account of the events of that day is as follows. He and Plant Manager Ricciardi were standing near the timeclock. Ricciardi was facing the clock; Violante was standing with his back to it. Ricciardi told him that Diego had just punched in two timecards. Violante then saw Diego put his own card and also his brother's card in the rack. He asked Diego why he punched in two cards; he told Diego that he knows the rule that anyone caught punching in two cards would be fired on the spot. Violante then went to see Ricciardi as he understood that all disciplinary action is to be done through the main office. Diego was then called to the office and given the option of quitting or of being fired.

Violante also testified that ever since he began working for Respondent 16 years previously and until about March 1986 there had been a sign posted over the timeclock, which reminded employees that if any employee is caught punching in another employee's timecard, the penalty is immediate dismissal. He testified also that on the day that Diego was fired the one sign posted was one reading: "Punch your timecard only."

On further examination, Violante testified that he had fired Diego on the spot about 7 a.m. and that, later (about 8 a.m.), when he told Ricciardi that he had done so, Ricciardi instructed him to bring Diego to his office to sign a release. Violante testified that Ricciardi wanted the release because Diego had supported SOLO.

Ricciardi did not testify; neither did Respondent's supervisor-foremen, Pasquale Rose.

I credit Diego Fernandez' account. Violante's account was hardly persuasive. It is unlikely that he fired Diego "on the spot" and also that Diego was brought to Ricciardi's office, well after the workday had begun, to sign a release. Further, Violante's testimony that Ricciardi wanted Diego to sign a "release" is too vague and also illogical in that Ricciardi would have no reason to think that Diego would gratuitously accommodate him in releasing Respondent from all liability arising out of his discharge. Moreover, it is very unlikely, as Violante's testimony would have it, that Diego and Rolando Fernandez would have flagrantly disregarded an established rule calling for immediate discharge; it is implausible that Diego would have punched in Rolando's card in the presence of a plant manager with knowledge that he would thereby lose a job he has had for almost 6 years. Lastly, I note that Ricciardi did not testify to controvert Diego's testimony that Ricciardi discharged him when he said he would go the U.S. Labor Department to stop the harassment.

The credited evidence establishes that Diego Fernandez was an active supporter of SOLO; that Respondent was aware of his support of SOLO; that there never was a posting or other promulgation of any rule barring one employee from punching in the timecard of another employee solely as a convenience;[1] that Respondent conjured up a "rule" as a pretext to issue a warning to Diego Fernandez on 23 May in order to harass him because he supported SOLO, and particularly SOLO's negotiating demands; and that when Diego Fernandez made it clear to Ricciardi that he was not intimidated by that warning, but would protest the harassment, Ricciardi discharged him.

A separate issue exists whether the evidence supports a finding that Diego Fernandez was discharged also for a reason proscribed in Section 8(a)(4) of the Act. The complaint alleges that he was fired because he informed Respondent that he intended to file unfair labor practice charges with the Board. As just found, Diego protested on 23 May that if Respondent continued in its "behavior towards [him]" he "was going to go to the U.S. Labor Department and complain what they were doing to [him]." The most obvious thing to note, respecting his remark, is that the National Labor Relations Board is the agency responsible for investigating complaints by employees of harassment based on union activities. Also noteworthy is that the Board, only a few months before his discharge, had conducted an election among Respondent's employees and certified SOLO. Lastly, I note that the Board affirmed a finding by Administrative Law Judge Edelman, in a case with a similar fact pattern, that a Spanish-speaking employee's use of the term, "Labor Department" pertained to the Board. See *Book Covers, Inc.*, 276 NLRB 1488 (1985). Also, the Supreme Court has held that Section 8(a)(4) is not to be read literally but is to be construed liberally in order to afford employees broad protection. See *NLRB v. AA Electric Co.*, 405 U.S. 117, 122 (1972). All these factors support the finding, which I now make, that Diego Fernandez was discharged because he informed Respondent, in essence, that he intended to file an unfair labor practice charge with the Board to stop Respondent's unlawful harassment of him.

D. *Warning and Suspension of Rolando Fernandez*

Rolando Fernandez (Rolando) began working for Respondent over 5-1/2 years ago. He is the most senior employee in the acid department. He had distributed authorization cards for SOLO during its organizational effort and did so although he was then a delegate for a rival labor organization, as related above. A picture of a SOLO committee, which included Rolando, was published in a Hispanic newspaper. Vice President Walter Weil was given a copy of this newspaper at a negotiating session on 13 March. Weil saw the photo then and acknowledged that Rolando was an active supporter of SOLO.

Rolando was not disciplined by Respondent on 23 May, the day his brother was issued a warning and was discharged, as discussed above. On 29 May, Rolando was issued a warning. The General Counsel contends that the reason given by Respondent is baseless and that the warning was intended to discourage his support for

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[1] Respondent adduced evidence that, in prior years, two employees had been discharged for incidents involving timecards. One of those employees had punched in the card of another employee who was absent from work that day; another had altered his own card. Those incidents do not establish that Respondent had a practice or rule requiring immediate discharge for punching in a card as was done in the instant case.

SOLO and to provide an excuse for Respondent to suspend him from work for a week, also to discourage support for SOLO. Respondent asserts that the discipline meted out to Rolando on 29 May was unrelated to his union activities.

Rolando's job in the acid department required him to remove parts that were submerged in an acid bath, rinse them in a water bath, shake off the excess liquid, and then to take these parts to his machine for processing. As the acid used is highly corrosive, the workers in that department wear protective clothing—rubber aprons, rubber gloves, and so on. Rolando, as the senior employee, trained new employees in that department.

Rolando's account of the events on 29 May is as follows. He was performing his job that day in a routine manner. His foreman, Joe Cirone, and Vice President Weil were standing about 10 feet from him. Cirone called out to him that he was spilling water on the floor. He responded that "this is not correct" and he told Cirone that he is the oldest employee there and is always careful, and that "the liquid doesn't spill." (It appears that the job involves minor dripping, hence the protective clothing. I construe the translations of Rolando's account, as they are quoted above, as his saying in effect that the dripping then was no more than normal.) Later that morning, Violante told him he was fired, and that it was not "his order." Violante told him to go with him to the office. He accompanied Violante to the office. Weil was there with an office employee. Rolando was told then that he was not going to be fired but was given a week's suspension. He was suspended a week. Later he volunteered to SOLO to be his brother's replacement on SOLO's negotiating committee and was present at the next two sessions—the one on 27 June and a later one.

As noted above, Violante testified in this case. However, he did not refer to the 29 May incident in his testimony. Supervisor-Foreman Cirone did not testify. Vice President Weil did end his account of the 29 May incident as follows. He was standing with Foreman Joe Cirone and observed Rolando take a piece out of the cleaning tray in such a way that the liquid ran onto the floor in "a nice, big flow." Weil told Cirone to tell Rolando to let the pieces drip properly. Cirone did so. A minute later Rolando again caused a spill. He did "the exact same thing just as if he were trying to be spiteful." Weil told Cirone to give him a warning. Cirone did so. Later, Cirone informed Weil that the warning he gave to Fernandez was his third and that he was due to be fired. Weil called Respondent's labor counsel and then decided on a 1-week suspension for Fernandez.

Other than what Weil testified to, there is no evidence in the record to indicate that Respondent had a policy of discharging employees summarily on the third warning. Nor is there evidence that Rolando had prior warnings, other than a notation to that effect on the 29 May written warning itself.

I credit Rolando Fernandez' account. While it may be possible, it is unlikely that an experienced employee wearing clothing to protect himself against a corrosive acid would splash it about. I note too that Supervisor-Foreman Cirone did not testify to challenge Rolando's account. In view of Rolando's support for SOLO, of which Respondent was aware, the pretextual nature of the warning given him and the union animus fairly to be inferred from it, and in view of the discrimination practiced less than a week before against Diego Fernandez and the other evidence bearing on that finding, I find that the General Counsel has made out a prima facie showing that Rolando Fernandez, a known supporter of SOLO, was disciplined on 29 May because of that support. As Respondent has not presented any probative evidence to negate this prima facie showing, I find that Respondent warned Rolando Fernandez on 29 May and then suspended him from its employ for a week in order to discourage him from supporting SOLO. See *Industrial Agrico Processing*, 274 NLRB 711 at fn. 2 (1985), for an analogous holding.

E. *Alleged Unlawful Refusal to Bargain*

The complaint alleges that Respondent has separately violated Section 8(a)(1) and (5) of the Act by having engaged in each of four types of conduct and also by its overall conduct. Specifically, the complaint cites the following acts as distinct violations; canceling meetings and refusing to meet unless SOLO accepted Respondent's demands or because SOLO had filed an unfair labor practice charge; unilaterally changing terms of employment of unit employees; failure to furnish requested financial data; having issued warnings to employees on SOLO's negotiating committee; and its overall conduct. In the brief filed with me, the General Counsel set out four points of argument that pertained to the alleged violations of Section 8(a)(1) and (5)—the alleged unlawful refusal to provide financial data; "surface bargaining," the alleged refusal to meet because SOLO filed an unfair labor practice charge; and alleged unlawful unilateral changes in the employees' workweek. Respondent asserts it never claimed inability to pay and hence contends that it was under no duty to furnish SOLO with financial data. It contends too that it engaged in "hard," not "surface" bargaining. It denies having unilaterally changed the workweek or refused to meet because SOLO filed unfair labor practice charges or otherwise.

As noted above, the first negotiation session took place on 3 March at which SOLO presented Respondent with its demands that were framed as modifications of or additions to provisions of the last collective-bargaining agreement between Respondent and Local 298. For example, three additional holidays were sought as were a $1 yearly increase in the hourly wage rate (as contrasted to 20 cents in the last year of the Local 298 contract), and a pension fund contribution where there had been none previously. In addition, ventilation, heating, and sanitary issues were raised by SOLO. Respondent took those demands under consideration and agreed to meet again.

The second session took place 10 days later. Respondent's representative reported that the complaint SOLO had raised as to the facilities in the women's bathrooms in the plant had been taken care of. Agreement was reached on the substance of a safety committee. As to a question raised by SOLO concerning certain layoffs, Respondent produced a computerized employee list to satisfy SOLO that the layoff procedure it followed was correct. Respondent's representative stated also that in the absence of a new collective-bargaining agreement between SOLO and Respondent it intended to follow the provisions of its Local 298. The session ended with agreement on two more meeting dates, 27 and 31 March.

On 27 March, only Attorney Cole appeared for Respondent. He read a prepared statement. Its text follows:

> As you can see, I am alone here at this negotiating session. There is no one from the Company here today. Mr. Gruodis has returned from his recent trip to the Far East and has reviewed your demands over the life of the three year agreement. The total cost to Lustrelon of your current demands is $11,319,075. The wage increases demanded alone are $4,992,000. The medical and dental coverages demanded are $2,376,000. Given the enormity of these demands, it was felt that no constructive purpose would be served by having Company officials here at this meeting.
>
> We believe that SOLO does not understand the industry that Lustrelon operates in. The industry itself is a highly competitive industry and large profits per piece are practically non-existent.
>
> While many of our employees have skills that are important to us, there are many other people not employed by our Company who can work for us to the same degree of efficiency. The wages and increases that you have demanded in this contract would make any company in this industry unprofitable.
>
> We respect our workers who respect us. We furnish considerable work for a great many people. Solo has come into this negotiation after an election campaign where you raised the people's expectation levels so high that this Company will not capitulate to your demands.
>
> Lustrelon suggests that SOLO go back to the people and tell them that the Company will not meet their demands. I have here a set of demands that we have prepared that we believe to be more reasonable than yours. We request that you take these demands back to the people and discuss the realities of our business with them. We suggest further that you withdraw all of your demands from the table and come back with a new set of demands that take into account a wage freeze.
>
> We had previously agreed with you that we would negotiate in our next negotiating session on Monday, March 31, 1986. We believe that nothing can come out of this next meeting until after you have removed these outrageous demands of yours from the table and begun to negotiate in a more reasonable fashion. We, therefore, wish to cancel this meeting for Monday. We will be happy to return to the negotiating table after you have presented us with a new set of written demands that we can study. We will presume that these demands will be reasonable and will take into account the wage freeze and other items that have been discussed in the Company's demands.

Cole then handed SOLO's president, Perez, the following set of demands, which were referred to in the above statement:

> 1. Open Shop Provision.
> 2. Wage Freeze for three year collective bargaining agreement.
> 3. Eliminate three personal days currently in force.
> 4. Company contribution to medical coverages to be frozen at current level. Any increases in cost for individual or family membership shall be paid for by the employee.
> 5. Regular monthly meetings with groups of employees to discuss quality and productivity improvement and methods of improvement of working conditions and employees' suggestions. Union present if desired by SOLO.
> 6. In order to eliminate vandalism and theft from Company, the Company demands the right to conduct random searches of any employee automobiles on premises.
> 7. All vans shall not be permitted entry to the Company premises. Any employees traveling by vans shall be discharged at the guard check.
> 8. All union demands not previously agreed to are denied.

Regarding item 8, the only proposal by SOLO that may be said to have been previously agreed to by Respondent was to its proposal that a safety committee be established; Respondent agreed "subject to contract language."

When Cole concluded his reading of the prepared statement on 27 March, Perez translated his remarks into Spanish for the benefit of the employees on SOLO's committee. Perez then told Cole that he would be willing to go along with the freeze proposal provided Respondent produced its books and records to enable Perez to "justify to [the employees] the reason for this type of proposal." Cole denied the request. There is a conflict whether Cole elaborated on that response. Perez testified that Cole then said that there was no need to substantiate Respondent's denial for a wage freeze as the employees were "standing around doing nothing." Cole testified that he simply denied the request and did not say anything further because he did not want to go beyond the language of the typed statement he had just read. Cole denied that he told Perez that he could verify the need for a freeze simply by noting that the employees had nothing to do. I credit Cole's account as it is unlikely that he, having prepared a written statement to read at the session with no other representative for Respondent present to assist, would have made the off-hand comment attributed to him by Perez. Perez testified that he and Cole then discussed an impending layoff or a "shutdown of some sort." Cole, however, testified that he limited his discussion on 27 March to the statement he had prepared and read. Perez' account of a "shutdown of some sort" is too vague for what seems to be a subject of some importance, a plant shutdown. Perez' account is not persuasive. I credit Cole's.

There was no meeting held on 31 March. Letters were exchanged between Perez and Cole, which essentially restated their respective positions, as set forth on 27 March. Cole wrote Perez on 11 June to state that SOLO has yet to submit revised proposals and that Respondent would meet with SOLO when it was ready to resume negotiations with revised demands. Perez then called Cole and they set up a meeting for 27 June. In that telephone conversation, Perez told Cole that the employees had informed him that Respondent had introduced a 4-day workweek. Cole responded that he knew nothing about this and that Respondent would give Perez its position on it at the next session.

On 27 June, Perez presented Cole with a set of reduced proposals, e.g., a 50-cent hourly wage increase each year instead of a $1 increase; 7 sick days instead of 10. Perez testified that he then referred to the subject of the 4-day workweek. His account is as follows. He told Cole that he understood Cole to have said, at the outset of negotiations, that Respondent would follow the terms of the expired Local 298 contract until agreement on a contract was reached with SOLO. Perez then pointed out that the Local 298 contract provided for a 40-hour workweek, not a 4-day workweek. Respondent's vice president, Weil, testified in response to Perez' account that Respondent followed the management prerogative provisions of the Local 298 contract in reducing the workweek for some employees to 4 days and also in shutting down the plant for the week, 30 April to 6 May. He testified, and this without contradiction, that Cole had given Perez written notice of the shutdown. Weil testified further that Perez never asked to discuss the 4-day workweek. I credit Weil's account as there is nothing in the correspondence SOLO had with Cole, respecting its complaints as to the negotiations, that refers to the 4-day workweek, and particularly as Perez was not hesitant in that correspondence to state his complaints as to the negotiation processes.

The parties met again on 23 July. At that session, Cole handed Perez the following:

> *Employer offer*
>
> 1. Three (3) year agreement commencing on date of ratification by employees.
>
> 2. Wage increase of One (1%) per cent per year on signing and on the anniversary dates of the contract for all employees who have at least one year's seniority at that time.
>
> 3. Company contribution to medical coverages to be frozen at current level. Any increase in cost for individual or family coverage to be paid for by employee. No entry into SOLO funds-continuation with same provider (SOLO HAS NOT FORWARDED INFORMATION ON PLAN AS REQUESTED IN 6/27 MEETING).
>
> 4. Eliminate three personal days.
>
> 5. Open shop.
>
> 6. Regular monthly meetings with groups of employees to discuss quality and productivity improvement and methods of improvement of working conditions and employees' suggestions. Union present if desired by SOLO.
>
> 7. In order to eliminate vandalism and theft from Company, the Company demands the right to conduct random searches of any employee automobiles on premises.
>
> 8. All vans shall not be permitted entry to the Company premises. Any employees traveling by vans shall be discharged at the guard check.
>
> 9. All union demands not previously agreed to are denied.

Perez told Cole that he has "got to be kidding." Cole responded that the offer was serious and that it was more than Respondent could afford. Perez then asked for Respondent's books and records and Cole denied the request, saying Respondent had already made clear its position respecting such a request.

Parenthetically, I note that Respondent's contract with Local 298 had included union-security and dues-checkoff provisions and allowed unit employees 3 personal days a year.

Perez testified that later in July Cole telephoned him to say that since Perez had filed an unfair labor practice charge alleging that Respondent refused to bargain with SOLO, Respondent would not meet again with SOLO until the charge was resolved. Perez testified further that he told Cole that SOLO had not filed any refusal to bargain charge. Perez testified that he then checked with Region 22, which advised him that SOLO had filed a charge on behalf of Diego Fernandez.

Cole testified that he has no recollection of telephoning Perez in late July and that his diary, in which he records telephone calls and other business data, has no entry of any such call. He testified that the only phone calls he made to Perez in July were on 10 and 15 July, as reflected in his diary, and that resulted in the 23 July session discussed above.

Perez wrote Cole on 14 August to complain about Respondent's refusal to produce its financial books and records. He made no reference in that letter to a refusal by Respondent to meet while there is pending a refusal to bargain charge. I credit Cole's testimony, not Perez. The absence of any assertion in Perez' letter of 14 August of any such refusal to meet tends to support the import of Cole's testimony—that he never refused to meet because such a charge was pending. Further, it is unlikely that Cole would have made such a statement in the offhanded way recounted by Perez.

The General Counsel placed in evidence a copy of a Dun and Bradstreet report on Respondent that SOLO had obtained. That report did not have a rating for Respondent; it did contain statements that reflected slow payments by Respondent to some of its creditors between 1 October 1985 and 1 October 1986. There was also a notation on the report that Respondent's president had written on 15 October that "[p]rofits for the past six months were up."

The last negotiation session held between Respondent and SOLO took place on 6 November. Respondent then offered 1.6-percent wage increase for each year of a 3-year contract. SOLO reduced its demands further. There was discussion also of changing the method of paying unit employees. The meeting apparently ended on a strange note. It seems that sometime before 6 November SOLO had asked a Teamsters union to pretend to engage in an organizing drive among Respondent's employees; apparently SOLO was hoping that Respondent would react by increasing its offers to SOLO to frustrate a Teamster campaign. At the 6 November session, SOLO accused Respondent of bringing the Teamsters on the scene.

No further negotiation sessions were sought or held.

As outlined earlier, the complaint alleges that Respondent, by each of the following matters, violated Section 8(a)(1) and (5) of the Act:

> (a) unilaterally implementing a four day work week.
>
> (b) cancelling meetings and refusing to meet unless SOLO accepted its demands or because SOLO filed charges under the Act.
>
> (c) issued warnings to members of SOLO's bargaining committee.
>
> (d) failing and refusing to furnish requested financial information.
>
> (e) its overall conduct.

Respecting the contention that Respondent unilaterally reduced the workweek, the evidence is clear that Respondent was committed to following the basic terms of the Local 298 contract until it reached agreement with SOLO on the terms of a new contract. The General Counsel notes that the Local 298 contract provides that the "normal" workday amounts to 8 hours and that the "normal" workweek consists of 5 days. The General Counsel argues then that the normal workweek consists of 40 hours and that Respondent, by having reduced the workweek to 4 days for some unit employees, thereby changed their terms of employment without notice to SOLO. Respondent points to the broad management prerogative clause in the Local 298 agreement as the basis for its claim that it had a contract right to reduce the workweek. I note too that the Local 298 contract states that it is not to be construed "as a guarantee of hours of work per day, or per week, or of days of work per week." Significantly, the record before me does not contain evidence of past practice to indicate that Respondent had been barred from implementing on its own a workweek reduction. Such evidence is an essential element of proof for the General Counsel. See *Eazor Express, Inc.*, 238 NLRB 1165 (1978). I therefore find no merit to the General Counsel's allegation that Respondent violated Section 8(a)(5) by unilaterally reducing the workweek of some unit employees.

The major aspect of the second allegation is that that Respondent violated Section 8(a)(5) by refusing to meet because SOLO had filed charges under the Act. Based on the credibility determination above as to the conflicting accounts of Cole and Perez, that allegation lacks merit. Part of this second allegation is that Respondent canceled meetings; that contention is treated separately below.

The complaint refers to the unlawful warnings to members of SOLO's bargaining committee as unlawful conduct engaged in by Respondent, which established that it violated Section 8(a)(5). The complaint does not allege these warnings in a separate paragraph and by themselves to be violations of Section 8(a)(5). The General Counsel's brief treats them as evidentiary factors supporting the allegation that Respondent's overall conduct constituted bad-faith bargaining.[2] These warnings then will be treated below in conjunction with other factors in weighing Respondent's overall conduct in its negotiations with SOLO.

The next contention of the General Counsel is that Respondent unlawfully failed and refused to furnish requested financial data to SOLO and, in conjunction therewith, canceled negotiation sessions and refused to meet with SOLO. There is no factual issue on this point. Cole canceled the 31 March meeting and proposed a 3-year wage freeze after having informed SOLO on 27 March of Respondent's estimates of the total costs of SOLO's demands; he told SOLO that its demands would make it or any company "in this industry" unprofitable; and he notified SOLO of Respondent's intent to defer meeting again until SOLO takes into account, inter alia, the wage freeze. SOLO's representative made it clear that SOLO wanted to take into account the wage freeze proposal and he requested Respondent to give SOLO the necessary financial data to enable it to go back to the bargaining unit employees. Respondent refused to furnish the data.

In *NLRB v. Truitt Mfg. Co.*, 351 U.S. 149 (1956), the employer there rejected a union's demand for a wage increase of 10 cents per hour and asserted that any increase of more than 2-1/2 cents per hour would put it out of business. When the union there asked it to produce evidence to substantiate that statement, the employer denied the request. The Court held that the Board's order should be enforced whereby the employer would be compelled to furnish the financial data requested. The Court noted that good-faith bargaining necessarily requires that claims made by either side should be honest claims and an asserted inability to pay an increase is important enough to require proof of its accuracy. Respondent's claims that a 3-year wage freeze is consistent with "the realities of [its] business" and that SOLO's demands would make Respondent unprofitable presumably were made in good faith. Respondent, under the rationale of *Truitt*, must be prepared to demonstrate that they are honest claims. Thus Respondent, by not honoring SOLO's request, failed to bargain in good faith. To the same effect, see *California Nevada Golden Tours*, 283 NLRB 58 (1987), and *Teleprompter Corp.*, 227 NLRB 705 (1977), enfd. 570 F.2d 4, 8 (1st Cir. 1977).

As to the allegation that Respondent unlawfully canceled meetings and refused to meet with SOLO, the evidence discloses that Respondent canceled the 31 March meeting but that it did meet thereafter as requested. I find that the evidence fails to establish that Respondent's cancellation of the 31 March meeting, by itself, was aimed at preventing a resolution of the underlying disputes; the cancellation of the 31 March session was ancillary to, and subsumed under, the allegation that Respondent unlawfully refused to furnish requested financial data, discussed above.

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[2] In the unlikely prospect that the warnings, by themselves, were intended to be alleged as a separate, distinct violation of Sec. 8(a)(5), I would dismiss such an allegation. Otherwise, every act of interference with Sec. 7 rights could be stretched into a separate 8(a)(5) violation simply because each such act can be said to have some impact on negotiations.

The last issue raised by the pleadings is the most difficult to resolve—whether Respondent engaged in surface or bad-faith bargaining. In making this determination, the Board looks to the totality of the circumstances in which the bargaining took place, at and away from the bargaining table. *Hedaya Bros.*, 277 NLRB 942 (1985), and cases cited therein. More specific guidelines have also been set out. A party may lawfully stand firm on a bargaining position he reasonably believes fair or has the strength to achieve; other conduct may be indicative of bad faith. *Atlanta Hilton & Tower*, 271 NLRB 1600, 1603 (1984). There is no litmus test that can quantitatively decide the issue. Reasonableness or lack thereof of a party's proposals are not to be evaluated in determining whether a party has bargained in good faith. See *Reichhold Chemicals*, 277 NLRB 639 (1985). Section 8(d) of the Act does not compel an employer to make concessions. Nonetheless, an employer is obligated to make a reasonable effort to compose differences. *NLRB v. Reed & Prince Mfg. Co.*, 205 F.2d 131, 134 (1st Cir. 1953), cert. denied 346 U.S. 887 (1953). Conduct indicative of bad faith includes delaying tactics, unreasonable bargaining demands, unilateral changes, efforts to bypass the union, failing to designate an agent with sufficient authority, withdrawal of agreed-on provisions, and arbitrary scheduling of meetings. See *Atlanta Hilton & Tower*, supra at 1603. Coercive conduct coupled with regressive proposal also can manifest bad faith. *Heyada*, supra.

The factual situation in the instant case places it between *Reichhold Chemical*, supra, where the Board found hard bargaining and *Heyada*, supra, where bad-faith bargaining was found. In *Reichhold*, the Board discounted 8(a)(1) statements by supervisors threatening discharge and the futility of bargaining. In *Rescar, Inc.*, 274 NLRB 1 (1985), the Board also discounted a pre-10(b) statement of an inebriated vice president of the employer there that it had no intention of signing a contract.

On the one hand, I note that there is, in this case, a virtual absence of the types of conduct noted above that point towards bad-faith bargaining—bypassing a union and so on. On the other hand, the coercive conduct in this case was aimed directly at employees on SOLO's negotiating committee at the instance of Respondent's key officials, Weil and Ricciardi, and the timing thereof relates closely to SOLO's demands for financial data. Again, on the one hand, Respondent ultimately did make wage increase offers of 1 percent, and then 1.6 percent, and on the other, it unlawfully refused to produce data to substantiate its claim that SOLO's demands would make its operation unprofitable.

There are other factors to consider. I note that Respondent's contract with Local 298 contained not only union-security provisions but also a dues check-off clause. Yet Respondent repeatedly proposed an open shop to SOLO. The Local 298 contract, too, called for wage increases substantially more than the percentages that Respondent offered SOLO. By themselves, Respondent's proposals could be just hard bargaining and ploys to induce SOLO to lower its demands. In context with other factors, however, the regressive nature of Respondent's proposals could be considered in evaluating bad faith.

After weighing all the relevant factors and noting particularly the unlawful warnings to SOLO's negotiating committee, the discriminatory treatment of the Fernandez brothers, Respondent's refusal to produce financial data to back up its own representations to SOLO, and the regressive nature of the proposals offered by Respondent, I find that the evidence supporting the complaint allegation outweigh the factors pointing towards good-faith bargaining, e.g., its meetings with SOLO, and its exchanges of proposals. From the totality of the circumstances, as they are reflected in the record before me, I find that the General Counsel has shown, by a preponderance of the evidence, that Respondent entered into and participated in negotiations with SOLO with an essentially closed mind intent on forcing SOLO to capitulate to its dictates and disinterested in seeking a peaceful resolution of its differences with SOLO.

CONCLUSIONS OF LAW

1. Respondent is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

2. SOLO is a labor organization as defined in Section 2(5) of the Act and the exclusive representative of the following unit appropriate for purposes of collective bargaining:

> All production and maintenance employees of Respondent, including shipping and receiving employees but excluding all office employees, clerical employees, administrative employees, executives, guards, maintenance men, professional employees, supervisors as defined in the Act and all other employees of Respondent.

3. Respondent, in violation of Section 8(a)(1) and (3) of the Act, has engaged in the following conduct:

(a) Issued warnings on 16 May 1986 to employees on SOLO's negotiating committee in order to discourage support for SOLO.

(b) Issued a warning on 23 May 1986 to Diego Fernandez and discharged him from its employment on that day to discourage support for SOLO.

(c) Issued a warning on 29 May 1986 to Rolando Fernandez and suspended him from its employ for a week in order to discourage support for SOLO.

4. Respondent, in violation of Section 8(a)(1) and (4) of the Act, discharged Diego Fernandez on 23 May 1986 because he informed Respondent, in substance, that he intended to file an unfair labor practice charge with the Board to protest the warning issued earlier to him that day.

5. Respondent, in violation of Section 8(a)(1) and (5) of the Act, has failed and refused to bargain in good faith with SOLO and has failed and refused to supply SOLO with requested financial data needed to enable it to bargain with Respondent respecting Respondent's

claim, in substance, that it cannot meet SOLO's bargaining demands and yet remain profitable.

6. In all other respects, the allegations of unlawful conduct set out in the consolidated complaint are without merit.

REMEDY

Having found that Respondent has engaged in unfair labor practices within the meaning of Section 8(a)(1), (3), (4), and (5) of the Act, I shall recommend that it cease and desist therefrom and that it take certain affirmative action necessary to effectuate the policies of the Act.

Accordingly, Respondent shall be ordered to offer Diego Fernandez immediate and full reinstatement to his former position, or if it no longer exists, to a substantially equivalent position without prejudice to his seniority or other rights and privileges and to make him whole for having unlawfully discharged him on 23 May 1986; and to make whole also Rolando Fernandez for having unlawfully suspended him from its employ in late May or early June 1986. Backpay shall be computed in the manner prescribed in *F. W. Woolworth Co.*, 90 NLRB 289 (1950), with interest as computed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987).

Respondent shall also be ordered to remove from its files all references to the unlawful warnings given on 16 May 1986 to employees on SOLO's negotiating committee to Diego Fernandez on 23 May 1986 and to Rolando Fernandez on 29 May 1986; to remove from its files, too all references to its discriminatory discharge of Diego Fernandez on 23 May 1986 and to its discriminatory suspension of Rolando Fernandez in late May or early June 1986 and to notify these employees that these steps have been taken and that the unlawful acts will not be used against them in any way.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[3]

ORDER

The Respondent, Lustrelon, Inc., Edgewater, New Jersey, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Warning employees to discourage support for Solidarity of Labor Organizations International Union (SOLO).

(b) Discharging or suspending employees because they support SOLO.

(c) Discharging any employees to discourage the filing of unfair labor practice charges with the Board.

(d) Refusing to bargain in good-faith with SOLO and refusing to furnish financial data requested and needed by SOLO to fulfill its obligations as exclusive representative in the unit described as certified by the Board.

(e) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affimative action necessary to effectuate the policies of the Act.

(a) Offer Diego Fernandez immediate and full reinstatement to their former jobs or, if those jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority or any other rights or privileges previously enjoyed, and make them whole for any loss of earnings and other benefits suffered as a result of the discrimination against them, in the manner set forth in the remedy section of the decision.

(b) Make whole Rolando Fernandez for all loses of earnings and other benefits suffered as a result of his unlawful 1 week's suspension from employment, in the manner set forth in the remedy section above.

(c) On request, bargain collectively in good faith with SOLO as representative of the employees in the certified unit, with respect to their wages, liners of work, and all other terms and conditions of employment.

(d) Provide SOLO with the financial data it requested to verify Respondent's assertion that honoring SOLO's demands would render its operations unprofitable.

(e) Remove from its files any references to warnings given employees on SOLO's bargaining committee and to the separate warnings given Diego and Rolando Fernandez and notify them all in writing that this has been done and that the unlawful acts will not be used against them in any way.

(f) Preserve and, on request, make available to the Board or its agents for examination and copying, all payroll records, social security payment records, timecards, personnel records and reports, and all other records necessary to analyze the amount of backpay due under the terms of this Order.

(g) Post at its Edgewater, New Jersey location copies of the attached notice marked "Appendix."[4] Copies of the notice, on forms provided by the Regional Director for Region 22, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material.

(h) Notify the Regional Director in writing within 20 days from the date of this Order what steps the Respondent has taken to comply.

IT IS FURTHER RECOMMENDED that all allegations in the complaint of unlawful conduct that were not found to have merit are dismissed.

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[3] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

[4] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

Koba Associates, Inc. ***and*** **Office & Professional Employees International Union, Local 2, AFL–CIO, Petitioner.** Case 5–RC–12553

June 28, 1988

DECISION ON REVIEW AND ORDER

By Chairman Stephens and Members Johansen and Cracraft

On November 25, 1985, the Regional Director issued a Decision and Direction of Election in which he found that, under the principles set forth in *National Transportation Service*, 240 NLRB 565 (1979), assertion of jurisdiction was warranted. On December 18, 1985, the Board granted the Employer's request for review of that decision. On December 20, 1985, an election was conducted in the unit found appropriate by the Regional Director, and the ballots were impounded. On June 30, 1986, the Board issued an order remanding the case for further consideration in light of its decisions in *Res-Care, Inc.*, 280 NLRB 670 (1986), and *Long Stretch Youth Home*, 280 NLRB 678 (1986), including, if necessary, reopening of the record. Subsequently, the Regional Director ordered that the record be reopened and, on November 5, 1986, a further hearing was held. On January 13, 1987, the Regional Director issued a Decision and Order to Open and Count Impounded Ballots in which he concluded that assertion of jurisdiction over the Employer was appropriate.

Thereafter, in accordance with Section 102.67 of the Board's Rules and Regulations, the Employer filed a timely request for review of the Regional Director's decision, in which the Employer contended that the Board should decline to assert jurisdiction. By unpublished order dated April 8, 1987, the Board granted the request for review. The petitioner filed a brief on review.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

We have considered the entire record in this case, and conclude, in agreement with the Regional Director, that it is appropriate to assert jurisdiction herein.

I.

The Employer provides management consulting services to governmental agencies. In the instant case, the Employer, under a contract with the Drug Enforcement Administration (DEA),[1] provides personnel for functions that are necessary to maintain the DEA's Narcotics and Dangerous Drugs Information System, functions which include document review and data analysis. The Petitioner seeks to represent a unit of the Employer's full-time and regular part-time employees employed at the DEA headquarters.

The Employer, as a contractor providing services to the Federal Government, is subject to the terms of the Service Contract Act of 1965, as amended, 41 U.S.C. § 351; as such, the wages and fringe benefits it provides its employees must equal at a minimum the standard established in a wage determination set by the Department of Labor (DOL). The wage determination sets forth the minimum compensation rates prevailing in the locality for wages and benefits. See 41 U.S.C. § 351 (a)(1), (2); *Dynaelectron Corp.*, 286 NLRB 302 (1987). In the instant case, the wage determination for 1985 set a minimum hourly wage for each of five classifications that ranged from $7.46 per hour for a coder/trainee to $12.30 per hour for a team supervisor. All service employees under the contract were to receive health and welfare benefits valued at 32 cents per hour, $12.80 per week, or $55.46 per month, a well as 2 weeks' vacation after a year of service and nine paid holidays each year. The dollar amounts required for wages and for health and welfare benefits in the wage determination are only minimum standards.

The contract is a labor-hours contract with fixed billing rates; the Employer bills the agency for each hour worked, at a rate up to the ceiling specified in the contract. The contract specifies the number and types of personnel required, the maximum number of hours required for each labor category on each shift, and the billing rate for each classification.[2] The billing rate includes overhead, general and administrative costs (G&A), and fringe benefits. The contract includes a total direct cost for each fiscal year, separated into direct labor costs for each job classification, and lists a maximum sum for all other direct costs, including, for example, such items as parking, local travel, and postage. The Employer bills the DEA both for direct costs and for G&A, overhead, and fringe benefits, at the billing rate. Thus, should an employee work 3 hours at a rate of $10 an hour, the Employer would bill the agency for $30, plus the percentage of the billing rate allocated for that particular classification. The Employer does not re-

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[1] The contract is between the DEA and the Small Business Administration (SBA), and the Employer is the subcontractor.

[2] The DEA has permitted the Employer to transfer funds allocated for two specific job classifications between the two classifications, so long as the combined hours for the two classifications equal the total required under the contract and the cost does not exceed the total dollar amount for both classifications.

289 NLRB No. 33

ceive the projected total contract price should there be a slowdown in production; the DEA is billed only for the hours worked.

The contract is for a 1-year period, renewable for a total period not to exceed 3 years. A price adjustment clause is included that provides that if the DOL issues a new wage determination during the term of the contract, the parties may negotiate an amendment to reflect that change at the next renewal period. If, however, nonlabor costs increase, the DEA will only pay the established rate.

Before the contract was awarded, the DEA or the Defense Contract Audit Agency (DCAA) audited the Employer to determine whether it had the capability to perform the contract. The DCAA examined the Employer's proposal for wages and estimated indirect cost items, from photoduplication costs to officers' salaries. If the DCAA disagreed with the Employer regarding the projected rate for a particular item, the DCAA would propose a rate it considered more reasonable, but under which the Employer would be able to operate without a loss.

The Employer must maintain accounting procedures that show all cost incurred, and the DEA may examine the Employer's records for accuracy of the cost and pricing data. The DEA may request an audit of invoices before final payment, and payments previously made are subject to reduction for overpayment or to increase for underpayment.

Certain Federal acquisition regulations (FARs) are incorporated in the contract that permit the DEA to terminate the contract in whole or in part if it is in the interest of the Government. These regulations also permit termination if the contractor fails to perform services within the times specified, fails to make progress on the contract, or otherwise fails to perform contractual provisions.

One of the Employer's vice presidents, Ilene Baylinson, testified that because the billing rate is fixed, the Employer has no flexibility to change wage and benefit rates once the contract is negotiated with the DEA, but she was unable to point to any section of the contract that bars increases or changes in wages and benefits. She also stated that, in practice, the FARs prevent the Employer from changing wages and benefits because such changes would be considered defective cost pricing; however, she conceded that the regulations do not expressly prohibit increases. Baylinson also acknowledged that certain employees were paid more than the minimums required by the wage determination. Furthermore, another vice president, Michael Bonner, testified that the Employer is free to award wages and benefits that exceed the minimum specified in the wage determination.

To receive payment under the contract, the Employer submits invoices twice a month to the DEA to show expenditures. After the Employer substantiates the hours worked, the DEA reimburses the Employer for all costs incurred within certain line items. If the Employer bills the DEA for nonapproved items or for amounts that exceed line items, the DEA may challenge the sum. Thus, if the Employer were customarily to submit an invoice for 100 hours for a particular classification and then submit an invoice for 500 hours, the DEA might reject it on the basis that it would be unnecessary to use that many employees in one category.

During negotiations for a final contract, the Employer complied with a DEA request to standardize wages. Initially, the Employer, which was then acting under a preliminary letter contract, set wages by awarding individual employees a certain percentage above a standard wage rate, which could result in increases varying between 5 and 17.5 percent. As a result, employees within the same classification received widely different wage rates. The Employer also complied with a DEA request that it set the hours for eligibility for a night-shift differential to correspond with those hours set by the DEA. Further, the Employer changed its basis for awarding increases on request of the DEA. The Employer at first based merit increases on productivity, time, and attendance, but it agreed to base awards solely on production so that its employees would not receive more awards than would the employees of the DEA.

In support of the Employer's allegation that its ability to bargain is limited, Vice President Bonner testified that the contract specifies that the employer may expend $3000 each quarter for merit increases, although to support this statement, he pointed to contract language prohibiting total other direct costs from exceeding that amount. Moreover he also testified that there is nothing in the contract to prevent the Employer from expending more than the amount specified.

The cost of the components of the fringe benefit package are incorporated into the fixed billing rate. Baylinson testified that the Employer is unable to make financial changes in the fringe benefits package because the DEA would find it to be defective cost pricing, but again, she was unable to cite to particular regulations that prohibit such changes. She also testified that the Employer could in effect award greater benefits out of corporate profits, but she stated that its profit margin was too slim to support increases and, moreover, that the agency might conclude after a capabilities audit that the Employer was unable to perform the contract. Bonner, however, testified that the Employer may, within the limits prescribed by the contract, modify the types of fringe benefits it provides employees. That is, beyond meeting at a minimum the wage determination and staying within the billing rate agreed on with the DEA, the Employer may change benefits, including changing health plans. The contract does not prohibit the Employer from increasing benefits or bar changing the components of the benefits package;[3] the Employer simply cannot reduce the value of the benefits below that specified in the wage determination.

The contract requires that the Employer maintain two daily shifts and specifies that the size of the work force be equivalent to a certain number of full-time employees, although the Employer may use part-time employees to achieve the manning level. The contract provides for an effective work force of a certain number of person-weeks, with a 10-percent variance permitted over a 3-month period. The contract also specifies the time an employee must spend in a particular classification before advancement. Any changes in promotion criteria must be approved by the DEA before incorporation in the contract.

The Employer interviews and hires applicants; although the DEA interviews applicants, its focus is on security matters. The Employer's employees work in a secure facility alongside the DEA's employees, and thus need a security clearance; the Employer's employees wear identification badges issued by DEA security. In the past, the Employer has terminated an employee on notification by the DEA that he had breached security.

The Employer determines who is eligible for merit increases. The Employer also assigns work and schedules vacations, and selects employees to work overtime, subject only to the contractual restriction that such employees must have maintained a certain production rate. The Employer evaluates employees, and it weighs employees' error rates in evaluating performance.

Both the DEA and the Employer maintain procedures for quality control. If the DEA uncovers employee errors in the course of monitoring performance, the employer's supervisors decide whether an individual employee is chargeable with the error. The Employer has removed an employee from quality control functions who was not performing properly after the DEA warned that unless the Employer did so, the agency would seek to modify the contract to eliminate the position.

When employees perform functions in classifications not covered by a wage determination, the Service Contract Act's accompanying regulations provide a conforming procedure for establishing pay. See 29 CFR § 4.6(b)(2)(i). For those job classifications not included in the wage determination, wage rates are established by interested parties or employer-represented groups, and the Employer must report to the exempt entity on what wages and benefits those employees will be paid. Compensation must bear a rational relationship to that listed in the contract's wage determination. See 29 CFR § 4.6(b)(2)(ii). Thus any change, including adding a new classification, must be done by agreement of the Employer, the employees, and the DEA. To meet this requirement, an Employee Advisory Committee (EAC) was established to meet four times each year; it consists of six or seven elected employee representatives, as well as a project director, team supervisor, and vice president. As an example of the EAC's input, in the past the EAC has petitioned the DOL for a reclassification of wage rates, and in May 1983, the DOL issued a reclassification with wage increases and backpay. The EAC has also dealt with such matters as problems with work supplies or the general work environment, and has considered the use of error rates in evaluations, On the other hand, there was testimony that employees did not participate in establishing the wage determination issued for the 1985 fiscal contract year, and that the EAC did not meet between the dates of the two hearings, November 1985 and November 1986.

II.

In *Res-Care*, the Board clarified its test for whether an employer shares a governmental entity's exemption from the Act. The test evolved from that set forth in *National Transportation Service*, 240 NLRB 565 (1979). *Res-Care* explained that whether the Board asserts jurisdiction is based on the extent of control retained by the employer over essential terms and conditions of employment *and* on the degree of control exercised by the exempt entity over the employer's labor relations policies. Thus, jurisdiction is asserted when the employer has the "final say on the entire package of employee compensation, i.e., wages and fringe benefits." Id. at 674.

The exempt entity in *Res-Care* placed direct limits on employee compensation and, as a consequence, the employer did not have the ability to bargain over economic terms and conditions of employment. The DOL approved the initial wages, wage ranges, and benefits that were included in the proposed operating budget. Once the employer's budget was approved by the exempt entity, the contract price was based on the budget, and the employer effectively was prevented from increasing wages and benefits. Changes in approved amounts needed DOL clearance, and expenditures over budget were disallowed. The contract placed a ceiling on wages; employees could not receive more than that prevailing for other employees in the locality, wages were held to a top level of less than 10 percent over the wages that employees received at their former employment, and wage increases were limited to less than 10 percent. Personnel policies were also subject to DOL approval.

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[3] Although the Employer asserted that it needed DEA approval to implement a change in the vesting schedule for its pension plan, the pension plan itself provides that the Employer has the right to amend, modify, or discontinue the plan at any time. The record does not show that DEA's authority to approve or disapprove amendments to the pension plan extends beyond any effect on the billing rate; the Employer contributes a percentage of each employee's salary into the pension fund and that sum is included in the fringe benefit total. In any event, the modification proposed would have no financial impact on the Employer's contribution rate and no effect on the billing rate.

By contrast, the Board asserted jurisdiction in *Long Stretch* because the employer was able to engage in meaningful bargaining; although there was a ceiling on the employer's total budget, there were no specific limits on employee compensation. Id. at 682 fn. 14. The exempt entity set minimum standards and qualifications for employees and suggested minimum and maximum salary ranges. The employer, however, was free to pay more or less than what the exempt entity suggested. The employer also submitted its proposed operating budget to the exempt entity, but the proposal was not the basis for the contract; instead it often varied from the actual budget.

The Employer here is less restricted than the employer in *Res-Care*, first, because there are no limits on the wages or compensation that the Employer proposes in submitting its operating budget. Beyond the wage determination's imposed minimum standards, the Employer may set forth its own compensation levels in the proposed budget. Unlike *Res-Care*, the DEA does not establish maximum levels at the outset; no ceiling was placed on wages or benefits in establishing contract terms. Bonner stated that the Employer could exceed the minimum specified in the wage determination, and wages under the contract have exceeded the wage determination. *Res-Care* is further distinguishable because here the Employer is not bound to keep wages under 110 percent of prior wages. Furthermore, the Service Contract Act provides for substitution of collectively bargained wages and benefits for the prevailing compensation rates set forth in wage determinations. *Dynaelectron*, supra at 303, citing 41 U.S.C. § 351(a)(1) and (2).[4] In *Dynaelectron*, the Board held that the terms of the Service Contract Act alone do not bar meaningful bargaining. Thus, because under the Service Contract Act, the rates in a collective-bargaining agreement would be incorporated as the wage determination in the contract, in the absence of other contractual limits, the Employer, through the process of bargaining, may set the compensation levels in the initial contract.

Once the contract is awarded, the Employer's budget does place some limits on changes in compensation. The limits are not such, however, that prevent bargaining over terms and conditions of employment. As in *Res-Care*, the budget becomes the basis for the contract and, moreover, the Employer may not bill the DEA for anything the DCAA has disallowed. Postaward, if the agency believes the Employer changed the components of the pricing structure, it may audit the Employer to determine whether it has the continued financial capability to perform the contract. If the Employer pays employees significantly more or less than what was recommended initially, the agency may conduct another audit with recommendations for wages and benefits that the Employer might pay under future contracts.

Payment methods here display more similarities to those in *Res-Care* than to those in *Long Stretch*. In *Res-Care*, to receive contract funds, the employer periodically submitted vouchers to the exempt entity, and the agency, which made payment monthly, had the discretion to reduce the contract payment by the amount of any costs it disallowed. The payment method under the contract in *Long Stretch* differed markedly. State funding was not tied to employee compensation and, instead, the employer received funds through the exempt entity from the state legislature based on reimbursement per resident. Here, the Employer submits specific invoices to the DEA, which reimburses it on review of the vouchers. The testimony indicates that if an invoice for a job classification shows a great increase, the DEA might question the basis for it and may refuse payment. The record does not show that the DEA would disallow payments for increased labor costs, unless, as with other items, they would exceed the contract price or undermine the Employer's ability to perform.

The record shows, however, that the Employer retains control over several crucial elements. The Employer's contract established only minimum rates, and the Employer's wage rates for its employees have exceeded those set by the DOL.[5] The

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[4] If the wages and benefits agreed on are shown, however, to be substantially at variance with those prevailing in the locality, or if reached after less than arm's-length negotiations, the DOL will not adopt those in setting a wage determination. 41 U.S.C. § 353(c); see *Dynaelectron*, supra at 304.

[5] *Old Dominion Security*, 289 NLRB 81 (1988), a somewhat similar case to that presented here, also involved an employer that was subject to the

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DOL's wage determination only sets a minimum dollar amount for all benefits, and the Employer is free to negotiate a higher fringe benefit dollar value with the DEA. In *PHP Healthcare Corp.*, 285 NLRB 182 (1987), a case in which the Board did not assert jurisdiction, the employer was more constricted by a contract that set maximum as well as minimum wage limits and established percentages for increases. As we noted in *Dynaelectron*, supra at 304, the Service Contract Act does not require the Employer to agree to provide higher wage rates or benefit levels than those prevailing in the locality.

The Employer asserted that the DEA's control over employee compensation is shown by restrictions concerning merit increases. However, the testimony regarding merit increases does not show that the Employer cannot determine what amounts, if any, to award to its employees. The record indicates that included in the line item budget for total "other direct costs" is a specified sum for merit increases. A reading of the contract does not show that the sum for "other direct costs" is broken down to separate amounts, including a sum for merit increases. Apparently, nothing in the contract limits the Employer's ability to award increases as it believes warranted.

If, during the term of the contract, the Employer were to enter into a collective-bargaining agreement with the Petitioner, because of the operation of the Service Contract Act, as stated above, the collectively bargained rates would become the new wage determination at the next renewal period.[6] Any wage or benefits increase resulting from bargaining would be incorporated in the contract. Thus, unlike *Res-Care*, should the Employer and the Petitioner negotiate a collective-bargaining agreement that increases compensation levels, such increases would not be disallowed, although under the contract the DEA still may ensure that the contract is performed and that the Employer is capable of performing it.[7] Hence, the Employer's contract with the DEA is less restrictive than that in *Res-Care.*

Based on the above, we find that the Employer does have the ability to engage in meaningful bargaining with a labor organization. The Employer has greater ability than in *Res-Care* to set initial compensation rates and, under the Service Contract Act, collectively bargained wages become the new wage determination. There are some factual similarities between the instant case and *Res-Care*; the Employer's submitted budget is the basis for the contract price, and the Employer submits vouchers periodically to receive payment. Unlike *Res-Care*, however, here there are no restrictions imposed by the DEA on the maximum wages and benefits, and the Employer determines the compensation its individual employees will receive, subject only to the minimums specified in the contract. Also unlike *Res-Care*, the contract does not specify employees' wage ranges. There is no evidence that the exempt entity possesses authority to approve or disapprove any changes in wages, aside from ensuring that the Employer continues to be capable financially to perform the contract. With regard to benefits, the Employer is limited only by the minimum standard, beyond that specification, the Employer is free to design a benefits package and to bargain over it with a labor organization.[8] The Employer, as in *Long Stretch*, does not operate under any specific limits on employee compensation expenditures beyond adhering to the minimum standards required under the Service Contract Act.

With respect to the exempt entity's involvement in day-to-day operations and labor relations, the DEA maintains certain security measures that require some input in hiring, and security breaches found by the DEA result in discipline. The use of a DEA facility and equipment requires that the DEA establish the hours of work and the number of em-

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Service Contract Act. There, the Board asserted jurisdiction over the employer, observing, inter alia, that although the levels of employee compensation did not exceed the wage determination's minimum standards, the employer was not limited to those levels.

[6] The Petitioner points to the existence of the EAC as evidence of the Employer's ability to bargain, and the Employer, by contrast, contends that the EAC is currently inactive. Neither position affects the outcome of this case. DOL regulations contemplate employee involvement in setting wages. Any contractor who wishes to employ a class of employees not included in the contract's wage determination must first comply with a conformance procedure that requires the employer to submit a proposal regarding wages and benefits for review. The employer must indicate whether the employees' authorized representative agrees with the wage proposal or, in the absence of such an authorized representative, whether the employees themselves approve the proposal. 29 CFR § 4.6(b)(2)(ii). Thus, if circumstances warrant, the EAC would be required to meet.

In *Res-Care*, the Board stated that whether an employer and a labor organization have entered into a collective-bargaining agreement is not determinative of its jurisdictional decision. Id. at 674 fn. 22. There, unlike the present case, the exempt entity had approval authority over all the terms in the collective-bargaining agreement and thereby controlled all economic terms and conditions of employment. Here, however, the negotiated compensation levels automatically become the wage determination without agency participation. See 41 U.S.C. § 351(a); *Dynaelectron*, supra at 303–304.

[7] Although the Employer has complied with DEA requests regarding certain factors that affect compensation, such as overtime differential eligibility and standards for merit increases, these requests for some uniformity on matters that also affect DEA employees at the same site do not limit the Employer's ability to engage in meaningful bargaining over its employees' essential economic terms and conditions of employment.

[8] Although Baylinson testified that the Employer was not free to alter components of the benefit package, the record as a whole does not support this conclusory statement; the contract merely provides what the Employer must, at a minimum, expend per employee on an hourly, weekly, or monthly basis. Baylinson, on being asked what contract provision prevented the Employer from altering the fringe benefits package, stated that regulations required that the cost and pricing data must be certified as accurate, but she did not point to any contract provision or regulation that prevented the Employer from allocating fringe benefits as it wishes.

ployees per shift, and the DEA approves the qualifications for positions. Citing these facts, the Employer contended that it lacked control in such matters as hiring, setting staffing levels, holidays, quality control, hours of work and overtime, promotions, demotions, and terminations, and work environment, and that therefore our assertion of jurisdiction is not appropriate. We do not agree.

Because of the type of work contracted for, the DEA sets the number and type of personnel, and because the DEA performs a security-related function, it controls certain aspects of the work environment. The Employer, however, remains responsible for hiring, evaluating, and directing employees, not the DEA, and the decision to discharge rests with the Employer. In *Long Stretch*, id. at 682 and fn. 15, the fact that the agency set minimum qualifications and could veto hires that did not meet these standards did not defeat jurisdiction, and in *Res-Care*, id. at 674 fn. 22, the Board specifically disavowed reliance on operational controls in declining to assert jurisdiction. Here, the DEA's involvement in day-to-day operations and personnel matters to ensure contract compliance and security does not impinge on the Employer's ability to bargain. The Employer's employees are subject to the DEA's regulations, and the DEA may suggest discipline, but the Employer remains responsible for personnel decisions. See *Dynaelectron*, supra at 305; *Old Dominion Security*, supra at 82. Operational controls may permit monitoring of contract compliance, but they do not limit the Employer's ability to bargain. *Long Stretch*, id. at 682 fn. 15; see *Res-Care*, id. at 674 fn. 22; *Rustman Bus Co.*, 282 NLRB 152 (1986); see also *Champlain Security Services*, 243 NLRB 755 (1979); *Atlas Guard Service*, 237 NLRB 1067 (1978).

In sum, we find that the Employer retains sufficient control over its employees' terms and conditions of employment to engage in meaningful collective bargaining, and that neither the DEA nor the DOL exercises any controls that affect the Employer's ultimate discretion over wage and benefit levels. *ARA Services*, 283 NLRB 602, 604 (1987): *Long Stretch*, id. at 682. We therefore hold that it will effectuate the purposes and policies of the Act to asset jurisdiction over the Employer. Accordingly, the Regional Director's conclusion is affirmed, and we shall remand the proceeding to the Regional Director for further appropriate action.

ORDER

The Regional Director's decision is affirmed and the case is remanded for further appropriate action.

Corry Contract, Inc. *and* United Steelworkers of America, AFL–CIO–CLC. Case 6–CA–19180[1]

June 28, 1988

DECISION AND ORDER

BY CHAIRMAN STEPHENS AND MEMBERS BABSON AND CRACRAFT

On January 15, 1987, Administrative Law Judge Thomas A. Ricci issued the attached decision. The General Counsel filed exceptions, a supporting brief, and a motion to strike portions of the Respondent's answering brief. The Respondent filed an answering brief, cross-exceptions, a supporting brief, and a response to the General Counsel's motion to strike.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings,[2] and conclusions as modified[3] and to adopt the recommended Order as modified.[4]

AMENDED CONCLUSION OF LAW

Substitute the following for Conclusion of Law 2.

"2. The Company violated Section 8(a)(1) of the Act by threatening employees with loss of jobs and benefits in retaliation for their union activities, telling employees that management would find a way to discharge prounion employees, and telling employees not to listen to an employee because he was a troublemaker and caused trouble for his previous employer by filing grievances."

ORDER

The National Labor Relations Board orders that the Respondent, Corry Contract, Inc., Corry, Pennsylvania, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Discharging employees in retaliation for their protected union activity.

(b) Threatening employees with loss of jobs and benefits in retaliation for their union activities, telling employees that management would find a way to discharge prounion employees, and telling employees not to listen to an employee because he was a troublemaker and caused trouble for his previous employer by filing grievances.

(c) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Offer Thomas Eberle immediate and full reinstatement to his former position or, if such position no longer exists, to a substantially equivalent posi-

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[1] On July 2, 1987, the Board granted the Petitioner's motion to sever Case 16–RC–9694 from the unfair labor practice case before us. In addition to severing the representation case, the Board granted the Petitioner's request to withdraw its election objections, and to certify the election results.

[2] The parties have excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

The judge stated that one-half of Respondent's work force was released because of a decline in business. The record reflects that only one-third of the work force was laid off during the beginning of 1986. The judge also stated that a conversation between Supervisor McFate and employee Sellon occurred the day before the election. The record reflects the conVersation occurred Tuesday of the week preceding the election on June 10, 1986. We correct these errors. These errors do not affect the ultimate determinations of the judge.

We deny the General Counsel's motion to strike portions of the Respondent's answering brief because, rather than objecting to the introduction of new evidence, the General Counsel is objecting to purported mischaracterizations of record evidence.

[3] We find the judge improperly went beyond the scope of the complaint by finding 8(a)(1) conduct in President Bill Kafferlin's statements that he would be hard to bargain with if the employees chose to be represented by a union and that the Respondent would not be obligated to bargain with a union selected by the majority of the employees, and Supervisor McFate's comments to Sharon Sellon that the Respondent was receiving union busting information from a law firm. The complaint did not allege these incidents, the General Counsel did not amend the complaint at the hearing, and the General Counsel did not either at the hearing or in her brief to the judge argue that these incidents were violations. Hence, the allegations were not actually litigated.

We agree with the General Counsel that Plant Manager Anthony's statement to employee Eberle that, if employees were listening to employee Spoveri, the latter was a troublemaker and had caused trouble for his previous employer by filing grievances, constitutes 8(a)(1) conduct. The statement was made in the context of threats by the plant manager of loss of jobs, benefits, and overtime and would plainly tend to impinge on employees' Sec. 7 rights. See *Garrison Valley Center*, 246 NLRB 700, 708–709 (1979). The judge found that the General Counsel failed to establish a prima facie case with regard to the layoffs of employees Rogers and Miller. While we adopt the judge's findings in this regard, we do not rely on the inferences the judge made relating to the employees named in the original charge.

Given the judge's finding that the Respondent threatened loss of employment in retaliation for union activity and other 8(a)(1) conduct, we find it unnecessary to pass on the allegation that the Respondent violated Sec. 8(a)(1) by employee Kraft's statement that employees could be fired for wearing a union button because finding the additional violation would essentially be cumulative and would not materially affect the Order.

[4] The judge recommended a broad remedial order. Such an order is warranted only when a respondent is shown to have a proclivity to violate the Act, or has engaged in such egregious or widespread misconduct as to demonstrate a general disregard for employees' fundamental statutory rights. *Hickmott Foods*, 242 NLRB 1357 (1979). Inasmuch as the Respondent's unlawful acts are not of such nature, we shall modify the recommended Order and notice to provide the narrow cease-and-desist language.

We shall modify the recommended Order to require that the Respondent remove from its files any reference to Eberle's unlawful discharge and notify him, in writing, that it has done so and that evidence of the unlawful discharge will not be used as a basis for future personnel actions against him. See *Sterling Sugars*, 261 NLRB 472 (1982).

289 NLRB No. 50

tion, without prejudice to his seniority or other rights and privileges previously enjoyed.

(b) Make whole Thomas Eberle for any loss of pay or benefits he may have suffered by reason of the Respondent's discrimination against him with interest thereon to be computed in the manner prescribed in *New Horizons for the Retarded.*[5]

(c) Remove from its files any reference to the unlawful discharge and notify the employee in writing that this has been done and that the discharge will not be used against him in any way.

(d) Preserve and, on request, make available to the Board or its agents for examination and copying, all payroll records, social security payment records, timecards, personnel records and reports, and all other records necessary to analyze the amount of backpay due under the terms of this Order.

(e) Post at its place of business in Corry, Pennsylvania, copies of the attached notice marked "Appendix."[6] Copies of the notice, on forms provided by the Regional Director for Region 6, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material.

(f) Notify the Regional Director in writing within 20 days from the date of this Order that steps the Respondent has taken to comply.

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

WE WILL NOT discharge any employee in retaliation for his union activities.

WE WILL NOT threaten employees with loss of jobs and benefits in retaliation for their union activities.

WE WILL NOT tell employees that management would find a way to discharge prounion employees.

WE WILL NOT tell employees that other employees are troublemakers and caused trouble for their previous employer by filing grievances.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL offer Thomas Eberle immediate and full reinstatement to his former position and, if that position no longer exists, to a substantially equivalent position, without prejudice to his seniority or other rights and privileges previously enjoyed.

WE WILL make whole Thomas Eberle for any loss of pay and other benefits he may have suffered as a result of the discrimination against him with interest.

WE WILL notify Thomas Eberle that we have removed from our files any reference to his discharge and that the discharge will not be used against him in any way.

CORRY CONTRACT, INC.

Ronald J. Andrykovitch, Esq., for the General Counsel.
Richard Perhacs, Esq. (Elderkin, Martin, Lelly, Messina & Zamboldi), of Erie, Pennsylvania, for the Respondent.
Mr. Wiley Welborn, Staff Representative, of Pittsburgh, Pennsylvania, for the Charging Party.

DECISION

STATEMENT OF THE CASE

THOMAS A. RICCI, Administrative Law Judge. A hearing in this proceeding was held on 8 and 9 October 1986 at Corry, Pennsylvania, on a complaint issued by the General Counsel against Corry Contract, Inc. (the Respondent or the Company) and on objections to an election held by the Board. The complaint issued on 6 August 1986 on a charge filed by United Steelworkers of America, AFL–CIO–CLC (the Union) on 6 June 1986. The principal issue presented is whether the Respondent unlawfully discharged three employees in violation of Section 8(a)(3) of the Act. Briefs were filed after the close of the hearing by the General Counsel and the Respondent.

On the entire record, and from my observation of the witnesses, I make the following[1]

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[5] In accordance with our decision in *New Horizons for the Retarded*, 283 NLRB 1173 (1987), interest on and after January 1, 1987. Shall be computed at the "short-term Federal rate" for the underpayment of taxes as set out in the 1986 amendment to 26 U.S.C. § 6621. Interest on amounts accrued prior to January 1, 1987 (the effective date of the 1986 amendment to 26 U.S.C. § 6621), shall be computed in accordance with *Florida Steel Corp.*, 231 NLRB 651 (1977).

[6] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

[1] A motion by the General Counsel to correct certain inadvertent errors in the transcript, unopposed, is granted.

Findings of Fact

I. THE BUSINESS OF THE RESPONDENT

Corry Contract, Inc., a Pennsylvania corporation, is engaged in the production and nonretail sale of office furniture. During the 12-month period preceding issuance of the complaint in the course of its business it purchased and received at its Corry, Pennsylvania facility products, goods, and materials valued in excess of $50,000 directly from points outside the Commonwealth of Pennsylvania. I find that the Respondent is an employer within the meaning of the Act.

II. THE LABOR ORGANIZATION INVOLVED

I find that United Steelworkers of America, AFL-CIO-CLC is a labor organization within the meaning of Section 2(5) of the Act.

III. THE UNFAIR LABOR PRACTICES ALLEGED

Whether the Respondent, in its campaign to defeat the Union's June 1968 election, exceeded the bounds of permissible Board law is a minor question in this overall case. In the event, that election will be set aside and a new one ordered. By the time this proceeding is decided by the Board it will be quite a full year since the last election, and therefore the Union would be entitled to another election in any event.

The real question of substance is whether the Respondent illegally "discriminated" against three named employees—Sheila Rogers, Richard Miller, and Thomas Eberle. I used the word "discriminated" advisedly, because the complaint says the Respondent violated Section 8(a)(3) of the Act as to these persons, and the statutory prohibition there literally reads not to "discriminate." The complaint says the Company "discharged" these three employees on 8 May 1986. It then goes on to allege further that "since that date" the Company refused to "recall" them. If a man is fired or discharged from his job, and the motive was illegal, what matters that he was never thereafter "recalled"? How does that failure constitute another unfair labor practice? The fact that the man stays "discharged," day after day, and is not "recalled," adds nothing to the case in support of the complaint. Unless, of course, the complaint was intended to allege two separate acts of illegal discrimination, one in the initial "discharge," and another in the later "refusal to recall." Which is it? There is no proof in this record about anyone trying to come back after the layoffs and being refused. I have difficulty following the reasoning of the complaint, especially in the light of the undisputed and clear relevant facts of record.

At the beginning of the year 1986 there were about 100 production and maintenance employees in this plant. About 20 of them were released in March because of a decline in the volume of business, about 20 more were laid off in April for the same reason, and 11 or 12 more were laid off on 8 May. That all these people were sent home, half the total complement of 100, because the Respondent had no work for them is not disputed on this record. There is not only documentary evidence proving the decline in the volume of business, but the General Counsel's own witnesses admitted they were told before it happened that such a reduction in force was being planned. In fact the Company held a special meeting of all employees in March—before any indication of union activity at all—expressly to inform them that this was exactly what was going to happen. Also, a notice to all employees was posted in "January or February," as Ms. Rogers recalled, telling them the reduction in force was imminent.

Of all the people sent home in these mass layoffs, the complaint here selects two—Rogers and Miller—and says they were "discharged" on 8 May because they were unioneers.[2] Considering the record in its entirety, the evidence does not suffice to prove the complaint allegation of illegal motive in the release of these two employees. Although it is clear the Respondent was at the time of the events opposed to having the Union represent its employees, and although it is true it had knowledge of practically all those employees who favored the Union, there is no convincing evidence the Respondent selected Rogers and Miller for layoff because of their union feelings. I do not think the record proves a prima facie case for these two persons. Moreover, the facts of record suffice to establish a perfectly proper reason why the Respondent joined these two workers, among others, that day in the general layoff. I shall therefore recommend dismissal of the complaint as to these two employees.

Rogers signed a union card on 11 April, and testified that she attended union meetings regularly thereafter at the union hall, that she wore a union button and T-shirt at work, and that she distributed union literature at plant entrances. But Rogers also testified that no one ever threatened her because of her wearing the union insignia, and that no one ever made any comment about it at all to her. In short, this was the alleged discriminatee herself admitting the Respondent never gave any indication of animosity against her because she was one of the many employees who behaved as she did. In other words, the complaint as to her therefore becomes: Rogers favored the Union; the Employer knew it; the Employer was opposed to having the Union represent its employees; it fired Rogers; ergo—the reason why it fired Rogers was because of her union activity. In my considered judgment, I do not think that reasoning suffices to prove a prima facie case. When an employer fires 30 employees during an active union campaign, and only 1 of them is alleged to have been selected because of such activity, there must be at least some evidence that the employer picked her for such reason. There is no such evidence here as to Rogers.

The case in support of the complaint as to Richard Miller is not much different. He signed a union card on 29 April and testified he wore a union button, gave out leaflets, and went to union meetings. This man also testified that he attended the union meetings after he had left the Company on 8 May, and that he distributed the leaflets also after being laid off that day. As to Miller's activities in aid of the Union's organizational campaign—going to meetings and distributing union leaflets—which he engaged in *after* his layoff, or "discharge," they could hardly have been a motivating cause for what the Respondent did *before* those things happened. Could this be the reason why the complaint doubletalks and says the unfair labor practice was in the refusal to recall?

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[2] The complaint also says employee Eberle was discharged on 8 May, but that is wrong. Eberle was discharged on 15 May.

Although the General Counsel made much of the fact all three of the employees involved in the complaint signed union cards before their release, there is no evidence, indeed it is not even claimed, that the Respondent had knowledge of those particular facts before those cards were entered as evidence at the hearing in this proceeding, 5 months later.

Miller testified about conversations he had with management representatives concerning the union activity that was going on. During the years he worked for this Company he was absent a number of times for illnesses, some of them for very long periods. The last such absence took place when he was hospitalized from 7 December 1985 to 5 May 1986. The day after 5 May, when he was put back to work, George Valletti: a supervisor, said to him: "I didn't know you were wearing that badge . . . that's all he said." With 50 percent of the employees wearing union buttons at work, of what significance was it for the supervisor to have said he noticed a button on a particular employee? The reason why all of them wore those buttons was precisely so that everybody in sight in the plant would become aware of them!

Miller also testified that when, on 13 May, 5 days after he had been laid off, and the only day he distributed union leaflets near the plant, he saw Bob Anthony, the factory manager, come out of the plant, and that he, Miller, told the supervisor: "[H]ere Bob, take one of these. He says no. I said come on take one. He says all right. So, he walked over and took one . . . and he said, goddamnit, Dick, you know better than this . . . . You been in a union before . . . they never done nothing for you." This was the alleged discriminatee himself admitting that the Respondent did not even know, before the discharge, that he was in any way involved with the Union. This is not surprising, for he had only been back on the job for 3 days before he was laid off. With this from the witness, can I find he was released because of his subsequent union activity?

As already stated Rogers and Miller are the only employees said to have been laid off on 8 May because of their union activities. But the record also shows, as the General Counsel's own witnesses conceded, that about half the total group at work at the time wore union buttons and T-shirts. That reality is also indicated by the results of the election the following month, when 43 voted for and 45 voted against the Union.

I think it fair to assume—certainly in the absence of any contrary evidence—that the hand of destiny fell as heavily on the prounion employees as it did on the antiunion group. The General Counsel does not contend that there was a top heavy selection of unioneers to support the present allegation of discrimination in general. If on 8 May Rogers and Miller were the only T-shirt wearers who were laid off while all the rest were known antiunion employees, a different picture would be presented. Instead, there is positive indication that even that day, as I presume also happened at the April layoff of 20 people, other known unioneers were sent home. The charge, filed by the Union on 6 June, lists nine employees (not including Eberle) as having been discharged on 8 May in violation of Section 8(a)(3) of the Act. The complaint then reduces the number to five. At the start of the hearing the General Counsel removed two more names from the complaint. As it stands only Rogers and Miller are now said to have been illegally selected that day. But if the Union charged that nine suffered illegally, it necessarily means that the Union knew they were open adherents of the union movement, and that the Company knew that to be so. The same inference must be made with respect to the General Counsel's having listed four employees in his complaint; if he did not know he could prove they were, all four unioneers to the knowledge of the Company, he would never have included them in his pleadings.

All this adds up to is a perfect affirmative defense of discharge for just cause. There is no contention that the Company was not justified, for business reasons, in releasing 11 or 12 employees on 8 May. Absent evidence of deliberate selection of any one of them for illegal reason, nothing wrong can be found with the fact it sent Rogers and Miller home that day.

There are two reasons why this part of the complaint fails on this record. The first is that with so many unioneers having been laid off on 8 May, to say nothing of an equal percentage laid off earlier, practically none of the whole bunch ever recalled, what was so special about Rogers and Miller that day that only they of the whole group can be said to have suffered "discrimination"? Nothing! They were but two of many unioneers, all in the same position and all treated alike.

A second argument by the General Counsel rests on what the Respondent's witnesses described as an established practice of permanently removing from its payroll any employees in layoff status for 60 days. Sixty days after 8 May—by 8 July—the Company altered its records to Mark Rogers and Miller as no longer having employee status. This meant all benefits ceased to apply to them, and that in the event they were ever offered an opportunity to return, or invited to come back, they must return under the usual routine examination and considerations that are applied to all new employees—probationary period, physical examination, qualifications, etc.

Rogers testified she had never heard of such a rule throughout her employment. Eberle said he first saw the rule when he received it as a printed copy with his termination notice 60 days after his layoff. He said the rule was enclosed with his termination notice. Sharon Sellen, another witness, gave like testimony.

Barbara Kimmey, the Company's personnel manager, testified the posted rule had been in effect since 1982, when it was first posted for all employees to see. She said the practice of sending a copy to laid-off employees when the 60-day layoff status ended was instituted to clear any misunderstandings about continuing benefits. The Company placed into evidence a copy of the rule, dated 1982, from its regular records. William Kafferlin, the Company's president, corroborated Kimmey. On the question of whether the Company in fact had in the past removed laid-off employees from its records, I must believe the management witnesses.

After the Respondent had rested its case, the General Counsel recalled Richard Miller as a rebuttal witness. He testified that in 1980–1981 he was on disability for a lengthy period, and that when he returned he resumed work on the same basis as when he had left. Then came the following from the witness:

> Q. Mr. Miller, you were rehired as a new employee, of May of 81, when you returned from this illness, weren't you?
>
> A. No, I wasn't rehired.
>
> Q. You were not rehired?
>
> A. No sir.
>
> Q. What happened to you?
>
> A. I brought a doctor's slip back from the VA Hospital. They let me work, I came right back to work, was on the same job as when I left.
>
> Q. Okay, what about your pay?
>
> A. My pay was dropped. I worked there, I would say, probably, a week, when they dropped my pay and they said then, at that time, that they would, had to do something about a plan or something.
>
> Q. What?
>
> A. A plan, some kind of a plan, where they—they had to start a new plan. They never had a plan before, in the shop, until—they told me at the time, there was never a plan in the shop. When I was off that year, they said there was no plan where you could be off 6 months and you started all over as a new employee. When I came back from that hospital, I started with the same pay and everything I left there with. And, then, after I worked there for a while, then they were going to start a plan, but I'd never seen the plan.
>
> Q. Okay, did you receive accident, sickness insurance benefits, when you were off?
>
> A. Accident and . . . .
>
> Q. Yes, 26 weeks worth.
>
> A. I've let's see, 26 and that, I believe, I did.
>
> Q. Then they ended after 26 weeks, right?
>
> A. Right.
>
> Q. You say they told you about the plan. Who is they?
>
> A. That was Bob Anthony and Bill Kafferlin. When I came back to work and that, I didn't know how to discuss and come out with a ballot. But, Bob Anthony came back to me and told me that they would have to start me all over again. And, I had already come back and started working with, what I left with.
>
> Q. So, he did tell you you have to start all over again?
>
> A. Right. After I already came back and got my own pay, when I left.
>
> Q. Right. But, you already back you were told that you would be started all over again?
>
> A. Right.

This testimony by a Government witness comports with the present assertion of the Respondent's witnesses that a rule on returning employees was established in 1982. I therefore find nothing wrong with the Company, in 1986, recording its laid-off employees as "terminated" after 60 days of a layoff period.

Actually, all the testimony about employees knowing or not knowing about the rule and its meaning dies in this case in view of the company records. There was received a prepared summary of information from the original records about people having been terminated exactly 60 days after their layoff. All parties agreed the prepared summary correctly reflects the records themselves, which were always available to the parties throughout the hearing. One exhibit alone shows that 36 employees who were laid off were permanently terminated precisely 60 days after their layoff during the years 1984 and 1985. This was before any union activity occurred. One man, listed on the exhibit, was laid off in 1982 and marked "terminated" 60 days later. Enough!

With respect to Thomas Eberle, a totally different picture is presented. He was not laid off with others, as a group, unioneers and nonunioneers. He was singled out for discharge. The work he was doing—maintenance—was not reduced in the overall lessening of the volume of business. His release had nothing to do with the general reduction in force. His work was simply given to another man, more junior than him in tenure, and not even claimed to have been more qualified. Indeed, there is no question of Eberle's desirability as an employee for he was retained many times despite forced absences.

Eberle was fired on 15 May. As to him, too, the defense is economic necessity, the importance of replacing him with another man whose skills were more diversified and would cost the Company less. Unlike the picture presented concerning Rogers' and Miller's release, Eberle's dismissal followed direct threats to him intended to stop his prounion activity.

He signed a union card at the 29 April meeting of the Union, attended all weekly meetings, and immediately started wearing a union button marked "organizer." He also distributed union literature about the plant. At one meeting he spoke up about several of the needs of the employees that could be obtained through the Union—such as safety equipment, which was lacking, and merit raises. Some employees who were opposed to having a union also attended the meetings, prominent among them an employee named Rick Kimmey, the son-in-law of the owner of the Company, and the husband of the Company's personnel manager. A few days after the meeting where Eberle spoke up about the need for safety devices, Bob Anthony, the plant manager, told him at work that "the safety equipment is ordered for the acid tank. It should be in shortly." That management was aware of Eberle's pronounced activities in favor of the Union is the clearest fact on this record.

Eberle also said that later that same week Anthony looked at him, saw the union button on the employee's hat, and called him a "shithead." Eberle continued to testify that the following Saturday, also at work, Anthony started another conversation with him about the Union, and said "that if we were going to get a union in, that the union would cost us jobs, and benefits, and overtime." When Eberle came back saying that if the Company put the benefits for the employees in writing the employees would not vote for the Union, Anthony responded:

> [I]f we were listening to Terry Sproveri, he was nothing but a troublemaker. That he had filed a grievance with Corry-Jamestown, and he just caused the Company a lot of trouble.
>
> Q. Do you recall anything else about the conversation?
>
> A. Yes. After that, he said that if—with getting the union, we were just skinning our own necks.

At the hearing Anthony testified it was Eberle who first brought up the subject of the safety equipment in conversation with him. He then admitted having made the derogatory remark to the man. I see no reason for him to have spoken so offensively to the employee right after mention of the complaint Eberle had voiced at the union meeting only a few days earlier, except it be resentment by the manager towards the man's instigation of others towards getting a union in the workplace. I do not believe Anthony's testimony that it was Eberle who spoke to him first about the lack of safety equipment. I can only find that the manager learned about what took place at the union meeting from the husband of the personnel manager. Rick Kimmy was not only outspokenly antiunion, but persisted in being present at one union meeting after another despite repeated protests by the regular employees for him to stay away from there. In the end they were forced to expel him from their meetings.

Anthony denied having voiced any of the threats as testified by Eberle. I credit Eberle against the plant manager. This finding rests not only on the demeanor of the witness, and his admitted animosity towards the man, but also on the fact—as will appear below—that one of the main points urged by Kafferlin, the owner, in his campaign against the Union, was a repeated assertion that unionism was a danger to their jobs. I find that by his statements to Eberle that if the Union prevailed in the scheduled election employees would lose their jobs and other benefits, by his threats constituted violations of Section 8(a)(1) of the Act chargeable to the Respondent.

Eberle also testified that before his discharge on 15 May, Sam Smith, another supervisor, said to him, "[I]f we were going to get the union, it was going to cost us jobs. And, that if the union did come in, Bill [Kafferlin] would find some way of getting rid of the union organizers." Smith also denied having made these statements. Again, I credit the employee against the supervisor, and I find that Supervisor Smith's threat to Eberle that employees, and union organizers, would be discharged by the boss if the Union prevailed in the election to take place, the Respondent violated Section 8(a)(1) of the Act.

It is admitted that from the end of April to the election held by the Board on 19 June the Respondent tried continuously to convince the employees they would be better off voting against union representation. It sent letters regularly to individual employees urging its view. On 17 June, 2 days before the election, Kafferlin held a number of meetings with the employees, gathering from 15 to 20 at a time from the various departments, where he spoke to them about the coming election. From the testimony of Sharon Sellen, an employee in the press department: "[H]e started out by reading off his statement and telling us pretty much why we did not need the union, and that . . . what the union was going to cause, like, the union was going to put us out on strike, or that they couldn't help us . . . . He said that if the union got in, that the union would put us out on strike. He said that we wouldn't have any choice, that if the union voted strike, we would have to go out on strike. He said that if we got the union in, he would be hard to bargain with, and it will be difficult to get a contract with him. . . . he said that companies that we were dealing with now, don't want to deal with a union, and we'd lose business, and he stated that IBM, which is stationed, or situated at the Steelworkers Union, would be one company which would not want to work with a union company . . . . He said people that were laid off would be terminated and not called back."

Sproveri, from the assembly department, testified about what Kafferlin said to his group at a meeting the same day. From his testimony: "[W]e got to discussing the Union. And, he had informed us that he was—had experience with negotiating with Unions, and that he could be hard to deal with, just as hard to negotiate with as the Union people could. And that through negotiations we could eventually lose some of the benefits that we have. . . . And, he said, that IBM would—in essence, he said, that IBM would rather not deal with a Union shop."

Employee Glenda Bounds also testified about the meeting she attended:

> He told us that he didn't have to bargain with the union if he didn't want to. He told, at that time, that the people that were on layoff, and that were terminated, were not to be called back at all. He said—told us that the union couldn't do anything for us, and that the union was taking our rights away, they were making our decisions for us. And, he said that the Union could make us go out on strike, and then he would hire other people, that we wouldn't have any rights for anything if we had a union.

After this came Kafferlin's testimony. He started with a negative response to a purely leading question, by denying having said "the Company would not agree to give the union anything if it won the election or words to that effect." Then came the following from the witness:

> Q. Did you, during the course of these meetings, discuss whether or not the company would refuse to bargain or refuse to negotiate with the union?
>
> A. We did discuss it, yes, sir.
>
> Q. What did you say about it?

> A. I said that we would negotiate, but that we would negotiate as hard bargainers.

The witness' testimony was evasive and therefore not really credible. For example:

> Q. Did you ever say that it would be hard for the union to get a contract from you?
> A. I said we would negotiate.
> Q. Did you ever say that specific statement that I said?
> A. I don't recall that I said that it would be hard to get a contract.

Again:

> Q. Did you ever say that the union was taking the employees' rights away?
> A. I didn't say they were taking their rights away, I said they were acting without their approval.
> Q. You made that statement?
> A. I did make that comment, that they were already acting without their approval.

Kafferlin denied telling the employees the Union would call them out on strike, and then added: "I said that we had been reviewed by customers, they had asked about our union status, and that we had our contract under negotiation, that the customer was sensitive to the fact that we did or did not have a union, and that that was one of the conditions under which we would be given an opportunity to bid."

Between Kafferlin and the employee witnesses I credit the testimony of the latter group. The owner's message was clearly one to intimidate the employees, to create a fear in them that if they voted in favor of the Union 2 days later, they ran the risk of losing their jobs. The message could not have been clearer. Kafferlin's explanation of his statements that loss of jobs was a probability if the Union prevailed rests on his unsupported assertion that his customers, or at least prospective customers, would refuse to do business with him if there were a union representing his employees. There is no evidence to that effect, nor did the Respondent come forth with objective proof of its present assertion. See *Long-Airdox Co.*, 277 NLRB 1157 (1985). I believe the employees who testified he said he would refuse to bargain in good faith with the Union in the event. I therefore find that by the owner's telling the assembled employees he would not bargain fairly with a union, that they would lose their jobs if the Union should prevail, the Respondent violated Section 8(a)(1) of the Act.

This, coupled with the direct threats of retaliation spoken to Eberle personally by more than one supervisor as they saw him pushing for the Union as an organizer while still at work, the finding is fully warranted that a prima facie case in support of the complaint as to that man is proved.

The now advanced defense of discharge for cause does not suffice to offset the case in support of the complaint. *Wright Line*, 251 NLRB 1083 (1980). Eberle's work continued as it always did; it all had nothing to do with the economic changing conditions of the Company. The testimony is not quite clear as to just who was used in his place beginning on 15 May. Anthony, the supervisor who had directly threatened Eberle with loss of employment and who also said it is he who decides which employee must be laid off now and then, testified he replaced Eberle with a man named Robert Nichols, because Nichols was also capable of doing inspection work. But the company records, offered into evidence by the Respondent, show Nichols was in laid-off status at the time Eberle was sent home. He had been laid off on 9 May and was recalled on 27 May, according to the records. Eberle was fired on 15 May!

This fits into Eberle's testimony that Anthony told him, on 15 May, that his job was being eliminated. Eberle also testified that a man named Bruce Pierce, a maintenanceman as he was, was doing his work later. This testimony is supported by that of employee Sharon Sellen, who said Pierce has been doing Eberle's work on a regular basis since the release of Eberle. Pierce, who testified for the defense, was not convincing. From his testimony:

> Q. Isn't it true that since the time that Eberle was laid off, you're doing the same work that he did prior to his layoff, is that correct?
> A. No.
> Q. What job are you doing now?
> A. I am doing his job now, but before I was working in the new building.
> Q. My question was, since Eberle was laid off, you, after—since the time Eberle's been laid off, you were the one who's doing the work that he did prior to the time he was laid off?
> A. Right.

Eberle had been on the job 5 years. The Company was glad to take him back every time he could not avoid an absence. Except for a single warning about a drawer falling to the floor accidentally in 1985, he was never given any disciplinary notice or warning of any kind. And even if Anthony did use employee Nichols to do Eberle's work later, for a while, it is still a fact the job was given to another regular man, Pierce, instead of recalling Eberle. Against the very convincing affirmative evidence of illegal motivation in the discharge of the man, I find the so-called defense of just cause unpersuasive, I conclude that Eberle was discharged on 15 May because of his persistent prounion activities, and that by such action the Respondent violated Section 8(a)(3) of the Act.

There is also testimony of unfair labor practices committed in violation of of Section 8(a)(1) by Charles McFate, an admitted supervisor. One day, before the election, McFate called employee Sellen into his office where he talked to her "an hour and 45 minutes," according to Sellen. She testified the supervisor told her that "we'd be better off if we went, you know, if we didn't have a union . . . that he knew that we wouldn't get anywhere by . . . voting in the union." Asked on cross-examination to repeat her testimony, Sellen did so: "he said he had family who worked in a law office in Oil City. And, he gave me this long name of people, or names, for a lawyer firm. And, he said that that was where he was getting his information for union busting."

As to this conversation in his office, McFate was evasive at times, and therefore not credible to me against the employee's testimony. He denied having said to her that he was getting "union busting" information. Then came the following cross-examination:

> Q. I have a question, the reason you called MS Sellen into your office, was to just talk to her and attempt to discourage her from supporting the union, is that correct?
>
> A. Not, entirely. It's nothing unusual to have, call people in and discuss work, work attitudes, and that type of thing.
>
> Q. Work attitudes?
>
> A. You know, thinking of, you know, work related.

I find that by calling an employee into his office in private conversation to tell her the employees would be "better off" without a union, and that he, the supervisor, was obtaining "union busting" information, McFate, on behalf of the Respondent, violated Section 8(a)(1) of the Act.

The complaint also alleges certain other violations of Section 8(a)(1) said to have been committed by three employees—Roger Mimmick, Lynn Mokwa, a receiving clerk, and Paul Kraft, a layout employee. One witness said she heard Kraft tell another employee he, or she, could be fired for wearing a union button. The only other significant misconduct charged to these three persons is the fact that Mokwa went about the plant polling the employees about their union sentiments before the election. He kept a chart with names and checked off those in favor and those against the Union. The Respondent disputes the alleged supervisory status of all three of these employees at the time of the events. I do not think the evidence sufficient to prove any one of these three men was in fact a supervisor at the time, or an authorized agent of the Respondent, and shall therefore ignore the relateo evidence there is on this record about their antiunion activity.

Apart from the testimony of the personnel manager that none of these three men exercised any of the authority listed in the statutory definition of a supervisor, the Government witnesses themselves conceded they had not themselves seen these men act with authority in a supervisory capacity. Some of them voted in the election, without challenge. What the witnesses offered to prove the asserted supervisory statues are claims of such authority voiced by the disputed employees themselves. But agency is not proved out of the mouth of the agent. None of the three men was called as a witness.

It is a fact the real supervisors were aware of Mokwa's going about the place asking one employee after another how he felt about the coming election. Maybe the Respondent should have stopped him from doing that. But then, it did not, as indeed it could not, stop the prounion people from advertising their contrary attitude by the buttons and T-shirts half of them wore throughout the place of work. Mokwa's activity was of the same nature as the the publicity activities of the prounion employees.

There is one more allegation in the complaint that I find unsupported by the evidence. About a week after his discharge, Eberle came back to the plant for his final check. He accepted union leaflets from a professional union organizer before entering the building. He did not go to the office but went into the regular workplace, in the maintenance department. Kafferlin happened to see him there. He took Eberle by the arm and urged him in the direction of the office. In the words of Eberle himself "he [Kafferlin] escorted me to the front office." The complaint characterizes this incident as "physical assault" by the owner. I do not agree. Eberle had no business being inside the plant that day, especially in view of his then activity as an organizer and distributor of union literature. He was not denied his right to go to the office for whatever was due him. I therefore make no finding adverse to the Respondent based on that visit to the plant.

IV. THE REPRESENTATION PROCEEDING

Case 6-RC-9694

As the result of the 19 June 1986 election now stands, the Union lost by a very narrow margin. It filed timely objections, claiming improper interference with a fair election by the Company before the voting took place. On investigation the Regional Director decided a hearing should be held on some of the objections. And because at the same time the Union filed its charge in Case 6-CA-19180, and the Regional Director decided to issue a complaint in that case. He then consolidated the two proceedings for a single hearing.

As explained, and as found above, the Company committed a number of unfair labor practices before the election date, including the outright discharge of one of the union organizers. Some of the unfair labor practices found involved certain aspects of the objections filed by the Union; there is even a certain overlap between the two kinds of improper conduct by management officials. Whether the unfair labor practices found fall within the scope of the objections or within the area of the complaint is of no moment. Indeed, if by chance there may have been minor additional incidents not clearly shown on the record in support of the objections, there is no need to belabor them here. Without doubt the election must be set aside and a new one ordered. Unfair labor practices committed so shortly before an election, aimed exactly at restraining the employees who felt prounion from so voicing their choice in the election, demands that the results be set aside, regardless of whether the more grievious misconduct was listed in the Union's objections.

V. THE EFFECT OF THE UNFAIR LABOR PRACTICES ON COMMERCE

The activities of the Respondent set forth in section III, above, occurring in connection with the operations of the Respondent described in section I, above, have a close, intimate, and substantial relationship to trade, traffic, and commerce among the several States, and tend to lead to labor disputes burdening and obstructing commerce and the free flow of commerce.

THE REMEDY

Respondent must be ordered to cease and desist from again committing the unfair labor practices found herein. Thomas Eberle must be reinstated to his former position, and he must be made whole for any loss of earnings he suffered in consequence of the illegal discrimination against him. In view of the nature of the unfair labor practices committed, the Respondent must be ordered to cease and desist from in any other manner violating the statute hereafter.

CONCLUSIONS OF LAW

1. By discharging Thomas Eberle on 15 May 19867 the Respondent has violated and is violating Section 8(a)(3) of the Act.

2. By the foregoing conduct, by threatening employees with loss of employment in retaliation for the union activity, by threatening employees with loss of benefits because of their union activity, by telling employees that management would find a way to discharge prounion employees, by telling employees Respondent would be hard to bargain with if it choose to be represented by a union, by telling employees that collective bargaining with the Union of their choice would mean loss of benefits being enjoyed, by telling its employees the Respondent would not be obligated to bargain with a union selected by a majority of the employees, and by telling employees that management was obtaining union busting information, the Respondent has violated and is violating Section 8(a)(1) of the Act.

3. The above-described unfair labor practices affect commerce within the meaning of Section 2(6) and (7) of the Act.

[Recommended Order omitted from publication.]

Horton Automatics *and* **International Union of Electronics, Electrical, Technical, Salaried and Machine Workers, AFL–CIO, District 11.** Cases 23–CA–10594 and 23–CA–10595

June 28, 1988

DECISION AND ORDER

BY MEMBERS JOHANSEN, BABSON, AND CRACRAFT

On November 27, 1987, Administrative Law Judge William N. Cates issued the attached decision. The Respondent filed exceptions and a supporting brief, and the General Counsel filed a brief in support of the judge's decision.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings,[1] findings,[2] and conclusions and to adopt the recommended Order, as modified.[3]

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge as modified below and orders that the Respondent, Horton Automatics, Corpus Christi, Texas, its officers, agents, successors, and assigns, shall take the action set forth in the order as modified.

Insert the following as paragraph 1(n).

"(n) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act."

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[1] The Respondent excepted to the judge's failure to admit G.C. Exh. 22, the notes of Plant Manager Carrier, as evidence of a prior consistent statement to corroborate Carrier's testimony that since he began working at the Company, he had expressed his view to then Plant Superintendent Castillo, among others, that the plant was overstaffed. We find it unnecessary to pass on this exception to the judge's evidentiary ruling because, even if admitted, the evidence would not affect the outcome in this case.

[2] The Respondent has excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

[3] The judge inadvertently omitted the cease-and-desist paragraph in the recommended Order. Accordingly, we shall modify the recommended Order.

Tamara J. Gant, Esq., for the General Counsel.

Gary L. Lieber, Esq. and *Karen Ann Broe, Esq.* on brief only *(Porter, Wright, Morris & Arthur)*, of Washington, D.C., for the Company.

Jaime P. Martinez, International Representative, of San Antonio, Texas, for the Union.

DECISION

STATEMENT OF THE CASE

WILLIAM N. CATES, Administrative Law Judge. I heard this matter on 23 and 24 April and 27 and 28 May 1987 at Corpus Christi, Texas. The cases arose when International Union of Electronics, Electrical, Technical, Salaried and Machine Workers, AFL–CIO, District 11 (Union) filed unfair labor practice charges against Horton Automatics (Company), on 12 January 1987. Acting on behalf of the Board's General Counsel, the Regional Director for Region 23 investigated the charges and issued an order consolidating cases, consolidated complaint and notice of hearing (complaint) on 20 February 1987. The complaint was amended on 17 March 1987 and at trial. The Company answered admitting many background and jurisdictional contentions made in the complaint but denied all claimed wrongdoings.

The General Counsel makes extensive claims in the complaint. It is claimed that the Company starting as early as October 1986[1] engaged in conduct prohibited by Section 8(a)(1) of the Act.[2] It is also alleged that the Company violated Section 8(a)(3) of the Act, by on or about 10 November laying off 10 of its employees and thereafter on 26 November discharging them.[3]

All parties were given full opportunity to participate, introduce relevant evidence, examine and cross-examine witnesses, argue orally, and file briefs. Briefs filed by the Company and counsel for the General Counsel have been carefully considered.

I conclude below, after examining the relevant evidence and applicable legal principles, that the Company violated the Act substantially as alleged in the complaint.

FINDINGS OF FACT

I. JURISDICTION

The Company is a division of Overhead Door Company, which is a wholly owned subsidiary of the Dallas Corporation, which is and has been at all times material an Indiana corporation with an office and place of business located in Corpus Christi, Texas, where it is engaged in the manufacture of glass and automatic doors. During the calendar year preceding the issuance of the complaint, a representative period, the Company in the course and conduct of its Corpus Christi, Texas operations purchased and received goods and materials valued in excess of $50,000 directly from points outside the State of Texas. During the same time period the Company derived gross revenues in excess of $500,000 from its Corpus Christi, Texas operations. Further, during the same time period the Company sold and shipped from its Corpus Christi, Texas facility goods and

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[1] All dates hereinafter are 1986 unless otherwise indicated.

[2] The specific 8(a)(1) allegations are fully set forth elsewhere in this decision.

[3] A list of the employees that were laid off is set forth elsewhere in this decision.

289 NLRB No. 57

materials valued in excess of $50,000 directly to customers located outside the State of Texas. The parties admit and I find the Company is, and at all times material has been, an employer engaged in commerce and in a business affecting commerce within the meaning of Section 2(2), (6), and (7) of the Act.

II. LABOR ORGANIZATION

The parties admit and I find the Union is, and at all times material has been, a labor organization within the meaning of Section 2(5) of the Act.

III. THE ALLEGED UNFAIR LABOR PRACTICES

In attempting to establish, or defend against, the claims set forth in the complaint, the parties called some 21 witnesses and presented numerous documents. The testimony and responses are set forth below, essentially in the order established by the complaint with the exception that I have attempted to address all 8(a)(1) allegations before addressing the 8(a)(3) allegations.

Inasmuch as credibility is a material issue in the instant case, I deem it appropriate to make some preliminary comments thereon. In deciding which of the conflicting versions of events is more credible I have given considerable weight to the demeanor of the witnesses while they were on the stand. I have considered each witness' testimony in conjunction with established or admitted facts, inherent probabilities, and reasonable inferences that may be drawn from the record as a whole. With respect to the testimony I have borne in mind the tendency of witnesses in general to testify as to their impressions or interpretations of what was said or done, rather than attempting to give a verbatim account of what they heard, saw, or did. Further, I am not unmindful that even in the case of persons testifying about their own remarks or actions, they may well tend to express what they said or intended to say in clearer or more explicit language than they actually used in their discussions or conversations. As to any witnesses having testified in contradiction of the findings, their testimony has been discredited either as having been in conflict with the testimony of credible witnesses or because it was in and of itself unworthy of belief. All testimony has been reviewed and carefully weighed in light of the entire record. As specific credibility conflicts arise, I will state more specifically my reasons for crediting or discrediting any particular witness on any particular portion of his or her testimony.

A. *Background and Undisputed Facts*

It is admitted that President Lew Hewitt (Hewitt), Plant Manager Robert Carrier (Carrier), Plant Superintendent David Castillo (Castillo), Supervisor Jose Elizadle (Elizadle), Supervisor Hank Howski (Howski), Supervisor Antonio Cruz (Cruz), Supervisor Gerald McKane (McKane), and Sales Manager Renaldo Salinas (Salinas) are and were at all times material supervisors and agents of the Company within the meaning of Section 2(11) and (13) of the Act.[4]

It is acknowledged that at all times material herein: Allen Bashor (Bashor) was vice president of human resources for the Dallas Corporation, David Hewitt (D. Hewitt) was engineering manager for the Company, and Jeff Williamson (Williamson) was division comptroller for the Company. It is likewise undisputed that Christine Aloquin (Aloquin) is the daughter of Plant Manager Carrier and Jamie P. Martinez (Martinez) and is and at all times material has been an International representative of the Union.

It is undisputed that President Hewitt was notified by the Union on 9 October that it wished to organize the employees at the Company. On 21 October the Union provided the Company a list of those serving on its employee voluntary organizing committee.

In a memorandum dated 3 November, President Hewitt notified all employees at the Company that a layoff was imminent and that the Company would follow its handbook with respect to layoff and recall procedures. In a memorandum dated 4 November, President Hewitt advised all employees that 10 of them had been specifically selected for and would be temporarily laid off effective 10 November. The 10 employees temporarily laid off on that date were: Rene Carreon (Carreon), Jon Eric Davis (Davis), Roy DeLeon (DeLeon), Carlos Garcia (C. Garcia), Joe Garcia (J. Garcia), Franklin Gonzalez Jr. (Gonzalez), Rolando Gutierrez (Gutierrez), Abe Herrera (Herrera), Manuel Mendez (Mendez), and Leonard S. Hoyt (Hoyt). On 26 November President Hewitt notified each of the laid-off employees in writing that they were permanently laid off, as of that date.

On 12 December the Board, in Case 23–RC–5318, conducted an election by secret ballot among the employees of the Company. All the laid-off employees except Hoyt, who did not vote, were challenged by the Company at the election on the basis they were permanently laid off with no reasonable expectancy of recall.

B. *The 8(a)(1) Allegations*

1. Supervisor Elizadle's alleged comments regarding the rumor of a layoff

It is alleged at paragraph 11 of the complaint that about 31 October Supervisor Elizadle told an employee that he and other employees should be careful because the Company was planning to lay off employees because of the Union and other activities engaged in by employees.

Voluntary organizing committee member Antonio Licon (Licon), a fabricator in the header department under Supervisor Elizadle, openly demonstrated his support for the Union by, among other things, wearing a union button and T-shirt at work. Licon testified Elizadle told him in Spanish at his work station that he should "be careful because there was a layoff coming around because of union activities." Licon placed the conversation somewhere between the time the Union notified the Company on 21 October of the existence of its voluntary organizing committee and the 10 November layoff.[5] Licon said he had not heard any rumors about a pending layoff prior to the time Elizadle spoke to him about an upcoming layoff.

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[4] Superintendent Castillo was terminated about 15 January 1987.

Supervisor Elizadle testified that approximately 2 weeks before the November layoff some employees who were gathered in the framing area asked him if there was going to be a layoff. Elizadle told them as far as he was concerned it was just a rumor but if a layoff did occur he would be the second person to know about it and they would be the next ones to know. Elizadle said he cautioned the employees to keep busy because business was slow. Elizadle remembered there were approximately six or seven employees present in the group but he did not state if one of them was Licon.

I credit Licon's testimony as outlined above. I am persuaded his apparent and admitted nervousness while testifying was as a result of his anxiety about having to testify and not as a result of any willful attempt on his part to misstate the facts. Likewise, his confusion as to dates and whether others were present appeared to have been honest and not caused by any deliberate intent on his part to fabricate facts. Some of Licon's confusion while testifying appeared to have resulted from the fact the conversation he was testifying about had been in Spanish and he was attempting to testify about it in English.[6] On the other hand, Elizadle was not an impressive witness. His recollection on cross-examination was selective and poor.[7]

I find Elizadle's statement in late October or early November that a layoff was coming because of the employees' union activities constituted an unlawful threat of layoff in violation of Section 8(a)(1) of the Act.

2. Supervisor Elizadle's alleged comments regarding recall of laid-off employees

It is alleged at paragraph 12 of the complaint that about 7 November Supervisor Elizadle informed DeLeon that (a) Elizadle doubted DeLeon and the other employees would be recalled in accordance with the Company's handbook as to layoffs and recalls, as in prior years, and (b) the employees would not be recalled in accordance with the Company's handbook as to layoffs and recalls, as in prior years, because of the Union.

DeLeon an active supporter of the Union[8] worked, from November 1985 until he was laid off in November 1986, for his friend, Supervisor Elizadle.[9] DeLeon testified Elizadle told him and J. Garcia[10] on 8 November that they were going to be laid off on 10 November. DeLeon stated he asked why and Elizadle told them the layoff was not up to him and he had not made out the list of those slated for layoff. Elizadle stated the list had been prepared by Plant Manager Carrier. According to DeLeon he asked if he could be transferred to the shipping and receiving department. Elizadle told him no, that he was going to get someone else to do DeLeon's job. DeLeon then asked if Plant Manager Carrier's daughter was going to be laid off because he had more seniority than she did. Elizadle responded that DeLeon knew very well Plant Manager Carrier's daughter would not be laid off. DeLeon asked Elizadle if anything could be done, or if anything could be worked out about the layoff. Elizadle told him he was sorry he had not made the list out and had not wanted to lay him off. DeLeon asked Elizadle: "[I]f we were really going to get called back and he said I doubt it. And I said why, and he said union. And turned around, and walked away from me." DeLeon stated he was wearing a union hat, button, and sun visor at the time.

Supervisor Elizadle testified he had a conversation with DeLeon on the Friday DeLeon received notification he was going to be laid off effective 10 November. The notification of layoff was in his paycheck envelope. Elizadle testified DeLeon was "pissed off" and said to him: "[H]ey Joe, what the fuck man, what is this shit, you know . . . am I going to be laid-off a day, a year, what the fuck man." Elizadle further testified: "I told him as far as I'm concerned it's just the way the memo states. It's just a temporary layoff. Business picks up I'm pretty sure they'll call you back." Elizadle asserts at that point he left the area where DeLeon was.

Elizadle first testified he could not recall if any mention was made about the Union or union activities during the conversation. However, when pressed further by company counsel he dutifully stated the Union was not mentioned.

I credit DeLeon's above outlined testimony. Elizadle's demeanor and the full record convince me he was not fully candid in his recall of this conversation.

An employer violates Section 8(a)(1) of the Act when it tells employees, as I find Elizadle did, that they will not be recalled from layoff because of their union activities. Compare *United Beef Co.*, 277 NLRB 1014, 1027 (1985).

3. Alleged comments of Superintendent Castillo regarding the layoff

It is alleged at paragraph 13 of the complaint that on or about 5 November Superintendent Castillo informed an employee that the scheduled layoff of 10 November, unlike prior layoffs, would include employees of the Company whom it considered to be "bad ones."[11]

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[5] Licon was somewhat confused as to when Elizadle talked to him and somewhat uncertain or confused with respect to whether anyone else was present during the conversation.

[6] Licon stated that approximately 80 percent of the work force spoke Spanish.

[7] E.g., when counsel for the General Counsel asked Elizadle about a conversation he admitted having with Supervisor McKane in 1986 he could not recall in what month it took place and even suggested to counsel for the General Counsel that she "pick [her own] month" as to when it occurred.

[8] DeLeon commenced his union activities in October. He thereafter handbilled at the plant approximately once or twice a week for 4 to 6 weeks and he also wore union hats, buttons, and T-shirts at work.

[9] DeLeon stated he considered Elizadle a friend and that Elizadle coached the softball team he was on. He said Elizadle had visited in his home and had even visited him when he was in the hospital. DeLeon on one occasion sold Elizadle a pet.

[10] DeLeon acknowledged on cross-examination that there was no mention made in his pretrial Board affidavit about J. Garcia having been present for the conversation. Although called as a witness by counsel for the General Counsel, J. Garcia was not questioned about nor did he mention being present at any conversation between Elizadle, DeLeon, and himself.

Voluntary organizing committee member Alonzo Gonzalez (A. Gonzalez) testified that on 5 November Supervisor Elizadle read a paper to his employees about declining sales and the pending layoff. Superintendent Castillo was also present at the time. Gonzalez testified some of the employees asked why the Company could not, as it had done in the past, go to a 4-day workweek and thus avoid a layoff. According to Gonzalez, Castillo responded they had done that in the past out of the goodness of their hearts but for them to "remember . . . we are now the bad guys." Gonzalez testified the conversation ended after Castillo's remarks.[12]

Supervisor Elizadle acknowledged reading a memorandum to the fabrication and door assembly employees on 5 November about the pending layoff. He stated that after he read the memorandum the employees asked Superintendent Castillo "if it was possible for them to . . . scatter the days [off] like they [had done] in the . . . past." Elizadle asserts Castillo replied, "last year it was done by the goodness of his heart, that we're the bad guys remember."[13]

The evidence is very conclusive and I find Superintendent Castillo not only told the fabrication and assembly employees that he had allowed the layoffs to be scattered over a number of days last time out of the goodness of his heart, but that he also told them this time the Company was the "bad guys."

The critical question is whether his comments violated the Act. Viewed in context, I find they did. The Union's campaign was active at the time. Supervisor Elizadle had a few days earlier told employees a layoff was coming because of the employees' union activities. Prior to the advent of the Union there had been at least one layoff that had been accomplished by employees' taking days off spread over a period of time. When Castillo told the employees this past practice with respect to layoffs could not be followed because the Company was the "bad guys," he clearly conveyed to them the message that the layoff was tied to their union activities.[14]

4. Washup rule and parts retrieval restrictions

It is alleged at paragraph 16 of the complaint that about 17 November Supervisor McKane informed employees working in the machine shop that effective that date, they could no longer wash up before breaks or lunch or at the end of the workday, as they had in the past.

Employees at the Company are daily given 15 minutes in the morning, 30 minutes at lunch, and 10 minutes in the afternoon for breaks. All employees take their breaks at the same time. Bells signal the beginning and ending of all breaktimes. Machinist Kendall Lewis (Lewis) testified that at least from May 1984 until November 1986 the employees, with company knowledge, stopped work 2 to 3 minutes before their breaktimes to go to the restrooms and clean up. Lewis stated Supervisor McKane, Superintendent Castillo, and Plant Manager Carrier had observed this practice without saying anything to the employees prior to November 1986. Lewis testified that on 17 November he observed:

> Jerry McKane start on the north end of the machine shop and approaching individuals, talking to each one of them for a minute or so. And when he got to the milling area he called the people that were working on the mills, and the people that were running the saws [Xavier Cisneros, Tony Barrera, Genero Perez, Ron Russel, and Lewis], together. And told us that we would no longer be able to wash our hands before the break bell rang.

According to Lewis, McKane did not mention the Union when he announced the restrictions. Lewis stated that "a few weeks" after the 12 December Board-conducted election was held, McKane told the employees they could wash their hands before quitting time but the restrictions on cleaning up before break-and lunchtimes would continue.

Supervisor Elizadle testified the Company had a written rule that employees were only allowed 5 minutes washup time before the end of each work shift.[15] He, however, said he had never enforced the rule with any of his 30 or so employees. Elizadle said Foreman McKane complained to him in November about his allowing the employees under his supervision to wash up 5 minutes before the noon break. According to Elizadle, McKane said his (McKane's) employees were complaining to him about the disparate enforcement of the rule. Elizadle said he thereafter met with the employees under his supervision and reminded them of the rule. He stated he told them he wanted them to start washing up at noon not 5 minutes before that time, however, he added he never enforced the rule and still does not pay much attention to whether it is adhered to.

It is alleged at paragraph 22(a) of the complaint that on or about 23 October Supervisor Elizadle informed employees that they would no longer be permitted to leave the department to secure parts in other plant departments.

Licon testified Supervisor Elizadle told the employees in his department, right after the Union notified the Company of the existence of its voluntary organizing committee,[16] that they could no longer leave the department to get parts or for any other reason. Elizadle told the employees he had assigned one employee (Davis) to "run parts" and "deliver headers."

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[11] I note the language of this paragraph of the complaint does not conform to the findings I have made on this allegation, however, the matter was fully litigated.

[12] Voluntary organizing committee member John Champion corroborated Gonzalez' testimony as outlined above. Champion stated Castillo did not specifically mention the Union when he made his comments.

[13] Castillo recalled telling the employees he had done it in the past out of the goodness of his heart but he contends he added the situation was different this time around. Castillo could not recall referring to himself or the Company as the "bad guys."

[14] The coerciveness of Castillo's comments was not lessened by the fact he made them in response to questions from the employees or that he did not use the word "union" in his comments.

[15] No such written rule was produced at the trial herein.

[16] The Union's letter notifying the Company of the existence and makeup of its voluntary organizing committee was mailed to the Company on 21 October.

Supervisor Elizadle testified that around the first of November he was instructed by Plant Manager Carrier and Superintendent Castillo to keep his employees at their work stations in order "to keep them from wandering around and talking to much about the Union."[17] Elizadle stated he told the employees under his supervision that they were to remain at their work stations and if they needed anything to have Davis get it for them. Elizadle stated Davis was assigned the newly created parts runner position approximately 1 month to 6 weeks before he was laid off. Elizadle stated Davis was required to perform his normal fabricator duties when he was not involved in running parts. Elizadle acknowledged that the Company had never previous to the time in question had a parts runner position in his department. He further acknowledged the position was eliminated after Davis and the others were laid off on 10 November. Elizadle asserts the parts runner position was created in order to keep Davis busy and was eliminated when he no longer had a surplus of employees in his department.

The Company contends that because both the washup rule and parts runner position dealt solely with employees worktime not their break or lunch times its enforcement of these rules, restrictions, and assignments was lawful. I reject the Company's contentions.

First I note the Act does not prevent an employer, such as the Company in this case, from making and enforcing reasonable rules addressing employees conduct during worktime. *Republic Aviation Corp. v. NLRB*, 324 U.S. 793 (1945). However, the Board in *Brigadier Industries Corp.*, 271 NLRB 656, 657 (1984), held:

> When faced with a union organizing campaign an employer may not for *union* reasons promulgate a no-solicitation and/or no-distribution rule or *place other restrictions on employees*. Nonetheless, during the union campaign, an employer maintains a legitimate interest in preserving production and discipline. When an employer adopts a rule during a union campaign, it does not automatically follow that the rule is invalid. If the employer has acted for legitimate business interests—rather than for union reasons—its promulgation of a rule cannot be deemed unlawful [emphasis added].

The Board's principle that otherwise valid rules or restrictions violate the Act when such are promulgated to interfere with employees' rights to self-organization rather than to maintain production and discipline have been upheld by the courts. (See, e.g., *Harry M. Stevens Services*, 277 NLRB 276 (1985), enfd. mem. 793 F.2d 1288 (5th Cir. 1986), and *Hunter Douglas, Inc.*, 277 NLRB 1179, 1185 (1985), enfd. 804 F.2d 808 (3d Cir. 1986).) In the instant case the Company's rule (if in fact one existed) against washing up before break, lunch, and quitting times had not been enforced prior to the advent of the Union.[18] The rule, as announced and enforced by Foreman McKane, took effect in the midst of the Union's campaign and was, in part, rescinded after the Board-conducted election was held. In light of these facts, I am persuaded, in agreement with counsel for the General Counsel, that the rule was announced and for a period of time thereafter enforced, at least by Supervisor McKane, for the purpose of limiting the time employees would have off the work floor for discussing union matters. There is no showing that the long practice of allowing employees to wash up before all breaks had suddenly become a disciplinary or production problem for the Company. Accordingly, I find the Company's purpose in promulgating (or suddenly enforcing) the rule in question was to interfere with its employees' right to self-organization and as such violated Section 8(a)(1) of the Act.

With respect to the newly created parts runner position, I find the evidence is overwhelming the Company was unlawfully motivated in establishing such a position. First, the parts runner position was created immediately after the Company received notification of the creation and composition of the Union's voluntary organizing committee. Second, the parts runner position was specifically intended to keep employees from "talking too much about the Union." Third, there is no conclusive evidence that production or discipline was suffering as a result of employees talking while they worked. Fourth, the position was abolished after the 10 November layoffs took place. The timing of the creation of the parts runner position coupled with its stated purpose and in the absence of evidence of any disciplinary or production problems compels a finding that the rule against employees leaving their work stations was discriminatorily motivated in that it was intended to prevent employees from discussing the Union.

Accordingly, I find the Company's newly established rule of restricting its employees to their work stations by utilizing a parts runner position was motivated by the purpose of interfering with its employees right to self-organization in violation of Section 8(a)(1) of the Act.

5. Confrontation between President Hewitt and International Union Representative Martinez and Plant Manager Carriers' comments

It is alleged at paragraph 17 of the complaint that about 10 December, 2 days prior to the election scheduled to be conducted in Case 23-RC-5318, outside of the plant, while employees were engaged in handbilling activities on their own time, and in the presence of the employees laid off and discharged and other employees, President Hewitt and Plant Manager Carrier in the presence of company agent Roy Blankenship and President Hewitt's sons David and Daniel Hewitt confronted International Union Representative Martinez whereby: (a) President Hewitt asked Martinez if he was going to call Hewitt a liar to his face; (b) International union representative Martinez stated that the handbilling was nonviolent and employees had Section 7 rights to solicit and distribute literature outside the Company's property; (c) either David or Daniel Hewitt pushed Martinez and yelled at him to "Answer the man"; and (d) as Martinez was walking away, Plant Manager Carrier told the laid-off employees that he would see to it that they would never work for the Company again.

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[17] Elizadle stated that when he talked to his employees about wandering around the plant he did not say anything to them regarding what they could do on their lunch and break times.

[18] Employee Lewis credibly and without contradiction testified Foreman McKane, Superintendent Castillo, and Plant Manager Carrier had observed that practice and had not said anything about it.

International Union Representative Martinez testified that starting in October he and various employees of the Company handbilled at the plant entrances on several occasions. Martinez stated that on one such occasion, which took place on 10 December, and at a time when approximately 30 to 40 employees were present,[19] President Hewitt came from the plant "yelling" for "Jamie Martinez."[20] Martinez identified himself as an International union representative and as the person President Hewitt was "yelling" for. Martinez testified Hewitt asked "in a very loud voice," "Are you going to call me a liar to my face?"[21] Martinez testified he spoke to the employees that were present and told them, "We're with the union and we've got a right to solicit," "We're nonviolent," "We've got a right to be here and solicit." According to Martinez, President Hewitt's son, Engineering Manager D. Hewitt, pushed him into the street using the palms of his hands and his chest. Martinez stated that as Engineering Manager D. Hewitt was pushing him into the street he was "yelling" into his ear, "spitting" in his face, and instructing him to "Answer the man." Martinez asserts he was pushed from the sidewalk across a curb into the street.[22]

President Hewitt testified the Union had circulated two handbills among the employees in December one of which implied he was a liar and the other that he was a hypocrite. Hewitt stated the leaflets were, in his opinion, extremely unfair and untrue and caused him a great deal of personal distress. President Hewitt said he met with employees of various departments at the plant on 10 December. He stated that in those meetings at which members of the Union's voluntary organizing committee were present he told them he had had enough insinuations that he was a liar and a hypocrite. He told the voluntary organizing committee members that if they knew how to get in touch with International Union Representative Martinez they should do so, because he was "going to confront him that afternoon." President Hewitt stated that as the day wore on he became "more determined" to have a confrontation with Martinez and set the matter straight between them. Hewitt said he did not know if anyone actually got word to Martinez, but that Martinez was just off company property handbilling that afternoon. President Hewitt testified he walked up to Martinez and asked him who he was. He stated Martinez identified himself and he asked Martinez if he had gotten his message. Martinez said he had not. Hewitt then told Martinez, "[Y]ou've been saying that I've been lying, and that's not true, and I want you to apologize for it." Hewitt stated Martinez looked at him for a while and then began to say something about employee rights and so forth. Hewitt testified he asked "again and again" "probably more loudly" if Martinez had called him a liar. He said Martinez would not answer him. President Hewitt testified his oldest son, Engineering Manager D. Hewitt, got within an inch or two of Martinez and repeatedly told Martinez to "Answer the man." Martinez would not respond. President Hewitt said he then reached out and touched his son David and told him, "We're not going to get an answer, let's go." President Hewitt said they then returned to his office. According to President Hewitt the entire confrontation lasted approximately 5 to 10 minutes. Hewitt denied anyone touched Martinez.

Several supervisors testified regarding what they observed and heard during the confrontation. Supervisor Howski testified the confrontation "got pretty loud and nasty." Howski testified Engineering Manager D. Hewitt stood "face to face . . . not more than an inch away" from Martinez, but he did not see him push Martinez. Supervisor Cruz testified President Hewitt was red in the face, speaking loudly, and visibly upset. He also said Engineering Manager D. Hewitt was very upset at Martinez. Cruz, however, stated he was not close enough to the confrontation to see if any touching took place between the participants. Supervisor Elizadle stated President Hewitt and Engineering Manager D. Hewitt were both "yelling" at Martinez; however, he added that because he (Elizadle) was short of stature he was unable to see if the Hewitts touched Martinez. Vice President of Human Resources for the Dallas Corporation Bashor testified, "they were not speaking in a civil tone" and "the emotions were increasing," but he asserts neither of the Hewitts struck nor touched Martinez.

Certain facts are beyond dispute. The confrontation was deliberate and preplanned by President Hewitt. He even challenged employees who supported the Union to get the word to Martinez, that he wanted a confrontation that afternoon. A high-level representative of the parent company did nothing to discourage or prevent the confrontation from taking place, because as the Dallas Corporation Vice President of Human Resources Bashor stated, "Lew [Hewitt] felt strongly about it." The challenge for the confrontation and the confrontation was known to and took place in front of numerous rank-and-file employees. President Hewitt and Engineering Manager D. Hewitt approached Martinez in an angry, loud, and emotionally charged manner.

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[19] Martinez estimated there were 50 employees present after others came from the plant at quitting time on that date.

[20] President Hewitt was accompanied by his sons David and Daniel Hewitt, Plant Manager Carrier, Supervisors Elizadle, McKane, Cruz, and others.

[21] Martinez explained the background to President Hewitt's question as follows. Martinez said he had filed charges with the Board against the Company and that President Hewitt had on 3 December informed the employees in writing the charges would delay the election scheduled for 12 December. Martinez testified he put out a handbill on 5 December informing the employees the election would be held as scheduled and that President Hewitt's information to the contrary was "a lie."

[22] Vasquez, J. Garcia, and Davis corroborated in essential parts Martinez' testimony as outlined above. Vasquez did add that traffic was approaching on the street at the time Engineering Manager D. Hewitt pushed Martinez into the street. Vasquez asserts, contrary to Martinez, that Martinez told President Hewitt he did not call him a liar. I am persuaded on this latter point that Vasquez was mistaken. However, I do not find this to impact on the credibility resolutions I have made. Furthermore, J. Garcia testified he did not hear President Hewitt talk at all but stated, "David Hewitt came up to [Martinez] and yelled in his ear, shoving him away" and told him "to get off the premises." Again I do not find these minor variations regarding what took place on 10 December to detract from the truthfulness of Martinez' account of what took place.

It is in light of this background that I consider whether Engineering Manager D. Hewitt physically assaulted Martinez. I find he did. Martinez' testimony that D. Hewitt assaulted him was corroborated by employees Vasquez and J. Garcia. Furthermore, it is very probable that in the emotionally charged confrontation D. Hewitt assaulted Martinez. Engineering Manager D. Hewitt, although still employed by the Company, did not testify, nor was his failure to do so explained in any way. Hence, the one additional person, on the part of the Company, who could have spoken with firsthand knowledge of the account, chose, for whatever reason, to remain silent.[23]

An employer violates Section 8(a)(1) of the Act, by assaulting a union representative when it does so in the presence of one or more employees under circumstances where onlookers would likely infer from the assault that the employer would also retaliate in the same fashion against any employee who supported the union. *Batavia Nursing Inn*, 275 NLRB 886, 891 fn. 2 (1985).

In the case sub judice, I find the employees could reasonably have believed that such a fate might befall them as had befallen the Union's International representative if they supported the Union. The reason announced to the employees for the confrontation grew out of the Union's campaign literature. The actual assault took place at a time when the Union's International representative was telling the employees they had a legal right to organize in a nonviolent manner. Thus, I find the Company violated Section 8(a)(1) of the Act when Engineering Manager D. Hewitt assaulted the Union's representative in the presence of the employees of the Company.

Martinez testified that one of the leaflets they were attempting to distribute on 10 December pertained to unemployment compensation payments for the laid-off employees.

Vasquez testified Herrera was one of those handbilling on 10 December and that he had copies of two unemployment checks that he showed Plant Manager Carrier. Davis testified that at that same time Plant Manager Carrier's daughter was telling International Union Representative Martinez to answer President Hewitt's questions about whether he had called him a liar. According to Davis, Herrera said Carrier's daughter did not have the right to say anything because she did not have any seniority and should have been one of the first to have been laid off. J. Garcia stated Herrera told Plant Manager Carrier that the laid-off employees would get their jobs back and with justice. According to J. Garcia, Plant Manager Carrier answered that the laid-off employees were not coming back to work.[24]

Plant Manager Carrier testified he did not have a conversation with Herrera on 10 December, but he said he heard Herrera make some comment about his daughter who was standing next to him at the time. Carrier testified he did not hear anyone say any words to the effect that certain of the employees would never work at the Company again.[25]

Simply stated I find unbelievable the testimony that Plant Manager Carrier stood by at this highly charged confrontation and said nothing. I find this highly unlikely especially considering the fact his daughter was actively participating in the verbal part of the confrontation and was at the same time being accused of receiving preferential treatment because she was Carrier's daughter. I credit counsel for the General Counsel's witnesses regarding the incident. I do not find the minor differences in their testimony to detract from the overall accuracy of their testimony.

I find the Company through Plant Manager Carrier violated Section 8(a)(1) of the Act, when he threatened that the laid-off employees would not be considered for recall by the Company because he would see to it.

6. President Hewitt's 14 January comments

It is alleged at paragraph 18 of the complaint that about 14 January, President Hewitt (a) asked employees if they were giving information to International Union Representative Martinez regarding the unfair labor practice charges filed by the Union in Cases 23-CA-10594, 23-CA-10595, and 23-CA-10596; (b) told employees, when they did not respond, that Hewitt had heard that the Union was having employees sign checkoff cards on company property and that this had to stop; (c) stated to employees that even if they were signing up employees for checkoff authorizations during their breaks, they could not do it at any time and that the election was "over with"; and (d) told employees that Hewitt wanted to know of any future activities any of the employees engaged in on behalf of the Union.

It is undisputed that President Hewitt spoke to all employees and supervisors at a meeting held in the quality control room at the plant on 14 January 1987. President Hewitt said he called the meeting to bring the employees up to date on the status of the Board-conducted election and to talk about foreign competition. According to Licon and Vasquez, Hewitt stated there had been unfair labor practice charges filed against the Company and he wanted to know who was responsible for giving the information to the Union on which the charges were based. Licon and Vasquez stated President Hewitt specifically asked employee Gordon Klitzke if he was the one who had given the information to the Union. Klitzke denied doing so.[26]

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[23] His silence is important only with respect to resolving this credibility issue.

[24] Vasquez, Davis, and International Representative Martinez corroborated, although in slightly different ways, the essential aspects of J. Garcia's above testimony. Vasquez, for example, stated Plant Manager Carrier said the laid-off employees would not be coming back to work as long as he was around. Davis stated Carrier said Herrera would never come back to work at the Company again. International Union Representative Martinez testified Plant Manager Carrier said the laid-off employees would not be coming back to work and that he would see to it they did not. Herrera did not testify nor was his absence explained in any manner.

[25] President Hewitt testified he never heard any official of the Company say he would see to it the laid-off employees never worked for the Company again. The Dallas Corporation Vice President of Human Resources Bashor testified he did not hear Plant Manager Carrier say anything during the confrontation. Supervisor Elizadle said he did not hear Carrier say anything at the confrontation but added he was giving his attention to the "yelling" that was going on at the time. Supervisor Howski testified he did not even know if Carrier was present at the confrontation. Supervisor Cruz could not recall what if anything Carrier might have said at the confrontation but he believed Carrier did not say anything.

Licon credibly testified President Hewitt also said he had heard rumors that employees were trying to get dues checkoff cards signed at the plant, and he did not want anyone signing up employees on company property and to please stop doing so.[27]

After observing Hewitt, Licon, and Vasquez testify, and weighing their testimony in light of admissions made by Hewitt, I credit Licon's and Vasquez' version of the 14 January 1987 general employees' meeting.

I find President Hewitt violated Section 8(a)(1) of the Act when he asked all the assembled employees who among them had been giving information to the Union that formed the basis for the Union's charges against the Company. The totality of the circumstances dictates such a finding. See *Rossmore House*, 269 NLRB 1176 (1984), enfd. sub nom. *Hotel & Restaurant Employees Local 11 v. NLRB*, 760 F.2d 1006 (9th Cir. 1985). The questioning was done by the highest official of the Company. The question asked was not rhetorical but rather was calculated to invoke a response from the employees that would reveal their union sympathies at a mandatory meeting of employees. Further, President Hewitt also violated Section 8(a)(1) of the Act, when he specifically singled out employee Klitzke and asked him if he was the one who had been supplying the information in question to the Union. Other than Hewitt's assertion that he knew Klitzke had not been supplying information to the Union, there is no evidence to indicate Klitzke had expressed his views, one way or the other, on the Union prior to that time. Furthermore, Klitzke was interrogated in front of all his fellow workers and for no valid or justifiable reason. I also find President Hewitt's statement to the assembled employees that he did not want them to solicit union dues checkoff cards on company property and to stop doing so violated the Act. In this regard, I note such a broad prohibition would clearly restrict employees from soliciting for the Union during their nonworking time on company premises.

It is undisputed that after the above-described meeting took place President Hewitt and Plant Manager Carrier met with Licon and Vasquez in Hewitt's office. Licon testified President Hewitt asked them if they were the ones that had been giving unfair labor practice charge-related information to International Union Representative Martinez. Licon told Hewitt they had not given any such information to Martinez. According to Licon President Hewitt said, "if there was any further union activities going on that he would like to be notified, instead of being caught off [guard] . . . with rumors and stuff." Vasquez testified President Hewitt also asked if they were the ones who had been soliciting employees to sign dues-checkoff cards. Vasquez told Hewitt he had been. Hewitt asked when he had done so. Vasquez told Hewitt, "I'm doing it on my own time which is before work, breaks, lunch, and after work." Vasquez testified President Hewitt told him he preferred they stop soliciting because the Union had not been recognized by the Company. Vasquez protested saying he had been doing it on his own time. Hewitt responded, "but you're still on [C]ompany property." Vasquez told Hewitt he would stop because he did not want to do anything that would harm anyone.

President Hewitt acknowledged he and Plant Manager Carrier met with Licon and Vasquez on the day in question. Hewitt said a complaint from an employee that Licon and Vasquez had constantly been after the employee to sign a union dues deduction card prompted the meeting. Hewitt acknowledged he asked Licon and Vasquez if they had been soliciting for the Union and he asserts they admitted they had. Hewitt said he told them:

> I may be wrong, but it is my opinion that until the [U]nion is certified, that it's not proper to ask employees to sign the cards. After it is certified that's fine, but until it is certified, I don't think it is proper.

According to Hewitt, Licon responded they had already decided not to solicit anymore. Hewitt testified he then told them, "I think out of courtesy to us that you should tell us when you are planning to do that again." Hewitt said they indicated they would do so.[28]

That a meeting between the two employees and two management officials took place after the general meeting on 14 January 1987 is not disputed nor is there any dispute with respect to the subject matters discussed. To the extent that there are differences between the employees' and managers' versions of what was said at the meeting, I credit the employees' account. I credit the employees' account because it is clear from the record as a whole that President Hewitt was determined to find out who had provided charge-related information to the Union and who had been soliciting dues-deduction cards on company property. Not only did he attempt to ascertain this type of information from the employees at the general meeting, but he had also directed at that general meeting that all card signing activities cease on company property. In light of his earlier actions it is quite logical and very probable that he said exactly what Licon and Vasquez attribute to him. Furthermore, President Hewitt impressed me as a very determined individual who would do or say whatever he perceived to be in his, or the Company's, best interest without full regard for the consequences of his actions.

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[26] President Hewitt acknowledged discussing certain unfair labor practice charges with the employees but stated he did so in the context of telling the employees that if the charges against the Company did not stop they would never get the Board-conducted election resolved. Hewitt also acknowledged asking Klitzke if he was the one who had supplied the information to the Union on which it based its charges against the Company. He added however that he knew "beyond question that he [Klitzke] would not be the one who was making charges against us."

[27] Vasquez corroborated Licon's above-outlined testimony. President Hewitt acknowledged discussing dues-checkoff cards with the assembled employees. He said he told the employees he had been getting complaints that they were trying to get others to sign dues-checkoff cards. He also said he told the employees he did not think it was proper for them to ask others to sign dues-checkoff cards because the Union had not been certified. He asserts he told the employees it was their privilege to sign or refuse to sign such cards.

[28] Plant Manager Carrier, in pertinent part, corroborated Hewitt's testimony as outlined above.

I find President Hewitt's questioning known union supporters Licon and Vasquez was, under all the circumstances herein, coercive and as such violated Section 8(a)(1) of the Act. First, the questioning took place after but on the same day Hewitt had unlawfully interrogated the entire assembled work force about the same subject matter. Second, the questioning took place in President Hewitt's office and in the presence of Plant Manager Carrier. Third, President Hewitt had already, at a group meeting, attempted to ascertain who had provided the information in question to the Union and after being unsuccessful there moved on to questioning Licon and Vasquez in the privacy of his office in his attempt to find out what he wanted to know.

I also find President Hewitt violated the Act by telling Licon and Vasquez he did not want them to solicit their fellow workers to sign dues deduction cards on company property, especially in light of the fact Vasquez told Hewitt that he had only done so during nonworking times.

7. Elizadle's alleged comments about who could vote in the Board-conducted election

It is alleged at paragraph 19 of the complaint that Supervisor Elizadle about 1 December informed employees that Plant Manager Carrier had informed Elizadle that because the employees that were laid off were now permanently discharged they could not vote in the election on 12 December in Case 23–RC–5318.

Licon testified that about 1 December Supervisor Elizadle approached him while he was alone[29] in his work area and told him the 10 laid-off employees were terminated and would be ineligible to vote in the election because of their union activities.

Supervisor Elizadle, after some difficulty in recalling an early December conversation with Licon about the layoffs, acknowledged such took place. However, he stated Licon asked him if the laid-off employees could vote in the Board-conducted election. He said he told Licon he did not know.

As is noted elsewhere in this decision Licon was somewhat confused about certain details in his testimony; however, I am persuaded his confusion was honest and not an attempt to misstate facts. I credit his testimony regarding his early December conversation with Elizadle. I note Supervisor Elizadle had told Licon back in October that he should be careful that a layoff was coming because of the Union. Furthermore, Elizadle had told employee DeLeon in early November that he doubted the laid-off employees would be recalled because of the Union. It is therefore logical and probable that he told Licon the laid-off employees had been terminated and would not be eligible to vote in the election because of their union activities.[30]

Elizadle's statement was clearly coercive and in violation of Section 8(a)(1) of the Act, in that it conveyed a message to the employees that the Company's latest action against the laid-off employees was taken because of their union activities and to preclude them from voting in the Board-conducted election.

8. Elizadle's alleged comments about negotiations

It is alleged at paragraph 22(c) of the complaint that Supervisor Elizadle about 1 December told an employee that it would take at least 2 years before they would reach an agreement on a contract and to cause further delay all the Company had to do was relocate or change its name in order to do away with the Union.

Licon testified that on 6 March 1987 he and fellow employees Vasquez and Lopez were discussing how long it would take to negotiate a contract when Supervisor Elizadle approached them.[31] Licon testified Supervisor Elizadle told them it would take at least 2 years for the Company and Union to negotiate a contract, and even if they did the Company could delay it further by changing its name or relocating its facility. According to Licon, Elizadle also told them such action on the part of the Company would do away with the Union. Licon stated that after Supervisor Elizadle finished talking they more or less ended their discussion because they did not want to antagonize Elizadle.

Supervisor Elizadle stated he had a 2- to 3-minute conversation about the Union with Licon in March 1987. According to Elizadle, Licon asked if it was true that it would take 2 years or something like that for the Union to come in. Elizadle said he told Licon he did not know. Licon then told Elizadle he had heard if the Union came in all the Company had to do was change its name or move to avoid the Union. Elizadle said he told Licon he did not know anything about that. Elizadle stated that ended their conversation because Licon was walking along with a heavy item at the time.

As is more fully explained elsewhere in this decision, I did not find Elizadle to be an impressive or credible witness. Licon on the other hand appeared to be making a conscientious effort to tell the truth to the best of his recollection. Accordingly, I credit Licon's account of his March conversation with Elizadle as set forth above.

Supervisor Elizadle's March 1987 statement to Licon and others was coercive and violated Section 8(a)(1) of the Act, in that it conveyed the message to the employees that it was futile for them to select the Union as their bargaining representative. See, e.g., *Thriftway Supermarket*, 276 NRLB 1450, 1460 (1985), enfd. mem. 808 F.2d 835 (4th Cir. 1986).

9. Plant Manager Carrier's alleged comments on an employee's wage review

It is alleged at paragraph 22(d) of the complaint that Plant Manager Carrier about 10 December solicited an employee's comment on his recent wage review and threatened that employee that if the employees voted for the Union the raise would be rescinded.

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[29] On cross-examination Licon stated Vasquez could have been present when Elizadle talked to him but he could not be certain.

[30] I noted there had been discussions at the Company among some of the managers on this subject. Superintendent Castillo testified Plant Manager Carrier told him that because the laid-off employees had been permanently laid off they would not be able to vote in the Board-conducted election.

[31] Licon assumed Elizadle overheard what they were discussing.

Voluntary organizing committee member John Champion testified he was given a review for a wage increase on 9 December and the next day (10 December) Plant Manager Carrier asked him about it. He said the two of them were alone at the time. Champion testified Carrier asked him if he had been given his wage review. Champion told Carrier he had. Carrier asked if it was a good one and Champion responded he had no complaints that he had gotten a raise. According to Champion, Plant Manager Carrier said, "I'm glad you got a good one, because if you guys vote the wrong way we won't have this any more."

Plant Manager Carrier testified Champion told him at the beginning of December he felt he had been skipped over when the other employees had been given wage reviews in November. Carrier checked into the matter and found Champion had in fact been skipped over. Carrier testified he instructed Champion's supervisor to review him for a wage increase. Carrier stated he later followed up on the matter by asking Champion if he had been reviewed, and if he was happy and satisfied. Carrier stated Champion indicated he was satisfied. Carrier stated the Union was not mentioned in their conversations.

I am persuaded that Plant Manager Carrier made the comments Champion attributes to him. The record evidence as a whole supports such a finding in that Plant Manager Carrier had a keen interest in the outcome of the union election. His keen interest led him to engage in conduct that violated the Act. He, for example, stated at the confrontation between President Hewitt and International Union Representative Martinez that the laid-off employees would not be recalled because he would see to it. As is discussed below he asked employee Lewis the day before the election how he was going to vote in the election. Although not found to be unlawful, he told Plant Superintendent Castillo the laid-off employees were permanently laid off and would not be able to vote. Although I have found Carrier's comments to have violated the Act, I do not find his remarks constituted a threat to rescind the wage increase involved but rather to constitute an unlawful threat that there would not be any future wage increases if the employees voted the wrong way in the Board-conducted election.

10. Plant Manager Carrier's alleged questioning of employee Lewis

It is alleged at paragraph 22(e) of the complaint that Plant Manager Carrier about 11 December interrogated an employee concerning how he planned to vote in the upcoming election.

Employee Kendall Lewis testified that on 11 December as he was alone walking from lunch[32] in the sheet metal fabrication area Plant Manager Carrier approached and asked him if he had decided which way he was going to vote in the election. Lewis told Carrier he had not decided. Lewis said that prior to Plant Manager Carrier's talking with him he had not in any way demonstrated his preference either for or against the Union.

Plant Manager Carrier testified he could not recall having a conversation in December with Lewis about the Union. He stated he knew however, by December, that Lewis supported the Union by his "mannerisms" and by the fact he had a union decal on his toolbox.

I credit Lewis' testimony as set forth above. I note Plant Manager Carrier was unable to deny the conversation. In crediting Lewis' testimony I note he had not expressed his views about the Union prior to Plant Manager Carrier's questioning him on 11 December. I find, under all the circumstances, that Carrier's questioning of Lewis was coercive. See *Rossmore House*, supra. Lewis had not made his union sympathies known at the time Carrier questioned him and the question specifically sought Lewis' personal sympathies about the Union. Plant Manager Carrier was a high-level management official who did not directly supervise Lewis and the questioning took place 1 day before the election for no valid or justifiable reason. Accordingly, I find the Company violated Section 8(a)(1) of the Act by coercively interrogating Lewis. See *H.S.M. Machine Works*, 284 NLRB 1482 (1987).

C. *Temporary and Permanent Layoff of 10 Employees*

It is alleged at paragraph 14 of the complaint and admitted by the Company in its answer that on 10 November it laid off its employees Carreon, Davis, DeLeon, C. Garcia, J. Garcia, Gonzalez, Gutierrez, Herrera, Mendez, and Hoyt. It is further alleged at paragraph 15 of the complaint that about 26 November the Company permanently discharged the above-named employees. The Company acknowledges the above employees were notified in writing, on that date, that they were permanently laid off.

Inasmuch as there is no dispute with respect to the fact the employees in question were laid off, first on a temporary and then later on a permanent basis, I shall examine the motives behind and the alleged necessity for the layoffs. In doing so, I shall examine the union activities of the laid-off employees, whether the Company knew of those activities, and whether those activities played any part in the Company's decision to have a layoff. Finally, I shall examine the Company's contention that the layoffs were brought about by economic necessity.

1. Events leading up to employees' union activities at the Company

Licon credibly testified that he and approximately 15 other employees met after work at Chiquita Park in Corpus Christi, Texas, in late June to discuss problems they perceived existed at the Company. They discussed wages, sick leave, supervision, and other related matters. Licon testified they also decided to attempt to arrange a meeting with President Hewitt or Plant Manager Carrier to discuss their problems. He said they also decided to contact a union for assistance.

Licon stated that the next day the same 15 employees met with Plant Manager Carrier and Supervisor Elizadle. Licon testified Carrier told the group the Company was trying to put together a plan for an across-the-board wage increase for all employees, and promised to look into their other concerns. However, Plant Manager Carrier told them:

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[32] Lewis testified that on lots of occasions Plant Manager Carrier would talk to employees during their lunch breaks.

> [T]his was America, this was a free country, and if we didn't like it there was the door. There was other opportunities you know, other places. That times were hard for the company to increase our pay rates.

Licon stated he thereafter on 16 July contacted International Union Representative Martinez via telephone and arranged to meet with him later that afternoon at a local motel. They discussed the various departments at the plant and some of the problems the employees were experiencing.[33] Licon stated little else was accomplished at the meeting with Martinez, however, in early October he and others started to solicit employees to sign union authorization cards. According to Licon a union voluntary organizing committee was established and the Company was notified in writing on 21 October of the existence of the Union's in-plant committee. The letter of notification sent to the Company listed nine voluntary organizing committee members.[34] Inasmuch as none of those on the voluntary organizing committee were laid off, I shall carefully examine the union activities of those who were laid off and attempt to ascertain if the Company was aware of any such activities on their part.

2. Union activities of laid-off employees

Carreon testified he wore a "Yes IUE" button at work three to four times per week starting in mid-October. He stated his immediate supervisor Elizadle saw him wearing the prounion buttons. Carreon testified he handbilled for the Union at the plant four or five times before the layoff. He testified he saw Davis and Gutierrez leafleting prior to the layoff. Carreon stated Plant Manager Carrier observed them leafleting each time they did so.

Davis testified he became involved with the Union shortly after he was hired and wore a union T-shirt to work two or three times during the 2 weeks before his layoff. He stated his supervisor, Elizadle, saw him four or five times and Plant Manager Carrier a couple of times each time he wore his prounion T-shirt. Davis also said he wore IUE buttons and leafleted in the parking lot, or inside the plant during breaktimes, six or seven times prior to his layoff.

DeLeon testified he commenced wearing union T-shirts, hats, and buttons in mid-October and did so almost every day until he was laid off. He stated he leafleted at the plant once or twice per week in the mornings and after work from approximately early October until he was laid off. DeLeon stated Gonzalez, among others, leafleted with him prior to the layoff. He stated Supervisor Elizadle observed them each time they leafleted and Plant Manager Carrier saw them almost every time they leafleted.

J. Garcia testified he wore prounion buttons daily and prounion sun visors and T-shirts at work every other day starting in late October. He stated he was observed by his supervisor, Elizadle, daily and by Plant Manager Carrier just about every day that he wore the union-related items. J. Garcia testified he, Gutierrez, Davis, Gonzalez, and others leafleted at the plant starting in late October.[35] He said Plant Manager Carrier observed them each time they leafleted.

Gutierrez testified he wore a union T-shirt or union button three times per week for approximately 4 weeks before he was laid off. He stated Plant Manager Carrier, Superintendent Castillo, and Supervisor Elizadle saw him wearing the union-related items. Gutierrez testified he, along with Mendez, J. Garcia, Carreon, and Herrera, leafleted outside the plant prior to the November layoff. He asserts Plant Manager Carrier observed them doing so.

Mendez testified he wore a union T-shirt approximately twice and union buttons four or five times at work starting in the second week in October.[36] He stated his immediate supervisor Cruz as well as Plant Manager Carrier observed him wearing the union related items. Mendez testified he as well as Carreon, Gutierrez, and others leafleted at the entrance to the plant parking lot prior to the layoff. He stated they were observed doing so by Plant Manager Carrier.

Vasquez testified he wore a union button just about every day starting around 9 October and a union T-shirt twice a week commencing about that same time. Vasquez stated President Hewitt and Plant Manager Carrier observed him doing so. Vasquez testified he and other employees leafleted at the plant from mid-October until December. He stated *all* the laid-off employees, including Hoyt, leafleted prior to and after they were laid-off.

A. Gonzalez testified that he and others including Carreon, J. Garcia, DeLeon, and Gutierrez leafleted at the plant several times prior to the 10 November layoff. A. Gonzalez stated Plant Manager Carrier or Supervisor Howski always observed them with Carrier doing so more often than Howski.

Champion testified he and others including J. Garcia leafleted at the plant prior to the layoff. Champion stated that "most of the time" Plant Manager Carrier observed the leafleting.

3. Company knowledge of union activities of laid-off employees

Supervisor Howski, who did not supervise any of the laid-off employees,[37] testified he never saw any of those who were laid off wearing or displaying any union-related items, such as T-shirts, buttons, hats, or stickers. Howski acknowledged leafleting took place before the employees were laid off, but he asserted he never saw any of those who were laid off, that he knew, participating in the leafleting prior to the layoff.[38]

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[33] Others present at the meeting were Janie Garcia (Licon's sister-in-law who is the president of Union Local 1029) and Josie Vela (a friend of Licon's).

[34] None of the nine listed on the letter were among those laid off on 10 November.

[35] He said he leafleted six or seven times before the layoff.

[36] He said the T-shirts had "IUE a Great Union" on them and the union buttons read "Vote Yes" or "Proud To Be IUE."

[37] Howski testified Mendez was on loan to his department prior to the layoff. He said he saw Mendez leafleting at the plant but that it was after the layoff.

Supervisor Cruz testified that two of the laid-off employees, Hoyt and Mendez, worked under his supervision. Cruz stated Hoyt never did anything that indicated to him that Hoyt favored the Union. He, however, stated he believed from things Mendez said that he favored the Union. Cruz observed employees wearing union T-shirts at the plant, but he could not recall if it was before or after the layoff took place. Cruz testified he knew certain of the laid-off employees by sight only, and that of those he knew by sight only, he never observed them leafleting at the plant. Cruz, however, acknowledged on cross-examination that he could not describe what laid-off employees Carreon, Davis, DeLeon, Gonzalez, Gutierrez, or Herrera looked like. Cruz further acknowledged on cross-examination that on the days when there was leafleting he only observed it for approximately 1 minute or less as he was on his way to his car in the parking lot.

Elizalde testified he supervised seven[39] of the laid-off employees and he said he never saw any of them[40] leafleting prior to the November layoff. He said he saw Herrera, Davis, and J. Garcia handbilling after they were laid off. He testified the first time he saw employees wearing union T-shirts was around Thanksgiving after the layoffs had taken place.[41] Elizalde stated he had seen union buttons and stickers in the plant prior to the layoff.

Plant Manager Carrier stated he positioned himself so as to be able to observe the leafleting every time it occurred at the plant. He said the leafleting first started sometime between 9 and 22 October and that International Union Representative Martinez along with some employees on the voluntary organizing commmittee leafleted once or twice a week before the layoff and sometimes as much as three times per week after the layoff.[42] When asked by company counsel if he knew in early November the position of the laid-off employees with respect to whether they were for or against the Union, Carrier answered, "I don't know . . . I would say no. No, I didn't know."

It is without dispute that the Company knew of the Union's presence at its facility from 9 October forward.[43] The Company was notified in writing about 21 October which of its employees were on the Union's voluntary organizing committee. Further, it is undisputed the Union engaged in leafleting activities at the entrances to the plant on various occasions starting in October. There is dispute with respect to the critical question of whether the employees that were laid off engaged in any union activities prior to their being laid-off, and whether the Company was aware of any such activities on their part.

The overwhelming weight of the evidence persuades me that each of the 10 laid-off employees engaged in activities on behalf of the Union, prior to their being laid off, and that the Company knew of their activities. Vasquez testified, and I credit his testimony, that all 10 of the laid-off employees leafleted at the plant prior to their being laid off. I note that Plant Manager Carrier observed all leafleting.[44] International Union Representative Martinez corroborated Vasquez' testimony that all 10 of the laid-off employees leafleted at the plant prior to their being laid off. Carreon, Davis, DeLeon, J. Garcia, Gutierrez, Mendez, A. Gonzalez, Champion, and Licon collectively corroborated Vasquez' testimony by identifying the same 10 individuals in the process of leafleting at one time or other prior to the layoff.[45] Although it is conceivable that all 11 of the above witnesses called by counsel for the General Counsel contrived their testimony or were mistaken regarding what they testified about, however, that is highly unlikely. As noted in *Fred Stark*, 213 NLRB 209, 214 (1974), the likelihood of perjury or mistake becomes more remote in direct or geometrical proportion to the number of persons who testify to a fact. Further evidence of the Company's knowledge of the union activities of its laid-off employees is demonstrated by the fact Carreon wore a union button two to three times a week starting in October and Supervisor Elizadle observed him doing so. Davis wore union buttons and T-shirts and Elizadle also observed him doing so. DeLeon wore union buttons, T-shirts, and hats until the layoff. J. Garcia wore union buttons daily and union T-shirts and sun visors every other day and was observed by Supervisor Elizadle daily and Plant Manager Carrier almost every day. Gutierrez wore a union T-shirt or union button three times per week during the 4 weeks before he was laid-off and Plant Manager Carrier observed him doing so. Mendez wore a union T-shirt twice before being laid off and union buttons approximately five times in mid-October. The buttons Mendez wore read "Vote Yes" and "Proud To Be IUE" and the T-shirts he wore read, "IUE a Great Union." I note Mendez' testimony comports with International Union Representative Martinez' testimony that he distributed union T-shirts, buttons, and related items to the employees in the second week of October with the words, "Proud To Be IUE" on some of them.

Hostility for and knowledge of the laid-off employees organizing activities is further demonstrated by various of the unfair labor practices the Company engaged in prior to the 10 November layoff. The Company, immediately after it received word of the existence of the voluntary organizing committee, created a parts runner position in Supervisor Elizadle's department for the purpose of interfering with its employees' right to self-organization by keeping them from "talking too much about the Union." Supervisor Elizadle told Licon, in late October or early November, that a layoff was coming at the plant because of the employees' union activities. Superintendent Castillo conveyed to the fabrication and assembly department employees the clear impression that the 10 November layoff was tied to their union activities when he, in the presence of Supervisor Elizadle, told them the Company would not follow its past practice of laying the employees off for 1 day a week over a period of time inasmuch as the Company was now the "bad guys." On 8 November Supervisor Elizadle told DeLeon and J. Garcia he doubted they would be recalled from layoff because of the employees' union activities.

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[38] Howski said he saw Mendez, Davis, and Herrera leafleting after they and the others were laid off. He acknowledged he could not describe what the other seven employees who were laid off looked like.

[39] He supervised Carreon, J. Garcia, Gonzalez, Davis, DeLeon, Herrera, and Gutierrez.

[40] He acknowledged on cross-examination he never stood around and observed the handbilling when it took place except for the 2 or 3 minutes it took him to walk from the plant to his car after work.

[41] He stated he observed J. Garcia and Herrera wearing them at that time.

[42] Carrier stated the first time he saw any employee leafleting that was not on the voluntary organizing committee was after the layoff.

[43] President Hewitt, for example, testified he received correspondence on that date relating to a petition for the Union.

[44] In light of all the record evidence I am unwilling to credit Plant Manager Carrier's testimony that the first time he saw any nonvoluntary organizing committee employees leafleting was after the employees had been laid off. I likewise do not credit Supervisor Elizadle's testimony that he never saw any of the 10 employees who were laid off leafleting prior to their being laid off.

[45] I place no reliance on or give any weight to Superivsor Howski's and Supervisor Cruz' testimony that they did not observe any of the laid-off employees leafleting prior to their being laid off. None of the laid-off employees worked for Howski and he was unable to give a description of 7 of the 10 that were laid off. Cruz only observed the leafleting for a minute or less on those days when there was leafleting and he could not describe 6 of the 10 laid-off employees.

4. Counsel for the General Counsel's prima facie case

Considering all the facts thus far discussed, I am convinced, as urged by counsel for the General Counsel, that the Company was motivated, in part, to have a layoff by its hostility for and animus toward the organizing activities of its employees.

Additionally, there is substantial postlayoff evidence of the Company's animus toward the organizing activities of its employees. Such evidence further demonstrates the 10 November layoff was, at least in part, motivated by antiunion considerations.

For example, the Company through Supervisor McKane announced in November and, for a time during the union campaign and following the Board-conducted election, enforced a rule that limited the amount of washup time employees could have off the work floor for discussing union matters.

On 26 November the Company notified the laid-off employees that their temporary layoff was permanent. The Company contends it sent the 26 November notification letters not only so the employees would know they were permanently laid off but also to inform them they needed to obtain health insurance elsewhere and so they and particularly F. Gonzalez would seek employment elsewhere. I reject the Company's contention that those were its reasons for sending the letters in question. I am persuaded that the Company's real motivation for sending the letters, which converted the layoff from a temporary to a permanent one, was to preclude 10 known union supporters from voting in the 12 December election. I reject the Company's contentions with respect to the letters for several reasons. First, according to President Hewitt, the layoff was to be governed by plant rules. Plant rules reflect that the laid-off employees would have recall rights for 1 year unless their total seniority was less than that time. Therefore, the employees were already aware of their recall rights. Prior to the layoff the employees had been informed by the Company that it would continue their insurance coverage for 30 days. Thus there was no need for the Company to further inform its employees of their recall rights or insurance coverage. Plant Manager Carrier testified he was concerned about F. Gonzalez, who is handicapped, not looking for work. Carrier stated F. Gonzalez' public agency counselor had told him F. Gonzalez was not looking for work because International Union Representative Martinez had assured F. Gonzalez he would be recalled to work quickly. Martinez credibly denied ever telling F. Gonzalez he would be quickly recalled to work by the Company.

Other of the Company's postlayoff conduct that reflects on its motivation is that on 1 December Supervisor Elizadle told Licon the laid-off employees were terminated and would not be eligible to vote in the Board-conducted election because of their union activities.[46]

In agreement with counsel for the General Counsel, I am persuaded the evidence establishes that not only was the initial layoff motivated by union animus, but the Company's decision and announcement that the layoffs were permanent came about as a result of the Company's desire to preclude its laid-off employees from voting in the 12 December Board-conducted election.

On 10 December the Company further demonstrated its strong union animus when President Hewitt deliberately engaged International Union Representative Martinez in an angry confrontation in the presence of many employees that resulted in his son, Engineering Manager D. Hewitt, physically assaulting Martinez.[47] Such actions clearly alerted the employees that the same fate could befall them if they continue to support the Union. At this same confrontation Plant Manager Carrier told the employees that those who had been laid off would not be considered for recall because he would see to it.

Still further evidence of the Company's overall motivation for its actions is demonstrated by Plant Manager Carrier's comments to employee Champion about his wage review. Carrier told Champion on 10 December that he was glad Champion had gotten a good review that resulted in a wage increase because if the employees voted the wrong way in the 12 December Board-conducted election they would not be getting any more favorable wage reviews. On 11 December Plant Manager Carrier asked Lewis about his personal sympathies toward the Union for no valid or justifiable reason.

Still further evidence of the Company's motivation is demonstrated by the fact that on 12 December it challenged the right of all the laid-off employees (except Hoyt who did not vote) to vote, when they attempted to do so in the Board-conducted election, on the grounds the employees were permanently laid off with no reasonable expectancy of recall.

In agreement with counsel for the General Counsel, I find the evidence demonstrates the Company continued to exhibit strong union animus even after the Board-conducted election. For example, on 14 January 1987 President Hewitt spoke to all the employees and demanded to know who was supplying the Union with information on which the Union was filing charges against the Company. Hewitt even specifically singled out an employee in the group in his attempt to ascertain who was supplying information against the Company. President Hewitt told the assembled employees he did not want them to sign each other up for the Union on company property and directed them to stop doing so. Immediately after his meeting with all the employees President Hewitt singled out Licon and Vasquez for a meeting with him and Plant Manager Carrier in Hewitt's office. President Hewitt then asked the two if they were the ones supplying information to the Union. Hewitt told the two if there were further union activities at the Company he wanted to be notified so he would not be caught off guard. Hewitt even asked and Vasquez told him they had been attempting to get employees to sign dues authorization cards before work and on their break and lunch times. Hewitt told the two they were doing it on "Company property" and he wanted it stopped. Vasquez promised Hewitt he would stop doing so.

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[46] I note Superintendent Castillo was told by Plant Manager Carrier after the employees were permanently laid off that they could not vote in the election.

[47] The Board has long abhorred violence as a means of attempting to achieve one's goals in labor relations. See, e.g., *Jones & Laughlin Steel Corp.*, 1 NLRB 503 (1936).

Supervisor Elizadle voiced the Company's continued animus toward the Union on 6 March 1987 when he told certain employees, who were discussing how long it would take to negotiate a collective-bargaining agreement, that it would take at least 2 years and even then their efforts would be futile because the Company could delay the matter further by changing its name or relocating its facility and such actions on its part would do away with the Union.

In view of the foregoing I find counsel for the General Counsel has established a prima facie showing sufficient to support the inference that protected conduct as a "motivating factor" in the Company's decision to lay off its employees on 10 November. *NLRB v. Transportation Management Corp.*, 462 U.S. 393 (1983), citing with approval *Wright Line*, 251 NLRB 1083 (1980), enfd. on other grounds 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982). Counsel for the General Counsel demonstrated union activity by all 10 of the laid-off employees in that they each had leafleted at the plant prior to their being laid off. A large percentage of them had worn or displayed union insignia of one kind or another at the plant prior to their being laid off. The Company collectively, through President Hewitt, Plant Manager Carrier, Superintendent Castillo, and Supervisor Elizadle, knew of their union activities. The Company's strong union animus has been demonstrated through the many unlawful acts the managers and supervisors committed prior to and after the employees were laid off. The timing of the layoff, which took place approximately 4 weeks before the Board-conducted election, coupled with the stated reasons for the layoff, convincingly demonstrates the Company's motivation for having the layoff was to preclude these 10 known union supporters from voting in the Board-conducted election that was held on 12 December.

Once counsel for the General Counsel makes a prima facie showing, such as she has done herein, that protected conduct was a motivating factor in the employer's actions against its employees, the burden shifts to the employer to demonstrate that it would have taken the same actions it did even in the absence of the protected conduct on the part of its employees. The employer's proffered basis must be proved by a preponderance of the evidence.

5. The Company's economic defense for reducing its work force on 10 November

The Company's assertion that its 10 November temporary layoff, which was thereafter made permanent on 26 November, was economically justified does not withstand close scrutiny.

The Company states, "1985 was a good year" in that its total net sales, which were $10,640,000, exceeded its projections.[48] It however argues that it "never came close to achieving the success it had projected for . . . 1986." The evidence belies such a gloomy assessment of 1986. Although the Company never achieved its projected 26-percent growth in sales for 1986, it did accomplish a 14.8 percent increase in net sales for that year over 1985. The total net sales for 1986 were $12,214,000.[49] Thus if 1985 was "a good year" it is difficult to validly conclude that 1986 was a devastatingly bad one.

During the last half of 1985 the Company maintained an average of 100 hourly employees per month. In the last 2 months of 1985 it employed 106 (November) and 107 (December) hourly employees. During the first 10 months of 1986 the Company maintained a monthly average hourly work force of 102. In January 1986 it employed 106 hourly employees and as late as September it employed 107 hourly employees. Plant Manager Carrier, who joined the Company in February 1986, testified it was evident to him at the time he came to the Company that it was overstaffed.[50] He asserts the Company's 1986 staffing levels were based on its projected 26-percent growth in sales. Plant Manager Carrier's assertion the Company was overstaffed in 1986 does not square with a number of established facts. First, the evidence shows the Company's staffing levels through October[51] were in keeping with its staffing levels for the last half of 1985, which was at a time when the Company was doing 14.8 percent less. Second, the Company hired 13 new hourly paid employees between June (some 4 months after Carrier became plant manager) and October.[52] If a genuine

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[48] The Company had projected $9,697,000 in net sales for 1985.

[49] The Company had in its most recent monthly type predictions projected $13,500,000 in net sales for 1986. However, in its "Five Year Strategic Plan (1984–1988)" it set "minimum sales increase of 15% per year" goals. The Company, with its 14.8-percent net sales growth in 1986, was on target with respect to its long-term projections. In that same 5-year plan the Company projected net sales for 1986 at $9,520,000. Its 1986 net sales exceeded that prediction by well over $2.5 million.

[50] Carrier testified he, from the beginning of his employment, discussed the Company's overstaffing problems with Superintendent Castillo. Superintendent Castillo credibly stated he could not recall any such conversation prior to the layoff addressed herein. In fact, Superintendent Castillo testified he "wasn't totally sure" the Company could fill its orders without the laid-off employees.

[51] It was in October that the Company learned of union activities at its facility.

[52] Plant Manager Carrier indicated he was unaware of any manufacturing employees being hired during the time period in question. However, after being confronted with documentary evidence to the contrary, he

Continued

overstaffing problem had existed, I am persuaded the Company would not have continued, up until October, to have hired new employees in order to maintain its hourly work force at levels in excess of 100 employees. Third, no conclusive evidence was presented to support Plant Manager Carrier's assertion that the new facility (that opened in August) enhanced productivity and lessened the need for employees.

The Company asserts a number of things occurred in the summer of 1986 that demonstrates its subsequent actions were not motivated by union considerations. For example, Sales Manager Salinas prepared a memorandum on 16 June for President Hewitt in which he pointed out:

> As you are aware, we are having one terrible time in filling our schedule. I would like to say that working with Bob Carrier has really help[ed] lift the burden during this trying time. I still believe the surge of work is still around the corner and scheduling should be settling down to projections and normal lead times soon [Emp. Exh. 6].

Salinas said he wrote the memorandum because they were unable to give the shop employees the 5 days' leadtime they needed from the time an order arrived at the plant until it went to the production floor. He explained they did not have the leadtime because of a decline in orders and a declining backlog. Notwithstanding the scheduling problems Salinas discussed, the Company hired two new manufacturing employees in June to replace two that had quit.[53]

President Hewitt testified he was called to corporate headquarters in Dallas, Texas, in early July for a "very intense discussion" with Corporate Chief Officer Bob Haugh and Corporate Group Vice President Andy Schwitter. Hewitt testified Haugh told him, "your sales are falling off," "your profits are falling off," "you're not going to make budget," and added he wanted something done about it. Hewitt testified the Company thereafter reduced its advertising budget and postponed some of its advertising commitments and cut two marketing consultants. Notwithstanding the concerns raised by the Dallas Corporation, the Company hired four new hourly employees in July. No hourly employees had been discharged or voluntarily quit during that month. I am persuaded that if the Company's situation had been as dire as it contends it was, it would not have continued to have hired employees (13 in all) between June and the advent of the Union in October.

On 30 October Sales Manager Salinas prepared a second memorandum for President Hewitt regarding the Company's declining business. In that memorandum Salinas stated:

> Our slide door backlog has dropped considerably over the last two weeks. Based on the orders on hand we are cutting back the vent factor 10% the first 3-1/2 days of November, and at this time it looks like we'll have to cut back an additional 10 percent over the next 5 days (week of November 10th). The vent count during the week of November 10th will be at about 22 per day average.
>
> I'm hoping by the week of the 17th we can start scheduling back to the 28 per day average. I will keep you posted as we progress through the month [Emp. Exh. 7].

President Hewitt testified he penciled a message to Plant Manager Carrier across the top of Salinas' 30 October memorandum that read, "Bob C. let me have your plan." Hewitt stated Plant Manager Carrier's response to the memorandum was to provide him with a list of employees that could be laid off without adversely affecting the business.

Certain factors raise very troubling concerns about Salinas' 30 October memorandum. First, it came within a relatively short time after the Company learned of union activities at its facility. Second, the Company was still in a hiring posture in October. It hired two new employees to replace two that had quit that month. Third, Salinas predicted the Company would be at a 22-per-day vent count in the second week in November and expressed hope it could start scheduling *back* to a 28-per-day vent production average in the third week in November. Salinas testified on direct examination that the Company tried to maintain, "something in the vicinity of 28 moving vents a day." On cross-examination he said that was what the Company had averaged over the past 9 to 12 months. The documents on vent production do not appear to support Salinas' testimony. For example, in 1985 the Company had approximately a 19.25 average daily vent count. Through October 1986 the Company had a 20.43 average daily vent count, and for all 1986 it had a 20.28 average daily vent count. In the first 3 months of 1987, the Company had a 19.16 average daily vent count.[54] Thus, it appears the Company had never averaged 28 vents per day and that the vent production for November was in line with the 1986 average daily vent count and ahead of the 1985 daily count. Therefore, it appears the November layoff was based on something other than average daily vent production. Other factors support such a conclusion. The Company had never, in the past, resorted to a layoff where the employees were not thereafter recalled to work. Supervisor Elizadle's testimony that he had been having to rotate four to five employees per day during the 2 months before the layoff in order to keep them busy does not strengthen the Company's economic defense because he acknowledged, on cross-examination, he had to do that during the previous year.

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conceded hiring had taken place during that time including the hiring of his daughter (an hourly paid manufacturing employee) in June. If Carrier had been completely candid in his testimony, I think he would have remembered that his daughter had been hired during the period in question.

[53] One of the two hired in June was Plant Manager Carrier's daughter and the other was Davis.

[54] I arrived at the average daily vent count by taking the total vent count per year (Emp. Exhs. 8 and 9) and then dividing by the number of weeks in the year and the number of days per week. The Company produced approximately 5005 vents in 1985; approximately 5275 in 1986 (with approximately 4495 being produced between 1 January and 30 October); and approximatley 1105 in the first 3 months of 1987.

I conclude the Company has not shown it would have laid off its employees on 10 November nor would it have permanently discharged them on 26 November absent their union activities.[55] Compare *Sogard Tool Co.*, 285 NLRB 1044 (1987). Accordingly, it follows that the Company's actions toward these 10 employees violated Section 8(a)(3) and (1) of the Act and I so find.

CONCLUSIONS OF LAW

1. The Company, Horton Automatics, is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

2. International Union of Electronics, Electrical, Technical, Salaried and Machine Workers, AFL–CIO, District 11 is a labor organization within the meaning of Section 2(5) of the Act.

3. By engaging in the following conduct between about October 1986 and about March 1987, the Company committed the following unfair labor practices in violation of Section 8(a)(1) of the Act:

(a) Threatening its employees with layoff because of their union activities.

(b) Telling its employees they would not be recalled from layoff because of their union activities.

(c) Informing its employees that their layoff was tied to their union activities.

(d) Promulgating and enforcing a rule limiting its employees washup time for the purpose of limiting the amount of time they would have off the work floor for discussing union matters.

(e) Establishing a parts runner position for the purpose of restricting its employees to their work stations so they could not discuss the Union among themselves.

(f) Assaulting a union representative in the presence of its employees.

(g) Threatening that its laid-off employees would not be considered for recall because of their union activities.

(h) Coercively interrogating its employees about their union activities and desires.

(i) Promulgating and enforcing an overly broad no-solicitation rule.

(j) Telling its employees that certain actions were taken against the laid-off employees because of their union activities and in order to preclude them from voting in a Board-conducted election.

(k) Telling its employees it would be futile for them to select the Union as their collective-bargaining representative.

(l) Telling its employees there would not be any further wage increases if they voted for the Union.

4. About 10 November 1986 laying off and thereafter about 26 November 1986 permanently discharging Rene Carreon, Jon Eric Davis, Roy DeLeon, Carlos Garcia, Joe Garcia, Franklin Gonzalez Jr., Rolando Gutierrez, Abe Herrera, Manuel Mendez, and Leonard S. Hoyt because of their sympathies for, and activities on behalf of, the Union, the Company violated Section 8(a)(3) and (1) of the Act.

5. The aforesaid unfair labor practices affect commerce within the meaning of Section 2(6) and (7) of the Act.

THE REMEDY

Having found that the Company has engaged in certain unfair labor practices, I find it necessary to order it to cease and desist therefrom and to take certain affirmative action designed to effectuate the policies of the Act.

It having been found that the Company discriminatorily laid off and thereafter permanently discharged employees Rene Carreon, Jon Eric Davis, Roy DeLeon, Carlos Garcia, Joe Garcia, Franklin Gonzalez Jr., Rolando Gutierrez, Abe Herrera, Manuel Mendez, and Leonard S. Hoyt, I shall recommend that it be ordered to offer them immediate and full reinstatement to their former positions or, if they no longer exist, to substantially equivalent positions without prejudice to their seniority or other rights and privileges previously enjoyed and make them whole for any loss of earnings they may have suffered by reason of the discrimination against them with interest. Backpay shall be computed in the manner prescribed in *F. W. Woolworth Co.*, 90 NLRB 298 (1950), with interest as computed in *New Horizons for the Retarded.*,[56]

Likewise it is recommended that the Company be ordered to remove from its laid-off employees' files any reference to their having been laid off and notify them in writing this has been done and that evidence of that unlawful action will not be used as a basis for any future personnel actions against them. Further it is recommended the Company be ordered to cease giving effect to its overly broad no-solicitation rule. Finally, it is recommended the Company be ordered to post a notice to its employees attached hereto as "Appendix" for a period of 60 days in order that employees may be apprised of their rights under the Act and the Company's obligation to remedy its unfair labor practices. Counsel for the General Counsel requested that a visitatorial clause be included in the Order. The evidence does not establish the necessity for such a clause. Accordingly, I deny that request.

On these findings of facts and conclusions of law, and on the entire record, I issue the following recommended[57]

ORDER

The Respondent, Horton Automatics, Corpus Christi, Texas, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Laying off, discharging, or otherwise discriminating against any employee for supporting International Union of Electronics, Electrical, Technical, Salaried and

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[55] Although not essential to the findings herein, I note that during the first 3 months of 1985 the Company utilized 1142 hours of overtime. In the first 3 months of 1986, it utilized 1361 hours of overtime. However, in the first 3 months of 1987, it utilized 2517 hours of overtime. The apparent increase in overtime hours worked appears to explain how the Company continues its normal production with 10 less employees.

[56] 283 NLRB 1173 (1987). Interest will be computed at the "short-term Federal rate" for the underpayment of taxes as set out in the 1986 amendment to 26 U.S.C. § 6621.

[57] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

Machine Workers, AFL–CIO District 11, or any other labor organization.

(b) Threatening employees with layoff because of their union activities.

(c) Telling employees they would not be recalled from layoff because of their union activities.

(d) Informing employees their layoffs were tied to their union activities.

(e) Promulgating and enforcing a rule limiting its employees washup time for the purpose of limiting the amount of time they would have off the work floor for discussing the Union.

(f) Establishing a parts runner position for the purpose of restricting its employees to their work stations so they could not discuss the Union among themselves.

(g) Assaulting representatives of the Union.

(h) Threatening that its laid-off employees would not be considered for recall because of their union activities.

(i) Coercively interrogating its employees about their union activities and desires.

(j) Promulgating and enforcing an overly broad no-solicitation rule.

(k) Telling employees that certain actions were taken against its laid-off employees because of their union activities and in order to preclude them from voting in a Board-conducted election.

(l) Telling employees it would be futile for them to select the Union as their collective-bargaining representative.

(m) Telling employees there would not be any future wage increase reviews if they voted for the Union.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Offer Rene Carreon, Jon Eric Davis, Roy DeLeon, Carlos Garcia, Joe Garcia, Franklin Gonzalez Jr., Rolando Gutierrez, Abe Herrera, Manuel Mendez, and Leonard S. Hoyt immediate and full reinstatement to their former jobs, or, if those jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority or other rights or privileges previously enjoyed, and make them whole for any loss of earnings and other benefits suffered as a result of the discrimination against them, in the manner set forth in the remedy section of this decision.

(b) Remove from its files any reference to its unlawful layoff and discharge of Rene Carreon, Jon Eric Davis, Roy DeLeon, Carlos Garcia, Joe Garcia, Franklin Gonzalez Jr., Rolando Gutierrez, Abe Herrera, Manuel Mendez, and Leonard S. Hoyt and notify them in writing that this has been done and that these actions will not be used against them in any way.

(c) Preserve and, on request, make available to the Board or its agents for examination and copying, all payroll records, social security payment records, timecards, personnel records and reports, and all other records necessary to analyze the amount of backpay due under the terms of this Order.

(d) Post at its Corpus Christi, Texas facility copies of the attached notice marked "Appendix."[58] Copies of the notice, on forms provided by the Regional Director for Region 23, after being signed by the Company's authorized representative, shall be posted by the Company immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Company to ensure that the notices are not altered, defaced, or covered by any other material.

(e) Notify the Regional Director in writing within 20 days from the date of this Order what steps the Company has taken to comply.

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

Section 7 of the Act gives employees these rights.

To organize

To form, join, or assist any union

To bargain collectively through representatives of their own choice

To act together for other mutual aid or protection

To choose not to engage in any of these protected concerted activites.

WE WILL NOT threaten you with layoff because of your activities on behalf of International Union of Electronics, Electrical, Technical, Salaried and Machine Workers, AFL–CIO, District 11 or any other labor organization.

WE WILL NOT tell you that you will not be recalled from layoff because of your activities on behalf of the Union.

WE WILL NOT inform you that your layoff was tied to your activity on behalf of the Union.

WE WILL NOT promulgate rules that limit your washup time or restrict you to your work stations for the purpose of restricting you from discussing the Union.

WE WILL NOT assault representatives of the Union.

WE WILL NOT threaten that our laid-off employees would not be considered for recall because of their activities on behalf of the Union.

WE WILL NOT coercively interrogate you regarding your union activities and desires.

WE WILL NOT tell you that certain actions were taken against our laid-off employees because of their activities on behalf of the Union and in order to preclude them from voting in a Board-conducted election.

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[58] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

WE WILL NOT tell you it would be futile for you to select the Union as your collective-bargaining representative.

WE WILL NOT tell you there will not be any future wage increase reviews if you vote for the Union.

WE WILL NOT lay off or discharge our employees because of their support for, assistance to, or membership in the Union.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL offer Rene Carreon, Jon Eric Davis, Roy DeLeon, Carlos Garcia, Joe Garcia, Franklin Gonzalez Jr., Rolando Gutierrez, Abe Herrera, Manuel Mendez, and Leonard S. Hoyt immediate and full reinstatement to their former positions or, if their jobs no longer exist, to substantially equivalent positions without prejudice to their seniority or other rights or privileges previously enjoyed and WE WILL make them whole for any loss of earnings and other benefits they may have suffered as a result of our discrimination against them, less any net interim earnings, plus interest.

WE WILL notify each of them that we have removed from our files any reference to their layoff and their layoff will not be used against them in any way.

HORTON AUTOMATICS

Swift Independent Corporation, Swift Independent Packing Company, and New Sipco, Inc., Joint and/or Single Employer and alter ego to, and/or Joint and/or Single Employer with, Esmark, Inc., Swift & Company, and Swift Independent Packing Company, Joint and/or Single Employer *and* United Food and Commercial Workers International Union, AFL-CIO. Cases 13-CA-21156 and 13-CA-21274

June 29, 1988

DECISION AND ORDER

BY CHAIRMAN STEPHENS AND MEMBERS JOHANSEN AND BABSON

On March 9, 1983, Administrative Law Judge William F. Jacobs issued the attached decision. The General Counsel and the Charging Party (the Union) filed exceptions, supporting briefs, and answering briefs.[1] The Respondents filed cross-exceptions, supporting briefs, and answering briefs.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings,[2] and conclusions[3] only to the extent consistent with this Decision and Order.

This case presents allegations of 8(a)(3) and (5) violations stemming from Respondent Esmark's 1982 divestiture of the fresh meats division of a subsidiary then known as Swift & Co. At all relevant times prior to the events presently at issue, Swift & Co., a meatpacking, food production, and sales operation, was a wholly owned subsidiary of Esmark and consisted of a fresh meats division and a processed meats division. In this capacity, Swift operated many facilities nationwide and its employees were represented by the Union in separate units designated in and covered by one master agreement. The last relevant agreement was effective September 1, 1979, to September 1, 1982.

Esmark, a holding company, provided its subsidiary, Swift, with certain services in the areas of public relations, legal counsel, financial matters, benefits programs, and labor relations. Until 1976 Esmark directly participated in the collective-bargaining negotiations between Swift and the Union. In April 1980, Esmark undertook the first in a series of steps that ultimately resulted in its divestiture of Swift's fresh meats division and its restructuring of that division into two corporations known as SIPCO and New Sipco. Thus, following a series of transactions detailed more fully in the judge's decision, Esmark, in essence, split the operations of the original Swift & Co., i.e., the processed meats operations were carried on by a new corporation using the old name of Swift while the fresh meats operations were carried on by SIPCO, which operated most of the fresh meats plants with the exception of the two located in Moultrie, Georgia, and Guymon, Oklahoma, which were operated by New Sipco. During the period of restructuring, SIPCO and New Sipco in substance remained wholly

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[1] The Union has requested oral argument. The request is denied as the record, exceptions, and briefs adequately present the issues and the positions of the parties.

[2] Respondents Swift Independent Corporation (SIC), Swift Independent Packing Company (SIPCO), and New Sipco, Inc. (New Sipco) have excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

In the findings of fact section of his decision, the judge inadvertently indicated that the $50 per-share price that Solomon Brothers had determined to be a "justifiable" price for the stock of Respondent Esmark, Inc. (Esmark) was substantially below the market value of the stock at that time. The record shows, and the judge correctly indicated at fn. 31 of his decision, that Esmark's stock was then trading around $25 to $30 per share. Therefore, a $50 per-share price would be substantially above, not below, the then market value of the stock. In that same section of his decision, the judge indicated that an April 25, 1979 meeting in the office of William Watchman, the then president of Respondent Swift & Co. (Swift), was attended by Watchman and Donald Kelly and Karl Becker, president and assistant general counsel, respectively, of Esmark. The record indicates that this meeting was attended by Watchman, Kelly, and John Copeland, then president of the fresh meats division of Swift. These inadvertent errors are insufficient to affect the results of our decision.

[3] We find merit in Esmark's exception to the judge's finding that it, along with the other Respondents, had admitted to being an employer engaged in commerce within the meaning of Sec. 2(6) and (7) of the Act. Contrary to the judge's finding, the record shows that, unlike Swift, SIPCO, and New Sipco, Esmark in its amended answers denied being an employer engaged in commerce. In this regard, it in essence denied that it meets the Board's standard for retail enterprises inasmuch as it derives no revenue from retail sales and provides services only to companies in which it has an ownership interest. We find, nevertheless, that the record clearly establishes that Esmark is an employer engaged in commerce within the meaning of Sec. 2(2), (6), and (7) of the Act. Thus, we note that the record shows that Esmark is a Delaware corporation with its principal office in Chicago, Illinois. Esmark's 1981 annual report, introduced into evidence by the General Counsel, indicates that it is a holding company that provides financial planning and management services to its subsidiaries, including International Playtex, Inc., Estech, Inc., Eschem, Inc., and Estronics, Inc., as well as Respondent Swift. The annual report indicates that for the fiscal year ending October 31, 1981, Esmark's total revenues were over $3 billion, which "ranks it among the largest industrial corporations in the United States." In addition, Esmark reported expenditures of close to $3 billion to cover cost of goods sold and selling, administrative, advertising, sales promotion, and interest costs in addition to other expenditures listed for pension, health care, and profit-sharing plans. The report further indicates that Esmark incurred a pretax loss of some $66.5 million from transactions pertaining to its divestiture of SIPCO. In this regard, the report reflects Esmark's assumption of SIPCO's liability for certain outstanding checks and its purchase of guaranteed income contracts to fund accrued pension and pensioners' health care liability related to SIPCO's ongoing operation. Respondent Esmark does not contend that these assertions in its annual report are incorrect. Additionally, the record shows that Esmark annually provides services clearly valued in excess of $50,000 to its subsidiaries, which in turn admit jurisdiction here. In light of all the above, as noted, we agree with the judge's finding that jurisdiction is properly asserted over Esmark. See generally *NLRB v. Erlich's 814, Inc.*, 577 F.2d 68 (8th Cir. 1978); *Glen Manor Home v. NLRB*, 474 F.2d 1145 (6th Cir. 1973), cert. denied 414 U.S. 826 (1973).

289 NLRB No. 51

owned by Esmark until April 1981 when through a public stock sale Esmark reduced its ownership interest to 35 percent.[4]

The actual process of severing the fresh meats division was initiated *in April 1980*. At that time Esmark's president, Donald Kelly, told John Copeland, then a vice president of Swift, that the decision had been made that Esmark should divest itself of the fresh meats division. Copeland was instructed that he was thereafter to report directly to Kelly and that he and his staff were to assemble a company that could be sold as a unit. Copeland was at this time also involved in Esmark's attempt to develop an employee stock option plan wherein around 60 percent of the stock in the fresh meats operation would be owned by employees. In June 1980 the Union rejected Esmark's proffered employee stock option plan. Thereafter, certain of Esmark's management officials and Copeland met with Kelly to discuss various alternatives concerning the disposition of the fresh meats operation. Kelly was interested in Copeland's proposals. Ultimately, as a result of these discussions, Esmark's board of directors, on June 26, 1980, approved a proposal that certain of the fresh meats plants, including Moultrie and Guymon, be closed, with Esmark paying all closing costs, and that the remaining units of the division should become a separate independent company known as SIPCO, which Esmark would sell. Thereafter, Copeland, who later became SIPCO's president, headed the effort to implement this decision, including the creation of the departments necessary for SIPCO's independent functioning and the selection of SIPCO's staff. Copeland appointed the individuals to sit on the board of directors, including two individuals suggested by Esmark's president, Kelly.

By letter of June 30, 1980, Swift's vice president of personnel, James Farren, wrote to union official Anderson formally announcing that the Moultrie and Guymon plants would be closed on December 28, 1980, and offering to meet to discuss the effects of the closings. In August 1980, Copeland and Farren met with Anderson. At that meeting, Copeland indicated that the plants at Guymon and Moultrie were good, modern plants that would fit in well with the new company but for their uncompetitive labor costs. Copeland asked Anderson about the possibility of getting relief from the master agreement at these plants. Anderson responded that the Union did not make midterm changes in the master agreement. Copeland indicated that, despite his wish to keep these two plants open, he would not do so if he had to pay master agreement rates. *Anderson reiterated* that there could be no reduction in benefits and that the master agreement would have to stand.

Later in August, Copeland and Richard Knight, then a vice president of Swift and subsequently appointed by Copeland to be SIPCO's vice president in charge of beef, lamb, and labor, met with Anderson in Anderson's office. At that meeting, Copeland told Anderson that potential buyers would find the new company a more attractive purchase if the Moultrie and Guymon plants were operating. He further indicated, however, that these plants would have to be closed absent some relief from the uncompetitive labor costs set out in the master agreement. Copeland said that SIPCO would continue to apply the master agreement at any plants where it was competitive. Anderson indicated that he could not see how any changes could be made in the master agreement.

Copeland, Knight, and Anderson met again on September 10 to discuss, inter alia, the efforts being made to sell SIPCO and the status of certain plants, including Moultrie and Guymon.[5] Copeland and Knight again asked Anderson if he could change the master agreement at these plants to make them more competitive. Anderson again indicated that he could not do so. Copeland testified that he told Anderson that

> our plan was to let Esmark go ahead with the closing of these plants in line with the master agreement terms and then after the company was sold to interests other than Esmark, we would reopen those plants, recognizing that the union still had bargaining rights, but would insist on a competitive labor rates [sic] in the new contract.

The parties discussed wage rates for various plants. Anderson questioned the legality of Esmark's plans concerning SIPCO. No agreement was reached.

At a September 18, 1980 meeting of Anderson, Knight, and SIPCO Counsel Bruce Thompson, the parties again discussed the planned closing of

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[4] The stock sold was that of SIC, a holding company for the fresh meats operation that Esmark incorporated in January 1981. Accordingly, Esmark's 35-percent ownership of SIPCO and New Sipco is by virtue of its ownership of SIC stock. These matters are discussed in greater detail in the judge's decision.

[5] At this time the formal steps necessary to separate the fresh meats division were proceeding. Thus, on September 3, 1980, Swift set up a subsidiary called Transitory Food Processors, Inc. (Transitory) and on October 21 transferred Swift's assets, except for the fresh meats division, to it. Transitory's name was then changed to Swift & Co. On October 24, the name of the remaining original Swift & Co. was changed to SIPCO. At this time, various tangible and intangible assets, including property, trademarks, notes, etc., were divided between the two entities. In essence, everything related to the fresh meats operation went to SIPCO, while everything else went to Swift. On October 27, SIPCO declared a dividend of all of (new) Swift & Co. stock to Esmark.

Moultrie and Guymon by Esmark and their subsequent reopening by SIPCO. Anderson reiterated *that the Union would not* agree to any midterm modification of the master agreement. He added that he would not "stir the pot" concerning the planned closing and reopening of these plants if the plans were legal, but he added that he doubted their legality. Knight reiterated that Moultrie and Guymon would be operated under competitive local agreements when they were reopened.

In October 1980, Knight kept in touch with Anderson by telephone, advising him of the progress made toward the splitting off of SIPCO from Swift and Esmark. He also told Anderson that he understood that Moultrie and Guymon would be closed on December 28 and reopened on January 10 or 15, 1981. Anderson responded that as long as it was legal they could go ahead.

Knight and Anderson met again on November 5, 1980, and Knight again advised Anderson that SIPCO was to be independent and would not apply the master agreement at Moultrie and Guymon. Anderson again refused to make any concessions, advising Knight that he felt the plan was unlawful. Knight told Anderson that the incorporation papers had been filed and a brokerage firm engaged to handle the public sale of stock, but that the sale of the Company probably could not be finalized until February 1981. Knight indicated that all plants then currently under the master agreement would continue to operate as before except for Guymon and Moultrie. Knight reiterated that he intended to close these plants and to have SIPCO reopen them after 2 weeks, at which time SIPCO would negotiate a more competitive local contract. Knight inquired whether, in view of the delay in selling the Company, it would be possible to reopen the plants before the actual sales date or to delay the closing. Anderson stated again that the master agreement could not be altered and that if the procedure that Knight had suggested was not legal he would not go along with it. Anderson later advised that a delay in closing would require a second closing notice and a 6-month extension of operations.

By letter of December 11, 1980, Knight indicated to Anderson that SIPCO had become a separate corporate entity on October 27, 1980, and that the terms and conditions of the master agreement would remain in effect at certain named plants.[6] The letter further indicated that SIPCO

> has begun the process of becoming a publicly owned corporation. Upon completion of this procedure [SIPCO] will be truly independent of Esmark . . . . There should be little doubt in the minds *of [the Union] that* the process of making Swift Independent Packing Company a publicly held corporation completely separate from Esmark had begun, and that it will be completed early in the spring of 1981 . . . . As part of the creation of [SIPCO] Esmark announced the closing of . . . meat packing plants located at Guymon, Oklahoma and Moultrie, Georgia. These two plants will be closed on December 28, 1980, and all closing benefits provided under the labor agreement will be paid to eligible employees by Esmark. The Guymon and Moultrie facilities will be owned by [SIPCO] and it is intended that these plants will be opened in early 1981 as non-Master Agreement units and it is intended that the [Union] will be recognized as the bargaining agent . . . . The Company will assure the Union that, if the process of becoming a publicly held independent corporation is not completed within a reasonable length of time after the opening of the Guymon and Moultrie facilities, the Company will recognize retroactively the terms and conditions previously provided to the employees at these locations under the [master agreement].[7]

On December 17, 1980, Knight and Anderson, along with their respective attorneys, Thompson and Gacek, met again. Knight tried to get Anderson and Gacek to agree to the reopening of Moultrie and Guymon before the completion of the public stock sale, then rescheduled for March, but ultimately not occurring until April 1981. In essence, Knight and Thompson did not wish to keep two plants closed for an extensive period dating from December 28, the then-scheduled date of the closings, through the completion of the public offering. Knight reiterated that the Company would retroactively apply the provisions of the master agreement to employees if the public stock sale was not completed within a reasonable period after the opening. Anderson responded that he felt the Company's plan was illegal, that SIPCO would not be independent of Swift and Esmark, and that the Union would not go along with it. Gacek added that if Moultrie and Guymon were opened before the sale of stock, it would be an alter ego situation and the openings would have to be under the master agreement. Thompson indicated that another corporation was being set up to protect against any legal problems concerning Moultrie and Guymon. Anderson and Gacek responded that the Companies could change their names all they wanted but that they were still the same and the master agreement should apply.

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[6] SIPCO at this time was a wholly owned subsidiary of Esmark.

[7] As noted earlier, supra at fn. 3, Esmark actually retained a 35-percent ownership interest in the holding company, SIC, of which SIPCO was, along with New Sipco, a wholly owned subsidiary.

Thereafter, Knight advised Anderson in a letter of December 22 that "[i]t is our present intention to close the Moultrie and Guymon plants on or about March 7, 1981, or just prior to [SIPCO] becoming a publicly held corporation." Ultimately, the plants did not close until April 17, about a week before the public stock offering on April 22, 1981.

In the meantime, Anderson and Knight met again on February 13, 1981, and Knight again requested relief from the master agreement at Moultrie and Guymon. Anderson again refused. Thereafter, on February 24, 1981, an entity named New Sipco was incorporated. Thompson testified that the incorporation of New Sipco followed a discussion he had had with SIPCO's general counsel, Tom McKay, wherein McKay had suggested the creation of a separate subsidiary, New Sipco, to open and operate the plants at Moultrie and Guymon so that employees would clearly distinguish between the employer that would terminate their employment and the one that would reopen these facilities.

As noted, the plants closed on April 17, 1981. Esmark paid employees the closing benefits specified in the provisions of the master agreement. The stock offering of April 22, 1981, consisted of the sale of SIC stock, the holding company that Esmark had incorporated in January 1981. The prospectus accompanying the sale indicated that the principal assets of SIC consisted of all the stock of SIPCO. The prospectus also indicated in relevant part that:

> SIPCO is the successor to and owns and operates . . . what was formerly . . . the Fresh Meats Division of the original Swift & Co. . . . SIPCO's Guymon, Oklahoma and Moultrie, Georgia plants are in the opinion of management, efficient facilities capable of successful and competitive operations. However, labor costs at these plants under the Master Agreement . . . with the [Union] were significantly higher than those prevailing at many plants in their respective areas. A new subsidiary of the Company intends to open Guymon and Moultrie shortly after completion of this offering with the objective of achieving competitive labor costs at these facilities. On April 8, 1981 [the Union] advised the Company that it . . . would contest any attempt to operate these plants under labor terms other than those of the [master agreement]. In the opinion of management, the aforementioned steps taken or being taken by Esmark, coupled with the anticipated reduction of labor costs at the Des Moines plant and the possible reduction of such costs at the Guymon and Moultrie plants will add further strength to SIPCO's ability to compete effectively and profitably in the fresh meats industry. There is no assurance that any reduction in labor costs will be achieved at the Guymon or Moultrie plants.

As alluded to in the prospectus, Anderson had written to Knight on April 8, 1981, as follows:

> You have openly announced that the Company intends to go through the purported closing of these two plants, and then immediately to reopen them and continue operations at the plants. You have made clear it is your intention, upon such "reopening" to treat the plants as if they are no longer covered by the Master Agreement which now clearly covers them. I want to make sure that there is no possibility of misunderstanding and accordingly I repeat to you that it is the Union's position that, regardless of the name of the particular corporation which you may choose as the entity under which the "reopening" is accomplished, this entire body of maneuvers is simply a charade intended to attempt to rid yourself of your collective bargaining and contract obligations and to enable you to attempt to accomplish a reduction in employee benefits and an evasion of contract obligations at these plants. We again want to be sure that you clearly understand that it is the Union's position that if those plants are reopened after your announced "closing," employees presently in those plants are entitled to . . . their employment in those plants and it is the Union's position that the Master Agreement will continue to apply to those plants.

In his letter of April 21, 1981, in response, Knight advised Anderson that the law provides that new owners can establish initial terms and conditions of employment as well as hire a work force of their own choosing. Knight added that "once the new ownership is in place and has had an opportunity to review its intentions and make a determination with respect to this subject, I am certain that it will be in touch with you."

Thereafter, on April 30, 1981, Knight wrote two letters to Anderson advising that the public offering of SIC stock had been completed, that SIC had purchased the assets of SIPCO, and that SIC's wholly owned subsidiary, New Sipco, now owned the Moultrie and Guymon facilities. One of these letters, on New Sipco stationery, further indicated that "the ownership, through their Boards of Directors," had decided to open the Moultrie and Guymon facilities on May 5, 1981, with terms and conditions of employment that were still under consideration and that applications from former SIPCO employees would be considered. The second letter, on SIPCO stationery, indicated that the "ownership, through their Boards of Directors," had decided to retain their current work force, and, as a successor employer, had decided to adopt the master agreement at the listed SIPCO facilities.

Most of the employees formerly employed at the Moultrie and Guymon plants, including plant managers and salaried employees, as well as unit employees, were rehired as employees of New Sipco. The terms and conditions of employment of Moultrie were set by Knight in consultation with local management. The terms and conditions of employment at Guymon, however, were those set out in a new local collective-bargaining agreement negotiated with Local 340 of the Union.[8] Guymon was reopened on May 14, 1981, and Moultrie was reopened on May 4, 1981.

Subsequently, in August 1981, SIPCO's Tampa sales unit facility was closed. The Tampa employees, who were covered by the master agreement, were permitted to transfer to SIPCO facilities also operating under the master agreement but were not permitted to transfer to Moultrie, Guymon, or any Swift & Co. facilities. The provisions of the master agreement permitted transfer to any plant under the master agreement whenever a plant closed.

Following the public sale, the SIPCO and New Sipco facilities have continued the fresh meats operations and have annual sales of around $1.6 billion. Customers and suppliers have remained essentially the same. As noted, their personnel and officers have also remained essentially the same. Although most of the officers that Copeland chose for SIC, SIPCO, and New Sipco had previously been employed by Swift, there has been no exchange of personnel since April 1981. Also since April 1981 no one from SIC, SIPCO, or New Sipco has reported to anyone from Esmark. Of SIPCO's nine-member board of directors, only one, Roger Briggs, still held a position with Esmark or Swift after the sale of SIC stock.

Except for Esmark's 35-percent ownership interest, its previously existing connections with SIPCO and New Sipco have apparently been discontinued. In this regard, Esmark no longer plays any role in the health care or pension plans, insurance, advertising, day-to-day operations, or labor relations of SIPCO and New Sipco. No employees of SIC, SIPCO, or New Sipco participate in Esmark's stock option, incentive, or growth plans.

SIPCO and New Sipco do, however, continue to have some business transactions with Swift. Swift does make some purchases from SIPCO and vice versa; they also have entered into a copacking arrangement in San Antonio, Texas. These transactions, however, appear to be conducted at arm's length. Some SIPCO sales units do sell Swift products, but they also sell those of competitors. SIPCO continues to rent office space from Swift at a reasonable rate made possible by Swift's favorable long-term lease.

Based on the above, the General Counsel alleged that each of the Respondent corporations violated Section 8(a)(3) by closing the plants and terminating employees at Moultrie and Guymon, and violated Section 8(a)(5) by repudiating the master agreement at Moultrie and Guymon and refusing to afford employees of the Tampa facility the full range of transfer rights set out in the master agreement. The judge dismissed these allegations.

With respect to the 8(a)(3) allegations, the judge concluded that Respondent Esmark had closed the Moultrie and Guymon plants as part of its lawful and economically motivated plan to divest itself of the fresh meats holdings. With respect to the 8(a)(5) allegations, he concluded that Respondents SIC, SIPCO, and New Sipco were free to set new terms and conditions of employment on the reopening of the Moultrie and Guymon plants after the public stock sale because these Respondents were then in the posture of successor employers within the meaning of *NLRB v. Burns Security Services*, 406 U.S. 272 (1972), and thus were not obligated to adhere to the master agreement. The judge thus rejected the General Counsel's contention that SIC/SIPCO/New Sipco were alter egos/single integrated enterprises/joint employers with Esmark and Swift. The judge noted that SIC/SIPCO/New Sipco were newly incorporated entities which, following the stock sale, were owned by a new set of owners totally independent of the previous owners. The judge further concluded that neither Esmark nor Swift had played any part in the decisions to reopen the Moultrie and Guymon plants and to refuse to apply the master agreement. Accordingly, he concluded that neither Swift nor Esmark had violated Section 8(a)(5) by the failure to apply the master agreement at these facilities. Finally, the judge dismissed the allegation regarding the refusal to transfer the Tampa employees to Swift & Co. or New Sipco facilities inasmuch as he found Swift to be a completely separate entity and that New Sipco legitimately refused to honor the master agreement.

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[8] We agree with the judge's finding, to which no exceptions were filed, that Respondents SIC, SIPCO, and New Sipco violated Sec. 8(a)(5) and (1) by recognizing, bargaining with, and executing a collective-bargaining agreement with this local union rather than with the Union, which is the sole and exclusive collective-bargaining representative of the Guymon unit employees.

The General Counsel and the Union have excepted to these findings, and we find merit in these exceptions. In so doing, we initially find that Respondents Esmark, SIC, SIPCO, and New Sipco violated Section 8(a)(5) by failing to apply the provisions of the master agreement at the Moultrie and Guymon plants on their reopening in May 1981, shortly after the April stock sale. We reject the judge's reasoning that the April 1981 stock sale brought about a change of employers and, consequently, freed Esmark, SIC, SIPCO, and New Sipco from the obligations of the master agreement under which the plants had operated prior to the stock sale. In disagreeing with the judge, we set out the following observations from *EPE, Inc.*, 284 NLRB 191, 198 (1987):

> The principal thrust of the Respondent's argument . . . is that the liabilities and responsibilities of that corporate entity ceased to exist once the controlling shares therein were acquired by another shareholder or group of shareholders and the new shareholder set about making and executing plans for an enlargement or improvement of the business. This rule, if consistently followed, would mean that every day's transactions on every major stock exchange and every purchase or sale of a corporate subsidiary would carry with it the potential for total disruption of the labor relations of the business being bought or sold. It is a rule which is at a marked variance with most Board and court holdings, and it flies squarely in the face of traditional corporation law as it has developed in this country over many years because it is irreconcilable with the fundamental rule of corporation law that the corporation and its shareholders are separate and distinct entities.
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> In those rare instances in which the corporate veil is pierced, it is done for the benefit and protection of a third party or outsider, not at the instance and behest of the shareholders or corporate officers, as is the Respondent's implied request herein. *Western Boot & Shoe*, 205 NLRB 999, 1005.

Applying these principles to the facts of the present case, we find that the April 1981 stock sale to the public did not achieve any substantive changes in the SIPCO/New Sipco corporate entities such that they were privileged to repudiate the master agreement in effect at the fresh meats plants. We note that the corporate restructuring of the fresh meats operation from a division of Swift to a new corporation, SIPCO, was essentially achieved by October 1980, some 6 months prior to the stock sale. In the ensuing 6 months the SIPCO/New Sipco management operated the fresh meats business under the SIPCO corporate banner and under Esmark ownership. During this period the SIPCO/New Sipco management applied the provisions of the master agreement to its employees and thereby adopted that agreement. The April 1981 sale of stock did not substantively change the fresh meats operation in any respect. Instead, the April stock sale merely accomplished the transfer of stock from Esmark to an essentially different set of shareholders.[9] In all other respects the fresh meats operation after the stock sale continued in fundamentally the same fashion as it had before under the same corporate banner, SIPCO, which had been operating the fresh meats business for some 6 months under Esmark stock ownership. Thus, following the sale, SIPCO/New Sipco continued to process and sell fresh meats and related products at the same locations with the same equipment and with essentially the same personnel as it had before. Its management remained the same as that selected by John Copeland in line with his direction from Esmark's president, Kelly.[10] Accordingly, Esmark's sale of stock in April 1981 accomplished a mere transfer of stock ownership, which did not substantively change the fresh meats operation and did not absolve SIC/SIPCO/New Sipco from their obligation to adhere to the provisions of the master agreement. See *Western Boot & Shoe*, 205 NLRB 999 (1973); *Phil Wall & Sons Distributing*, 287 NLRB 1161 (1988). We therefore conclude that Respondents Esmark, SIC, SIPCO, and New Sipco have violated Section 8(a)(5) and (1) by failing to apply the terms and conditions of the 1979-1982 master agreement to unit employees at the Moultrie and Guymon plants following their reopening.[11]

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[9] Esmark did retain a 35-percent ownership interest in the SIPCO group.

[10] We further note that except for the brief closure of the Moultrie and Guymon plants, which we find to be, in effect, a sham, there was no hiatus in the fresh meats operation.

[11] To the extent that the Respondents may contend that the reorganization, rather than the stock sale, effectuated a substantive change such that the reorganized entities, the SIPCO group, constituted a successor, as set forth above, the SIPCO group adopted and applied the master agreement during the 6 months of operation prior to the stock sale. The SIPCO group thus became bound to the agreement, for as the Supreme Court noted in *NLRB v. Burns Security Services*, 406 U.S. 272, 291 (1972):

> [I]n a variety of circumstances involving a merger, stock acquisition, reorganization, or assets purchase, the Board might properly

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In this regard, we find Respondent Esmark to be liable because the actual repudiation of the master agreement was, as discussed below with respect to the 8(a)(3) allegation, the fulfillment of an unlawful plan, in which Esmark was an active participant, to close and then reopen these plants for the purpose of evading the application of the master agreement. As noted, infra, Esmark's direct participation in this unlawful conduct at pertinent times forecloses Esmark from evading liability under the criteria set out in *Gerace Construction*, 193 NLRB 645 (1971), and *McEwen Mfg. Co.*, 172 NLRB 990 (1968).[12] Because the evidence does not establish that Respondent Swift participated in this conduct, we shall dismiss this allegation with respect to Respondent Swift.

We further find that Respondent SIPCO violated Section 8(a)(5) and (1) by failing to provide the unit employees at its Tampa, Florida facility the full range of transfer opportunities set forth in the master agreement.[13] As the record does not establish that any of the remaining Respondents played any direct role in this conduct, we shall dismiss this allegation with respect to the remaining Respondents.

We additionally conclude that Respondents Esmark, SIC, SIPCO, and New Sipco violated Section 8(a)(3) and (1) by closing the Moultrie and Guymon plants. In this regard, we note that the Supreme Court in *NLRB v. Great Dane Trailers*, 388 U.S. 26, 34 (1967), set forth the following mode of analysis:

> First, if it can reasonably be concluded that the employer's discriminatory conduct was "inherently destructive" of important employee rights, no proof of an antiunion motivation is needed and the Board can find an unfair labor practice even if the employer introduces evidence that the conduct was motivated by business considerations. Second, if the adverse effect of the discriminatory conduct on employee rights is "comparatively slight," an antiunion motivation must be proved to sustain the charge *if* the employer has come forward with evidence of legitimate and substantial business justifications for the conduct. Thus, in either situation, once it has been proved that the employer engaged in discriminatory conduct which could have adversely affected employee rights to *some* extent, the burden is upon the employer to establish that he was motivated by legitimate objectives since proof of motivation is most accessible to him.

Thus, the Supreme Court has found that while normally an affirmative showing of unlawful motivation must be found, an exception may be made where the allegedly unlawful conduct is inherently destructive of employee rights. Such conduct carries with it "'unavoidable consequences which the employer not only foresaw but which it must have intended' and thus bears 'its own indicia of intent.'" *Great Dane Trailers*, supra at 33. See also *Metropolitan Edison Co. v. NLRB*, 460 U.S. 698 (1983). Inherently destructive conduct has been found to be of the sort which would inevitably hinder future bargaining or create visible and continuing obstacles to the future exercise of employee rights. Cf. *Inter-Collegiate Press v. NLRB*, 486 F.2d 837 (8th Cir. 1973); *Portland Willamette Co. v. NLRB*, 534 F.2d 1331 (9th Cir. 1976); and *NLRB v. Transportation Consultants*, 607 F.2d 290 (9th Cir. 1979).

We conclude that the Respondents' conduct here, which culminated in the termination of employees for the purpose of evading obligations under a collective-bargaining agreement, was inherently destructive of Section 7 rights. See *Los Angeles Marine Hardware Co. v. NLRB*, 602 F.2d 1302 (9th Cir. 1979), enfg. 235 NLRB 720 (1978).[14] In

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find as a matter of fact that the successor had assumed the obligations under the old contract.

See, e.g., *J.R.R. Realty Co.*, 273 NLRB 1523 (1985), enfd. 785 F.2d 46 (2d Cir. 1986), cert. denied sub nom. *Babab v. NLRB*, 123 LRRM 2592 (1986).

We agree with the judge's conclusion that this finding of a violation is not barred by the 6-month limitation proviso to Sec. 10(b). Thus, we agree that the 6-month period began to run at the closing of the plants in April 1981 and not in June 1980 when the closings were announced in Farren's letter. We note that the actionable violation alleged was the actual closures of the plants, not the announcement of the closures. We also note that Farren's June 1980 letter announced that the closings would take place in December 1980; yet they did not actually occur until some months later in April 1981. Evidently, at the time of Farren's letter, the plans for the plants were inchoate and imprecise and both the timing and circumstances of the closings assertedly contemplated were unclear. This was borne out, as set forth earlier in this decision, by the subsequent and various changes in the Respondents' plans. In these circumstances we agree that the 10(b) period began to run as of the date of the actual closures. *Bay Medical Center*, 252 NLRB 1138 (1980). See also *Teamsters Local 42 v. NLRB*, 825 F.2d 608, 615 (1st Cir. 1987).

[12] *Gerace* presented the question of whether two separate legal entities operated as a single employing enterprise and thus constituted a single employer under the Act. *McEwen* presented the question of whether one entity operated as a joint employer with another separate legal entity. As we have found that Esmark was a principal actor in the unlawful closures, its liability for this conduct does not require any finding that it was a single/joint employer within the SIPCO group. See fn. 17, infra.

[13] We agree with the judge's conclusion that Sec. 10(b) does not preclude the finding of this violation. In this regard, we disagree with the Respondents' contention that the "transfer opportunity sheets" given the Union in July 1980 were sufficient to constitute notice of the Respondents' intent to limit employee transfer rights upon the closure of the Tampa facility in August 1981. *American Olean Tile Co.*, 265 NLRB 1625 (1982), enf. denied on other grounds 826 F.2d 1496 (6th Cir. 1987). See also *Teamsters Local 42 v. NLRB*, supra.

[14] In *Milwaukee Spring Division*, 268 NLRB 601, 604 (1984), a Board majority overruled that portion of *Los Angeles Marine* which held that the employers' transfer of work from one location to another was violative of Secs. 8(a)(5) and 8(d). The Board did not, however, overrule that portion of *Los Angeles Marine* pertaining to the 8(a)(3) violation found.

the present case, the record clearly establishes that Moultrie and Guymon were closed for the purpose of evading the application of the master agreement at these two plants. This purpose is evident from the very outset of Esmark's reorganization of the fresh meats and processed meats divisions of the old Swift & Co. Indeed, we note that, from Copeland's first meeting with Anderson on this topic in August 1980, he made it quite clear to the Union that these two plants would be closed if the Union would not capitulate to a midterm modification in the master agreement. This theme was reiterated repeatedly throughout the numerous meetings that followed between Knight and Anderson wherein relief from the master agreement was sought.

In finding that the closure of these two plants was merely a part of a lawful economic plan to sell the fresh meats business, the judge failed to appreciate the significance of the substantial evidence establishing that the closures were intended from the outset to escape the terms of the master agreement. Indeed, the record shows the "closures" themselves were not genuine closures, but were merely maneuvers designed to achieve indirectly what the Respondents could not directly obtain from the Union.[15] Thus, we note that the "closures" were effectuated with the preconceived intent to reopen the plants shortly thereafter under new terms and conditions of employment at variance from those in the master agreement. This intent is evident in the numerous meetings detailed above that took place prior to the closures and is documented in Knight's December 11, 1980 letter to Anderson indicating that "[t]hese two plants will be closed . . . and it is intended that these plants will be opened in early 1981 as non-Master Agreement units." We also note particularly the representations made in the prospectus accompanying the stock sale that "[a] new subsidiary of the Company intends to open Guymon and Moultrie shortly after completion of this offering with the objective of achieving competitive labor costs at these facilities." Thus, the Respondents openly and repeatedly professed their intent should the Union not consent to abrogate the agreed-upon contract.[16] Particularly in this context, the closing of the plants, the termination of the employees, and, as Knight himself testified, the rehiring of those employees "as new employees of the corporation" under new terms and conditions of employment must be considered conduct that would naturally hinder collective bargaining and as conduct inherently destructive of employee rights. Accordingly, we find that Respondents Esmark, SIC, SIPCO, and New Sipco, in concert, by causing the termination of the Moultrie and Guymon unit employees, have engaged in conduct inherently destructive of employees' Section 7 rights.[17]

Having found that Respondents Esmark, SIC, SIPCO, and New Sipco have engaged in conduct inherently destructive of employees' Section 7 rights, the burden has shifted to them, under *Great Dane*, to establish legitimate objectives for this conduct.[18] Respondents SIC, SIPCO, and New Sipco

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[15] As the record establishes that the closings were a sham, we note that the analysis pertaining to genuine plant closures set out in *Textile Workers v. Darlington Mfg.*, 380 U.S. 263 (1965), is inapplicable to the 8(a)(3) allegations in the present case.

[16] Pursuant to Sec. 8(d), the Union was under no obligation to consent to the modification or abrogation of the contract. See also *Oak Cliff-Golman Baking Co.*, 207 NLRB 1063 (1973), enfd. 505 F.2d 1302 (5th Cir. 1974), cert. denied 423 U.S. 826 (1975).

[17] We note additionally that in *NLRB v. City Disposal Systems*, 465 U.S. 822, 831–832 (1984), the Supreme Court stated:

> The invocation of a right rooted in a collective-bargaining agreement is unquestionably an integral part of the process that gave rise to the agreement. That process—beginning with the organization of a union, continuing into the negotiation of a collective-bargaining agreement, and extending through the enforcement of the agreement—is a single, collective activity.

Thus it is evident that conduct deemed discriminatory within the meaning of Sec. 8(a)(3), which is intended to deprive employees of bargained for contractual rights and benefits, may be analogous to discriminatory conduct designed to deprive them of a bargaining representative in the first instance. Accordingly, based on our findings with respect to the Respondents' conduct, we find that actual unlawful motive on their part can be found.

[18] We reject the contention of Respondents SIC/SIPCO/New Sipco that they are not liable for the closing of the Moultrie and Guymon plants because the decision to close was made solely by Esmark prior to their existence. The record clearly shows that these Respondents acted in concert with Esmark in closing these facilities. In this regard, we note that it was Respondent SIPCO's vice president, Knight, who played the major role in negotiating with the Union over the effects of the closure and in attempting to persuade Anderson to forgo application of the master agreement at these two plants. We further note SIPCO's active participation in the closure and planned reopening of the plants as evidenced in Knight's December 22, 1980 letter to Anderson on SIPCO stationery in his capacity as vice president, which indicates that "It is our present intention to close the Moultrie and Guymon plants on or about March 7, 1981, or just prior to [SIPCO] becoming a publicly held corporation." Finally, we note that the record shows that the filing for the incorporation of Respondent New Sipco was accomplished by SIPCO's attorney, Thompson, at the suggestion of SIPCO's general counsel, McKay, and we find that this step was taken as a further part of the scheme to close and reopen the Guymon and Moultrie plants to evade the obligations of the master agreement.

We similarly reject the contention of Respondent Esmark that it is not liable for closing of these plants on the grounds that the decision to close was made in June 1980 solely by Respondent SIPCO, through John Copeland, and that Esmark, as a mere parent corporation, did not participate in nor have any control over the labor relations decisions of its (then) wholly owned subsidiary. In rejecting this contention, we note that the record convincingly establishes that Esmark was a principal actor in the closures. We first note that at the time the decision was made to close these plants in June 1980 Copeland was reporting directly to Esmark's president, Donald Kelly. Copeland's plans for reorganizing the former fresh meats operations and for closing Moultrie and Guymon were made at the direction of and in consultation with Kelly. Esmark admits that its board of directors approved the decision to close the plants. Moreover, the record also shows that Esmark paid the resulting closing costs and assumed the unfunded pension liability resulting from the closings. In these circumstances, we find unavailing Esmark's reliance on *Gerace Construction*, 193 NLRB 645 (1971), and *McEwen Mfg. Co.*, 172 NLRB 990 (1968), as support for its proposition that it did not participate in or have any control over the labor relations decisions of SIPCO. As Esmark was a principal actor in the unlawful plant closures, its liability for these

Continued

contend, in pertinent part, that Moultrie and Guymon were closed to make the fresh meats operation more attractive to prospective purchasers and to enhance Esmark's ability to sell it. Respondent Esmark contends, in pertinent part, that the plants were closed because Copeland and Knight had decided that these plants would not fit into the new corporation (SIPCO) and because Swift, no longer in the fresh meats business, had no use for them.

We find these contentions to be implausible, inconsistent with the record, and insufficient to meet the burden of establishing "legitimate objectives" for the conduct in question. Moreover, even assuming that the Respondents' conduct was not "inherently destructive" but had only a comparatively slight adverse effect on employee Section 7 rights, within the meaning of *Great Dane*, we would further reject the Respondents' contentions on the basis that they do not establish adequate business justification for the discriminatory conduct.

In this regard, we note first that insofar as the destiny of Moultrie and Guymon was to be used to attract potential purchasers, the record shows that it was their planned reopening, not their closure, that was pointed out to potential purchasers in the prospectus prepared for the stock sale. Moreover, the record shows that the plants were closed not because Copeland or Knight felt them to be unsuitable for inclusion in the new corporation, but because the Union would not agree to a midterm modification of the master agreement in effect at these two plants. We note that in an August 1980 meeting with Anderson, Copeland advised Anderson that these two plants would fit in well with the new company but that he would not keep them open if he had to pay master agreement rates. A desire to escape collective-bargaining obligations, though economically motivated, is not a legitimate justification in this context. See *Los Angeles Marine*, supra, 235 NLRB at 735-736, and *Dahl Fish Co.*, 279 NLRB 1084 (1986), enfd. mem. 813 F.2d 1254 (D.C. Cir. 1987). The record establishes that such a desire was the Respondents' sole motivation for their action. Accordingly, we find that Respondents Esmark, SIC, SIPCO, and New Sipco have failed to establish legitimate objectives for their conduct and we conclude that they have violated Section 8(a)(3) and (1) by closing the plants in Moultrie and Guymon and terminating the employees for the purpose of evading the obligations under the 1979-1982 master agreement with the Union.[19] Because the record does not show that Respondent Swift participated in this conduct, we shall dismiss this allegation with respect to Respondent Swift.

ORDER

The National Labor Relations Board orders that

A. The Respondents, Esmark, Inc.; Swift Independent Corp.; Swift Independent Packing Co.; and New Sipco, Inc., Chicago, Illinois, their officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Closing facilities in Guymon, Oklahoma, and Moultrie, Georgia, and terminating employees at those facilities for the purpose of evading obligations under the 1979-1982 master collective-bargaining agreement with United Food and Commercial Workers International Union, AFL-CIO.

(b) Failing to apply the terms and conditions of the 1979-1982 master collective-bargaining agreement to unit employees employed in the Guymon, Oklahoma, and Moultrie, Georgia plants without the express written consent of United Food and Commercial Workers International Union, AFL-CIO.

(c) Recognizing and bargaining with and executing a contract or authorizing the same with Local Union 340, United Food and Commercial Workers International Union (AFL-CIO-CLC) as the exclusive collective-bargaining representative of the unit employees at the Guymon, Oklahoma plant unless requested to do so by United Food and Commercial Workers International Union, AFL-CIO.

(d) Giving effect to the collective-bargaining agreement with Local 340, United Food and Commercial Workers International Union (AFL-CIO-CLC) executed on May 6, 1981, or to any extension, renewal, or modification thereof; provided, however, that nothing in this Decision and Order shall be construed as requiring the Respondents to revoke any increase in wages or benefits or other substantive terms and conditions of employment that the Respondents have established in the performance of this agreement, or to prejudice the em-

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unfair labor practices does not require any finding that it had the status of alter ego/single employer, etc., with the SIPCO group. See fn. 12, supra.

[19] For the reasons set forth supra at fn. 11, we agree with the judge that this finding is not barred by the 6-month limitations proviso to Sec. 10(b).

Chairman Stephens agrees with his colleagues that Respondents Esmark, SIC, SIPCO, and New Sipco closed the Moultrie and Guymon plants and terminated the plant employees for the purpose of reopening the plants in a guise that would allow continued operation free of the terms of the still unexpired collective-bargaining agreement. Because of this finding concerning the motive of the Respondents, Chairman Stephens finds it unnecessary to analyze the case under the *Great Dane* test employed in the absence of "proof of an underlying improper motive." *NLRB v. Great Dane Trailers*, supra, 388 U.S. at 33.

ployees' assertion of their rights under the agreement.

(e) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Offer employees of the Guymon, Oklahoma, and Moultrie, Georgia plants immediate and full reinstatement to their former jobs or, if those jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority or any other rights or privileges previously enjoyed, and make them whole for any loss of earnings and other benefits suffered as a result of the discrimination against them as prescribed in *F. W. Woolworth Co.*, 90 NLRB 289 (1950), with interest as computed in *New Horizons for the Retarded.*[20]

(b) On request, apply the provisions of the 1979–1982 master collective-bargaining agreement with United Food and Commercial Workers International Union, AFL–CIO to employees in each of the following appropriate units:

> All production and maintenance employees employed at the Moultrie, Ga. plant, but excluding production incentive department employees, time office employees, superintendent's office employees, canteen manager, curing department scaler, watchmen, general foremen, foremen, assistant foremen, the superintendent, division superintendents, and all supervisors as defined in the Act.
>
> All production and maintenance employees including truckdrivers employed at the Guymon, Oklahoma plant, but excluding the plant manager, plant superintendent, plant auditor, chief clerk, department managers, salesmen, service truck salesmen, office clerical employees, plant clerical employees, quality assurance employees, livestock buyers, livestock buyer trainees, livestock clerical employees, livestock scalers, livestock yardmen and handlers, medical department employees, professional employees, protection employees, and all supervisory employees as defined in the Act.

(c) Make whole employees for any losses suffered by reason of the failure to apply the terms and conditions of the 1979–1982 master agreement to employees employed in each of the bargaining units noted above, with interest. *Ogle Protection Service*, 183 NLRB 682 (1970).

(d) Withdraw and withhold all recognition from Local 340, United Food and Commercial Workers International Union (AFL–CIO–CLC) as the exclusive bargaining representative of their employees for the purposes of collective bargaining at the Guymon, Oklahoma plant unless and until United Food and Commercial Workers International Union, AFL–CIO shall have requested the Respondents to recognize Local 340 as its agent for such purposes.

(e) On request, bargain collectively with United Food and Commercial Workers International Union, AFL–CIO as the exclusive bargaining representative of the employees in the Guymon, Oklahoma unit and, if an understanding is reached, embody such understanding in a signed agreement.

(f) Preserve and, on request, make available to the Board or its agents for examination and copying, all payroll records, social security payment records, timecards, personnel records and reports, and all other records necessary to analyze the amount of backpay due under the terms of this Order.

(g) Post at its plants located in Guymon, Oklahoma, and Moultrie, Georgia, copies of the attached notice marked "Appendix A."[21] Copies of the notice, on forms provided by the Regional Director for Region 13, after being signed by the Respondents' authorized representative, shall be posted by the Respondents immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondents to ensure that the notices are not altered, defaced, or covered by any other material.

(h) Notify the Regional Director in writing within 20 days from the date of this Order what steps the Respondents have taken to comply.

B. The Respondent, Swift Independent Packing Co., Chicago, Illinois, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Failing to provide unit employees of the Tampa, Florida facility the full range of transfer opportunities as required by the 1979-1982 master collective-bargaining agreement with United Food and Commercial Workers International Union, AFL-CIO.

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[20] In accordance with our decision in *New Horizons for the Retarded*, 283 NLRB 1173 (1987), interest on and after January 1, 1987, shall be computed at the "short-term Federal rate" for the underpayment of taxes as set out in the 1986 amendment to 26 U.S.C. § 6621. Interest on amounts accrued prior to January 1, 1987 (the effective date of the 1986 amendment to 26 U.S.C. § 6621), shall be computed in accordance with *Florida Steel Corp.*, 231 NLRB 651 (1977). In requiring that employees be made whole, interim earnings will be deducted from lost wages. In the circumstances of this case, the measure of interim earnings should include payments of closing benefits by Esmark pursuant to the terms of the master agreement. *A. S. Abell Co.*, 230 NLRB 17, 21 (1977), affd. 590 F.2d 554 (4th Cir. 1979).

[21] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

(b) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) On request, implement the full range of transfer opportunities provided for in the 1979-1982 master collective-bargaining agreement with United Food and Commercial Workers International Union, AFL-CIO, for employees in the following appropriate unit:

> All production and maintenance employees, including truck drivers, engineers, maintenance men, electricians, conveyor operators, continuous frank machine operators, at the Processing Sales Unit, Tampa, Fla., excluding the manager, the superintendent, salesmen, sales promotion men, sales demonstrators, service truck salesmen, shippers, assistant shippers, foremen, assistant foremen, all office and all office-clerical and plant clerical employees, guards, and all supervisors as defined in the Act.

(b) Make whole all unit employees of the Tampa, Florida facility for any losses they may have suffered as a result of the Respondent's denial of the full range of transfer opportunities provided for in the 1979-1982 master collective-bargaining agreement, as prescribed in *F. W. Woolworth Co.*, 90 NLRB 289 (1950), with interest as computed in *New Horizons for the Retarded.*[22]

(c) Preserve and, on request, make available to the Board or its agents for examination and copying, all payroll records, social security payment records, timecards, personnel records and reports, and all other records necessary to analyze the amount of backpay due under the terms of this Order.

(d) Mail a copy of the attached notice marked "Appendix B"[23] to the Union and to the last known address of each unit employee who was employed at the Tampa, Florida facility on the date of its closing in August 1981. Copies of the notice, on forms provided by the Regional Director for Region 13, after being signed by the Respondent's authorized representative, shall be mailed by the Respondent immediately upon receipt as above directed.

(e) Notify the Regional Director in writing within 20 days from the date of this Order what steps the Respondent has taken to comply.

APPENDIX A

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

WE WILL NOT close our facilities in Guymon, Oklahoma, and Moultrie, Georgia, and terminate employees at those facilities for the purpose of evading our obligations under the 1979-1982 master collective-bargaining agreement with United Food and Commercial Workers International Union, AFL-CIO.

WE WILL NOT fail to apply the terms and conditions of the 1979-1982 master collective-bargaining agreement to unit employees employed in the Guymon, Oklahoma, and Moultrie, Georgia plants without the express written consent of United Food and Commercial Workers International Union, AFL-CIO.

WE WILL NOT recognize and bargain with or execute a contract or authorize the same with Local 340, United Food and Commercial Workers International Union (AFL-CIO-CLC) as the exclusive collective-bargaining representative of the unit employees at our Guymon, Oklahoma plant unless requested to do so by United Food and Commercial Workers International Union, AFL-CIO.

WE WILL NOT give effect to the collective-bargaining agreement with Local 340, United Food and Commercial Workers International Union (AFL-CIO-CLC) executed on May 6, 1981, or to any extension, renewal, or modification thereof; however, nothing in the Board's Decision and Order requires us to revoke any increases in wages or benefits or other substantive terms and conditions of employment that we have established in the performance of this agreement, or to prejudice the employees' assertion of their rights under the agreement.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL offer employees of the Guymon, Oklahoma, and Moultrie, Georgia plants immediate and full reinstatement to their former jobs or, if those jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority or any other rights or privileges previously enjoyed and WE WILL make them whole for any loss of earnings and other benefits resulting from the discrimination against them, less any net interim earnings, plus interest.

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[22] See fn. 20, supra.

[23] See fn. 21, supra.

WE WILL, on request, apply the provisions of the 1979-1982 master collective-bargaining agreement with United Food and Commercial Workers International Union, AFL-CIO to employees in each of the following bargaining units:

> All production and maintenance employees employed at the Moultrie, Ga. plant, but excluding production incentive department employees, time office employees, superintendent's office employees, canteen manager, curing department scaler, watchmen, general foremen, foremen, assistant foremen, the superintendent, division superintendents, and all supervisors as defined in the Act.
>
> All production and maintenance employees including truckdrivers employed at the Guymon, Oklahoma plant, but excluding the plant manager, plant superintendent, plant auditor, chief clerk, department managers, salesmen, service truck salesmen, office clerical employees, plant clerical employees, quality assurance employees, livestock buyers, livestock buyer trainees, livestock clerical employees, livestock scalers, livestock yardmen and handlers, medical department employees, professional employees, protection employees, and all supervisory employees as defined in the Act.

WE WILL make whole employees for any losses suffered by reason of our failure to apply the terms and conditions of the 1979-1982 master agreement to employees employed in each of the bargaining units noted above, with interest.

WE WILL withdraw and withhold all recognition from Local 340, United Food and Commercial Workers International Union (AFL-CIO-CLC) as the exclusive bargaining representative of our employees at our Guymon, Oklahoma plant unless United Food and Commercial Workers International Union, AFL-CIO requests us to recognize Local 340 as its agent.

WE WILL, on request, bargain collectively with United Food and Commercial Workers International Union, AFL-CIO, as the exclusive bargaining representative of the employees in the Guymon, Oklahoma unit and, if an understanding is reached, we will embody it in a signed agreement.

ESMARK, INC.

SWIFT INDEPENDENT CORP.

SWIFT INDEPENDENT PACKING CO.

NEW SIPCO, INC.

APPENDIX B

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

WE WILL NOT fail to provide unit employees formerly employed at our Tampa, Florida facility the full range of transfer opportunities as required by the 1979-1982 master collective-bargaining agreement with United Food and Commercial Workers International Union, AFL-CIO.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL, on request, implement the full range of transfer opportunities provided for in the 1979-1982 master collective-bargaining agreement with United Food and Commercial Workers International Union, AFL-CIO, for employees employed in the following appropriate unit:

> All production and maintenance employees, including truck drivers, engineers, maintenance men, electricians, conveyor operators, continuous frank machine operators, at the Processing Sales Unit, Tampa, Fla., excluding the manager, the superintendent, salesmen, sales promotion men, sales demonstrators, service truck salesmen, shippers, assistant shippers, foremen, assistant foremen, all office and all office-clerical and plant clerical employees, guards, and all supervisors as defined in the Act.

WE WILL make whole employees for any losses suffered by reason of our denial of the full range of transfer opportunities provided for in the 1979-1982 master collective-bargaining agreement, with interest.

SWIFT INDEPENDENT PACKING CO.

Rochelle Golub, Esq., for the General Counsel.

George P. Blake and *Lawrence J. Casazza, Esqs. (Vedder, Price, Kaufman & Kammholz)*, of Chicago, Illinois, for Respondent Swift Independent Corporation et al.
Bruce H. Thompson, Esq., of Chicago, Illinois, for Respondent Swift Independent Packing Company.
Phillip V. Carter, Douglas Darch, and *John Schauer, Esqs. (Seyfarth, Shaw, Fairweather & Geraldson)*, of Chicago, Illinois, for Respondent Esmark.
George V. Gallagher and *Donald H. Bussman, Esqs.*, of Chicago, Illinois, for Respondent Swift & Company.
Irving M. King, Esq. (Cotton, Watt, Jones, King & Bowlus), of Chicago, Illinois, and *Carol Clifford, Esq.*, of Washington, D.C., for the Charging Party.

DECISION

STATEMENT OF THE CASE

WILLIAM F. JACOBS, Administrative Law Judge. These consolidated cases were heard in Chicago, Illinois, on various dates from February 17 to May 5, 1982.[1] The charge in Case 13-CA-21156 was filed on May 29, 1981, by United Food and Commercial Workers International Union, AFL-CIO (the Union). The complaint issued on July 10, 1981, alleging that Respondents Swift Independent Corporation (SIC), Swift Independent Packing Company (SIPCO), New Sipco, Inc. (New Sipco), Swift & Company (Swift), and Esmark, Inc. (Esmark) as joint and/or single employers and/or alter egos, violated Section 8(a)(1) and (3) of the Act by closing plants in Moultrie, Georgia, and Guymon, Oklahoma, and terminating unit employees at these facilities and violated Section 8(a)(1) and (5) of the Act by repudiating the master agreement between the Union and Swift, by refusing to adhere to and apply the terms of that agreement when the plants at Moultrie and Guymon were reopened and by bypassing the Union and negotiating with Local Union 340, a local of the Union, for a separate agreement covering the employees at the Guymon plant. Answers and amended answers filed by the various Respondents denied the commission of any unfair labor practices.

The charge in Case 13-CA-21274 was filed by the Union on July 6, 1981. The complaint issued on August 17, 1981, alleging that the Respondents, named above, repudiated the transfer rights of employees under the master agreement by unlawfully limiting the transfer rights of employees of the Tampa, Florida processing sales unit without affording the Union an opportunity to bargain about such unilateral limitations or about the effects thereof. The answers and amended answers denied the commission of any unfair labor practices. The two cases were consolidated on August 20, 1981.

In addition to the general denials contained in the answers of each Respondent, there were also affirmative responses. Thus, Esmark pleaded that the alleged unfair labor practice occurred, if indeed it had occurred, prior to November 29, 1980, and was thus barred by Section 10(b). Esmark also pleaded that it had never had a collective-bargaining relationship with or a bargaining obligation to the Union. Swift pleaded that the original charge, Case 13-CA-21156, did not name Swift as a respondent and that Swift was never served a copy of the charge as required by Section 10(b). Similarly, Swift pleaded that a copy of the charge in Case 13-CA-21274 was never served on it as required by Section 10(b). SIC filed an answer in which it admitted that SIPCO implemented the plant closings at Moultrie and Guymon and terminated bargaining unit employees at these facilities, that New Sipco thereafter refused to apply the master agreement at Moultrie and Guymon when those plants were reopened and that upon the closing of the Tampa processing sales unit, SIC permitted eligible bargaining unit employees to exercise their master agreement seniority to transfer only to other SIPCO facilities covered by the master agreement. SIC, however, denied that any of these activities violated the Act. It denied all other allegations contained in the complaint and asserted that the allegations regarding the closing of Moultrie and Guymon and the subsequent refusal to apply the master agreement were barred by the limitations period contained in Section 10(b).

All parties were represented at the hearing and were afforded full opportunity to be heard and present evidence and argument. All parties filed briefs. On the entire record, my observation of the demeanor of the witnesses, and after giving due consideration to the briefs, I make the following

FINDINGS OF FACT

Respondents are admittedly employers engaged in commerce within the meaning of Section 2(6) and (7) of the Act. The Union is admittedly a labor organization within the meaning of Section 2(5) of the Act.

I. THE UNFAIR LABOR PRACTICES

A. *Background*

The original Swift & Company began operations late in the 19th century as a meatpacking company. In 1945, the Union[2] and that company reached agreement for the Union's representation of the Company's employees, and in 1945 the first master agreement was executed by the parties. At the same time, other meatpacking companies reached agreement with the Union for similar master agreements.

In 1948, John Copeland became associated with Swift & Company, was appointed a vice president[3] of that corporation in 1965 and remained in its employ until October 24, 1980. In 1956, Richard Knight became associated with Swift & Company[4] and in 1974 was appointed vice president of services. He also managed several of the corporation's plants. Later, both of these individuals became associated with newly formed companies that are alleged in the complaint to be alter egos of Swift & Company.

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[1] On May 5, 1982, the hearing was adjourned sine die pending the receipt of interim briefs necessitated by the offer into the record of almost 500 exhibits and the desire to avoid argument as to the relevancy of each. Interim briefs were subsequently received and the case closed on August 30, 1982.

[2] Then called United Packinghouse Workers of America, CIO.

[3] Swift fresh meats division.

[4] Copeland also served as a member of the board of directors.

Until the later 1950s and early 1960s the meatpacking business was concentrated primarily in the hands of a few old line companies, Swift & Company among them, with plants located primarily in large meatpacking centers such as Chicago, Kansas City, St. Paul, and Omaha. During the 1960s, however, new companies came into existence, known generally as the new breed companies, and these built modern plants mostly located closer to the sources of supply. Swift & Company and other old line companies, because of outmoded facilities and equipment, poor locations, and high labor costs began closing various plants that could no longer compete. They also built new modern plants themselves with new equipment and techniques that were better able to compete with the newer companies. Despite the modernization undergone by the old line companies, however, they still suffered in competition with the new breed companies because of being saddled with heavy labor costs due to their being under master agreement while the new breed companies either had no labor unions at all or less costly local contracts.

Swift & Company in 1960 had 40 meatpacking plants in operation and produced about 15 percent of the nations inspected slaughtered beef, 16 percent of the pork, and 31 percent of the lamb. By 1980 these percentages dropped to 3-1/2, 6-1/2, and 16, respectively. Most of the decline occurred in the 1960s, although it continued thereafter.

Despite economic adversity in the 1960s and thereafter, Swift & Company endeavored to remain a viable part of the meatpacking industry by building or purchasing new plants and by expanding the number and type of commodities it sold. Also, during this period Swift & Company continued to negotiate consecutive master agreements with the Union[5] covering its employees throughout the country.

In 1969 there was a reorganization of Swift & Company and at that time the corporation was divided into divisional companies, one of which was Swift Fresh Meat Company. At this time, Copeland was asked to resign his position at Swift & Company and was appointed vice president of Swift Fresh Meat Company. Meanwhile, the merged unions, the United Packinghouse Workers and the Amalgamated Meat Cutters, combined their master agreements into a single document that was applied to the employees of Swift & Company, which the new union continued to represent. A new master agreement[6] was negotiated in 1970.

In the early 1970s Swift & Company undertook further attempts at diversification. In particular, less emphasis was placed on fresh beef and pork and more on consumer branded food products and nonfood products. In April 1973, further attempts at diversification were undertaken when Swift & Company, with the approval of its shareholders, created Esmark. Esmark was conceived of strictly as a holding company with no production facilities of its own. All production facilities were divided among its several wholly owned subsidiaries while Esmark itself provided only advisory counseling to them in areas of public relations, legal counsel, and fiscal matters.[7] The subsidiaries were left free to run their own businesses; to buy, sell, and distribute; and to do their own research and engineering. Esmark did, however, audit each subsidiary's books and pay their taxes.

The top managerial positions of the newly created Esmark were filled with individuals previously employed by Swift & Company. Thus, President Robert W. Reneker, Swift & Company, became the first president of Esmark and Robert Palenchar,[8] Swift & Company's vice president of personnel and public relations, became Esmark's vice president of personnel and public relations.

The subsidiaries that evolved in 1973 as a result of the reorganization were five or six in number, including Estech, Eschem,[9] and Swift & Company. Estech, a newly formed company, was separated from Swift & Company. It produced primarily fertilizer, leather, and adhesives. Estech's employees,[10] when it was part of Swift & Company, had been represented by the Union. After its separation from Swift & Company, its employees continued to be represented by the Union, under the master agreement. Eschem, a speciality chemical company previously wholly owned by Swift & Company, also continued to have its employees represented by the Union, under the master agreement, after separation. Swift & Company, following the reorganization, continued its food production operations, producing meat, peanut butter, edible oils, turkeys, and cheese. Its employees also continued to be represented by the Union under the master agreement.

In 1973 a new master agreement was negotiated. The procedure was exactly the same as it had been in prior years.[11] At the negotiating table, representing the Union was Jesse Prosten and representing Swift & Company and Estech were several individuals including Palenchar, still a vice president with Esmark, who acted as spokesman. Palenchar signed the document on behalf of Swift & Company and Estech both of whom were specifically named as parties in the document.

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[5] During this period the Union's name was changed to Amalgamated Meat Cutters and Butcher Workmen of North America, AFL–CIO. This followed a merger of two separate unions engaged in similar work within the industry.

[6] The negotiation of the 1970 master agreement took the form of previously negotiated contracts. A national conference of packing plant delegates, 300-400 in number, was called. Resolutions prepared earlier by the various locals as well as resolutions prepared at the conference outlining proposed demands to be made later on the packing industry were introduced for consideration. Proposed demands agreed on at the conference were later taken back to the chain (delegates from plants of a particular company) for consideration of such demands as well as of the needs of the local. Once decisions were made at the local level, a date was requested of each company for the undertaking of full-fledged negotiations. At the negotiations, union representatives from the Swift & Company plants were present as well as a spokesman from the International. The Union was represented by 40 to 60 people, while a dozen company representatives and a company spokesman were also present. The 1970 labor agreement was eventually agreed on in this fashion.

[7] Esmark also took over the administration of certain pension plans from Swift & Company.

[8] Palenchar represented Swift & Company during the 1970 negotiations with the Union.

[9] Initially known as Unitech.

[10] Estech's managerial personnel also came from the ranks of Swift & Company's management. Thus, Joseph Sullivan, president of Swift Agricultural Chemical Corporation, part of Swift & Company, became Estech's first president.

[11] The Union was, however, notified of the restructuring of the companies, that they were all separate corporate entities but that all would be parties to the agreement.

The 1973-1976 master agreement was administered on a day-to-day basis at the local level despite the fact that it had been negotiated by Palenchar as vice president of Esmark. Palenchar, however, handled the more important matters.[12] Thus, it was Copeland's office[13] at Swift & Company and Richard Green at Estech that handled grievances at all steps up to arbitration at which time Palenchar at Esmark made the final decision whether the grievance should go to arbitration. The pension and insurance programs, however, were Esmark's so that the various divisional personnel departments worked together with Esmark's people to administer these programs.

During the 1973-1976 period, following the creation of Esmark, it was determined that the program of diversification should continue and that expansion into other areas where a more reasonable rate of return on investments and more consistent profits could be expected than could ordinarily be obtained from a strictly commodity-oriented business. Through the years prior to the creation of Esmark, the profits on sales of beef and pork had been inconsistent. Some years there had been reasonable profits while other years the profits were small or nonexistent. In the late 1960s and in 1971 and 1972, Swift & Company's earnings were poor. In 1973 its earnings suddenly increased. This, of course, was good for Swift & Company because the purpose of its existence was to sell its products. It was not, however, good for Esmark, which, as a holding company producing nothing, was interested in seeing the value of its stock increase; stock value being measured by the P/E[14] ratio. When Swift & Company was earning less in previous years, Esmark's stock P/E had been 10 or 12. When its earnings suddenly increased in 1973, the P/E of Esmark's stock suddenly dropped to about 4 or 5. In short, the value of Esmark's stock failed to increase proportionally as Swift & Company's earnings increased. It was determined through a survey that the probable reason for the failure of Esmark's stock value to increase was the fact that Esmark was still unknown. It was therefore determined that an advertising campaign should be undertaken in order to educate the public as to what Esmark was and of what its holdings consisted. The advertising campaign was initiated in 1974.

In 1975 Swift & Company closed a plant in Kearny, New Jersey, and sold another in Wilson, North Carolina. Costs of closing were charged by Esmark to Swift & Company. After the sale of the Wilson plant, the new owners[15] negotiated a new contract with the Union at much lower rates. The Wilson plant, a modern one, well located, had been closed because its labor costs were too high compared to that of its competition. Other plants,[16] which were modern and well located, were also closed during the 1960s, 1970s, and early 1980s solely because of the disadvantageous comparative labor costs under the master agreement. Thus, despite the reorganization of 1973 and the dramatic increased earnings enjoyed by Swift & Company that year, economic difficulties reappeared thereafter, at least in part due to labor costs.

In 1975, Palenchar decided that since Esmark was not involved in the actual operations of any of its subsidiaries, the labor relations function was not appropriately a part of Esmark. He suggested to Swift & Company that it take over that function. However, since the 1976 negotiations were near at hand, the personnel at Swift & Company requested that he stay on the job as bargaining head rather than have Swift & Company undertake obtaining an outside consultant to represent Swift & Company in bargaining. Palenchar agreed to the request after discussing the matter first with Donald Kelly, newly appointed president of Esmark, on condition that Swift Fresh Meat Company provide a major executive to be part of the negotiating team since Palenchar was no longer close to the operations of Swift. The condition was agreed on and Richard Knight, vice president of services, fresh meat division, Swift & Company, was assigned to aid Palenchar.[17] Similarly, Richard Green was present representing Estech's interests while Carl Marshall represented the processed meats division. Jesse Prosten was the Union's chief negotiator[18] and Palenchar was chief spokesman for both Swift & Company and Estech. On local problems subcommittee meetings were held. On health and welfare and pension matters,[19] the Union's William Burns negotiated with Robert Bell, manager of benefits. The negotiations resulted in the signing of the 1976-1979 master agreement with Palenchar signing for Swift & Company and Estech and Prosten signing for the Union.

Following execution of the 1976 master agreement, there was no immediate changes in the method of its administration. Most grievances that arose under that agreement concerned the reasonable and customary clause of the health benefit provision matters. These grievances were handled by William Burnes for the Union and Robert Bell who was initially manager of benefits of Swift & Company but who later took the same title as Esmark.

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[12] Palenchar, during this period, had a number of personal contacts with Prosten concerning labor matter, and the administration of the contract. He also had two Esmark employees, Bob Lillian and Bruce Thompson, aiding him in his liaison labor work with Swift & Company.

[13] Clyde Aud and Dick Tagg handled grievances for the Fresh Meats Company's labor department. Aud was vice president and Tagg was the head of the staff.

[14] Price/earnings ratio.

[15] Dinner Bell Foods.

[16] Clovis, New Mexico (1980), Grand Island, Nebraska (1976), Tolleson, Arizona, and Scottsbluff, Nebraska.

[17] Palenchar was accompanied by two members of his own staff, Thompson and Lillian, who, despite being employees of Esmark, continued to maintain their offices at the Swift & Company site.

[18] Prosten was aided by the Union's Lewie Anderson.

[19] Increased benefits of retirees was of particular concern during these negotiations because the Union had set the pattern with Wilson Packing but Swift & Company had far more retirees receiving benefits than any other company under the master agreement. Thus, Swift had more to lose than other companies even though the master agreement signed by each company was virtually the same. With over 19,000 retirees to receive increased benefits under the new master agreement the management bargaining representatives were disturbed by the additional costs to them relative to the cost to be encountered by its competitors. The Company offered counterproposals to the Union but these were rejected and ultimatley the master agreement pattern proposal on this matter was accepted.

In 1976, William Watchman was brought into Swift & Company and made president in 1977. His backgound was in marketing and under his direction Swift & Company instituted a new program emphasizing the sale of consumer branded products, a change in direction that Esmark had repeatedly advocated. As part of the new program's implementation, Swift's fresh meat division's sales units, that had been selling turkeys and processed meat items along with their own fresh meats on a rental basis,[20] were, beginning in 1977, no longer permitted to do so. Rather, Swift & Company set up its own sales organization to handle the retail sale of processed meats and turkeys through its own salesmen and through outside brokers. Thus, in certain areas of the country Swift's fresh meat division salesmen would be selling fresh meats while other salesmen or brokers in the same area would at the same time be selling consumer branded products, processed meat items, and turkeys to retail customers.[21] Thus, there took place in 1977 the first of several steps, which eventually culminated in a complete separation of fresh meat business from the rest of the businesses operated within the Esmark family of companies.

Along with the business reorganization in 1977 there was also a labor relations reorganization that took place at the same time. The two were to complement each other. Thus, Palenchar for Esmark and Watchman for Swift & Company determined to remove Esmark from the labor relations field, and place all relations of this kind in the hands of those who dealt with them on a day-to-day basis. To accomplish this purpose, Watchman selected Director of Personnel of Playtex[22] James Farren to become vice president of personnel of Swift & Company. Lillian and Thompson were transferred from Palenchar's staff and from Esmark's payroll to Farren's staff and to Swift & Company's payroll to support Farren.[23] Palenchar also shifted all of his Swift & Company and Estech files to Farren's office. At the same time, personnel matters previously under control of Swift & Company's divisional offices were transferred to centralized control under Farren's office at Swift & Company. This was part of a larger reorganization wherein other divisional offices having to do with credit, taxes, etc., were consolidated under Swift & Company's immediate central control. In short, what occurred was that Watchman moved all control of labor relations from Swift & Company's divisions and from Esmark to a single point of control—Swift & Company's centralized office.

Palenchar advised the Union through Jesse Prosten of the reorganization of labor relations and the change in responsibilities. He, Prosten, and Farren, in fact, had lunch together[24] during which Prosten and Farren were introduced and it was explained how responsibility for labor relations had been transferred to Farren's Swift & Company industrial relations department.[25] The various respondents continued to honor the master agreement with the Union throughout this period of time.

By 1978 Esmark had become the holding company for six principle subsidiaries, thus successfully carrying out the diversification plan as previously envisioned. These six subsidiaries were: International Playtex, Inc; International Jensen, Incorporated; STP Corporation; Swift & Company; Estech, Inc.; and Vickers Energy Corporation. At this time Swift & Company continued its involvement in the food manufacture and distribution business.

Negotiations toward a 1979 master agreement went forward with union representatives of employees at the various plants participating, whether these plants were producers of fresh meats, processed meats, adhesives, chemicals, or whatever. Farren was chief spokesman for Swift & Company. Present also were Knight and Jaracz of the fresh meat division and Lee Lochmann of the processed foods division. Farren was aided by Bruce Thompson. Prosten was chief spokesman for the Union at these negotiations.[26]

Subcommittee meetings also took place as they had during previous contract negotiations. On pension and health and welfare matters, William Burns represented the Union. Farren and Douglas Empey represented Swift & Company.[27] Negotiations on these subjects followed a pattern established in earlier 1979 negotiations with John Morrell. However, the Morrell pattern required a number of changes in arrangement and language so that negotiations[28] were fairly time-consuming. Empey suggested certain changes in the medical and pension plans contained in the Morrell pattern agreement, which Farren presented at the main bargaining table. The Union, however, rejected these proposals and the contract eventually signed by the parties, for the most part, followed the Morrell pattern agreement.[29]

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[20] Sales to stores and supermarkets as opposed to sales to service companies such as chain restaurants and fast food operations.

[21] Swift's fresh meat division sales units continued to sell to some food service customers, but only in isolated instances to retail outfits.

[22] Another Esmark company.

[23] Similarly, since both Aud and Tagg of the Fresh Meat Company's labor department had already retired, it was their replacements that were placed under Farren's control to help administer the labor contract.

[24] The luncheon occurred on June 5, 1977, and according to Palenchar, he never saw Prosten on any occasion thereafter, although he did speak with him by telephone on one or two occasions shortly thereafter. On these occasions, when Prosten brought up particular labor problems, Palenchar referred him to Farren, advising Prosten that he, personally, was no longer involved.

[25] The newly formed Swift & Company's industrial relations department had three functions: (1) responsibility for master agreement units; (2) negotiation and administration of local agreements; and (3) safety. Although the administration of benefit plans had nominally been centralized in Farren's department Esmark, nevertheless, remained in charge of administering the pension plan and advising with respect to the insurance plan.

[26] Farren had earlier been introduced to Prosten, the Union's chief negotiator, by Palenchar, Farren's predecessor in negotiations. Farren reported to Watchman as president of Swift.

[27] Empey had replaced Bell and was, at the time, director of pensions and benefits for Esmark. Empey worked for Larry Magner, director or personnel, who was directly under Palenchar.

[28] It was during these negotiations that the merger of the two unions occurred and whereas the Union began negotiations as the Amalgamated, it completed these negotiations as the United Food and Commercial Workers.

In 1979, about the time the above-described negotiations were taking place, the Esmark people were undergoing economic self-analysis. Esmark was then ranked about 30th in terms of industrial companies with annual revenues of about $6 billion. As in the past, it remained strictly a holding company, owning other manufacturing companies but manufacturing, producing, or selling neither products nor services itself. Its primary concerns were seeing to it that its subsidiaries remained economically healthy and that the price of its own stock was reflective of its true value, or if possible was priced even higher. To these ends, Esmark would oversee the cash accounts between itself and its subsidiaries that reflected the flow of funds between them and that, in part, determined the size and type and growth or shrinkage of its investments in particular subsidiaries at a particular time. As to considerations affecting the price of Esmark stock at this time, there were several under review. One such consideration was the possibility of selling one or more subsidiaries in order to change the image of Esmark as perceived by potential investors. Standing in the way of such divestments were the pension plans in effect at the time and accrued liabilities thereunder. A study was undertaken in mid-1979 to determine how the two pension plans[30] administered by Esmark could be rearranged and pension liability reduced to make purchase of the subsidiaries more attractive. The study resulted in a finding that any possible sale of the subsidiaries participating in the Esmark pension plans would be severely undermined by the fact that the employees of those subsidiaries and retired employees of those subsidiaries had vested rights in the pension plans that would be considered a serious encumbrance by any potential buyer. The pension liability of each subsidiary had not yet been broken down at this time so that an immediate sale of any subsidiary was made impossible because the true worth of that subsidiary could not accurately be known until its pension liability was determined and this would take time to calculate. An outside actuarial firm was hired to compute the breakdown of pension liability for each subsidiary.

It would appear from the record that in late 1979 Esmark was, in fact, comtemplating a sale of some of its subsidiaries because in November 1979 the president of Esmark, while in Europe, was discussing with certain investors the possibility of their purchasing the Esmark subsidiaries or directly investing in Esmark.[31] Aside from the fact that Esmark was interested in divesting itself of certain subsidiaries in order to increase the value of Esmark stock, it was interested in selling certain holdings because at the time it was having liquidity problems. It had borrowed substantial sums for investment purposes and the costs of servicing these loans were proving excessive. To resolve the liquidity problem and to determine the reason for the relatively low price on the market of Esmark stock, Esmark hired Solomon Brothers to look into both of these questions. Solomon Brothers determined that $50 per share for Esmark was a justifiable figure, the figure Esmark was asking per share of its stock, but a figure substantially below its market value.

Even while Solomon Brothers was conducting its study, Esmark's management was concerned that Esmark investors were not receiving a reasonable return on their investments. It was believed that Esmark's investment in food producing companies was the direct reason for its lack of substantial return on investment. Experts in the field had determined that basic food companies' stock sold at a multiple of six, i.e., that the price of stock of food producing companies was six times greater than their annual earnings while hybrid oil company stocks sold at a multiple of eight or nine. From the expert findings it was determined that the general populace conceived of Esmark as a food company, more particularly connected with the fresh meat industry and that this perceptual connection caused more problems with respect to the value of Esmark stock than did any other consideration. It was determined that Esmark's image had to be changed.

Meanwhile, by December 1979, the study of how to rearrange the Esmark pension plans had been completed and it was determined that the existing plans should be separated among the various major subsidiaries already participating and that, in addition, a separate plan for retired employees[32] should be created. The separate pension plan for employees already retired appeared more desirable because it could be funded for less money since there would not be a steady stream of additional employees constantly being added to it. The decision to split the Esmark pension plan was to be effectuated by May 1980 and each subsidiary was to be charged independently for its contributions toward its own pension plan. The target dates of May 1980 was, in fact, met.

The beginning of 1980 witnessed no appreciable change in the economic situation under which Swift & Company continued to operate. In particular, its Clovis, New Mexico plant was having difficulties due to the contractual requirements of the master agreement. After discussing the matter with Esmark management and obtaining its approval, Copeland sought relief from the Union on such matters as cost-of-living and clothes changing allowances and vacation pay computations. It was Copeland's belief that because Clovis was a modern plant, ecomomic in size, its recent losses were due primarily to a poor competitive position vis-a-vis labor costs. He felt that if the Union would grant the relief requested Clovis could eventually once again become profitable. In accordance with its historical position against making midterm changes in the master agreement, however, the Union refused Copeland's request for relief during a meeting in February.[33] On March 27, the Company announced that the plant would close on September 28 and the plant was, in fact, closed[34] as per the announcement, but a few months later.

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[29] In the months following completion of the 1979 negotiations, Burns and other union officers would occasionally call Empey concerning grievances falling within his expertise. After suggesting that he call local plant management, Empey would sometimes answer the question himself as a matter of courtesy.

[30] There was a pension plan for salaried employees and one for hourly employees. The salaried plan covered employees of Swift & Company, Estech, and Vickers Energy. The hourly plan covered employees of Swift & Company and Estech. Other subsidiaries already had pension plans in existence at the time of acquisition, which were kept in place thereafter.

[31] There was, among other possibilities, the offer of selling Esmark shares at $50 per share. These shares were selling at the time for $25 to $30 per share, and for this reason were not seen as a particularly good investment by the Europeans questioned on the matter.

[32] At the time there were more people on pension than there were working and the unfunded pension liability was large.

1. The sale of the fresh meats operation

In April 1980, at a meeting of the board of directors, after serious consideration by certain members of management over a period of months, it was suggested that Esmark divest itself of the fresh meats division. The divestiture was part of a larger package of proposals that were made based on various considerations: the Solomon Brothers study, the liquidity problem, and the need for certain restructuring of the subholding companies. The board was receptive to certain portions of the suggested package, but not inclined to accept others. It was in favor of exploring the possibility of disposing of the fresh meats division as well as the energy segment.[35] No immediate, final decision on these proposals were made at this time.

On April 25, a meeting took place in Watchman's office. This meeting was attended by Kelly, Watchman, and Assistant General Counsel for Esmark Karl Becker.[36] Kelly announced that Watchman had resigned as president of Swift & Company and that he was appointing Sullivan, then president of Estech, as the new president of Swift & Company.[37] He also announced that a decision had been made that Esmark would divest itself of the fresh meats division one way or the other, either by selling it to private investors or through an employee stock ownership plan.[38] Kelly, at this meeting or at another held shortly thereafter, told Copeland that he should henceforth report directly to him and should, along with his staff, begin putting together a company that could be sold as a unit by adding to the existing fresh meats division additional staff functions to permit it to operate independently. He also told him to decide which of the already existing units of the fresh meats division should be included in the new company.

Following the April meeting of the board of directors and the above-described meeting of April 25, Becker, as instructed, educated himself as to ESOPs in general and to the feasibility of divesting the fresh meats division through the utilization of an ESOP. He discussed these matters with the fresh meats division management and advised them of his opinion that such an approach was worth pursuing. At the same time, Becker worked on the problem of Esmark's divesting itself of the energy segment, the wrinkle here being how to get in excess of a billion dollars for it, as management was expecting, when the total market value of its stock was about $550-$650 million. It was expected that Esmark would receive in excess of 10 times the value for the energy segment than it would for the sale of the fresh meats division.

Copeland, pursuant to Kelly's directions, undertook a study of the fresh meats division and determined that it was without and therefore needed the addition of certain departments in order to operate independently. These included treasury, personnel, tax, credit, legal, and other departments. He and his staff had to consider not only the creation of such additions but the staffing of each new department.[39] After the new personnel department was created, the other new departments were staffed through it.

The question of which plants and other physical units were to be included in the new company was also considered and the answer to this question would depend to a certain degree on whether the divestiture would eventually take the form of an ESOP or an outright sale of the entire company as a unit. A closing down of all facilities with piecemeal sales of individual plants and sales units was also a possibility. Each plant and sales unit was considered in light of its history—whether profitable, marginal, or had operated at a loss. Similarly, each plant's potential was also considered in light of possible changes including changes in existing labor contracts. Thus, in the Midwest where pork plants were operating under the master agreement but where competitors were also operating under the master agreement, it was decided that these plants would remain open. The same was felt regarding non-UFCW pork and beef plants that were also operating at a profit. Sales units and plants not operating at an acceptable margin of profit were to be closed.[40] It was concluded that if the Union rejected the ESOP plan a company with $2 billion in annual sales could be put together and operate at a profit. This company would be sold to outside investors. All decisions as to the inclusion or exclusion of certain plants and sales were, of course, subject to the approval of Esmark.

The Esmark board of directors' meeting was scheduled for May 29, 1980. In preparation for that meeting there were certain preparations that ultimately resulted in the proffering of an economic package plan for consideration by the board. The week before the board

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[33] Since the Union had virtually the same master agreement with various other companies, it could not afford to grant such changes without adversely affecting Swift & Company's competitors, particularly those in the same general geographic area. The Company's argument that there were no competitors under the master agreement in the same geographical area did not influence the Union's decision.

[34] Closing costs were borne by Esmark and charged against the fresh meat division.

[35] Reasons have been discussed supra.

[36] Sullivan later joined the group.

[37] This announcement was in accordance with a decision reached the day before at the board of directors' meeting.

[38] The subject of an employee stock ownership plan (ESOP) had come up earlier and Becker had been asked by Harrison to look into the feasibility of utilizing an ESOP as a possible means of Esmark's divesting itself of the fresh meats division.

[39] The new departments were staffed with personnel from Swift & Company, Esmark, and from outside. Many of the personnel obtained from Swift & Company had worked for the fresh meats division (Company) prior to an earlier reorganization.

[40] About 50 sales units plus the Clovis, New Mexico; Rochelle, Illinois; Moultrie, Georgia; and Guymon, Oklahoma plants fell into this grouping. However, if the Union were to accept the ESOP proposal, it was planned to request that the Union grant concessions to keep these plants operating, which concessions were to take the form of adjustments in labor costs. It was felt, however, that these plants could not continue to operate under the master agreement.

meeting, a preliminary meeting was held, which was attended by certain Esmark officers plus representatives of Solomon Brothers. At this earlier meeting a procedure for selling the energy segment was revealed and discussed whereby the maximum price could probably be obtained. This was to be part of the package plan presented at the forthcoming meeting of the board. Similarly, Becker had put together facts and figures on a proposed ESOP plan to be offered at the meeting for consideration by the board. He calculated the total wage earnings of the employees who were to purchase the new company and determined the size of the loan that sum could sustain, i.e., $135 million. He also worked out the mechanics of how the ESOP was to be set up. The amount of return to Esmark for the assets was similarly calculated for presentation to the board.

At the May 1980 board meeting the economic package was presented including the plan to sell the energy segment; the plan to dispose of the fresh meats operation, hopefully through the ESOP wherein 10 percent of the new company would be distributed among Esmark stockholders as a dividend, 30 percent would be owned by Esmark, and 60 percent by the employees; a plan to sell Swift International; a tender offer for roughly 50 percent of Esmark stock, priced between $55 and $60 per share; and the funding of certain outstanding pension obligations. Thus, the ESOP proposal was just a minor portion of a very large economic package, as measured in dollar values.

The board was in favor of the entire package, as presented, including the ESOP plan.[41] Direction was given to finalize and to put into proper form all the proposals contained therein.

Subsequent to the May board meeting, Kelly called a meeting, which was attended by certain management officials of Esmark and of the fresh meats operation. At this meeting, presentation of the ESOP plan to the Union was discussed and it was determined that the plan should be in writing and should reflect that the new fresh meats company would be a viable entity. The fresh meats people, Becker and others, thereafter worked up an ESOP proposal that provided for, among other things, changes in the master agreement at Guymon, Moultrie, and Clovis and the retention of those plants.[42] Other concessions were also envisioned. Esmark people contributed language dealing with the financial part of the ESOP as well as language suggested by the fresh meats people regarding contract concessions.[43]

On June 10, 1980, the ESOP plan was presented to the Union. The meeting[44] took place in the office of the president of the Union.[45] Palenchar, at the request of Copeland, acted as spokesman. He described to the Union's representatives the total ESOP plan and then gave them copies of the written document. At the end of his presentation, the union representatives asked questions and there was some discussion concerning the plan. William Wynn, president of the Union, stated that he recognized the seriousness of the situation and said that the plan would be given study and review in that light, although it was against the Union's philosophy to promote employee ownership in companies. He promised an answer in a matter of days.

On receipt of the ESOP plan, the Union had an attorney review it. The attorney suggested that the Union reject the proposal and it was agreed by union officials that they should do so. The Union contacted Carl Taylor and a meeting was scheduled for June 23 in Washington. On that date Palenchar, Copeland, and Farren flew to Washington, D.C. for the meeting at which they expected to hear from the Union regarding acceptance or rejection of the ESOP plan. When they arrived at Carl Taylor's office, they were informed that he was already over at Wynn's office and were advised to wait. When Taylor returned, he told them that he had already met with Wynn, that the Union had rejected the ESOP proposal, had offered no counterproposal, and saw no need for further meetings. After advising Kelly in Chicago of the events of the evening, the management group in Washington was instructed to return to Chicago in time for an early morning meeting.

At 8 a.m. on June 24 a meeting took place in Kelly's office, attended by various members of management of Esmark, Swift & Company, and the fresh meats division as well as by outside counsel. The purpose of the meeting was to decide what to do with the fresh meats units in light of the Union's rejection of the ESOP plan, considering the fact that all other pieces of the restructuring program, including sale of the energy segment, were in place. Those present had to determine how to dispose of the fresh meats operations and it was generally agreed that all of fresh meats units should be closed down, but only after giving proper notice to the Union as required by the contract and providing an opportunity to negotiate concerning the closings as required by law.

Available alternatives were discussed, including shutting down the entire fresh meats operation and selling off the assets. Kelly asked Sullivan if he wanted to keep any of the fresh meats units, reminding him that he was expected to run a consumer branded products company. With few exceptions, however, it was determined that all fresh meats units were going to be closed.

Later in the afternoon, Copeland got together with his people to consider whether there might be some other alternative to dissolving the fresh meats division. They decided that they should offer the plan considered earlier by him and his staff as an alternative to ESOP, that is the plan to close all units and sell the assets. Institution of the latter plan, however, would have meant the loss of 6000 jobs, including Copeland's. As a result of this realization, Copeland made arrangements to speak with Kelly to see if yet a third plan could be worked out. At the subsequent meeting, Copeland met with Kelly to see if he could convince him that there were viable possibilities superior to the considerations previously contemplated. At the meeting, Copeland showed projected profit-and-loss statements with supporting balance sheets. He identified those units that could be operated at a profit and indicated how much money would be necessary to support them over the next several years. He also specifically indicated which plants, in his opinion, should be closed and ventured that closing costs at these plants should be stood by Esmark. He pinpointed Guymon, Oklahoma, and Moultrie, Georgia, as plants that should be closed and noted that Clovis, New Mexico, already-scheduled for closing, should be closed also.[46] In short, he outlined the possibility of establishing a new fresh meats company, and offered profit projections to support its existence. Kelly was receptive and indicated that certain European investors might be interested in investing in such a newly formed company, if not others. He suggested that Copeland put the idea into a brochure form for him to take to Europe with him on an already-planned summer trip. Other members of management, present at the time, agreed. Sullivan, who was present during this meeting, asked Kelly if he should continue to consider which fresh meats units he would want to keep. Kelly, apparently taken with Copeland's argument, replied negatively, advising Sullivan to discontinue any such study, and indicating that, at this point, it would be certainly better to sell the fresh meats business as a unit.

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[41] Certain changes in the percentage of ownership were agreed on; for example, it was decided Esmark would retain 37.5 percent of the new company or the total value of the assets that the new company would own, assets obtained from Esmark, were in excess of the amount that could be obtained from a loan based on the employees' wages. Since the employees could not finance the entire transaction, Esmark decided to retain part ownership. The investment was also considered as a means of showing faith in the new venture.

[42] In the alternative plan to ESOP, these plants were to be closed, along with a lamb plant in Chino, as well as the plant in Rochelle, Illinois.

[43] Robert Palenchar and Karl Becker were responsible in large part for the preparation of the ESOP document on recommendations from Copeland and Farren.

[44] Present for management were Palenchar, Copeland, Farren, and Carl Taylor, Swift & Company's labor counsel. Present for the Union were William Wynn, president, and Lewie Anderson, acting vice president and director, packinghouse division.

[45] The president's office is in Washington, D.C.

On June 26, 1980, Esmark's board of directors met and approved the proposed disposal of the fresh meats division and the energy segment,[47] the tender offer of $55 million, and the funding of the pension plan, in short, the entire package. The decision was made at the meeting that certain plants and other facilities of Swift & Company should be closed[48] or otherwise disposed of with Esmark picking up the closing costs;[49] that the remaining units of the Swift fresh meats division should become a separate company known as Swift Independent Packing Company (SIPCO), to be sold by Esmark with Esmark possibly retaining an ownership position; and that Swift & Company should continue to operate in the processed foods area.

Following the decision by the board of directors to approve the entire package, steps were undertaken to effectuate its decision. Investment bankers were retained to sell the energy segment to major oil companies through a bidding procedure. Meanwhile Copeland and his subordinates had already decided which plants and sales units would go into the new company and which ones were to be closed or kept open. Similarly, they had the responsibility of carrying out the decision as to the creation and manning[50] of newly created departments made necessary by the separation of the new company from both Swift & Company and Esmark. Completion of all these tasks was targeted for the end of the fiscal year, October 1980, at which time SIPCO was scheduled to be entirely independent. Esmark personnel were responsible for the accounting and auditing functions involved in the split up of operations and the closing of facilities. In particular, the Esmark people had to set up a reserve against the expected losses connected with the closings.

On June 26, Farren contacted Anderson to inform him of the forthcoming formal announcement concerning the closing of certain master agreement facilities. Farren had previously informed Anderson that the rejection of the ESOP plan would result in such closings, and during the conversation of June 26 Farren specifically mentioned Moultrie, Guymon, Rochelle, and five sales units. On June 30 the closing notice was sent by Farren to Anderson announcing the plants to be closed and the dates of closing, and offering to meet and discuss the effects of the planned closings. All announced closings were approved by Kelly on behalf of Esmark.

In August, Copeland continued to pursue his staffing efforts on behalf of SIPCO. At that time, during a discussion with Kelly, the latter suggested that Edward Harrison and R. T. Briggs sit on SIPCO's board of directors and that the compensation committee of the board of directors consist of the two Esmark representatives and Copeland. Kelly also suggested that the board be comprised mostly of outsiders rather than of employees and officers of the Company. Copeland complied with these suggestions although he also included on the board the officers of SIPCO, also agreed to by Kelly.

At the same time, further work was being done on formulating which plants and sales units should be included within SIPCO. Permission was obtained to include the Des Moines plant, which had been closed for some time. In August also, it was finally decided to include the Moultrie and Guymon plants.

In August, while SIPCO was still being put together, Copeland asked Farren to try to set up a meeting with Anderson to inform him of his plans with regard to SIPCO. A meeting was scheduled attended by Copeland, Farren, and Anderson. Although termed by Copeland as "a get-acquainted meeting," during which he advised Anderson of the plan to sell SIPCO[51] and leave Esmark, he also, for the first time, personally broached the subject of getting relief from the master agreement in effect at Moultrie, Guymon, and Clovis. Copeland felt that these were good, modern plants which would fit in very well with the new company but for the sole deficiency that they were noncompetitive because of the labor costs. Anderson reminded Copeland that Moultrie and Guymon were both under the master agreement and that the Union did not make midterm changes in the master agreement. Copeland stated that he wanted to keep Moultrie and Guymon open, but would not do so if he had to pay master agreement rates. Anderson said that there could be no reduction in benefits and that the master agreement would have to stand. Copeland suggested that Anderson keep an open mind.

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[46] The closing of these plants did not necessarily mean that the new company would divest itself of them. This had not yet been decided.

[47] Vickers Energy Corporation.

[48] Guymon and Moultrie were included.

[49] Such costs included severance pay, pension adjustments, and costs of retraining transferees.

[50] For example, Niese who had been in charge of personnel at Swift & Company came over to SIPCO as vice president in charge of employee relations. Similarly, Copeland in late July or early August appointed Knight, vice president in charge of beef, lamb, and labor.

[51] At the time Kelly was planning a trip to Europe to sell the company to investors in Great Britain or Germany. The trip took place, as planned, on September 2 but was unsuccessful.

Later, after Copeland put Knight in charge of labor relations for SIPCO, he decided that he would introduce him to Anderson. A meeting was scheduled for August 25 both for this purpose and to keep the Union posted on the most recent events. He also wanted to discuss Moultrie and Guymon once again with Anderson. The meeting took place in Anderson's office in Washington. After introductions, Copeland described to Anderson the progress made toward separating SIPCO from Esmark, and informed him of future plans. Later in the meeting, Copeland again attempted to impress Anderson with the fact that the Moultrie and Guymon plants, if operating, would make the purchase of the company more attractive to potential buyers but that under the present circumstances they were not viable plants. He pointed out that Moultrie was paying $14 per hour under the contract while competitors were paying only $6.50 per hour under contracts with the same union and that neither Moultrie nor Guymon was competitive. He told Anderson that without relief those plants would have to be closed. On the other hand, Copeland assured Anderson that SIPCO would continue to apply the master agreement at any plants when it was competitive. Anderson, in response, was noncommittal, stating that he could not see how any changes could be made in the master agreement.

On September 10 the same three individuals met again to discuss SIPCO. This meeting took place in Chicago[52] at the behest of management, the purpose being to discuss efforts being made to sell SIPCO and to also converse once again on the status of Guymon, Moultrie, Clovis, and the possible reopening of Des Moines. More specifically, Copeland and Knight asked Anderson if he had come up with any way that he could change the master agreement at these plants to make SIPCO more competitive and permit it to operate these plants. Anderson replied that he had not. Copeland then told Anderson that other packers had voiced interest in these plants, particularly in Moultrie. He advised Anderson that at present the plan was to let Esmark go ahead with the closing in accordance with the master agreement terms, have Esmark to pick up all the closing costs, then sell the company to outside interests, and then have the new owners open those plants, recognizing that the Union still had bargaining rights but insisting on a new contract with competitive labor rates.[53] He analogized the plan to the sale of a few years previously of the plant in Wilson, North Carolina, to Dinner Bell, which, after Swift & Company closed the plant, opened it up again the following week with a new labor agreement far more competitive than the one Swift had had prior to the closing. Copeland argued that SIPCO, being a new company, was in the same position as Dinner Bell and that the Union should treat it the same way—that since SIPCO would no longer be owned by Esmark, but would be an entirely new and independent company, it should have the opportunity of negotiating a new, local, competitive contract. Anderson replied that negotiations toward a new, local, more competitive contract could take place after the sale only if the company could get out from under the master agreement legally. That meant, according to Anderson, that Esmark would first have to sell over 50 percent of the ownership of SIPCO. With this caveat, Anderson then entered into a discussion with Copeland and Knight concerning possible new competitive rates at the various plants. Generally, Anderson quoted certain rates, lower than master agreement rates, while Copeland argued that these rates were still noncompetitive. No agreement was reached. However, when Copeland advised Anderson of SIPCO's interest in reopening the Des Moines plant,[54] Anderson commented that he thought he could organize the employees and negotiate a new competitive contract with SIPCO for Des Moines once it was reopened. The parties agreed to discuss the Des Moines plant at a later date.

On September 18, Knight and SIPCO counsel Bruce Thompson[55] met with Anderson and Al Vincent, his assistant, in Washington, D.C., to continue the discussion concerning the Moultrie, Guymon, and Des Moines plants. At this meeting, the plans concerning the closing of Moultrie and Guymon by Esmark and their reopening by the newly sold SIPCO were reviewed with Anderson as was SIPCO's plan to reopen Des Moines if agreement could be reached with the Union for competitive labor rates at that point. Anderson stated that with regard to Moultrie and Guymon he wanted to go on record once again in stating the Union's position that it would not agree to any midterm modifications of the master agreement. He added that he understood what Knight was saying about closing and opening plants at Moultrie and Guymon and that the Union, meaning the International, would not "stir the pot" regarding these plans provided they were legal. He added that he did not think they were. He informed Knight and Thompson that although the International would not cause any problems at this point, if the International changed its position regarding the Moultrie and Guymon situaton, he would so advise them.[56] The discussion then moved to which units were to be included within the new company and what contracts were to be applied. Knight informed Anderson that certain plants and sales units would continue to operate under the master agreement whereas there were others that would not. Specifically, Knight reiterated that Des Moines, if opened, and Moultrie and Guymon, when opened, would operate under competitive agreements but all other plants then operating under the master agreement would continue to do so. Following the September 18 meeting, and throughout October, Knight kept in touch with Anderson by telephone, advising him of progress made toward splitting off SIPCO from Swift & Company and Esmark. Des Moines, Moultrie, and Guymon were also discussed. Regarding Des Moines, Anderson and Knight agreed to meet in November to discuss the reopening of that plant. Concerning Moultrie and Guymon, Knight relayed to Anderson his understanding that those plants would be closed as of December 28 as scheduled and would be reopened January 10 or 15, 1981. Anderson replied that as long as it was legal they could go ahead.

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[52] Anderson described a meeting with Copeland in September in Washington, D.C. Copeland denied meeting with Anderson after September 10. I credit Copeland. I believe Anderson was confused as to the Chicago meeting on September 10 with Copeland and a later meeting with Knight and Thompson in Washington.

[53] The position of management at this time was that as long as Esmark owned Swift & Company and SIPCO, all three were bound by the master agreement; that since Moultrie and Guymon were not economically viable under the master agreement rates and the Union refused to agree to make changes in these rates, these plants had to be closed; but once Esmark sold SIPCO, the new owners would no longer be bound by the master agreement and could negotiate a new contract after reopening these plants.

[54] The Des Moines plant had been closed in 1979, was no longer under the master agreement, and was therefore in a different position from the other plants. A similar offer, according to Copeland, was made by Anderson regarding Clovis. Anderson denies this. Other plants were likewise discussed.

[55] Anderson testified concerning a meeting he had with Knight in Washington in September. He denied, however, that Thompson was present. Elsewhere he testified that he may have attended a meeting at which Thompson was present. I credit Knight and Thompson on this point.

On September 30 and October 1 and 2, a major step toward the restructuring of Esmark was accomplished. The energy segment was disposed of in three pieces to three different buyers on these days. The total energy disposition was valued at $1.1 billion. One of the purchasers, Mobil Transocean Corporation, a subsidiary of Mobil Oil, offered $60 per share for Esmark stock to Esmark's public stockholders. The total value of the stock was $715 million. The Esmark stock was then exchanged for Esmark's stock in its subsidiary, Vickers Energy Corporation.

The actual restructuring of Swift & Company, when it finally occurred, was a piecemeal operation that extended over a period of months. Thus, Swift & Company, as a subsidiary of Esmark, set up its own subsidiary on September 3, 1980, called Transitory Food Processors, Inc. On October 15, the name of Transitory Food Processors, Inc. was changed to Swift & Co., effective October 24. On October 21 the original Swift & Company transferred all of its assets except for its ongoing fresh meat division to Transitory Food Processors, Inc. (now the new Swift & Company) effective October 27. On October 24, the name of the original Swift & Company was officially changed to Swift Independent Packing Company (SIPCO).[57] At this time the various tangible and intangible assets, physical properties, as well as trademarks, notes, etc., were divided between SIPCO (originally Swift & Company) and Swift & Company (previously Transitory Food Processors, Inc.). This amounted to transferring back to new Swift & Company its name, trademarks,[58] and everything else that did not apply directly to fresh meat. The things that were directly related to the fresh meat end of the business were taken by SIPCO. On October 27, SIPCO declared a dividend of all of (new) Swift & Company stock to Esmark. The net result of all of these transactions was the splitting of the original Swift & Company into two separate wholly owned subsidiaries of Esmark; SIPCO, which owned and operated the fresh meats business, and the new Swift & Company, which operated the remainder of the operations.

Along with these changes there were also some changes made in personnel. The board of directors of the original Swift & Company resigned and then, for the most part, became members of the board of directors of the new Swift & Company, previously Transitory Food Processors, Inc. It was also about this time that Copeland appointed a new board of directors for SIPCO and also appointed Knight both president of beef, lamb, and labor, and a member of the board of directors of SIPCO.

After finally completing the separation in late October, the decision then had to be made as to how Esmark would dispose of SIPCO. Of the various alternatives, public offering, over a period of time, gained ascendancy as a consideration. Solomon Brothers and other investment people were again consulted and it was agreed that sale to the public was a viable option. It was therefore agreed between Esmark and their various consultants that a public offering[59] should be put together. Becker and others worked on the problem from then on.

The primary concern of those assigned to work on the public offering issue was the pricing. A price multiple of four was being discussed, that is that the price for stock should be four times the company's earnings. This was determined to be the correct ratio because since high technology companies were selling at price multiples of 20 or 25, hybrid energy companies were selling at a P/E ratio of 8 or 9, and food companies normally sold at a price multiple of 6, it was felt that SIPCO would be most salable at a P/E of 4. The next thing to think about was the form of the sale, that is whether to sell direct to the public, to create another holding company and sell stock publicly in that holding company, or to use some other approach. All of these considerations were worked on beginning in October 1980 and extending into January 1981.

In October there was a meeting attended by officials of Esmark, SIPCO, and certain investment underwriters. Thereafter, members of the investment firms visited the various plants and interviewed Copeland and other SIPCO officials in order to get an overview of the operation. Meanwhile, another meeting between Knight and Anderson was scheduled for and took place on November 5 in Chicago at Knight's request; the purpose being to keep Anderson abreast of progress being made at SIPCO. At the meeting, Knight reiterated that SIPCO was to be independent, that in order to operate the plants at Moultrie and Guymon, relief would be necessary for this reason, SIPCO would not apply the master agreement at those plants. Once again Anderson refused to make any concessions and advised Knight that in his opinion the plan was unlawful. Nevertheless, Knight advised Anderson that incorporation papers had been filed for SIPCO, that brokerage firms had been engaged to handle the forthcoming public sale of stock, which would probably occur in January 1981. Knight then listed the plants and units that SIPCO planned to operate and those planned to close. He advised Anderson that all plants currently under the master agreement would continue to operate as before except for Moultrie and Guymon. With respect to those two plants, Knight told Anderson that it was his present intention to close those two plants and have SIPCO open them up again after 2 weeks. At the time of reopening, SIPCO negotiated a new local contract with the Union, which would be more competitive than the master agreement; that is to say, it would contain provisions less favorable to the employees. Yet, Knight assured Anderson that continuous service would be recognized for all employees at Moultrie and Guymon as well as elsewhere. Anderson asked that Knight put everything in writing and Knight agreed to do so. Finally, Knight advised Anderson that the Company probably could not be sold by January 15. In order not to have Moultrie and Guymon closed for too long a period of time, he asked Anderson about the possibility of the Company opening up these facilities before the sale was completely finalized. Knight explained that too long a period of closure would interfere with the supply of animals, distribution, and sales, and the experienced labor supply. As things stood at the time, the two plants were scheduled to close down December 28 and the sale was not expected to be finalized until February 1. The 5 or 6 weeks of shut down was considered unacceptable to Knight. Anderson refused to go along with Knight's request stating once again that the master agreement could not be altered and that if the procedure that Knight suggested was not legal he could not go along with it. Knight then requested, as an alternative, that the closing dates be extended. Anderson did not commit himself at the time and the two agreed to meet and discuss it again in a few days. Two days later, however, they talked by telephone and Anderson took the position that if the closings were delayed, it would require, according to the contract, a second closing notice and a 6-month extension of operations for the plants. Knight rejected this position.

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[56] Specific rates for the Des Moines Plant were discussed, but no agreement was reached at this time.

[57] In this way SIPCO became the successor to the original Swift & Company. This was preferrable for financial purposes and tax considerations.

[58] Since Esmark was keeping the consumer branded products, the name "Swift" and "Swift Premium" on those products was important to them.

[59] A public offering seemed feasible at this time because the facilities being operated at their locations seemed capable of being run at a profit, the product was proven, and Esmark had agreed to take the pension liability problem out of the picture.

On December 8, Knight met with Anderson in Washington and brought with him a draft containing the information that Anderson had asked on November 5 to be put in writing. The draft listed the SIPCO plants that were to continue under the master agreement, the proposed action to be taken at Moultrie and Guymon, as previously discussed, and the fact that SIPCO was going public with a timetable for accomplishing it. The contents of the draft were discussed as were other matters of mutual interest, including the opening of Des Moines and the possible closing of the Tampa[60] and Chino facilities. During the meeting Knight made notes on how the letter should be changed to reflect what Anderson wanted to get in writing. Regarding the Moultrie and Guymon plants, Anderson advised Knight that if what management was planning to do was legal the Union would not obstruct its action although it would not give the plan its blessing. On December 11 Knight sent to Anderson the letter containing the information requested by Anderson on November 5 and discussed by those two individuals on that date and on December 8.

Shortly after the mailing of the December 11 letter, Knight contacted Anderson and suggested another meeting to be attended by not only himself and Anderson but also by their attorneys, the object being to discuss certain problems that had evolved due to the Union's refusal either to permit SIPCO to extend the closing date for Moultrie and Guymon beyond December 28 or to open the plants early and the fact that the public sale probably was not going to take place until some time in March. The meeting was held in Chicago on December 17 and was attended by Knight and his attorney, Bruce Thompson, while Anderson was accompanied by in-house counsel Stan Gacek. At this meeting, Knight explained once again that SIPCO was going public and would be completely independent from both Swift & Company and Esmark. He reiterated that the plan was for SIPCO to close down while still owned by Esmark and to be reopened after the public sale. He attempted to convince Anderson and Gacek that the procedure was totally legal. He noted, however, that the Company was in a bind because it had already given notice that it was closing Moultrie and Guymon on December 28, but that it now appeared that the public sale of stock could not be completed until March. Knight explained the problems that would attend a prolonged period of closure and tried to obtain agreement from Anderson and Gacek to let SIPCO open Moultrie and Guymon early, before the public sale in order to cut down the period of closure. He offered his assurances as he had in his December 11 letter that if the process of becoming a publicly held independent corporation were not completed within a reasonable length of time after the opening of the Guymon and Moultrie facilities, the company would recognize retroactively the terms and conditions previously provided to the employees at these locations under the contract between Swift & Company and the Union, i.e., the master agreement. Anderson replied that in his opinion what the Company was doing was illegal, that SIPCO was not going to be independent of Swift & Company and Esmark, and that what it was doing at Moultrie and Guymon was likewise illegal. He added that the Union would not go along with it. Gacek added that the Union's position was clear—that if the Company opened Moultrie and Guymon before the sale by Esmark of the SIPCO stock it would be an alter ego situation, and the

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[60] Tampa was a facility that was under the master agreement and was suffering competitively. Knight informed Anderson that if relief were not obtained it too might have to be closed. Anderson replied that he could do nothing about the situation at the time.

Union would object to such an action on the Company's part as illegal unless the openings were under the master agreement. Any opening of the plants after the sale of stock would be all right provided it was legal. Thompson explained how there would be a new corporate structure that would hopefully insulate the Company from legal problems arising from the alter ego situation at Moultrie and Guymon, which at any rate would be a very short period, subsequently corrected by the public offering. Despite Thompson's argument, neither Anderson nor Gacek were convinced and maintained their position that the Union would not agree to the opening of these facilities prior to the completion of the public offering. They added that the Companies could change their names all they wanted but they were still all the same and the master agreement should apply. Having failed with this approach, Knight then asked, once again, about the possibility of extending the closing notice at Moultrie and Guymon. Anderson refused and suggested that the company might rescind its earlier notices but added that if it did, it would be obligated under the contract to give the workers another 6-month notice of closing. Knight replied that the company would likely be forced to unilaterally extend the notice of closing at Moultrie and Guymon. On December 22 Knight contacted Anderson by phone once again regarding the extension of the closing notice and informed him that the company had decided to extend the closing date to March 7, 1981.[61] Knight confirmed this conversation in a letter to Anderson of the same date. Similarly, notices of the extended closing date were posted at each plant.

In December work was undertaken on the filing of the SIPCO prospectus after meetings attended by underwriters and members of SIPCO management. The actual work in the prospectus, registration, and other documents began in December and continued on into January and February. This work was done by underwriters, their counsel, as well as SIPCO and Esmark people. At the same time discussions took place during which consideration was given as to the form of the forthcoming public sale, that is whether SIPCO should simply issue the stock itself or whether there should be created another holding company. For accounting and tax purposes the latter course was decided upon. On January 26, Esmark incorporated Swift Independent Corporation[62] with an authorization of 10 million shares of voting common stock and 155,000[63] shares of nonvoting convertible common stock. On February 13 Knight met with Anderson once again to bring him up to date on progress made toward SIC's going public. During this meeting he furnished Anderson with a draft of SIC's prospectus and informed him of progress made so far. Once again he broached the subject of the Moultrie and Guymon plants and their scheduled reopening in April after the public offering of the SIC stock. These subjects were also discussed in the prospectus. When Knight reiterated his desire of relief from the master agreement at these two locations, Anderson refused once again to grant relief and told Knight that the plan outlined by Knight and contained in the prospectus was illegal. Knight disagreed and no change in the position of either party resulted.

Following the incorporation of SIC, Arthur Rollin was chosen as its sole director.[64] Rollin, an outside attorney and not connected with Esmark, immediately undertook the election of officers and directors, adoption of bylaws, and other necessary organizational procedures for the new corporation. After accomplishing the organizational aims, Rollin resigned and elected a replacement board of directors, which consisted of 10 persons who were affiliated with SIPCO. The officers and directors of SIPCO thus became officers and directors of SIC. Several additional outside individuals unconnected with SIPCO or Esmark were also chosen as directors. The directors were actually chosen by Copeland.

On February 23 Esmark and SIC entered into an agreement in which all the outstanding stock of SIPCO would be sold by Esmark to SIC. In payment SIC agreed to deliver to Esmark $100 million[65] in the form of a demand note at 15 percent. SIC agreed in the same document to file with the Security and Exchange Commission a registration statement to sell shares of its own (SIC's) stock through public distribution; Esmark to acquire the option of purchasing from SIC 4.5 million shares of such stock conditioned upon a firm underwriting agreement whereby the underwriters would agree to purchase at least 2.5 million shares from Esmark. It was further agreed that SIC would deliver the 4.5 million shares of SIC stock and a $35 million subordinated note to Esmark in return for the $100 million note previously delivered to Esmark for the SIPCO stock. It was agreed about this time also that Esmark would retain a certain minority percentage of the SIC stock because the underwriters did not feel they could sell all of it to the public and because Esmark's keeping a certain percentage would indicate faith in the new venture.

Back in December 1980, SIPCO had hired a new general counsel, Thomas McKay. Bruce Thompson subsequently advised McKay of SIPCO'S plan to close Moultrie and Guymon and open them up again after the public sale as a new and independent company. Thompson informed McKay that inasmuch as the closings would take place at a time when SIPCO was still owned by Esmark, and would subsequently be reopened at a time when SIPCO was publicly owned and independent of Esmark, SIPCO would at the time of the reopening be a successor company and the plan was therefore legally justified.[66] McKay agreed with Thompson as to the justification of the planned course of action but during several conversations in January and February noted that since the employees at Moultrie and Guymon were being treated differently from the employees of the other SIPCO plants,[67] perhaps it would be beneficial for purposes of communication to create a new subsidiary company just to operate Moultrie and Guymon to impress on their employees that they were, indeed, working for an entirely new and independent company.[68]

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[61] Subsequently, the closing dates were extended to April 3, with notice being given to the Union by letter dated February 17, then extended further to April 17 or 18.

[62] Initially Swift Independent Holding Company.

[63] The 155,000 shares were subsequently issued to SIC officers as payment to them for work performed during its organization.

[64] Rollin, who was chosen by Esmark's assistant general counsel, Becker, also became SIC's sole stockholder when he was issued 100 shares of voting stock at the price of $1000.

[65] It was agreed in the document that SIPCO's assets were book valued at approximately $166.5 million so that the $100 million being paid for them was considerably less than their worth.

[66] The time between the closing and reopening was considered by Thompson to be an interim transitional period.

On February 24, New Sipco, Inc. was incorporated. SIC became its sole stockholder and SIC's board of directors and principal officers became the board of directors and principle officers of New Sipco, Inc. On the same day SIC filed its registration statement, effective April 22, the latter date being the earliest date when stock in that company could, by law, be sold. Esmark, of course, was responsible for issuance of the stock.

In late March, Knight received a telephone call from Anderson who advised him that he and the Union's attorney had reviewed the various documents that had been filed and it appeared to them that SIPCO was nothing more than Swift & Company with a new name and therefore if Moultrie and Guymon were reopened they would still be under the master agreement. Anderson told Knight that the Union intended to take action, that is file an unfair labor practice charge if the company pursued its announced plans with regard to Moultrie and Guymon. Knight advised Anderson that in his opinion there was nothing illegal about the Company's plan and suggested a meeting between the attorneys for the parties and themselves to discuss the matter. On April 2 the meeting took place in Chicago. The positions of the parties were repeated but the problem was not resolved. It was agreed that resolution of the problem would likely have to be through arbitration, through the filing of an unfair labor practice or through the initiation of a lawsuit. Though an additional telephone conversation followed the next day and at least one letter from Anderson to Knight followed thereafter, both of which dealt with the same problem, the problem remained unresolved.

On April 11, the February 23 agreement between Esmark and SIC was effectuated. On that date Esmark became the holder of the $100 million note[69] from SIC with the conditional option to purchase SIC stock as noted supra. SIC, on the same date, acquired all of SIPCO's outstanding stock. Esmark assumed all of SIPCO's liability for outstanding checks as of the close of business that day. On that day also, the connection between SIPCO's banking system and Esmark's banking system, which required daily adjustments to take care of surpluses and deficits was permanently severed and SIPCO, in this respect also, became independent of Esmark management. Similarly, SIC/SIPCO thereafter picked up all charges relating to SIPCO operations except for the closing costs for Moultrie and Guymon that, by prior agreement, were paid for by Esmark as part of the cost of the reorganization.

On April 17 Moultrie and Guymon were closed. All employees received their full closing benefits from Esmark as required by the master agreement.[70] Benefits were paid to separated employees at Moultrie and Guymon at special offices away from the plants to which personnel files and other records had been transported. The purpose was apparently to emphasize the fact that SIPCO and the old fresh meats division of Swift & Company were entirely different companies from New Sipco, Inc.; that SIPCO and the old fresh meats division, both of which had been owned by Esmark and both of which had employed the employees being terminated, should not be considered the same as New Sipco, Inc.; that New Sipco, Inc., which was to be owned by SIC and to which the plants and other assets had been transferred on April 11, and for whom most of the employees would work if and when hired by New Sipco, Inc., should be recognized as a new employer.[71]

On April 21 the underwriters of the SIC stock met with Esmark management and agreed on the price at which the stock would be sold. The stock was to be sold to the public at $15 per share with $1.05 of each share to go to the underwriters. The following day, April 22, Esmark entered into an underwriting agreement with Solomon Brothers, then exercised its option to acquire the stock[72] and the $35 million SIC note in exchange for the $100 million SIC note. The registration statement became effective and the public offering took place. The underwriters purchased 2.5 million shares of SIC stock from Esmark for resale to the public. The offer was completely sold out in less than 2 hours. Since the underwriters had an option to buy an additional 250,000 shares, they exercised that option and sold these additional shares, also on April 22. In addition there were the 345,000 shares issued in connection with a SIC employee benefit plan[73] and 155,000 shares of nonvoting stock issued to certain SIPCO employees for a total of $5 million shares issued. Thus, as of April 22 Esmark ceased its 100-percent control of SIC and SIPCO and became a 35-percent minority stockholder with no option or agreement outstanding to purchase additional SIC stock. With the completion of all transactions, Esmark in effect realized just under $100 million for its sale of SIPCO in the form of the $35 million note from SIC, approximately

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[67] Moultrie and Guymon employees, unlike employees at other SIPCO plants, would receive benefits under the closing provisions of the master agreement, would then be out of work for a short period of time, and then would be hired under new local contract provisions with fewer benefits than employees at other plants continuing to work under the master agreement.

[68] Thompson testified that labor law considerations were not discussed when the creation of the entirely new company was under discussion. Although I agree with the General Counsel that this statement is difficult to credit, I nevertheless find, in either case, that the answer is irrelevant and would not affect the decision here.

[69] The book value of SIPCO's assets were calculated at $166.5 million, in accordance with the earlier agreement, described supra.

[70] A grievance was filed by the Union concerning the Company's extension of the closing date, which was still pending at the time the hearing was in progress.

[71] Since the Union had been apprised of the entire plan over a period of several months, this separation of termination and hiring can hardly be considered a subterfuge of any kind.

[72] There were 1,750,000 shares of stock. The transaction was completed April 29.

[73] The outstanding shares previously owned by Rollin were purchased on April 22 by SIC.

$38 million in cash from the public sale of SIC stock, and the retention of about $25 million in SIC stock.

On April 26 Phil Immesote, secretary-treasurer of Guymon, Local 340 of the Union called Richard Knight. Knight knew Immesote from their previous contacts concerning grievances at the Guymon plant. Immesote advised Knight that when the plant was ready to open, he, Immesote, was ready to sit down and work out an agreement. Knight advised Immesote that he would keep in touch, but did nothing more. In particular, Knight did not call Anderson to let him know of Immesote's call. According to Knight, he believed that Immesote had Anderson's blessing on entering into a local agreement.

Following receipt of the telephone call from Immesote, Knight discussed its content with Copeland. Together they decided to take Immesote up on his offer. On April 30 Knight sent Anderson two letters, one bearing the SIPCO letterhead, the other on New Sipco, Inc. stationery. The SIPCO letter advised Anderson that SIC had gone public and had purchased the assets of SIPCO. It also informed Anderson that SIC's wholly owned subsidiary, the newly created New Sipco, Inc., now owned the Moultrie and Guymon plants. The letter also stated that SIPCO's board of directors had decided to retain its current work force at each of its existing operations currently operating under the master agreement, listing Glenwood, Iowa; National City, Illinois; Sioux City, Iowa; Charleston, South Carolina; Columbia, South Carolina; and New Orleans, Louisiana. It then stated that as a successor employer it recognized its obligation to bargain with the Union concerning these locations, but stated also that it had the right under the circumstances to establish initial terms and conditions of employment at each of the facilities named pending the outcome of such bargaining. The SIPCO letter then announced that "the SIC and SIPCO Boards have opted to have SIPCO adopt the terms and conditions of the Master Agreement—regarding the SIPCO facilities listed. . . ." Finally, the letter advised Anderson that SIC/SIPCO had elected to credit all previous service to employees working under the master agreement.

The second letter, the New Sipco, Inc. letter, in addition to repeating certain information contained in the first letter, also advised Anderson that SIC and New Sipco, Inc. had decided to open their Moultrie and Guymon facilities effective May 5, 1981, and that employees at these new operations would be working under terms and conditions "still under consideration." The letter advised Anderson that the new terms and conditions of employment would be made known to applicants at the time offers of employment were made and that applications from former employees would be considered.

Although neither of the two April 30 letters to Anderson mentioned Immesote, about the same day, Knight instructed Guymon Plant Superintendent Ray Heimbouch to contact Immesote and request a meeting to start negotiations toward a new contract. Heimbouch did so, and a meeting was scheduled for and was held on May 1 at which contract negotiations were initiated.

Beginning about May 3, interviews of job applicants were undertaken at Moultrie. Most of the old SIPCO employees were rehired as new employees of New Sipco, Inc. after filling out applications, taking physicals, and being advised of the new terms and conditions of employment. These terms and conditions of employment were determined by Knight, with input from local plant management. No one from Swift & Company or from Esmark had any input into these considerations.

Meanwhile, regarding Guymon, Knight and the local management had decided on wages and other conditions of employment for the employees at that plant just as they had at Moultrie. The same procedure was used during the interviews—new applications, physicals, etc.—but then contract negotiations that had begun on May 1 resulted in a contract being finalized on May 6. The conditions of employment of the employees were therefore governed by the provisions of this local agreement, which was eventually ratified by the Guymon employees on May 11. As was the case at Moultrie, almost all the newly hired employees were the same employees who previously had worked for SIPCO. The contract was negotiated by Immesote and local management.[74] No one from Esmark or Swift & Company participated.

On May 7 Anderson heard indirectly that a contract had been finalized at Guymon. He called Knight who acknowledged that a contract had, in fact, been reached. Anderson objected that Immesote had no authority to enter into any local agreement and stated that the local contract was invalid. Knight replied that he thought that Immesote had Anderson's "blessing" to negotiate the contract. Anderson denied that Immesote had his "blessing" and reiterated that the local contract was void. The following day, May 8, Anderson sent Knight a telegram in which he noted that discussion between the Company and a local union representative concerning terms and conditions of employment at Guymon had taken place. He advised that the Company was required to continue to recognize and bargain with the International and that the terms of the master agreement still applied to the Moultrie and Guymon plants. He added that the Company had always bargained on contract terms only with the International and that no local union had authority to enter into any bargaining agreement covering either Moultrie or Guymon without the International's approval. He further noted that the International had not approved any negotiations at the local level at Moultrie or Guymon nor approved any of the terms and conditions of employment discussed or agreed at those locations. Anderson demanded that negotiations for local contracts at Moultrie or Guymon cease and that the Company continue to bargain solely with the International and continue to apply the terms of the master agreement. Despite Anderson's telegram, the Immesote contract was ratified by the local membership that night and Guymon's management was so informed by telegram the following day. On May 12 Knight replied to Anderson's telegram informing him of the local contract's ratification and the fact that the Company planned to commence operations at Guymon on May 14 under the terms of the local agreement. Knight advised Anderson further that the Company's actions had been legal but offered to meet and discuss the labor situation. Guymon was, in fact, opened on May 14.[75]

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[74] Immesote had negotiated other local labor agreements on behalf of Local 340 where the plants were not covered by the master agreement. Other local unions' officials had done likewise at other locations. In March 1981 a new program was approved by the Union's International executive board whereby any local agreement would first have to be submitted to the International for approval before it could be finalized or ratified locally.

On May 29 Immesote wrote Knight a letter in which he stated that the contract that he had signed was void and that he was recinding both his signature and the ratification.[76] On June 1, Anderson wrote a letter to Knight referring to Immesote's position and reiterating the International's position that it alone was the sole representative of the Guymon employees and the master agreement continued in effect. On June 3[77] Anderson wrote a similar letter to Knight regarding the Moultrie plant. Despite the positions taken by Immesote in his letter of May 29 and by the International in Anderson's letter of June 3, the Guymon local contract was, according to Knight, nevertheless implemented and dues continued to be deducted in accordance with that contract and turned over to the Union right up to the time of the hearing. Similarly, again according to Knight, grievances have been filed and processed under the new contract.

2. Tampa

Prior to the reorganization, the conversion of the fresh meats division into SIPCO and the public sale of SIC and its subsidiaries, employees of Swift & Company had the right under the master agreement to transfer to other plants whenever a plant closed. SIPCO took the position, once it became independent from Swift & Company and from Esmark, that it no longer had any obligation regarding the transfer under the master agreement because the master agreement no longer applied. This too was the position of Swift & Company at that point in time.

Prior to the public sale of SIC in April 1981, Swift & Company's fresh meats division (SIPCO), still owned by Esmark, announced the closing of its Tampa sales unit facility. In a memorandum from B. H. Cowart at the Tampa installation to Copeland, dated February 4, 1981, Cowart noted how Swift & Company had operated the sales and distribution system located at Tampa since 1962. He further commented in the memorandum how in November 1980, with the reorganization of Swift & Company, jurisdiction of the sales operation was assumed by SIPCO with Swift & Company serving as landlord.[78] He recommended in this memo that for economic reasons the Tampa facility be closed and that in accordance with the master agreement the announcement of closure be made on February 6 with the final shutdown scheduled for August 8, 1981. Copeland, in a memorandum to Sullivan dated February 5, agreed with Coward and recommended that notification of the closing and the giving of the 6 months' notice to employees should come from Swift & Company rather than from SIPCO as the contract (master agreement) that controlled was between Swift & Company and the Union. On February 9[79] Knight wrote to Anderson notifying him of the planned closing of the Tampa sales unit as of August 7, 1981.[80] The notice of closing contained an offer to meet to discuss implementation of the closing provisions of the master agreement. Upon closing of the Tampa sales unit in August, employees working there under the master agreement were permitted to transfer to other master agreement facilities of SIPCO. They were not, however, permitted to transfer to Moultrie or Guymon or to Swift & Company facilities.

B. *Respondents' Operations Before and After the Public Sale*

1. Esmark

Following the public sale of SIC stock, Esmark continued to operate, as it had before, as a holding company. The president of the corporation, Donald Kelly, continued as chief executive, and the top officials of the corporation and its subsidiaries continued to report directly to him. These were the various presidents of the wholly owned subsidiaries, including Swift & Company and Estech; Edward J. Harrison, vice president and general counsel of Esmark; Robert E. Palenchar, vice president, corporate affairs and personnel of Esmark; and Robert Briggs,[81] senior vice president, finance, Esmark. Following the public sale, however, no one from SIC, SIPCO, or New Sipco, Inc. reported to Kelly nor to anyone else from Esmark. Palenchar, who in his role as vice president for corporate affairs and personnel, continues to hire Esmark executives and occasionally executives for its subsidiaries, and who still is in charge of their compensation as well as incentive plans, stock options, long-term growth plans, and pension plans, has had nothing to do with the hiring of executives for SIC, SIPCO, or New Sipco, Inc. since prior to the public sale of SIC stock in April 1981. Similarly, Palenchar's chief assistant, manager, supervises three management employees: Douglas Empey, director of benefits, who is in charge of pension plans, hospitalization plans, and life and disability plans; Norris Ewald, director of compensation (Esmark's personnel director), who is in charge of stock option plans, management incentive, and growth plans; and Steve Ward, pension administrator, who keeps pension records current and implements action initiated by subsidiary companies. These people who historically have acted as advisers to the operating (subsidiary) companies in their special fields have had no such contacts with SIC, SIPCO, or New Sipco, Inc. since April 1981.

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[75] Neither Esmark nor Swift & Company played any part in the decision to reopen Moultrie or Guymon.

[76] This letter was sent sometime after a meeting took place in Washington, D.C. at which Immesote was threatened by the International with removal from office and the local with receivership unless the local contract was voided.

[77] There is some question whether the June 1 and 3 letters were received.

[78] Swift & Company continued to operate a processing facility on the same premises adjacent to the SIPCO operation.

[79] Notice to employees of the closing was made the same day.

[80] Though Knight was at the time vice president of beef, lamb, and labor for SIPCO, the letter was under the Swift & Company letterhead.

[81] Briggs is one of SIPCO's board of directors.

Historically, there have been in existence several pension plans affecting various employees of Esmark and its wholly owned subsidiaries, including plans for Esmark salaried employees, Swift & Company salaried employees, Swift & Company nonsalaried employees, Swift retirees, Eschem salaried employees, Eschem nonsalaried employees, Estech salaried employees, and Estech nonsalaried employees. Each of these plans has its own pension board, each manned by Esmark. In addition, certain subsidiaries have their own pension plans that are not a part of the Esmark plan. When an employee of Swift & Company wishes to retire, that employee fills out a retirement form at his own company. This form is forwarded to Esmark where the amount in question is calculated. Questions concerning the amounts due under the various Esmark plans are forwarded to its board for review. Palenchar is chairman of the pension board at Esmark and various members of management are its members. Since April 1981 and the public sale, none of the Esmark pension boards nor any Esmark employee has had anything to do with any pension plan covering SIC, SIPCO, or New Sipco, Inc. employees.

Esmark had historically maintained stock option plans covering salaried employees of Esmark and its subsidiaries. Esmark, through its compensation committee, its chairman, Palenchar, and its director, Ewald, determines how much stock is to be made available for itself and for its subsidiaries. The subsidiaries then each decide how much of the amount of stock made available to it should be allocated among its own eligible employees and, based on this decision, makes a request. The stock so allocated is Esmark stock. The Esmark compensation committee next considers the requests received from the subsidiaries and presents these requests to the board of directors for approval. No employee of SIC, SIPCO, or New Sipco has participated in these plans since April 1981 and in fact no employee of SIC or New Sipco, Inc. had ever done so.

Esmark, over the years, has operated incentive plans and growth plans on behalf of certain of its employees and employees of its subsidiaries. Since April 11, 1981, however, employees of SIC, SIPCO, and New Sipco have not participated in these plans either.

Esmark has historically filed a consolidated tax return reflecting its earnings and the earnings of its subsidiaries (those of which it owns 80 percent) including Swift & Company and Estech. The 1981 fiscal year tax report will include SIPCO income up to April 11, 1981, but not thereafter. The 1982 fiscal year tax report will not include SIPCO earnings. SIC and New Sipco have never been included in Esmark tax returns.

Over the years Esmark has been self-insured where state law permitted. Otherwise, where state law required, Esmark obtained outside insurance. In the former case, the practice has been for Esmark's subsidiaries to maintain risk management departments, which self-insured for product liability up to $50,000. Esmark's own risk management department maintained additional coverage to a certain higher dollar value. Outside insurance companies furnished insurance to a still higher amount. Subsequent to April 1981 Esmark continued these practices for Swift & Company and other subsidiaries. In October 1980, in preparation for its independence, SIPCO began to handle its own insurance, and by April Esmark no longer performed any insurance functions for SIC, SIPCO, or New Sipco.

Esmark's subsidiaries have always done their own advertising of their products. Esmark would advertise solely to the financial community in such newspapers as the Wall Street Journal and leading newspapers based in the financial centers of the country. The advertising was undertaken for the purpose of making potential Esmark investors aware of the various holdings of Esmark and, for that reason, would mention the subsidiaries by name as well as their chief products. Similarly, and for like reasons, Esmark would advertise on television. Since April 1981, Esmark has had no connection with advertising of SIC, SIPCO, or New Sipco products or services.

Although Esmark has itself prepared booklets describing health care available to employees, the administration of the health care plan is handled by an outside service agency. Esmark has nothing to do with any health care plan covering SIC, SIPCO, or New Sipco employees.

In sum, Esmark does not perform any services for SIC, SIPCO, or New Sipco nor does it share physical facilities or departmental or staff functions with SIC, SIPCO, or New Sipco.

2. Swift & Company

Since its separation from SIPCO, Swift & Company has been engaged in the manufacture, sale, distribution, and marketing of processed meats, turkeys, cheese, and dry grocery products in the United States, United Kingdom, Europe, Panama, Puerto, and Japan. Unlike before the separation of SIPCO, it no longer slaughters animals except turkeys. Swift operates no fresh meat plants in the United States.[82] Its executive offices are still located in Chicago at 115 W. Jackson Blvd. on the 11th and parts of the 8th, 9th, and 10th floors.

Swift & Company board of directors and officers, in large part, remained the same after the separation of its fresh meats division and the latter's conversion to SIPCO and public sale in April 1981 as they had been in 1980. Notable among the exceptions are, of course, Copeland and Knight, both of whom left Swift & Company for positions with SIPCO. Copeland, who had been on Swift & Company's board of directors and who was, at the time, president, fresh meats division and Knight who had been vice president, service, then vice president, beef, lamb and labor, broke all ties with Swift & Company when SIPCO became independent in April 1981.

Swift & Company's labor relations are procedurally administered today as they were prior to the creation of SIPCO. Joseph Sullivan, Swift & Company's president, is responsible for its labor relations but has delegated authority in this area to Richard Greene, vice president of industrial relations at the corporate level. At the plant level each plant manager negotiates his own contract,[83] assisted by his vice president and general manager in a given area. These people work closely with Greene. In plants covered by the master agreement, the same procedure is used for negotiating purposes as well as for purposes of administering the contract. In the grievance and arbitration field, the individual plant managers and the legal departments work closely with Green until the arbitration level is reached, at which point Greene and the Swift & Company legal department handle the matter. The individuals in charge of industrial relations and who negotiate on behalf Swift & Company are different from those who are in charge of industrial relations at, and who negotiate on behalf of, SIPCO and New Sipco.

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[82] Swift & Company's international division does operate fresh meats facilities overseas.

[83] In such areas as insurance, Swift & Company may seek advise from specialists at Esmark just as it could in the past.

During the fiscal year 1981 Swift & Company's sales grossed $1.5 billion and purchases were valued at $1 billion. Of the purchases, between $70 and $80 million worth of products came from SIPCO and New Sipco. Purchases were of fresh meats for processing at Swift & Company's own plants. The same guidelines were used in making these purchases as were used in making purchases from any other sources, i.e., competitive price, quality of product, and service.

3. SIC, SIPCO, and New Sipco

Today, SIC is a publicly owned holding company that owns SIPCO and New Sipco. Like Esmark, it does not produce nor manufacture goods. Its primary concern is with selling its own stock, and this can best be achieved by making certain that the financial community is aware that its subsidiaries, SIPCO and New Sipco, are successful in selling their products.

Since April 1981, SIC has paid quarterly dividends to all of its stockholders of common stock, including Esmark.[84] As a matter of fact, following the separation of SIPCO from Swift & Company and the public sale of SIC stock, Esmark has been enjoying better returns from its combined investments in Swift & Company and in SIC[85] than it had from Swift & Company before the restructuring.

SIPCO is one of SIC's wholly owned subsidiaries. It processes fresh beef, lamb, pork, and manufactures frozen meats and markets them at various plants throughout the United States.

New Sipco, Inc. is the other of SIC's two wholly owned subsidiaries. It processes fresh beef at its Guymon, Oklahoma plant and fresh pork at its Moultrie, Georgia plant.

After April 1981, personnel at the various SIPCO and New Sipco plants remained pretty much the same as before. Plant managers and salaried employees[86] at the fresh meats plants as well as rank-and-file employees[87] remained the same after the public sale, after the closing of Guymon and Moultrie, and after their reopening as before. Similarly, customers and suppliers also remained the same. During the hiatus, between the time that the Guymon and Moultrie plants were closed by SIPCO while owned by Esmark and the time they were reopened by New Sipco while owned by SIC, which in turn was owned 65 percent by the public, management of these plants remained on the payroll, even though it required certain management personnel to take vacations and even though it required other management personnel to busy themselves at the plant doing maintenance work. Management personnel, in addition to Copeland and Knight, include Douglas Gray, executive vice president for SIC, SIPCO, and New Sipco, who had been with the fresh meats division; Charles Bedrosian, vice president and comptroller for SIC and SIPCO and director of New Sipco, who had been comptroller of fresh meats division; Joseph O'Bryant, vice president of public relations and marketing for SIC, SIPCO, and New Sipco, who had been president of the processed foods division of Swift & Company and a member of its board of directors; Richard Jaracz, in charge of pork for SIPCO and of the Moultrie plant, who had been with the fresh meats division; R. T. Vernam, director of purchasing for SIPCO, who had been with Swift & Company; Ed Heiter, director of quality assurance for SIPCO, who had held the same office at Swift & Company; W. J. Zautke, general sales manager for SIPCO, who had held the same position at Swift & Company; K. A. Nilson, general superintendent of operations for SIPCO sales units, who had held the same position at Swift & Company; H. G. Kuhlken, director of plant accounting for SIPCO, who had held the same position at Swift & Company's fresh meats division; L. D. Nye (retired) who had held a position in SIPCO's sales department and who had also held a similar position in Swift & Company's fresh meats division; W. D. Dillman, responsible for public relations, SIPCO who had been with the public relations department at Esmark; J. W. Swanson, director of taxes for SIPCO, who had held the same position at Swift & Company; and H. W. Vincent, director of sales unit accounting for SIPCO, who had held the same office at Swift & Company. All or most of these officers had been chosen by Copeland to be a part of the newly established SIC, SIPCO, and New Sipco group of companies. Similarly, other officers presently with SIC, SIPCO, and New Sipco had previously been employed at Swift & Company. Many of the senior officers of these companies are on the board of directors of SIPCO and New Sipco. Although all of these officers originally came over from Swift & Company, there has been no exchange of personnel between SIC, SIPCO, and New

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[84] Before April 1981 Esmark also received dividends.

[85] SIC is now sold on the American Exchange whereas previously it had been sold over the counter.

[86] Richard Knight openly testified that there was never any question that the same executives who were in charge before the closing of Guymon and Moultrie would remain in charge after their reopening. Thus, he, himself, who had been vice president, beef, lamb, and labor since October 1980, later became a vice president with SIC and responsible for beef and labor at New Sipco as of the spring of 1981. Knight was a member of the board of directors of SIPCO and SIC up until the public offering of April 1981. His responsibilities at New Sipco after April 1981 were the same as his responsibilities at SIPCO and SIC. These responsibilities were assigned to him by Copeland who, as noted above, has been the president and chief executive officer of SIPCO since October 24, 1980, of SIC since January 26, 1981, and of New Sipco since February 24, 1981.

[87] Twenty-five to fifty of SIPCO's employees remained covered by the Union's master agreement, while New Sipco's coverage by the master agreement remains here in dispute. (Compare the testimony of Copeland, Tr. 2373 and Thompson Tr. 2505, on UFCW master agreement coverage.)

Sipco on the one hand and Swift & Company on the other hand since April 1981. After April 1981 only one member of the SIPCO board of directors, Roger Briggs, still held any position with Esmark or Swift & Company. He is only one of nine members and has no more control than any of the other members. Accordingly to the credited testimony of John Copeland, no one from Esmark or Swift & Company has had any authority to control the day-to-day operations of SIC, SIPCO, or New Sipco after April 1981 nor has anyone from the latter group of companies had any authority or control over the day-to-day operations at Swift & Company. No employees of SIC, SIPCO, or New Sipco maintain any option to return to Swift & Company or Esmark, nor do any officers of the latter two companies have any rights to employment at SIC, SIPCO, or New Sipco.

At the time of the hearing, the legal department of SIC, SIPCO, and New Sipco was composed of Thomas McKay Jr., Bruce Thompson, and Dennis Goth. Thompson had been with the Esmark and Swift & Company legal departments at one time or another in the past. Goth too had worked for Swift & Company.

At the time of the hearing, the headquarters of SIC, SIPCO, and New Sipco was still located at 115 W. Jackson Boulevard on the 7th floor[88] and part of the 10th. As noted earlier, this is the same street address as Swift & Company although the latter is located in different offices and, in some cases, on different floors. SIPCO continues to rent its office space from Swift & Company, which enjoys a favorable long-term lease and can and does therefore offer reasonable rental rates. SIC and SIPCO share the same telephone numbers while New Sipco does not have a Chicago listing. Besides its headquarters in Chicago, SIC, SIPCO, and New Sipco have 5 pork plants, 3 beef plants, 1 lamb plant, 71 sales and distribution units, and 1 specialty plant.

The labor relations policies of SIC, SIPCO, and New Sipco are determined by Knight,[89] but Harry Niese,[90] vice president of personnel, and Copeland work on such matters as do other officers of these companies along with Knight. No one from Esmark or from Swift & Company have had anything to do with labor relations at these companies since the public sale nor have the officers of SIC, SIPCO, or New Sipco had anything to do with labor relations at Esmark or Swift & Company since the public sale.

According to Copeland, the Guymon and Moultrie plants would never have been reopened at all if it had to be done under the master agreement.[91] Rather, they would have been sold unless a competitive contract could be worked out. Moultrie, at the time of the hearing, was being operated without a contract while Guymon, as noted above, was operating under the terms of the local agreement negotiatied with Immesote. Copeland testified that New Sipco is saving $4 million per year by operating the Guymon and Moultrie plants outside the master agreement.

Since the public offering, Knight has negotiated 15 or 20 contracts on behalf of SIC, SIPCO, and New Sipco including labor agreements covering Des Moines, Iowa; Brownwood, Texas; San Antonio, Texas; and various sales units. No one connected with Esmark or with Swift & Company participated in these negotiations, nor did Knight consult with anyone from those two companies concering these negotiations or labor relations in general after April 1981.[92] In fact no departments or services are shared by SIC, SIPCO or New Sipco with Esmark or Swift & Company.[93]

Regarding the sales, SIPCO annually sells approximately $1.6 billion worth of products, about $1.1 billion of which is fresh meats produced at SIPCO's and New Sipco's own facilities. The remaining $.5 billion consists of purchased products, resold through SIPCO's sales units, 25 percent of which is processed meats.

Certain changes have occurred in the operation of SIPCO and New Sipco since October 1980 and April 1981. Thus, before October 1980 if Swift and Company did not want its fresh meats division to sell the products of other companies, it could not do so, although it did authorize certain sales of other companies' products. Today, the amount of SIPCO's resale of other companies' products is very large and its decision to sell or not to sell is independently its own. Today SIPCO has arrangements with a large number of producers in no way connected with Esmark or Swift & Company to sell processed meats. Thus, SIPCO counts among its suppliers of processed meats, Sunnyland, Pantry Pride, Peschke, Marval, Motts, and Rocco. It sells brands such as Plantation Pride,[94] American Farms,[95] Tender Pride, and Cornfield and the decision to do so is its own. The products consist of frankfurters, bacon, and bologna—all products in competition with Swift & Company's own Swift Premium brand. SIPCO also sells turkeys, cornish hens, geese, and ducks under copacking agreements with Marval, Motts, and Rocco. Some of these agreements had been made before and some after the public sale.

SIPCO still conducts business with Swift & Company. However, whereas prior to October 1980 transactions between the fresh meats division and Swift & Company were treated by means of intracompany transfer accounting rather than as cash accounts or accounts receivable and no charge was made because the purchase was merely a paper transaction after SIC, SIPCO, and New Sipco went public, transactions between the new companies and Swift & Company were handled just the same as any other transaction between Swift & Company and an independent unrelated customer. Purchases and sales between SIC, SIPCO, and New Sipco and Swift & Company were thereafter handled on an accounts receivable basis with the same carrying charges applicably charged to strangers. After April 1981 Swift & Company sold, and today sells, the same products to SIPCO as it does to its other customers on the same credit terms. If SIPCO finds Swift & Company's prices too high, it will not buy those products.

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[88] Knight had been located on the seventh floor for 6 years while with Swift & Company. In October 1980, he moved to new offices still on the seventh floor.

[89] Knight is in charge of contract negotiations.

[90] Niese is in charge of labor administration and benefit programs, including pension plans.

[91] This decision was made by Knight at Guymon, Jaracz at Moultrie, and by Copeland and other key officers.

[92] Labor relations manuals used at SIPCO are based on the old Swift & Company manual, with modifications as they envolve based on changes decided on by SIPCO management.

[93] SIC, SIPCO, and New Sipco still purchase services from Swift & Company's R & D Laboratory, which had always done this work before the public sale. The cost of this work is about $125,000 annually, this sum having been arrived at through arm's-length negotiation.

[94] Sunnyland's trademark. SIPCO by agreement has exclusive use.

[95] SIPCO's own trademark to which Swift & Company has no rights.

Some SIPCO sales units sell both Swift & Company products and competing products. In North Carolina and South Carolina, for example, SIPCO today sells Swift & Company's processed meats to supermarkets whereas prior to the public sale SIPCO was permitted by Swift & Company to sell its products only to restaurants, hospitals, and institutions (food services). It sells Swift & Company's Butterball line while at the same time it also sells its own brands, unlike the situation prior to April 1981. Similarly, though it has the exclusive rights in these areas to sell certain Swift & Company brands of processed meats, it can still sell competing brands, again unlike the situations prior to April 1981.

In one instance SIPCO has a copacking arrangement with Swift & Company similar to copacking arrangements with other companies. This one exception is in San Antonio, Texas, where both fresh and processed meats have been produced since 1934. Here, the plant[96] that had been owned by Swift & Company was transferred along with the other fresh meats plants to SIPCO at the time of its creation. Swift & Company, however, requested that SIPCO continue to produce certain Swift & Company products, hams, picnics, etc., which had historically been produced at that site for Swift & Company. SIPCO agreed and though the employees producing these same products are the same employees working for the same supervisors, they are now SIPCO employees. The sales of these products are still handled as before, SIPCO selling to food service accounts; Swift & Company selling to supermarkets (retailers). The agreement, which requires SIPCO to sell raw materials to Swift & Company with SIPCO employees to process the materials on Swift-owned equipment and which also requires SIPCO to turn over a certain amount of the products to Swift & Company sales units for resale, was negotiated initially on October 27, 1980, and was renewed in February 1981. The agreement[97] appears to be a legitimate arm's-length transaction.

New Sipco, which is a wholly owned subsidiary of SIC, operates a pork plant at Moultrie and a beef plant at Guymon. It has no sales units of its own and does its marketing through SIPCO's sales organization. Some of Moultrie's production is sold locally to retail stores and some for further processing. Its marketing procedure has not changed since the public sale. Guymon produces carcass beef. It was stated at the hearing that SIC would file a consolidated tax return for SIC, SIPCO, and New Sipco.

Analysis

A. *Procedural Questions*

1. The question of service

Regarding the service of charges the record indicated that the original charge in Case 13-CA-21156 was filed on May 29, 1981, and named as respondents:

> Swift Independent Packing Company, formerly known as Swift & Company
> Swift Independent Corporation
> New Sipco, Inc.
> Esmark, Inc.
>
> All as *alter egos*, a single employer and/or joint employers.

Although the charge form does not name Swift & Company as an "Employer Against Whom Charge Is Brought," the "Basis of the Charge" contains the following language:

> Swift & Company (now known as Swift Independent Packing Company) . . .
> The above respondents *and Swift & Company*, acting in concert . . . have engaged in a plan . . . to repudiate the Master Agreement . . . to oust the Charging Party . . . and unilaterally abrogate the collectively bargained terms and conditions of employment at such plants. . . . By these actions the employer has violated Section 8(a)(1), (3), and (5) of the Act.

Thus, although the charge does not specifically identify Swift & Company, in box 1,a of the form as an "Employer Against Whom Charge Is Brought" it does, in fact, indicate in the body of the charge that Swift & Company is being charged with acting in concert with those companies, identified in box 1,a, who are specifically charged with violating the Act. In my opinion, if anyone from Swift & Company read this charge, he would be derelict if he were to ignore it as implicating his company in this case.

The charge indicates that the employer representatives to contact were Robert Palenchar at 55 East Monroe Street, Chicago, Illinois, and Richard Knight, 115 West Jackson Boulevard, Chicago, Illinois. On June 2, 1981, copies of the charge were sent to Swift Independent Packing Co. et al., c/o Robert Palenchar at the East Monroe Street address and to Swift Independent Packing Company, formerly known as Swift & Company, Swift Independent Corporation, New Sipco, Inc. & Esmark, Inc. at the Jackson Boulevard address, to the attention of Richard Knight. At this time Palenchar was vice president of corporate affairs and personnel at Esmark and had earlier been deeply involved in personnel matters and in labor negotiations with the Union on behalf of Swift & Company. Knight's position at the time and previously is fully described supra.

The return receipt for the copy of the charge sent to the Monroe Street address was signed by one A. Lykes, otherwise not identified. The return for the copies sent to the Jackson Boulevard address was signed by Jim Mellon, similarly unidentified. The dates of delivery were June 3 and 5, respectively.

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[96] The processed meat equipment remained the property of Swift & Company.

[97] SIC Exh. 4.

On July 10, the complaint based on this charge issued naming Swift & Company as joint and/or single employers with and/or alter ego of the other Respondents. Swift & Company is specifically named in several allegations and included as one of the Respondents throughout. James Farren is specifically identified as "Vice-president of Respondent Swift" and is alleged to be a supervisor and agent of Respondent Swift & Company. Copies of the complaint were mailed to Palenchar at the Monroe Street address and to Swift & Company at the Jackson Boulevard address among others. The two copies of the complaint[98] sent to the Monroe Street address were received on July 13 and 14 and signed for by A. Lykes. The copy sent to Swift & Company at Jackson Boulevard was signed for by K. Small on July 13. Subsequently, orders scheduling hearing were mailed and return receipts were signed at Monroe Street, again by Lykes and at Jackson Boulevard by Small on behalf of both SIPCO and Swift & Company on July 20.

All parties filed answers to the complaint including Swift & Company, whose answer was dated July 23. Swift & Company's answer denied that it was served as alleged in the complaint on June 3 by certified mail.

On July 6 the charge in Case 13-CA-21274 was filed and named as respondents:

> Swift Independent Packing Company, formerly known as Swift & Company
> Swift Independent Corporation
> New Sipco, Inc.
> Swift & Company
> Esmark, Inc.
>
> All as *alter egos*, a single employer and/or joint employers.

Thus, the charge in Case 13-CA-21274 does, in fact, name Swift & Company as a respondent. Palenchar at the Monroe Street address and Farren and Knight at the Jackson Boulevard address were named as employer representatives to contact. On July 8, a copy of the new charge addressed to Palenchar was received at the Monroe Street address and the receipt therefore was signed by Small, the same individual who later signed the return receipt for the complaint address to Swift & Company at the Jackson Boulevard address on July 13. On July 8 also, a copy of the new charge addressed to Richard C. Knight and James Farren, Swift Independent Packing Company, was received at the Jackson Boulevard address and the receipt was signed by Lykes, who had previously signed for the receipt of documents addressed to Palenchar at the Monroe Street address.

On August 17 the complaint in Case 13-CA-21274 issued. Copies of the complaint were served on Swift & Company, among others, to the attention of Donald Bussman, Esq. at the Jackson Boulevard address on August 18. The return receipt for the copy of the complaint addressed to Swift & Company was signed for by Joe Doria, not otherwise identified. Joe Doria also signed for copies addressed to SIPCO, New Sipco, and to SIC, all at the Jackson Boulevard address.

Additional papers were served on the various Respondents after August 17. However, the above record of the various services convinces me that Swift & Company received actual notice, if not legal notice, of the charge and subsequent pleadings sufficient to enable it to adequately defend its position. Thus, the initial charge fully outlined the problem, and described how Swift & Company was considered to be the alter ego of the various other respondent companies and responsible for the unfair labor practice allegedly perpetrated by them. This charge was served on Swift & Company's alleged alter egos, in particular on Palenchar, vice president of Swift & Company's parent company. The language of the charge, having come to the attention of Palenchar at the very beginning, charging Esmark and its wholly owned subsidiary, Swift & Company, with being engaged along with its alter egos, or its joint employers, or as part of a single employer with SIC, SIPCO, and New Sipco with violating the Act, I find it impossible to believe that the parties served did not discuss this charge among themselves—all being charged as alter egos, among other things—as violators of the Act. All parties having only recently been totally entwined in each other's business, all having officers who had served on the staffs of each other's companies, all but Esmark doing business at the same address, how could Swift & Company not be actually make aware of the content of the charge? How could Esmark Vice President Palenchar read this original charge specifically naming Swift & Company as Esmark's alter ego, or as a joint and/or single employer with Esmark, as a correspondent and never advise Swift & Company, its wholly owned subsidiary, that it was so involved? How could Knight, on receipt of this charge, fail to discuss it with Swift & Company, named as the alter ego, etc., of SIC, SIPCO, and New Sipco, when Swift & Company, his prior employer, was located in the same building, perhaps the same floor, and the charge clearly alleged the same violations as having been committed by all corporate entities together? I cannot conclude otherwise but that Swift & Company obtained actual notice of the content of the charge about the same time notice was legally received by the other respondents, and that Swift & Company had plenty of time to organize its defense, offer evidence, and otherwise prepare for the hearing which, in any event, did not occur until January 1982. Thus, I feel that the minor procedural defect in the General Counsel's processing of the case did not in any substantial manner undermine Swift & Company's position, nor deny it due process. Indeed Swift & Company's subsequent full participation in all phases of these cases would certainly indicate otherwise. The notion to dismiss based on failure of service is denied.

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[98] Both were addressed to Esmark, one to the attention of Palenchar, the other to the attention of Edward J. Harrison.

2. The 10(b) question

a. *Case 13–CA–21156*

Respondents take the position that inasmuch as the public expression concerning the planned closing of the Moultrie and Guymon plants was made on June 30, 1980, and the decision not to apply the master agreement was announced in September 1980 and the charge in Case 13–CA–21156 was not filed until May 29, 1981, the allegations in the complaint concerning these matters should be dismissed because of the 10(b) period bar. The General Counsel and the Charging Party take the position that the 10(b) period began at the time these two plants closed in April 1981 and that the filing of the charge several weeks later was timely. I agree with the General Counsel and the Charging Party on this point. The numerous cases cited by Respondents in support of their positions are clearly distinguishable on the facts.

b. *Case 13–CA–21274*

Respondent Swift & Company and Esmark take the position that the May 11, 1981 letter, which limited rights of employees to transfer to other locations covered by the master agreement was not a violation in itself but was "merely the consequence of or the enforcement of a decision made and communicated to the Union in June 1980." These respondents claim that the June 1980 announcement was made more than 6 months prior to the filing of Case 13–CA–21274 and that therefore the filing of the charge was barred by the 10(b) provision. The General Counsel and Charging Party, however, take the position that the 10(b) period did not begin to run until the May 11, 1981 notice issued so that the filing of the charge was timely. Once again, I find the cases cited by Respondents in support of their positions easily distinguishable. Consequently, all motions to dismiss based on Section 10(b) are denied.

B. *Merits of the Cases*

1. Case 13–CA–21156

Analysis of the background facts and of the circumstances existing in 1980 convinces me that the reorganization initiated in April of that year and Esmark's decisions to divest itself of the energy segment and of the fresh meats division of Swift & Company were economically motivated. The subsequently offered ESOP proposal was, in my estimation, made in good faith and its rejection eventually gave rise necessarily to new plans: first to sell the fresh meats division as a unit to yet unknown buyers, and later to sell the fresh meats division by means of a public offering, both plans conceived out of economic considerations free of antiunion animus. Indeed, throughout the planning of the ESOP offer and the eventual subsequent public offering, the Union was continually kept informed of progress made toward divestiture of the fresh meats division and the creation of the new independent companies.

When the public offering was made and Esmark ceased to be the sole owner of SIPCO and became instead a minority holder of SIPCO through SIC, ownership passed to a new set of owners through their purchase of SIC stock. The question at that point became, "Are the new owners bound to the old Teamster agreement or are they not?" The General Counsel and Charging Party replied in the affirmative, Respondents argued to the contrary.

None of the cases cited by the parties and none that I have independently analyzed are factually on all fours with the instant case. The General Counsel and Charging Party have cited a number of cases falling within the stock transfer line.[**] But these cases appear to deal with situations where a single on-going corporate entity had a majority of its stock sold or transferred during the continued operations of the same corporation. The instant case, on the other hand, involves the incorporation of an entirely new and independent company with the issuance of new stock and the sale of a majority of that stock to the public; to new owners completely independent of the previous owners. In light of these facts, I conclude that the instant case is governed more properly by the hold in *NLRB v. Burns Security Services*, 406 U.S. 272 (1972).

The Supreme Court in *Burns*, might well have held that the existence of a valid collective-bargaining agreement between a labor organization representing the employees of a predecessor company and that company is sacrosanct and inviolable and that any purchaser of that company must be bound to the terms and conditions of employment contained in the existing labor agrement won for those employees through the collective-bargaining process. In short, the Supreme Court might well have said, "let the buyer beware," as it must be with regard to all other aspects of such a purchase—the condition of the buildings and equipment and the economic state of the business. Indeed, the Charging Party would have it so. The Supreme Court in *Burns*, however, recognized other considerations that had to be weighed along with the rights of employees covered by the existing collective-bargaining agreement and of the parties thereto. Specifically, the Court (406 U.S. at 287 to 291) stated:

> We also agree with the Court of Appeals that holding either the union or the new employer bound to the substantive terms of an old collective-bargaining contract may result in serious inequities. A potential employer may be willing to take over a moribund business only if he can make changes in corporate structure, composition of the labor force, work locations, task assignment, and nature of supervision. Saddling such an employer with the terms and conditions of employment contained in the old collective-bargaining contract may make these changes impossible and may discourage and inhibit the transfer of capital. On the other hand, a union may have made concessions to a small or failing employer that it would be unwilling to make to a large or economically successful firm. The congressional policy manifest in the Act is to enable the parties to negotiate for any protection either deems

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[**] E.g., *Hendricks-Miller Typographic Co.*, 240 NLRB 1082 (1979); *Topinkas' Country House*, 235 NLRB 72 (1978).

> appropriate, but to allow the balance of bargaining advantage to be set by economic power realities. Strife is bound to occur if the concessions that must be honored do not correspond to the relative economic strength of the parties.
>
> . . . .
>
> In many cases, of course, successor employers will find it advantageous not only to recognize and bargain with the union but also to observe the pre-existing contract rather than to face uncertainty and turmoil. Also, in a variety of circumstances involving a merger, stock acquisition, reorganization, or assets purchase, the Board might properly find as a matter of fact that the successor had assumed the obligations under the old contract. Cf. *Oilfield Maintenance Co.*, 142 NLRB 1384 (1963). Such a duty does not, however, ensue as a matter of law from the mere fact that an employer is doing the same work in the same place with the same employees as his predecessor, as the Board had recognized until its decision in the instant case. See cases cited supra, at 184. We accordingly set aside the Board's finding of an 8(a)(5) unfair labor practice insofar as it rested on a conclusion that Burns was required to but did not honor the collective-bargaining contract executed by Wackenhut.

In my opinion, the Supreme Court's concern that saddling a new employer with a predecessor's old collective-bargaining contract might discourage or inhibit the transfer of capital has application to the facts contained in the instant case. Respondents SIC, SIPCO, and New Sipco freely admit that if Moultrie and Guymon had been forced to operate under the master agreement, they would not have been opened at all because they were not economically viable plants when operating under the agreement. I find that under *Burns*, SIC, SIPCO, and New Sipco are not bound by the master agreement. As it is, the Union and Respondents, as conceded successors, are free to negotiate new terms and conditions of employment more acceptable, if not totally satisfactory, to both sides.

The complaint in Case 13-CA-21156 alleges that Respondents Esmark, Swift & Company, SIC, SIPCO, and New Sipco Inc. are and have been at all times material a single-integrated business enterprise, a single and/or joint employer, and alter egos. I take the term "at all times material" to mean the dates listed in paragraphs XII and XIII, the dates when the unfair labor practices allegedly occurred. Regarding these dates, it is alleged that on April 17 Respondent collectively closed the Moultrie and Guymon plants and terminated the employment of employees at those plants in order to avoid its obligations under the 1979-1982 master agreement in violation of Section 8(a)(1) and (3) of the Act. I find, however, that Esmark closed these plants in anticipation of, and as one of several steps to be taken in its overall lawful plan to completely divest itself of control of the fresh meats part of its holding[100] and as a transitional step in the creation of an entirely new set of companies—SIC, SIPCO, New Sipco—publicly owned and independent of itself and its subsidiaries. Inasmuch as the closing of the Moultrie and Guymon plants was not unlawfully motivated nor in violation of the Act, I find that the organizational interrelationship among the various corporate entities at this time, April 17, is immaterial.

The complaint further alleges that on May 4 Respondent reopened the Moultrie plant; that on May 14 they reopened the Guymon plant; that since about April 30 Respondents have unilaterally refused to adhere to and apply the terms and conditions of the master agreement at Moultrie and Guymon; and that by these collective acts Respondents have violated Section 8(a)(1) and (5) of the Act.

Analysis of the facts clearly indicates that by May 4 and 14, indeed as of the the end of April, all arrangements for the final separation of SIC, SIPCO, and New Sipco from its previous owner Esmark and from Esmark's subsidiary Swift & Company had been completed. Neither Esmark nor Swift & Company can be considered the alter ego of SIC, SIPCO, or New Sipco because the latter three, as of the critical dates, could in no way be considered a disguised continuation of the former, if in fact, they[101] ever could be. The splitting off of the fresh meats division was openly accomplished through its sale to a newly created corporate entity, publicly owned. Following the separation and public sale, SIC, SIPCO, and New Sipco became a separate entity or set of entities managed by individuals who had broken all ties with Esmark, and with Swift & Company as well as their operations and business purposes. SIPCO and New Sipco's operation, i.e., the production, processing, and sale of fresh meats and related products, though similar, to some degree, to their operations before SIPCO's separation from Esmark and Swift & Company, were by May 4 no longer subject to either control or review by Esmark or its subsidiary Swift & Company. Similarly, the business purpose of SIC, SIPCO, and New Sipco, i.e., obtaining a fair return on investments through these operations, became the concern of the officers, directors, and owners of the new company, no longer subject to the control or review of the officers, directors, or owners of Esmark or Swift & Company. By May 4 the officers of SIC, SIPCO, and New Sipco were responsible solely to their own boards of directors and to their own stockholders, a great majority of whom had no connection whatsoever with either Esmark or Swift & Company. Though most of the equipment and real property in use at SIC, SIPCO, and New Sipco locations as of May 1981 had also been used by SIPCO when it was owned by Esmark, this fact is a natural consequence of the sale of the equipment and property to the new corporations and in any event is not controlling.[102] Similarly, many of the customers and suppliers of the new operating companies are the same, but, on the other hand, new ones have been added and the system of servicing has been changed to a large degree. All in all, and with particular emphasis on the change in ownership, I conclude that as of the critical dates in May SIC, SIPCO, and New Sipco were not the alter ego of Esmark or of Swift & Company.

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[100] Esmark's role as a minority stockholder does not affect this decision.

[101] Contrary to other findings, it is quite apparent that after the public sale, SIC, SIPCO, and New Sipco operated as a single entity insofar as the matters have involved are concerned.

[102] *John Fender Electric Co.*, 244 NLRB 957 (1979).

Regarding the allegation that SIC, SIPCO, and New Sipco were collectively on May 4 and 14 a single-integrated enterprise or joint employer with Esmark and with Swift & Company, it should be recognized that to prove this allegation the General Counsel would have to show that the two latter corporations shared common management, interrelations of operations, and ownership as well as centralized control of labor relations with SIC, SIPCO, New Sipco on the dates in question. The record indicates, however, and I find that none of these indicia were present on those dates or subsequently. Esmark's and Swift & Company's[103] officers and directors remained primarily the same after disposition of the fresh meats business as they had been before, but they no longer had control or right of review over the operations nor over the labor relations of the new corporation. Whereas before the sale, Esmark controlled 100 percent of SIPCO, and before SIPCO's existence, 100 percent of Swift & Company's fresh meats division, after the sale Esmark only another minority stockholders with no more control over the new corporation than any other minority stockholder relative to the number of shares held. I conclude, therefore, that Esmark and Swift & Company as of May 4 and 14 were not single enterprises nor joint employer with SIC, SIPCO, or New Sipco when the latter opened up the Guymon and Moultrie plants and refused to apply at those times the provisions of the master agreement. Indeed, I find that neither Esmark nor Swift & Company played any part in the decision of SIC, SIPCO, and New Sipco to open those plants and to refuse to apply the master agreement. Consequently, I find that neither Esmark nor Swift & Company violated Section 8(a)(1) and (5) in this respect.

I have found that SIC, SIPCO, and New Sipco became totally independent of Esmark and Swift & Company at the time of the public stock sale in April. At that time SIPCO and New Sipco became successors to the fresh meats division of Swift & Company and to SIPCO when it was the transitional entity, both having been previously owned 100 percent by Esmark. When SIPCO and New Sipco became successors under the new owners, they were free to implement initial conditions of employment, subject to later negotiations with the bargaining representative of their employees. When New Sipco interviewed and hired employees to work at Moultrie and Guymon, it carefully advised these employees that they would be working for an entirely new corporation under working conditions other than those provided for in the master agreement previously in effect at those plants. The applicants were free to accept work under these new conditions or to reject the offer. As it turned out most of the prior employees of Esmark's SIPCO accepted New Sipco's new conditions of employment and it is patently clear that if they had not done so or had insisted on the application of the master agreement, they would not have been hired. Thus, until a substantial number of the old employees accepted the new terms, the employer could not be certain that the Union would be representing a majority of them. Under these circumstances New Sipco was within its rights as a successor to establish initial working conditions and not be saddled with the master agreement.[104] SIC, SIPCO, and New Sipco therefore did not violate Section 8(a)(1) and (5) in this respect, as alleged.

Inasmuch as I have found that neither Esmark nor Swift & Company were alter egos of nor operating as a single enterprise or joint employer with, SIC, SIPCO, or New Sipco after April 1981, and inasmuch as there is no evidence that anyone still connected with Esmark or Swift & Company participated in the negotiations with Local 340, which resulted in the May 6, 1981 contract between the local and New Sipco, I shall recommend dismissal of allegations XIII(d) as it refers to Esmark and Swift & Company. The record evidence, however, indicates that historically the International Union had been recognized as the sole and exclusive collective-bargaining representative for the employees at the Guymon plant. When New Sipco became the successor employer, a duty devolved on it to recognize and bargain with that Union concerning the wages, hours, and working conditions of employees in that unit. It chose, however, to circumvent this duty and to enter into negotiations with Local 340, executing with it a labor agreement on May 6. It should have been apparent to management at New Sipco that the Union could not logically claim the lawful application of the master agreement to Guymon and Moultrie as it had been doing consistently for at least a month prior to May 6 and at the same time acquiesce in or "give its blessing" to the negotiations on the local level between Local 340 and New Sipco. I find that SIC, SIPCO, and New Sipco[105] violated Section 8(a)(1) and (5) through the decision of Copeland and Knight to have New Sipco negotiate directly with Local 340 rather than with the Union.

I have found that Swift & Company and Esmark, as of the date of the public sale, no longer had any control over SIC, SIPCO, or New Sipco, that they were not alter egos of, or single, or joint employers with SIC, SIPCO, or New Sipco but that the latter three corporations were completely independent of the former two. This being the case, SIPCO no longer had any right after the April public sale to transfer its employees from the Tampa facility to Swift & Company-owned facilities. Likewise, because I have found that SIC, SIPCO, and New Sipco were free to establish initial terms and conditions of employment at Moultrie and Guymon following the public sale, and did so by deciding not to apply the master agreement at those facilities, they were likewise free on May 11 to limit the transfer rights of employees at the closed Tampa facility to other facilities then covered by the master agreement since much transfer rights vested solely by virtue of the application of the master agreement, and these rights were limited therein to facilities covered by the master agreement, in accordance with the seniority provisions covering master agreement employees. Consequently, I recommend that Case 13-CA-21274 be dismissed in its entirety.

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[103] Management personnel of the processed meats division and of the old Swift & Company remained in place to manage the new Swift & Company while management personnel of the fresh meats division of course moved on to manage SIC, SIPCO, and New Sipco.

[104] *NLRB v. Burns Security Service*, supra.

[105] The integrated operation of these three entities indicate that for purposes of this decision they should be considered a single employing enterprise.

CONCLUSIONS OF LAW

1. Respondent Employers are employers engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

2. The Union is a labor organization within the meaning of Section 2(5) of the Act.

3. Neither Esmark nor Swift & Company is an alter ego of SIC, SIPCO, or New Sipco, Inc.

4. Neither Esmark nor Swift & Company is a joint employer with SIC, SIPCO, or New Sipco, Inc.

5. Neither Esmark nor Swift & Company comprises a single enterprise with SIC, SICPO, or New Sipco, Inc.

6. SIC, SIPCO, and New Sipco, Inc. constitute a single integrated enterprise and are joint employers within the meaning of the Act.

7. At all times material, United Food and Commercial Workers International Union, AFL-CIO-CLC has been the exclusive collective-bargaining representative of the employees previously covered by the 1979-1982 master agreement at Moultrie, Georgia, and Guymon, Oklahoma.

8. The Guymon, Oklahoma plant unit and the Moultrie, Georgia plant unit described in the 1979-1982 master agreement, each constitute a unit appropriate for the purpose of collective bargaining within the meaning of Section 9(b) of the Act.

9. The employees of New Sipco, Inc., currently employed at the Moultrie, Georgia, and Guymon, Oklahoma plants are no longer covered by the 1979-1982 master agreement.

10. By recognizing and bargaining with and executing a contract or authorizing the same with Local Union 340, United Food and Commercial Workers International Union, AFL-CIO-CLC as the exclusive collective-bargaining representative of the employees at the Guymon, Oklahoma plant, SIC, SIPCO, and New Sipco, Inc. violated Section 8(a)(1) and (5) of the Act.

11. The above unfair labor practices affecting commerce within the meaning of Section 2(6) and (7) of the Act.

REMEDY

Having found that Respondents SIC, SIPCO, and New Sipco, Inc. have engaged in certain unfair labor practices, I shall recommend that they be ordered to cease and desist therefrom and to take certain affirmative action to effectuate the policies of the Act.

[Recommended Order omitted from publication.]

Industrial Security Services Corporation *and* **Jimmie R. Woodard** *and* **Nancy Hall.** Cases 23–CA–9232(E) and 23–CA–9233(E)

June 29, 1988

DECISION AND ORDER

BY CHAIRMAN STEPHENS AND MEMBERS JOHANSEN AND BABSON

On April 1, 1987, Administrative Law Judge David L. Evans issued the attached second supplemental decision. The Applicant filed exceptions and the General Counsel filed an answering brief.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the second supplemental decision and the record in light of the exceptions and brief and has decided to affirm the judge's rulings, findings, and conclusions[1] and to adopt the recommended Order.

We agree with the judge that the net worth statement submitted by the Applicant's accountant relies on the same unattested to and unaudited financial statements previously considered and previously found deficient by the Board in the original Order remanding this proceeding to the judge reported at 272 NLRB 1083 (1984).[2] Furthermore, we also find that the three affidavits of Merrill Gregory, the Applicant's administrative assistant, do not provide the requisite evidence of the Applicant's net worth. Gregory has stated in his affidavits that he has reviewed the net worth statement prepared by the accountant and has concluded that it accurately states the Applicant's net worth. However, Gregory did not explicitly declare that he prepared or reviewed any of the business records supporting the financial statement supplied to the accountant or how otherwise he knows that the accountant's net worth statement is accurate. We note that pursuant to Federal Rule of Evidence 901(a), evidence must be authenticated, and that Federal Rule of Evidence 901(b)(1) permits authentication through the testimony of a witness with firsthand knowledge. As Gregory has not claimed such knowledge, his affidavits are not admissible to prove that the statement is an accurate indication of the Applicant's net worth.[3] By contrast, under those rules, Gregory's affidavits concerning employee complement *are* admissible to establish that the Applicant had fewer than 500 employees. Gregory has averred in his affidavits that the employee complement statement, which was prepared under his supervision and direction, was compiled from business records and documents and that he has personal knowledge concerning the contents of those documents. Accordingly, while the Applicant has established that it has fewer than 500 employees, we conclude that the Applicant has failed to submit probative evidence of its net worth and its Equal Access to Justice Act (EAJA) application, therefore, must fail.

We recognize that this result may appear harsh. It should not be interpreted as meaning that every applicant for an award under EAJA must incur the expense of securing an audited statement of its records in order to satisfy EAJA's eligibility requirements. It should be read to mean, however, that an applicant must submit accurate and properly authenticated evidence of its net worth in order to satisfy the burden of eligibility that Congress has imposed. As the Applicant has failed to submit such evidence, we shall dismiss the application.

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge and orders that the application of the Applicant, Industrial Security Services Corporation, Houston, Texas, for an award under the Equal Access to Justice Act is dismissed.

MEMBER BABSON, dissenting.

I would find that the Applicant is eligible under EAJA and would therefore reach the merits of the Applicant's entitlement to an EAJA award. The Applicant has submitted the sworn affidavit of its certified public accountant who states that he has prepared the attached statement of the Applicant's net worth in accordance with "general accounting principles of certified public accountants." That statement indicates that the Applicant's net worth

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[1] In affirming the judge's second supplemental decision, we do not rely on the judge's opinion that the accountant's use of the term "general accounting principles of certified public accountants" seemingly indicates a lower standard of accuracy than the term "generally accepted accounting principles."

[2] The key factor here, as emphasized by the judge, is that the accountant's January 21, 1987 affidavit states, in essence, that he applied his professional expertise only to the extent of verifying the summary arithmetic contained in the financial statement prepared by the Applicant. As the accountant had previously stated in his July 29, 1983 letter to the Applicant, he did not examine any of the underlying business records and therefore he refrained from expressing his professional opinion as to the accuracy of the financial statement "taken as a whole." This procedure is in sharp contrast to that employed in *American Pacific Concrete Pipe Co. v. NLRB*, 788 F.2d 586 (9th Cir. 1986), one of the two cases relied on by our dissenting colleague. There the financial statement itself was prepared in accordance with "generally accepted accounting principles" and thus was based on the accountant's professional opinion that the statement was accurate. In *D'Amico v. Shipbuilding Workers*, 630 F.Supp. 919 (D.Md. 1986), there is no indication by the court that the claim of eligibility was not based on the accountant's personal knowledge.

[3] Our dissenting colleague stresses Gregory's statement that he has "personal" knowledge of the Applicant's "financial status." However, Gregory does not state how he acquired that knowledge or what is meant by "financial status," a less exact term than "net worth."

289 NLRB No. 53

is well below the statutory amount that a party must satisfy in order to be eligible for an EAJA award. Now read in conjunction with the affidavits of Merrill Gregory,[1] the Applicant's administrative assistant who, as the judge notes, has "personal knowledge of [the Applicant's] operations [and] financial status," the net worth statement provides sufficient evidence that the Applicant satisfies the EAJA net worth requirement. See generally *D'Amico v. Shipbuilding Workers*, 630 F.Supp. 919, 922 (D.Md. 1986); *American Pacific Concrete Pipe Co. v. NLRB*, 788 F.2d 586, 591 (9th Cir. 1986).[2] Furthermore, I agree with the judge that the Applicant's detailed statement reflecting the number of employees it had on the relevant date satisfies the other jurisdictional requirement that an applicant must meet. Consequently, notwithstanding whatever prudence guided the Board in its earlier deliberations in this matter, I find that the Applicant has now met its burden of establishing eligibility under EAJA. In my view, the evidentiary burden imposed on this applicant by my colleagues is inconsistent with the intent of Congress in enacting EAJA and inconsistent with the above court decisions that found similar documentary evidence submitted by EAJA applicants to be sufficient. Accordingly, I respectfully dissent.

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[1] The affidavits of Gregory were submitted with the Applicant's initial and various supplemental applications for an award of attorneys' fees and expenses. All the affidavits state that in his capacity as the Applicant's administrative assistant, Gregory has "personal knowledge of the operations, financial status, and work force" of the Applicant. Gregory has also averred in his most recent affidavit that he has reviewed the financial statement prepared by the accountant and "know[s] that it is a true and accurate statement of the total net worth" of the Applicant.

[2] In *Shipbuilding Workers*, the applicant submitted the affidavit of the individual who performed its accounting services, which averred that the applicant satisfied the net worth requirement. Rejecting the argument that the applicant should have submitted a balance sheet showing its net worth, the court concluded that "an applicant's affidavit which indicates eligibility should be sufficient to meet the applicant's burden, absent some at least minimally factually supported argument by the government that the applicant is not eligible." *Shipbuilding Workers*, 630 F.Supp. at 922. By requiring Gregory to prove "how otherwise he knows that the accountant's net worth statement is accurate" and "how he acquired . . . knowledge" of the Applicant's financial status when the General Counsel has failed to present at least some minimally factually supported argument that the Applicant is not eligible, my colleagues have imposed the type of requirements that the court rejected in *Shipbuilding Workers*.

Further, the Ninth Circuit in *America Pacific Concrete Pipe* determined that the applicant had satisfied its net worth eligibility by submitting a financial statement that was prepared "in accordance with general accounting principles" and that showed a net worth below the statutory ceiling. I find unpersuasive my collegues' argument that the procedure used by the accountant in the present case stands in "sharp contrast" to that employed by the individual who prepared the financial statement in *American Pacific Concrete Pipe*. The court's opinion in that case is devoid of any further description of that accountant's procedure other than that the balance sheet prepared included an allowance for depreciation.

Tamara J. Gant, Esq., for the General Counsel.
A. Martin Wickliff, Jr. (Mayor, Day & Caldwell), of Houston, Texas, for the Applicant.

SECOND SUPPLEMENTAL DECISION

Equal Access to Justice Act

DAVID L. EVANS, Administrative Law Judge. On 30 September 1985, by unpublished Order of that date, the Board, for the second time, remanded this matter to me for the purpose of receiving new evidence concerning Applicant's eligibility for any award of fees and expenses under the Equal Access to Justice Act (EAJA) and for the further purpose of considering, under EAJA, Applicant's petition for fees and expenses incurred following my supplemental decision issued 11 June 1984. The Board further ordered that I issue this second supplemental decision setting forth findings and conclusions on these issues.

On 26 January 1987, Applicant filed its second supplemental application for award of fees and expenses. Contained therein is certain information purporting to establish Applicant's eligibility under EAJA and further containing a statement of fees and expenses as provided for in the Board's Order. The General Counsel filed no response to this submission.

Eligibility of Applicant

The underlying complaint was filed on 17 May 1983; therefore, the eligibility standards for an award under EAJA are determined by 5 U.S.C. § 504 (1982); to wit, Applicant must have had at that date a net worth that did not exceed $5 million, and it must have employed no more than 500 employees.

1. Employee complement

Attached to the second supplemental application is the affidavit of M. V. Gregory, Applicant's administrative assistant. Gregory testified that in his capacity as administrative assistant he had personal knowledge of "the operations, financial status and work for of Applicant." Gregory further testified that the business records and documents of Applicant are under his "jurisdiction and control." Gregory testified that compilations submitted with his affidavit are based on such company records of which he had personal knowledge, and he knows such compilations to be accurate. The compilations reflect that Applicant, in its business of providing security services in Harris and surrounding Texas counties, employed during the month of May 1983, a total of 423 employees. The compilation also details the job descriptions and locations of these employees during the relevant period. Therefore, Applicant has produced probative, firsthand evidence that during the relevant period it employed no more than 500 employees.

2. Net worth

In its "Order Reopening Record and Remanding Proceeding for Further Hearing," dated 8 November 1984,[1] the Board reviewed an exhibit of net worth that had been submitted by Applicant. The exhibit contained a balance sheet, which, on its face, purported to reflect

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[1] 272 NLRB 1083.

Applicant's financial condition as of 31 March 1983. The Board found that the exhibit was not of probative value because it was not attested to by Applicant's accountant or any other responsible management official. The Board noted that a letter from Applicant's accoutant, Russell G. Davis, indicated that the financial statements submitted were prepared by Applicant's management and that the accounting firm merely reviewed them in a fashion that was "substantially less in scope than an exmaination in accordance with the generally accepted auditing standards." Finding this inadequate the Board remanded the case "for a hearing for the limited purpose of receiving new evidence with respect to the issue of Applicant's eligibility for an award of fees and expenses under the Equal Access To Justice Act."

On 16 January 1985, counsel for the General Counsel submitted a "Motion to Withdraw Portion of Answer and for Reconsideration." In the motion the General Counsel acknowledged that, on inspection of documentary evidence submitted to the General Counsel after the Board's 8 November 1984 remand, the General Counsel was satisfied that Applicant was eligible for relief under EAJA, and the General Counsel further moved to amend her previously submitted answer denying such eligibility.

On 29 January 1985, by order of that date, I granted the motion and resubmitted the matter to the Board for its consideration of the matter on the merits.

In its 30 September 1985 "Supplemental Order Reopening and Remanding Proceeding," the Board noted:

> While the General Counsel may now be satisfied that Applicant meets the EAJA requirements, we cannot decide this jurisdictional question based on an undocumented, off-the-record exchange of information by the parties. Based on the documentary evidence now before us, we are unable to ascertain whether Applicant has adequately established its eligibility for an award. Until this threshold question is resolved, we cannot determine the merits of the application.

The Board therefore ordered that the record be reopened "for the purpose of receiving new evidence concerning Applicant's eligibility for an award of fees and expenses under the Equal Access To Justice Act" and further ordered me to consider the petition for Applicant's fees and expenses incurred following my decision of 11 June 1984.

On 26 January 1987, Applicant submitted its "Second Supplemental Application for Award of Fees and Expenses under the Equal Access To Justice Act." As noted above, in this supplemental application Applicant submitted a detailed statement of employee complement by one having personal, firsthand knowledge on that issue, M. V. Gregory. However, regarding the net worth and issue, Applicant submitted no such evidence.

Applicant submitted an affidavit, dated 21 January 1987 by accountant Davis, the substantive paragraph of which states:

> The attached financial information (Exhibit 2A), showing total assets of One Million Seven Hundred Seventy-nine Thousand Seven Hundred Ninety-two and 00/100 Dollars ($1,779,792.00) and total liabilities of Two Hundred Sixty-nine Thousand Nine and 00/100 Dollars ($269,009.00) as of May 21, 1983 was developed from the financial statements of Industrial Security Services Corporation. The attached Exhibit 2A also shows a total equity of One Million Four Hundred Eighty-three Thousand Seven Hundred Eight-three and 00/100 Dollars ($1,483,783.00), representing a net worth of One Million Four Hundred Eighty-three Thousand Seven Hundred Eighty-three and 00/100 Dollars ($1,483,783.00). This net worth statement was arrived at by me in accordance with general accounting principles of certified public accountants.

The attached document "Exhibit 2A" is a letter to Applicant over the signature of Davis. The letter states:

> RE: Our review report dated July 29, 1983, on your unaudited financial statements as of May 31, 1983
>
> FINANCIAL INFORMATION.
>
> The following information is extracted from reference unaudited financial statements:

Total assets	$1,779,792
Total liabilities	296,009
Total equity	1,483,783

The "reference unaudited financial statements" to which Davis here refers are apparently the same unverified statements previously submitted, and rejected, by the Board in its original decision.

Obviously, Applicant has submitted no additional information by virtue of Davis' above-quoted affidavit and its "Exhibit 2A." The above-quoted affidavit of Davis does no more than state a simple proposition of subtracting and calls the result Applicant's "net worth." Davis did not state that he had reviewed Applicant's records, which demonstrate Applicant's May 1983 net worth; he testified only that he had reviewed unidentified "reference unaudited financial statements," and, accepting the accuracy thereof, a net worth can be computed by subtracting represented liabilities from represented assets. Perhaps the person who compiled the unidentified "reference unaudited financial statements" and submitted them to Davis has (or had) first-hand knowledge of what Applicant's records reflect, but that person's testimony has not been produced despite the opportunity given Applicant by the Board. In summary, the unattested information on which Davis relies is no more probative than the unattested balance sheets, and Davis' review thereof, which were previously found to be inadequate by the Board.[2] Therefore, I find and conclude that Applicant,

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[2] Applicant's second supplemental application represents that Davis' 21 January 1987 affidavit "states, on his personal knowledge, the net worth of Applicant, as of May, 1983." Davis' affidavit states no such thing, but the representation, like Gregory's affidavit on the issue of employee complement, demonstrates that Applicant knows what character of evidence the Board requires. Note further that in the 21 January 1987 affidavit

Continued

although given ample opportunity to do so, has failed to prove a net worth of less than $5 million and, accordingly, has failed to prove that it is entitled to any award under the Equal Access to Justice Act.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[3]

ORDER

It is recommended that the applcation of Industrial Security Services Corporation, for an award under the Equal Access to Justice Act be denied.

Davis eschews the term of art "generally accepted accounting principles," although that term was employed in his original affidavit submitted to, and found inadequate by, the Board. This time Davis calls his process of subtraction "general accounting principles of certified public accountants," a seemingly lower standard of accuracy.

[3] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

Sheraton Hartford Hotel *and* Local 217, Hotel and Restaurant and Bartenders Union, AFL–CIO. Case 39–CA–3385

June 29, 1988

DECISION AND ORDER

By Members Johansen, Babson, and Cracraft

On January 19, 1988, Administrative Law Judge Joel P. Biblowitz issued the attached decision. The General Counsel filed exceptions and a supporting brief, and the Respondent filed an answering brief.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings, and conclusions as modified and to adopt the recommended Order.

We agree with the judge that the Respondent did not violate Section 8(a)(5) when it failed to furnish the Union with requested information regarding the prices for separate components of a New Year's Eve package offered by the Respondent. But, rather than finding that the information requested by the Union did not exist, we find that the Union has failed to meet its burden of showing the reasonable and probable relevance of the requested information.

Since 1976, the Union has represented the Respondent's employees. The parties' collective-bargaining agreement contains a special provision (art. XI, sec. 17) that allows for the parties to bargain annually on the wages of employment for waiters, waitresses, and bartenders for any New Year's Eve function offered by the Respondent. It is understood that the gratuity is based on food and beverage cost. If no agreement is reached, the contract provides for instant arbitration, and the arbitrator is precluded from awarding a gratuity in excess of 15 percent of the retail cost.

Prior to 1985, waiters and waitresses were compensated for the New Year's Eve functions in a fixed amount per customer with a guaranteed number of customers per waiter. In 1985 the Respondent changed from the fixed amount method of compensation to a gratuity system based on a negotiated percentage of the food and beverage cost. The record discloses that the Respondent's change in 1985 resulted in the waiters and waitresses receiving approximately $20 less for working the New Year's Eve function than had been received in prior years; however, bartenders received more after the change.

On October 29, 1986,[1] the Union requested information from the Respondent regarding its plan for New Year's Eve. On November 3, 1986, the Respondent sent a letter to the Union stating it would offer a dinner and reception on New Year's Eve that had an inclusive price of $86 per couple, and the price included tax and gratuity. The letter further stated that servers and bartenders would receive a 15-percent gratuity. The Respondent also included an advertisement of the function that listed the full menu for the dinner and the other items (open bar, free parking, deluxe accommodation for two, entertainment) included in the total package cost of $198.70 per couple.

On November 26, the Union informed the Respondent that the November 3 letter was inadequate and that the Union needed the cost breakdown for all components of the New Year's Eve package. On December 23, the Respondent informed the Union that the Union could get a breakdown of the cost of the dinner from its banquet office, but that the other information was not pertinent. Although the Respondent subsequently provided information that the cost of the open bar was $20 and the cost of the meal was $48, it has continued to refuse to provide the specific cost breakdown of the New Year's Eve package as requested by the Union.

The Union asserts that the reason it needed the requested information was to determine whether the $86 figure for food and beverages was accurate or was undervalued (and the remaining items inflated) in order to reduce the gratuity to which employees were entitled. At the hearing, the Union asserted that it suspected the Respondent had arbitrarily devalued unspecified portions of the package because employees received substantially less compensation when the Respondent changed to a percentage-based gratuity system in 1985.

Section 8(a)(5) obligates an employer to provide a union requested information if there is a probability that the information would be relevant to the union in fulfilling its statutory duties as bargaining representative.[2] Where the requested information concerns wage rates, job descriptions, and other information pertaining to employees within the bargaining unit, the information is presumptively relevant.[3] Where the information does not concern matters pertaining to the bargaining unit, the union must show that the information is relevant.[4] When

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[1] All subsequent dates are in 1986, unless otherwise indicated.

[2] *NLRB v. Acme Industrial Co.*, 385 U.S. 432 (1967).

[3] *Trustees of the Masonic Hall*, 261 NLRB 436, 437 (1982).

[4] *Pfizer, Inc.*, 268 NLRB 916, 918 (1984), enfd. 763 F.2d 887 (7th Cir. 1985).

the requested information does not pertain to matters related to the bargaining unit, to satisfy the burden of showing relevance, the union must offer more than mere suspicion for it to be entitled to the information. *Southern Nevada Builders Assn.*, 274 NLRB 350, 351 (1985).

The information the Union seeks pertains to the cost of such items as an open bar, parking, accommodations, and entertainment. The parties agree that the employees' gratuity for the evening was properly based only on the food and beverage components of the package cost. Therefore, the cost of the other components of the package that entails the setting of rates for services separate from the food and beverage component was not presumptively relevant, and the Union must show the information is relevant.

The Union asserts that it needs the price on the nonfood and beverage items in the New Year's Eve dinner package in order to determine whether the Respondent had devalued the price of the food and beverages and shifted that cost to the other components of the New Year's Eve package. The sole basis for the Union's belief that food and beverage cost may have been devalued in the 1987 dinner package is the fact that some of the unit employees received less compensation under the system presently in effect than they had under a previous system. That some of the employees receive less under the new system of compensation may be grounds for dissatisfaction with the current system, but it does not satisfy the Union's burden to demonstrate that information regarding the price of nonfood and beverage items is relevant.[5] At best, the Union has advanced a hypothetical theory explaining how the information might be useful in determining whether the Respondent has violated the parties' contract. See *Southern Nevada Builders' Assn.*, supra. We find that the Union's proffered reason for believing the information relevant is nothing more than mere suspicion.[6] We conclude that the Union has not demonstrated the reasonable and probable relevance of the requested information. For these reasons, we therefore adopt the judge's recommended Order dismissing the complaint.

ORDER

The recommended Order of the administrative law judge is adopted and the complaint is dismissed.

Mark W. Engstrom, Esq., for the General Counsel.
Jay S. Siegel, Esq. (Siegel, O'Connor, Schiff, Zangari & Kainen, P.C.), for the Respondent.

DECISION

STATEMENT OF THE CASE

JOEL P. BIBLOWITZ, Administrative Law Judge. This case was heard by me in Hartford, Connecticut, on 12 and 13 November 1987.[1] The complaint, which issued on 28 April, and was based on an unfair labor practice charge filed on 2 March by Local 217, Hotel and Restaurant and Bartenders Union, AFL–CIO (the Union), alleges that Sheraton Hartford Hotel (Respondent), violated Section 8(a)(1) and (5) of the Act by refusing to provide the Union with certain information it requested from Respondent regarding a breakdown of the charges for its New Year's Eve party for 1986–1987.[2]

On the entire record including the briefs filed, I make the following

FINDINGS OF FACT

I. JURISDICTION

There being no dispute, I find that Respondent is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act, and that the Union is a labor organization within the meaning of Section 2(5) of the Act.

II. FACTS AND ANALYSIS

Since about 1976, the Union has represented the following employees of Respondent:

> All regular full-time and regular part-time employees in the food and beverage preparation and service department, including banquet waiters, waitresses and bartenders, housekeeping department uniformed service department, heat, light and power department, repairs and maintenance department, laundry department, guest service agents, restaurant cashiers, head banquet housemen, PBX operators and reservationists employed at the Employer's Trumbull Street at Civic Center Plaza, Hartford, Connecticut location but excluding all other employees such as accounting, administrative, sales, managerial, security and guards, timekeepers and receiving clerks, clerical employees, banquet cashiers and checkers, storeroom personnel, assistant housekeeper, inspectress, assistant chef, head waiter, purchasing agents, food and beverage controllers, as-

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[5] The General Counsel and the Union are not contesting the change in the method of compensation.

[6] We find this case distinguishable from *Pertec Computer Corp.*, 284 NLRB 810 (1987), which concerned a union's request to examine the respondent's financial records. In *Pertec* the information was necessary to substantiate the respondent's contention that its financial circumstances were central to its decision to relocate its operation. Here, the Union has received the information that is pertinent to unit employees, namely, the food and beverage cost upon which the gratuity is based.

[1] Unless indicated otherwise, all dates referred to relate to the year 1987.

[2] Unless indicated otherwise, the phrase New Year's Eve party refers to the party beginning the evening prior to 1 January 1987.

> sistant restaurant manager, executive steward, banquet steward, confidential employees, casual employees and supevisors as defined in the Act.

This unit description is set forth in the Union's collective-bargaining agreement with Respondent, the last of which expired 30 September. Article XI, section 17 of this agreement provides:

> 17) The Parties to this Agreement shall, if possible, meet to resolve the terms and wages of employment for New Year's Eve no later than November 1st of each year, if the Hotel plans any special events for the evening, such as special package deals, parties, etc. If no agreement is reached, the issues shall be submitted to instant arbitration without briefs and a bench decision requested if it can be provided by the arbitrator. The arbitrator shall not render an award with respect to gratuities which provides in excess of fifteen percent (15%) of the retail cost, and shall not award premium wages for waiters, waitresses, and bartenders.

By letter to Respondent dated 29 October 1986, the Union, by Constance Holt, its organizer, wrote:

> That is to notify you that the Union wishes to commence negotiations concerning the terms and wages of employment for New Year's Eve. In order to begin that process the Union is requesting information concerning what plans the Hotel has. Specifically we are requesting: 1. what type of function (parties, special package etc.); 2. What price the Hotel is offering the public for New Year's Eve, and 3. what the company plans to pay the employees. If there is any other relevant information please include it.
>
> If you have any questions please contact me.

Holt testified that in addition to beginning the process referred to in article XI, section 17, the information she requested "what type of function" was, principally, to learn whether the event would be buffet or individual table service (which would affect the number of employees required), and whether there would be a flat fee for the serving employees or whether it would be on a percentage basis. The prior year's New Year's Eve party was the first that paid the employees on a percentage basis and the employees received less than they had in the prior 10 or 11 years. By letter dated 3 November 1986, Respondent, by Lori Lafemina, its director of personnel, wrote to Holt:

> Per your request in your letter of October 29th for information referencing the New Year's Eve Plans for dinner package, I have outlined what the payment will be for our staff who work the function.
>
> The dinner and reception is an inclusive pre-fix price of $86.00 per couple which includes tax and gratuity.
>
> The servers and bartenders will receive 15% gratuity which as you know is beyond the normal banquet gratuity distribution of 12.5%, 13% for beverage provided in the contract, yet does not exceed the contractual provisions.
>
> Please find attached the menu for public distribution. As we have met the contractual obligations, please accept this information as fulfillment of the disclosure provided for in Article XI Section 17.
>
> If there are any questions, please do not hesitate to contact me.

Enclosed was a flyer advertising the evening as a "Gala Package $198.70 per couple." The full menu was listed (with a choice of two main courses), and the flyer listed the other items that were included in the total package cost: open bar, dinner and dancing, champagne toast at midnight, deluxe accommodations for two, late checkout time New Year's Day, free use of health club and pool, and free parking. Holt testified that this letter did not satisfy her request because it was a flat statement that the food and beverage cost was $86, including tax and tips; it did not give the cost breakdown for the other components that the Union was looking for—the room, decorations, music, entertainment, the breakfast (although Holt testified that it was included in the total cost, the enclosed flyer did not list it), and any other components that they might not have known about. The reason the Union needed this information was to determine whether the $86 figure for food and beverages was accurate or was devalued, and the remaining items inflated so that the food and beverage cost would be less and the resulting gratuities to the employees would correspondingly be less.

On 26 November 1986 Holt met with Lafemina and informed her that this letter was inadequate and she told her the reason, as stated above. She told her that she needed the breakdown for decorations, entertainment, the room, and breakfast cost. Lafemina was noncommittal, but said that the package information was in the mail. Not having received this information, by letter dated 19 December 1986 Holt wrote to Respondent's general manager, Reginald McDowell (Lafemina had some medical problems) about a number of pending issues, including:

> Finally, I also want to reiterate my request for pertinent information regarding the New Years Eve Negotiations. Several times I have requested a price breakdown of the $112.00 that makes up the $198.00 New Years Eve package. I have yet to receive this information.

Having received no reply to this letter, Holt called Respondent on 23 December 1986 and spoke to McDowell, as Lafemina was on a leave of absence. She told him that she was calling because her request had not been satisfactorily answered and she wanted to resolve the matter before the Christmas holiday. She asked McDowell for a breakdown of all the components of the evening. He told her that if she wanted a breakdwon of the cost of the dinner she could get that from Respondent's banquet office, but the other information was not pertinent and he was not going to give it to her. They then discussed and agreed on the mechanism of the 15-percent gratuity and the number of guests guaranteed for each empoyee. That was the extent of the conversation. After this conversation, she asked the Union's steward in the banquet department to locate the banquet menu with the prices, but never received any further information in this regard.

By letter dated 24 December 1986, Holt wrote to McDowell:

> This is to confirm the agreement made thus for [sic] concerning the rates and working conditions for employees who will work the New Years Eve function.
>
> 1) The gratuity will be 15% of the cost of Dinner and reception.
>
> 2) Because the dinner is a buffet there will be a minimum of 24 per server.
>
> In addition to the above agreements, the Hotel is refusing to provide the price breakdown of the $86.00 Dinner/Reception and the remaining $112.00 in the $198.00 New Years Eve package. Specifically, the Union has requested for the purpose of negotiations the Menu items prices, the reception costs, and the price breakdown of the room, entertainment, decorations, breakfast, and any other costs that are included in the $198.00 package. In our conversation December 23rd, you refused to provide me this information.

Later in the day on 24 December 1986 Holt received a number of items from Lafemina, including another copy of the flyer advertising the Respondent's New Year's Eve gala, and its component parts. Unlike the earlier one that Holt had received from Respondent, this one had two handwritten notations: Next to the words "Open Bar from 8:00 p.m.-2:00 a.m." was written "20.00" and next to the food items on the menu was written "48.00."[3] There were no further notations or explanations.

On 30 December 1986, Holt and Lafemina executed the following agreement:

> The agreement, thus far, concerning the working conditions for the New Years Eve function is as follows:
>
> 1. The gratuity will be 15% of the retail cost of the dinner and reception, which you state is $86.00 inclusive of tax & grat.
>
> 2. Because the dinner is a buffet there will be a guarantee of 24 covers per server.

Prior to executing this agreement Holt informed Lafemina that the Union was reserving its right to arbitrate Respondent's computation of the $86 and that she would receive a letter to that effect. By letter dated 30 December 1986, Holt wrote Lafemina:

> Because the Hotel refuses to provide pertinent information regarding the specific cost breakdown of the New Years Eve package, we are unable to determine the validity of the $86.00 upon which the 15% grauity (sic) is based. We therefore reserve our right to arbitrate the new years eve agreement.

By letter dated 6 January, Holt wrote to Lafemina:

> As of yet the New Year's Eve function information has not been provided. The flyer you enclosed in two different letter [sic] does not address the information I requested. Several times I have asked for the price breakdown of the entire package. Specifically, I requested: 1) the menu item prices and reception cost and 2) the cost breakdown of the remaining $112.00 in the $198.00 New Year's Eve Package. I was told by you that the remaining $112.00 consists of the cost for decorations, entertainment, room, and breakfast. It was those items and any others that I asked for a dollar amount on.
>
> The information you have sent thus far is simply inadequate in determining the legitimacy of the $86.00.
>
> While you claim the information has been provided, Mr. McDowell informed me that the Hotel management refuses to provide the specific breakdowns. Thus, we shall exercise our right to arbitrate.

By letter dated 5 January, Lafemina wrote to Holt:

> We are in receipt of your letter dated December 30, 1986. Please be advised that the hotel has provided the Union with all pertinent information (see letters dated 12/18/86 and 11/3/86). The $86.00 breakdown was provided. Also the banquet function order was available prior to the function. If you check with the servers I am sure they will acknowledge this.
>
> An agreement was reached by the Union and the Hotel as to the wages and covers. The contract does not state that the price charged to customers is to be negotiated between the Union and the Hotel—only the gratuity and wage amounts. As this was negotiated and the Hotel agreed to pay food servers an additional 2-1/2% after food gratuity and bartenders an additional 1-1/2% of Beverage, as well as guarantee 24 covers per food server, we consider negotiations final and complete.
>
> The contract states that "if no agreement is reached, the issues shall be submitted to instant arbitration", etc., an agreement was reached.
>
> I hope this clarified the Hotel's position. Should you have any questions, please contact us.

By letter dated 15 January, Holt made a final request to Lafemina for the breakdown of costs for the New Year's Eve party; having received no reply, by letter dated 4 February she wrote to the Connecticut State Board of Arbitration requesting arbitration of the issue. The arbitration had not been scheduled at the time of the hearing.

As can be gleaned from the facts recited above, the General Counsel and the Union's argument is that they are entitled to this information in order to ascertain that the components that they are paid on, food and beverages, was not devalued compared to the other components, room, entertainment, etc. McDowell testified for Respondent. He testified that there is no relationship between Respondent's pricing of food and beverages and its pricing of room rates in packages. He testified that Respondent maintains a banquet office that distributes brochures listing menus with prices, payment, and credit plans; the food and beverage costs Respondent set for the New Year's Eve gala were consistent with its regular food and beverage costs listed in these brochures. Although these are generally fixed prices, there is some degree of price flexibility depending on the number of guests at the function and whether it is a busy time for Respondent's banquet business. Respondent's position is that the Union is not entitled to this information because it would make no difference; as counsel for Respondent asked Holt, what difference would it make if Respondent told the Union that the room rate component was $50 or $100? In addition, what the Union was attempting to do was bargain about Respondent's rates, which admittedly it cannot do. Finally, if the Union really wanted to learn of the authenticity of the $86 rate for food and beverage, it could have checked this with Respondent's banquet office, which it did not bother to do.

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[3] The agreed-on gratuity rate of $68, plus the applicable tax, equals $86.

The law is clear that an employer, on request, must provide a union representing its employees with information that is relevant to it "in carrying out its statutory duties and responsibilities." *NLRB v. Acme Industrial Co.*, 385 U.S. 432, 437 (1967). Chief among a union's responsibilities is its obligation to enforce and administer the collective-bargaining agreement, and any information relevant to the Union in this regard must be provided to it, on request. *Conrock Co.*, 263 NLRB 1293 (1982). In *Pfizer, Inc.*, 268 NLRB 916, 918 (1984), the Board stated: "This, information need not necessarily be dispositive of the issue between the parties, it need only have some bearing on it."

The facts are clear and all three witnesses were extremely articulate and credible. The General Counsel alleges that the Union is entitled to the dollar value of the other components of the cost of the New Year's Eve package because only with this information could it be certain that the food and beverage portion (the only portion for which its members are paid) was not undervalued in relationship to the other components of the package's cost. However, this argument assumes one factor that I find was not established—a connection between the food and beverage charge and the total package cost. McDowell, who testified in a very convincing way, testified that there was no relation between the food and beverage charge and the total cost of the package; that Respondent priced the food and beverages from its banquet price list as it would for any affair, taking into consideration the food and liquor served and the type of service employed. The factors employed in determining the package cost were the desire to remain competitive with the other nearby comparable hotels while, at the same time, maximizing revenue for an evening that would otherwise be a low-revenue evening. This testimony is supported by other evidence as well. When McDowell commenced his employment at Respondent in August 1985, he learned that the prior New Year's Eve party generated 125 guests at a rate of $235 per couple. His research showed that this price was too high considering the competition and left, unused, available space—the Respondent's ballroom accommodates 550 people. For the 1985–1986 New Year's Eve party, Respondent lowered the price to $198.50 (this was in line with the competition) and had 300 guests. McDowell testified that Respondent "still had more room to grow," and, in determining the price for the 1986–1987 party, "we did a marketing ploy" by setting the price at $198.70, which resulted in 500 guests.

The above convinces me that, in determining the cost for the 1986–1987 New Year's Eve party, Respondent did not set a price for each component of the evening and add these components to reach the final price. Rather, the price was determined by competitive reasons and the desire to fill the ballroom, and by the "marketing ploy" of rigging the price to the year—$198.70. I therefore find that the information the Union requested did not exist. The information that it was entitled to, and that did exist, was the banquet menu, which Respondent informed the Union they could inspect (as could anyone) to determine the accuracy of the $86 figure for food and beverages; the Union chose not to take advantage of this offer.

CONCLUSIONS OF LAW

1. Respondent is an employer within the meaning of Section 2(2), (6), and (7) of the Act.
2. The Union is a labor organization within the meaning of Section 2(5) of the Act.
3. Respondent had not engaged in any conduct in violation of the Act as alleged here.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[4]

ORDER

It is recommended that the complaint be dismissed in its entirety.

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[4] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

best copy available

National Posters, Inc. and National Litho, a Division of National Posters, Inc. *and* Baltimore Graphic Communications Union, Local No. 61-C. Case 5-CA-14585

June 30, 1988

SUPPLEMENTAL DECISION AND ORDER

BY CHAIRMAN STEPHENS AND MEMBERS BABSON AND CRACRAFT

On February 11, 1988, Administrative Law Judge Bernard Ries issued the attached second supplemental decision. The Respondent filed exceptions, a brief in support of exceptions, and a motion to reopen the record or, in the alternative, for reconsideration,[1] and the General Counsel filed a brief in answer to the Respondent's exceptions and its motion. The Charging Party also filed a brief opposing the Respondent's motion.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings,[2] and conclusions and to adopt the recommended Order.[3]

ORDER

The National Labor Relations Board orders that the Respondent, National Posters, Inc. and National Litho, a Division of National Posters, Inc., Baltimore, Maryland, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Refusing to bargain collectively concerning rates of pay, wages, hours, and other terms and conditions of employment with Baltimore Graphic Communications Union, Local No. 61-C as the exclusive bargaining representative of its employees in the following appropriate unit:

> All production and maintenance employees including truck drivers, employed by the Employer at its 800 Debelius Avenue and 4206 Shannon Drive, Baltimore, Maryland locations; but excluding all office clerical employees, guards and supervisors as defined in the Act.

(b) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) On request, bargain with the above-named labor organization as the exclusive representative of all employees in the above-named appropriate unit with respect to rates of pay, wages, hours, and other terms and conditions of employment and, if an understanding is reached, embody the understanding in a signed agreement.

(b) Post at its facilities at 800 Debelius Avenue and 4206 Shannon Drive, Baltimore, Maryland, copies of the attached notice marked "Appendix."[4] Copies of the notice, on forms provided by the Regional Director for Region 5, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material.

(c) Notify the Regional Director in writing within 20 days from the date of this Order what steps the Respondent has taken to comply.

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[1] In its prior decision and order remanding this case for further hearing (282 NLRB 997 (1987)), the Board, inter alia, found no merit to the Respondent's contention that the high turnover rate among its employees since the last election required the holding of a new election. In its motion, the Respondent seeks to have the record reopened so that it could introduce into evidence an affidavit from its vice president, Diane Hild, describing the additional turnover and changes that have occurred since the Board's prior decision and, alternatively, requests that the Board reconsider its prior ruling that the "turnover" argument lacked merit. The Respondent's motion, having been duly considered, is denied as lacking in merit and raising matters previously considered by the Board.

[2] The Respondent has excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

[3] In his recommended Order, the judge directs that the Board's Order in the original proceeding in this case (265 NLRB No. 115, dated December 10, 1982) (not reported in Board volumes) be reissued. We agree. As the Board's Order and notice in that proceeding were not published, we shall reissue the Order and notice in full here, modified only to reflect the Charging Party's correct name.

[4] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

289 NLRB No. 58

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

WE WILL NOT refuse to bargain collectively concerning rates of pay, wages, hours, and other terms and conditions of employment with Baltimore Graphic Communications Union, Local No. 61-C as the exclusive representative of the employees in the bargaining unit described below.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL, on request, bargain with the above-named Union, as the exclusive representative of all employees in the bargaining unit described below, with respect to rates of pay, wages, hours, and other terms and conditions of employment and, if an understanding is reached, embody such understanding in a signed agreement. The bargaining unit is:

> All production and maintenance employees including truck drivers, employed by the Employer at its 800 Debelius Avenue and 4206 Shannon Drive, Baltimore, Maryland locations; but excluding all office clerical employees, guards and supervisors as defined in the Act.

NATIONAL POSTERS, INC. AND NATIONAL LITHO, A DIVISION OF NATIONAL POSTERS, INC.

Eric M. Fine, Esq., for the General Counsel.
Maurice Baskin, Esq. (Venable, Baetjer, Howard & Civiletti), of Washington, D.C., for the Respondent.
Sandra J. Hughes, Esq. (Delson & Gordon), of Washington, D.C., for the Charging Party.

SECOND SUPPLEMENTAL DECISION[1]

BERNARD RIES, Administrative Law Judge. On 15 December 1981, a representation election was conducted by Region 5 among the approximately 53 eligible voters at Respondent's two plants in Baltimore, Maryland. The tally of ballots showed that 24 employees voted in favor of the Charging Party[2] here, 21 unfavorable votes were cast, and 4 ballots were challenged.

Without holding a hearing, the Regional Director for Region 5 ruled, inter alia, that the ballot cast by employee Samuel John and another ballot should be opened and counted. Further action on the remaining two challenges was deferred pending the results of the revised tally. The Board adopted the proposed procedure.

Without holding a hearing, the Regional Director for Region 5 ruled, inter alia, that the ballot cast by employee Samuel John and another ballot should be opened and counted. Further action on the remaining two challenges was deferred pending the results of the revised tally. The Board adopted the proposed procedure.

The two ballots were opened and the revised tally showed the Union ahead by 25 to 22. The Regional Director issued a certification of representative to the Union, and the Respondent refused to bargain in order to test the validity of the certification. The Region issued a complaint asserting the Respondent's refusal to bargain to be unlawful.

On 10 December 1982, the Board issued a Decision and Order in which it granted the General Counsel's Motion for Summary Judgment and held that Respondent was violating Section 8(a)(5) of the Act by refusing to bargain with the Union. 265 NLRB No. 115 (not reported in Board volumes).

On 3 November 1983, the United States Court of Appeals for the Fourth Circuit held, contrary to the Board, that a hearing was required on the issue of Samuel John's eligibility to vote. (720 F.2d 1358.) Accordingly, by Order dated 6 April 1984, the Board directed that a hearing be held to determine the status of employees Samuel John, Albert Amend, and Wesley Souders. The right of alleged Supervisors Amend and Souders to vote had not previously been resolved because once the revised tally had issued in June 1982, the Union had enjoyed a lead of 25 to 22, thus making immaterial the votes of Amend and Souders. In directing the hearing, the Board recognized that the disposition of John's vote could make determinative the ballots of Amend and Souders.

A hearing on the eligibility of John, Amend, and Souders was held before me in June 1984. On 23 November 1984, I issued a decision recommending that the ballots of John and Souders be counted, but that Amend should be disqualified from voting as a statutory supervisor. Because John's ballot had already been counted, and the Union was ahead by 25 to 22, I further recommended that the Board's original bargaining order be reaffirmed.

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[1] In fn. 2 of its Decision and Order remanding for further hearing (282 NLRB 997, the Board pointed out that I should not have entitled my first decision in this case "Supplemental Decision," because "there had been no prior judge's decision written in this case." Despite the fact that the Board's first Decision and Order in the case (265 NLRB No. 115 (Dec. 10, 1982), not reported in published Board volumes) might arguably have made *my* first decision on remand a supplemental decision, the Board's comment is, of course, authoritative. Because there has now been a "prior judge's decision," I suppose that this one would properly be headed "Supplemental Decision," and, indeed, the Board's remanding Order directs the preparation of a supplemental decision. To avoid confusion, however, I have entitled this decision as shown above.

[2] In his brief, counsel for the General Counsel has requested that the name of the Charging Party be amended to reflect its present correct title. The motion is granted.

Appeals from my recommendations were filed with the Board. In addition, on 27 December 1984, Respondent filed a motion to reopen the record for two purposes. One objective was to submit evidence of substantial employee turnover since the election; a supporting affidavit was attached. The other was to "present evidence that the Petitioner no longer exists, or has undergone fundamental change without due process participation by Respondent's employees."

In support of the second contention, Respondent attached reprints of reports in labor newsletters, dated 5 April and 10 June 1983, regarding the merger of the Charging Party's parent organization with another International labor organization effective 1 July 1983, as well as copies of certain pages from what purported to be the Charging Party's "former by-laws." Respondent explained that the evidence "was not adduced previously, in part because some of the necessary evidence was not known by the Respondent until recently,[3] and also because the evidence was not relevant to any issues in this case until now. The Board's previous Order Directing Hearing . . . did not authorize the Administrative Law Judge to consider any issue other than the voting eligibility of the three challenged employees. . . . The evidence sought to be adduced in this motion, therefore, which previously might have been premature if presented to the Judge, is now extremely relevant to the resolution of the case."

On 4 February 1987, the Board issued a "Decision and Order Remanding for Further Hearing" (282 NLRB 997). Although the Board affirmed my rulings, findings, and conclusions, it also decided to reopen the record to determine whether the 1983 merger had "so substantially changed Local 61 as to raise a question concerning its continued status as the certified bargaining representative of the Respondent's unit employees." A hearing for the mandated purpose was held on 29 July 1987.

Briefs were filed by the General Counsel and Respondent on 25 September 1987. I have reviewed the transcript proceedings,[4] the exhibits, and the briefs, and I recommend that the Board conclude that the merger did not substantially affect the identity or continuity of the Charging Party as collective-bargaining representative of Respondent's employees.

The merger referendum was held in April 1983. Of an active IPGCU membership of 91,000, affiliated in about 540 locals, more than 49,000 members voted in favor of the merger and over 13,000 against. Active members of GAIU, which had on its rolls at the time about 76,000 members in 2000 locals, similarly approved the merger by more than a 4 to 1 majority. The effective date of the merger was 1 July 1983.

I. THE BASIC FACTS

The Charging Party, formerly known as Baltimore Printing Pressmen and Assistants' Union No. 61, was for many years a local of the International Printing and Graphic Communications Union, AFL-CIO, CLC (IPGCU). After some period of discussion, IPGCU and another International, Graphic Arts International Union, AFL-CIO, CLC (GAIU), decided to merge into an organization called Graphic Communications International Union (GCIU).

In approving the merger, the members adopted three basic documents—an agreement for merger, an implementation agreement, and a constitution. These documents provided for a "transition period" of 9 years, in recognition of a perceived "need to smoothly and efficiently integrate the policies, programs, officer structure, staff and personnel of the two merging internationals." (Agreement For Merger, G.C. Exh. 34 at 2, sec. 4.) During this period, various temporary provisions put into effect at the commencement of the merger would gradually be phased out by 1992.

II. THE BASIC LEGAL PRINCIPLES

In *NLRB v. Financial Institution Employees*, 475 U.S. 192 (1986), the Supreme Court rejected the Board's holding that all employees, including nonmembers of the union, should have been given an opportunity to vote in an election in which an independent union decided whether to affiliate with an International union. In its opinion, the Court also noted a second Board rule that came into play when changes occur in a union's organizational structure. If such changes are, in the Court's words, "sufficiently dramatic to alter the union's identity," a "question of representation" will arise, authorizing an employer to lawfully refuse to deal with the affected entity until the Board has conducted a representation election. Such a representation question may arise, said the Court, when the changed circumstances make it "unclear whether a majority of employees continue to support the reorganized union." Id. at 202.[5]

By this standard, the Court appeared to be adopting an underlying approach akin to that applied by the Board and the courts in determining whether a new employer is in law a successor employer, i.e., can it be concluded that employment conditions are sufficiently similar so as to raise the inference that employees would, as in the past, still desire representation by the incumbent union? *United Maintenance & Mfg. Co.*, 214 NLRB 529, 532 (1974); *Ranch-Way*, 183 NLRB 1168, 1169 (1970); *NLRB v. Albert Armato*, 199 F.2d 800, 803 (7th Cir. 1952).

The conceivable organizational and structural modifications of labor organizations are manifold. The reorganizations that, on their surface, present perhaps the most likely prospect that a change of identity has occurred are affiliations of independent unions with national unions and mergers of two local unions. Less superficially compelling, perhaps, is such restructuring as the change of affiliation by a local union from one parent union to another, or a merger of a parent with another national union; in such cases, the local has previously surrendered some control over its own shape and destiny to a superior authority, and its members have presumably contented themselves with the knowledge that changes affecting them might be wrought by the superior entity without their consent.

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[3] Presumably the material contained in the affidavit relating to turnover.

[4] Errors in the transcript have been noted and corrected.

[5] See also Id. at 205: "We repeat, dissatisfaction with the decisions union members make may be tested by a Board-conducted representation election only if it is unclear whether the reorganized union retains majority support."

In making assessments of bargaining representative "continuity," however, the Board has not expressly created presumptions about the particular nature of the modification, but rather has generally examined each case to determine the effect of the changes, if any, on the essential identity of the bargaining representative. "[S]tructure, administration, officers, assets, membership, autonomy, bylaws, size, and territorial jurisdiction," *NLRB v. Pearl Bookbinding Co.*, 517 F.2d 1108, 1111 (1st Cir. 1985), have all come under scrutiny; while none of these factors has been denominated as critical or dispositive, it is obvious that some are of more significance than others.[6] The burden of demonstrating a change in identity has been allocated to the party making the claim, even when the forum is an unfair labor practice proceeding. *Insulfab Plastics*, 274 NLRB 817 (1985), 821, enfd. 789 F.2d 961 (1st Cir. 1986).

III. AN EXAMINATION OF THE PERTINENT FACTORS

Local 61–C experienced very little immediate change in its structure and operations as a result of the 1 July 1983 merger of its parent union with GAIU. Virtually all the elected officers of Local 61 as of January 1983 remained incumbent in January 1984 and, in fact, most were still serving at the time of the hearing in 1987. The bylaws of Local 61–C were changed (by adoption at a membership meeting) in only a few respects subsequent to the merger: the oath of office was, although not required, amended to conform to the new GCIU constitution; the oath of membership, which *is* constitutionally mandated was adopted, but had no apparent substantive effect on the obligation of membership when compared with the former Local 61 oath; the jurisdictional and "Form of Organization" clauses of the Local's bylaws were broadened slightly, but not to the full extent of the scope of such clauses in the new GCIU constitution;[7] and the appropriate name changes were made throughout the Local's bylaws.

After 1 July 1983, Local 61–C continued to increase dues periodically, following the same procedure it had employed prior to the merger.[8] All increases have been occasioned by revenue needs, according to the testimony of longtime Local 61–C President and Business Agent Brown, and had no connection with the merger. The new GCIU constitution does not contain any provision prescribing standards that local unions must apply in formulating dues.

The merged constitution essentially carries forward the per capita taxes paid by the former IPGCU locals to the International prior to the merger. A provision in the merger agreement specifies that while a per capita structure that will apply to all GCIU members is contemplated, "there will be no changes in the Per Capita payments as a result of merger, and the matter of changes in the Per Capita structure need not and will not be considered as an issue at the 1984 Convention and can only be modified thereafter by Convention action or referendum of the entire membership of the GCIU." (G.C. Exh.34, Merger Agreement, p. 3, item 7.) Brown testified without controversion that, as of 1987, there have been no changes in per capita taxes paid to the GCIU by Local 61–C.

At least up to the end of 1986, the last information of record on the subject, there is no evidence that Local 61–C has suffered financially from the merger. For the year ending 31 December 1982, annual net revenues equaled $963 and members' equity was $17,668; as of 31 December 1986, the net revenue amounted to $2726, and members' equity was $21,111.

Local 61–C has a membership of about 190 and represents (both prior to and since the merger) employees in three bargaining units in Baltimore; the largest unit comprises those employees employed by an association called Printing Industries of Maryland. President Brown has been the chief negotiator for all three contracts since 1972. For the Printing Industries contract negotiated in 1982, he appointed to his negotiating team IPGCU members Kaplan and Hosza; in 1984, he appointed Kaplan and Local 61–C Vice President Edwards; and in 1986, he selected local officer Spies and Chapel Chairman Berry.

In 1984, after six or eight fruitless bargaining sessions, Brown asked Robert Callahan, a former IPGCU and then GCIU International representative, to assist in the Printing Industries negotiations. Callahan attended the last two meetings. In 1986, lack of progress again led Brown to call Callahan to the negoiations; the latter appeared for 1 day, and he was supplanted, also for 1 day, by James Mitchell, a onetime IPGCU vice president then serving as GCIU vice president. Brown testified that, about 1973, he had also sought the assistance of IPGCU International officers for such a purpose.[9]

The new GCIU constitution provides that if a local believes that it might have to strike, a membership vote for strike sanction is presented to the GCIU secretary-treasurer, who then asks the International's general board for approval. Such approval is only preliminary, however; it is thereafter up to the International president to make the final decision about approving an actual strike, and subsequently there must be authorization of the strike by a two-thirds vote of members in the affected unit as well as approval by the local union as a whole. (G.C. Exh. 34 at 51–52, ch. XIII, A.)

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[6] *Pearl Bookbinding* involved the 1972 merger of the International Brotherhood of Bookbinders and the Lithographers and Photengravers International Union, which produced the Graphic Arts International Union. That Union, as set out above, merged with the IPGCU in 1983. IPGCU was itself the product of an earlier merger.

[7] The record raises a question whether these changes even became effective. See R. Exh. 100, letter of International Recording and Financial Secretary Norton to Local 61–C President Brown dated 2 February 1984.

[8] R. Br., which states that the Local's dues "increased by $2 per journeyman over those of former Local 61 in the year following the merger," does not quite comport with the record. Eight journeyman classifications had dues increases of $2; one was increased by $1.50, two by $1, and one had no increase. The record also shows a $2 across-the-board increase (except for the "specialty" classification) in January 1982; a $1 general increase (with the same exception) in January 1983; and $1 general increases in April 1985 and January 1986.

[9] The negotiating team for the American Bank Stationery unit in 1982 was Brown, Chapel Chairman Cirri, and pressman Daniels; and in 1984 and 1986, Brown and Daniels. Brown has been the sole negotiator for the AFSCME unit, consisting of one employee.

Similar restrictions also applied, however, under the IPGCU constitution, although the procedure differed: the board of directors of the IPGCU was empowered to finally decide whether a strike was authorized (but the local then was required to secure a two-thirds approval from the entire membership, rather than just the unit involved). (G.C. Exh. 33 at 59–60.) Thus, both before and after the merger, Respondent's bargaining unit employees were powerless to decide for themselves whether to strike.[10]

With respect to the approval of collective-bargaining agreements, Brown testified that both before and after the merger, once the membership had ratified a contract, "we usually send a copy of that, at that time, for the International's approval."[11] But he went on to state his belief that "[i]t is still a contract on the local level, whether the International approves or not, actually," and that an agreement signed by a local and an employer is, without more, a "legal and binding" contract.

The new constitution provides, in a section entitled "Collective Bargaining," part 2, chapter XIII, Ch. 13.2, that "All collective bargaining contracts shall be *subject to approval* by the International President." (Emphasis added.) The General Counsel argues that the sentence does not require that every contract must be submitted for approval, and "it does not state that the contract is rendered nugatory if the International President does not approve it." Support for this contention may be found in the argument that a clearly mandatory provision could easily have been written: e.g., "All collective-bargaining agreements must be approved by the International President." That the drafters were capable of such clarity is found in the immediately following provision (Ch. 13.3): "No agreement shall be entered into with any employer who has establishments within the jurisdiction of more than one Local Union *without consultation* with the International President." (Emphasis added.) Not only is this prohibition more plainly mandatory, but its substance implies that locals may, in other situations than the one cited, "enter into" agreements that are immediately effective.

Respondent, in arguing on brief that, prior to the merger, Local 61–C "was completely subordinate to and controlled by the International," asserts, inter alia, that IPGCU "approved or disapproved local collective bargaining agreements ([G.C. Exh. 33], Art. XIII, §§ 1-3)." The cited provisions, under the heading "Contracts and Agreements," read:

> Section 1. No subordinate union or member thereof or any person shall enter into negotiations in the name or on behalf of the International Union for the purpose of making any contract or agreement with any organization, corporation, association, firm or individual, which may, in any manner, affect the interests of the International Union, or of any subordinate union thereof, or of any person affiliated therewith, without having been first authorized by the Board of Directors.
>
> Section 2. When negotiations involving [sic] the formulation of an agreement or contract which may effect [sic] the interest of the International Union, the subordinate union or person desiring to enter into such negotiations shall submit to each member of the Board of Directors a complete statement of all the facts pertaining thereto. Each member of the Board shall, thereupon, without delay, examine the same and forward his decision thereon to the President. The President shall notify such subordinate union or person of the decision of the Board of Directors.
>
> Section 3. No member or subordinate union shall act as an agent for or on behalf of the International Union without specific prior written authorization of the Board of Directors.

Assuming that the foregoing applies to bargaining agreements in the first place, a literal reading of this language would have only prohibited a local from "enter[ing] into negotiations" without authorization from the former IPGCU board. Although, as noted, Respondent concedes that the IPGCU constitution vested in the board a right of approval or disapproval of bargaining agreements, a board reading of the language is needed to reach that conclusion. On the other hand, if the provisions should be construed to mean that the IPGCU board had to preliminarily approve the main themes of bargaining proposals, it could arguably be termed retention of the right of approval.

Section 4 of the same article clearly seems to have assumed local autonomy in negotiating agreements:

> Joint Local Agreements
>
> Section 4. Where there are two or more subordinate unions in any jurisdiction in the book and job branch or in the newspaper branch of the business, no local contract or agreement shall be entered into without every effort being made for all such subordinate unions to join them.

But whatever inferences the reader may choose to draw about IPGCU's right of approval from the foregoing provisions, the remainder of the old constitution indicates that IPGCU did, in several respects, limit the authority of locals to agree to certain terms of employment. (See, e.g., G.C. Exh. 33 at 58, 134–137 (all local wage agreements shall not exceed a 3-year duration unless waived by the president; no contract shall require or permit any member to work in excess of 7-1/2 hours per day or 5 days in a week; no regular shifts shall exceed the established number of hours constituting a day's or night's work; and similar requirements).)

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[10] On brief, in an effort to show that the GCIU "established greater authority over the local after the merger and permitted less local autonomy than had the IPGCU," Respondent erects a strawman and then flails away at it. At 12–13 of its brief, Respondent asserts that "whereas the IPGCU had not disapproved one of Local 61's requests for strike sanctions in recent memory, the GCIU leadership has disapproved one of two such requests submitted by Local 61–C since the merger. (Tr. 26.)" At Br. 18 fn. 8, Respondent refers to this as "increased review and disapproval of local requests for strike sanctions." At 21, Respondent states that "whereas the IPGCU had never disapproved a Local 61 request for sanctions, the GCIU disapproved such a request immediately following the merger." These assertions overlook Brown's further testimony, on the same transcript page cited by Respondent, that the sanction was disapproved "on procedural grounds" because Local 61–C had "asked for strike sanction before it was voted by the membership, and at Tr. 27, that once the procedural defect was corrected, the sanction was granted.

[11] Subsequently, he testified that he "think[s]" the Local has always submitted a copy to the International since the merger, and that he "always" did prior to the merger.

There is considerable ambiguity in the record on this topic; I shall return to it later.

It appears that the grievance procedures between Local 61–C and its related employers have remained the same since the merger. Brown testified that the only arbitration in which the Union has been involved in the last 20 years was handled by International representative Callahan; but he was "[n]ot real sure whether it was before or after the merger."[12] Brown asked Callahan to represent the local because he himself had never handled an arbitration.

In size of membership, the merger has had no discernible effect on Local 61–C. Respondent states on brief:

> [O]fficials of Local 61–C have discussed the possibility of merging with at least one other GCIU local in the Baltimore area. (Tr. 61.) Such mergers are being encouraged by the International (G.C. Exh. 34), and additional mergers can be expected to occur in the Baltimore area during the "transition period." (Tr. 68–73.)

The first sentence is accurate so far as it goes. Brown testified that he had talked about merger at some unstated time to one of the officers of Local 41–S (with which Local 61–C was sharing offices), but got no "feedback" from the other officers of Local 41–S to whom he had sent materials on the subject. The matter was "just dropped."[13] The first clause of the second sentence is also accurate, but could use some amplification: The merger agreement states that locals will be encouraged to merge, but, "in recognition of the principle of Local autonomy and self-government, such mergers will not be compelled."

The final clause, however, can only represent Respondent's personal sentiment because it does not reflect Brown's testimony at the pages cited (or anywhere else). The closest Brown came to the notion of "mergers can be expected to occur in the Baltimore area" was the somewhat less affirmative "Anything is possible." There is no basis for this speculation so far as Local 61–C is concerned or, for that matter, any other Baltimore local.

Respondent contends on brief that the "trial and appeal procedure for IPGCU members has been entirely revamped under the GCIU constitution" (G.C. Exh. 34, art. XXI). Although the relevant provisions have been changed, it does not appear to me that, insofar as they affect members of Local 61–C, any significant substantive changes have been made.

There are some differences in approach. The new constitution expands the due-process rights of the charged member by, in effect, requiring two pretrial investigations—one by the local executive board and one by the membership. It also makes final a trial board's finding of innocent. Under the old system, a member could be expelled only by a two-thirds membership vote, but now a majority is sufficient. On a finding of guilty, the local membership has now lost the authority to increase the penalty recommended by the trial board. The channels of appeal at the national level have decreased from three to two.

The modifications of the former IPGCU constitution trial and appeal procedure do not seem sufficiently radical to render Local 61–C a new and different local; nor are they the kind of changed circumstances that would appear to bring into play the Supreme Court's standard (*NLRB v. Financial Institution Employees*, supra) of whether the reorganization makes it "unclear whether a majority of employees continue to support the reorganized union."

The Respondent also asserts that "[t]he new GCIU General Board has new authority to receive charges directly without prior local rulings . . . ([G.C. Exh. 34], Art. XXI, § 7)." The reference is probably to section 2 of article XXI, which apparently contemplates that certain charges can be filed with the general board (while the provision is not very clear, presumably those charges that may be "brought" by the general board—"Against an Officer or Other Official of a Local," "Against a Local," and "Against a Grouping"—are the ones that should also "be filed with . . . the General Board)." Although the IPGCU constitution contained no comprehensive provision relating to charges received and acted on by its governing board of directors, that constitution made references to action taken by the board that would undoubtedly have been board initiated (e.g., G.C. Exh. 33 at 29, art. V, sec. 3: Board has "power to suspend or revoke the charter of a subordinate union, or conference, or council, or to suspend or cancel the cards of members thereof for violations of the laws of the International Union"; p. 40, art. VI, sec. 16: subordinate unions failing to honor a traveler's card "shall be subject to a fine of $50 in the first instance"; pp. 59–60, art. XIV, sec. 1; any local failing to obtain strike sanction "may be disciplined by fine, suspension, or the revocation of its charter, as the Board of Directors may determine"). Manifestly, some level higher than the local one *had* to be authorized to entertain certain kinds of charges; in this respect, the new constitution is not materially different from the one that governed the old IPGCU.

Respondent's brief stresses the changes wrought by the merger at the national level. The merger agreement provides that "there will be a need for all of the Officers of the two organizations during the early years of merger, but that ultimately, the number of positions can and shall be reduced." It goes on to mandate that, as the "first officers" of the GCIU, the incumbent president of the GAIU would become president of the new union; the president of the IPGCU would become "President Emeritus," an essentially advisory position, of the GCIU; the IPGCU secretary-treasurer would occupy the same position in the merged organization; the GAIU secretary-treasuer would fill the office of GCIU recording and financial secretary; the GAIU executive vice president would hold that office with the GCIU (but the office would be eliminated for the term beginning 4 June 1984; however, in 1988, the office of recording secretary would become executive vice president), and of the 15 vice presidents, 8 of them would be incumbent IPGCU vice presidents and the other 7 would be incumbent GAIU vice presidents. These officials were to serve on the general board of the GCIU; the remainder of the general board included "the fourteen incumbent Councillors from among the ranks of the GAIU" and "[f]ourteen General Board members elected on a regional basis from among the ranks of the IP & GCU."

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[12] Despite this testimony, Respondent states on brief that "[t]he GCIU . . . has handled the only arbitration that Local 61–C has had under its collective-bargaining agreements."

[13] In addition to Locals 61–C and 41–S, there are two other GCIU locals in Baltimore. Brown testified that "[t]here is very little in competition with each other."

Thus, the GCIU general board, the central governing body of the Union between conventions, was to be composed of an equal number of representatives of each of the merging unions; and the merger agreement provided that as the number of officers and general board members was gradually reduced, "Every effort will be made to maintain an equal balance in the number of members of the general board from each of the merging organizations during the transition period. In any event, regardless of any imbalance in actual numbers, there shall always be equality of voting strength between the members of the General Board representing each of the merging organizations during the transition period." (G.C. Exh. 34 at 4, sec. 12.) The offices delineated above were to be filled only from the ranks of the respective merged organizations until 1992 when there would be only 10 offices (the president, the secretary-treasurer, and 8 vice presidents) that would be filled without regard to prior affiliation.

The merger agreement recognizes a need for the two memberships to feel secure that the amalgamated union would continue to represent each of them fairly and forcefully, as the foregoing provision implies. Although respecting this perception, the agreement at the same time phases in through the transition period an organization that will, eventually, achieve "the ultimate and strongly desired goal of one International Union for the entire graphic communications industry, with greater job security and economic prosperity for the thousands of men and women who contribute their labor to produce the diverse quality products of the industry."

The initial governing structure of GCIU was, as noted, 20 officers from the 2 Unions (to be gradually reduced to 10 officers by June 1992) and a "General Board" composed of those officers and 28 other members equally divided between the Unions (to be reduced by June 1992 to 12 such other general board members). It is difficult to agree with Respondent that the merger agreement "established an entirely new governing structure for the GCIU from that which previously governed the IPGCU."

The latter Union was governed by a president, a secretary-treasurer, and eight vice presidents (the latter being required to have specific kinds of craft-oriented membership, such as one vice president with a "commercial journeyman membership," one with a "newspaper journeyman membership," etc.).[14] These 10 officers constituted the IPGCU board of directors, which exercised dominant power over the Union between conventions.

There *are* differences between the two kinds of administrations. The new governing board of GCIU consists not only of officers, but also of other members of the two Unions. Since the latter seats are equally divided during the transition period, the change seems to be of little importance. In addition, the GCIU would not, by 1992, be selecting vice presidents by any kind of craft identification, as did the IPGCU; however, for the 1984 election, the eight IPGCU candidates for the offices of vice president *were* nominated according to their membership in the craft-related locals as had been spelled out in the former IPGCU constitution (G.C. Exh. 34 at 15, art. III, sec. 5). Thus, the terms of office being 4 years, the new constitution continued the practice of vice presidential craft representation from 1983 until at least 1988 for the eight vice presidents of IPGCU origin. Unlike the IPGCU constitution, however, the nonofficer general board members of GCIU were to be selected on a regional basis. (G.C. Exh. 34 at 18-19, art. X, sec. 2, A-E.)

The significance to the IPGCU members of such changes seems questionable. On cross-examination, Local 61-C President Brown admitted that just before the merger, he stated to his members that he "felt that the commercial section of the IPGCU wound up being underrepresented on that General Board." The "commercial" vice president on the *IPGCU* board of directors had been but 1 (or at most 2, if the Canadian vice president was "commercial") person out of 10, however, so it is hard to conceive that any potential additional dilution could have seemed to be a serious matter.[15] It should furthermore be noted that the new constitution has made special provision for the preservation of craft identification and control in the following paragraph found in the "Conventions" article of the new constitution (G.C. Exh. 34 at 28, art. XVII, sec. 13):

> Section 13. The Commercial, Paper Handler, Specialty, Newspaper, Stereotyper and Electrotyper Branches shall each have full jurisdiction in all matters pertaining to regulation and control of its own branch of the printing industry, insofar as the interest of other crafts is not affected; and when the Chairman and Secretary of the caucus held by the Branch certify over their signatures in the Convention that such a proposition has been adopted in caucus, it shall be announced by the chair and shall become the law of the International Union, unless two-thirds (2/3) of the delegates vote against such amendment.

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[14] The IPGCU constitution had provided that chartered locals be designated as "commercial, newspaper, assistants, paper handlers, stereotyper and electrotyper and specialty." G.C. Exh. 33 at 3, art. I, sec. 6.

[15] As earlier stated, Brown sent a letter to his members in April 1983 urging approval of the merger.

This provision is taken verbatim from the former IPGCU constitution, where it resided as the second section of an article entitled "Legislation" (the first section of which authorized the International to change the constitution and laws as it deemed necessary). (G.C. Exh. 33 at 69–70, art. XVIII.) It was not referred to at the hearing. On its face, it seems to both preserve the vitality of craft identity and to repose a great deal of power in the separate branches to regulate their crafts. In addition, chapter XVII, page 53 et seq., of the new constitution contains, under the heading "Practices Of The Former IP&GCU Unique To Their Respective Divisions," detailed provisions governing the work and benefits of the members of the various craft locals.

The extent to which the jurisdiction of the GCIU has been expanded, if any, in contrast to that of the IPGCU, is difficult to ascertain. The new constitution reproduces verbatim the first significant clause of the former IPGCU jurisdiction provision by stating: "The trade jurisdiction of this International Union shall cover every aspect of printing, publishing, graphic and other forms of communications and related fields of operations." The new constitution continues, however, "including but not limited to all work processes, operations and products directly or indirectly in whole or in any part incident to, associated with or related to lithography, offset, photoengraving, letterpress, gravure, intaglio, bookbinding and finishing, paper converting, and all workers wherever located and however described working in any industry whatsoever." In contrast, the rest of the former IPGCU jurisdiction clause seems more limited: "The work jurisdiction of this International Union shall cover all employees of private and public employers including printing, offset, intaglio and gravure pressmen, assistants, flymen, paper handlers, printing specialties and paper products workers, ink and roller makers, circulation workers, stereotypers, electrotypers and workers in associated operations."

The words "lithography," "photoengraving," and "letterpress" do not appear in IPGCU's clause; these processes all constitute printing," which does appear there. "Bookbinding and finishing" and "paper converting" were not expressly included in IPGCU's provision, but may well fall under "paper products workers" or "workers in associated operations." Although certain specific job titles (e.g., ink and roller makers stereotypers) found in the old IPGCU constitution do not appear in the new clause, they must surely be covered by the board language of the new clause "all work processes, operations and products directly or indirectly in whole or in any part incident to, associated with or related to."[16] Although the new constitution refers, finally, to "all workers wherever located and however described working in any industry whatsoever," I very much doubt that the GCIU intends a literal interpretation of that phrase to include, e.g., fishermen and poultry eviscerators. The preamble of the new constitution states, "This International Union is part of and dedicated to the trend toward the formation of one Union *in the graphic communications industry*" (emphasis added), and thereafter refers to "our industry" and "the growth and expansion of the graphic communications industry."

It is interesting to note that under neither constitution has Local 61 sought to duplicate the range of the respective constitutional clauses. Prior to the merger, the relevant provisions of Local 61's bylaws provided jurisdiction over "all printing pressmen, assistants, apprentices, and all offset pressmen, assistants, and preparatory workers employed in the industry in the territorial jurisdiction above described, except those employed in newspaper printing pressrooms." The changes proposed by Local 61–C to its bylaws after the merger afforded jurisdiction over "all pressmen, assistants, offset preparatory workers, duplicator operators, bindery, specialty, art, typesetting office workers, or any other workers in departments organized by this local and all registered apprentices in the various crafts employed in a particular plant in the territorial jurisdiction described above."[17] It can be seen that while Local 61–C attempted to expand its jurisdiction after the merger to specify certain coverage not previously named, it did not, just as it had not pre-GCIU, try to make its jurisdiction expressly coextensive with that of the respective International constitutions. Brown testified that the present jurisdictional clauses of the four Baltimore locals "includ[e] each other's employees," but Local 61–C has "not organized anyone in that line . . . . We just made it a possibility. If we do, we are covered."

The changes made here are not substantial. They arguably expand the potential jurisdiction of Local 61–C which, it seems, would be a more congenial modification in the eyes of the membership than a contraction, and yet the changes have not loosened the bonds of Local 61–C to the graphic communications industry.

Respondent argues, "General administration, including servicing of local unions, organizing and legal activity, was also merged, with a mandate that such services be reduced [G.C. Exh. 34, sec. 6]." In point of fact, there was no "mandate" to "reduce services." The merger agreement simply provides that the foregoing functions "are just a few areas wherein economic efficiencies can be effectively introduced," a matter to be studied by a committee of the top officers.[18]

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[16] As earlier noted, the new constitution expressly refers to the election of ex-IPGCU vice presidents in 1984 from such "divisions" as "Paperhandler," "Stereotyper" and "Specialty," and also to permanent "caucases" of those crafts.

[17] Whether these changes are in effect is unclear. Local 61–C submitted them to GCIU. In a response from recording secretary Norton in 1984, Norton appeared to be saying that it was too soon to tell whether the proposed clauses would be in conflict with the clauses of other Baltimore locals, and that any such conflict would be resolved by the International president. Brown thought that the changes had taken effect.

[18] It was, however, contemplated, as one of the areas of economic efficiency, that the number of International representatives servicing the GCIU locals would be reduced by attrition. As of 1 July 1983, there were 33 International representatives on the GCIU payroll. Since the merger, death and retirement have reduced the number of representatives by 15, and only 3 new representatives have been hired, leaving a total of 21 representatives. Since the representatives of each premerger union presumably covered the same territory, there was most likely a considerable amount of duplicative travel and expense that has now been eliminated; and, since in 1983 these employees earned roughly $35,000 each, the economic value of merger in such areas becomes apparent.

IPGCU's constitution had provided for the establishment by at least two local unions, with board of directors' approval, of "conferences," "councils," and "joint councils," and the board of directors could also charter "regional, national or other conferences" of locals; locals apparently could affiliate with these groups at their discretion. (G.C. Exh. 33 at 5–6, art. I, secs. 10–15.[19]) The merger agreement allowed these groupings to "continue to operate in the same manner as they did at the date of merger," but stated that the general board would not "expand the funding for Councils or Conferences, or charter new Councils or Conferences except in the case of consolidation or merger." The effect of these provisions, as testified to by GCIU Secretary-Treasurer McNally, was to leave existing councils and conferences (of both IPGCU and GAIU) in place and even capable of increasing their affiliations, but they could not have an "expansion in funds."

The record is silent regarding the amount of funding that the board of directors had ever furnished to the councils and conferences. The matter, however, appears to have been of no moment to Local 61–C, since there is no evidence that it has ever been a member of any such council or conference,[20] and there is no reason to believe that the freezing of funds to such groups would ever have any material effect on Local 61–C.[21]

Respondent argues that the merger agreement "established new procedures for delegate selection and voting representation at the governing international convention." The agreement provided that for the upcoming 1984 convention, voting would be weighted to equalize the voting strength of the two former groups. For the 1988 convention and thereafter, the *number* of delegates would be based on the number of members in a local according to a formula that differed from that in the old IPGCU constitution, but "[t]he principle of equal voting strength shall continue in force throughout the transition period, regardless of the number of actual delegates." (G.C. Exh. 34 at 7, sec. 16.)

It appears, from the formula contained in the old IPGCU constitution, that Local 61–C would have been entitled to about three delegates to an IPGCU convention. (G.C. Exh. 33 at 47, sec. 1.) How meaningful these 3 delegates would have been at a convention representing about 91,000 other IPGCU members is conjectural. Under the new constitution, in 1988 and thereafter, a local's delegate or delegates are entitled to vote on behalf all the local's members. (G.C. Exh. 34 at 29, art. XVII, sec. 17,C,IV.)

In the end, it does not appear to be accurate to speak of "new procedures for delegate selection" for the convention; the procedures differed, but still were essentially the same. There was, however, new "voting representation," in the sense that more people would be voting at GCIU conventions than at IPGCU conventions. If that fact were sufficient to change the "identity" of a local, then all mergers of International unions would automatically destroy all their subordinate locals' "identity." The Board has never so held.

As Respondent points out, unlike the former IPGCU constitution, the new constitution contains a "Code of Ethics," which imposes certain standards of conduct on officers, agents, representatives, and trustees of the various constituent bodies and benefit funds of GCIU, and requires the establishment of a committee of ethics in each local, together with annual reports. These provisions have no direct impact on the rank-and-file memberships of the locals, and many of the standards of conduct are already applicable by virtue of the common law and the Labor-Management Reporting and Disclosure Act. Moreover, one sentence of the IPGCU's old obligation of membership "I further promise that I will not wrong a brother member or see him wronged if it is in my power to prevent" arguably covers most of the fiduciary responsibilities spelled out in detail in the Code of Ethics.

A basic contention made by Respondent is that the merger constituted a "takeover" of IPGCU by GAIU.[22] One of the more specific allegations made in this catagory has to do with the finances of the parent organizations.

Respondent asserts on brief that "[p]rior to the merger, the IPGCU general fund contained more than two million dollars while the GAIU general fund ran a deficit of $16,276 (R. Exh. 106)." The last-named exhibit is a memorandum to IPGCU board members dated 1 November 1982.[23] Financial statements for GAIU (G.C. Exh. 36) as of 30 June 1983 tell a somewhat different story. As of that time, GAIU had in its general fund cash resources of $43,584 and liquid investments of $582,932; however, for the *13* months ended 30 June 1983, the general fund had shown a loss of $552,888 (compared with a loss of $168,822 for the year ending 31 May 1982). Nonetheless, GAIU's balance sheet for the general fund as of 30 June 1983 showed a net balance of $330,010.

IPGCU, however, also displayed some weaknesses in its general fund for the year ending 30 June 1983, showing excess expenses of $96,205. But IPGCU's apparently strong general fund balance of that date was $4,597,456.

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[19] GCIU Secretary-Treasurer McNally, however, testified to an instance in which the IPGCU board had "turned down" an effort by a Denver local to affiliate with a California council, because "it was too far away."

[20] McNally testified that councils are formed to assist small locals, some as diminutive as eight members. Local 61–C, on the other hand, has for some years had nearly 200 members.

[21] The Local has, however, continued its premerger affiliations with four union and craft organizations, such as the Metropolitan Baltimore Council of AFL–CIO Unions and the Allied Printing Trades of Baltimore. Local 61–C's representatives to these four groups have been President Brown and, with one change in 1983 or 1984, essentially the same individuals since at least 1981.

[22] On brief, Respondent has renewed its complaint about my refusal to grant a delay so that it might subpoena GCIU Vice President James J. Mitchell, a resident of New Jersey, to testify (1) about the history of the authority of the GCIU and IPGCU governing boards to pass on proposed affiliation of locals with councils, and (2) about Mitchell's opinion that some persons in the new organization desire to erase from it all vestiges of the IPGCU. I found that the first objective concerned a remote matter, particularly as it related to Local 61–C, and the second would have involved the hearing in a useless controversy about the existence of a conspiracy. I see no reason to believe that my ruling was erroneous.

[23] It was evidently this document to which GCIU Secretary-Treasurer McNally referred when he agreed at trial that the GAIU general fund showed a $16,000 deficit "prior to the merger."

Analysis of the copious financial statements seems undesirable in this lengthy opinion, but two points may be worth making. One is that the 1983 GAIU general fund balance sheet lists as liablilities "Inter-fund payables" of $2,086,349, derived from general fund debts to other funds operated by the GAIU; it also shows a separate loan payable to the GAIU mortuary fund of $800,352. The IPGCU financial statements, on the other hand, note that "All interfund transactions and balances have been eliminated." (G.C. Exh. 40 at 5, item 1.) Thus, comparison of the general fund balances of the two Unions as of the merger date is not possible.

Secondly, the GAIU owned a headquarters building that it had purchased in 1971 for $3,625,000; at the time of the merger, it was valued on a cost basis less depreciation at almost $3 million. An appraisal on 9 December 1982, however, valued the building at $16.5 million. (G.C. Exh. 36 at 10-11, item 2.) After the merger, this building would be commonly owned by all GCIU members. The IPGCU, on the other hand, owned no real estate and was renting its headquarters under a lease arrangement that would rise from $330,744 in 1984 to $438,460 in 1987.

The essential problem with the GAIU, McNally reported in his November 1982 memorandum, was its comparative inefficiency, causing a cash-flow problem. There is no reason to believe that the two unions did not, in fact, as stated in the merger agreement, "anticipate accelerating financial stress during the immediate period ahead" and did not sincerely share the opinion that "economic efficiencies can be effectively introduced, which will moderate the financial burden of the merged membership." (G.C. Exh. 34 at 2, item 6.) Subsequent to the merger, 36 employees have left the GCIU payroll and only 8 new employees have been hired. Annual GCIU excess expenses in the general fund account dropped from $1,358,988 for the year ending 30 June 1984 to $326,109 for the year ending 30 June 1986 (G.C. Exhs. 37 to 39).

Another aspect of the "takeover" alleged by Respondent is that the merged organization, including Local 61-C in this litigation, is now represented by Delson & Gordon, GAIU's former law firm. Local 61-C President Brown "thought" he recalled that the director of organizing for the International had made the decision for his Local to be represented by the firm, although the Local had not previously been represented by it, but he seemed to be attributing the need for a new attorney to the fact that the Baltimore, Maryland attorney who had previously represented the Local was no longer available.

It is at least clear that the choice of Delson & Gordon was, as Brown testified, directed by higher GCIU authority, but the issue does not seem very consequential insofar as the continuation of the Local's identity is concerned. The Local's regular attorney left town; the former GAIU counsel was retained because counsel was needed. New legal representation is, obviously, unavoidable in such circumstances. Moreover, that GCIU has employed GAIU's former counsel as its attorneys seems to no more demonstrate a "takeover" by GAIU than the fact that GCIU now employs as its auditor the firm that used to work for IPGCU demonstrates the primacy of the latter.[24]

Respondent advances an argument that the provisions of the GCIU constitution assigning the offices of president, recording and financial secretary, and executive vice president during the transition period only to former GAIU members is violative of section 401(e) of the Labor-Management Reporting and Disclosure Act. (LMRDA), 29 U.S.C. § 481(e).[25]

Record evidence shows that the U.S. Department of Labor warned GCIU International President Kenneth Brown in 1983 that the transitional constitutional restrictions on the eligibility of general officers would "constitute a violation of Title IV of the LMRDA, and subject those officer elections to challenge, pursuant to Section 402 of the LMRDA." Nonetheless, an election held in 1984 apparently went unchallenged. Minutes of a general board meeting in February 1987 state that Vice President Mitchell had written the president that the procedures "may be in violation of the law" and that if the general board did not act to assure compliance with the statute, Mitchell would file a complaint. The president noted that the same transitional procedures had been used by "all the former International Unions that now make up the GCIU" and that if a complaint were filed regarding the 1988 elections, the matter would be dealt with at that time.

Respondent argues, first, that the continuing dispute over the eligibility requirements "makes it impossible to state with certainty that no additional changes will take place in the near future which could further affect the union's claim to continuity." However, *if* a complaint is filed in 1988, under any scenario the most that could happen would be that a special election would be held (before the unrestricted 1992 elections roll around) without such built-in preferences. That sort of result, however, would hardly militate in favor of Respondent's claim that the continuity of Local 61-C could be even more attenuated by future events. In 1992, as previously pointed out, the union-origin restrictions will disappear.

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[24] Respondent urges that President Brown not be credited in certain areas "in view of the repeated contradictions between his testimony on cross-examination and both his direct testimony and his sworn prehearing affidavit." As an example, Brown testified on direct examination that the merger brought about only a few changes in the Local's bylaws: that the Local was "instructed" to change the name, but that the modifications of the jurisdiction and "form of organization" clauses were adopted by the Local on its own initiative. Respondent asserts on brief that Brown wrote in his affidavit that "there had been no changes in Local 61's 'bylaws, officers, or dues' following the merger (Tr. 45-46)."

The language purportedly quoted by Respondent on brief does not appear in the transcript. It does not even appear in the affidavit (at the hearing, I felt it unnecessary to receive the affidavit because I was led to believe that any inconsistencies had been brought out in the testimony; I now reverse my ruling). The affidavit states that "[t]he same officers, local dues structure, Local Constitution and Bylaws and geographical jurisdiction that existed prior to the merger between the IP&GCU and GAIU were retained by Local 61 after the effective date of the merger." The record does not show these assertions to be untrue: the bylaws were not changed until a membership meeting on 23 October 1983, and then in the relatively minor manner earlier noted; the date of resignation of Local Vice President Hosza in or around 1983 is not clear, but he retired perhaps in May as a result of disability, not the merger, and was evidently replaced soon *after* the date of the merger by a sitting member of the Local's executive board; and, as Brown expressly pointed out at the hearing, he had said in the affidavit that there had been no change in the "dues structure," not the "dues."

It appeared to me that Brown was doing his best at the hearing to recall some relatively ancient history. He probably did not recollect everything accurately, and he demonstrated some unfamiliarity with the details of both the old and new constitutions, but he tried. I was impressed by his admission that he told the members that the "commercial" section would be "underrepresented" on the new board. To the extent that my conclusions here rest on Brown's credibility, I view his testimony with favor except when the evidence otherwise shows that his memory failed him.

[25] The statute requires that "every member in good standing shall be eligible to be a candidate and to hold office (subject to section 504 of this title and to reasonable qualifications uniformly imposed."

As the second prong of this argument, Respondent asserts that the "illegal and discriminatory structure also constitutes an independent ground for Respondent's refusal to bargain, as the Board has in the past revoked the certifications of unions engaged in unlawful, invidious discrimination," citing *Metal Workers Local 1*, 147 NLRB 1573 (1964), and *Handy Andy, Inc.*, 228 NLRB 447, 456 (1977). Respondent contends that in *Handy Andy*, the Board failed to act on the allegations of union discrimination "solely because they were raised in a representation proceeding, rather than in an "appropriate unfair labor practice proceeding," and that the present case falls into the latter category. Respondent misreads *Handy Andy*. The Board at least three times (228 NLRB at 451, 453) stated that it was addressing the question of raising a union discrimination defense in a "certification and bargaining order" context, and also made singularly clear that it will entertain such an issue only in those "unfair labor practice proceedings" in which the union stands formally accused of discrimination. Id. at 455-456.

Moreover, I very much doubt that the type of "discrimination" under discussion would, in any event, be that contemplated by the Board in *Handy Andy*. Nor is it clear that the reservation of designated national positions for members of each union for a transitory period in a merger situation is violative of 29 U.S.C. § 481(e). Respondent offers no citations to support its claim of illegality. In *Wirtz v. Hotel & Restaurant Employees Union Local 6*, 391 U.S. 492 (1968), the Court found unreasonable a bylaw that made 97 percent of the membership ineligible to run for office, pointing out that "[u]nduly restrictive candidacy qualifications can result in the abuses of entrenched leadership that the LMRDA was expressly enacted to curb" (id. at 499). The present circumstances do not appear to present a case of "entrenched leadership"; in any event, if by some chance a determinative finding should be made prior to 1992, when the union-affiliation restrictions terminate, that the restrictive provision is unlawful, an article in the GCIU constitution would invalidate it. (G.C. Exh. 34 at 47, art. XXXIII.)

Because it refers to the matter at four different places in its brief, Respondent obviously attaches some significance to the fact that "Local 61-C's office address following the merger also was different from that of Local 61 [Tr. 46-47]." The cited source makes clear, however, that the reason for the relocation, which in fact did not occur until "a year and a half ago," was that the original office building was "torn down," which makes it somewhat difficult to comprehend why this change might seem merger-related.

IV. ANALYSIS AND CONCLUSION

In *NLRB v. Financial Institution Employees*, supra, 475 U.S. at 203, which involved the affiliation of an independent union with a national union, the Court made the broad statement that "[i]n many cases, a majority of employees will continue to support the union despite any changes precipitated by affiliation," citing with apparent approval the even broader statement in *American Range Lines*, 13 NLRB 139, 154 (1939), that affiliation "has no probative value concerning the employees' choice of the [union] as their collective bargaining representative."

As earlier discussed, this latter fiat is more expansive than the Board has since been willing to be. And even the Court in *Financial Institution Employees* accepted that if changes in the affiliating entity "are sufficiently dramatic to alter the union's identity, affiliation may raise a question of representation." Id. at 206. The Court decisively disagreed with the employer, however, that "affiliation necessarily changes the union's identity."

In so stating, the Court appeared to put in question the position of the Court of Appeals for the Third Circuit, which, while examining the facts in each such case, has generally viewed the superimposition of a national structure on a formerly independent union as almost inevitably creating a change in identity. See *Sun Oil Co. of Pennsylvania*, 228 NLRB 1072 1977), revd. 576 F.2d 553 (3d. Cir. 1978), and cases cited at 554. The Board has nonetheless persisted in holding that if the effects of the affiliation are such that the localized authority and character of the indendent are not significently impaired by the association with the International union, the baggage that always accompanies such affiliations (e.g., per capita taxes and other obligations to the adoptive parent) does not affect the essential identity of the former bargaining representative. Indeed, in *New Orleans Public Service*, 237 NLRB 919, 921 (1978), involving the affiliation of an independent with an International, the Board assumed "an entirely new set of bylaws . . . a new system of internal union discipline . . . . a different fee schedule, and that persons outside the unit may be involved in the removal of officers, the investigation of membership applications, the amount of initiation fees, and the expenditure of funds," but still found "no essential change in the identity of the bargaining representative" in view of the retention of various insignia of local control after the affiliation. Circuit courts have agreed: *St. Vincent Hospital v. NLRB*, 621 F.2d 1054 (10th Cir 1980); *NLRB v. Insulfab Plastics*, supra.

In the present case—a local *already* affiliated with an International union that merges with another International—the theoretical basis for concluding, in the Supreme Court's words in *Financial Institution Employees*, supra, that "it is unclear whether the reorganized union retains majority support," is considerably more narrow. Here the unit employees voted in the first instance to be represented by a labor organization that itself was under the governance of another larger organization; they chose to be part of a national structure, with all the added freight that such a relationship entails and portends. It thus cannot be said here, as it was in *U.S. Steel Corp. v. NLRB*, 457 F.2d 660, 664 (3d Cir. 1972), in which an independent became associated with a national union, "The very act of affiliation here is a commitment to change in the fulcrum of union control and representation."

Although the GCIU constitution was a new one (blending, however, many provisions of both former constitutions), "[t]he factual determination at issue revolves not around superficial criteria such as . . . organizational differences in the national unions of which they become a part." *J. Ray McDermott & Co. v. NLRB* 571 F.2d 850, 857 (5th Cir. 1978). In cases like this one, the Board (consistently) and the courts (frequently) have paid little attention to the fact that the merger of international unions necessarily wrought changes in the governing entity. When the International Brotherhood of Bookbinders merged in 1972 with the Lithographers and Photoengravers International Union to become the GAIU, and an employer raised the issue of the changed identity of a local of the former Bookbinders, neither the administrative law judge nor the Board even made reference to the new constitution, *Pearl Bookbinding Co.*, 206 NLRB 834 (1973), and the Court of Appeals for the First Circuit, in *NLRB v. Pearl Bookbinding Co.*, 517 F.2d 1108, 1111 (1975), other than summarizing the Respondent's argument predicated on the local being "subordinate to a new international with a new president and constitution," concentrated entirely on those local factors reflecting a continuity of representation.

Similar superficial treatment by the Board was accorded the affiliation of Retail Clerks International Association and the Amalgamated Meat Cutters and Butcher Workmen of North America when, in 1979, they joined together as the United Food and Commercial Workers International Union. The Board briefly recited certain aspects of the merger agreement, such as the integration of the national officers of the two unions into a single hierarchy, the transfer of membership, property, rights, and obligations from both unions into the new one, the allowance of "some discrepancies" between the constitutions of the locals and that of the new organization, and the like, and concluded that the newborn organization and its locals succeeded to the representational rights of the merged organizations. *Warehouse Groceries Management*, 254 NLRB 252, 255-256 (1981), enfd. per curiam 683 F.2d 418 (1st Cir. 1982).

In the instant case, there were no changes in the higher echelon governance by virture of the merger that could be deemed to seriously raise the question whether a majority of the Respondent's bargaining unit employees would continue to desire Local 61-C as their bargaining representative. And at the local level, Local 61-C essentially retained its longstanding identity. Respondent argues that "[l]ack of local autonomy following an international merger is one of the most significant factors leading to a Board finding of change in identity." In my view, however, the proper question in a case like this one is not whether there is a "lack" of local authority, but whether the preexisting local authority, with which the unit employees had presumptively been satisfied, has substantially *changed* for the worse. The record shows that almost all the same officers (with an exception unrelated to the merger) continued to serve after the merger; the Local's bylaws remained virtually the same, with a few changes that are, as a practical matter, of no consequence; the dues structure, including the procedure for increasing dues, remained intact, as did the per capita payments to the parent union; the Local's assets remained its own; the negotiating committees stayed basically the same, with only normal, nonmerger-related turnover; and strike sanctions are still, as they were prior to the merger, subject to higher level approval.[26]

Only one factor gives me pause, but not for long. As previously discussed, Respondent believes that under the IPGCU constitution, the International had "approved or disapproved local collective bargaining agreements." If that were true, and the GCIU simply continued to exercise similar authority, the merger would have effected no change in the relative autonomy of Local 61-C. If, however, the members of the Local possessed the authority before the merger, but did not thereafter, to finally consummate their own bargaining agreements, a question of continuation of identity would be raised.

In previous discussion of this issue, it appeared, in my view, that the former IPGCU constitution did not require submission of bargaining agreements for prior clearance by the International, but did impose various requirements that must be included in the agreements; failure to win employer acquiescence in such provisions would, I assume, have effectively precluded an IPGCU local from entering into agreements. The new GCIU constitution, which states that local agreements are "subject to approval" by the International president, may mean only that the president can intervene to prevent the execution of an agreement, and not that he must formally approve every contract before it takes effect; or it may mean the latter.

Brown was of little definitive help on this issue. He testified to his belief that once a local and an employer agree on a contract, it is "legal and binding." But he also said that he "thought" Local 61-C had "always" submitted contracts for International "approval," both before and after the merger. He maintained, however, that "it is still a contract on the local level, whether the International approves or not, actually." I note that Brown testified that he sends copies of "proposals" to the International to make sure the local is not violating any Federal law or International bylaw, and he may send copies of the consummated contracts to the International for the same purpose.

On the other hand, Respondent may be correct in asserting that the IPGCU International routinely approved or disapproved local bargaining agreements, based on knowledge Respondent would have acquired from an examination of the Union's records. At the hearing, counsel for the Union stated, in summarizing the documents provided to Respondent pursuant to a subpoena to the International, "We provided in response to specific paragraphs requesting information about such items, the strike sanction, *contract approvals*, documents discussing the merger." Counsel further stated that, from the files of 10 randomly selected Locals, "[f]ive from the former GAIU and five from the former IPGCU," the Union "provided files of the contract and research department, reflecting contract refusals, which was—approvals which was a stack about five inches high." Respondent did not contradict these representations, and the files thus produced may account for the position taken on brief that the former IPGCU approved or disapproved bargaining agreements.

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[26] These facts render distinguishable the cases cited by Respondent, all of which (other than the Third Circuit cases) involved complete and new dominance over, or absorption of, one labor organization by another, e.g., *Gas Service Co.*, 213 NLRB 932, 933 (1974), "a new and different labor organization with its own officers and a complete change in the representative."

Given the ambiguity of the evidence and of the "subject to approval" clause, as originally discussed above (compare G.C. Exh. 34 at 51, Ch. 13.2, with Ch. 13.3), together with the fact that the IPGCU constitution itself had imposed various limitations on the ability of locals to negotiate their own contracts with total independence, I am not persuaded that a sufficient showing of substantial change has been made on this issue. I might further note that the Board has not found a change in identity where, in addition to other constitutional restrictions and obligations assumed by an independent's affiliation with an International, the International did not permit its locals to sign bargaining agreements that failed to incorporate a prescribed national wage floor. *Sun Oil Co.*, supra.

Accordingly, I conclude, as a matter of law, that the 1983 merger of the International unions did not cause a substantial change in the identity of Local 61-C and a consequent lack of continuity of representation by Local 61-C with respect to the Respondent's employees in the certified unit.

[Recommended Order omitted from publication.]

Sampson Steel and Supply, Inc. *and* Chauffeurs, Teamsters, Warehousemen, and Helpers Local Union No. 377. Case 8–RC–13666

June 30, 1988

DECISION AND ORDER REMANDING TO THE REGIONAL DIRECTOR

BY CHAIRMAN STEPHENS AND MEMBERS BABSON AND CRACRAFT

The National Labor Relations Board, by a three-member panel, has considered the objections to and the determinative challenges in an election held September 18, 1987, and the hearing officer's report recommending disposition of them. The election was conducted pursuant to a Stipulated Election Agreement.[1] The tally of ballots shows five for and four against the Petitioner, with two challenged ballots.

The Board has reviewed the record in light of the Employer's exceptions[2] and brief and the Petitioner's brief in response to the Employer's exceptions and adopts the hearing officer's findings,[3] conclusions, and recommendations only to the extent consistent herewith.

The only issue raised by the exceptions is the hearing officer's disposition of Norman Cunningham's ballot. The hearing officer rejected the Petitioner's contention that Cunningham was a statutory supervisor, but sustained its alternative position[4] that he is managerial and does not share a community of interest with unit employees. The Employer excepts. We find merit in the Employer's exceptions.

Cunningham was hired by the Employer in 1980. He had been a purchasing agent for a large steel manufacturer for 23 years and thereafter worked as warehouse manager for a different employer. Larry Herman, the Employer's president, met Cunningham while Cunningham was working for the other employer. When Herman started his own business,[5] he hired Cunningham to be his warehouse supervisor. As warehouse supervisor, Cunningham hired and fired employees and directed their work on a day-to-day basis.

In the spring of 1985, Larry Herman's son, Roger, became the warehouse supervisor[6] and Cunningham became a self-described jack-of-all trades.[7] Cunningham's duties include operating a lift truck, working in the pipe yard, making deliveries in the pickup truck, and running errands. According to Cunningham, his principal duty of driving the pickup truck requires several trips a week to take care of small and emergency customer needs. Cunningham also has the keys to the shop and the code to the Employer's alarm system. He opens the shop for the morning shift employees. In addition, Cunningham is responsible for preparing mileage reports and has a desk in the warehouse office where he prepares these reports. Cunningham testified that he spends from 15 to 20 minutes a day in the office.

Although Cunningham does not work a regular shift and adjusts his schedule to his assignments, sometimes working extra hours and at other times working a short day, he does work a 40-hour week. Unlike other employees, he does not punch a clock and is paid a salary. Like other employees, Cunningham makes use of a car owned by Mrs. Herman to run errands on the Employer's behalf. While Cunningham also has personal use of the car and drives it back and forth to work, this is because Cunningham had damaged his own car on the Employer's property. Cunningham held the Employer responsible for the damage. Rather than pay for repairing Cunningham's car Mr. and Mrs. Herman decided to allow Cunningham to use Mrs. Herman's car.

All the employees run errands for the Employer. However, the bulk of the errands are performed by Cunningham. Cunningham, unlike the other employees, has the authority to charge items to the

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[1] The unit is:

> All warehousemen and drivers, excluding all office clerical employees, professional employees, guards and supervisors as defined in the Act.

[2] The Employer excepts to that portion of the hearing officer's report requiring that exceptions to the report be directly filed with the Board. This requirement is in accord with the requirements of Sec. 102.69(i) of the Board's Rules and Regulations. Accordingly, we find the Employer's exception to be without merit.

[3] In the absence of exceptions thereto, we adopt, pro forma, the hearing officer's recommendations that the objections be overruled and that the challenge to the ballot of Roger Churn be sustained.

[4] The Employer excepts to the hearing officer's reliance on the Petitioner's alternative argument that Cunningham is a managerial employee. It contends that the Regional Director limited the hearing in this case to Cunningham's alleged supervisory status and that by raising the managerial issue in her report after the record had been closed, the hearing officer prejudiced the Employer and denied it procedural due process. We find no merit in the Employer's exception. Counsel for the Petitioner in his opening remarks at the hearing asserted that Cunningham was managerial. The Employer's counsel did not raise an objection. Further, evidence with respect to Cunningham's managerial status was introduced by the Petitioner at the hearing, without objection. Witnesses were examined and cross-examined on the subject. In his closing statement counsel for the Petitioner reiterated the Petitioner's position that Cunningham is "either a supervisor or a managerial employee." Accordingly, we find that the Employer was sufficiently notified that Cunningham's status as a managerial employee was in issue and that under the circumstances the Employer was not prejudiced, taken by surprise, or otherwise denied procedural due process.

[5] The Employer maintains a warehouse from which it sells and delivers metal tube and pipe products.

[6] John Brown was also made warehouse supervisor in the spring of 1985. However, he ceased being warehouse supervisor in March 1987 and Roger Herman was the sole warehouse supervisor after that time.

[7] The employees were not informed of Cunningham's job change.

289 NLRB No. 59

Employer's charge accounts. These charges have sometimes exceeded $200, but those amounts are usually for recurring items such as motor oil for the trucks.[8] In addition, Cunningham can purchase items on his own volition to remedy supply shortages in the warehouse or office. These items can also be charged on Employer accounts but often Cunningham pays cash for the purchases and is reimbursed by the Employer. Other employees also purchase needed items such as kerosene and gasoline and then are reimbursed by the Employer.

Cunningham maintains a regular expense account which includes such items as gasoline, turnpike tickets, and meals while on the road. On the average he receives $200 a month for expenses. Also on Cunningham's expense account are "entertainment expenses." The Employer has encouraged Cunningham, in the course of making deliveries, to "entertain" customer purchasing agents by taking them to lunch. Cunningham obtains information about possible future orders and customer complaints, which he passes on to Larry Herman, but does not take customer orders, sign contracts, or remedy complaints. Larry Herman testified that these lunches constitute good public relations because of Cunningham's experience and reputation in the business. Although the Employer utilized Cunningham's past experience as a purchasing agent for Jones and Laughlin by seeking his advice prior to purchasing two large warehouse saws,[9] it is unclear whether Cunningham was advising the Employer on the desirability of the purchase or was simply along to aid in determining how to transport the saws to the Employer's facility. In any case, there is no evidence that this was a regular part of Cunningham's responsibilities.

In *General Dynamics Corp.*, 213 NLRB 851, 857 (1974), the Board defined managerial employees as:

> . . . those who formulate and effectuate management policies by expressing and making operative the decisions of their employer, and those who have discretion in the performance of their jobs independent of their employer's established policy [footnote omitted].
>
> . . . managerial status is not conferred upon rank-and-file workers, or upon those who perform routinely, but rather is reserved for those in executive-type positions, those who are closely aligned with management as true representatives of management.

The hearing officer found Cunningham managerial relying on the fact that Cunningham had pledged the Employer's credit in making both routine and nonroutine purchases. She noted that the mere possession of authority to extend an employer's credit did not confer management status but found that Cunningham's ability to determine on his own the purchases to be made together with the fact that he had no express dollar limitation on his purchasing authority denoted the possession of "independent discretion." The hearing officer also found that the Employer's utilization of Cunningham's past experience and his business contacts by promoting lunches between Cunningham and customer purchasing agents and by its seeking Cunningham's assistance in the purchase of major machinery proved that the Employer viewed Cunningham as a managerial employee. The hearing office further found that Cunningham was responsible for gauging employee performance both at the shop and in his dealings with customers, and concluded that such responsibility signified a close alignment with management.

Cunningham is a jack-of-all-trades. He shifts continually to where he is needed and it is his responsibility to make certain that necessary supplies are purchased. His past experience and general expertise permit this flexibility. Cunningham's work and the purchases he makes, however, are not independent of the Employer's established policy but are essential to maintain an operational status quo. Thus while the Employer may have consulted Cunningham prior to the purchase of the two large saws and while he can at times pledge the Employer's credit for nonroutine items, his advice is that of a knowledgeable employee and his purchases are a routine part of his duty to maintain a supply inventory. They do not involve independent judgment, nor the exercise of independent discretion and are not indicia of managerial status.[10] Further, while Cunningham's lunches with the customer purchasing agents promoted business, they were mainly for information-gathering purposes and did not involve Cunningham in the formulation and effectuation of Employer policies.[11] Accordingly, we find that Cunningham is not a managerial employee.

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[8] Cunningham believed that the Employer had placed a $75 limitation on his authority to charge nonrecurring items. However, no one told Cunningham of such a limit and there is no evidence in the record that any limitation had been imposed.

[9] The saws are approximately 3 feet wide and 6 feet long. There is no evidence as to the value of the saws.

[10] See *J/B Industries*, 225 NLRB 162 169 (1976).

[11] See *Marine Engineers District I*, 259 NLRB 1258, 1266 (1982).

Contrary to the hearing officer, we find little in the record to indicate that Cunningham gauges employee performances either in the shop or away. Cunningham testified that at various times he admonished the employees for not working hard enough, but there is no indication that the Employer sought his opinion of employee performance or that he in fact gave it. Further, while there is evidence that Cunningham did pass on to the Employer customer complaints he had gleaned during his lunches with customer purchasing agents, there is no evidence as to how the Employer responded to this information and in any event these were not Cunningham's criticisms but those of the customers.

In addition to excluding Cunningham from the unit on the grounds that he was a managerial employee, the hearing officer found that Cunningham's exclusion could be based on his lack of a community of interest with the unit employees. The hearing officer relied on Cunningham's differing duties as well as his terms and conditions of employment, which she found to be significantly different from those of the unit employees. These differences include Cunningham's use of the warehouse office, his responsibility for paperwork other employees do not share, his making purchases in behalf of the Employer, his entertainment of customer purchasing agents, his personal use of a company car, and his method of compensation and his hours of work.

None of the Employer's employees have clearly defined job classifications. Although some employees spend most of their worktime doing a particular job, all are expected to do any work that needs to be done. Thus, although Cunningham is assigned the bulk of the errands, all the unit employees do this type of work. Moreover, they, as Cunningham, use the Employer-owned car to run assigned errands. Although Cunningham does have some duties that differ from the unit employees, a substantial portion of his time on the job is spent doing unit work.[12] As Cunningham performed a substantial amount of bargaining unit work along with the other warehouse employees, we find that he had a strong community of interest with them. The difference in his hours[13] and method of pay or the fact that he uses Mrs. Herman's car are not sufficient here to require a contrary conclusion. Accordingly, we find that Cunningham is properly included in the unit.[14]

ORDER

It is ordered that the Regional Director for Region 8, within 10 days from the date of this decision, open and count the ballot of Norman Cunningham and thereafter prepare and cause to be served on the parties a revised tally of ballots, on which basis he shall issue the appropriate certification.

IT IS FURTHER ORDERED that the above-entitled matter is referred to the Regional Director for Region 8 for further processing consistent herewith.

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[12] Cunningham testified that he spends only 15 to 20 minutes a day in the warehouse office and it is uncontroverted that his principal duty is making deliveries in the pickup truck.

[13] Cunningham was responsible for opening the warehouse for the first-shift employees. Thus, it appears he started work at the same time as the other first-shift unit employees. Although his hours varied from those of other employees there is no evidence that he worked a shortened week.

[14] See *Bay Area Sealers*, 251 NLRB 89 (1980).

First Class Maintenance Service, Inc. and its Alter Ego, Clean Sweep Janitorial Services, Inc. *and* **Local 200, Service Employees International Union, AFL-CIO.** Case 3-CA-13279

June 30, 1988

DECISION AND ORDER

BY CHAIRMAN STEPHENS AND MEMBERS BABSON AND CRACRAFT

On January 28, 1987, Administrative Law Judge George L. McInerny issued the attached decision. The General Counsel filed exceptions and a supporting brief, and Respondent First Class filed an answering brief.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings, and conclusions and to adopt the recommended Order.

This case presents an extremely close question regarding application of the Board's alter ego doctrine. The General Counsel has alleged in substance that First Class Maintenance Service, Inc. (First Class) and Clean Sweep Janitorial Services, Inc. (Clean Sweep) are alter ego corporations and violated Section 8(a)(1) and (5) of the Act by refusing to apply First Class' collective-bargaining agreement with Local 200, Service Employees International Union, AFL-CIO (the Union) to employees of Clean Sweep. The General Counsel also alleges that the Respondents violated Section 8(a)(1) and (3) of the Act by causing the loss of employment of First Class employees who worked at the Arcata Graphics Building. For the reasons stated below, we hold that no alter ego relationship exists herein and we affirm the judge's dismissal of the 8(a)(5) allegations of the complaint. For the reasons stated by the judge, we also agree that Respondents did not violate Section 8(a)(1) or (3) of the Act. Accordingly, we shall dismiss the complaint in its entirety.[1]

An alter ego relationship may be found when two nominally separate entities share substantially identical management, business purpose, operation, equipment, customers, supervision, and ownership. *Advance Electric*, 268 NLRB 1001, 1002 (1984); *Crawford Door Sales Co.*, 226 NLRB 1144 (1976). Unlawful motivation is an additional factor frequently considered in determining whether alter ego status exists. See *Gilroy Sheet Metal*, 280 NLRB 1075 fn. 1 (1986), enfd. 816 F.2d 685 (9th Cir. 1987); *Fugazy Continental Corp.*, 265 NLRB 1301, 1302 (1982), enfd. 725 F.2d 1416 (D.C. Cir. 1984).

The facts are largely undisputed and indicate that there is substantially identical business purpose, operation, equipment, and customers between First Class and Clean Sweep. Thus our analysis focuses on the remaining indicia of alter ego status: substantial identity of management, supervision, and ownership as well as the presence or absence of evidence of unlawful motivation.

In approximately 1971, William T. Held Sr. and his wife Carolynn began a commercial cleaning service that they eventually incorporated as Held Janitorial Services (Helds).[2] In December 1985 W. and C. Held were awarded a contract with Arcata Graphics and were told they would "have to join this local [union]." W. and C. Held complied, formed a new corporation, First Class, hired all the former cleaning service employees at Arcata Graphics and executed the union contract. William T. Held Jr., the elder son of W. and C. Held, worked as a supervisor for First Class at the Arcata Graphics Building.

After submitting a bid for calendar year 1986 based on the union contractual rates, First Class was notified in January 1986 that its contract with Arcata was not being renewed for another year but, rather, would be extended on a month-to-month basis. Shortly thereafter, W. and C. Held were told by Greg Fodero, Arcata Graphics' buyer, that Arcata would accept only nonunion bids for calendar year 1986. Although C. Held submitted a "nonunion" bid on behalf of Helds,[3] W. Held withdrew the bid in May 1986 on advice of counsel.

Word of the tentative nature of the First Class contract with Arcata Graphics was well known by the employees. William Jr. had heard of First Class' problems with the Arcata contract both at work and at home where he lived with his parents. William Jr. approached his parents about forming his own corporation and bidding on the Arcata

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[1] The General Counsel has excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings. In so holding, we find it unnecessary to rely on the judge's comments in fn. 11 of his decision.

[2] The General Counsel has excepted to the judge's refusal to include in the record a newspaper article provided to him by counsel for Respondent First Class. Apparently discussion regarding this newspaper article occurred off the record. However, the judge acknowledged in fn. 3 of his decision that he reviewed the article for purposes of background information. Because of this acknowledgement, the General Counsel's motion to include the newspaper article in the record is granted.

[3] The General Counsel correctly notes that the judge mistakenly stated that First Class, not Helds, submitted the bid based on nonunion rates.

289 NLRB No. 60

contract. W. Held spoke with Greg Fodero about his son's proposal. Greg Fodero said Arcata would look at any responsible bid. The judge credited W. Held Sr.'s testimony that he did not guarantee his son's work or promise to oversee it in any way.

On May 27, 1986, William Jr. submitted a bid for the Arcata Graphics work. Although the amount he bid, $10,270 per month, was identical to the "nonunion" bid submitted by Helds, the judge credited William Jr.'s testimony that his calculations were independently performed based on a percentage of the labor cost in the First Class operation, with which he was familiar.

Two "nonunion" bids were received by Arcata. Although William Jr.'s was slightly higher, he was awarded the work due to his familiarity with the building and the specifications for the cleaning required.

By letter dated May 30, 1986, the First Class employees were notified that Arcata Graphics had hired a new cleaning contractor. Employees were advised they could apply for another position by calling the First Class office.

Employees who called the First Class office to apply for positions were told about possible jobs for Helds on a nonunion basis or other jobs with First Class under union contract. Calls regarding the Arcata work were referred to William Jr. who recruited for Clean Sweep by advertisements and hiring some of the laid-off First Class employees.

The credited evidence indicates that William Jr. made the hiring decisions without assistance from his parents except in two instances occurring during the first week of Clean Sweep's operation in which C. Held was involved.[4] Thus, William Jr. set the terms and conditions of employment, effected his own hiring and firing decisions, and scheduled and trained employees. The evidence further indicates, the judge found, and we agree that William Jr. managed Clean Sweep independently. He hired a lawyer to set up the corporation, hired an accountant for tax purposes, hired a payroll service, opened accounts at suppliers, and in all other manner of operations maintained entirely separate management.

Aside from performing these management functions, William Jr. was present to oversee all three shifts of the operation and filled in for employees as needed. Two supervisors performed the day-to-day supervisory duties. One of these supervisors, Fran Urbanczyk, had previously worked for First Class at the Arcata Graphics Building while the other supervisor, David Nightingale, came from a nonsupervisory position at Helds' United Parcel Service operation. There is no evidence that W. or C. Held participated in supervision of the Clean Sweep operation. We thus adopt the judge's conclusion that First Class and Clean Sweep did not have substantially identical supervision.

Clean Sweep is a State of New York corporation. William Jr. owns 100 percent of the outstanding shares of stock in the corporation. Initially William Jr. financed his operation with his lifetime savings of about $3200. Additionally his parents gave him a gift of used commercial cleaning equipment valued at approximately $2500.

The Board has held that a finding of substantially identical ownership is not compelled merely because a close familial relationship is present between the owners of two companies. *Victor Valley Heating & Air Conditioning*, 267 NLRB 1292, 1296–1297 (1983); *Shellmaker*, 265 NLRB 749, 754–755 (1982); *Friederich Truck Service*, 259 NLRB 1294, 1300 (1982). Rather, each case must be examined in light of all the surrounding circumstances. In particular, the Board focuses on whether the owners of one company retained financial control over the operations of the other. Id.

In this case, First Class is owned by W. and C. Held, while Clean Sweep is owned by their 20-year-old son, William Jr. who utilized his life savings as well as a gift of used equipment from his parents to start up the operation. The gift of used equipment is insufficient evidence on which to conclude that substantially identical ownership exists. We have found that William Jr. managed Clean Sweep independently, and there is no evidence that W. and C. Held retained financial control over its operations as a result of the gift of used equipment.

In so holding, we distinguish *Kenmore Contracting Co.*, 289 NLRB 336 (1988). In *Kenmore* the children of Jacqueline and Hugh Hanley Jr. formed a nonunion steel erection and equipment rental company. Their parents were the sole owners of an identical unionized operation. The two corporations shared the same premises, office equipment, and customers. Further, the parents were integrally involved in the day-to-day operation of the children's corporation and were vested with decision-making authority. Indeed, the evidence indicated that the children were unfamiliar with the operation of their own corporation. For capitalization of their corporation, the Hanley children used the proceeds from the sale of one of their cars which had been a gift from the parents and a student loan which became unnecessary for school expenses when the parents paid for these items. Thus the Hanley children were able to provide capitalization for their corporation only through aid from their parents: the gift of a car, the subsequent sham lease of another car, and the payment of college fees. In sum, the Board characterized the relationship between the children's company and the parent's company as one of near total dependence.

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[4] The General Counsel has excepted to the judge's refusal to allow certain rebuttal testimony which, if credited, would have shown an additional instance of involvement by W. or C. Held in Clean Sweep's hiring during the first week of its operation. The General Counsel seeks reopening of the record in order to place this additional testimony before us. The motion is denied. Not only would such evidence have been cumulative, but also denial of the request was an appropriate exercise of the judge's discretion where, as here, counsel for the General Counsel was on notice 9 days prior to seeking to call this "rebuttal" witness that he might desire the testimony but he did not have the witness available at the time he sought to introduce the testimony.

William Jr.'s capitalization was not due solely to his parents' assistance. The record reflects that he had been working in the cleaning industry for 6 years, that he had routinely estimated and prepared bids for jobs on his own, and that his savings were from these years in the industry. Furthermore, Clean Sweep is not dependent on or subject to the control of First Class. Rather, as the judge found, William Jr. "is in fact running his own business."

Finally, we adopt the judge's determination that unlawful motivation was not a factor. First Class knew that it was losing the contract with Arcata Graphics due to an internal decision within that organization and outside the control of W. and C. Held. Given this state of affairs, the senior Helds' decision to assist their son in going into business does not indicate an unlawful motivation.

Although the record reflects that there are substantially identical customers, operation, equipment, and business purpose, we have also found that there is not substantially identical ownership, management, or supervision. Nor is there sufficient evidence to establish unlawful motivation on the part of William Jr. or his parents. Based on these findings, we conclude on the record as a whole that the General Counsel has failed to prove by a preponderance of the credible evidence that First Class and Clean Sweep are alter ego corporations. See *Victor Valley Heating & Air Conditioning*, supra.

ORDER

The recommended Order of the administrative law judge is adopted and the complaint is dismissed.

Michael Cooperman, Esq., for the General Counsel.
Thomas S. Gill, Esq. (Saperston, Day, Lustig, Gallick, Kirschner & Gaglione, P.C.), of Buffalo, New York, for Respondent First Class Maintenance Service, Inc.
William T. Held Jr., of West Seneca, New York, for Clean Sweep Janitorial Services, Inc.
John Borton and *Paul McQuillen*, of Buffalo, New York, for the Charging Party.

DECISION

GEORGE L. MCINERNY, Administrative Law Judge. Based on a charge filed on 2 June and 4 September 1986[1] the Regional Director for Region 3 of the National Labor Relations Board (the Board) on 17 July issued a complaint alleging that First Class Maintenance Service, Inc. (First Class or Respondent First Class) and its alter ego, Clean Sweep Janitorial Services, Inc. (Clean Sweep or Respondent Clean Sweep) had withdrawn recognition from and refused to recognize Local 200, Service Employees International Union, AFL-CIO (the Union), all in violation of Section 8(a)(1) and (5) of the National Labor Relations Act, 29 U.S.C. § 151 et seq. (the Act). On 21 July First Class filed an answer denying the commission of any unfair labor practices.

Pursuant to notice contained in the complaint, a hearing was held before me at Buffalo, New York, on 8, 9, and 18 September,[2] at which time Respondent First Class was represented by counsel, the Union by its business representatives, and Clean Sweep by its president and sole stockholder. At the hearing all parties had the opportunity to present testimony and documentary evidence, to examine and cross-examine witnesses, to make objections and file motions, and to argue orally. After the close of the hearing, the General Counsel and counsel for First Class filed briefs, which have been carefully considered.

Based on the entire record in this case,[3] including my observation of the witnesses and their demeanor, I make the following

FINDINGS OF FACT

I. JURISDICTION

The complaint alleges, the answer admits, and I find that First Class is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

II. THE LABOR ORGANIZATION INVOLVED

Local 200, Service Employees International Union, AFL-CIO is a labor organization within the meaning of Section 2(5) of the Act.

III. THE ALLEGED UNFAIR LABOR PRACTICES

A. *The Alter Ego Issue*

First Class is a New York corporation that is wholly owned by Willam T. Held Sr. (W. Held) and his wife, Carolynn (C. Held). C. Held is the president and W.

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[1] All dates are in 1986 unless otherwise specified.

[2] The complaint was amended at the hearing to include an allegation that Respondent First Class had also violated Sec. 8(a)(3) of the Act. This was also denied by the Respondent.

[3] As a part of his brief, the General Counsel submitted a copy of a newspaper article concerning the history of Helds and Respondent First Class. A copy of the article had previously been given to me by counsel for First Class. I note that I have read the article but I have used it only for background material because it does not pertain to the issues of this case. The General Counsel's request that the article be made a part of this record is denied.

Held the vice president. The Helds own another corporation, Held Janitorial Services (Held's). W. and C. Held began the business that eventually became Held Janitorial Services some time in the late 1960s. C. Held handled the office, did bookkeeping, and handled the financial end of the business, and W. Held did the sales and marketing, estimated jobs, and supervised employees at the locations where the work was to be performed. Both W. and C. Held began by doing the actual cleaning work themselves and they continued to do so until the business grew so large that they hired others to do the actual work.

Around 1980, the Helds obtained a contract to clean at a company called Arcata Graphics. This job had been performed by a union contractor and after being awarded the job, the Helds hired the prior contractor's employees and signed a contract with the Union for the work. In order to seperate this new union business from other nonunion operations, the Helds formed a new corporation called First Class Maintenance, to bid on and perform cleaning and janitorial services with union employees. After obtaining the Arcata Graphics contract, First Class entered into cleaning contracts with the Buffalo Evening News, and with the management of a downtown building called the Brisbane Building.

Arcata Graphics occupies a large plant containing over 7 acres and First Class was responsible for cleaning all offices, the cafeteria, and toilets throughout the main building and a distribution center some distance away from the main plant. The cleaning contracts were awarded on the basis of competitive bids, with some discretion on the part of Arcata's buyer, Gregory Fodero. Late in 1985 the management of Arcata became concerned with the costs of cleaning services and, after having received bids from First Class for the calendar year 1986, management instructed Fodero to find out what they could save if "non-union work was brought in." Fodero then requested various cleaning services to submit either nonunion or union bids.[4]

As a result of Fodero's request, First Class submitted a bid that was based on nonunion rates, as well as the bid based on its current (January 1, 1984, to December 31, 1986) contract with the Union. However, the Helds were advised by counsel that they could have legal problems under article II of the union agreement. Similar problems would exist even if the job was awarded to the Helds instead of First Class.

Faced with the almost certain loss of the Arcata account, the Helds were very concerned. The situation dragged on into 1986, with the Helds hanging on to the account on a month-to-month basis. During this time the matter must have been discussed at their home in the presence of their son, William Held Jr. (Bill). Bill lived at the Held home and was at that time 20 years old, a graduate of a local community college, and a veteran of over 6 years' experience in the Held family cleaning business. He had started as a sweeper and worked up to stripping of floors, supervising other employees, and even using a computer in connection with business accounts. For a year and a half before the end of 1985 Bill had been a supervisor for First Class, working at the Arcata Graphics location.

At some point, and in some fashion, the idea occurred to the Held family to have Bill set himself up in the cleaning business and, from that position, submit his own bid on the Arcata work.

According to Fodero, W. Held asked him if he would allow Bill to put a bid in on the Arcata work. Fodero asked W. Held if he thought Bill was capable of doing the work. The answer being affirmative, Fodero told W. Held that he would be glad to look at a bid from Bill.

Shortly after that, in May 1986, Fodero received two bids. Bill's was a little higher than the other, but Fodero testified that he took into account his experience with the Helds over the years and the experience Bill had had in the Arcata plant, in awarding the contract to Bill. The evidence shows that the bid that Bill submitted to Arcata Graphics was identical with the bid previously prepared by C. Held and submitted as a nonunion bid on behalf of Helds Janitorial Services.[5]

On receiving the award, Bill proceeded to get himself into business. He first approached his parents' attorney, Thomas Gill. Gill referred him to another attorney in his firm, Timothy C. Cashmore, who proceeded in June to secure the incorporation of Clean Sweep Janitorial Services, Inc., under the laws of the State of New York. Bill is the only officer, the only director, and the only shareholder of Clean Sweep. Bill also secured the services of Joseph Muffaletto, a member of his parents' accounting firm, to act as his own accountant; selected Barber Insurance, also used by the family, to purchase his business insurance; arranged with Marine Midland Bank to provide a payroll service, exactly the same service used by First Class; and chose, as his suppliers of cleaning materials and supplies, the same firms used by the Helds.

These factors show that in the fundamentals of establishing and operating this small business, preparing and submitting the bid, arranging for incorporation (for tax and accounting) services, for insurance, supplies, and payroll, Bill followed his parents in their corporate practices. The evidence further shows that the Helds donated to Bill, at no cost, equipment that they valued at $2500, to allow Bill to start up his operation at Arcata without making a substantial capital outlay.[6] There is no question but that Bill continued to live at his parents' house during times material, using their facilities and telephone not only for his personal convenience, but also to run his business. There is no indication that Bill paid any rent, any share of telephone or utility bills, or other household expenses up to the time of this hearing.

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[4] While the record here confirms that the words "union" and "nonunion" were used in connection with the bids on the cleaning work, I do not believe that these were inspired by antiunion motivations either by Arcata or First Class. Rather, these words were understood by the parties involved to refer to the relative costs of the work if done under union scale or not.

[5] According to Fodero he relied heavily on Arcata's experience with W. Held, although the latter did not guarantee the son's work and gave no indication that he was going to keep an eye on the work. In any event, according to Fodero, the contract had a 30-day cancellation provision, and could be terminated if the services were less than satisfactory to Arcata.

[6] Bill testified that if he had purchased all new equipment for the Arcata operation it would have cost him much more than $2500.

The General Counsel maintains that the senior Helds regarded Clean Sweep as an addition to their other two corporations, Helds and First Class. I have some questions about this theory. In the initial stages of Clean Sweep's assumption of the Arcata contract, there is evidence that C. Held and Pam Zugger, at that time sort of an office manager and dispatcher for Helds and First Class, discussed wages and assignments with employees who were being laid off by First Class. Indeed the testimony of former First Class employees Anni Wrobel and Lynn McGuane shows that C. Held was influential in determining wage rates at the beginning of the Clean Sweep operation. Pam Zugger's function seemed to be more in the nature of an informant to the newly laid-off employees regarding other positions available either at union rates with First Class, or nonunion rates with Helds or Clean Sweep. At the same time, however, Bill also seemed to be making employment decisions. He did inform former First Class employee Lynn McGuane that she could have a vacation that year, and he was also referred to by Pam Zugger in her discussions with employees as the new owner and the person responsible for wages and other benefits.

In the 3-month period between the assumption of the Arcata contract by Clean Sweep and the time of this hearing there are no clear indications of participation by the senior Helds in the management of Clean Sweep. A former employee named Bruno Stra testified that Bill told him that W. Held was still in charge, but Bill denied this and I credit the latter's testimony. Stra had a poor memory and a confused recollection of several incidents during his employment. Anni Wrobel, who did impress me as a credible witness testified that she heard Bill discussing the discharge of another employee with W. Held on the telephone, but her testimony is not clear whether Bill was asking for a decision to be made on the discharge, or was, as Bill indicated in his testimony, merely seeking his father's advice on a decision that Bill had already made. Two employees of Helds testified that, at various times, they went to Arcata after Clean Sweep had taken over the contract and took equipment out of Clean Sweep's storeroom on Arcata's premises. Paul Eaton, one of these employees, testified that he thought the equipment still belonged to Helds.[7]

Apart from the single instance related by Lynn McGuane concerning her conversation with C. Held, there is no direct evidence that either W. or C. Held participated in any way in the operation or management of Clean Sweep after the end of May 1986. Further, both W. and C. Held testified credibly that Bill was on his own in this business, and that they would not share in his profits, nor underwrite any losses. Insofar as those views reflected the then-current situation, I accept them as accurate.

However, we do not have much to go on when determining whether Clean Sweep is a legitmate, independent operation, or whether it is merely an extension of the family-owned Held enterprises. The only financial data in this record are Bill's checkstubs for the period 17 June to 3 September 1986 from the Clean Sweep account on which he had scribbled figures showing deposits and expenditures into and out of this account.[8] The figures show a deposit of $3000 early in June, which Bill testified represented his savings used for captilization of the business. Arcata Graphics made two payments that were then deposited in Clean Sweep's account, in mid-June for $11,710.17 and another for $11,977.60 early in August. The stubs show payment of bills for payroll and payroll services, tax and unemployment deposits, supplies, and payments on a truck. As of 3 September the balance shown was $6,149.64, with another payment from Arcata Graphic due shortly. My own rough calculations from these sketchy figures show that the business should show a profit of about $1000 per month, a little over 10 percent of the Arcata contract. There were no deposits or indications that the senior Helds were contributing any money to the enterprise. Receiving no outside assistance, Bill would realize around $12,000 annual profit from the Arcata contract. Adding to this his own $7 per hour wage for what his payrolls show as a 50-hour week, or a total of some $18,000, Bill would gross about $30,000 per year. This appears to be a respectable and a legitimate sum, warranting the inference that Clean Sweep is a viable enterprise, capable of functioning on its own outside of the Helds home.

In determining whether one entity is the alter ego of another, the Board looks at a number of factors. One of these factors is the purpose behind the creation of the alleged alter ego. The Board is concerned whether the creation of the alter ego was a legitmate act, or whether it was taken to evade responsibilities under the Act; *Fugazy Continental Corp.*, 265 NLRB 1301 (1982). A finding of unlawful motivation is not essential to a finding of alter ego status, but it is one factor that the Board considers in each case; *Gilroy Sheet Metal*, 280 NLRB 1075 (1986).

The question of motive here is not clear. If there were any antiunion motive, it would have been the result of the decision of the management of Arcata Graphics to reduce the costs of cleaning and maintenance of its facility. From the testimony of Greg Fodero it really appears that the Company's motive was not so much to hurt the Union as to reduce costs. First Class, which had contracts both with Arcata and the Union, was then caught in a dilemma. If they stuck with their bid based on the Union's wage scales and benefits, the Helds knew that First Class would lose the Arcata contract. If they lowered their bid to obtain the Arcata contract, they would, presumably, have lost money.[9] So they lost their contract and laid off the employees. At the same time they encouraged and assisted Bill to set up Clean Sweep, to bid on and to receive the Arcata contract.

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[7] At Held's and First Class it was common for employees to take equipment from one location to service another.

[8] I appreciate the fact that this kind of evidence is self-serving, but between the state of the document and the testimony of Bill Held, I am convinced that the figures reflect Bill's financial condition accurately for the short period covered.

[9] Noting that Bill's percentage of profit is not high, I cannot envisage the Helds making a profit on the same contract at union rates. I am not aware of anything in the Act that would require the Helds to make and accept a money-losing bid on this kind of job.

I do not believe these facts show that the Helds set up First Class in order to avoid dealing with the Union. As the situation developed during the first 6 months of 1986, First Class, as a union employer, was out at Arcata, and someone, a nonunion contractor, was going to be in. The question of retaining the Arcata contract by First Class was settled. The fact that the Helds decided to assist Bill in setting up his own company does not, in my opinion, affect the First Class-Union relationship that had existed before 1986. Thus, I find that there was no intention on the part of Bill, or his parents, to evade union responsibilities in the setting up of Clean Sweep.

Other factors considered by the Board in determining the existence of an alter ego situation are "substantially identical management, business purpose, operation, equipment, customers and supervision, as well as ownership"; *Advance Electric*, 268 NLRB 1001 (1984). Here we have a substantially identical business purpose, the supply of cleaning and janitorial services; essentially the same kind of operation, the use of part-time cleaners under a contract with building owners; the same equipment, in this case the equipment donated to Bill by his parents; and identical customers, Clean Sweep's only customer was a customer of First Class.

The differences in this case are in ownership, management, and supervision. There is no question that Bill owned no stock in First Class, and while he had been a supervisor for that company, he had not participated in management decisions. There is, further, no question that either W. or C. Held have any equity position in Clean Sweep, and, as I have found, they exercise no management function at Clean Sweep. In regard to supervision, one of the supervisors who worked at Arcata for First Class remained as an employee of Clean Sweep. Bill Held, who had been a supervisor for First Class at Arcata moved up to management and another supervisor was hired from Helds.[10]

There are, in this situation, indicators that point to an alter ego situation if one considers the identity in business purpose, supply of services, customers equipment, and methods of operation; and those that point in the opposite direction, considering ownership, management, and supervision.

Based on all these factors, and considering my observation of the witnesses, particularly my observation of Bill Held as he testified under extended and vigorous cross-examination, I do not find that the establishment and operation of Clean Sweep is merely a technical change in structure or identity of First Class, the predecessor employer. Bill showed in his testimony that he had experience in this business, learning all aspects of the business for over 5 years prior to starting up Clean Sweep. He showed me that he is an intelligent, mature young man with a grasp of the economics and practice of the cleaning business and the strength and determination to make a go of it. Despite his continuing physical dependence on his parents, I find that he is fully capable, and is in fact running his own business independent of, and not the alter ego of, either of his parents' two corporations. *Advance*, supra; *Gilroy*, supra; *Howard Johnson Co. v. Detroit National Joint Executive Board*, 417 U.S. 249 (1974); *Crawford Door Sales Co.*, 226 NLRB 1144 (1976).

B. *The Alleged Refusal to Bargain*

The complaint alleges that the Respondent, First Class, repudiated its collective-bargaining contract with the Union on or about 1 June 1986 and thereafter refused to recognize or bargain with the Union. However, the undenied testimony of W. Held shows that he was aware that First Class was going to lose the contract, and that he communicated the fact to the Union before 1 June, but received no response or request from the Union to discuss the matter further. When the contract between Arcata and First Class finally ran out, Business Representative Paul McQuillen testified that he called C. Held. They discussed pay and vacations due employees, and C. Held told McQuillen that they were going to try to place the Arcata employees at other First Class locations, continuing them under the Union's contract. McQuillen made no further attempt to contact the Helds, and so far as I can determine no other union representative did so.

In these circumstances, I can find no violation of the law. Both W. and C. Held tried to do what they could to serve the Arcata contract. When they could not, the evidence shows that they notified the Union, that they responded to union telephone calls, were willing to discuss any matters concerning the loss of the Arcata contract with the Union, and that they attempted to place employees who wished at their other union locations at the Buffalo News and the Brisbane Building.

C. *The Alleged Discrimination Against Employees*

The complaint contains two separate allegations of discrimination against employees. The first of these states that "Respondent" told unit employees that they would have to work nonunion to remain at Arcata. The facts show that after First Class lost the Arcata contract the company addressed letters to its employees informing them of that fact and suggesting that if they wanted to continue working for First Class they could apply through the First Class office. C. Held and Pam Zugger testified that employees did call the office, and suggestions were made for alternative positions under the union contract. Employees like Lynn McGuane corroborated this testimony, but she and other employees did not care for the hours or the locations of the proffered positions. The employees were then referred to Bill Held. Either C. Held or Bill told them that they would have to accept rates that were lower than those called for by the union contract. This evidence does not, in my opinion, establish a violation of Section 8(a)(1) or (3) of the Act.

Debra Kemp testified that she was notified on 29 or 30 May that First Class no longer had a contract with Arcata. She continued to do her job at the request of Bill Held, who also told her to call "the office" in the morning. The next day Kemp called the Held office and talked to Pam. Pam told Kemp that she should not worry, that "we will find all you people jobs." Kemp was also told that Bill was in charge at Arcata. Kemp returned to work at Arcata, but on the following Tuesday morning, 3 June, Pam called her and said that she would not be working at Aracata anymore because, as Kemp quoted Pam, "We have too many ex-union members working at Arcata Graphics for us." Pam did arrange a job for Kemp at another of the Helds locations, Sierra Research. Kemp refused this job.

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[10] This move of an individual from a nonsupervisory position at Held's United Parcel Service location to a supervisory position at Clean Sweep is the only reported transfer to Clean Sweep from either First Class or Helds after 1 June.

Bill Held told a different version of the Kemp situation, testifying that he actually hired Kemp as the result of a telephone call. He stated that he had had trouble with Kemp doing one of her assignments and he had spoken to her about it while First Class was still on the Arcata contract. He said that they had a problem about assignments early in the first week of June and he discharged her.[11]

Bill's version of this situation was more detailed, more logical,[12] and more credible than that related by Kemp. Based on this, and on my observation of both while they were testifying, I credit Bill's story and do not credit Kemp.

I therefore do not find any violation in Kemp's separation from First Class or from Clean Sweep.

CONCLUSIONS OF LAW

1. First Class Maintenence Service, Inc. and Clean Sweep Janitorial Services, Inc. are New York corporations engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

2. Local 200, Service Employees International Union, AFL-CIO is a labor organization within the meaning of Section 2(5) of the Act.

3. Clean Sweep Janitorial Services, Inc. is not an alter ego of First Class Maintenance Service, Inc.

4. Neither Clean Sweep nor First Class has caused employees to suffer loss of employment because of their activities on behalf of the Union.

5. Neither Clean Sweep nor First Class discharged Debra Kemp or refused to employ her because of her activities on behalf of the Union.

6. First Class has not failed or refused to bargain with the Union.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[13]

ORDER

The complaint is dismissed in its entirety.

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[11] There is not much logic in Kemp's story that Pam told her she was being fired because she was a supernumerary exunion employee at Clean Sweep, but immediately arranged for her to obtain a job at another Held operation.

[12] Pam Zugger had no specific recollection as to her conversations with Kemp, only that she had had one or more conversations in the late May-early June period.

[13] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

MIS, Inc., and its alter ego M & H Riggers and Erectors, Inc. *and* International Association of Bridge, Structural and Ornamental Iron Workers, Local Union No. 70, AFL-CIO. Case 9-CA-22555

June 30, 1988

DECISION AND ORDER

By Chairman Stephens and Members Johansen, Babson, and Cracraft

On March 25, 1987, Administrative Law Judge Stephen J. Gross issued the attached decision. Respondent MIS, Inc. (Misco) filed motions, exceptions, and a supporting brief. The Charging Party filed an answering brief, and the General Counsel filed limited exceptions and brief in support thereof.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the motions,[1] exceptions,[2] and briefs and has decided to affirm the judge's rulings, findings, and conclusions and to adopt the recommended Order.

There are two issues. One issue is whether the Respondent violated Section 8(a)(5) of the Act by repudiating midterm its 1984–1987 8(f) prehire agreement with Local 70 of the International Association of Bridge, Structural and Ornamental Iron Workers and thereafter failing and refusing to apply the terms of this prehire agreement to employees employed by M & H Riggers and Erectors, Inc. (M & H), the alleged alter ego of Misco.

The other issue is whether the Board should defer to the arbitrator's decision on the above-described issue. As more fully set forth in the judge's decision, Local 70 filed a grievance against Misco in August 1985. The arbitrator was presented with substantially the same issues facing us, namely, did Misco effectively repudiate its contract with Local 70, and is M & H the alter ego of Misco.

We agree with the judge's finding that, under *John Deklewa & Sons, Inc.*, 282 NLRB 1375, 1389 (1987), enfd. 843 F.2d 770 (3d Cir. 1988), deferral to the arbitrator's award on the repudiation issue is unwarranted because the Board had determined to apply *Deklewa* "to all pending cases in whatever stage." As the judge correctly points out, it would create an anomaly for us to defer to an arbitrator's award which applied pre-*Deklewa* law when we would not apply this law ourselves at this stage in the proceedings. Insofar as the arbitrator relied on law which has now been overruled in reaching his conclusion that Misco effectively and lawfully repudiated its contract with Local 70, the arbitrator's conclusion became "palpably wrong"[3] once *Deklewa* issued with the retroactive component. Thus, to defer to the arbitral award on the repudiation issue, in the circumstances of this case, would necessitate reviewing the award under a legal standard which the Board has decided frustrates the Act's purposes.[4]

Further, as far as deferring to the arbitrator's resolution of the alter ego issue is concerned, given that the arbitrator relied, in part, on pre-*Deklewa* law for his finding and given the reasons discussed infra, the arbitrator's finding on this point similarly cannot arguably be reconciled with Board precedent in this area, is internally inconsistent, palpably wrong, and, therefore, is not a proper basis for deferral.[5]

We adopt the judge's findings that M & H Riggers and Erectors is the alter ego of Misco. We rely not only on the facts discussed by the judge, but rely additionally on the facts discussed below and the case precedent found in *Advance Electric*.[6] In *Advance Electric*, the Board stated that it would find alter ego status where two employers have "'substantially identical' management, business purpose, operation, equipment, customers, and supervision, as well as ownership." In addition, the Board considers whether there has been any hiatus in operations, whether the companies use the same building, and "whether the purpose behind the creation of the alleged alter ego was legitimate or whether, instead, its purpose was to evade responsibilities under the Act."[7] No one factor is determi-

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[1] The Respondent has requested oral argument. The request is denied as the record, exceptions, and briefs adequately present the issues and the positions of the parties.

The Respondent has also requested that we hold this case in abeyance pending the Third Circuit's decision on the appeal of *John Deklewa & Sons Inc.*, 282 NLRB 1375 (1987). Both the Charging Party and the General Counsel filed motions in opposition. The Respondent's request is denied inasmuch as the Third Circuit's opinion enforcing the Board's Decision and Order in *Deklewa* in its entirety issued on April 12, 1988.

[2] The General Counsel requested a visitatorial clause. We deny the General Counsel's request as unnecessary here. See *Cherokee Marine Terminal*, 287 NLRB 1080 (1988).

[3] In *Olin Corp.*, 268 NLRB 573 (1984), the Board held that it would defer to an arbitration award where the proceedings appear to have been fair and regular, all parties have agreed to be bound, the arbitrator has adequately considered the unfair labor practice issues, and the decision of the arbitrator is not clearly repugnant to the Act. The Board held that unless the award is "palpably wrong," i.e., unless the arbitrator's decision is not susceptible to an interpretation consistent with the Act, we will defer.

[4] See also *Certainteed Corp.*, 271 NLRB 76 (1984).

[5] See also *Garland Coal Co.*, 276 NLRB 963, 965 (1985).

[6] 268 NLRB 1001, 1002 (1984). See also *Vulcan Trailer Mfg. Co.*, 283 NLRB 480 (1987); *Continental Radiator Corp.*, 283 NLRB 234 (1987); *Better Building Supply Corp.*, 283 NLRB 93 (1987); and *Landhill Press*, 282 NLRB 378 (1986).

[7] Id., quoting from *Fugazy Continental Corp.*, 265 NLRB 1301, 1302 (1982), enfd. 725 F.2d 1416 (D.C. Cir. 1984).

289 NLRB No. 62

native of alter ego status, and not all of these indicia need be present to find that an alter ego relationship exists.[8]

The judge discussed these factors and found that Daymond Hardin and Michael Moore were the sole owners of both Misco and M & H. Both were equally involved in the management of the two companies, both having served sequentially as president of both companies. Both companies were engaged in the steel erection business and, by and large, Misco could have performed M & H's work had it not ceased operations in June 1985. When M & H began operations in June 1985, its only equipment was, with minor exception, equipment it received from Misco, the consideration for which was M & H's promissory note and its agreement to pay $1417 per month in lease payments to Misco. M & H, however, has not complied with the terms of either the promissory note or the lease agreement by which it acquired Misco's equipment. As evidence of the lack of arm's-length dealings between the two companies, the judge described how Misco has not sought to compel M & H to comply with the terms of the promissory note or the lease agreement and when Misco was faced with a Federal tax bill and had no funds to pay it, M & H "loaned" Misco the money to pay it.

In addition to these facts outlined by the judge, we note also that regarding supervision, Michael Moore, the current president of Misco, as well as M & H, testified that he was the field supervisor and did estimates for jobs for both companies. The evidence also shows that both Hardin and Moore participated in significant management and labor relations decisions for both firms. Both men handled negotiations with the Union in an attempt to work out a targeted job agreement which would allow Misco to pay only 80 percent of the union wage scale should it be the successful bidder on a Colonel Sanders Research and Development project. Thus, there is no doubt about common supervision and management of the two corporations.

Finally there remains for consideration whether the purpose behind the formation of M & H was to evade responsibilities under the Act. It is clear from Moore's testimony and that of Hardin that they formed M & H because they believed their bids could not be competitive, at least in part, because they were constrained to pay union wages and fringe benefits under the Misco contract. The parties differed, under the pre-*Deklewa* law, in their interpretation of the nature of this agreement. As they formulated their arguments before the judge, the dispute centered on whether under the law prevailing at the time, which included the so-called "conversion" doctrine, Misco could lawfully repudiate the collective-bargaining agreement. Thus, they apparently questioned their ability to repudiate Misco's contract as long as they operated under that name. Given this set of circumstances, it is only reasonable to conclude that Hardin and Moore chose the subterfuge of setting up another company rather than merely repudiating the prehire agreement.

Applying the standards and principles set forth in *Advance Electric*, supra, to these facts, we conclude, in agreement with the judge, that a preponderance of the evidence shows that M & H Riggers is the alter ego of Misco.

We further find, in agreement with the judge, that the principles announced in *John Deklewa & Sons, Inc.*, supra, are appropriately applied to the facts of this case. Thus, we find that the Respondent unlawfully repudiated the Misco 1984–1987 contract with the Union during the term of the agreement. However, under *Deklewa*, the Union enjoyed no presumption of majority status following the contract's expiration date of May 31, 1987, and thus at that point the Respondent was free to repudiate the 8(f) bargaining relationship. Therefore, we find that the Respondent violated Section 8(a)(5) and (1) of the Act by repudiating the 1984–1987 contract with the Union during the contract term and shall limit the make-whole remedy accordingly.

AMENDED REMEDY

The judge's recommended remedy provides that the Respondent be directed to make whole employees in accordance with the method prescribed in *Ogle Protection Service*, 183 NLRB 683 (1970). We find merit in the General Counsel's contention that *Ogle* applies only to situations where employees remain employed by the employer but are not compensated in accordance with the existing collective-bargaining agreement. Thus, while M & H employees must be made whole in accordance with *Ogle*, those employees who were in the past referred to Misco by the Union and were no longer employed by Respondent Misco must be made whole in accordance with the method set forth in *F. W. Woolworth*, 90 NLRB 289 (1950), which provides that employees be made whole for any loss of earnings and other benefits on a quarterly basis less any net interim earnings. We shall accordingly order the Respondent to make the M & H employees whole in the manner set forth in *Ogle*, supra, and to make the former Misco employees whole in the manner set forth in *F. W. Woolworth*, supra, for any losses they may have suffered as a result of the Respondent's failure to adhere to the contract from June 1, 1985, through May 31, 1987, with interest on any amounts due, paid in the manner prescribed in *New Horizons for the Retarded.*[9]

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[8] See, e.g., *All Kind Quilting*, 266 NLRB 1186 fn. 4 (1983), and *Blake Construction Co.*, 245 NLRB 630, 634 (1979), enf. granted in part and denied in part on other grounds 663 F.2d 272 (D.C. Cir. 1981).

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge and orders that the Respondent, MIS, Inc., and its alter ego M & H Riggers and Erectors, Inc., Louisville, Kentucky, their officers, agents, successors, and assigns, shall take the action set forth in the Order.

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[9] Interest on and after January 1, 1987, shall be computed at the "short-term Federal rate" for the underpayment of taxes as set out in the 1986 amendment to 26 U.S.C. § 6621. Interest on amounts accrued prior to January 1, 1987 (the effective date of the 1986 amendment to 26 U.S.C. § 6621), shall be computed in accordance with *Florida Steel Corp.*, 231 NLRB 651 (1977).

Anthony L. Sheehan, Esq., for the General Counsel.
Frank P. Campisano, Esq. and *Francis E. Bauman, Esq.*, of Louisville, Kentucky, for the Respondent.
Raymond L. Sales, Esq. (Segal, Isender, Sales, Stewart & Cutler), of Lousiville, Kentucky, for the Charging Party.

DECISION

STEPHEN J. GROSS, Administrative Law Judge. This case presents three questions. First, did MIS, Inc. (Misco) effectively repudiate its contract with the Charging Party, the International Association of Bridge, Structural and Ornamental Iron Workers, Local Union No. 70, AFL–CIO (Local 70 or the Union). Second, should Misco's contract with Local 70 be deemed applicable to M & H Riggers & Erectors, Inc. (M & H), a company formed by the owners of Misco. And third, to what extent, if any, should the Board defer to a decision of an arbitrator in respect to the first and second questions.

My conclusion is that Misco did not validly repudiate its contract with Local 70; that M & H is an alter ego of Misco and that the Misco-Local 70 contract accordingly covers M & H; and that the Board should not defer to the arbitrator's decision.[1]

Misco's Attempted Repudiation of its Contract with Local 70

Misco is no longer in business. While it was operating it did steel erection work in the Louisville, Kentucky area. At all times all of Misco's employees who were engaged in steel erection work were members of Local 70. Misco entered into two contracts with Local 70. The first was for the period 1 June 1983 through 31 May 1984. The second, signed in September 1984, covered the period through 31 May 1987. The parties agree that both contracts were prehire contracts subject to Section 8(f) of the Act.

On 27 February 1985, Misco's counsel wrote to Local 70 stating that the owners of Misco "expressed regret that they must terminate their contractual agreement with Local No. 70 effective June 1, 1985." According to the letter, the reason for Misco's action was that Misco's owners felt that the wages and fringe benefits required by the contract were too high to permit Misco to compete effectively.[2] Local 70 wrote back, objecting.

Misco had no employees on the purported effective date of the repudiation (1 June 1985). Misco stopped operating a short time later.

Conclusion

In September 1984, Misco voluntarily signed a contract with Local 70, thereby entering into an 8(f) relationship with Local 70 for a period that does not end until May 1987. The contract accordingly was, and is, "binding, enforceable, and not subject to unilateral repudiation" by Misco. *John Deklewa & Sons, Inc.*, 282 NLRB 1375, 1395 (1987) (*Deklewa*).[3] Thus by purporting to repudiate its contract with Local 70, Misco violated Section 8(a)(5) and (1) of the Act. *Deklewa*, supra at 1390; see also 1391 (concurring opinion).

The Relationship Between Misco and M & H

Misco and M & H are separate corporations, have separate tax numbers and separate bank accounts, and much of the time M & H's records have been kept at a location different from where Misco's records were kept. In addition M & H's employment policies differ from Misco's. Misco's employees rarely worked for Misco for more than a few days per week and did not necessarily work for Misco on consecutive weeks. M & H's employees work for M & H on a full-time (40 hours per week), week-in week-out basis. Nonetheless, as the discussion below indicates, M & H is Misco's alter ego. Indeed, it is hard to imagine a more obvious alter ego relationship.

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[1] This proceeding began with a charge filed by Local 70 on 1 November 1985. A complaint dated 20 October 1986 followed. Respondents Misco and M & H admit that they are employers engaged in commerce within the meaning of the National Labor Relations Act (the Act), and that Local 70 is a labor organization within the meaning of the Act. But Respondents deny that they violated the Act in any respect. I heard the case in Lousiville, Kentucky, on 10 December 1986.

Briefs have been filed by the General Counsel, by Local 70, and by Misco and M & H (jointly). The General Counsel has also filed a reply brief.

[2] In one instance the Union authorized Misco to pay less than normal wages and fringe benefits required by the Misco-Local 70 contract (via a "targeted job agreement"). But Misco found that it could not successfully bid even at that lower compensation level.

[3] *Deklewa* issued after the hearing closed and briefs had been submitted. Thus the parties' arguments are based on prior law, with the principal issue being—in respect to Misco's purported repudiation of its contract with the Union—whether Misco at any time had had a "permanent and stable workforce." See *Construction Erectors*, 265 NLRB 786 (1982); *Deklewa*, 282 NLRB at 1378. In view of *Deklewa's* retroactive applicability that issue is no longer relevant.

Ownership. Daymond Hardin and Michael Moore were the sole owners of both Misco and M & H.[4] Moreover, their interests in each of the corporations were the same: Hardin and Moore each had a half interest in both Misco and M & H.

Management. Hardin initially was president of both Misco and M & H. Subsequently, Moore became president of both.

Reason for M & H's Creation

As Hardin put it, as of early 1985 Misco "was basically out of work" because it was "being outbid [that is, underbid] by non-union competition."[5] Hardin and Moore decided that it was hopeless to continue trying to operate under a union contract. They accordingly created M & H in April 1985. M & H has never entered into any contract with Local 70 or any other union, and the compensation that M & H pays its employees is less than the amounts provided in Misco's contract with Local 70.

Equipment. On 15 April 1985, Misco agreed to transfer all of its equipment to M & H. The consideration for the transfer of some of the equipment was M & H's promissory note: the consideration for the transfer for the rest of the equipment was M & H's agreement to pay $1417 per month in lease payments to Misco. (Hardin signed the lease on behalf of both Misco and M & H.) No cash changed hands. When M & H began operations its only equipment was, with minor exception, the equipment it received from Misco.

Operations. Misco was, and M & H is, in the steel erection business in the Louisville area. Insofar as the nature of the work undertaken by the two companies is concerned, while the scope of M & H's work came to be somewhat broader than Misco's, M & H could have performed Misco's work and, by and large, Misco could have performed M & H's work.

Misco stopped operating on or about 5 June 1985. M & H began operating later in June, doing the steel erection work for the "Colonel Sanders Research and Development Center." Misco's last bid (which it withdrew) was for the same work on the same project.

Absence of arm's-length dealings. The relationship between Misco and M & H has not been characterized by arm's-length dealings. Most importantly, M & H has not complied with the terms of either the promissory note or the lease agreement by which M & H acquired Misco's equipment and Misco has not sought to compel compliance by M & H. Secondly, in April 1986, Misco was faced with a Federal tax bill and no cash to pay it. According to Hardin, M & H "loaned" Misco the necessary funds.[6]

Obviously M & H is Misco's alter ego. And because it is, it is subject to Misco's 1984–1987 contract with Local 70. M & H has not complied with the contract and accordingly has violated Section 8(a)(5) and (1).

Deferral to Arbitration Issues

In August 1985 Local 70 filed a grievance against Misco alleging that Misco: (1) employed persons who were not members of Local 70 to do work covered by Local 70's contract with Misco; (2) paid such persons "substandard wages and fringe benefits"; and (3) failed to utilize Local 70's "referral system." The grievance went to arbitration in December 1985. The arbitrator issued his decision in March 1986.

The arbitrator sought to resolve two principal issues: did Misco effectively repudiate its contract with Local 70; and is M & H the alter ego of Misco.

As for Misco's purported repudiation of the contract, the arbitrator concluded that it was effective. The arbitrator's reasoning was that the Misco-Local 70 contract was a prehire agreement, that Misco clearly and unequivocally communicated to Local 70 that Misco did not intend to be bound by the agreement, that there was no showing "that the Union had ever petitioned to show majority status" at Misco, that Misco had never had any "full time employees" apart from owners Hardin and Moore, and that an employer is entitled "to prospectively terminate" a prehire agreement "at any time."[7]

Turning to the alter ego issue, the arbitrator found that "the ownership and control" of Misco and M & H were "the same" that M & H was formed "for the admitted purpose of non-union contracting," and that M & H "purchased or leased its equipment from MIS." Nonetheless, said the arbitrator, M & H was not Misco's alter ego.

I confess to having some trouble following the arbitrator's reasoning. But as I understand the decision, its gist seems to be that: (1) at the time Hardin and Moore formed M & H, they had already terminated their agreement with Local 70 (albeit prospectively); and (2) given the termination of that agreement, there was no legal bar to Hardin and Moore establishing M & H "as a separate vehicle for them to compete in bidding in the market for construction under non-union conditions."[8] (Another possible interpretation of the arbitrator's decision is that Misco was in the business of contracting for unionized work, M & H was in the business of contracting for nonunionized work, and, as a result of that difference, M & H may not be deemed an alter ego of Misco.)

Conclusion

Insofar as the arbitrator concluded that Misco effectively repudiated its contract with Local 70, the arbitrator's conclusion became "palpably wrong" once *Deklewa* issued.[9]

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[4] In April 1986 Hardin ended his ownership interest in M & H and ended his relationship with both M & H and Misco.

[5] Tr. 112, 114.

[6] The General Counsel urges that there is still further evidence of less than arm's-length dealings between Misco and M & H; namely, although the Misco-M & H equipment lease was signed in April 1985, Misco retained the equipment until June, and did so without compensating M & H. Br. 4. But the equipment lease itself provides that the term of the lease begins "on the date each piece of equipment or property is delivered to the Lessee."

[7] The arbitrator's decision is in the record as R. Exh. 5. The quotations are from p. 21 of that exhibit.

[8] Id. at 22.

[9] The "palpably wrong" standard has been enunciated in many cases, most notably *Olin Corp.*, 268 NLRB 573, 574 (1984). I have considered

Continued

As for the arbitrator's conclusion that M & H is not Misco's alter ego, the arbitrator apparently based that conclusion on his determination that the Misco-Local 70 contract had been effectively repudiated which, as just stated, is wrong. (In any event, in light of the facts both as found by the arbitrator and as presented in this proceeding, any arbitral conclusion that M & H is not an alter ego of Misco would have to be palpably wrong.)

I accordingly recommend that the Board not defer to the arbitrator's decision.

THE REMEDY

The accompanying recommended Order requires that Respondent Misco and M & H cease violating Section 8(a)(5) and (1) of the Act and requires that Respondents take certain affirmative action designed to effectuate the policies of the Act.[10]

Respondents must make whole their employees, as prescribed in *Ogle Protection Service*, 183 NLRB 682 (1970), for any losses the employees may have suffered as a result of the Respondents' failure to adhere to Misco's 1984–1987 contract with Local 70 since 1 June 1985, with interest as computed in *Florida Steel Corp.*, 231 NLRB 651 (1977).[11]

The Misco-Local 70 contract appears to require Misco to make payments to certain truths and funds (e.g., the "Fringe Benefits Welfare Trust"). Respondents' obligation to make its employees whole includes making whole such trusts and funds.[12]

Finally, the Respondents' obligation to make its employee whole also includes the requirement that Respondents remit to Local 70 all dues and fees the Respondents should have deducted from the employees' wages pursuant to the terms of the collective-bargaining contract.

The General Counsel urges that the recommended Order include a visitatorial provision authorizing the Board to engage in discovery, if necessary, to monitor compliance with the Order. But it does not appear to me that the imposition of this kind of provision would be appropriate given the circumstances of this case. See *O. L. Willis, Inc.*, 278 NLRB 203 (1986).

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[13]

ORDER

The Respondents, Mis, Inc., and its alter ego, M & H Riggers & Erectors, Inc., Louisville, Kentucky, their officers, agents, successors and assigns, shall

1. Cease and desist from

(a) Withdrawing recognition during the term of a collective-bargaining contract from the International Association of Bridge, Structural and Ornamental Iron Workers, Local Union No. 70, AFL–CIO as the exclusive bargaining representative of the Respondents' employees covered by the contract.

(b) Refusing to adhere to Mis, Inc.'s 1984–1987 collective-bargaining contract with the Union.

(c) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Make whole the above-described employees, in accordance with the remedy section of this decision for any losses the employees may have suffered as a result of the Respondents' failure to adhere to the contract.

(b) Preserve and, on request, make available to the Board or its agents for examination and copying, all payroll records, social security records, timecards, personnel records and reports, and all other records necessary to analyze the amount of backpay due under the terms of this Order.

(c) Post at their facilities copies of the attached notice marked "Appendix."[14] Copies of the notice, on forms provided by the Regional Director for Region 9, after being signed by the Respondents immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Respondents shall take reasonable steps to ensure that the notices are not related, defaced, or covered by any other material.

(d) Sign and return to the Regional Director sufficient copies of the attached notice marked "Appendix" for posting by the International Association of Bridge, Structural and Ornamnetal Iron Workers, Local Union No. 70, AFL–CIO, if willing, in conspicuous places where notices to employees and members are customarily posted.

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the fact that the arbitrator's decision issued prior to the Board's issuance of *Deklewa*. But the Board has determined to apply *Deklewa* "to all pending cases in whatever stage" at 1389, quoting *Deluxe Metal Furniture Co.*, 121 NLRB 995, 1007 (1958). While the Board did not specify that *Deklewa's* standards should be used to determine whether to defer to pre-*Deklewa* arbitral decisions, in view of the broad retroactive applicability the Board has given to *Deklewa*, it would be anomalous to do otherwise. I accordingly make no finding about whether the arbitrator's decision regarding the effectiveness of Misco's purported repudiation is "susceptible to an interpertation consistent with the Act" (*Olin*, supra at 574) as the Board interpreted the Act at the time the arbitrator issued his decision.

[10] Such action includes, of course, posting notices. The record suggest that Respondents may have no facilities where their employees would be likely to see the notices. But because the matter has not been litigated, the recommended Order imposes no special notice posting or notice mailing requirements. See *Dependable Maintenance Co.*, 276 NLRB 27 fn. 3 (1985). Respondents will, however, be required to sign sufficient copies of the notice to permit posting by Local 70 if the Union wishes to do so. See *Deklewa*, supra at 1397.

[11] In no event, however, shall the make-whole period extend beyond the 31 May 1987 expiration date of the Misco-Local 70 contract. See *Deklewa*, supra at 1396.

[12] The determination of which such trusts and funds Misco was required to make payments to, and, of course, the amounts necessary to make such trusts and funds whole, will be left to the compliance stage. In that latter respect, see *Merryweather Optical Co.*, 240 NLRB 1213, 1216 fn. 7 (1979).

[13] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

[14] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

(e) Notify the Regional Director in writing within 20 days from the date of this Order what steps Respondents have taken to comply.

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

WE WILL NOT, during the term of a collective-bargaining contract, repudiate that contract and withdraw recognition from the International Association of Bridge, Strutural and Ornamental Iron Workers, Local Union No. 70, AFL–CIO as the exclusive collective-bargaining representative of our employees covered by the contract.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce our employees in the exercise of the rights guaranteed by Section 7 of the Act.

WE WILL make our employees whole for any losses they may have sufferes as a result of our failure to adhere to our 1984–1987 contract with the Union.

MIS, INC. M & H RIGGERS & ERECTORS, INC.

Aero Alloys ***and*** **Warehouse, Processing & Distribution Workers' Union, Local 26, International Longshoremen's & Warehousemen's Union.** Case 21-CA-25207

June 30, 1988

DECISION AND ORDER

BY MEMBERS JOHANSEN, BABSON, AND CRACRAFT

On November 25, 1987, Administrative Law Judge James M. Kennedy issued the attached decision. The General Counsel filed exceptions and a supporting brief, and the Respondent filed a brief in answer to the General Counsel's exceptions.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings, and conclusions[1] and to adopt the recommended Order.

We agree with the judge that the Respondent did not violate Section 8(a)(5) of the Act by withdrawing a previously agreed-to union-security clause from the new contract proposal it submitted to the Union on January 28, 1987. The General Counsel excepts to this finding, asserting that *Dresser Industries*, 264 NLRB 1088 (1982), supports her position that the Respondent improperly relied on the filing of a decertification petition as a reason for changing its bargaining position.

The General Counsel's reliance on *Dresser Industries* is misplaced. There the Board held that "the mere filing of a decertification petition will no longer require or permit an employer to withdraw from bargaining . . . ." Id. at 1089. The Respondent did not withdraw from bargaining; it merely withdrew from a tentative agreement that it had made with the Union on one issue and, significantly, thereafter continued to engage in negotiations for a new contract. Thus, we find no merit to the General Counsel's argument in this regard.[2]

Furthermore, we find, contrary to the General Counsel's contention, that the Respondent's explanation for its change of position does not indicate a lack of good faith. The judge found that

> [t]wo significant things had happened before Respondent made the decision to withdraw from that tentative agreement. The first was the 2-month strike which the Union abandoned without having obtained a new contract. The second was the filing of the decertification petition.[3]

Because a substantial number of the Respondent's employees after the strike was over had expressed a desire not to be represented by the Union, we find that the Respondent's decision to withdrew its prestrike union-security proposal does not warrant an inference of bad-faith bargaining in the circumstances of this case. See *Olin Corp.*, 248 NLRB 1137, 1141 (1980).

The Board has held that the withdrawal from a tentative agreement is not a per se violation of the Act, but rather

> represents only one factor to be considered in determining good- or bad-faith bargaining. In ruling on an allegation that a party has failed to bargain in good faith, it is well established that we look to the totality of circumstances reflecting the party's bargaining frame of mind.

Merrell M. Williams, 279 NLRB 82 (1986). Having considered all the circumstances of this case, including the Respondent's explanation for its retraction of its prior agreement regarding union security, its willingness to continue to engage in negotiations, the absence of evidence that the Respondent sought to frustrate the bargaining process or avoid reaching agreement, and the fact that the Respondent's conduct occurred in a context free of other unfair labor practices, we agree with the judge that the complaint should be dismissed.

ORDER

The recommended Order of the administrative law judge is adopted and the complaint is dismissed.

Brian Sweeney and *Peter Tovar*, for the General Counsel.
Charles H. Goldstein and *Deborah H. Petito (Goldstein & Kennedy)*, of Los Angeles, California, for the Respondent.
James G. Varga, of Los Angeles, California, for the Charging Party.

DECISION

STATEMENT OF THE CASE

JAMES M. KENNEDY, Administrative Law Judge. This case was tried before me in Los Angeles, California, on

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[1] We find it unnecessary to rely on the judge's discussion of *H. K. Porter Co. v. NLRB*, 397 U.S. 99 (1970).

[2] Member Cracraft agrees that *Dresser Industries* is inapposite. She does not pass on the question whether it was correctly decided.

[3] On December 12, 1986, an employee gave the Respondent a list of employee signatures on a document that read, "We, the employees at Aero Alloys, do not wish to have a union in our establishment." On December 16, 1986, a formal decertification petition was filed with the Board's Regional Office.

289 NLRB No. 63

June 2–4, 1987. It is based on a complaint issued by the Acting Regional Director for Region 21 of the National Labor Relations Board on March 19, 1987. The complaint is founded on charges and amended charges filed by Warehouse, Processing & Distribution Workers' Union, Local 26, International Longshoremen's & Warehousemen's Union (Union). The initial charge was filed on February 2, 1987; it was subsequently amended on February 23 and March 5. The complaint alleges that Aero Alloys (Respondent) has engaged in certain violations of Section 8(a)(1) and (5) of the National Labor Relations Act (Act).

Issues

There are two principal issues presented by this complaint. The first is whether an individual named Lourdes "Lulu" Martinez solicited or encouraged Respondent's employees to sign a petition to decertify the Union. Subsidiary to that question, if Martinez did solicit employees to sign such a petition, is whether her conduct is attributable to Respondent because she was either its supervisor or its agent. The second is whether Respondent violated the obligation to bargain in good faith by withdrawing from an earlier tentative agreement to include a union-shop clause in a successor collective-bargaining agreement. The withdrawal occurred after the Union had abandoned a 2-month strike and after the employees had filed a decertification petition.[1]

Based on the entire record of the case, as well as my observation of the witnesses and their demeanor, I make the following

FINDINGS OF FACT

I. RESPONDENT'S BUSINESS

The pleadings demonstrate that Respondent is a manufacturer of precision metal parts, which it sells to Government defense contractors from its plant in Compton, California. The pleadings further establish that Respondent annually sells and ships goods and products valued in excess of $50,000 directly to customers located outside California. Based on these facts, Respondent has admitted that it is an employer engaged in commerce and in a business affecting commerce within the meaning of Section 2(6) and (7) of the Act.

II. THE LABOR ORGANIZATION INVOLVED

Respondent admits the Union is, and has been at material times, a labor organization within the meaning of Section 2(5) of the Act.

III. THE ALLEGED UNFAIR LABOR PRACTICES

A. *Background*

Prior to December 1986 the Union had been the exclusive representative of Respondent's production and maintenance employees at the Compton plant. On September 26, 1986, the collective-bargaining agreement expired. According to a stipulation of the parties, on September 27, 1986, the Union engaged in an economic strike against the Employer because no successor agreement had been reached. Prior to the commencement of the strike, Respondent and the Union had exchanged proposals for a new collective-bargaining contract. One of the items that the parties had tentatively agreed on was the inclusion of a relatively standard union-shop clause.[2]

On October 16, 1986, approximately 2 weeks after the strike began, Respondent's collective-bargaining negotiators advised the Union by letter[3] that the offer that had been pending before the strike began was being withdrawn.

On October 31, 1986, Respondent proposed "an amendment to its last, best, and final offer" of September 26 and again included the union-shop clause. In the next to last paragraph of that letter, Respondent set a deadline of November 7, 1986, for the Union to accept the amended offer. The letter went on to say that if the offer was not accepted by that date Respondent would consider it as having been rejected. November 7 came and went without any action by the Union, and the strike continued.

It appears from a stipulation that during the course of the strike the Employer was able to continue its operations by the use of permanent replacement employees. On November 26, 1986, the Union made an unconditional offer on behalf of its striking members to return them to work. In early December Respondent began to recall strikers as openings occurred. Eventually, 56 strikers were recalled, though the record does not show how many actually accepted recall.

Furthermore, during a negotiation session, which also occurred on November 26, Respondent, at the urging of a Federal Mediation and Conciliation Service commissioner, agreed to put its October 31 offer back on the table. It did so, telling the Union it had until the close of business of December 4, 1986, to accept or reject.

It appears from the evidence that the Union neither accepted nor rejected the renewed offer, and the parties have stipulated that by letter dated December 12, 1986,

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[1] The complaint alleges that the withdrawal of the union-security provision amounted to both "surface" and "bad faith" bargaining. At the hearing, the General Counsel's representatives conceded that the surface bargaining allegation was too broad for they did not seek to prove that Respondent had engaged in a course of conduct demonstrating an unwillingness to reach an agreement. Accordingly, I made evidentiary rulings based on that concession. Despite that, the complaint was not actually amended to delete the phrase "surface bargaining." Nonetheless, the General Counsel's brief abandons such a theory as it specifically focuses on Respondent's single act of withdrawing from the tentative agreement to include a union shop.

[2] The principal difference between the union-shop clause as proposed and most union-shop clauses is that this one contained a 60-day grace period rather than a 31-day grace period before new employees were required to join the Union.

[3] The text of the letter is as follows:

> On September 26, 1986, you advised Aero Alloys that the union membership had rejected the company's proposal for a contract settlement. Further, you stated that the union committee would not accept any concessions and rejected the company's last, best, and final offer.
>
> In light of your rejection, the passage of time, and the intervening circumstances, including the strike and the changes in economic conditions, Aero Alloys' last, best, and final offer has expired and is no longer in effect. Any future offers will be based upon economic conditions as they exist at the time the offer is made.

Respondent formally withdrew it. In that letter Respondent's chief negotiator concluded by again saying, "Any future proposals will be based on the economic and other conditions which exist at that time."

B. *The Decertification Petition*

On December 12, 1986, bargaining unit employee Patrick Mount appeared in the office of Company Controller Gerald Parker and presented him with a list of signatures. The document is in evidence as Respondent's Exhibit 12. It states, "We, the employees at Aero Alloys, do not wish to have a union in our establishment." Beneath that statement were the signatures of some 55 employees.

Parker testified that he did not know what to do about the document, so he immediately called Respondent's labor attorney Charles H. Goldstein[4] as Mount sat in the office. While Parker described the events to Goldstein, Mount left the office, returning a few minutes later with a photocopy of the document. In the meantime, according to Parker, he had received some instructions from the attorney. On Mount's return, Parker told him that the petition was not something with which the Company could be concerned. He told Mount to see the officer of the day at the NLRB's Regional Office; he also said Mount was to handle the matter on his own time. Parker did, however, accept the copy of Respondent's Exhibit 12. Parker says the copy machine Mount used is available to anyone in the Company and that Mount did not specifically ask him for permission to use it nor was he required to do so.

On December 16, 1986, Mount filed a formal decertification petition with the Board's Regional Office. On the following day the Union filed an unfair labor practice charge that blocked the petition.[5] Between November 26, 1986, and January 28, 1987, no negotiation sessions were held. However, on December 26 the Union's chief negotiator, Luisa Gratz, wrote Company President Carl F. Nowak a letter in which she asserted that during some recent bargaining sessions, the Union had asked for, but had not received, information regarding the Employer's proposed health care changes. She made a specific demand for the details of the new program, including the cost to each employee and how often such payments would be deducted from paychecks.

Attorney Goldstein responded by letter dated January 7. Although he denied that the Company had failed to provide the information, he nonetheless transmitted to the Union material published by the administrator of the health plan, Kaiser Permanente, as well as material published by the dental plan, Confed Admin Services, Inc. In addition, Goldstein said he had asked the Company to delay implementation of the two plans in order to give the Union an opportunity to bargain with the Company regarding them.

C. *The Decision to Withdraw the Union-Shop Proposal*

Nowak testified that the reason Goldstein sent his letter explaining the health plan changes was because of a meeting that he had held with his superiors at Chromalloy-American Corporation[6] on January 5. At that meeting they had discussed the Union's letter of December 26, and had decided it deserved a response. During the meeting, however, the Company also decided that it would withdraw from the earlier tentative agreement regarding the union-shop clause. Nowak says they also discussed whether Respondent would maintain that position in the event that a contract was reached on all terms except that one. He says they determined they would be "flexible" if that occurred.

D. *Further Negotiations*

After union negotiator Gratz wrote a response to Goldstein's January 7 letter, the parties agreed to another negotiation session to be held on January 28, 1987. At that meeting, Goldstein issued a full proposal that was quite detailed, but that for the first time deleted any reference to the union-shop clause. According to Nowak, the Union's negotiators did not refer to the deletion in any way.

Two more meetings were held shortly thereafter. The first on February 2 and the second the following day, February 3. Both meetings were conducted under the auspices of the FMCS. At the beginning of the February 2 meeting, Goldstein gave another proposal to the Union. Like the January 28 proposal, it was detailed and consisted of eight pages plus an appendix. As before, it deleted the union-shop language.

Although the mediator attempted to assist the parties in resolving their differences, nothing of significance occurred on February 2. According to Nowak, on February 3 he told Mediator Phyllis Cayse that the deletion of the union-shop proposal was to reflect what the employees were doing on their own when they had filed their decertification petition in December. He says he told Cayse that the Company would nonetheless be flexible on the union-shop issue. He says Cayse then took his comment back to the Union. The parties have stipulated that eventually the Union came back with an 11-item counterproposal, one of which said that there would be "no change in union security." It is apparent, from reading the remainder of the Union's counterproposal, that the parties were still far apart on wages, maintenance of benefits, medical and dental plans, health care waiting period, holidays, vacations, leave of absence policy, no-strike and no-lockout, and sick leave.

Union negotiator Hector Cepeda denied that the mediator ever told the Union that the Company was flexible on union security. However, he testified that mediator Cayse had said she did not know if the Company's position on union security was final. She had suggested the Union make a counterproposal to find out. It was for this reason, says Cepeda, that the Union made its proposal of February 3.

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[4] Goldstein also served as Respondent's chief negotiator.

[5] This was the second charge that the Union had filed. The first was filed on October 22, but had been withdrawn on December 10. The parties have stipulated that the Regional Director processed the second charge, which was amended twice, by deferring a portion of it to arbitration. On January 30, 1987, the remainder was withdrawn.

[6] Respondent is a subsidiary of that conglomerate.

I think it is fair to say, however, that the proposal in all other respects was so different from the Company's proposal that it did not put the union-security issue to any sort of meaningful test. For example, the Company's proposal prior to the strike had been a 15-percent wage cut. The strike had ensued, but during the strike the Employer had implemented the 15-percent wage reduction. The lower wage scale was still in effect on February 3 when the Union's counterproposal asked that wages be the same as during the previous contract. With such a wide difference in wages and with Respondent's salary proposal having survived the strike, the Union's February 3 proposal is a curiosity.

If Cepeda is correct, that the mediator had suggested the Union put Respondent to a test to see if its position on a union shop was final, the February 3 proposal did not accomplish it. All it did was to furrow already plowed ground both with respect to union-security and to nearly every other proposal.

Nowak testified that after he had reviewed the February 3 counterproposal, he concluded that the parties were as far apart as ever.

The Company's proposal of February 2 had advised the Union that unless the offer was accepted by February 12, the Company would consider it rejected and the Company would implement it.

E. *The Company Responds to Rumors*

According to Nowak, within a day or two of the February 3 meeting, company officials began to hear rumors that there might be either another strike or a slowdown. As a result of that rumor, whether accurate or not, Nowak asked attorney Goldstein to prepare a notice to the employees in response. On February 5 Nowak issued a letter to employees entitled "Where We Stand." The letter adverted to the previous strike and said if the Union called another, the Company would again replace the striking employees and continue to operate. In the second paragraph Nowak observed that the employees had recently filed a decertification petition and accused the Union of filing "a number of phony unfair labor practice charges to avoid going before Aero Alloys' employees for a government secret ballot election. . . ." He asserted that the Company had successfully defended each of the unfair labor practice charges and went on to say, "To blunt the Union's attempt to prevent you from exercising your right to vote, the Company has proposed, in its recent negotiations with the Union, that no employee be forced to join the Union and pay dues in order to work at Aero Alloys. The Union has rejected this proposal but it is part of Aero Alloys' last, best, and final offer."

The letter concluded by saying the Union had until February 12 to accept or reject the offer, noting that if the employees again exercised their right to strike, it would be naive to think another strike would cause the Company to change its position.

F. *Lourdes "Lulu" Martinez*

1. Duties

Lourdes "Lulu" Martinez was hired on November 20, 1986, 7 weeks after the strike began and a week before it ended. She testified that she was hired by Accounting Supervisor Debbie Ardizzone, but was also interviewed by the controller, Parker. Martinez had been referred to Respondent by an employment agency because of her experience in working with payroll. Both she and Nowak say her job had no actual title, but she made out the payroll and served as the personnel clerk. She replaced a part-time payroll clerk who had left and also assumed some personnel duties previously performed by Ardizzone. She received an hourly wage of $6.50 per hour. In addition to Martinez' payroll and personnel duties, because she was bilingual in English and Spanish, she served as a translator for Nowak, Parker, and General Manager Carl Rezmer.

Martinez said when she was first hired, her principal duty was to complete and maintain the personnel files of the individuals who had been hired as strike replacements. As the strike ended and Respondent began to recall strikers, she was asked to contact former strikers to tell them to return to work. She, Nowak, and Parker all testified that the decision to recall individual employees was made by General Manager Rezmer and Nowak. They compiled a list of strikers who wished to return and, when appropriate, would tell Martinez when to contact a specific individual. She then followed their instructions.

The parties have stipulated that between December 2, 1986, and February 18, 1987, at least 57 Western Union telegrams were sent to employees, which were signed by Martinez. Examplers of those telegrams are in evidence as General Counsel's Exhibits 2 and 3. The parties have further stipulated that of those 57 telegrams, 5 identified Martinez as the "Director of Personnel." The remainder contain only her signature without any title. Fifty-six of those telegrams were directed to strikers telling them to report to work while one informed a striker that he was no longer employed.

Nowak, Parker, and Martinez all testified that Martinez never held the title of personnel director, personnel supervisor, or personnel manager. It appears from their testimony that no one at Respondent ever held such a title. Martinez testified that she never told Western Union that she had such a title, and so far as she can determine, the title, which appears on those five telegrams, is a Western Union mistake. She surmises that Western Union may have made the mistake when she told their telephone operator to write "payroll/personnel office" or "personnel office" under her name.

She further explains that Parker had told her to sign the wires herself so that the employees who spoke only Spanish would ask for her. She could more easily converse with them than could the three managers who did not speak that language.

Martinez also remembers that when she noticed the five telegrams, which incorrectly described her position, she told her immediate supervisor Debbie Ardizzone, who told her it was a minor mistake that could be corrected later. The correction was never made.

It also appears that Martinez had some specific safety-related duties. She maintained a supply of safety gloves and glasses. When individual supervisors ran out of those items, she was the source of resupply. She also attended safety committee meetings, apparently as a clerical or as a translator. She said that she was not actually a member of the safety committee and there is no evidence that she participated in safety meetings in a substantive way. She did prepare a bulletin board notice as required by the Occupational Safety and Health Administration that listed workdays lost to accidents. She noted at the bottom of the notice that she had prepared those figures.

2. The trim department meeting

According to Martinez, shortly before Christmas 1986 Parker instructed her to get the employees to sign the new health plan authorization forms. It will be recalled that Respondent was then in the process of implementing its last offer, which included a change in health plans. Pursuant to Parker's directive, Martinez caused those forms to be circulated throughout the plant. Many of the employees did not understand or appreciate what was occurring and did not sign them. If an employee did not sign the form, it meant that the employee would not be covered when the change was implemented. Martinez compiled a list of employees who had not signed the form and began contacting them. One group of employees who had not signed was from the trim department.

On approximately December 19, she went to the trim department, spoke to the supervisor, and managed to arrange a short meeting of about six or eight employees in a nearby exit to the parking lot. Three of those employees, Pablo Larios, Angel Estrada, and Margarito de Santiago, testified about that meeting.

Larios testified that Martinez said she needed signatures to get the Union out; the Company could then give employees benefits more freely, such as a $2 raise for de Santiago. He says she also said something to the effect that if the employees got the Union out, they would "get their 15 percent back," meaning the 15-percent salary loss would be restored. He remembers she referred somehow to a man who had been taking signatures the day before.

Estrada testified that Martinez told the gathering that the Company would return the 15-percent pay cut if the employees would "take out the Union." He says she also said the Company could give the employees raises and asserts Martinez said nothing about any fringe benefits. On cross-examination, he suffered some memory lapses in other areas and then agreed he could not remember much about the meeting. In his pretrial affidavit he had said he could not recall Martinez saying anything regarding a petition being passed around. In the same affidavit, he quotes Martinez as saying that if the employees wanted a union it was their own personal business. Unlike Larios, he never testified that Martinez asked him to sign anything.

Margarito de Santiago first said that he did not pay that much attention to Martinez during this gathering, but remembers she said something like, "The Union was not allowing her to give me the $2" and "they had signatures already." De Santiago did not see a list of signatures, but remembers Martinez said she had them. He says Martinez did not ask him to sign anything.

Martinez specifically denies everything these three employees said. She denies saying the meeting was called to gather names to get the Union out. She said she never told anyone that the Company needed more signatures to get rid of the Union; neither did she refer to raises or say that the Union would not let her give an employee a raise. Contrary to Estrada, she said she never told him the Company would give back the 15 percent if there was no Union, never said there would be more benefits without the Union, and never said the Company could not give raises because the Union would not allow it.

She did testify that during the trim department meeting Larios said that the employees did not wish to fill out her paperwork, that they had been told not to fill it out, and that they were afraid to do so. She remembers him saying their decision had something to do with the Union. She testified, "And I kept explaining to them over and over again that I had nothing to do with the Union, that I was just doing my job to see to it that they filled out the health enrollment cards, so they could have insurance for the year 1987." Despite her explanations, Larios responded, "Well, I am for the Union." She says she replied, "It is your opinion. You decide whose side you're on. I am not going to be against nor with you." Later she testified she told them "personally" she was "not for the Union." Nonetheless, she concluded by telling them she was "out of it."

De Santiago also testified that about 3 days before Christmas, in a private meeting with Martinez at the foreman's desk, and in the presence of his brother, Manuel, Martinez offered to get him a raise after the new year. Almost immediately he backed away from that version claiming she said she would "try" to get him a raise. Curiously, de Santiago does not connect this wage discussion with the Union in any fashion. In any event, Martinez denies having such a conversation, adding that she would not have said it because she had no such power.

IV. ANALYSIS AND CONCLUSIONS

I think it is apparent from the evidence that both issues presented by the complaint seem to be connected. The General Counsel contends that the Respondent sponsored the decertification petition and subsequently used it as the justification for engaging in an act of bad-faith bargaining, i.e., withdrawing from the tentative agreement to include a union-security clause in the new collective-bargaining contract. I conclude, however, that the evidence does not show the connection to be real. The General Counsel has failed to prove that Lulu Martinez engaged in any activity relating to the decertification petition. Even if she had, the General Counsel has also failed to prove that she was either a supervisor, agent, or apparent agent of Respondent in that endeavor. The evidence shows her to be only an office clerical employee. Second, I conclude that the mere act of withdrawing a proposal from a tentative agreement, after a strike and when the circumstances have dramatically changed, does not constitute a breach of the good-faith bargaining obligation.

A. *Martinez' Conduct*

The evidence demonstrates that Martinez was an ordinary employee, albeit employed outside the bargaining unit, who functioned as a clerical and as a translator. She was an hourly employee who operated solely under the direction of the Company's managers and supervisors. The only reason she was even involved in the striker recall process was because she was bilingual and had personnel functions. She is an able, articulate person and an excellent choice for the duty of being a conduit of management. She did not have any authority to use independent judgment, but operated in a routine and clerical way. Clearly she was not a supervisor as defined by Section 2(11) of the Act.

Second, being a conduit for management does not necessarily make her an agent either. There is absolutely no evidence that she was given any general authority to speak of on behalf of management. However, because the evidence does not show that she engaged in the conduct complained of, the ultimate question of her agency need not be reached. Even so, I think it is clear that she is not, and could not reasonably be perceived as, an agent. I note that the only time she ever discussed the Union was during the meeting near the doorway in December. At that time she told the employees that although she was personally against the Union, the choice of belonging to the Union belonged to them and she was "out of it." During that meeting, Larios had pressed her for an answer about her personal view, and she gave it together with an appropriate disclaimer.

It is, I suppose, true that the five telegrams in which Western Union mistakenly gave her the title of personnel director could have been repudiated. Yet, even the employees who testified about her authority seemed to know what her job was. They knew she worked in a cubical alongside other clericals and knew she prepared paychecks and had the power only to make mathematical corrections. The other tasks she performed were only at the specific direction of higher management or when she acted as a translator for them. The OSHA notice is clearly evidence of a clerical duty, not evidence of either agency or supervisory authority.[7]

Aside from Martinez' authority or apparent authority, however, it is clear that the General Counsel has failed to prove by credible evidence that Martinez ever solicited employees to sign any paper relating to the decertification. The decertification petition was circulated by bargaining unit employee Patrick Mount. He had obtained 55 signatures by December 12 and the General Counsel has not demonstrated that the 55 were insufficient to constitute the required 30-percent showing of interest to warrant the processing of the petition. Certainly the General Counsel has not shown that the Regional Director had asked for more before December 19. If Mount had obtained the required 30 percent, or if the Director had not yet made a determination that more were needed, there would have been no impetus for Martinez or anyone else to be soliciting additional signatures on December 19.

Moreover, the witnesses that the General Counsel presented regarding what was said at the doorway meeting cannot be credited. Larios, for example, took inconsistent positions regarding Martinez' job. At first on cross-examination, he claimed he did not know what position Martinez held; later, he said he knew she was an office employee. He also knew she did some translation. Finally, he said he had never seen anything describing Martinez as the personnel director. Clearly Larios knew Martinez was a clerical employee and had no managerial authority, yet he did not wish to reveal his knowledge. Similarly, Estrada did not present himself well. On one occasion he had an unexplained memory loss and he often let his voice fall. He even undercut his already weak testimony by saying he was not paying attention during the meeting. His pretrial affidavit was somewhat inconsistent with his testimony and he was generally an unimpressive witness. Last, Margarito de Santiago admitted that he was not paying that much attention. Both he and Estrada say Martinez did not ask them to sign anything. If they are to be believed, she did not ask them to sign either a health plan authorization card or a decertification petition.

Frankly, these three witnesses suffer from several and varied shortcomings. These include demeanor matters, testimonial inconsistencies, and confusion. All appear disgruntled over the wage loss. In these circumstances I believe much of their testimony on critical issues is the product of either confusion or dissemblance. Before Respondent even began to present its case, the testimony of these three gave me pause.

On hearing Martinez, however, it became quite apparent that she had a good understanding of what she was saying and why she was saying it. Her testimony that Larios responded to her request that he sign the health authorization card by bringing up the Union and her characterization of him as confused and mistrustful seems quite credible. I have no difficulty in finding that she called the meeting for the purpose of obtaining the health authorizations and had no other purpose. The slip of paper that she had in her hand contained the names of those individuals who had not signed the health plan forms. They were not signatures on a decertification petition.[8]

Furthermore, that she was a new employee unlikely to have authority to grant wage increases or recommend them seems clear on the record. That being the case, and considering Respondent had successfully endured a 60-day strike to obtain a 15-percent wage reduction, it seems improbable that she or anyone in management would be offering wage increases in December, for insufficient time had passed to determine whether the wage reduction had put the plant in an acceptable financial position. Finally, if Respondent were to offer wage increases to dissuade employees from the Union, she would not have been the appropriate spokesperson for that purpose. Such promises would have been made by someone far more authoritative than she. Accordingly, I conclude that Martinez' testimony is the more credible of the two versions. Under those circumstances I find the General Counsel has not proven that Martinez committed the acts alleged in the complaint or that Respondent provided any assistance to those employees who were engaged in soliciting signatures to support the decertification petition.

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[7] On February 13, 1987, Martinez did issue, in English and Spanish, a memo to employees announcing that new dental and health coverage were being implemented on that date. She did not sign it with any title and says she was directed to issue the memo by Nowak because Parker, who normally would have handled the matter had just left the Company. Even assuming that this memo would elevate her in the eyes of employees from clerical employee to a quasi-management job, the memo was not issued until well after the transactions complained of in the complaint. It does not prove anything regarding her authority or apparent authority the previous December.

[8] Presumably, Mount had already submitted his signature list to the Regional Office on December 16. The General Counsel has not shown that a supplemental list of signatures ever existed, much less was needed.

B. *Withdrawing from the Tentative Agreement on Union Security*

The General Counsel does not complain that Respondent has engaged in a course of conduct of bad-faith bargaining. Instead, her representatives maintain that, in late January, Respondent withdrew from one tentative agreement, which it had made with the Union before the strike, that the new contract would contain a union-shop clause. Two significant things had happened before Respondent made the decision to withdraw from that tentative agreement. The first was the 2-month strike that the Union abandoned without having obtained a new contract. The second was the filing of the decertification petition. According to Nowak, the Company's decision to withdraw from the tentative agreement was actually made in early January. It did not manifest itself, however, until the company proposal of January 28. At that point the Union had filed an unfair labor practice charge that had effectively blocked the processing of the decertification petition.

Despite the issues that the petition and the charge raised, Respondent nonetheless proceeded to engage in three collective-bargaining sessions thereafter. Not until two of those had passed did the Union even express a concern about the proposed loss of the union-security clause. When it finally did so, the credible evidence is that Nowak told the mediator that the Company would be flexible on that issue if agreement could be reached on other matters. It appears from inferences drawn from Cepeda's testimony that the mediator did in fact transmit Nowak's message to the union negotiators, but they were far more interested in testing the Company's resolve in other areas. It is true that the Union's counterproposal called for reinstatement of the union-shop clause but, ignoring the lost strike, proposed a general return to the prior contract. It is fair to say in that situation that neither the presence nor the absence of a union-security clause had anything to do with the status of negotiations at that stage. The topic was not considered to be a critical issue. If it had been, the Union would have compromised other areas of its proposal and an appropriate test would have been made to determine whether the union-security clause was truly a stumbling block. It chose instead to try to salvage the lost wages and other money matters, thereby demonstrating that those were the main issues, not union security.

In any event, it is quite clear that the withdrawal of a single provision of a tentative agreement is not an act of bad-faith bargaining. *American Thread Co.*, 274 NLRB 1112 (1985); *O'Malley Lumber Co.*, 234 NLRB 1171, 1179–1180 (1980); cf. *Reliable Tool Co.*, 268 NLRB 101 (1983). Moreover, when circumstances have changed, as they did here, due to the lost strike, modification of bargaining positions is permissible. *Valley Oil Co.*, 210 NLRB 370, 385 (1974).

The Supreme Court has held it is not for the Board to determine whether a contract should contain a specific clause. *H. K. Porter Co. v. NLRB*, 397 U.S. 99 (1970). If I were to conclude that the withdrawal of this provision in circumstances that would not frustrate bargaining elsewhere was an unfair labor practice, I would necessarily be deciding that this collective-bargaining contract must contain a union-security clause. Under the *Porter* doctrine, the Board may not issue such an order Because there is no evidence that Respondent was using this issue as a device to frustrate bargaining, it would be inappropriate under *Porter* to find that Respondent committed an unfair labor practice by withdrawing from the tentative agreement.[9]

I conclude, therefore, that the General Counsel has failed to prove any violations of the Act as alleged, and I will recommend that the complaint be dismissed in its entirety.

Based on these findings of fact and legal analysis, I make the following

CONCLUSIONS OF LAW

1. The Respondent, Aero Alloys, is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

2. The Union, Warehouse, Processing & Distribution Workers' Union, Local 26, International Longshoremen's & Warehousemen's Union, is a labor organization within the meaning of Section 2(5) of the Act.

3. The General Counsel has failed to prove the allegations in the complaint alleging that Respondent had violated Section 8(a)(1) and (5) of the Act.

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[9] Although the parties wish to litigate the meaning of the "Where We Stand" letter recited in sec. III,E, a definitive analysis would serve no purpose. If I were to agree with the General Counsel that the letter, as well as Nowak's statement that Respondent was recognizing the decertification petition by withdrawing the union-shop proposal, evidenced a desire to beard the Union, it would not follow that such a desire would also be evidence of bad-faith bargaining. When that letter was issued and when Nowak made his statement, Respondent had already made its proposal based on its perception of changed circumstances and the proposal was perfectly lawful. If it used the letter as an opportunity to take advantage of the Union's now demonstrated weakness, it was simply doing what economic circumstances permitted. *American Thread*, supra.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[10]

ORDER

The complaint is dismissed in its entirety.

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[10] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

The Metallic Lathers' Union of New York and Vicinity Local 46 of The Wood, Wire and Metal Lathers' International Union *and* Mack C. Griffin *and* Pembroke Blyden *and* Earl Diggs *and* Linton Brown *and* Alexander Thompson *and* John A. Cleary and Building Contractors Association, Inc. and The Cement League, Parties to the Contract. Cases 2-CB-6021(E), 2-CB-6046(E), 2-CB-6868(E), 2-CB-6923(E), 2-CB-6841(E), 2-CB-6851(E), 2-CB-6859(E), and 2-CB-6900(E)

June 30, 1988

SUPPLEMENTAL DECISION AND ORDER

BY CHAIRMAN STEPHENS AND MEMBERS JOHANSEN AND BABSON

On February 11, 1983, Administrative Law Judge Michael O. Miller issued the attached supplemental decision. The General Counsel filed exceptions and a supporting brief, and The Metallic Lathers' Union of New York and Vicinity Local 46 of The Wood, Wire and Metal Lathers' International Union (the Applicant) filed a brief in opposition to the General Counsel's exceptions. The General Counsel then filed a motion to strike certain portions of the Applicant's brief.[1] The Applicant filed a response in opposition to the motion to strike as well as a supplemental memorandum contesting the Board's jurisdiction to hear and decide exceptions to the judge's decision.[2] Finally, the General Counsel filed a supplemental brief in opposition to this memorandum.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions, motions, and briefs and has decided to affirm the judge's rulings, findings, and conclusions only to the extent consistent with this Supplemental Decision and Order.

On March 4, 1982, the Board issued a Decision and Order in the underlying unfair labor practice case.[3] On April 5, 1982, the Applicant applied for an award of attorney's fees and expenses pursuant to the Equal Access to Justice Act (EAJA), 5 U.S.C. § 504 (1982).[4] In the attached supplemental decision, the judge found that the application was timely filed, the Applicant is an eligible party, and the position of the General Counsel in the underlying case was not "substantially justified" with respect to certain allegations within the meaning of EAJA. Accordingly, the judge recommended that the Applicant be reimbursed for certain specified fees and expenses incurred in the underlying unfair labor practice proceeding and in the instant EAJA proceeding.

Initially, we must rule on the judge's denial of the General Counsel's motion to strike the application as untimely filed. Analogizing applications filed under EAJA to those filed under the Federal Tort Claims Act, the judge concluded that the application was timely filed, even though it was filed 2 calendar days beyond the 30-day filing period provided in EAJA, Section 504(a)(2). The 30th day following issuance of the Board's Decision and Order, however, fell on Saturday, April 3, 1983. In *B. J. Heating*, 268 NLRB 643 (1984), the Board held that when the 30th day falls on a Saturday, Sunday, or legal holiday, an application filed on the first business day following the expiration day is timely. Accordingly, we agree with the judge that the application was timely filed because it was filed on the first business day following the 30th-day deadline, which fell on a Saturday.

The General Counsel contests the Applicant's eligibility for an award, contending that, pursuant to Section 102.143(g) of the Board's Rules and Regulations, the net worth of the Applicant must be aggregated with that of its alleged affiliates, The Wood, Wire and Metal Lathers' International Union, and the local unions affiliated with that International, to determine whether the Applicant is a qualifying "party"[5] under EAJA. We find it unnecessary to resolve this eligibility issue in light of our ultimate conclusion that the General Counsel's position in the unfair labor practice proceeding was substantially justified as discussed below.

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[1] The General Counsel moved to strike as untimely all statements contained in the Applicant's opposition to the General Counsel's exceptions that deny or contest the Applicant's failure to cooperate in the investigation of the underlying unfair labor practice case. In support of the motion, the General Counsel points out that the judge, in his supplemental decision, specifically found that the Union cooperated only minimally in the investigation of the unfair labor practice charges. The Applicant did not except to this, or any other, part of the judge's supplemental decision. Accordingly, since the Applicant's assertions of cooperation are raised for the first time in its brief, we grant the General Counsel's motion to strike them. However, in view of our determination that the General Counsel presented evidence, which if credited and found sufficiently probative would have constituted a prima facie case, we find it unnecessary to rely on the Applicant's minimal cooperation in the investigation of the underlying charges.

[2] In its supplemental memorandum contesting the jurisdiction of the Board to hear and decide the General Counsel's exceptions, the Applicant contends that the Board has no jurisdiction to review the judge's decision based on the original language in the Equal Access to Justice Act (EAJA), 5 U.S.C. § 504 (1982).

Subsequent to the filing of this motion, the Board had occasion to consider this very issue in *Lion Uniform*, 285 NLRB 249 (1987). There, the Board found that recent amendments to EAJA make clear that the agency, rather than the administrative law judge, makes the final decision on the award of attorney's fees.

[3] *Lathers Local 46 (New York & Vicinity)*, 260 NLRB 624 (1982).

[4] Subsequently, EAJA was amended. See Pub. L. 99-80, 99 Stat. 183-187 (1985).

[5] In defining a "party" entitled to recover expenses incurred in an administrative proceeding, 5 U.S.C. § 605(b)(1)(B), which is the applicable subsection of EAJA, reads in relevant part:

> "Party" means a party as defined in 5 U.S.C. 551(3), who is . . . (ii) any owner of an unincorporated business, or any partnership, corpo-

Continued

289 NLRB No. 64

Assuming the Applicant's eligibility, we turn to the standards to be applied in making an award. Section 504(a)(1) of EAJA provides that an award shall be made to a prevailing party unless "the position of the agency as a party to the proceeding was substantially justified or . . . special circumstances make an award unjust." The Board's Rules and Regulations provide that an applicant may receive an award for fees and expenses incurred in connection with an adversary adjudication if it prevailed in that proceeding or in a significant and discrete substantive portion of that proceeding, unless the General Counsel proves that her position in the unfair labor practice case, over which the applicant has prevailed, was substantially justified.[6] Further, in order to defeat a claim for fees and expenses under EAJA, the General Counsel must meet that burden with respect to each readily identifiable stage of the proceeding.[7] Congress has emphasized that no adverse inferences are to be drawn from the fact that the Government did not prevail in the adversary adjudication. Nor does the standard require the Government to establish that its decision to litigate was based on a substantial probability of prevailing.[8]

Concerning the merits of this application, a brief review of the underlying unfair labor practice case is in order. The Metallic Lathers' Union of New York and Vicinity Local 46 of The Wood, Wire and Metal Lathers' International Union (the Union) operates an exclusive hiring hall for the referral of workmen in the lathing and structural steel reinforcing trades. The General Counsel contended in the underlying complaint that the Union had violated Section 8(b)(1)(A) and (2) of the Act by discriminatorily giving preference in referrals to its members (journeymen or bookmen) and denying referrals to permitmen (nonmembers and those who are members of other locals). This discrimination, it was alleged, occurred through the following means: (a) the Union failed to use the court-mandated priority list in making job referrals; (b) the Union permitted members to circumvent the hiring hall rules by obtaining jobs with contractors without registering at the union hall (direct hires); (c) the Union allowed members to return to work for a contractor after a layoff in excess of 1 day (callbacks), all to the detriment of the permitmen; and (d) the Union gave preference in referrals to members and failed and refused to refer nonmembers who were entitled to such referrals.

The hearing opened on October 31, 1978, and was postponed indefinitely pending settlement discussions. Once the hearing resumed in September 1980, evidence was revealed, which was apparently unknown to the General Counsel and which established that use of the priority lists had been abandoned about September 1, 1976, and referrals after that date were made according to the order of daily sign-in.

After the General Counsel's case-in-chief, the Respondent moved for dismissal, contending that the evidence did not support the allegations. The judge denied the motion.

In ruling on the application for attorney's fees, the judge found that

> the General Counsel had a reasonable basis in fact for issuing the complaint, amending it when the hearing reopened, and proceeding through the litigation, at least until that point where its misunderstandings with respect to the discontinuance of the priority lists became obvious. Accordingly, to the extent described above, I find that General Counsel's position was substantially justified.[9]

The judge further found, however, that

> when it became clear that the evidence would not support complaint allegations based upon alleged breaches of the priority system, General Counsel changed its theory to allege more generally widespread discrimination against the permit men based upon its analysis of the activity reports showing that bookmen received far more referrals, with far fewer hiring hall registrations, than permit men.

> ration, association, unit of local government, or organization, the net worth of which did not exceed $7,000,000 at the time the adversary adjudication was initiated, and which had not more than 500 employees at the time the adversary adjudication was initiated.

[6] Board's Rules and Regulations, Secs. 102.143(b), 102.144(a). The judge's supplemental decision in this case issued February 11, 1983, prior to the 1985 amendments to EAJA. Subsequent to those amendments, effective May 15, 1986, the Board revised Sec. 102.144(a) of its Rules and Regulations regarding substantial justification. That section now states (51 Fed. Reg. 17732 (1986)):

> An eligible applicant may receive an award for fees and expenses incurred in connection with an adversary adjudication or in connection with a significant and discrete substantive portion of that proceeding, unless the position of the General Counsel over which the applicant has prevailed was substantially justified. The burden of proof that an award should not be made to an eligible applicant is on the General Counsel, who may avoid an award by showing that the General Counsel's position in the proceeding was substantially justified.

[7] See *Tyler Business Services v. NLRB*, 695 F.2d 73 (4th Cir. 1982).

[8] S. Rep. No. 253, 96th Cong. 1st Sess. 6; H.R. Rep. No. 1418, 96th Cong. 2d Sess. 16 reprinted in 1980 U.S. Code Cong. & AD. News 4953, 4990.

[9] The Applicant did not file exceptions to this finding.

The judge concluded that the General Counsel had failed to sustain the burden of proving that the position with respect to callbacks and direct hires was substantially justified. In the judge's estimation, the General Counsel's theory, based on a comparison of member versus nonmember referrals, had neither a factual nor a legal basis. The judge also found that the General Counsel's position with respect to the steward-referral issue was not substantially justified.[10]

In her exceptions to these findings, the General Counsel contends that the judge erred in treating the callback and direct-hire allegations as significant and discrete portions of the case, when in fact they were but subparts of the overall theory of violation, i.e., that the Applicant was operating its hiring hall in a discriminatory manner, providing preferential treatment for members over nonmembers. The General Counsel also contends that the judge erred in concluding that the General Counsel was not substantially justified in issuing a complaint on these issues. Finally, the General Counsel argues that the judge erred in finding that the General Counsel was not substantially justified in continuing to litigate all allegations after September 22, 1980.

We find merit in the General Counsel's exceptions because the direct-hire and callback allegations and the steward-referrals issue do not constitute a "significant and discrete portion of the proceeding."[11] In view of the fact that the Applicant's entire hiring hall operations were under scrutiny, it incurred no discernible additional effort in litigating the General Counsel's overall theory of discrimination. Moreover, we disagree with the judge's assessment that the General Counsel's theory was "changed" to allege that bookmen received far more referrals, with far fewer hiring hall registrations, than permitmen. As noted earlier in the discussion of the procedural history of this case, the General Counsel initially made this allegation of discrimination in the September 25, 1978 amended consolidated complaint and supported it with referral activity reports. This allegation was not added after the testimony was adduced regarding discontinuance of the priority list.

Additionally, even assuming arguendo that the direct-hire and callback allegations do represent a "significant and discrete" portion of the unfair labor practice proceeding, we disagree with the judge's finding that the General Counsel was not substantially justified in issuing a complaint on those allegations. In our view, the resolution of the callback and direct-hire allegations, as with the out-of-priority allegation, depended on inferences[12] to be drawn from a statistical and factual analysis of the activity reports as well as credibility resolutions[13] based on the witnesses' testimony. Even the judge concluded in the initial litigation that, "[e]xamined broadly, comparing only the member referrals against those received by nonmembers, the statistics would seem to support the General Counsel's contentions."[14] Moreover, "[i]t would appear from the record that journeymen benefited more frequently from direct hires and callbacks than did permitmen."[15] At the time the complaint issued, the General Counsel was not basing the case only on reasonable inferences to be drawn from the activity reports. Rather, the General Counsel relied also on the Charging Parties' affidavits outlining a proclivity on the part of business agents to favor members over nonmembers when making referrals.[16] After reviewing the testimony from the General Counsel's witnesses, the judge found that "[c]ertain statements by the business agents do tend to show some desire on their part to prefer members."[17]

In pursuing the decision to issue a complaint and take the case to hearing, the General Counsel was armed with sworn affidavits from the Charging Parties that indicated discriminatory motivation on the part of the business agents in their referral practices, together with the statistical analysis gleaned from referral data contained in the activity reports, which it is reasonable to view as substantial evidence supporting the Charging Parties' allegations. In addition, there was legal precedent establishing that in certain circumstances the Board would find a violation of Section 8(b)(1)(A) and (2) based primarily on statistical evidence.[18]

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[10] In the underlying decision, the judge found that the Union had discriminatorily refused to appoint stewards from among journeymen members of other locals, in violation of Sec. 8(b)(1)(A) and (2) of the Act. The Board ultimately concluded that the issue had not been litigated at trial and reversed the judge's finding.

[11] See, e.g., *Temp Tech Industries*, 266 NLRB 730 (1983), enfd. 756 F.2d 586 (7th Cir. 1985); *Lion Uniform*, 285 NLRB 249 (1987).

[12] See *Bosk Paint & Sandblast Co.*, 270 NLRB 514 (1984); *Iowa Parcel Service*, 266 NLRB 392 (1983), enfd. sub nom. *Iowa Express Distribution v. NLRB*, 739 F.2d 1305 (8th Cir. 1984), cert. denied mem. 469 U.S. 1088 and 470 U.S. 1024 (1984).

[13] See, e.g., *Natchez Coca-Cola Bottling Co.*, 269 NLRB 877, 878 (1984).

[14] 260 NLRB 624, 638 (1982).

[15] Id.

[16] In reaching our determination on the substantial justification question, we find it unnecessary to rely on the affidavits attached to the General Counsel's answer to this EAJA application.

[17] Id. at 640.

[18] See *Iron Workers Local 45 (Contractors of New Jersey)*, 235 NLRB 211 (1978); *Iron Workers Local 373 (Contractors of New Jersey)*, 235 NLRB 232 (1978); *Iron Workers Local 480 (Contractors of New Jersey)*, 235 NLRB 1511 (1978).

Thus, the General Counsel presented evidence that, if credited and found sufficiently probative[19] by the factfinder, would prima facie establish the merits of the contentions the General Counsel was making. The General Counsel's case did not prevail, in part, because the judge concluded that the statistical record was too open to the possibility of error and he did not find the discriminatory motive testimony sufficiently extensive or persuasive to support the finding of a violation. Such weighing of facts and drawing of inferences is not the General Counsel's province in the investigative stage of a proceeding. The weighing of various explanations for the apparent discriminatory treatment of nonmembers and the drawing of inferences from the testimony are, in the first instance, the exclusive province of the judge; they require submission of the case to the factfinding process of litigation.

The judge also accused the General Counsel of disregarding recognized exceptions to the referral system. In our view, the General Counsel prudently concluded that a reasonable evidentiary inference could be drawn from what was perceived to be a striking statistical contrast between member and nonmember referrals, notwithstanding the recognized exceptions to the referral procedures. The inference could also be drawn that a substantial number of special exception designations were false.

Accordingly, we find that the General Counsel had substantial justification for issuing the complaint and proceeding to hearing on all allegations of the complaint, including the callback and direct-hire allegations. Those allegations were but subparts of the overall allegation that the Applicant was operating its hiring hall in a discriminatory fashion. Further, given the evidence adduced and the type of violations alleged, the General Counsel was substantially justified in continuing to litigate the entire case up to final resolution of the issues by the Board.

The application will be denied in its entirety.

ORDER

The National Labor Relations Board orders that the application for attorney's fees and expenses filed by The Metallic Lathers' Union of New York and Vicinity Local 46 of The Wood, Wire and Metal Lathers' International Union pursuant to the Equal Access to Justice Act and the Board's Rules and Regulations is denied.

SUPPLEMENTAL DECISION

Equal Access to Justice Act

STATEMENT OF THE CASE

MICHAEL O. MILLER, Administrative Law Judge. These consolidated cases were tried before me in New York, New York, on October 31, 1978; September 17, 18, and 22, 1980, December 15, 16, and 17, 1980; and January 22, 1981. In my decision, dated July 30, 1981, I recommended that the consolidated complaints be dismissed in all respects save one. The General Counsel and Respondent filed exceptions to my recommended Order and, on March 4, 1982, the Board issued its Decision and Order, 260 NLRB 624 (1982) dismissing the consolidated complaints in their entirety.[1]

By an application received by the Board on April 5, 1982, as subsequently revised, The Metallic Lathers' Union of New York and Vicinity Local 46 of The Wood, Wire and Metal Lathers' Union (the Applicant or the Union), seeks an award of attorney fees and expenses in the amount of $44,808 under the Equal Access to Justice Act (EAJA), Pub. L. 96-481, 94 Stat. 2325, 5 U.S.C. § 504 and Sec. 102.143 et seq. of the Board's Rules and Regulations.[2] By Order of the Board dated April 9, 1982, that application was referred to me for appropriate action.

Following denial of the General Counsel's motion to dismiss the EAJA application and the Applicant's submission of additional information as directed in my June 23, 1982 Order, the General Counsel, on October 6, 1982, filed its answer together with a supporting memorandum and other documents. On October 28, the Applicant submitted a reply memorandum.

The issue having thus been joined, this decision is made on the documents in the record pursuant to Section 102.153(a) and (b) of the Board's Rules and Regulations.

I. THE ISSUES

The following issues will be treated seriatim

A. Was the application timely filed?

B. Is the Applicant an eligible party under EAJA?

C. Was the position of the General Counsel in this litigation substantially justified?

D. May the Applicant recover fees and expenses incurred prior to October 1, 1981?

E. May the Applicant recover fees and expenses incurred in prosecuting its EAJA application?

F. To what reasonable fees and expenses is the Applicant entitled?

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[19] There is no bright-line test to apply in making a determination on what set of circumstances in an out-of-order referral case is sufficient to establish a violation of the Act or how many out-of-order referrals are necessary to establish a pattern of unlawful conduct. See the court's discussion in *Electrical Workers IBEW Local 211 v. NLRB*, 821 F.2d 206 (3d Cir. 1987).

[1] I had found that the Respondent Union had discriminatorily refused to appoint stewards from among the Local 46 permitmen who were journeymen in other locals, in violation of Section 8(b)(1)(A) and (2). The Board held that the General Counsel had failed to put this question in issue at the hearing, thereby denying the Union an opportunity to litigate the matter fully and to present evidence justifying its conduct. Thus, the issue had not been sufficiently litigated.

[2] By its revision, the Applicant seeks those additional fees and expenses incurred in pressing its EAJA application.

II. DISCUSSION

A. *Timeliness*

EAJA, Section 504(a)(2), and the Board's Rules, Section 102.148 require that an application for fees and expenses be filed within "30 days after the entry of the Board's final order," the "final disposition in the adversary adjudication." In the instant case, the Board's Order issued on March 4, 1982, and Respondent's application, while "dated and apparently served by mail on April 1, 1982,"[3] was filed with the Board on April 5, 1982, numerically beyond the 30-day limitation period. The General Counsel has moved for dismissal of the application as untimely.

In my earlier Order denying the General Counsel's motion to dismiss, I concluded that the application had been timely filed, stating the following:

> The Board's Order referring Respondent's application to me establishes that it was filed with the Board on April 5, 1982, 2 calendar days beyond the 30 day filing period provided in EAJA Sec. 504(a)(2). The thirtieth day following issuance of the Board's Decision and Order herein, however, fell on Saturday, April 3, 1982. Pursuant to the Board's Rules and Regulations, Sec. 102.114(a), "a Saturday on which the Board's offices are not open for business shall be considered a holiday . . ." and the filing period then runs to the end of the next business day. The provisions of this rule are properly applied to EAJA applications in order to avoid the injustice of foreshortening that Act's already brief filing period. Therefore, the period for the filing of this application ran until the close of business on Monday, April 5, 1982.

That ruling is adhered to here.

The General Counsel contends that EAJA, as a relinquishment of sovereign immunity, must be strictly interpreted and narrowly construed. The Federal Tort Claims Act (FTCA) (28 U.S.C. § 1346, 2671 et seq.) is similiarly a limited waiver of sovereign immunity. The FTCA, Section 2401(b), provides, in mandatory language even more explicit than that of EAJA § 504(a)(2):

> A tort claim against the United States shall be forever barred . . . unless action is begun within six months after the date of mailing . . . of notice of final denial of the claim by the agency to which it was presented.

In both *Kirby v. U.S.*, 479 F. Supp. 863 (D.S.C. 1979), and *Rodriquez v. U.S.*, 382 F.Supp 1 (D.P.R. 1974), the question was presented whether, when the applicable limitations period would have expired on a Saturday, that period was extended until the next business day, pursuant to Rule 6(a) of the Federal Rules of Civil Procedure. That rule provides, in language substantially identical to that of the Board's Rule 102.114(a), that

> The last day of the period so computed shall be included unless it is a Saturday, a Sunday, or legal holiday, in which event the period runs until the end of the next day which is not a Saturday, Sunday or legal holiday.

Both courts held Rule 6(a) applicable to the Federal Tort Claims Act and found the actions to have been timely filed. They noted that the absence of contrary legislative intent suggested implied congressional approval of a lenient and liberal approach. Those cases are, to all practical effect, "on all fours" with the instant situation and the analyses presented are compelling. Further guidance is provided by the rationale of *Bledsoe v. Department of Housing and Urban Development*, 398 F.Supp. 315 (E.D.Pa. 1975). The court specifically addressed the sovereign immunity question and stated:

> Strict construction of the statutory provisions applicable to the Act may be appropriate in certain instances to avoid unwarranted extensions of the waiver of sovereign immunity, provided by Congress. However, it is a perversion of this principle to construe the six month provision of section 2401(b) so that six months under section 2401(b) includes less time, in fact, than that provided under any other six-month statutory period. Absent explicit congressional direction, courts should not, under the rubric of sovereign immunity, create a separate and cramped mathematics of computation. [Id. at 320–321.]

As noted, the limitations provision of the FTCA more expressly bars actions filed outside the stated period than does EAJA, and it sets forth a longer period in which to file than EAJA provides. EAJA's abbrievated limitations period and its less explicit language thus provide even stronger justification for a liberal application of what the court in *Bledsoe* described as the general or common law rule with respect to the computation of limitations periods. See also *Sherwood Bros. v. District of Columbia*, 72 App. D.C. 155, 113 F.2d 162, (1940), quoted in *Bledsoe*, where it was pointed out that the rule (as embodied in FRCP Sec. 2401(b) and Sec. 102.114(a) of the Board's Rules) was "the common-law rule . . . embedded in the habits and customs of the community . . . by long-establised legal and commercial tradition." The court there found it reasonable to "assume that Congress had the common-law rule in mind when it legislated, and to construe the statute accordingly."[4]

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[3] G. C. memorandum in support of answer, 8.

[4] Cf. *Monark Boat Co.*, 262 NLRB 994 (1982). There, the Board, faced with the question of whether the 3-day period for the filing of an EAJA application was extended by 3 days pursuant to Sec. 102.114(a) of the Board's Rules, concluded that the 30-day time limit was a jurisdictional condition that the Board could not legally extend. The Board further noted that the 3-day extension portion of Rule 102.114(a) was not applicable to an EAJA application inasmuch as that portion of the rule deals with actions required to be taken "within a prescribed period after *service*" and EAJA § 504(a)(2) and the Board's Rule Sec. 102.148 both require that the application be filed within 30 days of *entry* of the final order, without reference to service. The Board left open the question presented here as to effect of Rule 102.114(a) on a 30-day limitation period that ends on a Saturday, Sunday, or legal holiday. The Board similarly left this question open in *Lord Jim's*, 264 NLRB 1098 (1982).

Accordingly, I conclude that the filing of this application on Monday, April 5, 1982, was timely. The General Counsel's motion to dismiss the application as untimely is denied.

B. *The Applicant's Eligibility*

The General Counsel concedes that the Applicant, standing alone, meets the EAJA eligibility requirements, inasmuch as it was an unincorporated association or organization with a net worth not exceeding $5 million or employing more than 500 employees at the time the adversary adjudication was initiated. However, the General Counsel contends that the Applicant has not established its eligibility inasmuch as it failed to provide the number, category, and work location of the employees, or the net worth, of its alleged affiliates, The Wood, Wire and Metal Lathers' International Union and the local unions affiliated with that International.[5]

In its response to my order on motion to dismiss its EAJA application, where I had raised questions concerning the Applicant's potential affiliates, the Applicant set forth, by affidavit, that its International union had but 15 employees working in various specified locations and positions as of January 23, 1978, when the original complaint issued. It further claimed by affidavit that the net worth of that International union, as of December 31, 1978, was less than $5 million. Other than naming the various locals affiliated with its International union, the Applicant did not provide any information as to either the net worth of such local unions or the numbers, positions, or locations of their employees.[6]

EAJA, which is expressly applicable to labor organizations,[7] makes no mention of the aggregation of either the net worth or the employee complement of an applicant with that of affiliates. The reference to affiliates, as found in the Board's Rules, apparently stems from the model rules of the Administrative Conference of the United States (ACUS), Section 0.104(f). That section suggested the following rule.

> (f) The net worth and number of employees of the Applicant and all of its affiliates shall be aggregated to determine eligibility. Any individual, corporation or other entity that directly or indirectly controls or owns a majority of the voting shares or other interests of the Applicant, or any corporation or other entity of which the Applicant directly or indirectly owns or controls a majority of the voting shares or other interest, will be considered an affiliate for purposes of this part, unless the adjudicative officer determines that such treatment would be unjust and contrary to the purposes of the Act in light of the actual relationship between the affiliated entities. In addition, the adjudicative officer may determine that financial reltationships of the Applicant other than those described in the paragraph constitute special circumstances that would make an award unjust.

The model rules would thus have required aggregation only when an applicant had a majority interest in another entity or was itself controlled by an entity possessing a majority interest in it. The Board, in adopting its rule, omitted the references to majority control of or by affiliates, apparently to leave open the questions, presented here, as to whether the net worth and employee complement of an International union and the other local unions affiliated with it must be aggregated with the employee complement and net worth of an applicant that is itself a local union.

Case law provides little relevant precedent. On the one hand, it is clear that a local union is a separate and distinct entity from the International union with which it may be affiliated so that one is not automatically liable for the misconduct of the other. *Carbon Fuel Co. v. Mine Workers*, 444 U.S. 212, 217 (1979); *Mine Workers (Blue Diamond Coal)*, 143 NLRB 795 (1963). On the other hand, when considering whether to assert jurisdiction over a labor organization functioning as an employer, the Board has considered the relationship between a local union and its International. See *Louisiana Council No. 17, AFSCME, AFL–CIO*, 250 NLRB 880, 892 (1980); *Chain Service Restaurant Employees Local 11*, 132 NLRB 960 (1961).

Absent clear precedent, recourse must be had to the statute (EAJA) and its stated purposes. As noted, it was expressly intended that EAJA apply to labor organizations. Application of an affiliation principle as suggested by the General Counsel would, if considered realistically, render all but the smallest unions, the unaffiliated in-plant organizations, ineligible. Where Congress has expressly included a group within those intended to be eligible for the benefits of its legislation, I cannot conclude that it simultaneously intended to exclude the vast majority of such organizations from those benefits. Accordingly, I must conclude that the Applicant is not required to aggregate the net worth and employee complement of its International union with that of its own in order to establish eligibility. Perforce, it would not be required to aggregate the net worth and employee complements of its "sister" locals, with whom its relationships, particularly in regard to the matter of control, is even more tenuous.[8]

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[5] The Board's Rule Sec. 102.143(g) provides:

> The net worth and number of employees of the Applicant and all of its affiliates shall be aggregated to determine eligibility.

[6] The Applicant submitted a list of approximately 246 local unions in the United States and Canada, which were affiliated with The Wood, Wire and Metal Lathers' International Union. None of these, it stated, were as large as the Applicant and few, it believed, had any full-time employees. The Applicant denied that it was affiliated with The Wood, Wire and Metal Lathers' International Union or any of the locals affiliated with that International within the contemplation of the Board's Rules.

[7] EAJA, Sec. 202(a) provides, inter alia:

> The Congress finds that certain individuals, partnerships, corporations, and labor and other organizations may be deterred from seeking review of, defending against, unreasonable governmental action because of the expense involved in securing the vindication of their rights in civil actions and in administrative proceedings.

[8] In the event that the Board, on review of this supplemental decision, concludes, contrary to my recommendation, that the net worth and employee complement of The Wood, Wire and Metal Lathers' International Union must be aggregated with that of the Applicant, I recommend that

Continued

The General Counsel's motion to dismiss the application on the basis of the Applicant's alleged ineligibility is therefore denied.

C. *The Substantial Justification Question*

Section 504(a)(1) of EAJA provides that an award shall be made to a prevailing party unless "the position of the agency as a party to the proceeding was substantially justified or . . . special circumstances make an award unjust." The burden of establishing substantial justification is on the Government and the test of whether governmental action is substantially justified is one of reasonableness. The government, to defeat an award, must establish that its position had a reasonable basis in fact and law. However, the fact that the Government lost its case does not give rise to any presumption that its position was unreasonable and the "substantially justified" standard does not "require the Government to establish that its decision to litigate was based on a substantial probability of prevailing."[9] Moreover, as the Board has recently pointed out, the Government's position might still be deemed reasonable in fact and law notwithstanding that the General Counsel failed to establish a prima facie case.[10] The "special circumstances" exception was included in the statute to permit the government to advance "in good faith the novel but credible extensions and interpretations of the law that often underlie vigorous enforcement efforts."[11] It permits the litigation of close questions of fact or law.[12]

The General Counsel, acknowledging its burden to establish substantial justification, contends that its positions were reasonable both at the time that complaint first issued, January 23, 1978, and when the hearing resumed after a 2-year hiatus in September 1980. Particularly, it points to the language of the hiring hall agreement, analysis of the hiring hall records showing a preponderance of referrals to union members, and the Applicant-Respondent's limited cooperation in the investigation of the underlying unfair labor practice charges. The General Counsel further contends that it acted reasonably in litigating the EAJA case inasmuch as it involves issues of first impression and thus argues that the Applicant's revised request for fees and expenses incurred in the EAJA proceeding should be denied. The Applicant, pointing specifically to the findings and conclusions set forth in my decision and order, as affirmed by the Board, disputes the General Counsel's contentions of substantial justification. It asserts that the General Counsel totally misunderstood the rules and procedures under which the hiring hall operated, causing it to misplead substantial portions of the complaint and further causing it to place unwarranted reliance on alleged numerical disparities in the referral of members and permitmen. This failure to comprehend how the hiring hall operated, the Applicant contends, resulted from a faulty and inadequate investigation. Contrary to the General Counsel, the Applicant contends that this case did not present either close or novel questions of fact or law. Resolution of these issues requires examination of the General Counsel's contentions, the evidence that it possessed and adduced in support of those contentions, and my findings thereon.

As described more fully in my initial decision, the Union's jurisdiction included inside skilled lathers' work and outside less-skilled work that was the laying out or preparation of reinforcing structural steel preliminary to the pouring of concrete for slabs, beams, and columns. The outside work included both general and specific work skills. The Union's geographical jurisdiction included the five boroughs of New York and considerable suburban territory outside those boroughs.

The Applicant operated a hiring hall under rules established pursuant to a consent decree and settlement agreement approved by Judge Marvin E. Frankel in settlement of an action under title VII of the Civil Rights Act of 1964. The agreement provided for the opening of the Union's hiring hall to nonmembers, particularly members of minority groups, by permitting them to acquire work permits for outside work. It required nondiscriminatory referrals but permitted preference on the basis of experience where specific skills were required. Specifically established was a system of acquiring priority for referrals by those who had registered six or more times in a 2-week period. All employment was supposed to be secured through the hiring hall; employees were not supposed to secure their own employment and, if they were laid off for more than 1 day, they were supposed to return to the hiring hall and register for referral to subsequent employment. Employers were, however, permitted to transfer workmen between jobsites so long as there was no break in the continuity of employment. The Union was precluded from granting employer requests for the referral of specific individuals except as foreman; it was, however, permitted to fill requests for minority group workmen. The agreement required the Union to plan, establish, and publicize training programs to increase the specific experience of permitmen for outside work.

The employers with whom the Union had collective-bargaining agreements were not parties to the consent decree and agreement. However, the contracts between the Union and two associations of employers provided for the establishment of an exclusive hiring hall and adopted the rules set forth in the consent decree and agreement as the rules governing the operation of that hiring hall. The record does not reveal whether a similar incorporation of those rules and procedures existed in the collective-bargaining agreements between the Union and the other employers with whom it had collective-bargaining agreements.

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the Applicant not be penalized for its failure to submit with its application a detailed exhibit showing the net worth of the Applicant and any affiliates (as defined in Sec. 102.143(g)) as required by Rule 102.147(f). My order on motion to dismiss application required the Applicant to provide information concerning the net worth of the International union did not specifically require the furnishing of a detailed net worth statement. If the affidavit that it submitted is considered insufficient, due process would require that the Applicant be permitted additional time to furnish appropriate documentation.

[9] S. Rep. No. 96-254 at 6-7, 14-15 (1979); H.R. Conf. Rep. No. 96-1418 at 10-11 (1980); *Stanley Spencer v. NLRB*, 548 F.Supp. 256, 261 (D.C. Cir. 1982).

[10] See *Enerhaul, Inc.*, 263 NLRB 890 (1982).

[11] S. Rep. No. 96-253, supra at 7; H.R. Conf. Rep. No. 96-1418, supra.

[12] 126 Cong.Rec. H10226 (daily ed. Oct. 1, 1980).

The terms governing the operation of the Union's hiring hall required that extensive records be prepared and maintained. Included in these records was documentation of the employees' signing in at the hiring hall, the contractors' requests for workmen, the referrals in response to such requests, and the reports from the jobsites indicating the work performed and by whom. These records were collated by computer into periodic activity reports.

The General Counsel's original complaint, dated January 23, 1978, alleged that the Union had discriminated against the permitmen by failing to follow the priority system established by the hiring hall rules and by permitting bookmen to obtain employment directly from the employers, thus circumventing the hiring hall. When that complaint issued, the General Counsel possessed the activity reports detailing the referral activity in the hiring hall. From those acitivity reports it appeared that the literal terms of the priority system were, indeed, being ignored to the detriment of the the permitmen. The General Counsel also possessed affidavits from a number of the permitmen indicating use of out-of-date priority lists and attributing statements to the Union's business agents that were susceptible to an interpretation establishing a preference and an intention on the part of those business agents to refer bookmen.[13]

Once the hearing was resumed in September 1980, evidence was introduced that established that the above-described system of according priorities had fallen into disarray by 1975 due to the fact that the number of job seekers was far out of proportion to the relatively few jobs available. About September 1, 1976, after nearly 2 years of referrals being made from backlogged priority lists that were months or years old, the priority system was abandoned by authority of the hiring hall's court-appointed administrator. Referrals after that date were made according to the order of daily sign-in. The General Counsel was apparently unaware of the backlog of priority lists used during the 1975 and 1976 and was similarly unaware that the use of those lists had been abandoned with the administrator's permission. As I found, this misunderstanding as to the operations of the priority sytems caused the General Counsel to misplead those aspects of the complaint that related to the priority system.

The General Counsel asserts, without contradiction, that the Union had cooperated only minimally in the investigation of the unfair labor practice charges and further asserts that it was justified in proceeding to complaint and litigation in reliance on evidence indicating that the priority rules had never been changed in writing, that the Union remained under the obligation to comply with those rules, and that it failed to do so. In light of activity reports tending to show that the priority system was being ignored and the affidavits of at least some permitmen tending to establish reliance on out-of-date priority lists and a willingness on the part of the Union's business agents to favor the bookmen, and in the absence of cooperation by the Union during the course of the investigation, which might have corrected the General Counsel's misunderstandings, I must conclude that the General Counsel had a reasonable basis in fact for issuing the complaint, amending it when the hearing reopened, and proceeding through the litigation, at least until that point where its misunderstandings became obvious.[14] Accordingly, to the extent described above, I find that the General Counsel's position was substantially justified.

However, when it became clear that the evidence would not support complaint allegations based on alleged breaches of the priority system, the General Counsel changed its theory to allege more generally widespread discrimination against the permitmen based on its analysis of the activity reports showing that bookmen received far more referrals, with far fewer hiring hall registrations, than permitmen. As I stated in my initial decision:

> . . . Examined broadly, comparing only the member referrals against those received by nonmembers, the statistics would seem to support the General Counsel's contentions. Clearly, the journeymen-members of Local 46 received the lion's share of the referrals. Such a broad examination, however, is misleading [260 NLRB at 638].

I found that in making its comparison of member and nonmember referrals, the General Counsel had disregarded the recognized exceptions to the referral system for inside workers and specifically skilled outside workers. Its failure to consider these exceptions led to "fallacious conclusions . . . of no probative value in determining whether or not the Union operated its hiring hall in a discriminatory manner." (260 NLRB at 638.) To the extent that the General Counsel recognized the existence of these exceptions, it argued that the Union falsely labeled contractors' requests as requiring specific experience so as to exclude permitmen from the referrals. The

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[13] Ultimately, the General Counsel introduced the testimony of several permitmen to this latter effect. I found those statements to be neither "sufficiently numerous or persuasive, when viewed against five years of referral activity, to overcome the valid explanations for the disparity in referrals . . . or the evidence establishing the unreliability of the activity reports as proof of discrimination." 260 NLRB at 630–631, 638–639. The General Counsel submitted, as attachments to its answer to the application here, affidavits of 15 permitmen, including 4 charging parties, whose testimony was never offered. The General Counsel contended that by the time this case resumed for hearing in September 1980, after the 2-year hiatus for settlement discussions, these individuals had become either unavailable or uncooperative. Contained in the affidavits of three of those employees are statements similar to those contained in the record, which tend to show a preference by the business agents for bookmen. Nine, I would conclude, merely confirmed data contained in the activity reports or expressed the witnesses' belief that they had been discriminated against for various reasons. Three of these affidavits, it appears, were received by the General Counsel subsequent to July 1979, including two taken in early August 1980. None of these latter affidavits contribute probative support to the General Counsel's position.

[14] This is not to stay that the General Counsel was blameless in regard to this misunderstanding. Evidence on this point and others could have been secured from the court-appointed administrator. Indeed, when, on November 16, 1978, the General Counsel brought to my attention the administrator's refusal to comply with a subpoena unless authorized to do so by the district court from which his appointment stemmed, I directed that the General Counsel and the administrartor go to that court for the necessary authorizations. The General Counsel did not further pursue that avenue.

General Counsel also argued that the Union had failed in its obligation to provide training for specific experience jobs to the permitmen. I found that neither allegation was encompassed within the complaint nor supported by record evidence. I further found that when the General Counsel's specific examples of alleged discrimination were examined in light of the recognized exceptions to the referral procedures, no conclusion of discrimination was possible.

Accordingly, as this principal theory underlying the General Counsel's continuation of the litigation had neither a factual nor a legal basis to support it, I must conclude that the General Counsel has failed to sustain its burden of proving that its portion in this regard was substantially justified or otherwise reasonably based in fact or law.[15]

In the initial litigation, as previously stated, the General Counsel had contended that Respondent had breached the duty of fair representation owed to all those who sought employment through the referral system by failing to enforce the hiring hall rules on workers who secured employment without union referral and on contractors who called back employees or hired them directly. I found that even if such a contention had a basis in law, the record evidence did not support the allegation. Both members and nonmembers, including some of the Charging Parties, had benefited from direct hires and callbacks. There was no evidence that employers were encouraged by the Union to hire members directly or to call them back. Moreover, the preponderance of callbacks and direct hires of members over nonmembers, I found, could be as rationally explained on the basis of the members' specific inside and outside work skills (factors ignored or disregarded by the General Counsel) and the likelihood that they were better known to the employers because of their longer service in the industry as by any supposed preference for union members. I further found that the statistical record relied on by the General Counsel was too open to the possibility of error, particularly error resulting from missing stewards' reports, to support the General Counsel's allegations. This was especially pertinent, I found, to the callback allegations inasmuch as a missing steward's report would make it appear as if all of the employees on the jobsite had benefited from callbacks. Finally, I found, in the absence of any evidence that any of the hundreds of employers who secured employees through the Union's hall, other than those who were members of two named associations, were bound to comply with the hiring hall rules, I could not conclude that the Union could have effectively enforced the rules had it chosen to do so. In light of these conclusions, all of which were upheld by the Board, I must conclude that the General Counsel has failed to sustain its burden of proving that its position in regard to the callback and direct-hire allegations were substantially justified.

Finally, notwithstanding that I found evidence of discrimination in the Union's refusal to appoint stewards from among the permitmen who were journeymen in other locals, I must conclude that the General Counsel's position in regard thereto, as asserted in its brief, was without substantial justification. As found by the Board, the General Counsel had failed to put this question in issue at the hearing. In light of that failure, its position in regard to this contention can hardly be deemed substantially justified or reasonable in fact or law.

D. *Applicability of EAJA to Fees and Expenses Incurred Prior to October 1, 1981*

The General Counsel reasserts the position taken initially in its motion to dismiss the application, that fees and expenses incurred prior to October 1, 1981, the effective date of the EAJA, are not recoverable. The General Counsel argues that "traditional rules of statutory construction, sovereign immunity, and the Congressional purpose underlying an enactment of the EAJA" warrant such a construction.

In my order denying the motion to dismiss, it was stated:

> . . . I am satisfied that the "plain, clear and common meaning" of both the statutory and regulatory language supports the conclusion that EAJA was intended to apply to expenses and fees incurred before October 1, 1981 and that there exists no clear direction from Congress to the contrary [footnote omitted]. This was the conclusion reached by the Courts in *Heydt v. Citizens State Bank*, 668 F.2d 444 (C.A. 8, 1982), *Wolverton v. Schweiker*, 533 F. Supp. 420 (D.Ct. Id., 1982), and *Photo Data, Inc. v. Sawyer*, 533 F. Supp. 344 (D.D.C., 1982).

Subsequent authority buttresses my earlier conclusion. Thus, in *Tyler Business Services v. NLRB*, supra, the United States Court of Appeals for the fourth Circuit found pre-October 1, 1981 fees and expenses recoverable, stating that "The Act's test for recovery for attorney fees is whether the case was pending on or after October 1, 1981, and not when the fees were incurred."[16] Most persuasive, I believe, is the decision by Judge Bryant for the United States District Court for the District of Columbia in *Nunes-Correia v. Haig*, 543 F.Supp 812 (1982). Recognizing that prior to the passage of EAJA, "the doctrine of sovereign immunity barred fee awards against the United States absent clear or express statutory authority to the contrary"[17] and responding to the

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[15] See *Tyler Business Services v. NLRB*, 695 F.2d 73, 75-76 (4th Cir. 1982), where the court concluded that the fact that "the government's preliminary decision to institute an administrative proceeding may not justify an award of attorney's fees . . . . would not precluded an award, if at subsequent stages of the administrative process . . . it appears that the government's position at these levels of litigation was not substantially justified.

[16] The court cited *Hutto v. Finney*, 437 U.S. 678, 694 fn. 23 (1978), and *Bradley v. School Board*, 416 U.S. 696, 711-721 (1974), noting that " the statutes involved in those cases and the Equal Access to Justice Act address similar concerns," making the rationale of those cases applicable to EAJA cases. The Board has filed a petition for rehearing and a suggestion rehearing en banc in the *Tyler* case.

[17] *Alyeska Pipeline Co. v. Wilderness Society*, 421 U.S. 240,267-268 (1975).

Government's argument that no language in EAJA expressly or unequivocally waived sovereign immunity retoractively, Judge Bryant stated that he was inclined "to hold that the plain language of the statute explicitly authorizes fees for pre-October 1, 1981 work" and to find any alternative construction of the Act "strained." However he found it unnecessary to reach that holding, concluding from the Congressional Budget Office (CBO) cost estimates that Congress intended EAJA to apply to pre-October 1, 1981 fees and expenses. He stated, in an analysis worth repeating here, the following:

> According to the government, had Congress expected parties to be able to recover pre-October 1, 1981 fees in pending cases, Congress would have forcasted substantially greater expenditures during the Act's first year, when old cases such as the one here with large accumulated legal fees were being decided or settled, than in the Act's second or subsequent years. The statistical reasoning underlying this argument is flawed. Since, *ceteris paribus*, the distribution of long-lived and short lived cases terminated in 1982 and each subsequent year will remain constant, awarding fees for the entire litigation in cases pending on or after October 1, 1981 can be expected to result in constant expenditures over the years.
>
> If, however, the Act does not cover pre-October 1981 work in pending cases, the estimated total payout will increase with the amount of post-October 1981 work performed in the cases. Since cases filed a long time before October 1, 1981 and terminated shortly after October 1981 will present less post-October 1981 work than cases terminated many years after 1981, under this assumption annual expenditures will rise sharply during the Act's first years, and then level off.
>
> In fact, the Congressional Budget Office predicted that the annual expenditures under the Equal Access to Justice Act will vary directly with the number of cases terminated each year. In addition, the CBO assumed that the cost will increase as a result of increases in the federal caseload generally and as a result of inflation. Finally, the CBO predicted that the Act's incentive structure will over time increase the size of the awards and the number of cases in which awards are made. H.R.Rep. No. 1418, 96th Cong. 2d Sess. 21 reprinted in [1980] U.S. Cong. & Ad. News 4943, 4984, 5000 ("House Report").
>
> When Congress passed the Equal Access to Justice Act, it had available the CBO estimate. Congress' acceptance of that estimate's assumption that the cost of the Act would vary only with cases' temination rate, inflation, and the Act's incentive effect, demonstrates that Congress clearly intended the Act to authorize fees for work performed before October 1, 1981.[18]

Judge Bryant further stated, in *Nunes-Correia*, that he would have reached the same conclusion even absent the CBO estimate, citing *Bradley v. School Board*, 416 U.S. 696 (1973); *Hutto v. Finney*, 436 U.S. 678 (1977); and related cases. Judge Bryant noted that the Supreme Court had applied the fee recovery statutes involved on these cases retroactively even in the absence of statutory language and legislative history. As he pointed out, the case for retroactive fees and expense is stronger under EAJA than it was under the statute involved in *Bradley* (providing for attorney fees in desegregation cases), which did not contain the "pending on or after" language of EAJA.

Accordingly, I must conclude that recovery of the fees and expenses incurred by the Applicant prior to October 1, 1981, is not barred by the statute.

E. *Recovery of Fees and Expenses Incurred in Prosecuting the EAJA Application*

Included in the fees and expenses sought by the Applicant are those that it incurred in prosecuting this EAJA application. The General Counsel argues that such fees and expenses are not recoverable because they were not incurred "in connection with an adversary adjudication" within the meaning of the Board's Rules, Sections 102.114 and 102.143. The General Counsel further argues that these fees and expenses should not be recoverable because the EAJA proceeding was a significant and discrete portion of the underlying proceeding where its positions, involving important issues of first impression, were clearly reasonable.

EAJA, itself, is silent on the question of whether the fees and expenses incurred in a proceeding under its terms are themselves recoverable. I believe that if the rights granted by EAJA are to have any meaning, such fees and expenses must be considered recoverable whenever the Government's position in the underlying proceeding lacks substantial justification. To hold otherwise would, in many cases, severely impinge on the value of the right granted by Congress and discourage otherwise prevailing litigants from contesting unreasonable governmental actions, contrary to the stated purposes of the Act. The only court to consider this question, the Fourth Circuit in *Tyler Business Services*, supra, reached this same conclusion, analogizing this case to cases under the Civil Rights Act of 1964, Pub. L. 88-352, 78 Stat. 241, 42 U.S.C.A. § 2000 et seq., where such recovery is permitted.[19]

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[18] As the Government had in *Nunes-Correia*, the General Counsel here argued in both its motion to dismiss and in its answer that the CBO estimates support its arguments against retroactivity. In denying its motion to dismiss, I had included:

> The estimates [$154 million in the first fiscal year, $187 million in the second, and $228 million in the third] were based upon projections of the number of proceedings which would terminate in each year and the increases therein were expressly projected on the basis of anitcipated growth in the ammount of litigation and in the cost of living. They do not appear to have been projected upon different lengths of time during which the fees and expenses may have been incurred. As argued by Respondent, had the CBO intended to encompass only those fees and expenses incurred in the first year of Act's effectiveness, rather than all of the expenses and fees incurred in all of the cases closed in that year, its estimates for [the first fiscal year] would have been much lower than its estimates of cost for the following years.

[19] See *Young v. Kenley*, 641 F.2d 192, 195 (4th Cir. 1981); *Manhart v. City of Los Angeles*, 652 F.2d 904, 909 (9th Cir. 1981); *Love v. Mayor, City*

Continued

Accordingly I must reject the General Counsel's objection to the granting of the fees and expenses incurred in connection with the EAJA application.

F. *The Applicant's Fees and Expenses*

Applicant sought reimbursement, at the rate of $75 per hour, less than his normal billing rate, for 258 hours expended by Applicant's principle counsel, Richard H. Markowitz, in the litigation of the underlying case. It also sought compensation for 10.75 hours expended by Markowitz in regard to the EAJA application. Included within the 258 hours involved in the underlying case were 163.5 hours expended between the issuance of complaint and September 1980. I have previously found that the General Counsel's position in the litigation, insofar as it concerned alleged violations of the literal terms of the hiring hall rules with respect to the acquistion of priorities and referrals pursuant to such priorities, was substantially justified notwithstanding that this position was ultimately determined to be erroneous. While no precise calculation is possible, it would appear that that theory amounted to approximately 50 percent of the General Counsel's case. The remaining 50 percent, to that point in time, consisting of its allegations concerning callbacks amd direct hires, which allegations I found to be without substantial justification. Accordingly, because it was September 22, 1980, when the General Counsel abandoned its priority based theory and commenced to argue a broader theory based on the statistical analysis of the hiring hall records, which theory I have found to be without substantial justification, I shall reduce the fees to which Applicant is entitled by 50 percent of those sought for time spent between January 25, 1978, and September 22, 1980, thus, reducing the allowable compensable hours by 81.75 hours. Additionally, on my own motion I will disallow the 2 hours claimed for Markowitz' time spent at the resumption of the hearing on its final day, January 22, 1980. While that resumption had been scheduled to hear the General Counsel's rebuttal testimony, the General Counsel had earlier indicated that there would be no such testimony. Respondent then used the time to argue on the record for fees and expenses, a position that was unsupported by then-exisiting law. The Union's motion was also presented in its brief to me. Oral presentation of the motion was unnecessary and resulted in unnecessary expenditures of time and money for all concerned. It would therefore be unjust to permit the Applicant to recover attorney fees for time thus expended.

I therefore conclude that the Applicant is entitled to the attorney's fees for Richard H. Markowitz for 185 hours at the rate of $75 per hour, a total of $13,875.

Applicant seeks attorney's fees, at $65 per hour, for services performed by William T. Josem, an associate of Markowitz, for a total 292 hours expended between September 8, 1980, and September 22, 1981 in regard to the underlying case and a total of 24.75 hours expended by Josem in regard to the EAJA application. In view of complexity of the issues and the volume of the extensive record here, I must conclude that an expenditure of 316.75 hours at a rate of $65 per hour is reasonable and that the Applicant is entitled to be reimbursed for these expenses, for a total of $20,588.75.

I find that the expenses incurred by the Applicant in regard to the litigation of both the underlying case and the EAJA application, which includes the photocopying of exhibits, the purchase of transcripts, postage, long-distance telephone calls, and witness fees, totaling $4063, is reasonable.

CONCLUSIONS

Accordingly, I find that the Applicant is entitled to the following

Attorney's fees:

Richard Markowitz—$13,875.
William T. Josem—$20,588.75

Expenses: $4,063
Total $38,526.75

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of Cheyenne, 620 F.2d 235, 247 (10th Cir. 1980); *Weisenberger v. Huecker*, 593 F.2d 49, 53-54 (6th Cir. 1979); *Johnson v. Mississippi*, 606 F.2d 635, 638-639 (5th Cir. 1979); *Lund v. Affleck*, 587 F.2d 75, 77 (1st Cir. 1978); and *Souza v. Southworth*, 564 F.2d 609, 614 (1st Cir. 1977).

International Brotherhood of Electrical Workers, Local 77 *and* Bruce-Cadet, Inc. Case 19-CB-6077

June 30, 1988

DECISION AND ORDER

BY CHAIRMAN STEPHENS AND MEMBERS JOHANSEN AND BABSON

On September 14, 1987, Administrative Law Judge Richard J. Boyce issued the attached decision. The General Counsel filed exceptions and a supporting brief, and the Respondent filed cross-exceptions and a reply brief.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings, and conclusions only to the extent consistent with this Decision and Order.

The charge filed in this case by the Employer, Bruce-Cadet, Inc., on March 16, 1987,[1] alleges that the Respondent, International Brotherhood of Electrical Workers, Local 77, violated Section 8(b)(1)(B) of the Act by commencing disciplinary proceedings against supervisors Dennis Dallas and James Reinkens "because said individuals directed the work of employees dispatched by Local 112 at the request of the [Employer] on work which had been claimed by both Local 112 and Local 77, as those individuals were instructed to do by the [Employer's president], who had made the decision to have the work done by Local 112 personnel."

The judge, applying the Supreme Court's recent decision in *NLRB v. Electrical Workers Local 340*, 107 S.Ct. 2002 (1987), found that there could be no 8(b)(1)(B) violation, because he concluded that the Respondent neither had a collective-bargaining relationship with the Employer nor aspired to one. We disagree with the judge and for the following reasons find that the Respondent violated Section 8(b)(1)(B) of the Act.

Bruce-Cadet is an electrical contractor working as a subcontractor on the Hanford Nuclear Reservation in the State of Washington. Bruce-Cadet is party to the Site Stabilization Agreement, an agreement between the International Unions of Building Trades and construction contractors at the Hanford site, which governs the terms and conditions of employment for all construction work at the site.

Bruce-Cadet employs members of Electrical Workers Local 112, a sister local of the Respondent, to do electrical work at the Hanford site. Local 112 is party to the Site Stabilization Agreement, pursuant to its membership in the National Trades Council. Local 112's jurisdiction is confined to inside or wireman's work. The Respondent, whose jurisdiction encompasses outside or lineman's work, is not party to the Site Stabilization Agreement.

George Elgin, Local 112's business manager, testified that the Site Stabilization Agreement caused problems between the Respondent and Local 112 regarding jurisdiction. Elgin testified that the problem was primarily a result of the fact that the Respondent was not party to the Agreement and therefore there was no method for settling a jurisdictional dispute with the Employer.[2] Rather, the matter had to be resolved internally within the IBEW between the Respondent and Local 112. As a result, an informal agreement was reached that if Bruce-Cadet needed outside linemen, members of the Respondent would be cleared to work through Local 112.[3] This informal agreement was in place at the time the events transpired that led to the disciplinary charges being filed against Dallas and Reinkens.

Dennis Dallas and James Reinkens have been foremen for Bruce-Cadet for several years and are indisputably supervisors under Section 2(11) of the Act. As foremen, their duties include purchasing material, ordering men from the union hall, handling field disputes such as straightening out wage questions, dealing with jurisdictional problems, and, in general, handling everything in the field. Dallas

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[1] All dates refer to 1987 unless otherwise specified.

[2] The Site Stabilization Agreement provides:

> JURISDICTIONAL DISPUTES
>
> Section 1. The parties hereto agree that all jurisdictional disputes over division of work with crafts affiliated with the Building and Construction Trades Department, AFL-CIO, will be assigned and settled in accordance with the procedural rules and regulations of the Impartial Jurisdictional Disputes Board under the Plan for Settlement of Jurisdictional Disputes in the Construction Industry, effective June 1, 1977 or any successor plan. All signatory contractors agree to be stipulated to the procedures of the Impartial Jurisdictional Disputes Board for work performed under this AGREEMENT.
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> Section 2. In the event of any dispute as to Jurisdiction of work covered by the terms of this AGREEMENT being claimed by UNIONS other than those affiliated with the Building and Construction Trades Department, AFL-CIO, then such disputes shall be referred to the International Unions involved, for determination by whatever procedure they may adopt and work shall proceed as assigned by the individual EMPLOYER until such determination by the International Unions. Any given jurisdictional determination shall be implemented immediately by the individual EMPLOYER involved.

[3] The parties stipulated that Bruce-Cadet obtains linemen under the understanding "sporadically." Elgin testified that he knew of at least two and possibly more times that it may have happened. Elgin further testified that the agreement is still in place and that within the 2-month period prior to the hearing the Respondent's members have been dispatched through Local 112's hiring hall to Bruce-Cadet for the purpose of performing electrical work.

289 NLRB No. 65

and Reinkens both testified that they had the responsibility of determining whether work should be done by members of the Respondent or members of Local 112. Although a grievance has never arisen under Bruce-Cadet's labor agreement, first-level responsibility for resolution of the grievance would lie with the foremen. Bruce Mackebon, owner of Bruce-Cadet, testified, however, that he would have final authority to resolve any issues involving money. Along with their foremen responsibilities, Dallas and Reinkens both work with tools on the job as well.[4] Both men are members of Local 112.

On February 2 the Respondent filed disciplinary charges against Dallas and Reinkens, alleging that they violated certain provisions of the parent International's constitution.[5] The charges alleged that Dallas and Reinkens violated the Respondent's jurisdiction and "did knowingly and repeatedly do work that belonged to Local #77," thus causing economic harm to the Respondent's members. After trial on May 12, which neither Dallas nor Reinkens attended, the Respondent informed them that they had been found guilty and were being fined $2000 each, with $1800 suspended, and placed on 2 years' probation.

The charges against Dallas and Reinkens stemmed from a dispute concerning linework in the 100-D, 200-E, and 300 areas of the Hanford site. According to the Respondent's business agent, Frank LaFaire, after hearing that outdoor work was being done on the Hanford site he visited the site and "noticed they had two ladders up a pole . . . and observed that there was a wire on the ground that they had just pulled out." LaFaire testified that such work is lineman's work, stating that "All wood-pole construction is ours, whether it's low voltage or high voltage." LaFaire stated that the charges against Dallas and Reinkens were also based on reports by other members of the Respondent that the two men were performing work that belonged to members of the Respondent.

Dallas and Reinkens both testified about the scope of their duties and the nature of the work; however, neither man was specifically asked if he engaged in the work that LaFaire allegedly witnessed. Dallas described the work at the 300 area as an electrical upgrade of the emergency system and the 200-E job as a rerouting of a high-voltage line, the routing of a low-voltage line, and the rehooking of a low-voltage line. Dallas testified that he determined that Local 112 members could do the low-voltage work, but that he obtained linemen to do the high-voltage work. Dallas stated that while he was not certain whether the Respondent traditionally claimed the low-voltage work, Local 112 had done that type of work in the past.

Local 112's business representative, Elgin, testified that after LaFaire observed the pole work being done at the worksite, LaFaire spoke to him about Bruce-Cadet's failure to use linemen to set poles. On learning of the problem, Elgin contacted Bruce Mackebon, and resolved the problem by persuading Mackebon that linemen should do the work.

It is the General Counsel's contention that the Respondent violated Section 8(b)(1)(B) by disciplining Dallas and Reinkens for their role in interpreting the informal agreement between the parties and assigning the work to employees represented by Local 112 rather than the Respondent.[6] The Respondent contends, on the other hand, that there can be no 8(b)(1)(B) violation here as it does not have a collective-bargaining agreement with Bruce-Cadet. Furthermore, the Respondent asserts that it did not bring disciplinary action against Dallas and Reinkens because of their 8(b)(1)(B) activities, but because they violated the International's constitution by performing work that belonged to the Respondent.

Before addressing the parties' contentions, a brief overview of the development of the law under Section 8(b)(1)(B) is in order. Section 8(b)(1)(B) of the NLRA provides:

> It shall be an unfair labor practice for a labor organization or its agents—
>
> (1) to restrain or coerce . . . (B) an employer in the selection of his representatives for the purpose of collective bargaining or the adjustment of grievances . . . .

Originally, the Board construed Section 8(b)(1)(B) as prohibiting only union pressure applied directly to an employer forcing the employer to select a certain representative. The Board, however, expanded its interpretation of Section 8(b)(1)(B) in *San Francisco-Oakland Mailers' Local 18 (Northwest Publications)*, 172 NLRB 2173 (1968), by finding that a union violates Section 8(b)(1)(B) when it disciplines an employer-representative for the manner in which the representative performs

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[4] Pursuant to the Site Stabilization Agreement, it is within the Employer's discretion to allow foremen to work with tools on the job.

[5] The International's constitution was not offered into evidence.

[6] The General Counsel also asserts that the Respondent selectively enforced its constitution by disciplining only Dallas and Reinkens for performing work that allegedly belonged to members of the Respondent when it was aware that other employees of Bruce-Cadet were performing the same work. We find no merit in the General Counsel's assertion as we agree with the judge that the General Counsel failed to show that the Respondent had knowledge of other employees doing the work in question. Absent knowledge of other individuals performing the work, there can be no selective enforcement.

8(b)(1)(B) duties. The Board reasoned that when a union attempts to compel an employer's foremen to take prounion positions in interpreting the collective-bargaining agreement it interferes with the employer's control over its representatives. As a result, the employer is faced with having to replace its foremen "or face de facto nonrepresentation by them." Id. at 2173. The Board's decision in *Oakland Mailers* significantly expanded the scope of Section 8(b)(1)(B) by recognizing indirect coercion of the employer's selection of a representative and by recognizing that contract interpretation duties are so closely related to collective-bargaining duties as to make them also 8(b)(1)(B) activities.

In *Florida Power & Light v. Electrical Workers Local 641*, 417 U.S. 790 (1974), the Supreme Court assumed, "without deciding," that *Oakland Mailers* fell within the "outer limits" of an appropriate test for 8(b)(1)(B) coercion where union discipline of a supervisor-member is concerned—namely, whether "that discipline may adversely affect the supervisor's conduct in performing the duties of, and acting in his capacity as, grievance adjuster or collective bargainer on behalf of the employer." 417 U.S. at 804–805.[7] Subsequently, in *American Broadcasting Co. v. Writers Guild*, 437 U.S. 411 (1978), the Court embraced the *Oakland Mailers* indirect coercion test that it had accepted only arguendo in *Florida Power*. 437 U.S. at 429–430.

More recently, in *NLRB v. Electrical Workers Local 340*, supra, the Supreme Court declined to uphold the Board's finding that a union violates Section 8(b)(1)(B) by discipling supervisor-members merely for working for an employer who has no collective-bargaining agreement with the union; but it did not retreat from its acceptance of *Oakland Mailers*. Thus, while rejecting the view that a union violates Section 8(b)(1)(B) through discipline of members that merely restricts the pool of supervisors from which an employer might choose a representative for the purposes of grievance adjustment or collective bargaining, the Court agreed that union discipline of a member is prohibited under Section 8(b)(1)(B) "when that member is engaged in § 8(b)(1)(B) activities—that is collective bargaining, grievance adjustment, or some other closely related activity (e.g., contract interpretation, as in *Oakland Mailers)*." 107 S.Ct. at 2010. The Court thereby rejected the Board's "reservoir doctrine,"[8] which did not require that a disciplined supervisor actually have the authority to engage in 8(b)(1)(B) functions on behalf of the allegedly coerced employer. The Court also held that a critical element of an 8(b)(1)(B) violation is the existence of a collective-bargaining relationship—either actual or prospective—between the union-respondent and the employer that is allegedly coerced in its choice of 8(b)(1)(B) representatives. In the absence of such a bargaining relationship, the Court concluded, the possibility that union discipline of supervisor-members would coerce the employer is "too attenuated to form the basis of an unfair labor practice charge." 107 S.Ct. at 2012.

Applying *Electrical Workers Local 340* to the facts of this case, the judge below dismissed the complaint, reasoning that

> [a] bargaining relationship is lacking, the record contains no substantial evidence that Respondent aspired to one at relevant times, the reservoir doctrine is no more, and the status of Dallas and Reinkens otherwise as 8(b)(1)(B) grievance adjusters is shaky in light of the Court's observations . . . .

We disagree with the judge's application of *Electrical Workers Local 340* to the facts before us.

As the Supreme Court concluded, a benchmark requirement for finding an 8(b)(1)(B) violation is that the union either have a collective-bargaining relationship with the employer or be seeking to establish one. Admittedly, there is no signed collective-bargaining agreement between Bruce-Cadet and the Respondent; however, a closer look at the facts reveals that there is a relationship between the two parties sufficient to satisfy the *Electrical Workers Local 340* requirement. Here, both the Respondent's sister local, Local 112, and the parent International union are signatories to a collective-bargaining agreement with Bruce-Cadet. That agreement specifically provides that when jurisdictional disputes arise involving unions not party to the Site Stabilization Agreement, the dispute shall be submitted to the appropriate International union for resolution and, once the dispute is resolved, the employer shall abide by that resolution. That is exactly what happened here. A jurisdictional dispute arose concerning the electrical linework for Bruce-Cadet. Local 112's members, who were employed by Bruce-Cadet, had an interest in performing the work, as did the Respondent's members, who, pursuant to their jurisdiction granted by the International, had jurisdiction of all outside linework in that geographic area. Because the Respondent was not party to the collective-bargaining agreement, the dispute was submitted to the International for resolution. The International, along with the Respondent and Local 112, resolved the situation, in an informal agreement, by deciding Local 112 would refer members of the Respondent to Bruce-Cadet to do linework. Bruce-Cadet willingly accepted this resolution as directed to do so by the Site Stabilization Agreement. Thus, by creating this arrangement, the parties established a relationship between the Respondent and Bruce-Cadet for the purposes of enabling the Respondent's members to do linework for Bruce-Cadet.

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[7] The Court declined to uphold the Board's order in that case because it concluded that disciplining supervisors solely for crossing picket lines to perform rank-and-file work during a strike did not interfere with an employer's control over his supervisors' performance of 8(b)(1)(B) functions, i.e., collective bargaining or grievance adjustment or related activities.

[8] This doctrine was first developed in *Toledo Lithographers Locals 15-P and 272 (Toledo Blade Co.)*, 175 NLRB 1072 (1969), enfd. 437 F.2d 55 (6th Cir. 1971). Although the Court in *Florida Power*, supra, 417 U.S. at 811 fn. 21, commented on the difference between those who are merely supervisors within the meaning of Sec. 2(11) of the Act and those who possess authority to engage in 8(b)(1)(B) functions, it did not directly pass on the "reservoir doctrine"; but the Court in *Electrical Workers Local 340* squarely rejected it. 107 S.Ct. at 2010. Our decision in this case in no way rests on the "reservoir doctrine" because, as we explain below, Supervisors Dallas and Reinkens not only possessed authority to engage in a form of collective bargaining—i.e., contract interpretation and administration on behalf of the Employer—they were actually disciplined by the Respondent for their performance of this function.

The Respondent argues that the informal agreement does not rise to the level of a collective-bargaining agreement and that therefore there can be no 8(b)(1)(B) violation. We find it unnecessary to determine whether the informal agreement, by itself, would rise to the level of a collective-bargaining agreement enforceable in law, as it is apparent that the parties abided by the informal agreement, as directed to under the Site Stabilization Agreement, and, by doing so, established a collective-bargaining relationship whereby the Respondent's members were able to perform linework for Bruce-Cadet.

Having determined that a collective-bargaining relationship existed between the parties, we now turn to the question of whether Dallas and Reinkens were disciplined for their activities in carrying out 8(b)(1)(B) contract interpretation duties or, as claimed by the Respondent, for performing work belonging to the Respondent. For the reasons set forth below, we find that they were fined for carrying out 8(b)(1)(B) duties.

The Respondent claims that it fined Dallas and Reinkens for performing work that belonged to the Respondent. At the time that Dallas and Reinkens were fined, however, the Respondent had no claim to Bruce-Cadet work except as granted through the informal agreement and the Site Stabilization Agreement. These agreements, however, did not specifically state who was entitled to do the work. Consequently, it was necessary to interpret the agreements to determine whether the work performed by Dallas and Reinkens belonged to the Respondent or to Local 112. Dallas and Reinkens, in carrying out their responsibilities, interpreted the agreements and determined that the work in question could be done by members of Local 112. Having so determined, they proceeded to do the work.

Under the circumstances, we find that Dallas and Reinkens were fined because they determined that the work in question belonged to Local 112 and, pursuant to that determination, assigned the work to members of Local 112. The Respondent was actively pursuing the work; Dallas and Reinkens had the authority to determine, on their employer's behalf, who should perform the work; Dallas and Reinkens made that decision, adverse to the interests of the Respondent; and they were subsequently fined by the Respondent. The Respondent's assertion that Dallas and Reinkens were fined only for doing work belonging to the Respondent ignores the context in which the discipline was imposed.[9] Consequently, we find that Dallas and Reinkens were fined for their role in interpreting the informal agreement and the Site Stabilization Agreement in determing that the work in question belonged to members of Local 112.[10] Because, as in *Oakland Mailers*, that discipline constituted a direct punishment for the manner in which Dallas and Reinkens carried out 8(b)(1)(B) duties for Bruce-Cadet, we find that the Respondent violated Section 8(b)(1)(B) by imposing that discipline, and we order the Respondent to take action set forth in our Order, below.[11]

ORDER

The National Labor Relations Board orders that the Respondent, International Brotherhood of Electrical Workers, Local 77, Seattle, Washington, its officers, agents, and representatives, shall

1. Cease and desist from

(a) Fining, placing on probation, or otherwise disciplining Dennis Dallas and James Reinkens, or any other representative of Bruce-Cadet, Inc., for their performance of 8(b)(1)(B) duties.

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[9] We do not question the Respondent's belief that the work Dallas and Reinkens were performing belonged to its members; however, as the agreements had to be interpreted to determine who was entitled to the work, the Respondent was not free to impose its position on the Employer by fining the Employer's representatives. The fact that subsequent to the incidents that gave rise to Dallas and Reinkens being fined, the Respondent, Local 112, and Bruce-Cadet reached an understanding that members of the Respondent were entitled to do the pole work, does not support the Respondent's claim that Dallas and Reikens were fined for doing work belonging to the Respondent's members. Indeed, the subsequent understanding supports the conclusion that the agreements had to be interpreted to determine which Local was entitled to the work.

[10] In light of our finding that Dallas and Reinkens were fined for performing contract interpretation duties, we find it unnecessary to pass on their status as 8(b)(1)(B) grievance adjusters.

[11] The General Counsel's request for a visitatorial clause is denied as the circumstances of this case do not "demonstrate a likelihood that [the] [R]espondent will fail to cooperate or otherwise evade compliance." See *Cherokee Marine Terminal*, 287 NLRB 1080 (1988).

(b) In any like or related manner restraining or coercing Bruce-Cadet, Inc. in the selection and retention of its representatives for the purposes of collective bargaining or the adjustment of grievances.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Rescind the fines levied against Dennis Dallas and James Reinkens.

(b) Refund to Dennis Dallas and James Reinkens any moneys held on account of the fines assessed against them with interest to be computed in the manner prescribed in *New Horizons for the Retarded.*[12]

(c) Restore Dennis Dallas and James Reinkens to membership in good standing and remove all records of the fines against Dallas and Reinkens and their probation from its files.

(d) Post at its offices and meeting halls and other places where notices to its members are customarily posted copies of the attached notice marked "Appendix."[13] Copies of the notice, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to members are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material.

(e) Notify the Regional Director in writing within 20 days from the date of this Order what steps the Respondent has taken to comply.

APPENDIX

NOTICE TO MEMBERS
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

WE WILL NOT fine, place on probation, or otherwise discipline Dennis Dallas and James Reinkens, or any other representative of Bruce-Cadet, Inc., for their performance of 8(b)(1)(B) duties.

WE WILL NOT in any like or related manner restrain or coerce Bruce-Cadet, Inc. in the selection and retention of its representatives for the purposes of collective bargaining or the adjustment of grievances.

WE WILL rescind the fines levied against Dennis Dallas and James Reinkens.

WE WILL refund to Dennis Dallas and James Reinkens any moneys held on account of the fines assessed against them, with interest.

WE WILL restore Dennis Dallas and James Reinkens to membership in good standing and remove all records of the fines against them.

INTERNATIONAL BROTHERHOOD OF
ELECTRICAL WORKERS, LOCAL 77

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[12] In accordance with our decision in *New Horizons for the Retarded*, 283 NLRB 1173 (1987), interest on and after January 1, 1987, shall be computed at the "short-term Federal rate" for the underpayment of taxes as set out in the 1986 amendment to 26 U.S.C. § 6621. Interest on amounts accrued prior to January 1, 1987 (the effective date of the 1986 amendment to 26 U.S.C. § 6621), shall be computed in accordance with *Florida Steel Corp.*, 231 NLRB 651 (1977).

[13] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

S. Nia Renei Cottrell, Esq., for the General Counsel.
Richard Robblee, Esq. (Hafer, Price, Rinehart & Schwerin), of Seattle, Washington, for the Respondent.
Bruce Mackebon, of Kennewick, Washington, for the Charging Party.

DECISION

STATEMENT OF THE CASE

RICHARD J. BOYCE, Administrative Law Judge. This matter was tried in Kennewick, Washington, on 25 June 1987.[1] The charge was filed by Bruce-Cadet, Inc., on 16 March 1987. The complaint, issued on 22 April, alleges that International Brotherhood of Electrical Workers, Local 77 (Respondent) violated Section 8(b)(1)(B) of the National Labor Relations Act (Act) about 19 February 1987 by:

> Fil[ing] charges against [Dennis] Dallas and [James] Reinkens because said individuals performed supervisory functions for Bruce-Cadet, which does not have a collective-bargaining relationship with [Respondent] and does not employ members of [Respondent].[2]

I. JURISDICTION AND LABOR ORGANIZATION

Bruce-Cadet is an electrical contractor in Kennewick. The parties agree and I find that it is an employer engaged in and affecting commerce within Section 2(2), (6), and (7) of the Act.

The parties also agree and I find that Respondent is a labor organization within Section 2(5) of the Act.

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[1] This manner of setting forth dates conforms with the wishes of the Board.

[2] Sec. 8(b)(1)(B) provides: "It shall be an unfair labor practice for a labor organization . . . to restrain or coerce . . . an employer in the selection of his representatives for the purposes of collective bargaining or the adjustment of grievances."

II. THE ALLEGED MISCONDUCT

A. *Facts*

Dallas and Reinkens have been foremen for Bruce-Cadet for several years. They indisputably are supervisors for purposes of the Act.

Bruce-Cadet is party to a labor agreement with a sister local of Respondent, Electrical Workers Local 112. Local 112's jurisdiction is confined to inside or wiremen's work. As the complaint acknowledges, Bruce-Cadet does not have a bargaining relationship with Respondent, whose jurisdiction encompasses outside or linemen's work. Dallas and Reinkens accordingly belong to Local 112, but not Respondent.

Much of Bruce-Cadet's work is as a subcontractor on the Hanford Nuclear Reservation in the Tri-Cities area of Washington.[3] It and Local 112, but not Respondent, are among several contractors and labor organizations subject to a Site Stabilization Agreement, so called, which dictates terms and conditions of employment for construction work at Hanford.[4] Local 112's business manager, George Elgin, testified that this agreement "created considerable problems in jurisdiction" between Respondent and his local; and that the two locals and Bruce-Cadet consequently fashioned an informal understanding whereby Respondent provides linemen through Local 112's hiring hall when Bruce-Cadet needs outside electricians at Hanford.[5]

On 2 February 1987, Respondent's business agent, Frank LaFaire, preferred two disciplinary charges against Dallas and one against Reinkens, alleging that they had violated article XXVII, section I, subsections 1 and 7, of the parent International's constitution since October 1986. The constitution is not in evidence.

One of the charges against Dallas elaborated:

> Brother Dallas repeatedly violated Local 77's jurisdiction, setting poles, cable splicing, terminations, etc. He was told on several occasions that he was doing our work but did not cooperate with us. I talked to Local #112 business manager and to the owner of the company both with negative results.

The other charge against Dallas and that against Reinkens was identical, alleging that each, "along with" the other, "did knowingly and repeatedly do work that belonged to Local #77," thus causing "economic harm to our members."

By letters dated 19 February, Respondent's recording secretary informed Dallas and Reinkens of the charges and that they were to appear before Respondent's trial board in Seattle on 17 March to answer them. The letters depicted the allegedly violated constitutional provisions as follows:

> Article XXVII, Sec. 1, subsection (1): Violation of any provision of this Constitution and the rules herein, or the bylaws, working agreements, or rules of a L.U. local union.
>
> Subsection (7): Wronging a member of the IBEW by any act or acts (other than the expression of views or opinions) causing him physical or economic harm.

Respondent later acceded to the requests of Dallas and Reinkens that the proceeding be moved to the Tri-Cities, and the trial board convened in Kennewick on 12 May. Neither Dallas nor Reinkens attended. Respondent subsequently informed them that they had been found guilty as charged and were being fined $2000 each, with $1800 suspended, and placed on 2 years' probation.

The conduct for which Dallas and Reinkens ostensibly were charged took place in the 100-D, 200-E, and 300 areas at Hanford. The three projects ran from about October 1986 to February 1987, and Dallas and Reinkens worked with the tools on all.[6] One involved pulling new conductors up poles and hooking up disconnects, another dealt with setting several poles and rerouting a high line, and the other consisted of upgrading an emergency electrical system.

LaFaire testified that, having heard that Dallas and another wireman (not Reinkens) were doing linemen's work, he visited one of the sites on 2 February and "noticed they had two ladders up a pole." He continued:

> I drove up there and observed the wire [on the] ground that they had just pulled out. They had two ladders up a pole that they had just pulled this wire out. It was disconnected by the line crew at Rockwell, and they pulled the wire from the pole to the switch house.

LaFaire added that this is linemen's work, explaining, "All wood-pole construction is ours, whether it's low voltage or high voltage."

LaFaire did not cite an instance in which he saw Reinkens encroach on Respondent's jurisdiction, and conceded that some of the conduct underlying his charges "was reported by other people." He denied that the charges were prompted in any way by Dallas' or Reinkens' performance of supervisory duties. Asked, then, why he preferred charges against only them, he replied (in seeming contradiction of his testimony elsewhere that he saw and heard about Dallas and another wireman in flagrante delicto) that he "didn't witness any other employees doing it" and that "they were the only two that were involved with [seen by] the witnesses."

The record does not conclusively establish whether Dallas and Reinkens in fact violated Respondent's jurisdiction. Neither denied doing so, however, and the evidence overall raises a respectable likelihood that they did. Local 112's Elgin testified that LaFaire spoke to him in December 1986 or January 1987 about Bruce-Cadet's failure to use linemen to set poles in the 100-D area; and that he consequently prevailed upon Dallas, Reinkens, and Bruce-Cadet's owner/general manager, Bruce Mackebon, to have linemen complete the work.

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[3] The Tri-Cities consist of Richland, Kennewick, and Pasco.

[4] The agreement, entered into on 10 September 1984, runs from year to year, renewing automatically absent timely notice to the contrary. Signatory parties are J. A. Jones Construction Services Company, Morrison-Knudsen Company, and Building & Construction Trades, AFL-CIO.

[5] Previous to this understanding, apparently reached in 1985, Bruce-Cadet had denied Respondent's request that they enter into a labor agreement covering outside work. The parties stipulated that Bruce-Cadet obtains linemen under the understanding "sporadically"; and Elgin testified, "I know of at least twice, and I believe three times, and it may have been more."

[6] The agreement between Bruce-Cadet and Local 112 permits a supervisor to work with the tools as long as the crew under him does not exceed five employees. Apparently all the projects in question qualified.

Regarding Dallas' and Reinkens' duties as foremen, Mackebon testified: "They purchase material; they order men from the union; they handle any . . . field disputes." Asked what he meant by field disputes, Mackebon replied:

> I remember one recent situation where a man said he was not being paid the proper amount, so they [Dallas or Reinkens] called the office and got it straightened out so that everybody is happy.

Mackebon added that Dallas and Reinkens deal with jurisdictional problems "right on the spot," and in general "handle everything in the field except what [he] would call top-level management functions."[7] Mackebon testified that, while a grievance has never arisen under Bruce-Cadet's labor agreement, first-level responsibility for resolution would lie with Dallas and Reinkens should it happen. Mackebon would take over should they not settle the matter, he went on, and "final authority would rest with" him in any case "if it involved money."

B. *Conclusion*

After the present complaint issued, but before trial, the Supreme Court markedly narrowed the scope of Section 8(b)(1)(B) with its decision in *NLRB v. Electrical Workers IBEW Local 340.*[8]

Previous to that decision, the Board had taken the view that "persons who are supervisors within the meaning of the Act are employer representatives within the meaning of Section 8(b)(1)(B)" even if not "actually vested with authority to act for [their] employer in collective bargaining or the adjustment of grievances."[9] It reasoned that "such individuals form the logical 'reservoir' from which the employer is likely to select his representatives for collective bargaining or grievance adjustment."[10]

A union consequently violated 8(b)(1)(B), under prior Board law, when it visited disciplinary sanctions on a supervisor-member "unless the offense occasioning the discipline involved a matter purely of internal union administration, unrelated, either directly or indirectly, to any dispute between the union and the employer," or unless the "supervisor-member [was] disciplined after he [had] engaged in more than a minimal amount of rank-and-file work during a strike."[11] By matters of internal union administration, the Board contemplated such as "failing to pay . . . union dues or . . . disturbing a union meeting."[12]

Further, the Board read the word "grievances" in 8(b)(1)(B), and in the Section 2(11) definition of supervisors, to embrace employee grievances unrelated to collective bargaining.[13] This meant, the so-called reservoir doctrine aside, that a supervisor who dealt with employee complaints or problems relating to wage rates, job assignments, time off, etc., was an 8(b)(1)(B) grievance adjuster.[14]

These several principles applied regardless of the existence of a collective-bargaining relationship.[15] Were they still intact, I would have little difficulty concluding that Respondent violated Section 8(b)(1)(B) as alleged. Dallas and Reinkens, as supervisors, would be deemed grievance adjusters by virtue of the reservoir doctrine; and Respondent's actions against them did not involve matters "purely of internal union administration," nor did they have anything to do with the performance of rank-and-file work during a strike. Even without the reservoir doctrine, this same result would have obtained, for Dallas and Reinkens in fact were authorized to adjust certain grievances—having to do with wage rates, for instance—thus satisfying the Board's definition of grievance adjusters, regardless.

In *NLRB v. Electrical Workers IBEW Local 340*, however, the Supreme Court declared:[16]

> We conclude that discipline of a supervisor-member is prohibited under § 8(b)(1)(B) only when that member is engaged in § 8(b)(1)(B) activities—that is, collective bargaining, grievance adjustment, or some other closely related activity . . . . [A] supervisor cannot be disciplined for acts or omissions that occur during performance of Sec. 8(b)(1)(B) duties if he or she has none. *We therefore reject the NLRB's "reservoir doctrine."* [*Emphasis added.*][17]

The Court continued, overriding the Board in another critical respect:[18]

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[7] Regarding jurisdictional problems, Reinkens described an instance in which he and representatives of Local 112 and a general contractor "hammered out a deal" to stop the general contractor's use of carpenters on electrical work.

[8] 107 S.Ct. 2002 (1987).

[9] *Electrical Workers IBEW Local 113 (Pride Electric)*, 283 NLRB 39, 41 (1987), and cases there cited.

[10] Ibid.

[11] Ibid.

[12] Ibid.

[13] Ibid.

[14] Ibid.

[15] Ibid.

[16] At 107 S.Ct. 2010.

[17] Moreover, although not passing on the Board's definition of 8(b)(1)(B) grievances, the Court suggested (at 107 S.Ct. 2012 fn. 12) that it is overbroad:

> The NLRB held in the alternative that because [the supervisor-member] did adjust *personal* grievances—as opposed to contract grievances—he qualified as a § 8(b)(1)(B) supervisor, even without application of the reservoir doctrine. . . . [W]e need not decide whether the Board's broad definition of grievance—and hence of "grievance adjustment"—is consistent with the narrow purpose and scope of § 8(b)(1)(B). We observe, however, that in *Florida Power* the Court said that grievance adjustment is a "particular and explicitly stated activity." 417 U.S. at 803. . . . Other sections of the . . . Act . . . similarly suggest a narrow meaning . . . . See also Comment, Union Discipline of Supervisor-Members, 1976 Wis. L. Rev. at 879 ("[I]n *Florida Power* the Supreme Court appears to have defined both [collective bargaining and grievance adjustment] very narrowly.").

[18] At 107 S.Ct. 2012.

> We find that the absence of a collective-bargaining relationship between the union and the employer, like the absence of § 8(b)(1)(B) responsibilities in a disciplined supervisor-member, makes the possibility that the Union's discipline of [supervisor-members] will coerce [their employers] too attenuated to form the basis of an unfair labor practice charge.

The Court concluded:[19]

> [U]nion discipline directed at supervisor-members without § 8(b)(1)(B) duties, working for employers with whom the union neither has nor seeks a collective-bargaining relationship, cannot and does not adversely affect the performance of § 8(b)(1)(B) duties. Consequently, such union action does not coerce the employer in its selection of § 8(b)(1)(B) representatives.

The unqualified tenor of these passages seemingly dictates open-and-shut dismissal of the present complaint. A bargaining relationship is lacking,[20] the record contains no substantial evidence that Respondent aspired to one at relevant times,[21] the reservoir doctrine is no more, and the status of Dallas and Reinkens otherwise as 8(b)(1)(B) grievance adjusters is shaky in light of the Court's observations reported above in footnote 17.

But, to dismiss at this point would be premature, for the Court articulated one exception to the requirement of an extant or sought-after bargaining relationship, and hinted at another:[22]

> Direct coercion of an employer's selection of a § 8(b)(1)(B) representative would always be a § 8(b)(1)(B) violation, whether or not the union has or seeks a bargaining relationship with an employer. This case does not present the question whether indirect coercion of an employer in its selection of a representative through a union's *selective* enforcement of a facially uniform rule would constitute a violation of § 8(b)(1)(B) without regard to whether the union has a bargaining relationship with the employer. The Court of Appeals has suggested that it might. See *NLRB v. International Brotherhood of Electrical Workers*, 714 F.2d at 872 ("The case may be different if there is evidence that the union's actual purpose in enforcing its bylaw was to interfere with the employer's selection.").

By "direct coercion," the Court presumably had in mind activities against an employer qua employer, such as picketing. The conduct in issue plainly is not of that character.

The question becomes, then, whether Respondent's actions against Dallas and Reinkens betray selective enforcement of the International constitution against supervisor-members for the purpose of interfering indirectly with Bruce-Cadet's choice of 8(b)(1)(B) representatives.[23] I conclude, on the record before me, that they do not. LaFaire's professed belief that Dallas and Reinkens had violated Respondent's jurisdiction probably was accurate; and, even if not, was not so flimsily based as to bespeak pretext. Further, although LaFaire initiated no action against the nonsupervisory wireman he apparently saw teaming with Dallas on certain of the disputed work, and weakened his credibility by testifying first that he did, then that he did not, see or hear about anyone but Dallas and Reinkens doing such work, those arguable instances of disparate treatment and dissimulation are too isolated and otherwise inconclusive to satisfy the General Counsel's burden of proving selective enforcement calculated to interfere with Bruce-Cadet's choice of representatives.

Summarizing, Respondent's actions against Dallas and Reinkens did not adversely affect their performance of 8(b)(1)(B) duties, if any, and so could not have coerced Bruce-Cadet in its selection of representatives to perform those duties, because (a) Respondent neither had nor sought a bargaining relationship with Bruce-Cadet at relevant times, and (b) given that deficiency and indulging, arguendo, the assumption stated above in footnote 23, the General Counsel has not met her burden of proving that Respondent selectively enforced its constitution against Dallas and Reinkens to interfere with Bruce-Cadet's freedom of choice.

The complaint therefore lacks merit.

CONCLUSION OF LAW

Respondent did not violate the Act as alleged.[24]

[Recommended Order for dismissal omitted from publication.]

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[19] At 107 S.Ct. 2015.

[20] I am unpersuaded that the informal and sporadically applicable jurisdictional understanding among Respondent, Bruce-Cadet, and Local 112 satisfies this requirement. More specifically, I fail to see that it enlarges the potential for abuse of the type Sec. 8(b)(1)(B) was enacted to prevent. See the Court's discussion at 107 S.Ct. 2013-2015.

[21] The most that can be said, on the present record, is that Respondent was seeking to enforce the jurisdictional understanding. Inasmuch as the understanding itself does not give rise to the requisite relationship between Respondent and Bruce-Cadet (see preceding footnote), Respondent's strivings to enforce it can hardly be construed as for the larger purpose of seeking such a relationship.

[22] At 107 S.Ct. 2012 fn. 13.

[23] Assuming for argument that selective enforcement against supervisor-members would be improper, bargaining relationship or not.

[24] In light of this result and the underlying rationale, I need not address whether Dallas' and Reinkens' duties made them 8(b)(1)(B) grievance adjusters.

Maid In New York, Inc. *and* Local 32B-32J, Service Employees International Union, AFL-CIO. Case 2-CA-21817

June 30, 1988

DECISION AND ORDER

By Chairman Stephens and Members Johansen and Babson

On October 27, 1987, Administrative Law Judge D. Barry Morris issued the attached decision. The General Counsel filed exceptions and a supporting brief.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and brief and has decided to affirm the judge's rulings, findings,[1] and conclusions[2] and to adopt the recommended Order.

ORDER

The recommended Order of the administrative law judge is adopted and the complaint is dismissed.

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[1] The General Counsel has excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

In adopting the judge's dismissal, we note that the judge implicitly credited Considine rather than the employees concerning what they were told about the Respondent's hiring procedure. We also note that both employees' testimony indicates they were applying for work only at the Whitney Museum.

[2] The judge inaccurately characterized the complaint as alleging a refusal by the Respondent to hire the employees rather than a refusal to consider them for employment at the Whitney Museum. Based on the credited facts as found by the judge, however, we conclude that the complaint was properly dismissed because the alleged discriminatees, for lawful reasons, would not have been considered for hiring at the Whitney without having first demonstrated their ability at another location.

Alice Joyce Garfield, Esq., for the General Counsel.
Thomas E. Durkin, Esq., of Newark, New Jersey, for the Respondent.
E. David Hyland, of New York, New York, for the Charging Party.

DECISION

Statement of the Case

D. Barry Morris, Administrative Law Judge. This case was heard before me in New York City on 6, 7, and 8 April 1987. On a charge filed on 5 August 1986,[1] a complaint was issued on 19 September, alleging that Maid In New York, Inc. (Respondent) violated Section 8(a)(3) and (1) of the National Labor Relations Act, (the Act). The complaint alleged that Respondent refused to hire three individuals because they were members of Local 32B-32J, Service Employees International Union, AFL-CIO (the Union). Respondent filed an answer denying the commission of the alleged unfair labor practices.

The parties were given full opportunity to participate, produce evidence, examine and cross-examine witnesses, argue orally, and file briefs. Briefs were filed by the General Counsel and by the Respondent.

On the entire record of the case, including my observation of the demeanor of the witnesses, I make the following

Findings of Fact

I. JURISDICTION

Respondent, a New York corporation with an office and place of business in New York City, is engaged in the business of providing cleaning services to commercial customers. Respondent admits and I find that it is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act. In addition, Respondent admits and I find that the Union is a labor organization within the meaning of Section 2(5) of the Act.

II. THE ALLEGED UNFAIR LABOR PRACTICES

A. *The Facts*

1. Background

Prior to July 1986 the maintenance contract for cleaning services for the Whitney Museum, located in New York City, was held by Allied Maintenance Corporation. John Murray, operations officer of the Whitney Museum, testified that the museum decided to change contractors because Respondent was prepared to perform the services for a lower price. Murray also testified that the Allied crew was too small for the amount of work necessary and that certain jobs were not being done. Accordingly, the decision was made by the museum to award the contract to Respondent. Robert Dellacona, president of Respondent, testified that prior to the award of the contract he inspected the museum's premises and noticed that certain areas of the museum were not cleaned properly. Respondent began working at the museum on 4 August.

2. Hyland's employment with Respondent

E. David Hyland, who appeared to me to be a credible witness, testified that in mid to late July he was advised by Vernon Sampson, chairman of the Union's District 5, that Allied was about to lose the contract with the Whitney Museum. Hyland decided to embark on a course of trying to obtain employment with Respondent. Accordingly, on Friday, 25 July, he telephoned Respondent to inquire about the possibility of applying for a job. Hyland testified that he was told he would "have

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[1] All dates refer to 1986 unless otherwise specified.

289 NLRB No. 66

to come down on . . . a Monday at 2:30. That was the time apparently when typically interviews were held." As instructed, Hyland appeared at Respondent's offices the following Monday, 28 July at 2:30 p.m. Hyland met with Dellacona and with Robert Considine, Dellacona's assistant, and was told to return the next day. On 29 July, as instructed, Hyland came back to Respondent's offices. He and three or four other employees were addressed by Dellacona who "began to talk about the new job that had been acquired and how he was going to schedule work at the museum." Dellacona, however, did not mention the name of the museum. Hyland was assigned a job, not at the museum, and was told by Dellacona "he was going to put me on a job to see if I could clean."

On 30 July Hyland telephoned Dellacona and told him that he was unable to work that day. Hyland was then assigned to a different job, where he worked the following day. On 4 August Hyland appeared at Respondent's offices to pick up cleaning supplies. At that time Hyland told Dellacona that he had signed a pledge card for the Union. Dellacona replied, "We have nothing to do with that and that we are trying to resist the Union." Hyland then reported to the job he was assigned and at 8 p.m. that day he walked off the job. The following morning Hyland telephoned Dellacona to tell him that he was resigning his position with Respondent. Dellacona asked, "What's all this I hear about you talking about the Union with employees." Hyland replied that he was a representative of the Union in its contract department and that he "wanted to find out how Maid in New York operates."

Hyland testified that after his initial telephone conversation with Respondent on 5 July he advised Sampson of the conversation and that he planned to go to Respondent's offices the following Monday for an interview and to fill out an application. After Hyland returned from his interview on 28 July, he had another conversation with Sampson. Hyland testified that Sampson told him that two employees had been taken to Respondent's offices by two of the Union's business agents. Subsequently, Kevin McCulloch, assistant to the president of the Union, instructed Hyland to prepare a mailgram to be sent to Respondent. On 31 July the Union sent a mailgram to Respondent that stated, in part, "the Union wishes to file unconditional application for employment" on behalf of Diaz, Choute, and Penago.

3. Visits to Respondent's offices by Choute and Penago

Dellacona testified that he considered the Whitney Museum as a good account to have obtained and that he wanted to impress the museum with the type of services his company was performing. Consequently, he decided that he would not assign any new employees to work at the museum. He testified that he would not place "new hires" at the Whitney because "it was too important to take the chance." He further testified that sometime during July several of the former employees of Allied came to Respondent's offices seeking employment. Edwin Feliciano, a union business agent, accompanied them and it was made clear that they wanted to work exclusively at the Whitney Museum. Dellacona testified that Considine told the individuals that Respondent was not hiring any new employees to work at the Whitney. Dellacona explained:

> Particularly in this case because at that particular time for my company to get an account like the Whitney Museum was a big deal. There were not many accounts with that monthly billing at that time on my roster. It was supremely important to me to impress them favorably. So under no condition would I let someone I had absolutely no knowledge of come in and go to a place like that.

Dellacona testified that after he received the mailgram dated 31 July from the Union he instructed Considine to advise the Union that the individuals were welcome to make an appointment for an interview at the standard time of Monday, 2:30 p.m. Considine testified that he telephoned Sampson that same day. Sampson told Considine that he was representing the men who were employed at the Whitney and that he wanted Considine "to also employ those people at the Whitney Museum." Considine replied that Sampson "could have the men call to make an appointment, to come in and fill out applications."

Considine testified that a day or two after receipt of the mailgram, Feliciano came to Respondent's offices together with one of the former employees of Allied, Sergio Penago. Feliciano requested to fill out an application for Penago's employment at the Whitney Museum. Considine replied that Respondent was not hiring anyone for the Whitney, and that "he could have the workers involved call to make an appointment to come in the following Monday afternoon . . . to fill out an application, which was our standard procedure." Considine also testified that Feliciano returned to Respondent's offices in September, together with another former Allied employee, Adolph Choute. Feliciano told Considine, "We're here to apply for employment at the Whitney Museum." Considine replied, "I'm still not accepting applications for employment at the Whitney Museum . . . if you'd like you may have Mr. Choute call back and make an appointment for an interview on Monday afternoon."

Choute and Penago also testified. They both appeared to be credible witnesses. Choute testified that sometime after 1 September he went with Feliciano to Respondent's offices. He testified that Feliciano did all the talking and told Respondent's representative that "Mr. Choute used to work at the Whitney Museum. You . . . took over that location, therefore you have to hire Mr. Choute at that location." Respondent's representative replied, "We don't have any opening right now." When Feliciano asked for an application to fill out for Choute, the representative replied, "We don't give any application without an appointment." Penago testified that he went with Feliciano to Respondent's offices during the last week of July. He stated that Feliciano told Respondent's representative that Penago worked at the Whitney Museum and that he was going to fill out an application "to work there again," to which the representative replied "there was no work." Penago further testified that never filled out an employment application for Respondent. In addition, Penago stated that Feliciano told him that Respondent was supposed to hire him with the same salary and the same benefits that he enjoyed while working for Allied and at the same location.

Feliciano did not appear to have a good recollection of the events. Although he testified that he went to Respondent's offices with Choute on 31 July, his affidavit stated the date of the visit to be 17 July. I credit Choute's testimony that he was on vacation during August, and when he returned he went with Feliciano to Respondent's offices after 1 September. Feliciano also testified that he went to Respondent's offices with Penago on 1 August. He spoke to Considine each time and Considine said that no positions were available. Feliciano testified that Considine did not tell him about the Monday procedure for job interviews. When asked what Considine told him about new hires for the Whitney Museum, Feliciano conceded, "He told me that there [were not] any new hires, only that they were trying to place their own personnel at the present time." Feliciano further stated that after 1 August he never called Respondent to find out if there were any openings nor did he follow up the matter in any way.

B. *Discussion and Conclusions*

Based on the above, I find that around the last week of July Penago went to Respondent's offices accompanied by Feliciano. Feliciano spoke to Considine and requested that Penago be employed to work at the Whitney Museum. Considine told Feliciano that Respondent was not hiring employees to work at the Whitney. This was consistent with Dellacona's credited testimony that because the Whitney account was so important he wanted to assign only those employees whose work he "had an opportunity to review," and that, accordingly, no "new hires" were being assigned to work at the museum. Considine informed Feliciano that Penago could call to make an appointment for a Monday afternoon interview. This was Respondent's standard procedure for interviewing applicants, which the record shows was followed in most instances. Indeed, when Hyland, the Union's own employee, appeared at Respondent's offices on Friday, 25 July, he was told to return the following Monday afternoon for an interview. Penago never called to arrange a subsequent interview.

On 31 July the Union sent Respondent a mailgram that stated, in part, "the Union wishes to file unconditional application for employment" on behalf of Diaz, Choute, and Penago. On receipt of the mailgram Considine called the Union's office and spoke to Sampson. I credit Considine's testimony that Sampson stated during the conversation that he wanted Respondent to employ the individuals at the Whitney Museum. Considine replied that he was not hiring people to work at the Whitney and that Sampson could have the men call to make appointments and come in to Respondent's offices for interviews and to fill out applications. About a month later, sometime after 1 September, Feliciano returned to Respondent's offices with Choute. Feliciano again stated that he was there to apply for employment for Choute at the Whitney Museum. Considine replied that he was still not accepting applications for employment at the Whitney and again suggested that the individual could call and make an appointment for an interview on Monday afternoon.

With respect to Diaz, the complaint alleges that on or about 22 July he applied or employment with Respondent and was not hired. The record does not support a finding that Diaz applied for employment on 22 July or at any other time. The record shows that Diaz has been working for the Whitney Museum as a mechanic since sometime in July. The complaint also alleges that Choute unsuccessfully applied for employment on 22 and 31 July and that Penago similarly unsuccessfully applied for employment on 22 July and on 1 August. The record does not support findings that either Choute or Penago applied for employment on 22 July. The record does show, however, that Penago came to Respondent's offices during the last week of July and that Choute came to Respondent's offices sometime after 1 September.

I find that Respondent did not refuse to hire Choute and Penago because they were union members. When they came to Respondent's offices, Feliciano asked on their behalf that they be employed at the Whitney Museum. Feliciano was told that no new hires were being assigned to the Whitney. However, if the two individuals wished to apply for other cleaning jobs with Respondent, they were to call and make an appointment for a Monday afternoon interview. This was in accordance with Respondent's general procedure for conducting interviews. Choute and Penago did not comply with that procedure.

On 31 July the Union sent a mailgram to Respondent stating that it wishes to file "unconditional application for employment" on behalf of the individuals. As of 31 July the record shows only Penago to have come to Respondent's offices and at that time Feliciano requested that Penago be employed to work at the Whitney. Although Hyland, who prepared the mailgram, testified that he was not aware of any prior conditions having been placed, it is possible to construe the mailgram as an attempt to eliminate the condition that Penago be considered for employment only at the Whitney. However, during the conversation between Considine and Sampson, which took place after Respondent had received the mailgram, Sampson reiterated the request that the individuals be employed at the Whitney Museum. That the Union continued to adhere to its position that the individuals be employed only at the Whitney is buttressed by the fact that a month later, when Choute appeared at Respondent's offices, Feliciano again requested that Choute be hired to work at the Whitney Museum.

I find that Respondent refused to hire the individuals in question because they requested to work specifically at the Whitney Museum and Respondent was not hiring new employees for work at that location. In addition, the individuals never arranged for Monday interviews, which the record shows is Respondent's standard time for interviewing new applicants for employment. Accordingly, the allegations are dismissed.

CONCLUSIONS OF LAW

1. Respondent is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

2. The Union is a labor organization within the meaning of Section 2(5) of the Act.

3. Respondent has not engaged in the unfair labor practices alleged in the complaint.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[2]

ORDER

The complaint is dismissed.

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[2] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

Carpenters Local 33, a/w United Brotherhood of Carpenters and Joiners of America, AFL-CIO *and* CB Construction Co., Inc. Case 1-CC-2153

June 30, 1988

DECISION AND ORDER

By Members Johansen, Babson, and Cracraft

On September 1, 1987, Administrative Law Judge George F. McInerny issued the attached decision. The General Counsel filed exceptions and a supporting brief, and the Respondent filed an answering brief.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings,[1] and conclusions only to the extent consistent with this Decision and Order.

The judge found that the primary gate set aside for the Union under a reserve gate system was effectively hidden from the view of the general public and was so remotely and inconveniently located as to substantially impair the effectiveness of the Union's picketing, calculated to reach the primary employer's suppliers, visitors, and the general public. The judge concluded that the Respondent Union's picketing at the neutral gate, therefore, was privileged and did not violate Section 8(b)(4)(i) and (ii)(B) of the Act. We disagree.

CB Construction Co., Inc., the Charging Party and the primary employer in the Respondent Union's area standards labor dispute, is a nonunion subcontractor performing renovation work at 262-266 Summer Street, Boston, Massachusetts. The building at 262-266 Summer Street is owned by the 262 Summer Street Realty Trust (Trust). William and Gary Vanderweil, general partners in the Trust, are also the principals of R. G. Vanderweil Engineers, Inc. (RGVE). RGVE moved into the premises at 262-266 Summer Street about March 3, 1987. RGVE and the Trust are secondary or neutral employers in this dispute.

The Respondent Union picketed the 262-266 Summer Street building from about October 20, 1986, until enjoined by the Federal district court on January 28, 1987, with signs stating:

R. G. VANDERWEIL
The owner of 266 Summer Street
IS USING
A
SCAB
Construction Company
Carpenters Local No. 33, AFL-CIO

On March 12, 1987, Administrative Law Judge Marion C. Ladwig issued his decision and recommended Order in Case 1-CC-2144 finding that this picketing, which unlawfully named Vanderweil, the neutral employer, as the object of the Respondent's picketing, violated Section 8(b)(4)(i) and (ii)(B) of the Act.[2]

On February 3, 1987, the Respondent Union resumed picketing at 262-266 Summer Street with signs stating:

CB CONSTRUCTION

IS
A
SCAB
Contractor
Who Does Not Conform to
Area Standards Established
by Carpenters Local No. 33, AFL-CIO

This sign is not for organizational

or recognitional purposes.

On February 12, 1987, the Federal district court clarified its order to permit such lawful picketing at 262-266 Summer Street.

On March 4, 1987, RGVE and the Trust established a reserved gate system at the site. The main entrance to the building at 266 Summer Street was established and reserved for the use of employees and suppliers of all persons except the employees, suppliers, and visitors of the primary employer.[3] This entrance was designated "Gate B." A gate was established in the rear of the building for the use of employees, suppliers, and visitors of the primary employer. The rear entrance was designated "Gate A."

On March 4, 1987, the Trust notified the Respondent of the reserved gate system. On March 5,

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[1] In fn. 3 of his decision, the judge stated that the Federal district court injunction in Case 1-CC-2144 was issued on February 28, 1987. The correct date is January 28, 1987.

The General Counsel's request for a visitatorial remedy is denied. See *Cherokee Marine Terminal*, 287 NLRB 1080 (1988).

[2] The Respondent Union's picketing of RGVE officers at 38 Chauncy Street in Boston and the residence of Gary Vanderweil with signs bearing similar legends was also the subject of the Federal district court injunction and Judge Ladwig's decision in Case 1-CC-2144. No exceptions were filed to Judge Ladwig's decision, and on April 21, 1987, the Board adopted his decision and recommended Order.

[3] This entrance is the only entrance on Summer Street that may be used by tenants to gain entry into the office space in the building. The other two Summer Street entrances enter into the retail premises of a delicatessen and a graphic arts equipment store, tenants of the building.

289 NLRB No. 67

1987, the Respondent advised the Trust, by telegram, that it would not honor the reserved gate system. Specifically, the Respondent stated:

> The gate established for CB Construction is in a back alley entirely out of view of the public. Since we are attempting to inform the public of this area's [sic] standard[s] dispute, it is not a valid dual gate system.

After the establishment of the primary gate at the rear of the building, the Respondent continued to picket at the Summer Street entrance. The instant charge was filed and an injunction issued.[4]

As described in the judge's decision, the building at 262–266 Summer Street, the locus of the dispute, is an eight-story brick loft building, which is one of a row of similar structures extending along Summer Street about 660 feet from Fort Point Channel to an overpass over a street called A Street. This row of buildings is unbroken by any opening or passageway between the structures. At the channel end there is a wooden walkway extending along the channel to a 25-foot-wide passageway at the rear of the row of buildings. The structure adjacent to 262–266 Summer Street, 268–272 Summer Street, juts out 40 feet beyond the rear entrance of the locus forming a jog in the passageway. This jog in the passageway extends from the locus to a 30-foot-wide road designated as "Sleeper Street" on one of the plans submitted into evidence. Sleeper Street extends from the rear passageway to a public thoroughfare called Congress Street. Congress Street and the rear passageway run parallel to one another and Sleeper Street connects them. A building backs up to the passageway in the rear of the 262–266 Summer Street structure on one side of Sleeper Street. Across from this building, on the opposite side of Sleeper Street, is a short-term public parking lot used by people who work in the Summer Street buildings, their customers, and other members of the public.

The judge credited William Vanderweil's testimony that the elevator serving the Summer Street entrance to the building is small and unsuitable for the conveyance of construction materials needed for renovation of the upper floors of the building. The judge further credited Vanderweil's testimony that there is only one rear entrance to the premises at the level of the passageway, which is used by Vanderweil's employees, other building tenants, the Charging Party's employees, and others making deliveries or performing work inside the premises. The rear entrance provides access to a freight elevator that is substantially larger than the elevator at the Summer Street entrance. The record indicates that the entrance designated as the primary reserved gate has always been used by CB Construction, its employees, and suppliers since the inception of its work at 262–266 Summer Street because the entrance provides easier access for trucks and workmen carrying supplies. Tradesmen are notified by a sign posted at the Summer Street entrance that all deliveries are to be made at the rear of the building.

The judge concluded that the primary reserved gate is so well hidden from the view of the general public and is so remotely located that restriction of the Respondent Union's picket patrol to the primary gate would substantially impair any lawful picketing's effectiveness. Based on photographs of the situs submitted by both parties, the judge determined that the primary gate sign is scarcely visible to the general public because of its location behind iron window bars and parked cars in a shadowed alley. The judge further determined that members of the public would not be likely to see any pickets patrolling the primary gate entrance or be able to read or comprehend the message on the picket signs.

It is well established that although picketing at locations other than a properly marked primary gate in common situs disputes may indicate noncompliance with *Moore Dry Dock* standards,[5] this is not so where observance of the separate entrances established would substantially impair the effectiveness of the picketing in reaching the primary employees and suppliers. The General Counsel excepts, inter alia, to the judge's factual determination that the primary gate location substantially impairs the Union's ability effectively to convey its message to all within the legitimate direct appeal of its picket signs and asserts that by picketing the neutral reserved gate the Union engaged in unlawful secondary activity. We find merit to the General Counsel's exceptions.

In recommending dismissal of the complaint, the judge relied on the Board's decisions in *Electrical Workers IBEW Local 453 (Southern Sun)*, 237 NLRB 829 (1978); *Carpenters Local 354 (Sharp & Tatro)*, 268 NLRB 382 (1983); and *Electrical Workers IBEW Local 501 (C. W. Pond Electric)*, 269 NLRB 274 (1984).

Southern Sun is factually distinguishable from the present case. In *Southern Sun* the Board found that the union's picketing of the neutral gate did not violate Section 8(b)(4)(i) and (ii)(B) of the Act because the reserved gates were improperly established and restriction of picketing to the entrance reserved for the primary employer would unjustly impair the effectiveness of the union's lawful picketing to convey its message to Southern Sun personnel, suppliers, visitors, and the general public. The Board's conclusion was based on the following circumstances: the gate sign for neutrals was placed approximately halfway between two entrances to the construction site; the reserve gate sign for the primary was located near a third entrance on a private alley that, although owned by the general contractor, could not be distinguished visually from the private parking lot of the adjacent store building; the reserved gate sign was barely visible from a public right-of-way; and the primary employer had ignored the reserved gate. On these facts the Board determined that neither the primary nor neutral area was delineated in a manner to provide reasonable assurances to the union that its message would be carried to all within the legitimate, direct appeal of its picket sign.

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[4] The record indicates that an injunction was issued by the Honorable William G. Young, United States district judge for the district of Massachusetts on March 25, 1987, barring picketing by the Union other than at the gate reserved for the exclusive use of CB Construction Co., Inc., its employees, suppliers, and visitors.

[5] *Sailors Union (Moore Dry Dock)*, 92 NLRB 547, 549 (1950).

In the present case, contrary to the discussion in footnotes 5 and 6 of the judge's decision, the evidence does not support a finding that the reserved gate system was breached by the primary employer's employees. Frank Donovan, the project manager for CB, testified on cross-examination in relevant part:

> Q. Isn't it true that your employees take their coffee break in the New York Deli?
>
> A. Occasionally in the beginning, yes.
>
> JUDGE MCINERNY: How about during the winter?
>
> THE WITNESS: During the winter—at a certain point there were coffee machines made available to my employees inside the building.
>
> By Respondent's Attorney:
>
> Q. But even after the machines were made available, did they have occasion to go to the New York Deli for their coffee?
>
> A. I would say so. I'm not there all the time.
>
> Q. When they went to the New York Deli they would exit through the front door, isn't that correct?
>
> A. I have no immediate knowledge of that but I would say that's probably correct.
>
> Q. And they would go in the front of the door of the New York Deli on Summer Street?
>
> A. Yes.
>
> Q. They did this in the last month of March and April as well, isn't that true?
>
> A. No, I would say probably not.
>
> Q. Is your testimony none of your employees went to New York Deli?
>
> A. No it isn't.
>
> Q. After March 1st.
>
> A. I don't know for a fact but I do know they for the most part were having coffee inside the building.
>
> Q. But on the occasions since March 4, when they went to the New York Deli for coffee, they went out the front door and in the front door of New York Deli?
>
> . . . .
>
> THE WITNESS: My employees were instructed not to use the front door after the gate system was set up.
>
> JUDGE MCINERNY: But you don't know all the time—
>
> THE WITNESS: I can't say because I'm not there all the time.
>
> JUDGE MCINERNY: You don't know whether they would have preferred to go to the New York Deli for a cup of coffee instead of buying it out of some machine.
>
> THE WITNESS: Some of the guys would more than likely rather get it free than pay for it.[6]

This testimony, which was the only testimony on the issue, does not establish that the reserved gate system was tainted. Also, in contrast to *Southern Sun*, the gates in the present case were clearly delineated. There is no evidence that the reserved gate signs were ambiguously phrased or lacked clarity such that the primary employer's workmen, suppliers, and visitors or those doing business with neutrals were confused or left without guidance.[7] The record discloses, rather, that the gates were clearly marked and there was strict compliance with the reserved gate system.[8]

In *Pond*, supra, the Board rejected the union's contention that the primary reserved gate was established improperly because it was located at the end of a dead end public road that was rarely used by the general public.[9] The Board determined that the primary gate was clearly marked and maintained, and thus the union was able to convey its message directly to the primary employer and its employees, visitors, suppliers, and the general public. On review before the U.S. Court of Appeals for the District of Columbia, the case was remanded to the Board to determine whether the union could practically have placed its pickets at a location near the jobsite both reasonably exposed to public view and reasonably separated from the neutral gate.[10] The court ruled that, when a general contractor has established a reserved primary gate virtually hidden from public view, the Board cannot presume unlawful secondary intent from neutral gate picketing without considering whether the union had access to a reasonable alternative public location. Significant to the court's ruling was the fact that the parties had stipulated that the reserved primary gate was virtually hidden from all public view.[11] In the present case, by contrast, the extent of public access to the primary reserved gate is the issue being disputed by the parties.

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[6] The reference to free coffee is to the coffee machines set up inside the building for CB employees.

[7] See *Sharp & Tatro*, 268 NLRB at 388.

[8] The Respondent Union contends that the primary gate sign was not "clearly marked" because it was not visible to members of the general public. The visibility of the gate sign to the general public, however, is not relevant for purposes of determining whether the gate system was clearly delineated and maintained with respect to those utilizing the gate system.

[9] The Board in *Pond* specifically rejected the contention that *Southern Sun* holds that a primary reserved gate on a public road is established improperly simply because there is little traffic by the general public at the primary reserved gate.

In *Sharp & Tatro*, supra, the neutral reserved gate was located on open frontage of the construction jobsite facing onto a city street. The primary reserved gate was located on a more remote corner of the jobsite and could be reached by traversing approximately 455 feet of a cul-de-sac driveway or public access road that merged into a public thoroughfare designated "Welburn Avenue." The union had stationed picket patrols at both gates and near the junction of the public access road and Welburn Avenue. The union contended that its picketing of the neutral gate was privileged because restriction of its patrols to either of the other locations would substantially impair the effectiveness of its lawful picketing. The union conceded that patrols stationed at either the primary gate or close to the intersection of the public access road and Welburn Avenue could effectively reach the primary employer's employees, direct suppliers, and visitors.

The judge held there, with Board approval, that the record did not support the union's assertion that restriction of the picket patrols to either location would preclude meaningful communication of the picket line message to members of the general public. The judge determined that the primary gate was not so well hidden or so remotely located that restriction of the picket patrol to the gate's immediate vicinity would substantially impair any lawful picketing's effectiveness. In so finding, he stated that the fact that the pickets could reach only a limited public composed of tenants of nearby apartments, their visitors, and prospective customers or business callers who might park their cars on the public access road was not grounds for invalidating the gate system. Further, the fact that members of the general public might fail to notice or be unable to read the primary gate sign was found by the judge to be without significance. The judge stated that the union's argument

> that a labor organization cannot "effectively" picket a reserved primary gate at some construction jobsite unless *members of the public* can, without difficulty, discern a connection between that organization's picket sign messages and some nearby, *readily visible*, project designated as the proclaimed dispute's particular situs—lacks persuasive precedential support.[12]

Consistent with Board precedent we find that the restriction of picketing in the instant case to the primary reserved gate's immediate vicinity would not substantially impair the effectiveness of the Respondent Union's lawful picketing. The intent of the law of common situs picketing is to balance the right of a labor organization to reach its intended audience with the right of neutral employers to be free of labor disputes that are not their own. The determination of where to locate the primary gate was limited in the subject case to two choices—the Summer Street entrance and the rear passageway entrance. Space limitations regarding the Summer Street entrance and front lobby elevator made use of that entrance by CB employees performing renovation work infeasible. In addition, the rear entrance had been utilized by the primary employer's employees prior to the establishment of the reserved gate system. Thus, the designation of the rear entrance reflects a choice that cannot be characterized as reflecting a calculated "bad faith" ploy specifically designed to render ineffective the Union's picketing.[13]

The evidence clearly demonstrates sufficient public use of the rear of the 250–268 Summer Street building to justify the designation of the primary gate as an appropriate reserved gate. The record indicates the following public uses: pedestrian traffic through the rear passageway from Congress Street to the boardwalk abutting the channel on through to Summer Street; pedestrian traffic from the public parking lot to the rear entrance of a restaurant located approximately 60 feet from the primary reserved gate; use of the rear entrance and public parking lot by employees[14] and visitors of tenants of the building and by the primary employer, its employees, suppliers, and visitors; and use of the public parking lot by members of the general public. Tradesmen were instructed by a sign posted at the Summer Street entrance that all deliveries to building tenants were to be made at the rear entrance. One of the building's tenants, CCSI, chose to locate its main customer entrance on the rear passageway. CCSI's door is located approximately 25 feet to the left of the primary gate. The gate sign is located between the primary gate entrance and CCSI's entrance. Thus, the primary reserved gate provided the Union with some access to the public and full access to the primary employer, its employees, suppliers, and visitors.

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[10] *Electrical Workers IBEW Local 501 v. NLRB*, 756 F.2d 888 (D.C. Cir. 1985).

[11] See discussion at 756 F.2d at 896. We note that *Pond* was settled prior to the Board's consideration on remand.

[12] 268 NLRB at 390.

[13] Ibid.

We find without significance any contention that members of the general public might fail to notice or be unable to read the primary gate sign because of its location.[15] We disagree with the judge's finding that members of the public would not be likely to see pickets moving around the rear entrance or be able to read the picket sign message because of shadows or obstructions in the alley. Photographs of the rear passageway illustrate that vehicular congestion and light conditions varied. Based on the evidence of public use of the passageway, in particular, the "limited public" composed of tenants, visitors, prospective customers, or business callers utilizing the rear passageway or adjacent public parking lot, we conclude that pickets stationed in the immediate vicinity of the primary reserved gate could have effectively communicated their message. Although the primary gate location may not have been ideal, we note that Board precedent does not require primary reserved gate placements calculated to maximize a picket's chances to reach members of the public.[16]

Accordingly, under the circumstances of this case, we conclude that the Respondent Union's legitimate picket line objectives were effectively served without substantial impairment by the established primary reserved gate and we infer unlawful secondary intent from the Union's neutral gate picketing in violation of the secondary boycott provisions of the Act.

Conclusions of Law

1. CB Construction Co., Inc. is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) and Section 8(b)(4) of the Act.

2. Carpenters Local 33, a/w United Brotherhood of Carpenters and Joiners of America, AFL–CIO is a labor organization within the meaning of Section 2(5) of the Act.

3. By inducing and encouraging individuals employed by R. G. Vanderweil Engineers, Inc., 262 Summer Street Realty Trust, or by other persons engaged in commerce or in an industry affecting commerce to engage in a strike or refusal in the course of their employment to perform services, and by threatening, coercing, and restraining the above-named Employers, or other persons engaged in commerce or business operations affecting commerce with an object of forcing or requiring the above-named persons to cease doing business with CB Construction Co., Inc., Carpenters Local 33, a/w United Brotherhood of Carpenters and Joiners of America, AFL–CIO has engaged in unfair labor practices affecting commerce within the meaning of Section 8(b)(4)(i) and (ii)(B) and Section 2(6) and (7) of the Act.

Remedy

Having found that the Respondent, Carpenters Local 33, a/w United Brotherhood of Carpenters and Joiners of America, AFL–CIO, has violated Section 8(b)(4)(i) and (ii)(B) of the Act, we shall order it to cease and desist and to take certain affirmative action designed to effectuate the policies of the Act.

ORDER

The National Labor Relations Board orders that the Respondent, Carpenters Local 33, a/w United Brotherhood of Carpenters and Joiners of America, AFL–CIO, Boston, Massachusetts, its officers, agents, and representatives, shall

1. Cease and desist from

(a) Inducing or encouraging any individual employed by R. G. Vanderweil Engineers, Inc., 262 Summer Street Realty Trust, or other persons engaged in commerce or in an industry affecting commerce to engage in a strike or refusal in the course of employment to use, manufacture, process, transport, or otherwise handle or work on any goods, articles, materials, or commodities or to perform any services, where an object thereof is to force or require the above-named Employers, or any person engaged in commerce or in an industry affecting commerce, to cease using, selling, handling, transporting, or otherwise dealing in the products of, or to cease doing business with, CB Construction Co., Inc.

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[14] In addition to employees working in adjacent buildings, the rear entrance to 262–266 Summer Street is used by some employees of RGVE, 20th Century Press, and Normon Harrow, Inc., which employ a total of approximately 140–150 employees.

[15] 268 NLRB at 390.

[16] Ibid.

(b) In any manner threatening, coercing, or restraining R. G. Vanderweil Engineers, Inc., 262 Summer Street Realty Trust, or any other persons engaged in commerce or in an industry affecting commerce, where an object is to force or require the above-named Employers, or any other persons engaged in commerce to cease using, selling, handling, transporting, or otherwise dealing in the products of, or cease doing business with, CB Construction Co., Inc.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Post at its office and meeting halls copies of the attached notice marked "Appendix."[17] Copies of the notice, on forms provided by the Regional Director for Region 1, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately on receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to members are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material.

(b) Deliver to the Regional Director for Region 1 signed copies of the notice in sufficient number for posting by the Employers, if willing, at all places where notices to employees are customarily posted.

(c) Notify the Regional Director in writing within 20 days from the date of this Order what steps the Respondent has taken to comply.

APPENDIX

NOTICE TO EMPLOYEES AND MEMBERS
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

WE WILL NOT, nor will our officers, business representatives, business agents, or anyone acting for us, whatever his title may be, engage in or induce or encourage any individual employed by R. G. Vanderweil Engineers, Inc., 262 Summer Street Realty Trust, or any other person engaged in commerce or in an industry affecting commerce to engage in a strike or a refusal in the course of employment to use, manufacture, process, transport, or otherwise, handle, or work on any goods, articles, materials, or commodities, or to perform any services, where an object thereof is to force or require the above-named Employers, or any other person engaged in commerce or in an industry affecting commerce, to cease using, selling, handling, transporting, or otherwise dealing in the products of, or cease doing business with, CB Construction Co., Inc.

WE WILL NOT threaten, coerce, or restrain R. G. Vanderweil Engineers, Inc., 262 Summer Street Realty Trust, or any other persons engaged in commerce or in an industry affecting commerce, when an object is to force or require the above-named Employers or any other persons engaged in commerce to cease using, selling, handling, transporting, or otherwise dealing in the products of, or cease doing business with, CB Construction Co., Inc.

CARPENTERS LOCAL NO. 33, A/W UNITED BROTHERHOOD OF CARPENTERS AND JOINERS OF AMERICA, AFL-CIO

Carol Sax, Esq., for the General Counsel.
Aaron Krakow, Esq. (Fienberg and Feld), of Boston, Massachusetts, for the Respondent.

DECISION

GEORGE F. MCINERNY, Administrative Law Judge. Based on a charge filed on 9 March 1987 by CB Construction Co., Inc. (Charging Party), the Acting Regional Director for Region 1 of the National Labor Relations Board (Regional Director and the Board) issued a complaint on 27 March 1987 alleging that Carpenters Local 33, affiliated with the United Brotherhood of Carpenters and Joiners of America, AFL-CIO (Respondent) had violated Section 8(b)(4)(i) and (ii)(B) of the National Relations Act (the Act). The Respondent Union filed a timely answer to the complaint, in which it denied the commission of any unfair labor practices.

Pursuant to notice issued by the Regional Director, together with the complaint, a hearing was held before me at Boston, Massachusetts, on 7 and 19 May 1987, at which hearing the General Counsel and Respondent were represented by counsel, and all parties had the opportunity to present testimony and documentary evidence, to examine and cross-examine witnesses, and to argue orally. After the close of the hearing the General Counsel and Respondent filed briefs, which have been carefully reviewed.

Based on the entire record in this case, including my observation of the witnesses and their demeanor, I make the following

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[17] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

FINDINGS OF FACT

I. JURISDICTION

The parties stipulated that: (1) the charges were filed by the Charging Party on 9 March 1987, and that a copy was served on the Respondent; (2) at all times material, the Charging Party was a corporation with an office and place of business in West Roxbury, Massachusetts, where it is engaged in the construction business as a general contractor; (3) that during the calendar year ending 31 December 1986, the Charging Party purchased and received at its Massachusetts locations goods and materials valued at over $50,000 directly from points outside the Commonwealth of Massachusetts; and (4) that at all times material the Charging Party has been an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

II. THE LABOR ORGANIZATION INVOLVED

The parties stipulated, and I find, that the Respondent, Carpenters Local 33, a/w United Brotherhood of Carpenters and Joiners of America, AFL-CIO is a labor organization within the meaning of Section 2(5) of the Act, that Robert M. Marshall is an organizer for the Union, and that Robert D. Marshall, the father of Robert M. Marshall, is a business agent for the Union.

III. THE ALLEGED UNFAIR LABOR PRACTICES

A. *Stipulated Facts*

The parties stipulated:

(1) That 262 Summer Street Realty Trust has owned and operated an office building located at 262-266 Summer Street, Boston, Massachusetts, at all times material.

(2) That the Charging Party has had a contract with 262 Summer Street Realty Trust to perform renovation work at 262-266 Summer Street at all times material.

(3) That at all times material, the Respondent Union has been engaged in a labor dispute with the Charging Party, pursuant to which the Union commenced picketing about 3 February 1987 at 262-266 Summer Street, bearing signs stating

C.B. Construction
is
SCAB
CONTRACTOR
Who does not conform to
area standards
established by Carpenters
This sign is not for
recognition or
organizational purposes

(4) That on or about 4 March 1987 a dual-gate system was established at the building. The entrance at 262-266 Summer Street was established and reserved for the use of employees and suppliers of all other persons except the employees, suppliers, and visitors of the Charging Party. A gate was established in the back of the building for the use of employees and suppliers of the Charging Party.

(5) After the establishment of the dual-gate system on 4 March 1987, the Respondent continued to picket at the front of the building at the Summer Street entrance.

B. *The Locus of the Dispute*

The matters at issue here arise out of remodeling work being performed at an eight-story brick loft building located at 262-266 Summer Street in the city of Boston. The building is one of a row of similar structures located on a main street located just across a disused waterway called Fort Point Channel[1] from the downtown business district. This row is a solid line of buildings, extending along Summer Street about 660 feet from the channel to an overpass over a street called A Street unbroken by any opening or passageway between the structures. At the channel end there is a covered wooden walkway 5-1/2 feet wide extending along the channel to an alley or passageway at the rear of the row of buildings. This latter passageway is 25 or 26 feet wide and extends the length of the block, terminating at the aforementioned A Street.

Directly in back of 262-266 Summer Street there is a jog in the passageway, and there is another way, described on one of the plans submitted in evidence as being 30 feet wide, and on another as having the name Sleeper Street, extending from this locus to a thoroughfare called Congress Street. On one side of Sleeper Street there is a building that backs up to the passageway in the rear of our Locus. The other side is occupied by a parking lot used, according to the testimony of William Vanderwill, the managing partner of the 262-266 Summer Street building, as parking for people who work in the Summer Street buildings, their customers, and other members of the public.

No one was able to state whether Sleeper Street or the rear passageway just described were public or private ways. However, a portion of Sleeper Street on the side adjacent to a building, and opposite the parking lot, apparently is reserved for parking for tenants of that building, and photographs of the rear passageway show "no parking" signs at the rear of buildings abutting on that way. There are also dumpsters sitting in the passageway, apparently for the use of owners or tenants of the abutting buildings. The question of public or private ownership is not really an issue here, but I would assume that these passageways are privately owned, with permitted access by the public through from the walkway along the channel through to A Street, and along Sleeper Street to Congress Street.

The plans submitted in evidence here indicate, and the photographs taken under the direction of the General Counsel and the Respondent show, that the portion of the rear passageway immediately adjacent to the rear entrance of the locus is a dark, unpaved, area cluttered by dumpsters, delivery trucks, and service vehicles. One building stands directly opposite the rear entrance, of the locus, and another, the adjacent structure at 268-272 Summer Street, jots out 40 feet beyond our locus and forms a jog in the rear passageway. The location of these neighboring buildings with the fact that the rear of the locus faces almost directly north, means that the rear entrance would be almost always in shadow. Indeed the photographs[2] indicate a dark, canyon-like aspect to the passageway directly in the rear of 262-266 Summer Street.

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[1] Described in the record as "four point" channel, or "4 point" channel.

C. *The Building at 262-266 Summer Street*

As I have noted, this building, the locus of the dispute here, is an eight-story, brick loft building, similar to the seven or eight others in the row between Fort Point Channel and the A Street overpass. Its dimensions are about 97 feet on Summer Street, narrowing to 87 feet at the rear passageway, and 93 feet on the sidelines. It almost entirely covers the 6198 square foot lot on which it is situated.

On the Summer Street side, the street level of the locus has three entrances, a delicatessen at the northerly end, a graphic arts equipment store in the middle, and the entrace to the building lobby, and elevator, upper floors and offices at the south end. There was testimony, which I credit, that the elevator serving this entrance is small, about 2 by 4 feet, and unsuitable for the conveyance of construction materials to the upper floors, which were undergoing rehabilitation during times material.

At the rear, Vanderweil's testimony stated that there is only one entrance to the premises, at the level of the above-described passageway, which is used by Vanderweil's employees, other building tenants, the Charging Party's employees, and others making deliveries or performing work inside the premises. At this level there is a freight elevator, substantially larger than the elevator at the Summer Street entrance, which serves to carry equipment and supplies as well as people to the upper floors. There is a passage, by means of corridors and stairs, from this rear entrance to the first entrance, but there is no indication in the record that any of the people involved in this case were or are in the habit of using this passage.

D. *Background and Current Factual Situation*

A previous matter concerning these same parties was the subject matter of a charge filed on 29 December 1986 in Case 1-CC-2144. A complaint was issued in that case on 4 February 1987 by the Regional Director, and a hearing was held on 9 March 1987, before my colleague Administrative Law Judge Marion C. Ladwig.[3] Judge Ladwig's decision isued on 12 March 1987 and found that the Union had violated Section 8(b)(4)(i) and (ii)(B) of the Act. No exceptions were filed to this decision, and on 21 April 1987 the findings, conclusions, and recommended Order of Judge Ladwig's decision were adopted by the Board.

So far as can be determined by the record in this case, the Union has complied with the Board's decision in Case 1-CC-2144. The picketing at the offices of Vanderweil Engineering, and at the home of one of the general trustees of the 262 Summer Street Realty Trust ceased, and the language on the picket signs was changed.

From 3 February to 4 March, when the reserved gate was established, picketing went on at the Summer Street entrance to the building. After the establishment of the reserved gate at the rear of the building, the Union continued to picket at the front. The instant charge was then filed and a second injunction was issued by Judge Young. The picketing ceased and, so far as can be determined from the record, has not resumed either at the front or back of the building. There has been no communication between the Realty Trust, Vanderweil Engineering, and the Union, and the only communications between the Charging Party, CB Construction, and the Union was an exchange of mailgrams; one from CB to the Union dated 4 March informing the Union of the reserved gate, and a reply dated 5 March from the Union stating that the reserved gate "is in a back alley entirely out of view of the public. Since we are attempting to inform the public of this area's [sic] standard dispute, it is not a valid-dual gate system."

The evidence here, based on the generally credible testimony of William Vanderweil and Frank Donovan, the project manager for CB, shows that the sign for the reserved gate, gate "A," was at least until the time of the hearing in this case partially obscured because it was located in a window, adjacent to the entrance it described, behind iron bars that cover the window. After the first day of this hearing, the sign was moved above the bars.

There is some pedestrian traffic at the rear of the building. Vanderweil testified that his employees use the rear door to come in and out of the building, that his tenants and those servicing his offices and those of the tenants found it more convenient to use the parking lot and the rear entrance, rather than Summer Street with its parking meters and heavy traffic. Vanderweil also testified about other people using the rear passageway and Sleeper Street to patronize a restaurant[4] in the next building.[5]

The testimony of Robert M. Marshall, which I also found generally credible, indicated that at times when he observed the rear entrance, not only was the reserved gate sign partially obscured by the barred window, but the signs and the passageways themselves were blocked by vehicles as well as wooden pallets, old concrete posts, other debris, and dumpsters, and was marred by puddles and potholes.

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[2] Both those submitted by the Union and by the General Counsel.

[3] The General Counsel in the instant case stated on the record that in Case 1-CC-2144 an injunction was issued by the Honorable William G. Young, U.S. district judge for the district of Massachusetts, on 28 February 1987, barring unlawful picketing by the Union. Counsel also stated that 4 or 5 days later picketing resumed at 262-266 Summer Street by the Union, with signs bearing the legend set out in item 3 of the stipulation, supra.

[4] Not the same as the delicatessen in 262-266 Summer Street.

[5] Donovan also testified that he was aware that CB employee, who ordinarily came and went through the reserved entrance also used the front door, gate "B" reserved for all others except employees of CB, to leave the building proper to patronize the delicatessen at 262 Summer Street. All of this may raise some question about the integrity of the reserved gate system, but in view of my disposition of the issues, I do not feel it is necessary for me to face that question. See *Electrical Workers IBEW Local 441 (Suburban Development)*, 158 NLRB 549 (1966).

E. *Conclusion*

The photographs submitted by both parties here show, as I have indicated, that the passageway to the rear of the locus here was shadowed, cluttered, in poor repair, and unlikely to be used by anyone except people with business in the buildings abutting. Pedestrians wanting to travel between Summer and Congress Street use an attractive, covered walkway along Fort Point Channel. Otherwise, they would have to walk through the row of buildings that includes 262-266 Summer Street. If there are people who do use Sleeper Street, the passageway to patronize a restaurant is about 60 feet east of the locus. The reserved gate sign was scarcely visible even from that part of the parking lot or Sleeper Street closest to the locus.[6] Members of the public, even if they were passing up Sleeper Street toward the locus in order to go to the next-door restaurant would, in my opinion, have to search for the sign in order to see it. Nor would members of the public be likely to see any pickets moving around that rear entrance between and among puddles, pallets, and pickups, let alone be able to read or comprehend the message on picket signs moving about in the shadows.

The evidence thus seems clear that the gate here set aside for the Union to picket is effectively hidden from the view of the general public, and is so remotely and inconveniently located as to substantially impair the effectiveness of the Union's picketing, calculated to reach the primary employer's employees, suppliers, visitors, and the general public. *Electrical Workers IBEW Local 453 (Southern Sun)*, 237 NLRB 829 (1978); *Carpenters Local 354 (Sharp & Tatro)*, 268 NLRB 382 (1983); *Electrical Workers IBEW Local 501 (C. W. Pond)*, 269 NLRB 274 (1984).

There are no issues in this case on the other standards in *Moore Dry Dock*.[7]

I find, therefore, that the Respondent Union has not violated Section 8(b)(4)(i) and (ii)(B) of the Act.

CONCLUSIONS OF LAW

1. The Charging Party, CB Construction, is an employer within the meaning of Section 2(6) and (7) of the Act.

2. The Respondent Union, Carpenters Local 33, is a labor organization within the meaning of Section 2(5) of the Act.

3. The Respondent Union has not violated the National Labor Relations Act.

[Recommended Order for dismissal omitted from publication.]

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[6] As the Union points out in its brief, the fact that the reserved gate sign was obscured by iron bars, trucks, and cars afforded no assurance that the appropriate persons would use the gate. Donovan's testimony shows that CB employees, in fact, used the other gate, in the front, from time to time. He did not know how often, or how many people used the wrong gate.

[7] 92 NLRB 547 (1950).

Newspaper and Mail Deliverers' Union of New York and Vicinity *and* Macromedia Publishing Incorporated. Case 22-CP-356

June 30, 1988

DECISION AND ORDER

BY CHAIRMAN STEPHENS AND MEMBERS JOHANSEN AND BABSON

On the basis of a charge filed on January 27, 1986, by Macromedia Publishing Incorporated (the Employer), the General Counsel of the National Labor Relations Board, by the Acting Regional Director for Region 22, issued a complaint against Newspaper and Mail Deliverers' Union of New York and Vicinity (the Respondent) on February 7, 1986. The complaint alleges that since about December 28, 1985, the Respondent has violated Section 8(b)(7)(C) of the Act by picketing the Employer in order to force or require the Employer to recognize and bargain with the Respondent as the representative of certain of its employees, without a valid petition under Section 9(c) of the Act having been filed within a reasonable period of time from the commencement of the picketing. The Respondent filed an answer to the complaint on February 20, 1986, in which it denied the commission of any unfair labor practice and asserted several affirmative defenses.

On May 6, 1986, the parties filed a motion to transfer proceeding to the Board and they agreed that certain documents would constitute the entire record in this case,[1] waived a hearing before an administrative law judge, and submitted this case directly to the Board for it to make findings of fact and conclusions of law and the issuance of a Decision and Order. On July 25, 1986, the Board granted the motion and set a date for the parties to file briefs. None of the parties filed a brief.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the entire record[2] and makes the following

FINDINGS OF FACT

I. THE BUSINESS OF THE EMPLOYER

The Employer, a New Jersey corporation, is engaged in the publication, circulation, and distribution of the News Tribune newspaper at its facility in Woodbridge, New Jersey. During the past year, the Employer derived gross revenues in excess of $200,000 and held membership in, and subscribed to, interstate news services, published nationally syndicated features, and advertised nationally sold products. From the foregoing, the Employer admitted, and we find, that the Employer is engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

II. THE LABOR ORGANIZATION INVOLVED

The Respondent is, and at all material times has been, a labor organization within the meaning of Section 2(5) of the Act.

III. THE UNFAIR LABOR PRACTICES

A. *Facts*[3]

Prior to the Employer's purchase of its assets, Middlesex County Publishing Company (Middlesex) was the publisher of a daily newspaper, the News Tribune. In October 1971, the Board certified the Respondent as the exclusive bargaining representative of all circulation employees, including truckdrivers, mailroom workers, promotion employees, branch office operators, and other shipping and receiving employees employed by Middlesex at its Woodbridge, New Jersey facility. In March 1972, with the Respondent's consent, Middlesex subcontracted its delivery operation to 3-C Corporation (3-C), which then entered into a collective-bargaining agreement with the Respondent. About the same time, Middlesex signed a letter of understanding with the Respondent, stating that if Middlesex terminated its contract with 3-C it would either directly deliver the newspaper using its own employees and negotiate an agreement with the Respondent or subcontract to another company that already had an agreement with the Respondent.

On November 5, 1985, in a bona fide purchase, the Employer acquired the assets of Middlesex.

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[1] The parties did not file a stipulation of facts. They agreed that the record in this proceeding should consist of the following: the charge, the complaint, the order granting extension of time to file an answer, and the answer; the transcript of proceedings on January 14, 1986, in *NMDU v. Macromedia Publishing Incorporated*, Civil No. 85-5940 (D.N.J. 1986), a Sec. 301 suit in the U.S. District Court for the District of New Jersey, and two attendant exhibits (assets purchase agreement and assignment and assumption agreement), the transcript of the proceedings on January 15, 1986, and the orders issued in that case on January 29, 1986, and March 25, 1986; and the record in *Kendellen v. NMDU*, Civil No. 86-582 (D.N.J. 1986), a Sec. 10(l) proceeding in the U.S. District Court for the District of New Jersey, including the petition for injunction, the Respondent's answer to the petition, Petitioner's memorandum of points and authorities in support of petition for injunction, transcript of the proceedings on February 28, 1986, and attendant exhibits, posthearing memorandum of NMDU, the Petitioner's posthearing memorandum, transcript of the proceedings on March 13, 1986, and order granting preliminary injunction.

[2] A Determination of Dispute involving the parties to this proceeding issued on September 29, 1986, in *Newspaper & Mail Deliverers (Macromedia Publishing)*, 281 NLRB 588 (1986).

[3] The facts, which are not in material dispute, are taken from the evidence adduced in the proceedings in the U.S. District Court for the District of New Jersey, supra, fn. 1.

289 NLRB No. 68

The Employer agreed to assume certain agreements, leases, and contracts as stipulated in the purchase sale agreement.

On November 7, 1985, Middlesex advised 3-C that its contract was canceled. About December 20, 1985, 3-C advised the Respondent that truckdrivers represented by the Respondent would be terminated effective January 1, 1986, once the newspaper operations were transferred to the Employer. On December 23, 1985, the Employer advised the Respondent that it intended not to hire 3-C employees represented by the Respondent, but instead would subcontract the Employer's delivery services to another independent contractor. In December 1985, the Employer engaged T C Enterprises, Ltd. d/b/a Associated Security Specialists (Associated), whose employee drivers are unrepresented, to provide security and delivery services for the publication of the News Tribune.

On December 27, 1985, the Employer commenced publication of the News Tribune. From that date, the Respondent commenced picketing of the Employer's premises carrying picket signs bearing, inter alia, the legends, "NMDU Locked Out, the News Tribune Unfair to Organized Labor," "'It Ain't Over Till It's Over' This Site Founded on December 27, 1985, by Pr. Jerry Cronin, N.M.D.U.," and "Scabs Go Home." At some point between January 14, 1986, and about February 5, 1986, some of the picket signs also read, "Notice To The Public Including Consumers. The News Tribune Does Not Employ Members of Newspaper and Mail Deliverers' Union." After February 5, 1986, the pickets continued to carry signs stating "Scabs Go Home" and other pickets carried no signs at all. There was no hiatus in picketing prior to the appearance of the "Notice to the Public" legends, and the picketing continued unabated. The Respondent did not file a valid petition for an election under Section 9(c). According to the testimony of the Employer's attorney, John Langel, the Respondent's attorney indicated to him that the only way the picketing would cease would be if the Employer hired the employees directly or entered into an agreement with "an NMDU organized wholesaler" to provide delivery.

The picketing disrupted the Employer's operations to the following extent. The picketing caused 25-30 delivery trucks to stop at the picket line and turn away. These trucks carried advertising inserts, newsprint, and other materials used in the Employer's operation. Further, the pickets stopped several trucks by running or standing directly in front of the trucks. As a result of the picketing, the Employer has made special arrangements to receive deliveries, including sending security personnel to pick up supplies and advertising supplements. The Employer's vice president and business manager, John Burk, testified in the Section 10(l) proceeding[4] that 90 percent of his time was consumed making special arrangements attributable to the picketing. The Employer has had to change its presstime from 7 a.m. to 1 a.m., at least in part as a result of the disruptions caused by the picketing.

B. *Contentions of the Parties*

As noted, the parties did not file briefs or make any contentions before the Board independent of the pleadings in this case and the proceedings of the U.S. District Court for the District of New Jersey in the Section 301 and Section 10(l) matters. The General Counsel contends that the Respondent picketed the Employer with an object of forcing it to recognize or bargain with the Respondent in violation of Section 8(b)(7)(C) of the Act. The General Counsel further contends that the picketing was not privileged by the second proviso to Section 8(b)(7)(C) of the Act. The Respondent contends in its answer that it is the certified representative of certain employees at the News Tribune, that the Employer is a successor to Middlesex for purposes of bargaining with the Union, that the Employer terminated employees represented by the Respondent in furtherance of a plan to deprive employees of their collectively bargained rights, and that the picketing was not for a recognitional objective, but rather was for the purpose of truthfully advising the public that the Employer does not employ members of the Respondent or have a contract with the Respondent.

D. *Discussion and Conclusions*

Section 8(b)(7)(C) of the Act, in pertinent part, makes it an unfair labor practice for a labor organization, not certified as the representative of an employer's employees, to picket an employer

> . . . (7) where an object thereof is forcing or requiring an employer to recognize or bargain with a labor organization as the representative of his employees . . . .
>
> (C) where such picketing has been conducted without a petition under section 9(c) . . . being filed within a reasonable period of time not to exceed thirty days from the commencement of such picketing . . . . *Provided further,* That nothing in this subparagraph (C) shall be construed to prohibit any picketing or other publicity for the purpose of truthfully advising

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[4] Supra, fn. 1.

> the public (including consumers) that an employer does not employ members of, or have a contract with, a labor organization, unless an effect of such picketing is to induce any individual employed by any other person in the course of his employment, not to pick up, deliver or transport any goods or not to perform any services.

The record here shows that, prior to the Employer's acquisition of the News Tribune, the Respondent represented circulation employees employed by subcontractor 3-C, pursuant to a Board certification and letter of understanding with Middlesex, the former owner of the News Tribune. Picketing began on December 27, 1985, virtually immediately on the Employer's commencement of publication and its use of a nonunion independent contractor, Associated, to perform security and delivery services. The picketing was directed at the News Tribune, now published by the Employer, protested the use of "scabs," and accused the News Tribune of locking out employees and being unfair. Further, the Respondent's attorney indicated to the Employer that the picketing would cease if the Employer hired employees directly or entered into an agreement with a delivery service whose employees were represented by the Respondent.

In these circumstances, it is evident that an object of the Respondent's picketing of the Employer was to achieve a continuation of the Respondent's former representative status of circulation employees employed in the operation of the News Tribune, either by establishing a bargaining relationship directly with the Employer or by forcing the Employer to subcontract work to an entity having a bargaining relationship with the Respondent. Indeed, consistent with the objective sought by the picketing, the Respondent has consistently maintained that the Employer is legally *obligated* to recognize and bargain with the Respondent. Thus, in its answer to the complaint, the Respondent asserts that it *is* the representative of the circulation employees of the News Tribune and, pursuant to that assertion, the Respondent filed both an unfair labor charge contending, in pertinent part, that the Employer violated Section 8(a)(5) and (1) of the Act by refusing to bargain,[5] and a Section 301 suit also asserting a bargaining obligation on the part of the Employer.[6] Accordingly, we find that an object of the picketing was to force or require the Employer to recognize the Respondent as the representative of the circulation employees.

The Respondent contends in the answer to the complaint, as it did in the prior proceedings before the District Court of New Jersey, that it is the certified representative of the circulation employees and that the Employer is a successor to Middlesex, from whom the Employer acquired the News Tribune. The Employer, however, employs no employees to handle deliveries in the circulation unit that the Respondent asserts it represents. Those duties are performed by Associated, whose employees are not represented by the Respondent. Thus, the Employer is not an employer of the employees for whom the Respondent contends a successor relationship exists.[7] Further, there is no evidence establishing that the Employer agreed to recognize the Respondent or to assume the obligations of the collective-bargaining agreement between 3-C and the Respondent.[8] Because there is no probative evidence of the requisite work force continuity necessary to establish successorship status on the Employer,[9] or to establish that the Employer agreed to be bound by the obligations of the seller, Middlesex, we find that the Employer is not a successor to Middlesex or 3-C with respect to the circulation employees formerly employed by 3-C, and that the Respondent, therefore, is not a labor organization "currently certified as the representative of such employees" within the meaning of Section 8(b)(7)(C).[10]

Subsequent to the finding by the U.S. District Court for the District of New Jersey that the Employer was not a successor employer, the Respondent displayed additional picket signs at the Employer's premises reading, "Notice to the Public Including Consumers. The News Tribune Does not Employ Members of Newspapers and Mail Deliverers' Union." The Respondent contends that these signs privilege the picketing under the second proviso to Section 8(b)(7)(C). We find this contention lacking in merit. Despite the appearance of the "Notice to the Public" signs, we find an object of the picketing continued to be immediate recognition. The signs were not accompanied by a disclaimer of recognition, the "Scabs Go Home" signs continued to be used, and some pickets carried no signs, which under the circumstances, indicated that they were picketing in furtherance of the messages conveyed by the legends of both signs. There also was no hiatus in the picketing; and the Respondent not only did not inform the Employer that it was not interested in immediate recognition, it never repudiated the statements of its attorney—nor did he retract them—that the picketing would cease when the Employer either hired the former 3-C employees or signed a contract to provide delivery services with a subcontractor whose employees were represented by the Respondent. See *McClintock Market*, 244 NLRB 555, 556 (1979) (despite disclaimer, union's course of conduct was tantamount to present demand for recognition where there was no hiatus in picketing and the union did not unequivocally inform the employer it was not interested in immediate recognition).

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[5] The Respondent filed an unfair labor practice charge on December 27, 1985, against Middlesex, 3-C, and the Employer, alleging violations of Sec. 8(a)(1), (3), and (5). On January 24, 1986, the Regional Director dismissed the charge. On April 14, 1986, the General Counsel denied the Respondent's appeal of the dismissal.

[6] Supra, fn. 1.

[7] There is no evidence that the Employer is a joint employer with Associated of the circulation employees.

[8] The record before us in this proceeding, as it pertains to the Respondent's successorship contentions, consists virtually entirely of the Sec. 301 proceeding in the U.S. District Court for the District of New Jersey. The primary evidence presented in that proceeding by the Respondent to establish successorship is the Assets Purchase Agreement between Middlesex and the Employer. That agreement provides that the latter "will purchase from sellers all the tangible and intangible assets of [Middlesex] including, without limitation the following: [specification of assets omitted here]." The only labor agreement mentioned thereafter is an agreement with Newark Newspaper and Graphic Communication Union No. 8. The Assets Purchase Agreement makes no mention of the bargaining agreement between 3-C and the Respondent. Accordingly, we find no merit to the Respondent's contention that the Employer contractually assumed Middlesex' relationship with the Union. *Newspaper & Mail Deliverer (Macromedia Publishing)*, 281 NLRB 588 fn. 15 (1986).

[9] *NLRB v. Burns Security Services*, 406 U.S. 272 (1972); *Fall River Dyeing Corp. v. NLRB*, 482 U.S. 27 (1987).

[10] In its answer the Respondent asserts that Macromedia and Middlesex terminated union-represented employees in furtherance of a plan to deprive individuals represented by the Respondent of their collectively bargained rights. As no evidence was presented in support of this assertion, we reject it as lacking merit.

In any event, assuming, arguendo, that these signs express the Respondent's true intention to inform the public that its members are not employed at the Employer's premises, the picketing at the Respondent's premises had the effect of inducing individuals in the course of their employment not to pick up, deliver, or transport goods or not to perform services. As noted, numerous delivery trucks refused to cross the picket line and the pickets stopped several delivery trucks from the site by running or standing in front of the trucks. These substantial disruptions required the Employer to make special arrangements to receive deliveries and contributed to the alteration of its designated presstime from 7 a.m. to 1 a.m.[11] Thus, the picketing at no time was privileged by the second proviso of Section 8(b)(7)(C).

Accordingly, we find that the Respondent's picketing at the Employer's premises since December 27, 1985, violated Section 8(b)(7)(C) of the Act, as alleged.

THE REMEDY

Having found that the Respondent has violated Section 8(b)(7)(C) of the Act, we shall order it to cease and desist and take certain affirmative action necessary to effectuate the policies of the Act.[12]

CONCLUSIONS OF LAW

1. Macromedia Publishing Incorporated, Woodbridge, New Jersey, is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

2. The Respondent is a labor organization within the meaning of Section 2(5) of the Act.

3. By picketing the Employer commencing December 27, 1985, with an object of forcing or requiring the Employer to recognize and bargain with the Respondent as the representative of circulation employees, where such picketing has been conducted without a petition being filed under Section 9(c) of the Act within a reasonable period of time not to exceed 30 days from the commencement of such picketing, the Respondent has violated Section 8(b)(7)(C) of the Act.

4. The foregoing is an unfair labor practice within the meaning of the Act.

ORDER

The National Labor Relations Board orders that the Respondent, Newspaper and Mail Deliverers' Union of New York and Vicinity, Woodbridge, New Jersey, its officers, agents, and representatives, shall

1. Cease and desist from picketing, or causing to be picketed, Macromedia Publishing Incorporated where an object thereof is forcing or requiring the Employer to recognize or bargain with the Respondent as the collective-bargaining representative of circulation employees, at a time when the Respondent is not certified as such representative and where such picketing has been conducted without a petition under Section 9(c) of the Act being filed within a reasonable period of time not to exceed 30 days from the commencement of such picketing.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Post at its offices and meeting halls copies of the attached notice marked "Appendix."[13] Copies of the notice, on forms provided by the Regional Director for Region 22, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to members are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material.

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[11] We find no merit to the Respondent's contentions that these disruptions were de minimis in character.

[12] The General Counsel's request for a visitatorial clause is denied, as such clause is not necessary in the circumstances of this case. *Cherokee Marine Terminal*, 287 NLRB 1080 (1988).

[13] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

(b) Furnish the Regional Director for Region 22 signed copies of the notice in sufficient numbers for posting by Macromedia Publishing Incorporated, if willing, in places where notices to employees are customarily posted.

(c) Notify the Regional Director in writing within 20 days from the date of this Order what steps the Respondent has taken to comply.

APPENDIX

NOTICE TO MEMBERS
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

WE WILL NOT picket, or cause to be picketed, Macromedia Publishing Incorporated, where an object thereof is forcing or requiring the Employer to recognize or bargain with us as the collective-bargaining representative of circulation employees, at a time when we are not certified as such representative and where such picketing has been conducted without a petition under Section 9(c) of the Act being filed within a reasonable period of time not to exceed 30 days from the commencement of such picketing.

NEWSPAPER AND MAIL DELIVERERS'
UNION OF NEW YORK AND VICINITY

General Longshore Workers Local Union No. 3000 of International Longshoremen's Association, AFL–CIO *and* Coastal Cargo Company, Inc. and Teamsters Local Union No. 270, affiliated with the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, AFL–CIO.[1] Case 15–CD–293

June 30, 1988

DECISION AND DETERMINATION OF DISPUTE

By Chairman Stephens and Members Johansen and Babson

The charge in this Section 10(k) proceeding was filed on August 14, 1985, amended August 15, by the Employer, alleging that the Respondent, General Longshore Workers Local Union No. 3000 of International Longshoremen's Association, AFL–CIO, violated Section 8(b)(4)(D) of the National Labor Relations Act by engaging in proscribed activity with an object of forcing the Employer to assign certain work to employees it represents rather than to employees represented by Teamsters Local Union No. 270, affiliated with the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, AFL–CIO. The hearing was held on September 16 and 17 before Hearing Officer Lyn J. Beck.[2]

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board affirms the hearing officer's rulings, finding them free from prejudicial error.

On the entire record, the Board makes the following findings.

I. JURISDICTION

The Employer, Coastal Cargo Company, Inc. (CCCI), a Louisiana corporation, operates a cargo company. Based on a projection of the Employer's New Orleans operations (since they commenced on July 16, 1985), the Employer will derive annual gross revenues in excess of $50,000 for services performed as a link in interstate commerce and will annually purchase and receive goods and materials valued in excess of $50,000 directly from points outside the State of Louisiana.

The parties stipulate to facts that satisfy the Board's jurisdictional requirements. We find that CCCI is engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

The parties stipulate, and we find, that Local 3000 and Local 270 are labor organizations within the meaning of Section 2(5) of the Act.

II. THE DISPUTE

A. *Background and Facts of Dispute*

CCCI was incorporated on July 16, 1985. It is a cargo company that loads and unloads ships docked at the Port of New Orleans. CCCI loads grain, breakbulk, and containerized cargo onto vessels and discharges cargo from vessels or barges onto the dock. In the related case, *Coastal Cargo Co.*, supra, the Board determined that CCCI is the alter ego of a now-defunct company called Coastal Cargo Company, which operated from May 4 to October 1, 1984; this company had a collective-bargaining agreement with Local 270, which ran from May 1, 1984, to April 30, 1987. On July 1, 1985, CCCI signed a collective-bargaining agreement with Local 270, effective until June 30, 1988. The Board determined that this was a valid agreement because CCCI was a continuation of Coastal Cargo Company and was subject to the latter's bargaining obligations.[3]

On July 16, 1985,[4] CCCI engaged in its first operation. CCCI loaded and unloaded the M/V *Marina Heeren*, which was docked at the Galvez Street Wharf in New Orleans. At the wharf a man who said he was a vice president of Local 3000 approached CCCI's president, Durel Landry, and asked him who was loading the *Marina Heeren*. When Landry said Local 270 was doing the work, the man stated that he was going to Local 270's president, Mitch Ledet, and ask why members of the Teamsters were doing stevedoring work.

Ledet testified that on July 24, at a meeting attended by Ledet and Local 3000's president, Cliven Cormier, Cormier said he would do whatever was necessary to get the stevedoring work back from Local 270. Cormier denied making the statement.

On July 29, the *Marina Heeren* returned to the Galvez Street Wharf and was unloaded by CCCI's employees. During the unloading, the Galvez Street Wharf and surrounding areas were picketed by approximately 50 men carrying signs.[5] The

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[1] On November 1, 1987, the Teamsters International Union was readmitted to the AFL–CIO. Accordingly, the caption has been amended to reflect that change.

[2] A stay was issued in this case on January 15, 1986, in order that a related case could first be resolved. See *Coastal Cargo Co.*, 286 NLRB 200 (1987). See also the companion case issued this day, *Longshoremen ILA Local 3000 (Coastal Cargo Co.)*, 289 NLRB 546.

[3] 286 NLRB 200 (1987).

[4] All dates refer to 1985, unless otherwise indicated.

[5] CCCI's facility is located at 4500 Galvez Street. Photographs were taken of the signs. The signs said: "Mitch Ledet is taking food out of our babies' mouths"; "big-time union boss Ledet is stealing workers' bread"; "what has the boss given you, Ledet, for you"; "Ledet has forgotten where he came from. Don't you be a scab"; and "what has the boss given Ledet for you to make scabs out of brother Teamsters."

289 NLRB No. 69

group contained retired and active members of Local 3000.[6] The police eventually dispersed the pickets and they moved from the wharf to the Galvez Street—Japonica Street area. This was the entranceway used by the trucking firm hired by CCCI to transport the containers unloaded from the *Marina Heeren*. The truckdrivers were also members of Local 270. Landry testified that 10 pounds of roofing nails and drywall nails were spread on the access roads to the Galvez Street Wharf. The nails became imbedded in the tires of the hired trucks.

On August 13 the *Marina Heeren* again docked at the Galvez Street Wharf. About 50 men picketed at the Galvez Street floodgate carrying the same signs as on June 29. Harris and Sarentine were among the pickets.

B. *Work in Dispute*

The disputed work involves the loading and unloading of containerized cargo from the oceangoing vessel M/V *Marina Heeren* at the Galvez Street Wharf.

C. *Contentions of the Parties*

The Employer, CCCI, contends that reasonable cause exists to believe that Local 3000 violated Section 8(b)(4)(D) of the Act; and that the work in dispute should be awarded to CCCI's employees represented by Local 270 based on the factors of employer preference, past practice, the collective-bargaining agreement, skill, and economy and efficiency.

Local 3000 contends that the picketing was informational picketing, and the signs were aimed at Local 270's president, Mitch Ledet, and not at the Employer. Local 3000 also contends that Harris organized the picketing without authority from Local 3000 and that Harris is not an agent of Local 3000.

D. *Applicability of the Statute*

Section 10(k) of the Act empowers the Board to determine a dispute out of which an 8(b)(4)(D) charge has arisen. However, before the Board proceeds with a determination of dispute it must be satisfied that there is reasonable cause to believe that Section 8(b)(4)(D) has been violated, and that there is no agreed-upon method for voluntary settlement of the dispute.

At the beginning of the dispute, CCCI's employees represented by Local 270 had been assigned to perform the work in dispute. The longshoremen contended that the work belonged to them. Members of Local 3000 twice picketed the *Marina Heeren*, the situs of the work, with signs, two of which referred to the teamsters as "scabs." Scab is a "term of art" commonly used by a union member who has lost work in reference to the person who has taken the work. Further, the picketing done by members of Local 3000 was clearly aimed at the employees of CCCI, the *Marina Heeren*, and the truck company.[7]

There is reasonable cause to believe that an object of the picketing was to force or require CCCI to assign the work in dispute to employees represented by Local 3000 rather than to its own employees represented by Local 270 and that the picketing was not solely for the purpose of informing the public that Mitch Ledet and Local 270 were doing stevedoring work. Also, on July 24, according to Ledet,[8] Cormier told Ledet that he would do whatever was necessary to get the work back from Teamsters Local 270.

There is also evidence that Harris, a retired Local 3000 member, tried to induce or encourage employees of CCCI to cease unloading the ship. Further, Sarentine, a current member, was identified as one of the individuals picketing the *Marina Heeren*. There is reasonable cause to find that Harris and Sarentine were acting on behalf of Local 3000. Their actions were in furtherance of Local 3000's objectives, and Local 3000 never repudiated their activities.

No evidence was produced at the hearing of an agreed-upon method for the voluntary adjustment of the instant dispute.

We find reasonable cause to believe that a violation of Section 8(b)(4)(D) has occurred and that there exists no agreed method for voluntary adjustment of the dispute within the meaning of Section 10(k) of the Act. Accordingly, we find that the dispute is properly before the Board for determination.

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[6] CCCI's superintendent, Scott, overheard one of the pickets ask two of CCCI's employees not to unload the ship. The picket was later identified as Thomas Harris, a retired Local 3000 member.

Landry testified that he saw one picket "jumping up and down screaming, 'blood, blood, real blood's going to flow over this.'" The man was later identified as Paul Sarentine, a former business agent of Local 3000 and a current member.

[7] Chairman Stephens finds it unnecessary to infer a noninformational object from the use of the word "scab" in the picket signs carried by the ILA members. He agrees that it may commonly refer to a person who has taken work from a union member. However, according to one authority, "[t]he terms may be applied to an individual who will accept lower wages or poorer working conditions than those which the union has established or seeks." *Roberts' Dictionary of Industrial Relations* at 644 (3d ed. 1986 BNA). In the instant case, the ILA contends that the Teamsters were undermining local wage and benefit standards established by the Respondent and further that the purpose of the picketing was to publicize that fact to the public. Be that as it may, Chairman Stephens finds from the remaining evidence in the record that there was also an unlawful object of forcing the employer to assign the stevedoring work to the ILA.

[8] Although Cormier denied making the threat, a conflict in testimony does not prevent the Board from proceeding under Sec. 10(k). The Board is not charged with finding that a violation actually occurred but only with determining whether reasonable cause exists for finding a violation. *Longshoremen ILA Local 1588 (Atlantic Cement)*, 273 NLRB 1723, 1725 (1985).

E. *Merits of the Dispute*

Section 10(k) requires the Board to make an affirmative award of disputed work after considering various factors. *NLRB v. Electrical Workers IBEW Local 1212 (Columbia Broadcasting)*, 364 U.S. 573 (1961). The Board has held that its determination in a jurisdictional dispute is an act of judgment based on common sense and experience, reached by balancing the factors involved in a particular case. *Machinists Lodge 1743 (J. A. Jones Construction)*, 135 NLRB 1402 (1962).

The following factors are relevant in making the determination of this dispute.

1. Certification and collective-bargaining agreement

CCCI has a collective-bargaining agreement with Local 270;[9] it has no collective-bargaining agreement with Local 3000. No Board certification has been issued regarding CCCI's employees engaged in stevedoring operations or regarding any other unit of employees.

This factor favors an award of the disputed work to employees represented by Local 270.

2. Company preference and past practices

CCCI prefers that the work in dispute be done by its employees who are represented by Local 270. CCCI's alter ego Coastal Cargo Company used employees represented by Local 270 to load and unload ships. This factor favors awarding the disputed work to employees represented by Local 270.

3. Area practice

The record shows that the loading and unloading of ships in the Port of New Orleans has in the past been done by employees represented by Local 3000. More recently employees represented by Local 270 have engaged in stevedoring work. Therefore, this factor does not favor awarding the disputed work to either group of employees.

4. Relative skills

Both employees represented by Local 270 and Local 3000 possess the skills needed to load and unload ships. Both groups of employees have experience in stevedoring work. Therefore, this factor does not favor awarding the disputed work to either group of employees.

5. Economy and efficiency

CCCI's president, Landry, testified that it is more economical and efficient for the Employer to use its own employees represented by Local 270. Landry testified that usually he would have to hire 18 longshoremen as opposed to 7 teamsters for each job. Landry also testified that he only hired as many teamsters as he needed and did not have to hire waterboys and timekeepers as required by the longshoremen. Therefore, this factor favors awarding the disputed work to employees represented by Local 270.

Conclusion

After considering all the relevant factors, we conclude that employees represented by Local 270 are entitled to perform the work in dispute. We reach this conclusion relying on the collective-bargaining agreement between CCCI and Local 270, employer preference and past practice, and economy and efficiency.

In making this determination, we are awarding the work to employees represented by Teamsters Local Union 270, affiliated with the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, AFL-CIO, not to that Union or its members.

Scope of the award

The Employer contends that the determination should encompass all stevedoring work within the geographical jurisdiction of Local 3000. Generally, for the Board to issue a broad, areawide award, there must be evidence that the disputed work has been a continuing source of controversy in the relevant geographic area and that similar disputes are likely to recur. There must also be evidence that demonstrates the charged party has a proclivity to engage in unlawful conduct to obtain work similar to the disputed work.

In this case, the notice of hearing limited the scope of the disputed work to the loading and unloading of the M/V *Marina Heeren* at the Galvez Street Wharf in the Port of New Orleans. However, in the companion case, *Longshoremen ILA Local 3000 (Coastal Cargo Co.)*, supra, the notice of hearing defined the work in dispute as the loading and unloading of ships within the geographical jurisdiction of Local 3000. Further, in the companion case, the Board makes an award regarding the broad definition of the work in dispute. Thus, in this case we do not grant the Employer's request for a broad award. Although we here limit the scope of our award to the loading and unloading of the M/V *Marina Heeren* at the Galvez Street Wharf, our award in the companion case, in effect, gives the Employer the relief that it is requesting.

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[9] The agreement covers the classifications of: checker, crane operator, lift driver, loader, flag man, loading crew, labor, and palletizer. The agreement does not describe the work these classifications perform.

Accordingly, our determination is limited to the controversy that gave rise to this proceeding.

DETERMINATION OF DISPUTE

The National Labor Relations Board makes the following Determination of Dispute.

1. Employees of Coastal Cargo Company, Inc., represented by Teamsters Local Union 270 affiliated with International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, AFL-CIO, are entitled to perform the loading and unloading of the M/V *Marina Heeren* at the Galvez Street Wharf in New Orleans, Louisiana.

2. General Longshore Workers Union No. 3000 of International Longshoremen's Association, AFL-CIO is not entitled by means proscribed by Section 8(b)(4)(D) of the Act to force Coastal Cargo Company, Inc. to assign the disputed work to employees represented by it.

3. Within 10 days from this date, General Longshore Workers Union No. 3000 of International Longshoremen's Association, AFL-CIO shall notify the Regional Director for Region 15 in writing whether it will refrain from forcing the Employer, by means proscribed by Section 8(b)(4)(D), to assign the disputed work in a manner inconsistent with this determination.

General Longshore Workers Local Union No. 3000 of International Longshoremen's Association, AFL-CIO *and* Coastal Cargo Company, Inc. and Teamsters Local Union No. 270, affiliated with the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, AFL-CIO,[1] Party to the Dispute and Mississippi River Grain Elevator, Inc., Party to the Dispute. Case 15-CD-295

June 30, 1988

DECISION AND DETERMINATION OF DISPUTE

BY CHAIRMAN STEPHENS AND MEMBERS JOHANSEN AND BABSON

The charge in this Section 10(k) proceeding was filed on November 12, 1985, by the Employer, alleging that the Respondent, General Longshore Workers Local Union No. 3000 of International Longshoremen's Association, AFL-CIO, violated Section 8(b)(4)(D) of the National Labor Relations Act by engaging in proscribed activity with an object of forcing the Employer to assign certain work to employees it represents rather than to employees represented by Teamsters Local Union No. 270, a/w International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, AFL-CIO. The hearing was held on December 3 before Hearing Officer Lyn J. Beck.[2]

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board affirms the hearing officer's rulings, finding them free from prejudicial error. On the entire record, the Board makes the following findings.

I. JURISDICTION

The Employer, Coastal Cargo Company, Inc. (CCCI) a Louisiana corporation, operates a cargo company. Based on a projection of the Employer's New Orleans operations (since they commenced on July 16, 1985), the Employer will derive annual gross revenues in excess of $50,000 for services performed as a link in interstate commerce and will annually purchase and receive goods and materials valued in excess of $50,000 directly from points outside the State of Louisiana.

The parties stipulated to facts that satisfy the Board's jurisdictional requirements. We find that CCCI is engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

Mississippi River Grain Elevator, Inc. (MRGE) is a party to the dispute. MRGE is engaged in the storage, sale, and transfer of grain. The parties stipulated that MRGE in the preceding 12-month period in the course and conduct of its business operations within the State of Louisiana derived gross revenues in excess of $50,000 for the transportation and handling of commodities and cargo in interstate commerce pursuant to arrangements with and as agents for various common carriers. The parties further stipulated that during this 12-month period MRGE purchased and received at its Myrtle Grove, Louisiana facility goods and materials valued in excess of $50,000 directly from points outside the State of Louisiana.

We find that MRGE is engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

The parties stipulate, and we find, that Local 3000 and Local 270 are labor organizations within the meaning of Section 2(5) of the Act.

II. THE DISPUTE

A. *Background and Facts of Dispute*

CCCI was incorporated on July 16, 1985. It is a cargo company, which loads and unloads ships docked at the Port of New Orleans. CCCI loads grain, breakbulk, and containerized cargo onto vessels and discharges cargo from vessels or barges onto the dock. In a related case, *Coastal Cargo Co.*, 286 NLRB 200 (1987), the Board found that CCCI is the alter ego of a now-defunct company called Coastal Cargo Company, which operated from May 4 to October 1, 1984; this company had a collective-bargaining agreement with Local 270, which ran from May 1, 1984, to April 30, 1987. On July 1 CCCI signed a collective-bargaining agreement with Local 270 effective until June 30, 1988. The Board determined that this was a valid agreement because CCCI was a continuation of Coastal Cargo Company and was subject to the latter's bargaining obligations.[3]

MRGE first subcontracted work to CCCI in September 1985. On September 5 MRGE contracted with CCCI for the unloading of the M/V *Anastasia II*. Over a 16-hour period, employees of CCCI represented by Local 270 loaded the ship

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[1] On November 1, 1987, the Teamsters International Union was readmitted to the AFL-CIO. Accordingly, the caption has been amended to reflect that change.

[2] The Employer made a motion to consolidate this proceeding with a companion case, *Longshoremen ILA Local 3000 (Coastal Cargo Co.)*, 289 NLRB 542. The motion is denied as the work in dispute in each case differs in scope.

All parties present in the proceeding stipulated to include the record transcript from the companion case. The parties requested the Board to take official notice of the proceedings in that case and stipulated that the facts set out in that record would constitute the record here.

[3] *Coastal Cargo Co.*, 286 NLRB 200, 203-204 (1987).

289 NLRB No. 70

with approximately 4700 tons of grain. No members of Local 3000 picketed the ship. CCCI performed other loading services at MRGE in late October and early November with no pickets in attendance.

On November 7, CCCI was under contract with MRGE to load the M/V *Massmiliano F.* with grain. Employees of CCCI commenced loading operations on November 7 at 6 p.m. During the afternoon of November 8, Durel Landry, CCCI's president, received word that Local 3000 was going to put up a picket line at the MRGE facility where the *Massmiliano F.* was still being loaded.

Landry testified that at 5:45 a.m. on November 9 he observed three men with picket signs at the entrance to the main road leading to MRGE's facility.[4] Landry recognized one of the pickets as Paul Sarentine,[5] a current member and previous vice president and business agent of Local 3000. The pickets remained all day and left at 5:30 p.m. The grain loading continued through the night and finished at 9:30 a.m. on November 10.

B. *Work in Dispute*

The work in dispute[6] involves the loading and unloading of oceangoing vessels within the jurisdictional boundaries of General Longshore Workers Local Union No. 3000 of International Longshoremen's Association, AFL–CIO in the Port of New Orleans, New Orleans, Louisiana.

C. *Contentions of the Parties*

The Employer, CCCI, contends that reasonable cause exists to believe that Local 3000 violated Section 8(b)(4)(D) of the Act; and that the work in dispute should be awarded to CCCI's employees represented by Local 270 based on the factors of employer preference, past practice, the collective-bargaining agreement, skill, and economy and efficiency.

MRGE argues that the picketing is an extension of the picketing in the companion case. It maintains that the work in dispute should be awarded to employees represented by Local 270 on the basis of company preference and economy and efficiency of operations. MRGE also states that neither it nor CCCI are parties to any procedure for the joint resolution of jurisdictional disputes.

Local 3000 does not acknowledge the existence of a jurisdictional dispute. It disputes the applicability of the statute in this matter and denies that "reasonable cause" exists to believe that it violated Section 8(b)(4)(D) of the Act. It contends that the picketing was isolated. Local 3000 also contends that the ILA and the Teamsters have formed a joint board to resolve jurisdictional disputes.

D. *Applicability of the Statute*

Section 10(k) of the Act empowers the Board to determine a dispute out of which an 8(b)(4)(D) charge has arisen. However, before the Board proceeds with a determination of dispute, it must be satisfied that there is reasonable cause to believe that Section 8(b)(4)(D) has been violated, and that there is no agreed-upon method for voluntary settlement of the dispute.

At the beginning of the dispute, CCCI's employees represented by Local 270 had been assigned to perform the work in dispute. The longshoremen contended the work belonged to them. Members of Local 3000 picketed the MRGE facility at which the M/V *Massmiliano F.* was docked. The picket signs indicated that the Teamsters, Local 270 was "unfair" to Local 3000 members. There is reasonable cause to believe that an object of the picketing was to force or require CCCI to assign the work in dispute to employees represented by Local 3000 rather than to its own employees represented by Local 270.[7] Although MRGE did not control the work in dispute, Local 3000 accused it of being unfair to Local 3000.

There is no evidence that CCCI or MRGE are bound to any resolution reached by the joint board. Therefore there is no agreed-upon method for the voluntary adjustment of the instant dispute.

We find reasonable cause to believe that a violation of Section 8(b)(4)(D) has occurred and that there exists no agreed-upon method for voluntary adjustment of the dispute within the meaning of Section 10(k) of the Act. Accordingly, we find that the dispute is properly before the Board for determination.

E. *Merits of the Dispute*

Section 10(k) requires the Board to make an affirmative award of disputed work after considering various factors. *NLRB v. Electrical Workers IBEW Local 1212 (Columbia Broadcasting)*, 364 U.S. 573 (1961). The Board has held that its determination in a jurisdictional dispute is an act of judgment based on common sense and experience, reached by balancing the factors involved in a particular case. *Machinists Lodge 1743 (J. A. Jones Construction)*, 135 NLRB 1402 (1962).

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[4] The picket signs read: "Teamsters Local 270 Unfair ILA Longshoremen"; "M.R.G.E. Unfair to ILA 3000"; and "Feruzzi Sillo Non Gusto a ILA-Operaio."

[5] Variously spelled Seruntine and Serantine in the record.

[6] The specific work involved in this case was the loading of grain aboard an oceangoing vessel at the Myrtle Grove, Louisiana facility of MRGE. The Regional Director's notice of hearing broadened the dispute to include any similar operation within the geographical jurisdiction of Longshoremen Local 3000. No party contested the scope of the dispute.

[7] We note, as set forth in the companion case, that, according to Local 270's president, Mitchell Ledet, Local 3000's president, Cliven Cormier, threatened to do whatever was necessary to get the stevedoring work back from Local 270.

The following factors are relevant in making the determination of this dispute.

1. Certification and collective-bargaining agreement(s)

CCCI has a collective-bargaining agreement with Local 270;[8] it has no collective-bargaining agreement with Local 3000. No Board certification has been issued regarding any CCCI employees engaged in stevedoring operations or regarding any other unit of employees. This factor favors an award of the disputed work to employees represented by Local 270.

2. Company preference and past practice

CCCI prefers that the work in dispute be done by its employees who are represented by Local 270. CCCI's alter ego Coastal Cargo Company used employees represented by Local 270 to load and unload ships. This factor favors awarding the disputed work to employees represented by Local 270.

3. Area practice

The record shows that the loading and unloading of ships in the Port of New Orleans has in the past been done by employees represented by Local 3000. On occasion MRGE has contracted stevedoring work to companies whose employees were represented by Local 3000. Employees represented by Local 270 have also engaged in stevedoring work in the Port of New Orleans. Therefore, this factor does not favor awarding the disputed work to either group of employees.

4. Relative skills

Both employees represented by Local 270 and Local 3000 possess the skills needed to load and unload ships. Both groups of employees have experience in stevedoring work. Therefore, this factor does not favor awarding the disputed work to either group of employees.

5. Economy and efficiency

CCCI's president, Landry, testified that it is more economical and efficient for the Employer to use its own employees represented by Local 270. Landry testified that usually he would have to hire 18 longshoremen as opposed to 7 teamsters for each job. Landry also testified that he only hired as many teamsters as he needed and did not have to hire waterboys and timekeepers as required by the longshoremen. Therefore, this factor favors awarding the disputed work to employees represented by Local 270.

Conclusion

After considering all the relevant factors, we conclude that employees represented by Local 270 are entitled to perform the work in dispute. We reach this conclusion relying on the collective-bargaining agreement between CCCI and Local 270, employer preference, past practice, and economy and efficiency.

DETERMINATION OF DISPUTE

The National Labor Relations Board makes the following Determination of Dispute.

1. Employees of Coastal Cargo Company, Inc., represented by Teamsters Local Union No. 270 a/w International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, AFL-CIO, are entitled to perform the loading and unloading of oceangoing vessels for Coastal Cargo Company, Inc., within the jurisdictional boundaries of General Longshore Workers Local Union No. 3000 of International Longshoremen's Association, AFL-CIO in the Port of New Orleans, New Orleans, Louisiana.

2. General Longshore Workers Union No. 3000 of International Longshoremen's Association, AFL-CIO is not entitled by means proscribed by Section 8(b)(4)(D) of the Act to force Coastal Cargo Company, Inc. to assign the disputed work to employees represented by it.

3. Within 10 days from this date, General Longshore Workers Union No. 3000 of International Longshoremen's Association, AFL-CIO shall notify the Regional Director for Region 15 in writing whether it will refrain from forcing the Employer, by means proscribed by Section 8(b)(4)(D), to assign the disputed work in a manner inconsistent with this determination.

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[8] The agreement covers the classifications of: checker, crane operator, lift driver, loader, flag man, loading crew, labor, and palletizer. The agreement does not describe the work that these classifications perform.

Leasco, Inc. ***and*** **James E. Bender.** Case 6–CA–19520

June 30, 1988

DECISION AND ORDER

By Chairman Stephens and Members Johansen and Cracraft

On February 26, 1988, Administrative Law Judge Richard H. Beddow Jr. issued the attached decision. The Respondent filed exceptions and a supporting brief, and the General Counsel filed a brief in support of the judge's decision.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings,[1] and conclusions and to adopt the recommended Order.

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge and orders that the Respondent, Leasco, Inc., Dubois, Pennsylvania, its officers, agents, successors, and assigns, shall take the action set forth in the Order.

Charles H. Saul, Esq., for the General Counsel.
Edward R. Noonan, Esq., of Pittsburgh, Pennsylvania, for the Respondent.

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[1] The Respondent has excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

In his analysis, the judge erroneously attributed to Terminal Manager Ramey the statement made to a group of drivers that he would be glad to take his coat off and "go to the backroom" to finish a discussion with the drivers. The judge's findings of fact and the record indicate, however, that Company Official Gerry Meyers made this offer. In our view, it is of little import whether the offer was voiced by Ramey or by Meyers. Both are agents of the Respondent. The significance of the offer, especially when considered along with driver Bowman's oral acceptance of the challenge, is that it indicated that a certain degree of bravado was not unusual in this particular employment setting. Accordingly, although we do not condone the Charging Party Bender's use of profanity, we do agree with the judge that Bender's statement to official Bruce Anderson that "if you're taking my truck, I'm kicking your ass right now," constitutes a colloquialism that standing alone does not convey a threat of actual physical harm. Under all the factual circumstances here, we affirm the judge's conclusion that Bender's conduct was not so egregious as to render his concerted activity unprotected or to make him unfit for further employment. See *Consumers Power Co.*, 282 NLRB 130 (1986).

289 NLRB No. 72

DECISION

Statement of the Case

Richard H. Beddow Jr., Administrative Law Judge. This matter was heard in Dubois, Pennsylvania, on 11 February 1987. Subsequent to an extension of filing dates, briefs were filed by all parties. The proceeding is based on a charge filed 26 September 1986[1] by James E. Bender, an individual. The Regional Director's complaint dated 10 November 1986, as amended,[2] alleges that Respondent Leasco, Inc., of Indianapolis, Indiana, violated Section 8(a)(1) of the National Labor Relations Act by terminating Bender because of his protected concerted activities.

Subsequent to the close of the hearing, Respondent made a timely request to reopen the record and the General Counsel replied. By Order dated 4 March 1987 the motion was denied.

On a review of the entire record in this case and from my observation of the witnesses and their demeanor, I make the following

Findings of Fact

I. JURISDICTION

Respondent is a corporation that leases motor vehicles and the services of drivers to an affiliated company, a common carrier by motor vehicle certified to engage in interstate and foreign commerce. It has an office and place of business in Indianapolis, Indiana, and performs services in States other than Indiana, including Pennsylvania. During the 12-month period ending 31 August 1986, Respondent had gross revenues in excess of $50,000 for services performed directly at locations outside Pennsylvania and it admits that at all times material it has been an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

II. THE ALLEGED UNFAIR LABOR PRACTICE

James E. Bender was one of over 150 drivers based at the motor carrier's Dubois, Pennsylvania terminal and had been employed by Respondent for over a year until he was terminated on 12 September for allegedly threatening a company official in a confrontation that occurred the previous evening.

Respondent's employees are not represented by a union. On 11 September the Dubois terminal was visited by company officials Gerry Meyers and Bruce Anderson to inform drivers that the motor carrier operations were going to be changed to a "slip seat" operation and that regular tractors would no longer be "assigned" to them. Later that day, after hearing indirectly about the change, several drivers, including Bender, who had not yet been formally notified of the conversion, met that evening after work at a local bar to discuss what was happening.

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[1] All following dates will be in 1986 unless otherwise indicated.

[2] In accordance with provisions made at the hearing the General Counsel filed a second amended complaint that incorporates oral amendment made at the hearing. The Respondent also filed an amended answer and both documents (Bd. Exhs. 2(a) and (b)) are received into evidence.

Bender and other drivers were highly upset by the change because it meant that they would no longer drive the same vehicle each day but would change to different units and be faced with operating equipment of condition unknown and that had been used and slept in by other drivers. They also were upset because they no longer would be able to drive vehicles to their home as was their practice and because they had experienced serious, undesirable problems using the "slip seat" method when they worked for other companies. Near midnight the drivers learned that Anderson and Meyers had gone to a lounge at the Dubois Ramada Inn. Approximately seven drivers, including Bender and drivers John Slike, Ronald Dinklocher, John Davies, Danny Williams, Donald Manges, and Rummel went to the Ramada "to get some answers."

The drivers each had about five to six beers during the evening, which they said was not an abnormal amount, prior to arriving at the Ramada Inn between 12:30 and 1 a.m. they found Anderson in the company of trainer and dispatcher Douglas Mills and two girls, Stephanie Scott, an assistant dispatcher and Kim Jenny, a traffic clerk, all employed at the Dubois terminal. Bender who led the drivers into the lounge approached the group and asked, "Who's the bigwig from Indianapolis?" Bender and the drivers were then introduced to Anderson. Then Bender, joined by the other drivers, particularly John Slike, began to voice their concerns about the switch to a "slip seat" system and Respondent's taking away their assigned trucks. Anderson initially refused to discuss the matter, saying this was neither the time nor the place. The conversation became loud and profane (a band also was playing for part of this period), and Bender accused Anderson of "giving us a bunch of bullshit." Scott testified that she told the drivers "to shut the fuck up" because they were interrupting her "good time." Several drivers testified that Anderson would not discuss their complaints and appeared to have a "smirk" on his face. Kim Jenny also testified that Anderson's face had "like a smirk." Jenny also testified that she heard someone tell Anderson "I'm going to kick your ass, or something to that effect" and believes that it was Jack Slike or Danny Williams.

Slike testified that he, Bender, and Williams were talking more than the others, that Williams' behavior was the most "radical" (Williams had already told the other drivers he was leaving for another job the next day) but that he did not make the remark to Anderson. He recalled hearing Bender tell Anderson "he could be knocked off of the stool." Bender recalls that he was upset that Anderson would not even discuss the matter with them and further upset by Anderson's smugness, and told Anderson that "you shouldn't be like that to people when they are asking you a question because some day, somebody is eventually going to knock you off your barstool."

Anderson testified that he had dinner around 9 p.m. and then joined Mills at the bar around 10 p.m. and had two or three drinks prior to the arrival of the drivers. He did not know Bender at the time of the confrontation but recalls that Bender persisted in talking and said, "If you're taking my truck, I'm kicking your ass right now." Anderson said the comment was repeated at least once but was not accompanied by any raising of a fist or motion toward him; however, he said Bender pointed a finger at him, as if to emphasize his point. Anderson testified that Williams also said he would kick his "ass." Anderson admitted that he has commonly heard such vulgarities around truckdrivers; however, the comment was not previously directed at him as a manager. He testified that he was "concerned" about the confrontation with the group of emloyees but was not "upset" and made no effort to leave. After he did leave the bar area, he remained nearby and talked with some of the other drivers for about 10 minutes.

The next day between 8 or 8:30 a.m., Bender, Slike, and driver Donald Bowman went to Respondent's terminal and asked Manager Richard Ramey for a meeting with Meyers; however, Meyers was not yet present. Bowman repeated the request between 9:30 and 10 a.m., when approximately 20 to 30 drivers were in the drivers' lounge. About 5 minutes later, Bender was called into Ramey's office and was told by Ramey that he was fired for "harassing a company official." Bender denied harassing a company official and tried to explain to Ramey what had occurred. Ramey told Bender that he had 5 minutes to clear out his truck and get off Respondent's property.

Anderson, Meyers, and Ramey held a meeting with about 12 to 14 drivers, including Bowman and Slike about 11:30 a.m. Meyers told the employees that some "radicals" went to the Ramada Inn the previous evening and that the "culprit" had been taken care of—discharged.

Two witnesses testified that Meyers told the drivers that if any of them wished to continue their discussion, he would be glad to take his coat off and meet them in the backroom after the meeting. Bowman responded that he was there to find out about his job, but if Meyers wanted to, he would join Meyers in the backroom. No fight occurred and Bowman was not disciplined as a result of his challenge to Meyers.

Anderson testified that when he went to the terminal the following morning Mills identified Bender and Williams to him and Anderson told Meyers "what took place and how the threats were made to me (by both Bender and Williams), that I was going to get my ass kicked." Sometime prior to 10 a.m. Meyers called Indianapolis, spoke to some unidentified person at the company's office and informed Anderson that Bender would be fired. Mills testified that neither he nor Anderson recommended that anyone be fired and that he was just asked to identify the drivers for Anderson.

Terminal Manager Richard Ramey testified that about 10 days before the incident Williams had informed him that he would be quitting for another job. Ramey said he told Williams he was a good driver and that he was welcome back if things did not work out. On 12 September Williams went to the terminal to see if they wanted him to complete delivery of a load he had brought in the previous evening but was told a local driver would do it. He went to Ramey's office around 10 a.m., confirmed that it was his last day, waited a short while, and filled out and signed a resignation form supplied by Ramey. He was not asked about the previous evening and no mention of it was made. Williams recalls that Ramey shook his hand and again was told he was a good driver and to come back if he needed to. Ramey, however, indicated that this comment was made only at the earlier occasion.

Ramey also testified that he was told by Meyers to terminate Bender between 8:30 and 9:30 a.m. Meyers told him he had just talked to "corporate" to bring Bender in, terminate him, and give him 10 or 15 minutes to get off the property. No other names were mentioned. Ramey previously had overheard Anderson, Meyers, and Mills mention Williams when they were talking about the incident, and he told them that Williams had already given notice that he was quitting. He heard no statement that they were considering any discipline for Williams. Ramey said he called Bender to his office and told him that he screwed up last night, threatened a company official, and that he had been instructed by Meyers to terminate his employment. Bender argued that it did not happen on company property and asked what was going to happen to the other drivers. Ramey replied he did not know, it was not his decision. On cross-examination Ramey was asked why he did not fire Williams and he said that it was because he had already quit. He did not indicate whether anyone had suggested or inquired about also terminating Williams.

Ramey also stated that he overheard Anderson's initial conversation with Meyers that morning, which occurred in an open area outside his office, and recalls that Anderson's first words were "you should have been with me last night, I almost got my ass kicked."

III. ADMISSIONS AND STIPULATIONS

In its answer to the second amended complaint, Respondent admits that, on the evening of 11 September 1986, Bender concertedly complained regarding wages, hours, and working conditions. Respondent further stipulates that, by the same conduct, Bender was engaged in concerted activity for mutual aid or protection.

IV. DISCUSSION

The sole issue in this proceeding is whether Bender engaged in misconduct sufficient to deny him the protection his concerted protest would have otherwise enjoyed under Section 7 of the Act.

Bender was terminated the morning after he and others had engaged in a "loud and profane" conversation regarding working conditions with a company official in a public lounge. The alleged justification for Respondent's action is that Bender threatened a company supervisor. Respondent's disciplinary action was decided on or endorsed by an unidentified company official in Indianapolis based on a phone conversation (with a possible reply) with another company supervisor, Meyers, who had heard about the incident minutes before. Meyers was at the Dubois terminal to inform drivers about the Company's immediate changeover to a new type of operation, a change opposed by the drivers engaged in the conversational confrontation. Within 1-1/2 hours of first learning of the incident, Meyers directed Terminal Manager Ramey to terminate Bender. He made no attempt to interview Bender, the other terminal employees who were present, or any of the other drivers, and he made no other investigation of Bender's alleged conduct.

Anderson and Mills, the two company officials who witnessed the incident, made no recommendation for disciplinary action and the Respondent presented no evidence of any company policy regarding disciplinary actions. Here, I find that the decision to terminate was based solely on Bender's alleged statement to Anderson: "if you take my truck, I'll kick your ass," which was construed to be a threat to a company supervisor. Bender denies making that specific comment; however, he admits using a somewhat similar phrase, absent any profanity. I do not credit Bender's description of his comment to Anderson, and I find that the corroborating and credible testimony of several witness to the incident clearly support Anderson's version of the words used.

Anderson's testimony makes it clear that he considered Bender (who clearly was the most articulate driver) to be the principal spokesman for the group of drivers that attempted to speak with him. His impression was relayed to Meyers, who made a decision to pursue disciplinary action. Anderson also identified Williams as one who was present and who made a similar "I'll kick your ass" remark as well as other vulgarities. As noted above, no attempt was made to discipline Williams. He was not given any admonition for his role in the confrontation, and he was allowed to complete a previously announced plan to resign, although Respondent had the opportunity to terminate him before he did so, or to otherwise place some disciplinary-type admonition in his personal file.

Although the conversation between Anderson and the drivers was loud and profane, it was not accompanied by any physical gestures such as the clenching or shaking of a fist, no invitation to "step outside," and no actual or potential physical contact. Anderson testified that he was "concerned" but was not "upset" and he remained around to talk for 10 or more minutes after Bender had assumed a peacemaker role and escorted the more verbally abusive Williams from the area. Slike offered an apology to Anderson at this time and Anderson otherwise remained seated in an open public lounge in the presence of two young women from the office. Anderson, who is 5 feet 11 inches tall and weighs 245 pounds (compared with Bender at 6 feet 1 inch tall and 215 pounds), is a former truckdriver and was described as appearing calm and unfrightened. Mills, who had heard Bender's remark to Anderson, subsequently had a conversation with Bender and said he did not feel he was in any danger from Bender.

As stated by the Board in *Consumers Power Co.*, 282 NLRB 130, 132 (1986):

> The Board has long held, however, that there are certain parameters within which employees may act when engaged in concerted activities. The protections Section 7 affords would be meaningless were we not to take into account the realities of industrial life and the fact that disputes over wages, hours, and working conditions are among the disputes

> most likely to engender ill feelings and strong responses. Thus, when an employee is discharged for conduct that is part of the res gestae of protected concerted activities, the relevant question is whether the conduct is so egregious as to take it outside the protection of the Act, or of such a character as to render the employee unfit for further service.

Here, Anderson and Mills, the two supervisors actually present during the confrontation, did not take the matter so seriously that they recommended disciplinary action. Supervisor Meyers, however, initiated a phone call to other managerial personnel at company headquarters and then he instructed Terminal Manager Ramey to fire Bender. Meyers did so without benefit of any meaningful investigation and within only a few minutes of first learning of the incident. Respondent also failed to consider the use of the same language by Williams sufficiently egregious as to warrant even an admonition for his personal file and it also failed to react to Manager Ramey's offer to fight and driver Bowman's acceptance of that offer as egregious conduct that would warrant some disciplinary action against them, thereby indicating that Respondent has substantial discretion in choosing how it would respond to Bender's conduct.

Under these circumstances, I conclude that Respondent's decision to discharge Bender was arbitrary, discriminatory, and capricious, and I infer that it would not have occurred were it not for Bender's protected concerted protests about conditions of employment. Respondent seized on an incident in which an employee used a profane colloquialism and construed his statement as threatening, insubordinate conduct in order to get rid of an apparent leader of the drivers who had raised questions about its planned changes in working conditions. Respondent imposed the most severe penalty possible, discharge, rather than some lesser degree of discipline that would have permitted Bender to remain as an employee still in a position to speak out under the protection of the Act.

I find that the words used by Bender were not accompanied by any other threats, actions, or circumstances that were understood by Anderson to be a threat of an actual physical confrontation. I find further that the phrase "I'll kick your ass" (and variations thereof) is a profane colloquialism used commonly to verbalize the speaker's desire to prevail over another person or group. Its apparent usage in this respect has been accepted by prominent sports and political figures and, standing alone in its ordinary usage, it does not convey a threat of actual physical harm.

Accordingly, I find that the record fails to show that Bender's conduct was so egregious as to lose the protection of the Act or of such a character as to render him unfit for further service. I conclude that the counsel for the General Counsel has met his overall burden of proof and has persuasively shown that Respondent's discharge of Bender violates Section 8(a)(1) of the Act as alleged.

CONCLUSIONS OF LAW

1. Respondent is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

2. By discharging James E. Bender on 12 September 1986, Respondent engaged in an unfair labor practice in violation of Section 8(a)(1) of the Act.

THE REMEDY

Having found that Respondent has engaged in an unfair labor practice, it is recommended that the Respondent be ordered to cease and desist therefrom and to take the affirmative action described below, which is designed to effectuate the policies of the Act.

With respect to the necessary affirmative action, it is recommended that Respondent be ordered to reinstate James E. Bender to his former job or, to a substantially equivalent position, without prejudice to his seniority or other rights and privileges previously enjoyed, and make him whole for any loss of earnings he may have suffered because of the discrimination practiced against him by payment to him of a sum of money equal to that which he normally would have earned from the date of the discrimination to the date of reinstatement, in accordance with the method set forth in *F. W. Woolworth Co.*, 90 NLRB 289 (1950), with interest as computed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987),[3] and that Respondent remove from its files any reference to the discharge and notify him in writing that this has been done and that evidence of this unlawful discipline will not be used as a basis for future personnel action against him.

Otherwise, it is not considered to be necessary that a broad order be issued.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[4]

ORDER

The Respondent, Leasco, Inc., Dubois, Pennsylvania, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Discharging any employee for activity protected by Section 7 of the Act.

(b) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Offer James E. Bender immediate and full reinstatement and make him whole for the losses he incurred as a result of the discrimination against him in the manner specified in the remedy section of this decision.

(b) Remove from its files any reference to the discharge, of James E. Bender on 12 September 1986, and notify him in writing that this has been done and that evidence of this unlawful discharge will not be used as a basis for future personnel actions against him.

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[3] Under *New Horizons for the Retarded*, interest is computed at the "short-term Federal rate for the underpayment of taxes as set out in the 1986 amendment to 26 U.S.C. § 6621. Interest accrued before 1 January 1987 (the effective date of the amendment) shall be computed as in *Florida Steel Corp.*, 231 NLRB 651 (1977).

[4] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

(c) Preserve and, on request, make available to the Board or its agents for examination and copying, all payroll records, social security payment records, timecards, personnel records and reports, and all other records necessary to analyze the amount of backpay due under the terms of this Order.

(d) Post at its Dubois, Pennsylvania facility, copies of the attached notice marked "Appendix."[5] Copies of the notice, on forms provided by the Regional Director for Region 6, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately on receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material.

(e) Notify the Regional Director in writing within 20 days from the date of this Order what steps the Respondent has taken to comply.

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

Section 7 of the Act gives employees these rights

To organize

To form, join, or assist any union

To bargain collectively through representatives of their own choice

To act together for other mutual aid or protection

To choose not to engage in any of these protected concerted activities.

WE WILL NOT discharge any employees for engaging in activities protected by Section 7 of the Act.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce our employees in the exercise of the rights guaranteed them by the Act.

WE WILL offer to James E. Bender immediate and full reinstatement and make him whole for any losses he may have incurred as a result of our discrimination against him in the manner specified in the remedy section of this decision.

WE WILL remove from our files any reference to the discharge of James E. Bender on 12 September 1986 and notify him in writing that this has been done and that evidence of this unlawful discharge will not be used as a basis for future personnel actions against him.

LEASCO, INC.

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[5] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

Nu Dawn Homes, Inc. *and* **Susan K. Martin** *and* **Modesta L. Greenland.** Cases 19–CA–19053 and 19–CA–19105

June 30, 1988

DECISION AND ORDER

BY CHAIRMAN STEPHENS AND MEMBERS JOHANSEN AND CRACRAFT

On February 4, 1988, Administrative Law Judge Arline Pacht issued the attached decision. The Respondent filed exceptions and a brief in support, and the General Counsel filed an answering brief.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings,[1] and conclusions and to adopt the recommended Order.

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge and orders that the Respondent, Nu Dawn Homes, Inc., Federal Way, Washington, its officers, agents, successors, and assigns, shall take the action set forth in the Order.

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[1] The Respondent has excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

In affirming the judge's finding that the Respondent violated Sec. 8(a)(1) of the Act by discharging employees Martin and Greenland because they insisted on being paid overtime in accordance with the wage and hour laws of the State of Washington, we find it unnecessary to rely on the small-plant doctrine in determining whether the Respondent was aware of the concerted nature of their activity. There is ample evidence, as found by the judge, that the Respondent knew that the two were acting not only for themselves but also on behalf of their coworkers.

Further, we correct the judge's analysis insofar as she states that under *Wright Line*, 251 NLRB 1083 (1980), enfd. 662 F.2d 899 (1st Cir. 1981), the General Counsel bears the initial burden of proving that the employees were engaged in protected concerted activity which was a "dominant" factor prompting the employer's action. The General Counsel bears the initial burden of proving that the protected concerted activity was a motivating factor in the employer's action.

Linda Scheldrup, Esq., for the General Counsel.

Chris McCleod, Esq. (Harpold, Fornabai & Fiori), of Auburn, Washington, for the Respondent.

DECISION

STATEMENT OF THE CASE

ARLINE PACHT, Administrative Law Judge. On charges filed by Susan K. Martin (Martin) and Modesta L. Greenland (Greenland) on April 10 and 30, 1987, respectively.[1] A consolidated complaint issued on May 29 alleging that Respondent Nu Dawn Homes, Inc. violated Section 8(a)(1) of the National Labor Relations Act (the Act), by terminating Martin and Greenland and thereafter refusing to reinstate them because they concertedly asserted their right to be paid for overtime work. The Respondent filed a timely answer on June 4, as amended on June 8 and October 9.

The case came to trial before me in Seattle, Washington, on October 14 and 15, at which time the parties had full opportunity to examine and cross-examine witnesses, to introduce documentary evidence, and to present oral argument. After considering the witnesses' demeanor, the parties' posttrial briefs, and the General Counsel's reply brief,[2] and on the entire record, pursuant to Section 10(c) of the Act, I make the following

FINDINGS OF FACT

I. THE RESPONDENT'S BUSINESS

Respondent, a Washington corporation with an office and place of business in Federal Way, Washington, is engaged in constructing residential homes. During the past 12 months, a representative period, in the course and conduct of its business, Respondent had gross sales of goods and services valued in excess of $500,000. Further, during the 12 months prior to the issuance of the complaint, Respondent purchased and caused to be transferred and delivered to its facilities within the State of Washington, goods and materials valued in excess of $50,000 directly from sources outside of the State or from suppliers within the State, that in turn obtained such goods and materials directly from sources outside of the State. Accordingly, the complaint alleges, Respondent admits, and I find that Nu Dawn Homes is and has been at all times material herein an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

II. THE ALLEGED UNFAIR LABOR PRACTICES

A. *The Dramatis Personnae*

Respondent, a small, closely held corporation, is one of five allied enterprises wholly owned by John C. Tynes and Floyd Hoffman, his brother-in-law, who serve as president and vice president, respectively, of the companies. At the time of the operative events described below, Della Pulley, Respondent's vice president for management and finance, was responsible for bookkeeping and office personnel management for all the sister companies. Three administrative assistants, Susan Martin, Modesta Greenland, and Kathleen Zulaski—plus a receptionist, Shirley Ebeling, worked under her supervision. Don Winslow, vice president for acquisitions and marketing, his assistant, Donna Heider, and Respondent's architect, Fred Wopfer, all worked in the same somewhat cramped office space.

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[1] Unless otherwise specified all events took place in 1987.

[2] Because Respondent's counsel inadvertently filed his brief late, after having received opposing counsel's brief, the General Counsel was authorized to submit a reply.

289 NLRB No. 73

Greenland began working for the Respondent as a receptionist-secretary on February 26, 1986, at a starting monthly salary of $800. By end, she was earning $1000 per month. In addition, Company President Tynes awarded her a $100 bonus in November. A month later, he congratulated her on receiving high grades in two computer program courses she had just completed at Respondent's expense.

Respondent's managers evidently were pleased with Greenland's work and spoke highly of her industry at a corporate meeting in December 1986. Don Winslow related that at this meeting Tynes praised her as "the hardest working person in the Company . . . ." Tynes, Pulley, and Hoffman then agreed that Greenland should be promoted to a position as Pulley's assistant, effective in January 1987.

Greenland continued as receptionist/secretary while gradually assuming some of her new duties until her replacement, Shirley Ebeling, was hired in mid-January. Greenland then became responsible for Ebeling's training.

Martin, who had worked with Pulley at another company in 1976, was recruited by her and began working for Respondent in April 1986, performing a variety of bookkeeping tasks. In addition to a 1-year college accounting course, Martin had more than 20 years' experience working for various companies using secretarial, bookkeeping, and computer skills. Consequently, at her initial interview, Pulley advised her that she might be overqualified for the position with Respondent. At that same time, Pulley also mentioned that because another employee, Linda Vixie, had complained to her about Respondent's overtime policy, she wished to make it clear that any overtime work would be compensated with time off but not with extra pay. Martin's starting salary was $1200 per month. By December 1986, she was earning $1600 with pay periods falling on the 5th and 20th of each month. She also received several bonuses, most recently in November 1986. During the last week of January, she received flowers with an appreciative note from Pulley who thanked her for proposing a new accounting procedure that, as Pulley put it, "will make us efficient, accurate, and help us to get out of here at 5."[3]

In August 1986, after Linda Vixie gave notice of her intent to resign, Respondent hired Kathleen Zulaski. Witnesses for the General Counsel and the Respondent offered widely divergent views of the quality of Zulaski's performance during the first 6 months of her employment. According to Vixie, who trained her initially, and to Martin, who took over when Vixie left, Zulaski worked slowly and frequently needed considerable assistance particularly when transferring data from invoices to the computer. Others, including Tynes, complained about Zulaski's inept handling of telephone inquiries.

Tynes and Pulley acknowledged at the hearing that Zulaski was far less experienced than Martin. However, they both maintained that because her formal training in accounting was superior to that of Martin's or Greenland's, she had the potential to out-perform the other women. However, Pulley and Tynes erred as to the extent of Zulaski's formal training when they testified that she held two accounting degrees. In fact, she received one accounting certificate from a business school after taking two accounting courses, each lasting approximately 3 months. She received a second certificate from the same school after completing an additional course in management. She also had a one-year college course in computer science. Prior to her employment with Respondent she had held two temporary jobs whose duration was no more than a week or two. By Zulaski's own account, she was a novice in the business world and had much to learn. She candidly acknowledged turning frequently to Martin for advice and to making mistakes entering data into the computer. She revealed that she was reprimanded in January 1987 for not processing utility bills to Pulley's satisfaction and that she had made a few errors in writing checks. At the time of trial, her work was still under review by Pulley.

B. *The Employees Challenge Respondent's Overtime Policy*

Greenland and Martin recalled discussing Respondent's overtime policy with Vixie in July 1986. When Vixie tendered her resignation that same month, she told Pulley that she thought Respondent's failure to pay overtime was unlawful and bad for employee morale. Pulley responded that the Respondent would not alter its policy and would continue granting compensatory time off rather than paying for extra hours worked.

While working late one evening in December 1986, and after having accumulated a considerable amount of uncompensated overtime hours, Martin remarked to Pulley that she had heard it was illegal for employees not to be paid for overtime. Pulley reminded Martin that she accepted the job with knowledge of Respondent's overtime policy and that if she was dissatisfied she could find another position.

Beginning in January 1987, Martin and Greenland became increasingly assertive in questioning Respondent's overtime practices. As noted previously, Greenland became Pulley's assistant in January. However, Greenland apparently misunderstood the terms of her promotion, believing that she would receive a $500 raise as soon as she assumed her new post. When she failed to receive the anticipated raise or payment for a modest amount of overtime worked in 1986 on each of two pay periods in January and again on the first pay period in February, she questioned Pulley about the delays on several occasions.

When Greenland first raised the matter, Pulley advised her that the raise would commence at the end of January. It was not until February 5 that Greenland received a check for $600 reflecting a pay raise of $100 per pay period. However, this amount was less of a raise than she believed she had been promised. Therefore, she again pursued the matter with Pulley, questioning both the wages she thought were due as well as payment for overtime. Realizing that there had been a misunderstanding, Pulley prepared a memo on February 7 that explained that Greenland had embarked on a 6-month training program as her assistant at a salary of $1200 a month ranging upward to $1500 depending upon the responsibilities that she might assume. The memo further noted that Greenland would receive a $100 check making her pay raise retroactive to January 1 and also cover the "extra-time" that she previously had worked, an apparent reference to the overtime. Greenland signed this memo on February 9 and received the $100 retroactive paycheck on February 11.

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[3] In its brief, Respondent contends that Martin could not recall the details of her proposal. The record proves otherwise for she clearly explained that she suggested transferring data to the computer from the accounts payable records rather than from the more cumbersome check ledger.

Greenland shared her concerns about her pay raise and the overtime situation with Martin since, as she explained, she anticipated having to work more overtime as Pulley's assistant. When she mentioned a newsletter published by the State Department of Industries and Labor, which contained an article concerning overtime pay, the women agreed that Greenland would call the agency to make further inquiry. She did so about February 11 and then reported to Martin that State law required that an employer pay time and a half for each hour of overtime worked unless the employee was granted time off within the time period in which the overtime was worked. The next day Martin called the agency herself to confirm Greenland's understanding.

After both women had ascertained the applicable law on overtime compensation, they talked with other office employees about their right to overtime pay. Receptionist Ebeling recalled that Martin asked her to keep any incoming calls from the Department of Labor and Industries confidential. Ebeling also confirmed that Greenland had spoken to her about overtime. However, out of fear and a desire to avoid office politics, Ebeling indicated that she did not wish to get involved. Martin also spoke to Zulaski about the overtime matter and found that she, too, exhibited some apprehension and said she would prefer to take compensatory time off. In addition, Martin and Greenland spoke to Wepfer, Winslow, and Heider about the overtime matter.

On the evening of February 12, Martin and Greenland conferred by telephone about how best to present their findings about overtime pay to Pulley. Martin testified that on the following day she told Pulley in private that she wanted to be paid for her overtime at time and a half, and advised Pulley that she had an obligation to inform the employees of their legal rights under state law. According to Martin, Pulley grew very angry and said she would respond to Martin's request after checking with Respondent's attorney. Martin testified that the following week Pulley informed her that Respondent's counsel had said it was the Company's choice either to pay for overtime or grant time off. She agreed to pay Martin for her overtime but at a straight time rate and asked her to sign a statement agreeing that it was a one-time only payment. Martin refused to sign such a statement and bluntly told Pulley that her information about the Company's legal obligation was incorrect. Pulley ended that conversation by saying that she would consult Tynes as to the next step.

Thereafter, on February 23, Pulley received a letter from Respondent's attorney confirming what Martin and Greenland already had learned; that is, that an employer was obliged to provide compensatory time within the same pay period or else pay time and a half for each hour of overtime worked. Greenland happened to see the attorney's letter since at the time she was supervising Ebeling in distributing the mail. On the day after this letter arrived, Ebeling told Greenland that Pulley had been upset on receiving the mail. That same day Pulley instructed Greenland that she was no longer to review incoming mail.

About the same date, Pulley informed Martin that she would receive a check for her overtime at time and a half. According to Martin, Pulley added that she did not understand why Martin was being so disloyal; that she was "stabbing me [Pulley] in the back." Soon thereafter, Martin was correctly paid for her overtime work.

Without specifically denying the remarks Martin attributed to her, Pulley offered a much different account of their exchange about overtime pay. She related that in early February Martin requested time off for 50 hours of accumulated overtime work. Fearing that extended absence would create a paperwork backlog, Pulley maintained that on her own initiative she sought Vice President Hoffman's approval to pay Martin for her overtime. Pulley admitted, however, that she did advise Martin that the payment would be a one-time practice, that Martin insisted it was the employee's option to take leave or seek wages for the overtime, and suggested that she advise the other office employees as to state overtime requirements.

I find Martin's detailed version of these matters more reliable than Pulley's vague recollection. Pulley, for example, thought that counsel's letter arrived early in February until she was shown the February 23 date stamped on the document. In contrast, Martin recalled facts by tying them to particular events, some of which (such as their phone call) were corroborated by Greenland. Moreover, regardless of who initiated the conversation with regard to overtime pay, Pulley did verify some of the salient details of Martin's account, including the fact that it was Martin who insisted that employees had a right to seek wages for overtime and that other employees should be notified of their rights.

Pulley testified at the trial that she was not at all disturbed about this overtime controversy; rather, she was relieved to have the matter resolved. Time may have mellowed her recollection of this event, however, for Winslow recalled that her reaction to the overtime pay problem was an angry one. Thus, he testified that Pulley told him that she was very upset and frustrated at the situation that Martin and Greenland had created. Further, Hoffman asked Winslow in an agitated manner if he had heard about the overtime problem with "Della's girls" and asserted that if they were his workers he would "kick their butts out in the street."[4]

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[4] I credit Winslow's account for I found him to be a calm, thoughtful witness who candidly acknowledged having harbored and overcome bitter feelings when he was terminated. Moreover, Hoffman, who shared an office with Pulley, was not called as a witness and, thus, did not contradict the statement Winslow attributed to him.

C. *Respondent's Financial Difficulties*

For the past several years, since at least 1986, Respondent and its affiliated companies had been operating in the red, a situation that did not improve during the first quarter of 1987. Thus, a profit-and-loss statement covering the Nu Dawn enterprises' fiscal year ending March 31, 1987, showed an overall deficit of $171,000. The single greatest cause of this loss, approximately $67,000, was due to Nu Dawn Realty's failure to sell as many homes as had been projected, thereby creating what Respondent claimed was a serious cash flow problem.

At a management meeting in early January, Tynes, Hoffman, and Pulley agreed to search for ways to reduce overhead expenses. About February 18, Hoffman held a general meeting with employees, including office and field personnel, at which time he focused on the Company's financial plight.[5] It is undisputed that at this mid-February meeting, Hoffman stated that he wanted to dispel rumors that employees might lose their jobs and assured them that salaries would be reduced before any discharges took place. In keeping with this approach, he announced that he would move into the field as chief job superintendent while current job superintendents would shift into construction work.[6]

Notwithstanding Hoffman's assurances to the contrary, Pulley testified that after the January management meeting, she decided to reduce the number of officeworkers. Consequently, she stated that throughout January and February, she evaluated the performances of her subordinates. By early March, she had selected Greenland and Martin for dismissal, allegedly because they were less competent than Zulaski and Ebeling.

In comparing Martin and Zulaski, Pulley testified that Zulaski's formal accounting education equipped her to be a more desirable employee in the long run. Further, Pulley maintained that Martin made several errors that revealed her shortcomings as a bookkeeper. First, she pointed out that during her absence in October 1986 Martin was put in charge of the office and during this time twice issued a check for $13,000 to the same supplier. Fortunately, the second check was returned uncashed. Martin also erred in failing to add a tax onto a contractor's bill and reversed the debit and credit columns on one occasion. Pulley acknowledged that Martin responded favorably when these errors were brought to her atention and no further oversight of her work was required. Pulley also stated that she was dissatisfied with Martin's training of Zulaski who performed more effectively under her own supervision. Contrary to Pulley's recollection, Zulaski herself indicated that she was not supervised by Pulley until after Martin had been dismissed.

Pulley also stated that Greenland was less capable than Zulaski. Pulley was particularly distressed at what she claimed was Greenland's lack of responsibility in failing to make a deposit one Friday afternoon, which would have transferred $60,000 from one of Respondent's accounts to another. This sum was to serve as earnest money to cover a particular sales transaction. Pulley explained that Respondent was spared embarrassment only because the customer failed to verify whether the earnest money had been deposited over the weekend. Greenland did not deny failing to make the deposit, but explained that the bank refused to handle such a large transaction at its outdoor window. Not understanding what the problem was, Greenland retained the check over the weekend. Pulley maintained that she did not offer to return Greenland to her former position as a receptionist since Greenland had been adamant about receiving a higher salary. Further, Pulley indicated that Greenland was diverted by marital problems, and therefore was less efficient than the new receptionist, Ebeling.

Finding that the Company's economic health posture was continuing to decline, Pulley decided in early March that she would have to terminate Greenland and Martin. Accordingly, she obtained Tynes' approval for her decision and at the end of the day on March 13 advised each of the women separately that they were terminated, effective immediately, for lack of funds. However, Pulley quickly perceived that she had to fill the gap left by Martin's and Greenland's departure. Accordingly, in early April she advertised for a new bookkeeper and on April 6 Janet Munger began working for the Respondent at a monthly salary of $1500. On March 23, Winslow was dismissed and within several months Nu Dawn Realty, the business for which he had primary responsibility, was phased completely out of existence.[7] As a further economy, Tynes reduced his own salary from $6000 to $2000 a month, but not until August. At some undetermined time in 1987, he took a second mortgage on his home, using the $100,000 proceeds for operating expenses.

Discussion and concluding findings

The General Counsel contends that Greenland and Martin were terminated because they protested the Respondent's failure to pay for overtime work as required by state law. Respondent asserts, however, that they were discharged solely as a way to offset the Company's serious business losses. Because the Charging Parties' discharges arguably involved both permissible and impermissible causes, assessing the true reason for the Respondent's actions requires analysis under the standards set forth in *Wright Line*, 251 NLRB 1083 (1980), enfd. 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982); approved in *NLRB v. Transportation Management*

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[5] Respondent asserted in its brief that this meeting with employees took place in early January, mistakenly relying on Pulley's testimony.In fact, the record shows that Pulley alluded to a January corporate meeting that was attended solely by Hoffman, Tynes, and herself. Moreover, one of Respondent's own witnesses, Architect Fred Wepfer, generally corroborated Greenland's and Martin's recollection as to the date when he testified that the staff meeting at which Hoffman pledged that no one would be let go occurred just a few weeks before the women were discharged.

[6] Respondent stated in its brief that one field superintendent was dismissed as part of a financial reorganization. Although the record is not altogether clear in this regard, I infer from Tynes' testimony that a field superintendent was not dismissed but was transferred to a lesser paying job framing houses. See Tr. 9.

[7] Winslow had been in charge of marketing new homes, acquiring new properties, and supervising the sales staff.

Corp., 462 U.S. 393 (1983). Under *Wright Line*, the General Counsel bears the initial burden of proving that the employees were engaged in protected concerted activity that was a dominant factor prompting the employer's disciplinary action. If the General Counsel succeeds in establishing a prima facie case, the burden shifts to the Respondent to prove affirmatively that its adverse actions would have been the same even in the absence of the employees' protected conduct.

On applying these standards, I am convinced that the General Counsel has met its burden. The protected nature of Greenland's and Martin's efforts to reform Respondent's overtime policies requires no discussion, for the Board long has held that such conduct comes within the guarantees of Section 7. See, e.g., *Joseph De Rario, DMD, P.A.*, 283 NLRB 592 (1987).

The record also contains proof that their actions were concerted, as the Board has construed that word of art. In *Meyers Industries*, 281 NLRB 882, 884 (1986), the Board reaffirmed the definition of concerted activities adopted in the first *Meyers* case[8] ruling that "to find an employee's activity to be 'concerted,' we shall require that it be engaged in with or on the authority of other employees, and not solely by and on behalf of the employee himself." Here, uncontroverted evidence establishes that Martin and Greenland shared their concerns about the Respondent's overtime practices with one another as well as bringing it to management's attention on more than one occasion. They also advised their coworkers about the requirements of state law and encouraged them to seek just compensation for any overtime that might be worked. When Martin met with Pulley and challenged Respondent's failure to compensate the employees at time and a half, she did so with at least Greenland's express consent. Moreover, when Martin urged Pulley to advise others in the office about state requirements governing overtime pay and when Greenland urged a fellow worker to keep careful records so that she too might receive proper compensation for overtime, they clearly were engaged in activities that went beyond their own self-interest.

Further, Respondent cannot seriously claim that it was unaware of Martin's and Greenland's interest in obtaining overtime pay for themselves and others in the office. Pulley admitted as much when she testified that Martin urged her to advise the other employees of state law, and learned that Martin had already spoken to Zulaski about the matter. Pulley's sudden withdrawal of Greenland's duty to review the distribution of mail the day after receiving counsel's letter regarding overtime pay can be explained in only one way, she knew that Greenland was allied with Martin in demanding that Respondent comply with state overtime requirements. Pulley maintained at trial that she was relieved to have the overtime issue resolved, but her latter-day recollection of such feelings cannot be reconciled with the evidence of her expressions of frustration to Winslow about Greenland's and Martin's activities. In addition, Hoffman's remarks to Winslow regarding the effrontery of "Della's girls" challenging Respondent's overtime policy revea Respondent's knowledge of and hostility toward th women's concerted activity. Considering that Hoffma shared office space with Pulley, with whom he conferre about overtime payment for Martin, and considering als that he was vice president of the firm and Tynes' broth er-in-law, his undisputed comments to Winslow are par ticularly probative on the question of knowledge an animus.

Although abundant evidence establishes that Respond ent was well aware of the Charging Parties' concerte efforts, knowledge also may be inferred by application o the Board's "small plant" doctrine. See, e.g., *Wiese Plo Welding Co.*, 123 NLRB 616 (1959). Here, within th confines of Respondent's crowded quarters, enough dis cussion of the overtime issue took place so that even new disinterested employee like Ebeling had hear "something going on about overtime." If Ebeling, wh wished to abstain from politics, knew of the overtim controversy, then certainly, Pulley, an alert and defen sive manager, most certainly knew of it.

Pulley's and Hoffman's angry reaction to Greenland' and Martin's insistence on a revised overtime polic leads to suspicion that the discharges were prompted i large part by unlawful reasons. These suspicions are int virtual certitude when the events leading to the dismis sals are juxtaposed and examined in context. In bare out line, the salient events are as follows: (1) In January an in the first week of February, Greenland complained tha she had not obtained her proper wage increase, (2) an had not received her overtime pay. The following wee Martin challenged Pulley about Respondent's overtim pay policy and insisted on compliance with state regula tions. On February 18 or thereabouts, Hoffman promise that wages would be trimmed before jobs were cut. O February 23, Pulley received a letter from counsel indicating that Martin had been right on the overtime issu and she had been wrong. Realizing that Greenland ha seen the letter, Pulley reacted swiftly, excluding he access to such information by relieving her of the dut to review the mail distribution. On March 13, Pulle fired Greenland and Martin and on April 6 hired a new bookkeeper. The Board often has drawn an inference o unlawful motivation when a close connection in tim exists between employees' protected concerted activit and an employer's adverse response. See, e.g., *Aluminum Technical Extrusions*, 274 NLRB 1414, 1418 (1985); *Limpert Bros.*, 276 NLRB 364, 374 (1985). Such an inferenc is warranted here.

Respondent argues that because Martin had questione its overtime policy in 1986 without being disciplined, i follows that her discharge in 1987 was unrelated to he protected activity. The record shows, however, tha Greenland and Martin became aware of Respondent' failure to comply with state overtime regulations in February and thereafter insisted that Respondent comply with those requirements. Thus, it was not until mid-February that the conflict about overtime came to a head. Respondent's acknowledgment that it had erred in refusing to properly compensate for overtime preceded the discharges by only several weeks. The close nexus between these critical events undermines Respondent's argument that it had long tolerated employee criticism of its overtime policy.

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[8] 268 NLRB 493 (1984), revd. and remanded *Prill v. NLRB*, 755 F.2d 941 (D.C. Cir. 1985).

The abruptness of the discharges, announced in the middle of a pay period and without prior notice to two long-term employees who previously were considered valuable contributors to the Company, lends support to the conclusion that Greenland and Martin were fired because of their stand on the overtime issue.

In defense, Respondent contends that its financial predicament compelled it to trim its office personnel and that Martin and Greenland were selected for discharge only because they were the most expendable members of its clerical staff. It is true that the Nu Dawn sister companies were losing money, but business necessity is not invariably a complete defense; it certainly may not be used to conceal employment decisions that are unlawfully motivated. Here, the Respondent's contradictory and illogical actions persuade that the selection of Greenland and Martin for discharge was not driven by its economic problems.

Respondent admittedly had suffered business reverses continually since 1986. However, no climactic economic event occurred in 1987 that might explain why in early March of that year Pulley decided she could wait no longer to decimate her staff by 50 percent, thereby eliminating in one swoop, her two most experienced office employees. Certainly, Respondent's economic situation was not serious enough to compel Tynes to reduce his own salary by 70 percent until some 5 months after the terminations occurred. The abrupt discharges seem particularly inexplicable when only a few weeks earlier Hoffman had pledged that wages would be reduced before jobs were eliminated. Indeed, Hoffman adhered to that pledge by stepping down to the position of field superintendent and transferring job supervisors to construction work rather than discharging them. Yet, contrary to Hoffman's assurances, neither Greenland nor Martin was offered the opportunity to remain at a reduced salary. By deviating from its own proclaimed policy in firing the women, Respondent provides telling evidence that cost savings were not at the root of these actions. Respondent's subsequent dismissal of Winslow does not defeat this conclusion for his departure was simply one step in the complete abolition of an entire Nu Dawn operation.

Pulley's alleged reasons for retaining Zulaski and Ebeling in preference to Martin and Greenland seem based on factors freshly marshalled at the time of trial rather than at the time of their discharges. It is significant that until March both Martin and Greenland were treated as valued employees. Martin, who came to her job with a wealth of experience, was awarded pay raises and bonuses. At the end of January, Pulley acknowledged that she had made a notable contribution to office procedure. Pulley's negative appraisal of Martin just 2 months later, which supposedly rested in part on an error Martin made the previous October, is a transparent attempt to conceal the true reason for her discharge.

Respondent's contention that it discharged Martin and Greenland to reduce overhead expenses was undermined by its hiring Janet Munger just 3 weeks later. If lack of funds was the real reason for Martin's dismissal (and the only reason Pulley mentioned during the exit interview), then surely Respondent would have recalled a seasoned employee like Martin when funds became available enough to fill the vacancy she left. Respondent also tries to justify its action by pointing out that it hired a "full charge" bookkeeper who was more skilled in accounting than Martin. This argument, too, is unconvincing for when Martin was dismissed Respondent had no way of foreseeing who would replace her. In any event, Martin and Munger performed virtually the same sort of bookkeeping chores. In addition, Respondent submits that because Munger worked little overtime she was a more efficient employee than Martin. Respondent may not fairly compare Martin's efficiency with Munger's when it presented no evidence showing whether the quantity of office work remained the same after March. Surely the abolition of Nu Dawn Realty as a business entity had to reduce the amount of paperwork in the office. Pulley herself admitted that the number of invoices declined substantially in 1987, and Martin's improved bookkeeping procedure also had to affect the amount of overtime worked.

In attempting to defend its actions, Respondent unfairly degrades Martin's contributions and exaggerates Zulaski's worth. While Zulaski may be a diligent and competent employee, it is clear from the record that Respondent's positive comments about her performance relate to her work at the time of trial, a year after she joined Respondent, and not as of March 13. Evidence establishes that at that earlier time, she was inexperienced, made mistakes, and was slower at performing her work than was Martin. Respondent's witnesses conveniently disregarded these deficiences when they praised her at the hearing. Pulley and Tynes accorded educational credentials to Zulaski that she did not possess, and in so doing underscored the contrived quality of Respondent's defense.

Similarly, Respondent found fault with Greenland's performance at trial, yet its conduct toward her prior to March 13 demonstrates that she was held in high regard. Like Martin, Greenland received raises and a bonus. Just 1 month before her rude termination, Pulley confirmed her promotion and, despite Respondent's declining fortunes, assured Greenland that she could expect greater responsibility accompanied by increased earnings. In paying the tuition fee for Greenfield's accounting course, Respondent appeared to be investing in training her for a career position with the Company.

Even acknowledging that Greenland made errors in her new position, surely, Pulley could have offered to return her to the receptionist job at which she had been "outstanding." Respondent's claim that Ebeling was a better receptionist than Greenland appears less than objective. Tynes had praised Greenland's industry and her educational achievement. Further, Tynes acknowledged, her marital problem was long known in the office and viewed sympathetically; it had never prevented her advancement. Moreover, if she had been offered and agreed to return to the receptionist position, Respondent would have had the benefit of an experienced receptionist who also was well trained on the computer and was in the process of acquiring accounting skills. If Pulley's evaluation had been genuinely neutral, Ebeling, who was new to the office and who had neither prior exposure to computer operations nor accounting training, could not reasonably be considered a more desirable employee than Greenland.

In light of the foregoing considerations, I find that Respondent has failed to prove that it would have selected Greenland and Martin for discharge even if they had not protested its overtime policy. Respondent's financial problems appear to have been genuine, but its asserted reasons for dismissing the Charging Parties are pretextual and designed to mask an unlawful intent to penalize its employees for exercising a right protected by Section 7 of the Act.

CONCLUSIONS OF LAW

1. The Respondent, Nu Dawn Homes, Inc., is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

2. By discharging Susan Martin and Modesta Greenland on March 13, 1987, because they engaged in protected concerted activities, the Respondent interfered with, restrained, and coerced them in exercising rights guaranteed by Section 7 of the Act, thereby violating Section 8(a)(1) of the Act.

3. The aforesaid unfair labor practices affect commerce within the meaning of Section 2(6) and (7) of the Act.

THE REMEDY

On concluding that Respondent has engaged in certain unfair labor practices, I find it necessary to recommend that it cease and desist therefrom and take certain affirmative action designed to effectuate the policies of the Act. Having unlawfully discharged Susan Martin and Modesta Greenland, Respondent shall offer them reinstatement, and make them whole for lost earnings and other benefits computed on a quarterly basis from the date of discharge to the date of a proper offer of reinstatement, less net interim earnings in accordance with *F. W. Woolworth Co.*, 90 NLRB 289 (1950), plus interest as computed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987).[9]

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[10]

ORDER

The Respondent, Nu Dawn Homes, Inc., Federal Way, Washington, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Discharging any employees because they engage in protected concerted activities for their mutual aid and protection.

(b) In any like or related manner interfering with, restraining, or coercing employees in the exercise of their rights guaranteed them in Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Offer Susan Martin and Modesta Greenland immediate and full reinstatement to their former jobs or if those jobs no longer exist to substantially equivalent positions without prejudice to their seniority or any other rights or privileges previously enjoyed and make them whole for any loss of earnings and other benefits they may have suffered as a result of the discrimination practiced against them in the manner set forth in the remedy section of this decision.

(b) Preserve and, on request, make available to the Board or its agents for examination and copying all payroll records, social security payment records, timecards, personnel records and reports, and all other records necessary to analyze the amount of backpay due under the terms of this Order.

(c) Remove from its files any reference to the discharges of Susan Martin and Modesta Greenland on March 13, 1987, and notify them in writing that this has been done and that evidence of their unlawful discharges will not be used as a basis for future personnel actions against them.

(d) Post at its office in Federal Way, Washington, copies of the attached notice marked "Appendix."[11] Copies of the notice on forms provided by the Regional Director for Region 19, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately on receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to insure that the notices are not altered, defaced, or covered by any other material.

(e) Notify the Regional Director in writing within 20 days from the date of this Order, what steps Respondent has taken to comply. For the purpose of determining or securing compliance with this Order, the Board, or any of its duly authorized representatives, may obtain discovery from the Respondent, its officers, agents, successors or assigns, or any other person having knowledge concerning any compliance matter, in the manner provided by the Federal Rules of Civil Procedure. Such discovery shall be conducted under the supervision of the United States court of appeals enforcing this Order and may be had on any matter reasonably related to compliance with this Order, as enforced by the court.

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[9] Under *New Horizons for the Retarded*, supra, interest is computed at the "short-term Federal rate" for the underpayment of taxes as set out in the 1986 amendment to 26 U.S.C. § 6621.

[10] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

[11] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF
THE NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

Section 7 of the Act gives employees these rights.

To form, join, or assist any union

To bargain collectively through representatives of their own choice

To act together for other mutual aid of protection

To choose not to engage in any of these protected concerted activities.

WE WILL NOT discharge employees for engaging in concerted activities for their mutual aid and protection.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce employees in the exercise of rights guaranteed by the National Labor Relations Act as amended.

WE WILL offer Susan Martin and Modesta Greenland immediate and full reinstatement to their former jobs or if those jobs no longer exist, to substantially equivalent positions without prejudice to their former seniority or any privileges previously enjoyed and WE WILL make them whole for any loss of earnings and other benefits resulting from their discharge, less any net interim earnings, plus interest.

WE WILL remove from our files any reference to the discharges of Susan Martin and Modesta Greenland on March 13, 1987, and WE WILL notify them that this has been done and that evidence of their unlawful discharges will not be used in any way as a basis for future personnel actions against them.

NU DAWN HOMES, INC.

Wells Fargo Alarm Services, a Division of Baker Protective Services, Inc. *and* International Brotherhood of Electrical Workers, Local 332, Petitioner. Case 32–RC–2549

June 30, 1988

DECISION AND ORDER

BY CHAIRMAN STEPHENS AND MEMBERS JOHANSEN AND BABSON

Pursuant to a Stipulated Election Agreement approved June 10, 1987, an election by secret ballot was held on July 10, 1987, under the direction and supervision of the Regional Director for Region 32, among the employees in the stipulated unit.[1] The tally of ballots shows 13 votes for, and 6 against, the Petitioner; there were 13 challenged ballots, a sufficient number to affect the results.

After investigation, the Regional Director on August 6, 1987, issued a report and recommendations on challenges and notice of hearing in which he ordered a hearing on the challenged ballots.

A hearing was held before Hearing Officer Sharon Chabon. On October 23, 1987, she issued and served on the parties her report recommending disposition of the challenged ballots. The hearing officer recommended that: (1) the challenges to the ballots of guard operators Mark Brestel, Humberto Mahecha, and Armando Montour be sustained on the grounds they are guards within the meaning of Section 9(b)(3) of the Act and thus excluded from the unit; (2) the challenges to the ballots of lead shift operators (also designated by the Employer as relief shift supervisors) Rita Gangloff, Donelle Lopez, Cindy Madrid, and Mimi Marquez be overruled on the grounds they are not supervisors within the meaning of Section 2(11) of the Act; and (3) the challenges to the ballots of service technicians John Dana, Jeffrey Gerard, George Partan, Donald Pfaff, Elbert Travis, and John Wilson be overruled on the grounds that they are not statutory guards. Consequently, the hearing officer recommended opening and counting the ballots of the latter 10 voters and issuing a revised tally of ballots.

On November 2, 1987, the Employer timely filed exceptions to the hearing officer's report and a supporting brief. The Employer contends that the hearing officer erred in overruling the challenges to the ballots of the lead shift operators and the service technicians. The Employer argues that the lead shift operators/relief shift supervisors are statutory supervisors. In the alternative, it argues that, as employees, they function as operators who, along with the service technicians, are guards.[2] The Employer further contends that, because these challenged employees are guards, the unit is inappropriate because it contains guards and nonguards and, hence, the petition must be dismissed. The Petitioner filed an answering brief in which it supported the findings and recommendations of the hearing officer.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the hearing officer's report and the record in light of the exceptions and briefs and has decided to adopt her findings, conclusions, and recommendations only to the extent consistent with this Decision and Order.[3]

In ruling on challenges in cases where the parties have stipulated to the appropriateness of the unit, the Board will rely on the scope of the stipulation itself, with its various inclusions and exclusions, unless it is contrary to any express statutory provisions or established Board policies.[4] In this case, the Employer and the Petitioner agree that employees designated as lead shift operators are included in a classification stipulated as within the unit, namely, "operators." The Petitioner further contends that the service technicians are within the unit classification of "service personnel." The Employer appears to disagree, but fails to explain why the service technicians should not be considered to be clearly and unambiguously within the service personnel classification. If the employees in either or both of the disputed classifications are guards, as contended by the Employer, then the unit is not appropriate under Section 9(b)(3). If the employees in the disputed classifications are not guards, as contended by the Petitioner, then the challenges should be overruled and the challenged ballots opened and counted. Consequently, the Board must decide the issues relating to the lead shift operators and the service technicians notwithstanding the finding that the guard operators are guards. This is so because the evidence indicates that the parties may not have intended to include guard operators in the stipulated unit. Thus, there is no unit classification entitled "guard operators," the Employer

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[1] The stipulated unit is:

> All full-time and regular part-time installation technicians, installation helpers, lead installers, systems technicians, fire inspectors, alarm technicians, operators and service personnel employed by the Employer at its facility located at 466 Vendome Street, San Jose, California, excluding all other employees, including office clerical employees, guards, and supervisors as defined in the Act.

[2] Because, as set forth below, we agree with the latter position we find it unnecessary to decide the Sec. 2(11) issue.

[3] No exception was filed to the hearing officer's finding that the guard operators are statutory guards and we therefore adopt it, pro forma.

[4] *White Cloud Products*, 214 NLRB 516, 517 (1974); *SCM Corp.*, 270 NLRB 885 (1984).

289 NLRB No. 74

did not include these employees on the *Excelsior* list, and the record does not disclose that the Petitioner asserted that they were within the unit. In any event, for the reasons set forth below, we find that the unit as stipulated includes guards along with other employees, and thus the Board is required by Section 9(b)(3) to vacate this election and dismiss the petition.[5]

The Employer provides property protection services to approximately 2500–2800 industrial and commercial customers by installing, maintaining, and monitoring electronic security devices to detect unauthorized entry, fire, and other contingencies. The Employer's San Jose facility consists of a central station and installation and service departments. The central station operates 24 hours per day, 7 days per week, with an overall complement of approximately 11 employees. Typically, one operator, two guard operators, and a lead shift operator,[6] or an undisputed supervisor work each shift. Service technicians are supervised from central station employees, although they can receive work assignments from central station personnel. Approximately five service technicians work the weekday day shift and approximately four others cover all or at least part of the remaining weekday shifts and the weekend shifts.[7]

The duties of the central station employees involve both providing services to the Employer's customers and protecting the Employer's own facility. With respect to the former responsibility, when a customer's security system is triggered, the central station employee monitoring the signal immediately notifies the customer and the police or fire department. For the approximately 8 percent of the Employer's customers who have additionally contracted for a guard response service, the central station employee will also immediately dispatch an employee to the customer's premises. Depending on the number of such "guard runs" required, the ordinary service calls scheduled on any given shift, and the availability of personnel, the employee dispatched will generally be a guard operator or, if necessary, a service technician.[8]

A guard operator or service technician making a guard run will report his arrival to the central station and visually inspect the customer's premises for signs of entry. He will wait for the arrival of the police or firefighters and, in some instances, the customer. During that time he will ask any individual seeking to enter the facility for identification and he will refuse entry to unauthorized persons. The Employer has instructed all employees making guard runs not to use force to prevent such entry. The only difference in the duties of guard operators and service technicians during a guards run is that the latter also may make repairs to the security system.

The hearing officer found that the guard operators are guards within the meaning of Section 9(b)(3) of the Act. She relied on evidence showing that, though most of a guard operator's worktime is spent in the central station monitoring alarm equipment, an essential part of his job is to respond to certain alarms and do whatever is necessary to see that the customer's premises are continuously protected. The hearing officer cited *Electro-Protective Corp.*, 251 NLRB 1141 (1980), in which the Board, on nearly identical facts, found that the employees dispatched to a customer's premises to protect it until the police or the customer arrives and have the authority to deny entry to persons lacking proper identification are, like those employees protecting their employer's own property, statutory guards. As indicated above, no party excepted to this finding.

The hearing officer, while recognizing that the identical analysis used to determine the status of guard operators should be applied to the service technicians, who are included in the stipulated unit description (which on its face intends to exclude guards), found that they too infrequently perform "guard runs" to qualify as statutory guards. We disagree. Though the primary function of the service technicians is to repair and service the security devices located at customers' locations, the record makes clear that guard run responsibilities are an essential component of the service technicians' work duties. While this assignment is performed less frequently by service technicians than by guard operators, the record shows that over 20 percent of

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[5] Sec. 9(b)(3) of the Act prohibits the Board from

> decid[ing] that any unit is appropriate . . . if it includes, together with other employees, any individual employed as a guard to enforce against employees and other persons rules to protect property of the employer or to protect the safety of persons on the employer's premises . . . .

[6] The record shows that the lead shift operators, to the extent they are not performing duties alleged by the Employer to be supervisory, perform the same duties as operators.

[7] A service technician is on duty only until 1:30 a.m. during the 11 p.m.-7 a.m. central station shifts.

[8] The testimony of Jorge Santamaria, the central station lead shift supervisor, shows that during a typically busy month for guard response calls, January 1987, approximately 18 of the 24 guard runs were made by guard operators and the remaining 6 by service technicians. During a typically slow month for this service, July 1987, 9 of the 11 guard runs were made by guard operators and the remaining 2 by service technicians. It is likely that those guard runs assigned to service technicians occur primarily on night and weekend shifts, based on the testimony of two service technicians, both of whom work the weekday day shift. Donald Pfaff testified that he had never made a guard run during his 4 months of employment. George Partin testified that although he had been assigned guard runs during the first 13 years of his employment when he worked the 4:30 p.m. to 1 a.m. shift, he had not made any guard runs during the preceding 3 or 4 years he has been working the weekday day shift.

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the guard runs are made by service technicians. More importantly, while on these runs, the service technicians perform the same duties as the guard operators. We find, therefore, that the service technicians, insofar as they are required to protect property a portion of their time, are also guards within the meaning of Section 9(b)(3) of the Act.[9]

As for the challenged lead shift operators, the hearing officer did not pass on their status as guards because she found the Employer made no such argument. The Employer acknowledges that, in challenging the ballots of the lead shift operators, it did so on the basis of their alleged supervisory status; but it contends, as it did on brief to the hearing officer, that the issue of their status as employees eligible to vote in the election, having once been properly raised, encompasses the issue of whether they are guards. We find merit in that contention, particularly when, as here, the issue strikes at the heart of the unit's statutory appropriateness. We further find that, because lead operators, when not performing alleged supervisory duties, perform as operators (a class of employees included in the stipulated unit), any determination we make concerning the guard status of lead operators in their occasional role as operators will apply as well to all other operators.

As correctly found by the hearing officer, all central station employees, that is, lead operators and operators, and guard operators when not out on a guard run, perform essentially the same tasks. In addition to monitoring the security systems of the customers, they have a continuing responsibility to protect the integrity of the central station itself, which is located within a freestanding building. A television camera is mounted outside the building to cover the entrance from the main parking lot to the building. A second camera is located in a security lobby or "man-trap" situated just inside the outer door. Monitoring screens for both cameras are placed at the control desks within the central station area itself. The operator, guard operator, or lead shift operator on duty is responsible for identifying any person seeking entrance to the central station and controlling access by means of a buzzer system attached to the inner door of the man-trap.

Each central station employee is thus charged by the Employer to enforce its rule forbidding unauthorized persons from entering the central station. Thus, to the extent that the duties of the operators and lead shift operators involve the protection of their own Employer's property, we find that these employees are guards under the Act. *Brink's Inc.*, 272 NLRB 868 (1985).

Having found that the operators, including the lead shift operators, and the service technicians are guards within the meaning of Section 9(b)(3) of the Act, we further find that the stipulated unit in this proceeding is not and cannot be appropriate for collective-bargaining purposes because, as constituted, it includes both these employees and nonguard employees. Accordingly, no question concerning representation exists and we shall vacate the election and dismiss the petition.

ORDER

The election is vacated and the petition is dismissed.

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[9] *MGM Grand Hotel*, 274 NLRB 139 (1985); *A.D.T. Co.*, 112 NLRB 80 (1955).

Ernst Enterprises, Inc. *and* **International Union, United Automobile, Aerospace and Agricultural Implement Workers of America, UAW.** Case 9-CA-23593

June 30, 1988

DECISION AND ORDER

BY CHAIRMAN STEPHENS AND MEMBERS JOHANSEN AND BABSON

On June 22, 1987, Administrative Law Judge Peter E. Donnelly issued the attached decision. The Respondent filed exceptions and a supporting brief.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and brief and has decided to affirm the judge's rulings, findings,[1] and conclusions[2] and to adopt the recommended Order.

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge and orders that the Respondent, Ernst Enterprises, Inc., Dayton, Ohio, its officers, agents, successors, and assigns, shall take the action set forth in the Order.

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[1] The Respondent has excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

[2] We adopt the judge's conclusion that the Respondent engaged in bad-faith bargaining in September and October 1986 by insisting to impasse on wage and benefit reductions, in retaliation against its employees for having supported the Union. In so doing, we emphasize the particular facts of this case, including the Respondent's 8(a)(1) violations, such as the threat to cut wages and benefits if the Union won the election, and the Respondent's grant of a 5-percent wage increase only 4 months prior to insisting on wage reductions without any substantiating reasons.

Bruce H. Meizlish, Esq., for the General Counsel.

Robert J. Brown, Esq., of Dayton, Ohio, for the Respondent.

Ronald E. Mason, of Cincinnati, Ohio, for the Charging Party.

DECISION

STATEMENT OF THE CASE

PETER E. DONNELLY, Administrative Law Judge. The charge was filed by International Union, United Automobile, Aerospace and Agricultural Implement Workers of America, UAW (Union or Charging Party) on 6 October 1986. A complaint issued on 24 November 1986 alleging that Ernst Enterprises, Inc. (Employer or Respondent) had unlawfully threatened, promised, and otherwise coerced employees in violation of Section 8(a)(1) of the Act. Further, that Respondent violated Section 8(a)(5) and (d) of the Act in that Respondent, in the course of negotiations, "insisted to impasse that wage and benefit concessions be agreed to by the Union and included in any collective-bargaining agreement reached, notwithstanding the fact that Respondent had granted all unit employees a 5-percent wage increase in May 1986, immediately prior to the NLRB election which resulted in the Union's certification." A hearing was held before me in Dayton, Ohio, on 17 and 18 March 1987. Briefs have been timely filed by the General Counsel and Respondent and have been duly considered.

289 NLRB No. 75

FINDINGS OF FACT

I. EMPLOYER'S BUSINESS

The Employer is an Ohio corporation with facilities in various States, including facilities at Cincinnati and Lebanon, Ohio, the facilities involved in the instant proceeding, where it is engaged in the manufacture and nonretail sale and distribution of ready-mixed concrete and other products. During the past 12 months Respondent purchased and received at its Cincinnati and Lebanon, Ohio facilities products, goods, and materials valued in excess of $50,000 directly from points outside the State of Ohio. The complaint alleges, the answer admits, and I find that the Employer is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

II. LABOR ORGANIZATION

The complaint alleges, the answer admits, and I find that the Union is a labor organization within the meaning of Section 2(5) of the Act.

III. THE ALLEGED UNFAIR LABOR PRACTICES

A. *Facts*[1]

Beginning in late March or early April 1986,[2] the Union began an organizing effort at the Respondent's two cement plants in Lebanon and Cincinnati, Ohio. These two facilities are managed jointly, treated as one in the corporate structure, and served by one crew of about 20 cement truckdrivers and about 5 support employees, mechanics, and general maintenance. Cincinnati is a new plant. It became operational in October 1985 and began its first full production season 1 April 1986.

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[1] There is conflicting testimony regarding some allegations of the complaint. In resolving these conflicts, I have taken into consideration the apparent interests of the witnesses. In addition, I have considered the inherent probabilities, the probabilities in light of other events, and corroboration or lack of it, also the consistencies or inconsistencies within the testimony of each witness and between the testimony of each and that of other witnesses with similar apparent interests. In evaluating the testimony of witnesses, I rely specifically on their demeanor and have made my findings accordingly. While apart from considerations of demeanor, I have taken into account the above-noted credibility considerations, my failure to detail each of these is not to be deemed a failure on my part to have fully considered it. *Bishop & Malco*, 159 NLRB 1159, 1161 (1966).

[2] All dates refer to 1986 unless otherwise indicated.

The Union's principal employee organizer was Kevin Lamb, a driver. Lamb solicited authorization cards for the Union, held union meetings, and distributed union pamphlets, stickers, and pins. The union campaign was conducted openly. Union supporters, including Lamb, wore hats and pins and displayed bumper stickers in the presence of supervisors, including Denny Cole, division supervisor; Mark Van de Grift, vice president of operations; and John Ernst, president.

About mid-May, prior to the representation election on 5 June,[3] in the dispatch trailer at the Cincinnati plant, Robert Beatty, former plant manager for Cincinnati-Lebanon, testified to a conversation he overheard between Ernst, Cole, and Julie Cain, the dispatcher, in which Ernst made the statement that he would bargain with the Union presumably if it won the election, but would not sign a contract. Cole and Ernst denied this conversation. However, having carefully weighed the testimony, I am satisfied that Beatty was the most candid and reliable of these witnesses, and I credit his testimony. Sometime in May at a time when Respondent was hiring drivers for the Cincinnati-Lebanon operation, Beatty testified that he was told by Cole that they did not want to hire any of the Union "son-of-a-bitches" from Reading Concrete, whose employees were represented by the Teamsters. It appears that some Reading drivers were terminated when the operation was sold to another company. Cole denies that he said this, although he admits that he instructed Beatty that they were not going to hire any terminated Reading employees since he felt they were not qualified if they were not rehired by the new owners. In evaluating the testimony on this matter, I am persuaded that Beatty was the more convincing and should be credited.

In late May shortly before the June 5 election, Ernst approached Lamb at the trailer parking lot of the Cincinnati operation and said to him "'Let's face it. You have some influence on the people around here.' And he said, 'If you forget about this union stuff here we have possibly some management openings in Atlanta you could work into.' And I said, 'Well, I can't do that John.' And he said 'Well, how about if we make you a lead man right here at this plant here and we can work out a contract for these guys. We don't need a union to do that.' And I said 'I can't do that neither.' He said, 'Well, I respect you for where you stand.' And that was about the end of the conversation." Ernst admits that he took Lamb aside to discuss problems at the Cincinnati facility and to see what his complaints were. He also concedes that he asked Lamb if he would want to go to Atlanta, because they needed employees in the Respondent's new Atlanta operation, and Lamb had previously shown some interest in going there, but that he was not offering any supervisory position in either Atlanta or Cincinnati for Lamb to withdraw his support from the Union. He also denied offering to work out a contract without the Union. A careful analysis of the testimony convinces me that Lamb was the more reliable witness, and I credit his testimony. Accordingly, I find that by offering Lamb a management position to withdraw his support for the Union, and by soliciting Lamb to circumvent the Union by dealing directly with him, Respondent has interfered with the organization rights of employees guaranteed in Section 7 of the Act.

A few days prior to the 5 June election, James Moore and Mark Blevins, both drivers, testified that they were in the yard of the Cincinnati plant discussing the union campaign when Van de Grift broke into their conversation and stated to them that if the Union were voted in, the Respondent had a legal right to cut their wages and benefits. Neither Moore nor Blevins responded to this and went about their work. Van de Grift recalls the conversation but not specifically what he said. However, Van de Grift testified that what he had told employees throughout the campaign was that they can start where they are and can negotiate either down or up. Having reviewed the testimony, I am satisfied that the mutually corroborative testimony of Moore and Blevins is a more reliable account, particularly since Van de Grift did not recall specifically what he said. Accordingly, in the circumstances, I conclude that Van de Grift's statement was coercive and constitutes interference with the organizational rights set out in Section 7 of the Act.

In May 1986, Van de Grift testified employees were given a 5-percent wage increase, which was provided for in Respondent's budget.[4]

A representation election was held on Friday, 5 June, in a unit of production and maintenance employees, including truckdrivers, loader operators, and mechanics at the Cincinnati and Lebanon facilities. The Union won the election and was certified on 13 June.

On Monday, 8 June, at 6 a.m., Ernst called a meeting of all the unit employees for both locations at the parking lot of the Cincinnati plant, just outside the trailer being used as temporary office space. Management employees present were Cain, Cole, Beatty, Van de Grift, John Ernst, and John Ernst Jr., son of John Ernst, assistant vice president of operations, and another management employee named Andrew Allen. Ernst addressed the employees telling them, according to Lamb, in substance, that he would bargain with the Union in good faith because he had to but that he would stand 100 percent behind the eight people who did not vote for the Union in the election. Also that he would dedicate his life to the fight against the Union and that if something happened to him, his son, John Ernst Jr., would take over. This testimony is generally corroborated by the testimony of Moore and Blevins.

Ernst testified that the meeting was called because of "chaos" within the unit concerning the effect of representation by the Union. According to Ernst, he told the group that the Respondent had lost the election and he would bargain in good faith, denying that he said "because he had to." Also, that it was "looking like a pretty good year coming up," and that they needed everyone pulling together. He denied saying that he would dedicate his life to fighting the Union but as to the eight who voted against the Union, Ernst testified.

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[3] The election was won by the Union by a vote of 12 to 8.

[4] No unfair labor practice charge was filed alleging illegality in the granting of this wage increase.

> And the people had voted for me, in the trust of the company, or trusted me in the company, that I wouldn't betray that trust. And if something ever happened to me, I pointed to my son and said, "You'll carry that trust on." And that was the end of the conversation.

A series of negotiating sessions began with noneconomic items being discussed in the early sessions. The Union was represented by International Representatives Ronald Mason or Jim Caldwell, and several employees, including Lamb, Moore, Blevins, and Don Brown. Respondent was represented by spokesman Attorney Richard Brown, Van de Grift, John Ernst Jr., and Cole. Certain economic issues, wages, and fringe benefits were discussed at the 15 September meeting, and at the 24 September meeting Respondent made its initial economic proposal. The unit consisted of approximately 20 drivers, 2 operators, a lead mechanic, a mechanic, and a service employee. The proposal provided, among other things, for wage reductions effective 15 January 1987 in the above classifications ranging from cuts of $1.22 per hour (drivers) to none for the mechanic. The economic proposal also provided for elimination of the Employer-paid family option to the health insurance coverage unless the employee paid the premium for such coverage. The monthly premium cost for the family health coverage option is $105 to $115 per month, or just about double the individual rate. Respondent also proposed elimination of a third week of paid vacation after 9 years of service although at the time no employees had 9 years of service. Respondent also offered an alternative economic proposal providing for $1.35 per hour in each classification over its original wage proposal, but eliminating all employee payments for holidays, vacation, and insurance premiums. Robert J. Brown, Respondent's attorney and spokesman during the negotiations, explained that these economic concessions were being sought because economic projections in the Respondent's budget as to production and sales for the Cincinnati-Lebanon operations were not being met. Respondent placed in evidence "Budget Income Statements" for August and September 1986 to support this position. However, at the negotiating session the Union did not request nor did Respondent offer any documentation of its oral position. Van de Grift also testified that it was his best guess that budget projections in the "area" of April and May 1986, when the 5-percent wage increase was granted, were not met either.

In testifying about the economic condition of the Respondent, Van de Grift stated that the Cincinnati operation was begun because of Respondent's desire to expand the Lebanon operation in order to break into the Cincinnati market. As noted above, Cincinnati did not begin operations until late 1985 for the 1986 season. However, during the summer of 1986 it produced more concrete than Lebanon and employs about 15 drivers compared with 4 in Lebanon. Van de Grift testified that Respondent has plans to open another plant in the Cincinnati area around Miamitown, Ohio. Van de Grift testified that Cincinnati-Lebanon is a growing operation and Ernst testified, as noted above, that the prospects were "pretty good" for 1986 and later testified that 1986 turned out to be a "pretty good" year.

Brown also told the union negotiating committee that a wage survey of their competitors disclosed that some of those wage rates were much lower than Respondent's. This wage survey was conducted primarily by a salesman named Donald Flowers by making telephone calls to some other employers and asking various people about their wage rates and benefits. Cole wrote down whatever information he received and this was the basis of Respondent's position.[5]

At this negotiating session, Lamb asked Van de Grift how come they were given a raise in May and now it was being taken back and Van de Grift told him that bookkeeping was months behind and that they "just didn't catch it until now" that wages needed to be cut. Lamb also asked Brown if they were planning on making any wage cuts of Respondent's other plants and Brown said they were not at that time. It appears that prior to being unionized, Respondent had, in May 1985 at the Lebanon operation, eliminated Saturday overtime and daily overtime after 8 hours, granting overtime only after 40 hours per week had been worked. Some of Respondent's other operations, apparently owned or controlled by Ernst, are under contract. These include four plants in the Dayton area (Teamsters), Springfield, Ohio (Teamsters), and Richmond, Indiana-Fort Jefferson, Ohio (Laborers). In Dayton, a contract concession in May 1985 consisted of a wage reduction from $10.28 to $8.50 per hour and elimination of overtime after 8 hours and Saturday, with overtime only after 40 hours per week. However, the rate went up to $9.34 per hour in January 1986. In Springfield, a wage concession in the January 1987 contract included a wage reduction from $8.90 to $8 per hour with elimination of daily and Saturday overtime and a fourth week of vacation eliminated from the schedule as well as elimination of an employer contribution to an IRA fund.

At the 24 September meeting, Brown advised the Union, on inquiry, that this was not Respondent's final offer. At the next negotiating session on 29 September, Respondent produced another written economic proposal in which the hourly wage rates were all raised 50 cents per hour over the prior proposal, and also Respondent agreed to pay the first $12 per week of the premium cost for those employees electing the optional family health insurance coverage, with the employee paying the rest. Respondent's original alternative proposal would also be increased by 50 cents per hour, still eliminating any payment for insurance premiums, holidays, or vacations. Respondent's 29 September proposal also provided for jury pay and funeral leave benefits. On

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[5] Flowers did not testify nor did any representative of any of the surveyed employers, nor was any supporting documentation offered to support the representations made. Thus, while the document was admitted as relevant to the issue of motivation as to the good-faith bargaining aspect of the case, it is obviously hearsay and not probative as to the accuracy of the representations made.

3 October, Respondent presented its "Full and Final Economic Proposal," adding 25 cents per hour to its proposal for all classifications and also to the alternative proposal. In addition, Respondent proposed a full draft contract containing many other contract provisions to which the Union had tentatively agreed, subject to ratification by the membership, except to the extent that the Union's written proposals of 29 September was at variance with it. Thus it appears that on 3 October Respondent's final proposal provided for a wage reduction of 47 cents per hour from the wages being paid on 25 June 1986, for drivers and operators with smaller reductions for the lead mechanic and service employee and an increase of 75 cents per hour for the mechanic. In addition, employees were required to pay the first $12 per week for family health insurance coverage with the Company paying the remainder. Also, a third week of vacation after 9 years of employment was eliminated.

There also remained outstanding the above-noted union proposal about economic and noneconomic contract provisions, and the parties concede that impasse was reached at the 3 October session. Despite a meeting of the parties attended by a Federal mediator on 15 December, neither party made any further modifications in its proposal.

B. *Analysis and Recommendations*

The General Counsel takes the position that Respondent, by bargaining to impasse regarding wage and benefit concessions, was acting in retaliation against its employees for having supported the Union. Respondent contends that its action was not retaliatory but was motivated by economic considerations. It is undisputed that Respondent, in May 1986, shortly before the representation election on 5 June and the certification of the Union on 13 June, gave the employees a 5-percent wage increase. It is also undisputed that Respondent's first wage proposal on 24 September 1986, about 4 months later, called for substantial wage cuts for nearly all unit employees as well as substantially reduced health insurance coverage unless the employees paid the premiums for the reduced coverage. Also proposed was the elimination of a third week of paid vacation after 9 years of service, although it appears that no employees were affected by the last proposal since none had obtained 9 years of employment; all to become effective 15 January 1988.

Respondent explains that the 5-percent wage raise was given in May because it was budgeted. The much greater proposed reduction in wages and health care in September, it argues, were made for economic considerations. What then happened between May and September 1986 to the business condition of Respondent to justify or explain the proposed reductions?

Respondent argues that the basis for its proposed concessions was that its budget projections were not being met. However, one must be careful not to equate projected budget figures with the actual economic condition of the Respondent. Projected budgets, by definition, involved estimates and evaluations concerning annual anticipated business operations of the company. These estimates and evaluations may be either cautious or optimistic depending on the projector; or perhaps even unrealistic. The fact that projections are or are not being met does not define the economic condition of the company. It is possible for a company to be financially robust, showing generous growth and substantial profits, and still not be meeting projected business goals. This is especially true in the instant case where Cincinnati is a new plant, opening in 1986, with really no history of operations on which to predicate any realistic projections at that time. In any event, Van de Grift's testimony suggests that projections were not being met a few months earlier at the time the May 1986 wage increase was granted. However, Respondent apparently deemed its financial position sufficiently secure to grant the 5-percent wage increase at that time. In addition, it appears that the economic condition of the Respondent was good. Indeed, Respondent does not contend, or at least offered no evidence to show that its business was not profitable or even only marginally profitable, and Respondent's president testified that 1986 promised to be and was a pretty good year for the Cincinnati-Lebanon operation.

Respondent also argues that its insistence on the proposed concessions was justified by the fact that a wage survey of its competitors disclosed that some of them were paying less in wages and benefits. However, the written wage survey submitted to support that contention is insufficient as a matter of evidence to establish that fact. The wage survey was essentially a long-handed account of information acquired by a salesman of the Respondent by making telephone calls to various unnamed individuals apparently employed by some of Respondent's competitors. Neither the salesman nor those he spoke to testified. The information itself is incomplete and nonspecific. If it were complete and detailed, it would still have no probative value for the purpose of establishing that the actual wage rates and benefits of the other companies contained therein were accurate since the document is clearly hearsay for that purpose. As the record reflects, the document was admitted only for the purpose of showing that some information on the document was read to the Union at a negotiating session.

Respondent argues in its brief that the Union never demanded documentation to support the information set out in the wage survey nor did it request substantiating data for Respondent's claim that failure to meet budget projections motivated Respondent to propose wage and benefit concessions. However, this argument begs the question. The question is whether there did in fact exist justification for Respondent's insistence on its proposals. Whether the Union demanded proof is beside the point in establishing that proposition.

It is also true that Respondent, notably Ernst, did not accept the notion of unionization. Respondent resisted the Union's organizational efforts, even telling his supervisors that if the Union won he would bargain but would not sign a contract. Ernst manifested his continuing animosity when he called a meeting of unit employees on 8 June, the first working day after the Union won the election. In addressing them, as noted earlier, he stated that he would negotiate with the Union because he had to but would dedicate his life to fighting the Union and would stand 100 percent behind those who voted against the Union. Although Ernst testified that he called the meeting to stabilize or normalize the operation after the election, these remarks were not conciliatory, they were hostile and reflect a continuing rejection of and contempt for the bargaining process, even after the Union was certified.

In these circumstances, I conclude that Respondent's proposals to reduce wages and benefits were not made in good faith and that while negotiations subsequently produced impasse, that impasse was not bona fide since it was tainted and motivated by retaliatory considerations.[6]

IV. THE EFFECT OF THE UNFAIR LABOR PRACTICES ON COMMERCE

The activities of the Respondent, set forth in section III above, in connection with Respondent's operations described in section I above, have a close and intimate relationship to traffic and commerce among the several States and tend to lead to labor disputes burdening and obstructing commerce and the free flow of commerce.

V. THE REMEDY

Having found that Respondent has engaged in certain unfair labor practices in violation of Section 8(a)(1) of the Act, I shall recommend that Respondent be ordered to cease and desist therefrom and from infringing in any like or related manner upon its employees' Section 7 rights and that it take certain affirmative action designed to effectuate the policies of the Act.

Having found that Respondent engaged in bad-faith bargaining by proposing and insisting to impasse on retaliatory wage and benefit concessions, it shall be recommended that Respondent be required, on request, to bargain in good faith with the Union.

CONCLUSIONS OF LAW

1. Respondent is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

2. The Union is a labor organization within the meaning of Section 2(5) of the Act.

3. By offering a job promotion to an employee for abandoning his support for the Union, Respondent violated Section 8(a)(1) of the Act.

4. By proposing to bypass the Union and deal directly with the employees, Respondent violated Section 8(a)(1) of the Act.

5. By threatening to cut wages and benefits if the employees elected union representation, the Respondent violated Section 8(a)(1) of the Act.

6. All production and maintenance employees, includng truckdrivers, loader operators, and mechanics, employed by the Respondent at its 10093 Princeton-Glendale Road, Cincinnati, Ohio facility and its 43344 Columbia Road, Lebanon, Ohio facility, but excluding dispatchrs, batchmen and all office clerical employees and all rofessional employees, guards, and supervisors as dened by the Act constitute a unit appropriate for the purposes of collective bargaining within the meaning of Section 9(b) of the Act.

7. At all times material, the Union has been and is the exclusive representative of the employees of the Respondent within the unit found appropriate for the purposes of collective bargaining.

8. By proposing and insisting to impasse on retaliatory wage and benefit concessions, Respondent violated Section 8(a)(5) of the Act.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[7]

ORDER[8]

The Respondent, Ernst Enterprises, Inc., Dayton, Ohio, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Offering employees job promotions for abandoning their support for the Union.

(b) Proposing to bypass the Union and deal directly with the employees.

(c) Threatening to cut wages and benefits if the employees elect union representation.

(d) Failing and refusing to bargain collectively with the Union regarding wages and benefits.

(e) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Recognize and, on request, bargain collectively in good faith with the Union as the exclusive representative of all employees in the appropriate unit described above with regard to wages, benefits, and other terms and conditions of employment.

(b) Preserve and, on request, make available to the Board or its agents for examination and copying, all payroll records, social security payment records, timecards, personnel records and reports, and all other records necessary to analyze the amount of backpay due under the terms of this Order.

(c) Post at its facilities in Cincinnati and Lebanon, Ohio, copies of the attached notice marked "Appendix."[9] Copies of the notice, on forms provided by the Regional Director for Region 9, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately on receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material.

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[6] The General Counsel contends, in par. 6 of the complaint, that an mployee, Bill Hubbard, was threatened by Cole. However, since the ly testimony offered was the rejected hearsay testimony of Beatty, I all recommend the dismissal of par. 6.

[7] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

[8] In the absence of circumstances indicating the propriety of a visitatorial clause as a part of the proposed remedial order, the General Counsel's request therefore is denied.

[9] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

(d) Notify the Regional Director in writing within 20 days from the date of this Order what steps the Respondent has taken to comply.

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

WE WILL NOT offer employees job promotions for abandoing their support for the Union.

WE WILL NOT propose to bypass the Union and deal directly with the employees.

WE WILL NOT threaten to cut wages and benefits if the employees elect union representation.

WE WILL NOT fail and refuse to recognize or bargain with the International Union, United Automobile, Aerospace and Agricultural Implement Workers of America, UAW, by proposing and insisting to impass on retaliatory wage and benefit concessions.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL recognize and, on request, bargain collectively with the International Union, United Automobile, Aerospace and Agricultural Implement Workers of America, UAW, with regard to wages, benefits and other terms and conditions of employment.

ERNST ENTERPRISES, INC.

G. Zaffino & Sons, Inc., Vabs Realty Corp., Vincent Zaffino, Angelo Zaffino, Bruno Zaffino, and Salvatore Zaffino[1] *and* Shopmen's Local Union No. 455, International Association of Bridge, Structural & Ornamental Iron Workers, AFL–CIO. Cases 29–CA–6890 and 29–CA–6932

June 30, 1988

SUPPLEMENTAL DECISION AND ORDER

BY MEMBERS JOHANSEN, BABSON, AND CRACRAFT

On June 30, 1987, Administrative Law Judge James F. Morton issued the attached supplemental decision. The Respondent filed exceptions and a supporting brief, the General Counsel filed exceptions and a supporting brief, and the Respondent filed a brief in response to the General Counsel's exceptions.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the supplemental decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings,[2] and conclusions only to the extent consistent with this Supplemental Decision and Order.

The Respondent's employees who were represented by Local 455, the Union, went on strike on July 1, 1975. In January 1976, the Respondent violated Section 8(a)(2) and (1) of the Act by soliciting its employees to abandon their support for the Union and urging and soliciting them to join Teamsters Local 810 and violated Section 8(a)(1) by threatening plant closure as an inducement for the employees to abandon their support for the Union.[3] The Respondent subsequently violated Section 8(a)(5) and (1) of the Act by refusing to bargain with the Union when it requested bargaining in July 1978.[4] In August 1978, the Union made an unconditional offer to return to work. In 1980, the Board found that the Respondent violated Section 8(a)(3) by failing to reinstate fully its striking employees.[5] Subsequently, the Regional Director issued the instant backpay specification.

The judge found, inter alia, that no discriminatee for whom the General Counsel sought backpay pursuant to the make-whole order was entitled to reimbursement for fringe benefits lost as a result of participation in the strike. The judge also found that Sylvio Ruta, Roger Williams, and Robert Catalano, strikers who returned to the Respondent's employ, were not entitled to receive reimbursement for lost wages pursuant to the make-whole order. Additionally, the judge found that Williams and Catalano were not entitled to reimbursement of medical expenses. For the reasons set forth below, we disagree with the judge.

1. It is well settled that the "finding of an unfair labor practice . . . is presumptive proof that some backpay is owed by the [Respondent]."[6] The burden is on the General Counsel to prove the gross amount of backpay due.[7] The burden then shifts to the Respondent to establish facts that negate or mitigate its liability.[8]

In analyzing the General Counsel's backpay claims for Joseph Cassara, Albert Cioffoletti, Junius Howell, Joseph Reiss, Sylvio Ruta, Roger Williams, and Robert Catalano, the judge acknowledged that the collective-bargaining agreement effective just prior to the 1975 strike provided unit employees various fringe benefits. He also found that the Respondent did not provide these contractual benefits to employees after the strike began. The judge mistakenly stated that the Regional Director's second amended backpay specification sought to make the discriminatees whole by requiring the Respondent to provide them the fringe benefits that the Union had established in subsequent contracts with other employers during the backpay period. The judge then reasoned that requiring the Respondent to provide such benefits would compel the Respondent to grant concessions to the Union that had not been achieved in negotiations, contrary to Section 8(d) of the Act.

The Regional Director's second amended backpay specification does not seek to impose on the Respondent any terms in the Union's subsequent collective-bargaining agreements with other employers; rather, the specification uses a formula based on continuing the terms of the parties' expired agreement. Although the Second Circuit held that the Respondent validly withdrew from the multiemployer group following the 1976 impasse in bargaining between the group and the Union,[9] the Union, as the incumbent, was still entitled to a presumption of majority status among the Respondent's unit employees.[10] The Respondent was, therefore, obligated to bargain on request with the Union as an individual employer, because the Respondent did not show a good-faith doubt as to the Union's majority status.[11] Because the Union retained majority status, the Respondent was obligated to bargain with the Union on its July 1978 request for bargaining.[12] The Respondent was likewise required to continue giving effect to its expired collective-bargaining agreement with the Union until bargaining to impasse.[13] Thus, the second amended backpay specification, based on the expired agreement's terms, correctly calculated the gross amounts of backpay due. The Respondent, on the other hand, has not established any facts to negate or mitigate its liability.

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[1] The caption is amended to reflect the second amended backpay specification. References to the Respondent in this Supplemental Decision and Order, unless otherwise specified, refer to G. Zaffino & Sons, Inc.

[2] In sec. E of his supplemental decision, the judge inadvertently stated that Albert Cioffoletti suffered net wage losses totaling $9677.47. Cioffoletti actually suffered net wage losses totaling $7030.10, as claimed in the second amended backpay specification, and reimbursement of that amount is ordered.

[3] *Independent Assn. of Steel Fabricators*, 231 NLRB 264 (1977), enfd. in pertinent part 582 F.2d 135 (2d Cir. 1978), cert. denied 439 U.S. 1130 (1979).

[4] *Kuno Steel Products Corp.*, 252 NLRB 904, 905 (1980), enfd. sub nom. *NLRB v. Koenig Iron Works*, 681 F.2d 130 (2d Cir. 1982). G. Zaffino & Sons, Inc. was one of the respondents in *Kuno*.

[5] Id. at 905–906.

These employees are Sylvio Ruta, Roger Williams, and Robert Catalano, who individually abandoned the strike and returned to the Respondent's employ, as well as Joseph Cassara, Albert Cioffoletti, Junius Howell, and Joseph Reiss, who were not reinstated upon the August 1978 unconditional offer to return to work.

[6] *NLRB v. Mastro Plastics Corp.*, 354 F.2d 170, 178 (2d Cir. 1965), cert. denied 384 U.S. 972 (1966).

[7] *NLRB v. Brown & Root*, 311 F.2d 447, 454 (8th Cir. 1963).

[8] Ibid.

289 NLRB No. 76

Specifically, the judge denied all claims set forth in the second amended backpay specification for vacation, holiday, and sick leave pay, as well as contributions to the Union's Welfare, Pension, and Annuity Funds. We will, therefore, order the Respondent to make the discriminatees whole by paying them the respective amounts set forth in the second amended backpay specification for vacations, holidays, and sick leave,[14] and by making the contributions to the Local 455 Welfare Fund,[15] Pension Fund, and Annuity Fund on their behalf in the respective amounts set forth in the second amended backpay specification.

2. The backpay specification also claimed that Sylvio Ruta, Roger Williams, and Robert Catalano, strikers who returned to work for the Respondent,[16] are owed $294.83, $4651.60, and $9677.47 in back wages, respectively, on the theory that they would have received the same pay rates and wage increases that similarly situated replacement employees received, absent the discrimination against them. The measure of back wages due used in the specification was the pay rate each earned before the strike, plus increases granted similarly situated employees, less the rates each actually earned, multiplied by the hours each worked.[17]

The judge rejected the claims for Ruta, Williams, and Catalano because he found that the pay rates set and increases granted before July 1, 1978, were not discriminatory and did not constitute continuing violations of the Act. This proceeding, however, is not an unfair labor practice proceeding; the unfair labor practice has already been found and affirmed by a court of appeals. *Kuno Steel Products Corp.*, 252 NLRB 904 (1980), enfd. sub nom. *NLRB v. Koenig Iron Works*, 681 F.2d 130 (2d Cir. 1982). The judge apparently misunderstood the *Kuno* order. The Board specifically found that the Respondent violated Section 8(a)(3) by not fully reinstating strikers who individually returned to work before August 9, 1978,[18] but ordered that, under the circumstances, the Respondent's backpay liability would run only from 6 months before the instant charges were filed.[19] Manifestly, the Board contemplated the use of the discriminatees' prestrike pay rates and increases granted to similarly situated employees before the backpay period to determine the amounts of back wages due. Accordingly, we will order the Respondent to make whole Sylvio Ruta, Roger Williams, and Robert Catalano by paying them $294.83, $4651.60, and $9677.47, respectively, as claimed on their behalf in the backpay specification.

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[9] *NLRB v. Independent Assn. of Steel Fabricators*, 582 F.2d 135 (2d Cir. 1978).

[10] Id. at 150.

[11] Ibid.

[12] *Kuno Steel Products Corp.*, 252 NLRB 904, 905 fn. 4 (1980).

[13] See *NLRB v. Katz*, 369 U.S. 736 (1962); *Taft Broadcasting Co.*, 163 NLRB 475 (1967).

[14] Sylvio Ruta, Roger Williams, and Robert Catalano are entitled to $3033.80, $7662.50, and $9839.20, respectively.

[15] The Respondent asserts that a discriminatee is made whole when he is reimbursed for the cost of premiums incurred in obtaining substitute health insurance coverage and for his out-of-pocket medical expenses to the extent that those expenses would have been reimbursed through the Local 455 Welfare Fund. To be made whole, however, a discriminatee must be restored to the position he would have occupied had the discrimination not occurred. This includes not only reimbursement of the discriminatee's premiums and medical expenses, but also requires the Respondent to contribute to the Welfare Fund according to the expired contract's terms so that the discriminatee's future interests in the Fund will be ensured. "[T]he diversion of contributions from the union funds undercut[s] the ability of those funds to provide for future needs." *Stone Boat Yard v. NLRB*, 715 F.2d 441, 446 (9th Cir. 1983).

Hassett Maintenance Corp., 260 NLRB 1211 (1982), a cryptic decision on which the Respondent relies, focused on what it characterized as the double insurance costs that would result from requiring the employer (which had provided other coverage) in that case to make contributions to the welfare fund. *Hassett* did not address restoring the full range of an employee's interests in the welfare fund. The *Hassett* decision did not reconcile its limited remedial order with pre-*Hassett* precedent requiring employer contributions to union welfare funds on employees' behalf, see, e.g., *Kraft Plumbing & Heating*, 252 NLRB 891 (1980), affd. mem. 661 F.2d 940 (9th Cir. 1981), as does precedent decided after *Hassett*. See *Stone Boat Yard*, 264 NLRB 981 (1982), which the Ninth Circuit enforced. The court rejected the double-coverage/punitive claim: the "employer cannot complain of the extra cost of improperly created, substitute fringe benefits. . . . The company is merely required to repay what it has unlawfully withheld." *Stone Boat Yard v. NLRB*, 715 F.2d at 446.

[16] Member Cracraft continues to adhere to her position that in certain circumstances an employer's obligation to bargain may be suspended with regard to the wages, hours, and terms and conditions of employment of employees who abandon a strike and return to work. See *Schmidt-Tiago Construction Co.*, 286 NLRB 342, fn. 9 (1987) (joining then Chairman Dotson's dissent in relevant part). This position was and continues to be a minority view. For institutional reasons, Member Cracraft will apply precedent in this area. She notes, additionally, that the parties have not raised the issue in this case.

[17] The calculation, computed quarterly, was adjusted for overtime and part-time.

[18] Although Robert Catalano returned to the Respondent's employ on August 24, 1978, after the Union's unconditional offer to return, the Board grouped him with those who returned before August 9, 1978, for purposes of the make-whole order in *Kuno*, supra at 906.

[19] Id. at fn. 5.

3. The General Counsel has excepted to the judge's failure to include in the make-whole remedy reimbursement of Roger Williams and Robert Catalano for the purchase of substitute health insurance and out-of-pocket medical expenses incurred during the backpay period. The second amended backpay specification, to the extent supported by the documents the General Counsel introduced at the hearing, claimed $5253.22 for Catalano's and $3572.53 for Williams' substitute medical insurance premiums and out-of-pocket medical expenses. The judge, who, as stated above, dismissed all fringe benefit claims for all discriminatees, did not specifically address medical expenses.

It is customary to include reimbursement of substitute health insurance premiums and out-of-pocket medical expenses in make-whole remedies for fringe benefits lost.[20] Because the Respondent has established no facts that would negate or mitigate its liability, we will order the Respondent to reimburse Catalano $5253.22 and Williams $3572.53 for their documented medical expenses during the backpay period.

ORDER

The National Labor Relations Board orders Respondent G. Zaffino & Sons, Inc., New Rochelle, New York, its officers, agents, successors, and assigns, Respondent VABS Realty Corp., New Rochelle, New York, its officers, agents, successors, and assigns, and Respondents Vincent Zaffino, Angelo Zaffino, Bruno Zaffino, and Salvatore Zaffino, New Rochelle, New York, their agents, successors, and assigns, to make whole the employees named below by paying them the amounts of backpay set forth opposite their names, plus interest in the manner prescribed in *New Horizons for the Retarded*,[21] less tax withholdings required by Federal and state laws, and by paying to the Welfare Fund, Pension Fund, and Annuity Fund of Shopmen's Local Union No. 455, International Association of Bridge, Structural & Ornamental Iron Workers, AFL-CIO, the respective amounts on their behalf set forth opposite their names, plus interest in the manner prescribed in *Merryweather Optical Co.*[22]

Name	*Backpay*	*Medical Expenses*	*Welfare Fund*	*Pension Fund*	*Annuity Fund*
J. Cassara	$4,942.25	0	$5,636.88	$7,046.10	$1,409.22
A. Cioffoletti	7,030.10	0	562.41	703.01	140.60
J. Howell	3,719.35	0	297.55	371.94	74.39
J. Reiss	2,557.40	0	204.59	255.74	51.15
R. Catalano	19,516.67	$5,253.22	7,243.88	9,054.85	1,810.97
S. Ruta	3,328.63	0	1,970.14	2,462.68	492.54
R. Williams	12,314.10	3,572.53	5,901.11	7,376.38	1,475.28

Kathleen M. Troy, Esq. and *Beatrice Kornbluh, Esq.*, for the General Counsel.

Stanley Israel, Esq. (Kliegman, Goldstein, Israel & Cooper), of New York, New York, for the Respondent.

SUPPLEMENTAL DECISION

STATEMENT OF THE CASE

JAMES F. MORTON, Administrative Law Judge. This is a proceeding to determine how much backpay, if any, is due seven employees who, as found by the Board, were discriminated against by G. Zaffino & Sons, Inc. (Respondent) because they took part in a strike called by Shopmen's Local Union No. 455, International Association of Bridge, Structural & Ornamental Iron Workers, AFL-CIO (Local 455). The hearing in this case was held in conjunction with five other backpay cases, all of which had their genesis in a strike that began almost 12 years ago.

Three of the seven discriminatees involved in this case had been reinstated by Respondent to their former jobs, but not fully. The other four had been unlawfully denied reinstatement.

The General Counsel amended the backpay specification to allege that Respondent was owned by four Zaffino brothers and that they, together with a realty company they controlled, should be held jointly and severally liable for all backpay found to be due.

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[20] See, e.g., *RMC Constructors*, 266 NLRB 1064 (1982).

[21] 283 NLRB 1173 (1987). Interest on and after January 1, 1987, shall be computed at the "short-term Federal rate" for the underpayment of taxes as set out in the 1986 amendment to 26 U.S.C. § 6621. Interest on amounts accrued prior to January 1, 1987 (the effective date of the 1986 amendment to 26 U.S.C. § 6621), shall be computed in accordance with *Florida Steel Corp.*, 231 NLRB 651 (1977).

[22] 240 NLRB 1213 (1979).

Respondent, in its answer to the amended specification, asserts that no backpay is due. Regarding the three discriminatees who had returned to its employ, Respondent states that they have been fully reinstated. Concerning the remaining four discriminatees, Respondent contends that they "were unavailable for work" as of the start of their backpay period. It further contends that one of those four incurred a willful loss of interim employment.

Counsel for Respondent also represents the four Zaffino brothers and the realty company involved, VABS. They all deny that they should be liable for any backpay.

On the entire record, including my observation of the demeanor of the witnesses and after due consideration of the briefs filed with me, I make the following

FINDINGS OF FACTS

I. BACKGROUND AND OUTLINE OF THE CASE

Respondent had been engaged in the business of making and installing iron, steel, and related products in New York City and vicinity. In mid-1975, it had been a member of an employer association then negotiating a collective-bargaining agreement with Local 455 to supersede the one that was then scheduled to expire on 30 June 1975. Local 455 struck on 1 July 1975 and the approximately seven unit employees of Respondent began picketing.

A bargaining impasse was reached on 19 January 1976. See *NLRB v. Steel Fabricators*, 582 F.2d 135 (2d Cir. 1978). Respondent withdrew from the multiemployer unit. Local 455 requested Respondent, on 13 July 1978, to bargain regarding its unit of employees. Respondent violated Section 8(a)(1) and (5) of the Act in rejecting that request. See *Kuno Steel Products Corp.*, 252 NLRB 904 (1980). Respondent had by then made numerous changes in the wage and benefits of its unit employees. The Board made some reference to it in finding that three of the discriminatees had, prima facie, not been fully reinstated, but there was no contention that those changes were unilaterally instituted in violation of Section 8(a)(5).

Three of Respondent's striking employees abandoned the picket line and returned to Respondent's employ. In the underlying decision in this case, the Board made the findings excerpted below. See *Kuno Steel Products*, supra at footnote 5, which reads

> The General Counsel presented evidence establishing a *prima facie* case, which [Respondents have] not adequately rebutted, that . . . unfair labor practice strikers individually returned to work prior to August 9, [1978] and were not fully reinstated to conditions current at the time the strike began. Since an individual employee may make an unconditional offer to return to work, each individual employee who was reinstated pursuant to an unconditional offer was entitled to full reinstatement to the status quo which he occupied at the time he went on strike. *The Laidlaw Corporation*, 171 NLRB 1366, 1381–82 (1968), enfd. 414 F.2d 99 (7th Cir. 1969), cert. denied 397 U.S. 920 (1970). Accordingly, in light of Respondents' failure to rebut the General Counsel's *prima facie* case, we find their conduct in this regard to be violative of Sec. 8(a)(3) of the Act.
>
> We agree with the Administrative Law Judge's recommendation that determination whether the total wages and benefits package these employees have received since returning to work is substantially equivalent to the wages and benefits they received prior to the strike—and thus satisfies the full reinstatement requirement—should be considered in the compliance stage of this proceeding. Under the circumstances of this case, we hold that Respondents' backpay liability to any employee who returned to work before August 9 shall run only from 6 months prior to the filing of charges herein (i.e., from 1 July 1978).

In the footnote just quoted, "August 9" is the date on which Local 455 applied, inter alia, to Respondent on behalf of the remaining strikers to return to work. In *Kuno Steel*, supra, the Board found that Respondent had unlawfully refused to accept that application and ordered Respondent to offer those strikers reinstatement and to make them whole.

The Board's order in *Kuno Steel* was enforced. See *NLRB v. Koenig Iron Works*, 681 F.2d 130 (2d Cir. 1982). Seven years had, by then, passed since the strike had begun. In related proceedings, the Board has had occasion to comment on the lengthy history of the litigation arising from that strike.

Shortly after the strike began, Respondent hired replacements and reemployed two of the striking employees when they abandoned the strike. It paid these employees lower wage rates and provided them with different fringe benefits than those given just prior to the start of the strike. It has, throughout the years since, effected many other changes in the wages, hours, and other terms and conditions of employment of the unit employees. Respondent stated, in its brief, that no unfair labor practice charges have even been filed against it for either (i) unilaterally paying to bargaining unit replacements wages and benefits lower than those paid prior to the strike or (ii) unilaterally changing prestrike benefits granted to strikers on their return to work.

Bargaining between Local 455 and Respondent resumed in 1983. Local 455 filed an unfair labor practice charge on 8 July 1983 and a complaint issued thereon against Respondent alleging that it violated Section 8(a)(l) and (5) of the National Labor Relations Act, by refusing to bargain in good faith. That complaint was dismissed on a finding that Respondent was engaged only in lawful hard bargaining. See *G. Zaffino & Sons*, 275 NLRB 456 (1985).

The first three claims discussed below are for those discriminatees who had returned to Respondent's employ.

II. SYLVIO RUTA

Just before the strike began in July 1975, Ruta had worked for Respondent as a mechanic at $6.70 an hour. He joined the strike on 1 July 1975 but left it on 9 September 1976 to return to work for Respondent. He was the first striking employee to return. According to footnote 5 of the Board's decision in *Kuno Steel*, supra, his backpay period did not begin then but started on 1 July 1978—the date 6 months prior to the date on the underlying unfair labor practice charge was filed in this case.

As of the start of his backpay period, he was receiving $7.50 per hour. The General Counsel contends that he should have then been receiving $7.70 an hour based on average raises given other employees since the strike began and is due a total of $294.84. Shortly after the backpay period began, he received a raise that disposed of any further wage claim. Strangely, Ruta actually received larger raises in his backpay period and more total wages than the General Counsel's gross backpay formula would have given him.

The General Counsel's formula, in essence, asserts that, at some point antedating the start of the limitation period of Section 10(b) of the Act, i.e., 1 July 1978 as set by the Board in footnote 5 of *Kuno*, supra Respondent gave raises to unit employees, including Ruta and that Ruta, at that point, should have been receiving $7.70 an hour. The General Counsel's formula then projects that figure into the backpay period. In other words, the General Counsel contends in effect that Respondent's failure to pay Ruta an average increase at a time barred by Section 10(b) was a discriminatory act that continued into the backpay period. Such a theory is clearly without merit under the doctrine of *Machinists Local No. 1424 v. NLRB*, 362 U.S. 411 (1960).

I therefore find that Respondent has not discriminated against Ruta concerning his wage rates on or since 1 July 1978.

The General Counsel also contends that Ruta should be made whole regarding alleged fringe benefit losses he suffered. The General Counsel contends that he was discriminatorily denied all the fringe benefits provided for in Local 455's contract with Respondent, which had expired on 30 June 1975 and also all the improvements in those benefits in the subsequent standard contracts Local 455 reached with other companies in the New York City area.

As noted above, a bargaining impasse had been reached in 1976. No unfair labor practice charge was ever filed to protest Respondent's discontinuance of the use of Local 455 benefit plans and recently, the Board dismissed a complaint that Respondent had failed to bargain collectively with Local 455 about a new contract. In these circumstances, were Respondent required now to provide Ruta with the fringe benefits of Local 455 contracts, it would effectively be compelled to grant concessions, a result proscribed by Section 8(d) of the Act. Moreover, the furnishing of such benefits to Ruta and not to all other unit employees would constitute disparate treatment based on the fact that Ruta had taken part in the Local 455 strike. To award him those benefits would constitute, not remedy, discrimination.

I therefore conclude that Respondent is not obligated to provide Ruta or for that matter the other discriminatees, with the fringe benefits contained in Local 455 contracts.

Respondent has provided certain fringe benefits for unit employees. The General Counsel has not asserted any claims thereunder for any of the discriminatees. I note this here because later in this decision, the discussion of fringe benefits claims asserted by the General Counsel for some of the other discriminatees refers to the above.

I find that Respondent provided Ruta, during the whole of his backpay period, with a nondiscriminatory wages and benefits package and I conclude that he was fully reinstated with no backpay due him.

III. ROGER WILLIAMS

Williams had been employed by Respondent as a finisher just prior to the start of the strike; he was then earning $7.40 per hour. He joined the strike but left it on 6 April 1978 to return to work for Respondent at $9 an hour, the rate he was earning at the start of his backpay period, 1 July 1978. The General Counsel's backpay formula states that he should have then been receiving only $8.40 an hour. I have some difficulty comprehending the nature of the backpay claim asserted for him. The formula used by the General Counsel is based on an average of wage increases given since 1975. According to the General Counsel, Williams' actual hourly wage rates continued to exceed those projected for him under the General Counsel's formula for the first 10 quarters of his backpay period. At that point, the "average" increases received by others began to outweigh the increases he actually was given. Obviously, if the compliance investigation had been completed in the first year or two of the backpay period, the General Counsel would have had no wage claim to make for Williams under its present formula.

The critical point for me to decide, in any event, is whether Respondent had, as of the start of the backpay period, discriminated against Williams. Certainly, based on his wage rate, it did not because he was then earning 60 cents an hour more than the rate the General Counsel contends he was entitled to get. Regarding his fringe benefits, he and the other employees of Respondent then were all being treated equally. The General Counsel's claim on behalf of Williams for fringe benefits is the same as the one I already rejected for Ruta.

It may be that, as the General Counsel contends, in the 11th calendar quarter after 1 July 1978, Respondent paid him less than the average wage rate because of some unlawful reason, but it would be inappropriate for me to assume that Respondent resumed then, for no apparent reason, its earlier discriminatory treatment of Williams. There was no unfair labor practice charge filed during or after the 11th quarter alleging any such resumption.

Based on the above I find that Williams had been fully reinstated as of and since 1 July 1978 and is due no backpay.

IV. ROBERT CATALANO

Catalano returned from the strike to Respondent's employ *after* Local 455 had applied on 8 August 1978 for reinstatement of the strikers. It appears from the Board's order in *Kuno Steel*, supra, that it treated Williams as one who had returned *before* the application. In any event, he had been earning $6.70 an hour as a mechanic when the strike began in 1975. He returned to Respondent's employ on 24 August 1978 as a mechanic earning $7.50 an hour. The General Counsel contends that, based on average raises granted to unit employees in the 3-year period antedating the start of the backpay period, Catalano's hourly rate should have been $7.70 an hour then, not $7.50. However, the first discriminatee discussed above, Ruta, was receiving $7.50 an hour then based on raises received earlier and, in his overall backpay period, there was no discrimination shown him, according to the General Counsel's own formula. If the $7.50 rate was discriminatory, it was set well before the backpay period began to run. The General Counsel's formula uses average raises to calculate the rates Respondent should have paid. As noted earlier, the rate on which $294.83 was claimed for Ruta was set long before the limitations period of Section 10(b) of the Act began to run. The raises he received during the backpay period exceeded the average. For the second discriminatee who returned to work, Williams, his wage rates for 2-1/2 years after the start of the backpay period, also exceeded the average. For Catalano, his rates were lower than the average. It may fairly be said then that the rates of those three discriminatees, on average, were about equal to the average raises given replacements. Certainly, no separate basis exists to infer that Respondent sought to further penalize the discriminatees during the backpay period because they once had taken part in the Local 455 strike. The fact that Catalano did not get the same raises as the other two discriminatees is no basis to find that Respondent continued to discriminate against him. I find, instead, that the mathematical computations for Catalano in the General Counsel's formula are insufficent by themselves to show that he was given disparate treatment because he once took part in this Local 455 strike.

Respecting the claim made on his behalf for fringe benefits, the finding above about similar claims made for Ruta and Williams are applicable. Accordingly, I conclude that Catalano had been fully reinstated on his return to work for Respondent and that no backpay should be awarded to him.

V. ALBERT CIOFFOLETTI

In this and following sections, the claims of the four discriminatees who were not reinstated by Respondent are discussed.

According to the amended backpay specification, Cioffoletti had the most seniority among Respondent's employees who were still on strike when Local 455 applied for their reinstatement on 9 August 1978. On that premise, the specification alleged that he should have been reinstated on 31 August 1978 when Respondent instead hired a replacement. In support of that allegation the General Counsel offered the testimony of the supervisory compliance examiner in Region 29 who stated that all of the material allegations in the amended specification were based on information and records furnished to Region 29 by Respondent. Respondent did not controvert that account. Indeed, its own formula, discussed below, uses much of the same data relied on by the General Counsel, and its formula differs from the General Counsel's principally in that Respondent would omit certain data as irrelevant.

Respondent, in its answer, asserted that Cioffoletti incurred a willful loss of employment during his backpay period and thus is entitled to no award. Respondent contends that Cioffoletti had retired from employment soon after the start of the strike and long before Local 455 applied for his and other strikers reinstatement. In support of that assertion, Respondent placed in evidence a document furnished it by the General Counsel. The document was submitted to Region 29 by Cioffoletti when it was conducting its compliance investigation. The document is entitled "Statement of Claimant for Backpay." It is signed with Cioffoletti's name and the General Counsel acknowledged that Cioffoletti did sign it. The General Counsel noted too that the answers to the printed questions were inserted in longhand by someone whose handwriting clearly was not that of Cioffoletti. That is obviously the case. The handwritten answers are to some extent confusing. On the one hand the "No" box is checked alongside a question asking if the claimant was unavailable for work during the backpay period.[1] Yet, at another point in the document, there is a note to the effect that the claimant was unemployed during the backpay period, and a further note, with an asterisk that reads, "Did not pursue employment" and still a further note, reading "None" (also asterisked) in the section asking claimant to describe efforts to secure employment. The document contains no explanation why the asterisks were placed on it.

The Respondent has the burden of establishing that a backpay claimant has incurred a willful loss of employment. See *Clear Pine Mouldings*, 268 NLRB 1044, 1059 (1984) and cases cited there. Respondent, to prove that Cioffoletti incurred such a loss, offered only the document described above. On its face, it is ambigious. Cioffoletti's signature on it seems to some extent to be written by a feeble hand. If there had been some other evidence before me, I might have been able to give some weight to this document but, by itself, it affords no basis to reject Cioffoletti's claim. There is nothing to explain the apparent contradictions in the document, or the use of the asterisks or the variations in the handwriting. Respondent has offered, without more, an ambiguous document as an admission against interest. Cf. *Industrial Waste Service*, 268 NLRB 1180 at fn. 1 (1984), where the Board (absent consistent, objective facts) rejected the General Counsel's contention that a decedent's affidavit should be given weight. Had Respondent offered some clarification of the apparent inconsistencies and confusion in the document before me, the burden might have shifted to the General Counsel to come forward with rebuttal evidence. On the record before me, I can give no weight to the document. More significantly, Respondent easily could have tested the validity of its own theory, that Cioffoletti was unavailable because he was retired. It could have, on receiving Local 455's application on his behalf, offered to reinstate him. It did not. It cannot be allowed to exploit the very ambiguity its unlawful acts created.

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[1] The "Yes" box alongside had a crossed out "X" in it.

The gross backpay formula relied on by the General Counsel is based on the earnings of the mechanic who was hired in place of Cioffoletti. The use of this formula has been approved by the Board. See *Big Three Industrial Gas & Equipment Co.*, 263 NLRB 1189, 1194–1195 (1982). Respondent offered an alternative formula, one based on an amalgam of Cioffoletti's wage rate when he went on strike in July 1975 and the rates paid to his replacement, beginning more than 3 years later. Respondent contends that the Board, at footnote 5 of *Kuno Steel*, supra, specified that the formula it proposes is the one to be used. Footnote 5, however, refers to those discriminatees who had returned to Respondent's employ without full reinstatement. It has no application to Cioffoletti's case or to those of the other discriminatees discussed below. If Respondent's formula had been used, Cioffoletti would be credited with less pay than his replacement received—a result that would compound the very wrong that footnote 5 was aimed at correcting.

The General Counsel's claim for fringe benefits allegedly owed Cioffoletti fails for the reasons discussed at length above concerning essentially the same such claim for Sylvio Ruta.

Based on the foregoing, I find that Cioffoletti suffered quarterly, net wage losses totaling $9677.47.

VI. JOSEPH CASSARA, JUNIOUS HOWELL, AND JOSEPH REISS

The gross backpay formula used by the General Counsel in calculating wage losses of these discriminatees is premised on the same concept used in computing Cioffoletti's, just discussed, i.e., the earnings of replacements as disclosed by Respondent's own records. Respondent's answer raises the same contention already considered in discussing Cioffoletti's claim. For the same reasons set out above, I reject those contentions of Respondent and find that these discriminatees are entitled to awards respectively for the net backpay claimed in the second amended specificiation. The fringe benefits claimed for them, however, are denied for the reasons discussed above in the section relating to Sylvio Ruta's claim. Thus, the sums due these employees appear alongside their names:

Joseph Cassara	$4,942.25
Junious Howell	3,719.35
Joseph Reiss	2,557.40

VII. THE OTHER RESPONDENTS

The General Counsel contends that VABS Realty Corp. (VABS), and Vincent Zaffino, Angelo Zaffino, Bruno Zaffino, and Salvatore Zaffino are, with Respondent, a single-integrated business enterprise and therefore that all are jointly and severally liable for backpay due under the Board Order.

Vincent Zaffino, Angelo Zaffino, Bruno Zaffino, and Salvatore Zaffino are brothers who, over 40 years ago, took over their father's business. In 1947, they formed VABS, an acronym comprised of the first initials of their respective first names, for the purpose of holding title to the real property and the building where the operating companies were then housed. They, with their sister Clementine, each owned one-fifth of the shares of VABS stock. The four brothers also founded Respondent in 1947 in order to incorporate the operating company; each owned one-quarter of Respondent's issued stock.

These brothers were the only ones to manage Respondent's operations. It appears that Bruno took care of all purchasing, hiring and firing employees, and administrative functions. The other brothers worked in the shop, and in the field as estimators or overseeing operations. The four were the only officers of Respondent; no board of directors was ever established.

It appears that there never was a written lease of the building to Respondent by VABS. Each month Respondent paid a certain sum to Clementine as her share of the rental of the building. The four brothers later increased that rental payment to her. When Vincent died in 1980, his widow also began to receive regular rental payments from Respondent. It does not appear that the other three brothers drew any money from VABS. In fact, at one point VABS mortgaged its holdings in order to provide Respondent with operating capital. The arrangement that Respondent had with VABS was characterized by one of the brothers as very informal and the same thing has to be said of the way the brothers operated Respondent. Thus, its records indicate that items of a personal nature were paid by Respondent, e.g., the cost of perpetual care of their father's grave; maintenance work on an apartment building owned by one of the brothers was paid out of Respondent's assets.

Vincent died in 1980. His widow, instead of inheriting his stock, received the proceeds of an insurance policy paid for by Respondent, which also retired the stock presumbly held by Vincent. The same practice was followed when Bruno died. Angelo and Salvatore Zaffino then were the sole stockholders. They sold the business to AT&T Iron Works in 1984 for $120,000 and split that sum between them. The real property held by VABS was also sold then, for the sum of $325,000, presumably for the benefit of the five shareholders; Angelo, Salvatore, Clementine, and the widows of Vincent and Bruno.

The relevant indicia of a single enterprise are (1) interrelationship of operations, (2) centralized control of labor relations, (3) common management, (4) common ownership or financial control, and (5) representation to the public as a single-integrated enterprise, although no one of these factors is controlling. See *Capital Theatre, Capital Rock*, 231 NLRB 1370, 1374 (1977). In that case, a realty company and the operating companies were held to constitute a single-integrated enterprise responsible for remedying the unfair labor practice filed therein. The record in the case before me shows dealings between VABS and Respondent, that cannot be characterized as being at arms length. Instead these furthered the common interests of the overall business. On the basis of the foregoing and the record as a whole, I find that VABS and Respondent were highly integrated enterprises in terms of ownership, operation, and centralized control of labor relations and, as such, constitute a single employer within the meaning of the Act.

The Board's Order ran against Respondent's officers, agents, successors, and assigns. As the corporate assets were distributed to the Zaffinos in 1984 when the business and property were sold and as a corporation cannot by divesting itself of all property leave remediless the holder of a contingent claim, it is appropriate now to pierce the corporate veil to hold those individuals liable for the backpay up to the amounts of the funds distributed to them from corporate assets. See *F & W Oldsmobile*, 272 NLRB 1150 (1984).

THE REMEDY

For the reasons set forth above, I find that the obligations to the discriminatees will be discharged by the payment to them of the respective amounts found due set forth above. The backpay provided with interest is to be computed quarterly in the manner prescribed in *F. W. Woolworth Co.*, 90 NLRB 289 (1950), and *Florida Steel Corp.*, 231 NLRB 651 (1977), minus any tax withholding required by Federal and state laws.

[Recommended Order omitted from publication.]

Continental Insurance Company, Division of Continental Corporation *and* Hotel Employees and Restaurant Employees Union Local 100, New York, New York and Vicinity, AFL–CIO, Successor to Local 6, Hotel, Restaurant and Club Employees and Bartenders Union, AFL–CIO

Marriott Food Service, Inc., a Division of Marriott Corp. *and* Hotel Employees and Restaurant Employees Union Local 100, New York, New York and Vicinity, AFL–CIO, Successor to Local 6, Hotel, Restaurant and Club Employees and Bartenders Union, AFL–CIO

Interstate United Corporation *and* Hotel Employees and Restaurant Employees Union Local 100, New York, New York and Vicinity, AFL–CIO, Successor to Local 6, Hotel, Restaurant and Club Employees and Bartenders Union, AFL–CIO. Cases 2–CA–17886, 2–CA–17887, and 2–CA–18204

June 30, 1988

DECISION AND ORDER

BY CHAIRMAN STEPHENS AND MEMBERS JOHANSEN AND BABSON

On July 25, 1984, Administrative Law Judge Harold B. Lawrence issued the attached supplemental decision. Thereafter the Respondent, Continental Insurance Company, and the General Counsel filed exceptions and supporting and answering briefs.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the record and the attached Supplemental Decision in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings,[1] and conclusions[2] only to the extent consistent with this Decision and Order.

In his decision, the judge concluded that backpay claimants Bertha DePalma, Angelo Bonomo, and Elaine Hickey should receive the backpay sought for them by the General Counsel. Specifically, the judge found that these three discriminatees made reasonable and diligent efforts to obtain employment during the backpay period. The Respondent has excepted to these findings and, for the reasons set forth below, we find merit in the Respondent's contentions.

The record shows that on February 27, 1981,[3] Marriott Food Service, Inc. (Marriott) terminated the operation of a cafeteria and executive dining room for personnel of the Continental Insurance Company (the Respondent) at the Company's offices in downtown Manhattan. In June, Interstate United Corporation (Interstate) resumed operation of the facility and offered similar positions to many of the previously discharged cafeteria employees. The reinstatement and tolling date for the backpay period was July 6.

Bertha DePalma

Claimant Bertha DePalma, who resided on Staten Island, was employed by Marriott as a waitress at its downtown facility. While employed in that position she traveled to work by ferry and bus to downtown Manhattan. According to DePalma's testimony, she talked to Marriott's general manager, Carol Kramer, about employment opportunities at other Marriott facilities. As a result, Kramer offered DePalma a similar position at Marriott's midtown Manhattan facility located on 42d Street.[4] However, in order to reach this facility, DePalma would have had to travel by subway to midtown after the ferry ride. DePalma testified that it was too far to travel on the salary being offered and that she had never ridden the subway. For these reasons, she rejected Kramer's offer.

The judge found that DePalma's rejection of this position was not, by itself, a sufficient ground to disqualify her from receiving backpay. Rather, he concluded that DePalma was under no obligation to accept employment in midtown since she had diligently sought positions elsewhere[5] and there was an abundance of restaurants in the downtown Manhattan area.

Unlike the judge, we view DePalma's action not in terms of the reasonableness of limiting her job search but as a refusal to accept an offer of similar employment.[6] DePalma testified that she rejected

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[1] The Respondent has excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

[2] In accordance with our decision in *New Horizons for the Retarded*, 283 NLRB 1173 (1987), interest on and after January 1, 1987, shall be computed at the "short-term Federal rate" for the underpayment of taxes as set out in the 1986 amendment to 26 U.S.C. § 6621. Interest on amounts accrued prior to January 1, 1987 (the effective date of the 1986 amendment to 26 U.S.C. § 6621), shall be computed in accordance with *Florida Steel Corp.*, 231 NLRB 651 (1977).

[3] All dates are in 1981.

[4] On termination of its operation at the Continental facility, Marriott transferred Kramer to its Pfizer facility, located on 42d Street, as the general manager there.

[5] In this regard the evidence shows that DePalma read newpaper advertisements each day and answered a number of them. She contacted several brokerage firms, applied at several restaurants, and inquired of a friend who was a dining room supervisor at Chase Manhattan Bank. She did not accept any of the jobs advertised because they required night or weekend work and she wanted to continue to work normal daytime hours as she had done at the Respondent's facility.

[6] See *Lundy Packing Co.*, 286 NLRB 141, 142 (1987).

289 NLRB No. 77

Kramer's offer at Marriott's midtown facility because it was too far to travel on the salary being offered and because she had never ridden the subway. DePalma offered no specifics, however, as to the difference in travel time or expense. The absence of such evidence, coupled with the fact that her stated reason for not riding the subway was a personal preference, leads us to conclude that the record contains an insufficient basis for excusing DePalma's rejection of this job offer.[7] Accordingly, we find that DePalma's rejection of a comparable job offer tolled her backpay.

Angelo Bonomo

Angelo Bonomo had been employed as the first chef at the Continental facility and was 66 years old at the time of his discharge. A few days prior to the closing of the cafeteria, Bonomo advised Marriott's general manager, Carol Kramer, that he intended to retire. According to Kramer's testimony, Bonomo stated he would not apply for a position at other Marriott facilities because "he was an old man and intended to retire." Similarly, Marriott's personnel director, Delores Coe, testified that Bonomo had advised her that he intended to retire on his dismissal.[8]

During the backpay period Bonomo collected social security and union pension payments in addition to receiving unemployment insurance benefits. Moreover, according to his credited testimony, Bonomo sought employment by reviewing newspaper advertisements, and by visiting the Union's employment office, a private employment agency, and the New York State employment referral service several times a week.

The judge found that Bonomo was eligible for backpay. In arriving at this determination, he relied on the fact that Bonomo had collected unemployment insurance benefits and concluded that Bonomo had conducted a reasonable job search. The judge further found that Bonomo's collecting social security benefits and union pension payments did not automatically mean that he had elected to rely exclusively on that income, and that his acceptance of those benefits is not necessarily inconsistent with a desire to obtain employment. Since he found that Bonomo had conducted a reasonable job search, the judge concluded that this claimant is entitled to backpay from February 27 to June 29, when he failed to accept Interstate's offer of reinstatement. We disagree.

The unrefuted evidence demonstrates that Bonomo advised three management officials and one fellow employee that he intended to retire on the closing of the cafeteria. Consistent with this stated intention, Bonomo actually collected both social security and union pension benefits. Although Bonomo also collected unemployment insurance benefits and visited several unemployment agencies, there is no substantial evidence that Bonomo either interviewed or applied for specific positions during the backpay period. The record does show, however, that Bonomo was contacted during this time and offered employment by AT&T as an occasional cook. Bonomo rejected this offer because he was going away but stated that he would contact AT&T on his return. He never followed up on this offer.[9] Bonomo was also offered reinstatement by Interstate in mid-July but effectively rejected the offer by responding that he was planning a vacation and would be unavailable until September.

In the particular circumstances here, we find that Bonomo's visits to several employment agencies do not warrant finding that he engaged in a reasonable job search. Thus, Bonomo's stated intent to retire and his acceptance of retirement benefits, his response to the AT&T and Interstate job offers, and the absence of a showing that he actually interviewed or applied for a specific job lead us to conclude that, if he did not retire, he effectively removed himself from the job market.[10] More specifically, Bonomo's refusal of jobs with AT&T and Interstate because those jobs did not suit his convenience demonstrate that he would only have accepted work when he chose and as he pleased. That being so, Bonomo's visits to employment agencies are not inconsistent with his announced retirement intentions (which may well have dissuaded Marriott from offering him work at its other facilities) and his claiming social security and pension benefits. Indeed, viewed in the context of Bonomo's job refusals and the receipt of such benefits, those visits appear to have been for the purpose of enabling him to decide if there were any jobs he might be interested in, rather than as active efforts on his part to seek work and fulfill his obligations to mitigate any backpay that might be owed him.[11] Accordingly, we find that Bonomo is ineligible for backpay.

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[7] We acknowledge, as our dissenting colleague notes, that DePalma is a grandmother. We also note, however, that she testified that she "[had her] health" and that her subsequent acceptance of a position as a waitress makes it clear that she was physically capable of carrying out the duties of that job.

Regarding her objection to taking the subway, DePalma testified that she did not do so because "I don't have to." Under further questioning by counsel for the General Counsel, she elaborated on her reasons as follows: "I'd be afraid to. I don't know anything about the subway. I may as well tell you the truth. I never rode them. I worked on Bleeker Street, and then I worked on Maiden Lane." We note, however, that so far as the record indicates, the job at Marriott's midtown facility, which DePalma declined, was a day-shift job that would call for travel on the subway at times when millions of other New Yorkers are traveling by subway to their jobs. We further note that DePalma also testified that she "take[s] the bus" in New York, but she indicated that she had not bothered to find out whether the bus would take her to 47th Street, where the Marriott facility was located, since she had "never travelled that far."

[8] The judge did not discredit the testimony of either Kramar or Coe. Bonomo did not contradict the testimony of management officials or a fellow employee that he told them he planned to retire.

[9] We find this evidence relevant not for the purpose of showing a comparable offer, but as an indication of Bonomo's actions consistent with his stated intention to retire.

[10] In so finding we are not overruling the judge's crediting of Bonomo's testimony that he made attempts to find employment, but are finding that such attempts were insufficient to establish a reasonable job search.

Elaine Hickey

Elaine Hickey had been employed as a waitress for Marriott and resided on Staten Island. During the backpay period she followed advertisements in a Staten Island newspaper, and applied for positions at several restaurants, department stores, and a clothing store. With the exception of a diner in Brooklyn, all of these positions were located on Staten Island. In this regard, Hickey testified that she did not apply for jobs in other city boroughs but confined her search to the Staten Island area because she believed it was too expensive to commute to Manhattan.

Although the judge observed that by essentially limiting her job search to Staten Island, Hickey had eliminated prospects for employment in other boroughs, he, nevertheless, concluded that this did not mean that she failed to conduct a diligent job search. Rather, based on the evidence, the judge found Hickey made reasonable efforts to find employment on Staten Island and is entitled to an award of backpay.

Contrary to the judge, we find that Hickey unreasonably limited her job search. We find it significant that Hickey was working for Marriott in Manhattan when she was unlawfully discharged and she subsequently accepted reinstatement with Interstate there. Her exclusion of this area is, therefore, at odds with a reasonable job search and, therefore, we conclude that Hickey did not make reasonable efforts to seek interim employment. Accordingly, we find her to be ineligible for an award of backpay.

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge as modified below and orders that the Respondents, Continental Insurance Company, Division of Continental Corporation; Marriott Food Service, Inc., A Division of Marriott Corp.; and Interstate United Corporation, their officers, agents, successors, and assigns, shall take the action set forth in the Order as modified.

Delete the following named claimants and the amounts set forth opposite their names from the Order: Angelo Bonomo, Elaine Hickey, and Bertha DePalma.

MEMBER JOHANSEN, dissenting in part.

It is a rare and regrettable chapter in the annals of Federal statutory compliance in which a panel majority of the National Labor Relations Board informs a grandmother earning social security that she must either conquer her fear of the New York City subway system or forgo restitution under the Act. Backpay claimant Bertha DePalma actively sought out job opportunities waitressing on two shores of New York Harbor and rejected no job offer in the relevant job market for a woman of her age,[1] experience, and skills.[2] I dissent from the tolling of her backpay on June 29, 1981.

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[11] Likewise, his claiming unemployment benefits indicated no more than that he believed he was entitled to such benefits simply because he had been terminated from his job at the Continental cafeteria.

[1] To a question by counsel for the General Counsel seeking to adduce her precise age, DePalma gave the following response: "Do I have to tell my age? All that matters is that I have my health, right?"

[2] See *Lundy Packing Co.*, 286 NLRB 141, 142 (1987).

Leonard Grumbach, Esq., Peter Fuster, Esq. and *Ellen Dichner, Esq.*, for the General Counsel.

Melvin S. Katzman, Esq., of New York, New York, for Respondent Continental.

Louis Neuman, Esq. (Guggenheimer & Untermyer), of New York, New York, for Respondent Interstate.

Carlton J. Trosclair, Esq., of Washington, D.C., for Respondent Marriott.

Robert M. Archer, Esq. (Suozzi, English & Cianciulli, P.C.), of Mineola, New York, for the Petitioner.

SUPPLEMENTAL DECISION

STATEMENT OF THE CASE

HAROLD B. LAWRENCE, Administrative Law Judge. Pursuant to an Order of the National Labor Relations Board approving a stipulation entered into among the Respondents and the Board on July 15, 1981, in which it was provided that the Respondents, jointly and severally, would make whole the losses suffered by the discriminatees named in these proceedings for any loss of pay that they may have suffered by reason of the alleged discrimination against them, and differences having arisen concerning to the amounts payable under the Order, the Regional Director for Region 2 issued a backpay specification and notice of hearing in Cases 2-CA-17886, 2-CA-17887, and 2-CA-18204. The Respondents have filed an answer and two amended answers to the backpay specification, which admitted the allegations of the backpay specification except regarding cutoff dates, the effect on the claimed amounts of wage increases, overtime payments, vacation pay, bonuses, and fringe benefits, and denied knowledge or information sufficient to admit or deny the interim earnings data supplied in the appendices to the specification. However, the Respondents admitted the correctness of the allegations relating to gross backpay of the claimants, the formula for determining the net earnings, and the formula for determining net backpay.

The Respondents have conceded the correctness of 11 of the backpay specifications; questioned one, that of Octavio Parra, only as to the correctness or propriety of including medical expenses in the backpay award; requested retention of jurisdiction for 1 year with respect to 4 claimants who did not appear at the hearing; and contest the eligibility for backpay of 29 of the claimants. They have alleged affirmative matter in the answer and amended answers that essentially embraces five points: that the claimants failed to exercise reasonable diligence in seeking employment during the backpay period; that claimants who did not follow up on a suggestion made by Marriott that they file applications for employment at other Marriott facilities should be deemed to have willfully failed to seek employment; that the backpay period should be deemed tolled as of the date when Respondent Interstate sent out a mailgram to the claimants offering reinstatement; that the Respondents are entitled to offset severance pay given to the employees; and that Respondents are entitled to offset certain amounts that were erroneously paid to two employees when the employees received vacation paychecks to which they were not entitled.

A hearing was held before me at New York City, New York, on April 25-27 and 29; May 2-5; June 1-3; and July 5, 1983. The parties were afforded full opportunity to be heard, to call, examine and cross-examine witnesses, and to introduce relevant evidence. Posthearing briefs have been filed on behalf of the General Counsel and by Respondent Continental Corporation on behalf of all the Respondents.

On the entire record and based on my observation of the demeanor of the witnesses and the manner in which they gave their testimony and after consideration of the briefs submitted, I make the following

FINDINGS OF FACT

I. BACKGROUND AND ISSUES

Marriott Food Service, Inc. (Marriott) is a division of Marriott Corp. It operated a cafeteria and executive dining room for personnel of the Continental Insurance Company at that Company's offices in downtown Manhattan, New York City. It terminated its operation of these facilities on February 27, 1981,[1] on very short notice to the employees. It paid many of them severance pay equal to 1 week's wages. Respondent Interstate United Corporation (Interstate) took over the operation of the facilities immediately thereafter. On June 26, Interstate sent mailgrams to the backpay claimants, as follows:

> You are hereby offered employment with Interstate United Corporation at 80 Maiden Lane, New York City, in the same job you formerly held with Marriott Food Service at that address or in a substantially equivalent job. If interested, please write Don Gerstein, Interstate United Corporation, 80 Maiden Lane, New York, N.Y., 10038, or telephone him at (212) 440-2670, within two weeks from your receipt of this message.

A number of the claimants responded to the mailgram and were interviewed by Donald Gerstein, Interstate's district food service manager. The proposed reinstatement date was July 6, 1981, which I accordingly find to be the date on which the backpay period was tolled except in certain specific situations noted hereinafter.

II. CONTENTIONS APPLICABLE TO MORE THAN ONE CLAIMANT

A. *The Standard of Diligence by Which Claimants' Efforts to Find Employment Must be Judged*

The Respondents' admission of the gross backpay computations made it incumbent on the Respondents to allege and prove any respect in which any of the claimants were ineligible for backpay or any respect in which the backpay specifications were incorrect. *Marlene Industries*, 234 NLRB 285 (1978); *Blue Hills Cemetery*, 240 NLRB 735 (1979). The Employer has the burden of showing that the backpay claimant incurred a willful loss by refusing to take new employment or by neglecting to make reasonable efforts to find interim work. *Inland Empire Meat Co.*, 255 NLRB 1306, 1308 (1981), enfd. mem. 692 F.2d 764 (9th Cir. 1982). The determination of whether there has been a lack of diligence in looking for work depends on the facts and circumstances of each case. *Amshu Associates*, 234 NLRB 791, 794 (1978). The discriminatee is required only to make reasonable efforts to find work. Consequently, his failure to explore some employment possibilities or to employ a particular modality of search, as when an employee concentrates on personal applications but fails to consult newspaper advertisements, does not by itself compel the conclusion that a diligent search was not conducted. *DeLorean Cadillac*, 231 NLRB 329, 330 (1977), modified on other grounds 614 F.2d 554 (6th Cir. 1980). See *Blue Hills Cemetery*, supra at 736. Doubts respecting such matters are resolved in favor of the backpay claimant and against the respondent employer, who is the wrongdoer responsible for the existence of the uncertainty. *United Aircraft Corp.*, 204 NLRB 1068 (1973).

Amshu Associates and *Inland Empire* make it very clear that examination of the backpay claimant and attempts to impeach his testimony are not acceptable substitutes for affirmative proof by the employer that the claimant failed to make reasonably diligent efforts to find interim employment, but there is an important qualification that is explicitly mentioned in both these decisions. The testimony of the backpay claimant must be credible. Thus, in *Amshu* it was held that a prima facie case was made of diligent effort to find work that shifted the burden to the Respondent to establish willful loss of earnings, but the testimony of the backpay claimant was expressly credited by the administrative law judge. Similarly, in *Inland Empire*, the respondent attempted to impeach the testimony of the backpay claimant in much the same way the Respondents attempted to do in this case, and was held not to have met its burden of proof in the face of testimony by the backpay claimant that the administrative law judge expressly credited. Nothing different is involved in those cases (such as *Blue Hills Cemetery*, supra) in which it has been held that the General Counsel meets his burden by putting the backpay specification into evidence, whereupon the respondent has the burden of showing failure to make a reasonable effort to find interim employment. If the Respondent calls the backpay claimant to testify and the administrative law judge credits the testimony, the Respondent will have failed to meet its burden, in the absence of introduction of any other evidence.

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[1] All references to dates and quarter years refer to dates in 1981 and quarters of that year unless otherwise stated.

At the same time, it must be recognized that the rules respecting burden of proof are not matters of mechanical application. Where "reliance on the bare testimony of [the claimant] himself is not warranted based upon the record as a whole" the mere fact that the General Counsel has filed a specification will not clothe the backpay claimant with special standing to recover simply because the employer has been unable to produce affirmative evidence of failure to make diligent effort to obtain interim employment. See *DeLorean Cadillac v. NLRB*, supra, 614 F.2d at 555. I have found the testimony of several of the claimants in these proceedings to be unworthy of belief and have accordingly found them ineligible to receive backpay.

The fact that backpay liability arose in this case by reason of a stipulation between the General Counsel and the Respondents does not alter the parties' burdens of proof. They are in the same position as any other parties to a backpay proceeding. It is therefore in accordance with these and other generally applicable principles that I have reviewed the 29 disputed claims. The parties have also urged that I take into consideration court decisions rendered under other statutes and certain area employment statistical data.

The Respondents call attention to language contained in court decisions rendered under the Civil Rights Act of 1964 to the effect that award of backpay is a discretionary power that must be guided by meaningful standards. The Respondents assert that I should be guided by the application of standards consistent with the purposes of the National Labor Relations Act (the Act). Award of backpay under the Act is not at all discretionary with me but is mandated by law. Board decisions and court decisions interpreting the Act are controlling regardless of any seemingly contradictory language that may be found in cases dealing with an altogether different statute that addresses problems other than the concerns of this case and the National Labor Relations Act.

Both the General Counsel and the Respondents have urged me to consider statistics that they presented respecting employment conditions in the New York area, and that supposedly are of probative value with respect to the capacity of many of the claimants to find jobs. The Respondents challenge the reliability of the General Counsel's statistics, which concededly are based on a sample rather than a full count of the population. Sampling on a defined statistical basis is a standard method of preparing such statistics and does not invalidate them. However, I have not accorded any weight to the statistics adduced by either side, for they are simply not probative of the facts they were offered into evidence to prove. They would be relevant if they showed that it would be either difficult or easy for these particular claimants to obtain employment. They do not show that.

The utility of statistics to show whether jobs are available in an area is extremely limited. In *Flite Chief, Inc.*, 258 NLRB 1124 (1981), affd. 696 F.2d 1003 (9th Cir. 1982), it was observed:

> At most, Respondents' statistical analysis may create an element of doubt. Any doubts must be resolved in favor of the backpay claimant rather than Respondents. [258 NLRB at 1128.]

Accordingly, my findings are based on the evidence actually adduced by the parties that would tend to show what efforts particular backpay claimants made or failed to make to find employment.

B. *Offsets Claimed by the Respondents*

The Respondents contend that a week's severance pay received by each of the claimants and vacation checks erroneously issued to two of the claimants are appropriate offsets against backpay due them.

The guiding principle underlying the award of backpay is that the discriminatees must be made whole for the losses that they have suffered by reason of the employer's unfair labor practice. In cases in which the employer has already compensated the discriminatees in some manner for that loss, failure to deduct the amount of such compensation from the gross backpay due to the discriminatees would in effect overcompensate them. Consequently, it has been held that severance payments made by an employer to discriminatees during the backpay period should be deducted from the amount of gross backpay awarded. *Fibreboard Paper Products Corp.*, 180 NLRB 142 (1969), enfd. sub nom. *United Steel Workers of America v. NLRB*, 436 F.2d 908 (D.C. Cir. 1971).

The General Counsel calls attention to the Board's failure to make such a deduction in a later case, *Laidlaw Corp.*, 207 NLRB 591 (1973), enfd. 507 F.2d 1381 (7th Cir. 1974), cert. denied 422 U.S. 1042 (1975). However, I do not believe that case is applicable to the instant situation. The severance payments made in *Laidlaw* were not made during the backpay period and did not overlap the backpay award. The language employed in the decision clearly indicated that the award of backpay, by itself, was the compensation for the loss suffered by the discriminatees and that the severance payment was voluntarily made independently thereof only to certain of the employees on closing of a plant in Peru, Indiana, several years after the latest backpay period date of any of the claimants in the case. One event had nothing to do with the other.

In the present case, Respondent Marriott made the severance payments at the time the facility was closed (February 27) in lieu of pay for the first week of the backpay period, and they must therefore be deducted from backpay owing for the first quarter of 1981. See *W. R. Grace & Co.*, 247 NLRB 698, 704 (1980).

The Respondents claim to be entitled to an offset against the backpay due to two of the claimants because they were erroneously paid vacation pay to which they were not entitled. This tribunal is asked to ensure that the claimants are not unjustly enriched, because they will have received payment for vacation pay in the gross backpay as calculated by the General Counsel. It is agreed that accrued vacation pay normally is includable in a backpay award. *Richard W. Kaase Co.*, 162 NLRB 1320 (1967); *Kartarik, Inc.*, 111 NLRB 630 (1955), enfd. 227 F.2d 190 (8th Cir. 1955).

The Respondents' rights to a setoff is questionable. Dolores Coe, Marriott's director of personnel, testified that an explicit decision was made not to stop payment on the checks when it was discovered that they had been erroneously mailed out. No effort was made prior to these proceedings to recover the sums paid out. The making of the payments was a deliberate act that entailed payroll deductions, such as taxes. The entitlement of any of the Respondents to a refund is therefore a matter for determination in a plenary proceeding specifically directed to that issue. The Respondents can not be given an offset in this proceeding, which is concerned with altogether different types of issues, but must seek restitution in a forum that has jurisdiction to determine the relative rights of the parties with regarding the money and consider equitable factors that might justify an order of restitution.

Accordingly, vacation pay will not be offset from any amounts owed as backpay.

C. *The Backpay Cutoff Date*

The Respondents contend that the backpay cutoff date for all eligible claimants was June 26, on which date Respondent Interstate sent out mailgrams offering them reinstatement. It is uncontroverted, however, that claimants returning to work as a result of the mailgram were to start on July 6. Accordingly, the backpay period is tolled only as of that date except in certain cases noted below in which a different cutoff date is mandated by the particular circumstances.

D. *Failure to Seek and Accept Alternate Positions with Marriott*

The joint answers interposed by the Respondents contain an affirmative defense claimed to be applicable to Angelo Bonomo and Malcolm Thomas, to the effect that discriminatees who were offered and failed to accept alternate positions by Marriott are ineligible for backpay, and another affirmative defense claimed to be applicable to them and to 13 other employees, to the effect that discriminatees who were offered positions by Interstate and failed to accept such positions, though they were without alternate employment, are ineligible for backpay. The Respondents introduced evidence that on February 24, two of Marriott's Washington-based officers, Dolores Coe, the personnel director, and James Davis, Marriott's manager of employee relations, visited the Continental cafeteria and dining room in New York City and advised the employees being laid off that they could file applications for employment at other Marriott facilities, and that Carol Kramer, general manager of the facilities at Continental, also advised employees that they could file applications at the other Marriott facilities. It seems clear that such a visitation was made, but most of the employees dispute the claim that they were invited to file applications at other facilities.

Despite the Respondents' attack on the credibility of the claimants, I believe the testimony of the 22 employees who testified that they were not advised that they could file applications for employment at other Marriott facilities. The credible evidence indicates that only 10 of the claimants were approached. The Respondents' own witnesses conceded that application forms were given to only 15 of the employees who had just been laid off, and it is not even claimed that any information was disseminated about locations where job openings existed. Rupert Cayenne and Ruth Lang testified that they made inquiries at other Marriott facilities and received negative and discouraging responses. The evidence clearly establishes that no effort was made to advise the claimants that they could apply at other Marriott facilities. On the contrary, Respondent Marriott's witnesses conceded that, as of February 27, there were no job openings at other Marriott facilities. Marriott application forms were available at the premises, but no attempt was made to distribute them among all or among any large number of the employees who were leaving. The letter of February 27 advising the backpay claimants of their termination makes no mention of any opportunity to file applications at other Marriott facilities, though the letter contains information about numerous other matters such as vacation benefits, medical and life insurance, and other employee fringe benefits.

The Respondents' contention founders in any event on the obvious fact that the communication to the few employees to whom anything was said did not constitute an unconditional offer of employment. At best, it was merely an invitation to a few employees to put in applications at other locations, with no assurance that jobs comparable to those from which they had just been laid off were available.

A final point that deserves consideration is the basic question whether employees who believed, as many of the employees in the present case certainly believed, that they had been discriminatorily and unfairly treated, were obligated to pursue the suggestion that the Respondents' claim was made to them that they apply for positions at other facilities operated by the Marriott organization. An employee is not obligated to attempt to return to work for the very same employer who has discriminatorily discharged him, or with an affiliated employer. In the present case, therefore, the reason the claimants think they were terminated is a relevant consideration. The Respondents never conceded that such discrimination existed, but it was the gravamen of the complaint against the Respondents that was settled by stipulation, and thus it is a given factor in this case that the employees believed they had been discriminatorily discharged. That circumstance may be considered, therefore, in evaluating the reasonableness of their efforts to find employment, and in a proper context may preclude a determination that efforts had not been reasonably diligent because they did not seek or accept positions with the former employer.

III. THE CLAIMANTS

A. *Undisputed Claims*

The Respondents concede the eligibility and correctness of amount owed for backpay of only 12 of the 44 claimants referred to in the backpay specification. These claimants are Phillip Deutsh, Alice Fox, Esther Gutnick, Geoffrey Hill, Jenny Irizarry, Anna Jankunis, Bridget McNamara, Octavio Parra, Blanca Schauer, Elenora Sukovich, Gregory Taylor, and Maria Unterreiner. This concession is subject to the Respondents' general contention respecting the deductibility of severance pay received by all the claimants at the time of their termination, with which I concur and, in the case of Parra, subject to such adjustments as may be required by coordination of medical benefits with other private and governmental coverages (the basic backpay being conceded). As is shown in Appendix A hereto, I have made allowance for their receipt of severance pay in my calculation of the backpay to which they are entitled. Parra's claim for medical benefits is discussed separately below.

B. *Claimants Who Did Not Appear at the Hearing*

The Respondents contend that four claimants who did not appear at the hearing and did not testify (Lewis Barbee, Ermine Blades, Betty McPherson, and George Whitehead) are not entitled to be paid because their eligibility cannot be determined. Request was made in Respondents' posthearing brief that the administrative law judge retain jurisdiction for 1 year so that the record could be reopened on proper application.

It suffices that a backpay specification was filed, as is indicated by authorities previously cited. The claimants' failure to appear cannot automatically be deemed to suggest some fault or lack of credibility or reliability on their part or some lack of merit to their claims. The burden is on the Respondents, who have possession of the payroll records and had recourse to subpoenas to compel the attendance at the hearing of any claimants whom they wished to examine (a right of which they availed themselves when it suited them in the case of at least one other claimant), to show any respect in which the specifications were incorrect or inaccurate. No showing having been made that the specification fails to set forth the proper amount owning to these four claimants, their claims must be allowed as alleged in the specification.

The Respondents never lose the burden of proving that a claimant willfully incurred loss of earnings during the backpay period. They have sustained that burden only insofar as they have demonstrated that all four of the claimants received severance pay. However, since the Respondents have not had the opportunity to examine the claimants respecting interim earnings, the amount of gross backpay as reduced by the amount of the severance payments, as indicated in Appendix A, will be paid to the Regional Director to be held by him in escrow for a period of 1 year from the date of the Order. During that time, the Regional Director will arrange for the Respondents to conduct their examinations of the claimants, if the Respondents so desire, and afford them an opportunity to present other witnesses and other relevant evidence with respect to the amount of backpay due to the claimants. The General Counsel shall be represented at any such examinations or presentations. The Regional Director will determine whether any deductions should be made from the amount of claimants' gross backpay by reason of interim earnings or otherwise, returning all sums so deducted to the Respondents and making payment of the net backpay to the claimants. The Regional Director shall report the status of the matter to the Board on its conclusion.

Accordingly, the claimants, Lewis Barbee, Ermine Blades, Betty McPherson, and George Whitehead are awarded the amount of backpay alleged in the specification, less the amounts received by them as severance pay, as detailed in Appendix A hereto.

C. *Contested Claims*

1. Eric Allen

The specification alleges that Allen, who worked as an assistant cook, earned $5.10 per hour or $204 per week. A total of $3632 backpay is claimed for the period from February 27 to July 6, when he resumed work with Interstate. Respondents' objection to such payment is that Allen did not make a reasonable effort to obtain employment. The Respondents' contention is based on Allen's own testimony respecting his efforts to find employment, which are asserted to be not credible. To the extent that it is credible, Respondents argue that it shows that his efforts to obtain interim employment were inadequate because the claimant did not apply to employment agencies, did not seek work with any other food service contractor, and applied for a job as an electrician for which he was patently unqualified. Respondent explains the failure of the claimant to furnish information showing attempts to obtain employment on a form supplied by the Board, but as a general matter, I did not consider failure to list efforts to find employment on the Board forms as necessarily requiring that the claimant's testimony regarding such efforts be discredited, especially when the testimony regarding such efforts is clear and specific and remains unimpaired after cross-examination. See *Crazy Horse Saloon*, JD-621-81, slip op. at 21, 22.

Allen testified that he is illiterate, but that advertisements were read to him from the newspapers three or four times a week by his cousin. I do not credit his testimony. Allen could not say why three or four times a week was the appropriate number of times to check the newspaper, and later changed his testimony to assert that the advertisements were read to him five or six times a week. His testimony that he could not remember the name of his cousin, who supposedly read the newspapers to him so frequently, placed a near fatal strain on his credibility.

There is no requirement, however, that a backpay claimant seek the precise type of work in which he had engaged prior to his termination. Allen's failure to seek work with other food service contractors and his going for an interview for a job as an electrician does not disqualify him for the simple reason that his main reliance was on the placement service at the Unemployment Insurance Office to assist him in obtaining employment. It is that office that referred him for an electrician's position. He filed for and collected unemployment insurance until he was hired by Interstate. He was counseled by the Unemployment Insurance Office twice a week. Moreover, the evidence indicates that the Unemployment Insurance Office referred Allen for a cook's position and for one other position and that Allen, on his own, applied for a job as an auto mechanic at a company where his cousin was employed.

I am convinced from listening to the testimony and observing the demeanor of this witness that the witness made an effort to obtain employment that, in the light of all of his personal circumstances, was a reasonably sufficient effort. It consisted mainly of going to the Unemployment Insurance Office and going out on the job interviews with the prospective employers to whom they referred him. When an offering occurred at Interstate, he took the job.

I find that Allen made reasonable and diligent efforts to obtain work. No issue was raised with respect to the calculation in the specification of the backpay due him and I accordingly find him entitled to the amounts alleged, less severance pay that he received in the amount of $204. I have deducted that amount from his gross backpay owing for the first quarter and find him entitled to net backpay in the amount of $3468, as set forth in Appendix A.

2. Joseph Autry

Interim second quarter earnings as a pot washer in the amount of $400 reduced Joseph Autry's backpay specification to $2211 for the period February 27 to July 6. The Respondents suggest that Autry's attempt to find employment with a company for which he had formerly worked as a security guard, and which terminated him for being out of uniform, did not constitute a diligent effort to find employment. However, it may be argued with equal force that an employee who attempts to find work even with an employer who has once before discharged him is making an unusually diligent effort to find employment.

The Respondents are also critical because Autry admitted that the only newspaper advertisements he looked for were for security jobs and he did not look for another job as a pot washer. Autry testified that he considered his experience at Marriott to be bad since his employment there lasted only a few months, and that he looked for work as a security guard because he had several years of experience in that area. The law does not require an employee to limit himself to the lowest possible pay scale when he is looking for work or accept any work regardless of how menial. He is required to seek employment within the broad overall range of his experience and capabilities. The question, therefore, is whether Autry's efforts to find a job were reasonably diligent in the light of all the circumstances. His failure to look for a job as a pot washer does not mean that he could not have made a diligent search for some other type of employment.

Much more serious is Autry's concession that one of the Marriott supervisors advised him to transfer before the layoff occurred, but he made no effort to find employment at any other Marriott hotel or restaurant. He did not suggest any reason for his failure to do so that even remotely hinted at any desire to avoid a discriminatory employer. Furthermore, he gave an altogether unsatisfactory explanation of his failure to apply for unemployment insurance benefits. Though he was advised by Marriott personnel how to do so, he did not file for unemployment insurance benefits because, he said, he wanted to use his time to look for a job. I cannot believe that. (Strangely, the Respondents purported to believe him, asserting in their posthearing brief that "the reason he did not file was due to a previous experience wherein he was denied benefits.") The testimony of the claimant that he did not file leads me to believe that he did not make a reasonable effort to find employment. His testimony respecting his efforts to find work was totally incredible. He testified that he and a coworker named Whitehead went together to look for work and that he saw Whitehead every day because he lived in the same apartment as Whitehead throughout the backpay period, and Whitehead was also unemployed. The evidence indicates, however, that Whitehead was employed and that his total backpay entitlement amounted to only $86. It seems almost superfluous to note that Whitehead did not testify in this proceeding.

(The glaring inconsistency between Autry's testimony and the Whitehead backpay specification placed the burden on the General Counsel to call Whitehead as a witness. His failure to do so can only give rise to an inference that Whitehead's testimony would not have supported that of Autry.)

My grave reservations regarding Autry's credibility prevent me from crediting his account of efforts to find work as a security guard at five companies that he named and his testimony respecting his efforts to obtain work as a shipping clerk at Alexander's Department Store.

Accordingly, I find that Joseph Autry failed to make a reasonable effort to find employment during the backpay period and is not eligible for backpay.

3. George Bacote

George Bacote was alleged to be due backpay in the amount of $1743 for the period February 27 to July 14.

After being laid off, Bacote spent 7 or 8 months in New Haven, Connecticut. He did not apply for unemployment insurance benefits. After taking a few weeks off and living on money that he had saved, he confined his efforts to find work to visits to an employment agency specializing in temporary jobs. He showed up there at 6 a.m. three or four times a week. It was not until after the end of the backpay period that he became interested in looking for employment of a permanent nature.

The Respondents contend that they should not be compelled to support the lifestyle of a person whose ambitions are limited to a series of temporary jobs.

The legal requirement is not that a backpay claimant seek a permanent job, but that he make reasonable efforts to secure employment and mitigate the damages caused by his wrongful termination. The question in this instance is whether the claimant's search for a succession of temporary jobs amounts to the same thing as looking for one job with a single employer and therefore constitutes a reasonable attempt to mitigate the loss by obtaining interim employment.

There is good reason to answer in the negative. Implicit in solicitation of employment through a temporary agency is the prospect that whatever employment is obtained will come to a relatively speedy end, resulting in a renewed period of unemployment. Thus, solicitation only of temporary employment must be viewed as incurring a willful loss. The evidence is clear that Bacote only worked when the agency sent him out and as a result there were weeks when he did not work at all.

This type of situation has nothing to do with the kind of situation in which a backpay claimant's prior experience in job hunting and his work capacities severely limit the type of job hunting of which he is capable. It is possible to agree with the General Counsel's argument that, in judging the reasonableness of the claimant's efforts to obtain interim employment, we take him as we find him and judge his efforts in the light of his background and capabilities, while at the same time taking due cognizance of this claimant's testimony that it was only after the backpay period expired that he searched for permanent employment. If he is credible, then he had the capacity and should have hunted for permanent employment during the backpay period, and his failure to do so was a willful failure to mitigate the loss. His later conduct illuminated his conduct during the backpay period, and should not be overlooked. *Big Three Industrial Gas & Equipment Co.*, 263 NLRB 1189 (1982).

Accordingly, I find that Bacote is not eligible for backpay. I have made a similar finding on somewhat similar circumstances in the case of Malcolm Thomas, below.

4. Marie Bellisi

The backpay specification for Marie Bellisi indicates net backpay owing in the amount of $1144, a reduction having been made for interim earnings in the second and third quarters of 1981. The Respondents point to an apparent error regarding her statement of interim earnings for the week of June 5, 1981, and submit that the General Counsel failed to meet the burden of proof.

The claimant obtained interim employment at a fixed salary of $160 per week, but the amount listed for interim earnings for the week ending June 5, 1981, was only $128. Her paycheck stub so indicated. The Respondent contends that she should be chargeable for the fixed salary of $160. The claimant testified that she did not recall the reason for the reduction in salary that week. She did not recall having been out sick and was unable to furnish any other explanation. This failure is not chargeable against her, however, but against the Respondents. The burden is on them to come forward with proof of lack of diligence on her part in reducing the loss. It should not have been difficult to establish the reason for the reduced pay in that 1 week, inasmuch as the Respondent Interstate was her Employer and had the pertinent records.

The claimant, on the other hand, worked the week before and the week after the week in question, as well as during the week in question. She cannot be said to have made no reasonable effort to mitigate the Respondents' damages.

Accordingly, the General Counsel was correct in computing her interim earnings for that week at $128, the amount that she actually earned and by which Respondents' backpay liability is mitigated.

The law requires that interim earnings be deducted from the gross amount of backpay and that the backpay claimant receive the net backpay after such deductions. That is precisely what the General Counsel has computed in this instance. I have made a further deduction of the amount of $184 paid to her as severance pay.

Accordingly, I find that Marie Bellisi is entitled to net backpay in the amount of $960, as set forth in Appendix A.

5. Angelo Bonomo

The backpay specification respecting Angelo Bonomo, who was employed as chief chef in the Continental facility, calls for payment of $5779 net backpay for the first and second quarters of 1981. There were no interim earnings during this period. At the hearing the General Counsel moved to amend the backpay specification to include an additional $336, vacation pay accrued during this period, bringing the total net backpay requested to the sum of $6115. The Respondents contest any backpay award to this claimant on the ground that he had clearly indicated his intention to retire, and consistently therewith, had refused to submit an application for employment at any other Marriott facility though invited to do so. Three Marriott officials and a former coworker testified with respect to statements he made respecting his intention to retire and the Respondents emphasize Bonomo's complete failure to work since he was laid off by Marriott. Nevertheless, the Respondents, despite their contention that Bonomo retired, introduced evidence that when he was offered reinstatement by Interstate as of June 29 he rejected the offer, but said that he would be available on his return from vacation in September. He received social security benefits and union pension payments, but also collected unemployment insurance benefits.

Bonomo testified that he visited the employment office of Local 302, that he visited a private employment agency, and that he went to the New York State Employment Referral Service four or five times a week. In addition, he applied for and collected unemployment insurance. He reviewed the advertisements in the New York Times. I found Bonomo's testimony credible.

The fact that Bonomo was collecting social security benefits and payments from a union pension fund, and therefore had other income, does not automatically mean that he had elected to rely exclusively on that income. His acceptance of those benefits is not necessarily inconsistent with a desire on his part to obtain employment and does not contradict his testimony regarding his attempts to find it. Because I credit Bonomo's testimony that he made the attempts that he described to find employment, the fact that he did not in fact return to work is not persuasive. The Respondents cite *Big Three Industrial Gas & Equipment Co.*, 263 NLRB 1189 (1982), that holds that conduct after the close of the backpay period is not dispositive regarding the question of whether a backpay claimant has taken himself out of the labor market at an earlier point, thus indicating that to a degree an examination of such conduct may be pertinent. It is significant, however, only if there is some evidence tending to show a lack of serious interest in employment before the close of the backpay period. No such showing is made with respect to Bonomo. True, when he declined employment by Interstate he said he was taking a vacation; however, while that might bring into question his availability at that time and during some period (undefined in length) immediately preceding, it affords no warrant for wholesale speculation and it must be remembered that the offer from Interstate was not made until June 26, making for a backpay period much too long to support the kind of speculation in which the Respondents seek to indulge.

The Respondents properly raised the question; the burden remains on them, however, to come forward with proof (not speculation). The testimony of Bernice Jackson that she offered Bonomo employment did not help them in that regard. She was unable to fix the time when she made the offer, except to say that she made the offer between the months of May and July. Even at that, the offer was only for "an occasional cook's job" which is an altogether inadequate offer. It suffers from precisely the same deficiency that caused the Respondents to urge that backpay be denied to those claimants who only sought temporary work through temporary employment agencies.

Bonomo testified that he was on jury duty from late June (he said June 27, which was a Saturday) to July 14 and spoke to the Interstate manager the following Monday. The manager told him to come into work the next day, but Bonomo replied that he was taking the month of August as his vacation and could not come in until September. He patently was unavailable for work from June 29 onward.

I find that from February 27 to June 29, Bonomo was available to work and is entitled to backpay for that period, reduced by severance pay that he received in the amount of $336 and augmented by a like amount for accrued vacation pay. Having rejected a specific offer of permanent employment by Interstate on June 29, however, Bonomo cannot collect for the period after that date.

Accordingly, I find that Angelo Bonomo is entitled to backpay for the period from February 27 to June 29, in the amount of $5779, as set forth in Appendix A.

6. Rupert Cayenne

Backpay in the sum of $3876 was claimed by Rupert Cayenne for the first three quarters of 1981. He resumed work on July 6, 1981, after receiving an offer of reinstatement from Interstate. The Respondents contest his entitlement to backpay on the ground that he did not make credible efforts to obtain interim employment. Respondents specifically note Cayenne's testimony that he did not recall being invited to file an application for employment at any other Marriott facility. This is not a valid objection because even had he been told to file at another Marriott facility, his failure to do so would not by itself have disqualified him from receiving backpay. The issue is whether he made a reasonable effort to obtain other employment. In fact, Cayenne testified that he was told by Carol Kramer that he would not be employed in any other position with Marriott.

The Respondents also cite Cayenne's work stoppage in the last week, when he refused to work, until he was advised whether employees would be paid all moneys due them on their last day of work. I think that is irrelevant to the issue.

Cayenne testified that he was employed as a chef at a salary of $240 per week and had worked for Marriott for approximately 5 years. During the period from February 27 to July 6, 1981, he attempted to find employment. He applied first to a few of the airlines at Kennedy Airport. He specifically named Delta and North West, where he said he put in applications approximately 2 or 3 weeks after he was laid off and was told that he would be called if they needed him. He also went to Skychef.

The manager of Skychef called him in for an interview and told him that if he was needed they would call him. As a matter of fact, they did call him, 2 weeks before he was called back to work by Interstate, but by that time he was working in a factory.

Cayenne testified that he also put in applications at several hospitals, and named several of them. He put in an application at an employment agency where he applied for any type of job that he thought he could get and he either visited or telephoned the agency every week. In addition, he filed an application with the placement division of the New York State Unemployment Insurance Division, where he was advised that there were no openings. He followed the ads in the New York Daily News and the New York Post every day. Friends and relatives assisted him in the job hunt. Two weeks before Interstate called him back, a friend finally got him a job with a paper company as a machine assistant at $5.50 per hour for a 40-hour week.

The Respondents seek to impale Cayenne on his own testimony that experienced chefs like himself do not have difficulty finding work in the restaurant industry. This flies in the face of Cayenne's testimony respecting his unsuccessful efforts to obtain interim employment. Even if generalities such as this straw grasped by the Respondents might otherwise be helpful in weighing the facts, the credible testimony of Cayenne regarding the specific efforts made by him would always, and in this instance does, outweigh it.

I credit Cayenne's testimony that he was always available to work during the period from February 27 to June 26. He appears to have made a reasonable effort to obtain employment and, accordingly, I find him eligible for backpay. In my calculation of the amount of backpay owing, I find that he received severance pay in the amount of $240 that must be deducted from his gross backpay for the first quarter and I do not interpret the testimony as requiring deduction of 2 weeks' interim earnings from the gross backpay for the second quarter. Cayenne's testimony was that he was available through June 26. He worked on the interim job during the week of June 29 to July 3. (He testified that his friend got him the job 2 weeks before he resumed work with Interstate, not that he worked for those 2 weeks.) His interim earnings thus amounted to $220 for .4 weeks in the second quarter and .6 weeks in the third quarter. I therefore calculate Cayenne's net backpay at $4100 as set forth in Appendix A.

7. Bertha DePalma

The backpay specification in the amount of $2112 for Bertha DePalma covers the first two quarters of 1981 and the first 2 weeks of the third quarter, and is based on a weekly salary of $114. At the hearing, the specification was amended to allege average weekly earnings of $142.50 prior to termination and net backpay of $2,764.50. She had been a waitress at the Continental facility since April 1979, earning an hourly wage of $5.70. The number of hours that she worked each week varied.

The Respondents dispute her eligibility because she rejected a position with Marriott, and assert that if she is eligible the cutoff date should be not later than June 29.

DePalma conceded that she asked Carol Kramer about another job and Kramer offered her a job at the Marriott facility at the Pfizer facility. DePalma felt that the location was unsuitable because it was uptown around 47th Street in Manhattan. She lives in Staten Island. She did not feel that she could travel that far by ferry and bus on the salary that was being offered. She was used to coming to work by ferry and bus to downtown Manhattan and did not like the idea of having to ride the subway uptown. Because of the travel factor, she turned down the job.

DePalma's rejection of employment in midtown Manhattan is not, by itself, reason to disqualify her from receiving backpay. The test is whether she actively sought employment. She testified credibly that she did. She registered for and collected unemployment insurance benefits. She read the want ads in the New York Daily News and Staten Island Advance every day and answered several advertisements (she did not take the jobs advertised only because they required night or weekend work and she wanted to continue working normal daytime hours as she had done at the Continental facility). She contacted several brokerage firms in New York City. She applied at several restaurants in Staten Island. She made inquiry of a friend who was a dining room supervisor at Chase Manhattan Bank.

DePalma's testimony respecting her reluctance to use the subways and her desire to continue the mode of work that she had known up to that point is reasonable and credible. If downtown Manhattan was an area in which restaurants were few and restaurant work scarce, it might be argued that she was under some obligation to consider job openings in nearby areas easily reached by public transportation. However, restaurants are plentiful in lower Manhattan and DePalma did, in fact, subsequently obtain employment there with Interstate. She responded immediately to Gerstein's June 26 mailgram and came in for an interview with him. Under the circumstances, I find that DePalma's efforts to find employment were reasonable and sufficient to entitle her to backpay for the period.

In her interview with Gerstein, he authorized her to return to work on July 13, 1981, instead of July 6 because she was caring for her grandchildren while her daughter-in-law was in the hospital. She testified that she had made a commitment to take care of her grandchildren during the week of July 6, pursuant to plans that had been made in late June and early July. When she was offered a position by Interstate, to start July 6, she requested and received permission to start on July 13 instead. The Respondents contend that in view of that circumstance the proper cutoff date for backpay is June 29, arguing that her unreadiness to resume work on the date requested makes it highly unlikely that she was looking for work the week of June 29. They assert she could not have been looking if she had a commitment for the week of July 6.

The Respondents' argument runs afoul of the fact Gerstein did not offer DePalma work for the week of June 29, and thus their assumption that she could not have been looking for work fails to take into account the possibility that had Gerstein asked her to work the week of June 29, she might have agreed, while still arranging to take the following week off. The latter speculation is sounder than that of the Respondents.

Furthermore, it is well settled that a reasonably diligent effort to find interim employment does not require that the search be conducted in each and every week of the backpay period, but only that a reasonably diligent effort be conducted over the course of the entire backpay period. That is what was proved to have been done in DePalma's case.

The General Counsel agreed that DePalma's backpay period should be tolled as of July 5, instead of July 12, by reason of her unavailability during the week of July 6, and amended the backpay claim to $2622 instead of $2,764.50, deducting $142.50 for that week.

I have reached a different result for the amount of the backpay owing to the claimant. I have calculated DePalma's backpay at $142.50 per week for the 4.4 weeks of the first quarter, the 13 weeks of the second quarter, and .6 weeks of the third quarter, and have deducted the amount of severance pay received by her from her backpay for the first quarter. This has yielded a final net backpay figure of $2,416.80, as elucidated in Appendix A.

8–9. Louise Fuller and Celia Hassett

Louise Fuller and Celia Hassett were part-time waitresses who were employed solely in connection with special functions held in the Continental facility's Monroe Room. They worked an extremely limited schedule.

I am satisfied that the evidence establishes that both of them made reasonably diligent efforts to find employment as part-time party waitresses comparable to that which they had had prior to the layoffs.

The Respondents characterize the testimony of these claimants respecting their efforts to obtain employment as vague, generalized, and uncorroborated. Listening to the claimants at the hearing, I heard them testify to various efforts that they made to obtain employment, including following ads in the newspapers and making visits to various prospective employers. Fuller listed a number of such employers, identified the newspapers in which she followed ads, and testified that she sought assistance from friends in finding employment and kept in touch with Marriott. She collected unemployment insurance during this period and reported regularly to the New York State Placement Service.

Hassett's testimony was similar. She named employers from whom she sought employment, followed the newspapers, and reported to the New York State Placement Service after registering for unemployment insurance benefits. Both claimants returned to work when they were called back. I found the testimony of the two claimants sufficiently specific and detailed to merit credibility in all particulars.

The real issue with respect to these claimants pertains to the computation of the amount of their backpay. The General Counsel has computed the sum of $2268 to be owing to Louise Fuller and the sum of $2916 to be owing to Celia Hassett. His calculation assumes that they would have worked the normal weekly hours that they had worked previously. In fact, however, they both would have worked considerably fewer hours. It is altogether unnecessary to speculate or make assumptions respecting this question, for the Respondents introduced into evidence a listing of the functions held in the Monroe Room from March 2 through October 30, 1981. The records establish precisely the number of hours Fuller and Hassett would have worked. Ironically, in this instance, the General Counsel and the Respondents adopted the reverse of the positions they argued in the case of Marie Bellisi, when the Respondents wanted to speculate that she really earned her normal salary while the General Counsel rested on the actual paycheck stub.

The General Counsel further urges, in his posthearing brief, that the information regarding the actual number of functions held at which these two waitresses would have worked ought to be excluded from evidence because they were not alleged in either the Respondents' original answer or in their first amended answer. The argument that the Respondents are required to set forth in their answer with specificity the basis on which they contend that the backpay should be calculated differently than as set forth in the specification is true generally but is not applicable in these circumstances. The purpose of that requirement is to place on the Respondents the burden of showing any respect in which an error is claimed to exist and to prevent surprise to the General Counsel. When evidence is introduced by the Respondents that shows the existence of an error in the specification and shows in what respect an error exists, and goes further to establish incontrovertibly the true facts of the case, there is no justification for excluding such evidence. The Respondents have met precisely the burden that is placed on them by the rules that govern the procedure in backpay cases.

The General Counsel does not complain of surprise. There is no respect in which the backpay claimants can legitimately complain that they have been prejudiced by the introduction into evidence of the actual history of the dining room during the pertinent backpay period, which fixes the maximum number of hours they could possibly have worked there. With the actual facts available, it would be unconscionable to hold that backpay should nevertheless be based on the average earnings of the claimants during the period prior to the layoffs, for that would entail conscious and deliberate speculation regarding something whose history is already fully known (and which contradicts the proposed speculation). I not only refuse to speculate when I have the actual facts before me, but I reject the General Counsel's contention that the Respondents' argument is "speculative"; I cannot see how proven facts can be deemed a matter of conjecture. I also decline to speculate, as the General Counsel urges, that Fuller and Hassett might have requested and been granted additional work to fill in as executive dining room waitresses. There is not a shred of evidence to support that argument, which is literally couched in speculative terms, and the evidence of the claimants as to the type of interim employment they looked for makes it clear that, if anything is probable, it is that they would not have sought to augment their working hours.

In any event, though the Respondents' answer and first amended answer did not deny the correctness of the formula used to compute gross backpay, the second amended answer alleged that the number of shifts the claimants would have worked had they continued in Marriott's employ during the backpay period (a fact that is known precisely because the number of functions is known) should be the basis of the computation. That was sufficient compliance with the pleading requirements, for it clearly put the General Counsel on notice that the Respondents expected to introduce the history of the dining room and argue that the claimants' backpay should be calculated on the basis of it.

The Respondents introduced evidence to the effect that 29 functions were held in the Monroe Room on various dates during the backpay period: on six dates in March, 3 dates in April, 5 dates in May, 5 dates in June, 6 dates in July, 3 dates in August, and 1 date in September. The claimants' maximum earnings can thus be calculated. Each would have worked a maximum of 6 hours. Fuller would have earned a maximum in the entire period of $1,017.90 ($5.85 x 6 x 29) and Hassett would have earned a maximum of $1131 ($6.50 x 6 x 29). For the purpose of fixing the backpay award, I assume (or speculate) that they each would have worked all 29 functions. That speculation is permissible because it involves clearly defined limits, and in backpay proceedings doubts are resolved in favor of the claimants.

Hassett and Fuller each received severance payments for which due allowance has been made. As is set forth in Appendix A, I have calculated Fuller's net backpay in the amount of $900.90 and Hassett's net backpay in the amount of $1001.

10. Gerald Furby

The Respondent objects to the specification filed on behalf of Gerald Furby for net backpay in the amount of $2448 for the period from February 27 to July 6, the date when he was reinstated by Interstate, on the ground that the claimant's testimony as to his efforts to find employment are contradicted by the recitation of extremely limited efforts set forth in a statement that he signed on August 3, 1981. The Respondents offer no evidence that would indicate a good reason to discount Furby's testimony other than the paucity of information contained in the written statement of claim. They assert that "Furby's testimony bears a remarkable resemblance to the litany of efforts to obtain employment testified to by most of General Counsel's witnesses." I see nothing remarkable about it: there are just so many ways in which an unemployed person can seek employment and the backpay claimants in this case inevitably had recourse to similar means of looking for a job, including interviews with prospective employers, applications to the New York State Placement Service, scrutiny of newspaper ads, and followup of leads furnished by relatives and friends. Written statements furnished by the claimants on various occasions, such as interviews by Board investigators, are not necessarily more accurate accounts of their efforts to find employment than their testimony. Their testimony under oath, subject to cross-examination, and under controlled conditions is much more dependable. Respondents' disappointment in their failure to elicit retractions on cross-examination does not justify doubts about the veracity of the claimants based solely on the meager contents of their earlier statements, which were obviously prepared by the claimants, persons unaccustomed to preparing such documents, with scant regard to their ultimate importance in these proceedings.

I find that Gerald Furby made reasonable efforts to find employment during the backpay period. Deducting severance pay in the amount of $136, I calculate his backpay at the sum of $2312 as set forth in Appendix A.

11. Nicholas Graham

Graham was unemployed for 5.2 weeks in the first and second quarters of 1981 (February 27 to April 7). The backpay specification alleges a sum owing in the amount of $832 with interest. There were no interim earnings. The Respondents contend that because he concededly collected unemployment insurance benefits during this period, the amount he received should be deducted from the backpay, along with severance pay which he received. By their calculation, he sustained no loss of earnings and therefore is entitled to nothing, since he testified he received unemployment insurance benefits till he returned to work.

The claimant testified initially that he collected benefits for 1 week; he later stated he collected them until he returned to work. His testimony is not inconsistent. Because collection of benefits must await expiration of a 2-week waiting period, he patently was referring to the circumstance that he collected benefits for 1 week, which was the week before he returned to work. In any event, unemployment insurance benefits are not an offset against gross backpay. However, severance pay that claimant received in the amount of $160 is an offset and brings net backpay to the sum of $672, as set forth in Appendix A.

12. Curtis Hailey

The net backpay alleged in the specification for Curtis Hailey for the period from February 27 to July 6 is $2408, allowing for interim earnings in the second quarter in the amount of $400. Hailey earned $156 per week at Continental as a cook's helper. He testified that he sought employment during the backpay period with various restaurants, with a drycleaning establishment, and with a security guard company, followed up newspaper advertisements and leads from friends, and registered for unemployment insurance benefits.

The Respondents pointed out a number of specific circumstances testified to by Hailey himself as casting doubt on the sincerity of his attempts to seek employment. The Respondents contend that he should therefore be found ineligible for backpay. However, in each case Hailey offered specific and detailed explanations of what had occurred.

For example, though Hailey applied for unemployment insurance benefits, he was disqualified from receiving them because he failed to appear on one of his reporting dates (May 20). He testified that he failed to report because he had been ill on that day, and that the failure was not excused because he could not cope with the agency's procedure for removing the default (he was asked to fill out certain forms, but he did not do so because he could not understand what was required of him). This certainly is enough to arouse suspicion, but closer examination of all the circumstances discloses that Hailey did collect unemployment insurance for about a month and a half up to the date when he missed making his report. He had started collecting in the second week in March, and testified without contradiction that he reported to the unemployment insurance office on two earlier occasions when he was supposed to report.

Another questionable circumstance for which he made a satisfactory explanation was his rejection of a job as a dishwasher 3 or 4 weeks after he filed for unemployment insurance benefits. He told the interviewer he was looking for a job as a cook's helper. While he was at the Unemployment Insurance Placement Office the placement worker telephoned the prospective employer and was advised that there was an opening for a dishwasher, and asked him if he wanted the job. He declined it. He wanted to try to stay a cook's helper. This is credible in light of his testimony that he filled out applications and sought employment in restaurants as a cook's helper. I do not believe that Hailey's credibility is diminished by the fact that he accepted temporary employment as a carpenter's helper, assisting the owner of the house in building an extra room. He worked from 9 a.m. to 5 p.m. 5 days a week for 4 weeks and earned $100 per week, clearly proving his willingness to work if worthwhile work was available.

The fact that he did not respond to the mailgram offering him reinstatement is cited as a refusal on his part to accept work. He testified that he ignored the mailgram because he never actually read it. I find no difficulty in believing, on the basis of all his testimony, that had he understood the mailgram he would have reported. That certainly was his reaction when he received a telephone call instructing him to report for work. This objection by the Respondents ignores the claimant's testimony that friends furnished leads and that the lead to the construction work came from his brother. I attach no significance to Hailey's failure to contact Local 6. He is required to have made a reasonable effort to obtain interim employment; that does not mean he must be penalized for having overlooked some possibility that has occurred to the Respondents' lawyers.

The fact that the construction work started shortly after May 20 has prompted the Respondents, in their posthearing brief, to speculate that Hailey missed his reporting date at the Unemployment Insurance Office because he was already working, and that the period of interim employment is therefore longer than he admits. However, no affirmative proof was presented, such as testimony from the owner of the house. Backpay cannot be reduced on the basis of speculation.

The questions that the Respondents raise respecting the claimant's testimony are not unreasonable, but in each instance that they cited, the claimant provided an explanation plausible enough to entitle his overall testimony that he attempted to find other work to be credited. Again, it is to be noted that doubts are required to be resolved in favor of the claimant in a backpay proceeding.

I credit the claimant's testimony that he looked for work. In fact, he found work and when he did, he worked a full working day, 5 days a week, for an entire month. The fact that there is no testimony that he spoke to friends or relatives or contacted Local 6, a point argued in the Respondents' posthearing brief, does not eradicate the substantial evidence of the efforts that he did make to find work.

Accordingly, allowing for the severance pay that he received in the amount of $156, and his interim earnings in the amount of $400 in the second quarter, I find him entitled to backpay in the amount of $2252 as set forth in Appendix A.

13. Eddie Hall

The backpay specification for Eddie Hall is $2332, for a period covering 13.4 weeks, from February 27 to June 3, at $175 per week. Though Hall obtained employment before receiving an offer of reinstatement, the Respondents contend that he failed to make diligent efforts to obtain interim employment. Their position is based entirely on the manner in which Hall testified. The Respondents point out that initially Hall testified to efforts that he made during the month of March, and those seemed to be the only efforts that he made; after what the Respondents characterize as prompting by the General Counsel, he testified to efforts made subsequently.

I did not have the impression, while listening to this claimant, that his testimony was the result of prompting, nor did I find it incredible that he did not succeed in obtaining employment by following newspaper advertisements. I credit his explanation that he was not qualified for many of the positions advertised.

During the backpay period, he signed up to take several civil service examinations. He took and passed the Post Office examination but was not called for a position. The Respondents' argument, that Hall failed to go after certain jobs that appeared to offer only minimum wages, ignores Hall's very credible explanation that these particular employers were looking for people just coming out of school who would be willing to work for the minimum wage. There was no point to his taking a job that paid a salary below what he needed to live, and the law does not require acceptance of employment on a level lower than that from which he was discriminatively discharged.

Accordingly, allowing for $160 severance pay that Hall received, I calculate his net backpay at $2172 as set forth in Appendix A.

14. Elaine Hickey

The backpay specification for Elaine Hickey indicated net backpay owing in the amount of $1857 for the first and second quarters of 1981, from February 27 to June 29, based on her weekly salary of $108. This was amended at the hearing to reflect a cutback of the period to May 8, 1981, and a reduction of net backpay to $1555. However, as a result of her testimony, the General Counsel has moved to amend the backpay specification, again, this time to toll backpay as of July 20 and to reflect a reduction in the amount of 1 week's pay for a week in which she was on vacation. Net backpay owing is therefore asserted to in the amount of $2052. The Respondents, however, contend that Hickey made no diligent effort to attempt to seek employment and therefore is ineligible, because she limited her search to Staten Island. Respondents point out that the unemployment insurance benefits that she was receiving, plus savings on carfare that resulted from her not coming into Manhattan, were almost equivalent to the amount of her former salary. They contend that this proves she had a motivation not to work. They hypothesize that she must have been unwilling to go job hunting in the brisk March weather after returning from a week's vacation in sunny Puerto Rico. Finally, they assert that the mere fact that she was eligible for unemployment insurance benefits does not establish that she made diligent efforts to find employment.

The Respondents' argument wholly ignores the actual evidence that is in the record and that they have failed to rebut. The fact that Hickey limited her job hunt to Staten Island and thus eliminated prospects for employment in other boroughs, chiefly Manhattan, does not mean that she did not conduct a diligent search in Staten Island. The mere fact that unemployment insurance payments that she received almost equaled her income when she worked does not negate the claimant's sworn (and credible) testimony respecting efforts that she made to find a job. The Respondents' skepticism cannot take the place of evidence. The Respondents' assertion of the obvious, that it is colder in New York in March than it is in sunny Puerto Rico, similarly proves nothing. Finally, the General Counsel did not rely on the fact that the claimant received unemployment insurance benefits but on her testimony as to actual efforts made by her to find a job.

Hickey testified that she applied to numerous restaurants on Staten Island and to a diner in Brooklyn; she applied for sales positions on two occasions at May's Department Store and at a clothing store on Staten Island; she filed an application with a private employment agency in Staten Island; she followed the want ads in a Staten Island newspaper, which furnished her leads to the opportunities at May's, at the clothing store, and at one of the restaurants. She reported to the unemployment insurance office weekly except for 1 week at the end of March when she went to Puerto Rico. When she was offered reinstatement by Interstate, she accepted and was reinstated as of July 20, 1981.

On this evidence I find that the backpay claimant made reasonable efforts to find employment and is entitled to backpay for 3.4 weeks in the first quarter, 13 weeks in the second quarter, and 2.6 weeks in the third quarter, with the first quarter's backpay reduced by the severance payment that she received. I calculate net backpay in the amount of $1944 as set forth in Appendix A.

15. Ruth Lang

The backpay specification for Ruth Lang, in the amount of $2931, covers the period from February 27 to July 6, when she was reinstated by Interstate. The Respondents contest her eligibility for backpay on the ground that she did not make reasonable efforts to find employment during the backpay period.

I do not believe that Lang made any serious attempts to find employment, notwithstanding the fact that she collected unemployment insurance benefits. Lang failed to list places to which she applied for employment on her statement of backpay claim dated August 4, 1981. Her demeanor and testimony during the hearing were such as to compel me to reject her explanation of her failure to furnish the information. Notwithstanding my reluctance to penalize claimants for lack of completeness in filling out such questionnaires, I cannot accept Lang's excuse that she did not furnish the information because she did not believe that her right to backpay depended on how many places she went to in search of a job. Unlike some other claimants whose statements were sparse or incomplete, she could not credibly fill in the details omitted from the statement by testimony regarding such efforts. Then she conceded that her efforts were minimal. I find altogether incredible her testimony that she did not look for employment because she did not have carfare. Her testimony showed that she had carfare to travel to the unemployment insurance office and to May's Department Store, where she claimed she looked for work; that on being laid off, she received a paycheck in the approximate amount of $137, a severance payment of $186, vacation pay of $502.20, and an additional erroneous check for vacation pay of $576.60; and that she collected unemployment insurance benefits during the backpay period. In the face of this, I cannot credit her testimony, when pressed for a reason why she did not have enough carfare to go job hunting, that she had to pay bills. I can understand the necessity to pay pressing expenses and the difficulty of traveling in an era of high transportation costs. Nevertheless, the quickest solution to her problems would have been to find employment. Under these circumstances, while failure to institute a job search immediately after being laid off does not disqualify a backpay claimant, in this situation the claimant's failure to begin looking for 3 or 4 weeks undermines her credibility. A much more strenuous effort was indicated than she appears to have made, and her excuse for her failure is singularly inappropriate.

Lang's credibility was not enhanced by her testimony that she was ignorant of the amount of money that her husband earned. Not only is that hard to believe, as I repress my incredulity at his failure to lend her carfare, but I am baffled at her testimony that her husband drove her back and forth by car to collect her unemployment insurance checks but she could not remember what kind of car he owned. I also cannot credit her testimony that even the little cash she had available for carfare was reduced because her bills increased after she became unemployed.

Accordingly, I find that Ruth Lang is not eligible for backpay by reason of her failure to make a reasonably diligent effort to obtain interim employment.

16. Tina Lindsey

The backpay specification filed for Tina Lindsey originally alleged backpay owing in the amount of $1755 for the 16-week period from February 27 to June 29, without offset for interim earnings. It was amended to reflect interim earnings of $640 in the second quarter and net backpay of $1013, and was further amended, in the General Counsel's posthearing brief, to reflect interim earnings of $770. Respondents question the calculation of net backpay.

On the basis of Lindsey having worked Saturdays and Sundays for 10 weeks, from April 18 through June 21, with average tips of $17.50 per day and an interim weekly salary of $42, making a weekly total of $77 per week, the General Counsel arrived at a total of $770 interim earnings for that period. On June 25, she began working a 28-hour week, at the same hourly rate of $3.50. Her weekly salary for the 4 days immediately preceding June 29 would therefore amount to $98, with tips of $70, bringing her total earnings for that week to $168.

I thus calculate that Tina Lindsey had interim earnings of $968 in the second quarter, which, with the severance pay of $102 that she received in the first quarter, must be deducted from her backpay entitlement. Her net backpay, as set forth in Appendix A, therefore amounts to $1285.

17. Evelyn Major

Evelyn Major's eligibility for net backpay for the period from February 27 through the third quarter of 1981 (June 29) amounting to $2322 is challenged by Respondents on the basis of her written statement in July 1981 listing only two prospective employers to whom she had made application for employment. These were the Chase Manhattan Bank and the Chemical Bank. The Respondents cite discrepancies between that statement and her testimony at the hearing and suggest that she may have been coached. They call attention to the similarity of her testimony to factors listed in the NLRB Casehandling Manual. I find nothing in the claimant's testimony that would lead me to believe that she had been "coached" in the pejorative sense of that term. That a witness covers essential favorable points in the course of her testimony is certainly not cause to disregard it—adherence to such a view would speedily reduce our legal system to shambles, for no prima facie case could ever be accepted as credible.

There has been no effective attack on testimony that she gave under oath as to her efforts to find employment. She testified that after her termination she returned to the Continental facility to seek employment by Interstate; she applied to Chase Manhattan Bank, Chemical Bank, Orbachs, and Macy's; she went back to an employment agency from which she had previously obtained part-time employment and attempted through that agency to obtain a full-time position; she read the want ads in the Daily News and the New York Post on a daily basis; she responded to an ad placed by a private employment agency for a cafeteria worker; she enlisted the assistance of other persons in her search for employment; she reported on several occasions to the New York State Placement Service, and she collected unemployment insurance benefits. As soon as Interstate offered her reinstatement she accepted the position and went back to work.

Accordingly, I find that she is entitled to backpay as alleged in the specification, but reduced by severance pay received by her in the first quarter in the amount of $136. As set forth in Appendix A, her net backpay thus amounts to $2186.

18. Peter McCabe

The only issue with respect to Peter McCabe's claim is whether the 1 week's severance pay given to him by Marriott at the time of his termination precludes his receiving backpay for the 1 week that elapsed before he was rehired. Though the specification alleged that he was out of work from February 27 to March 16, he testified that he was rehired 1 week after he was terminated. Acordingly, the Respondents contend he is not entitled to backpay.

McCabe testified that the Marriott operation at Continental Insurance closed on Friday and the following week he made application with Marriott to work at its Pfizer Corporation facility because he knew Marriott had just opened up there and needed help. He was hired 5 or 6 days thereafter. He testified that he was out just that week and went back to work the following week. Documentary evidence shows his return to work on March 11, 1981.

The receipt of severance pay does not destroy eligibility, but the amount of the severance pay received must be deducted from the backpay due the claimant. He is entitled to 1 week's backpay in the amount of $336. He received severance pay in the amount of $364, according to the schedule of severance pay introduced into evidence by the Respondents. He concededly received not less than 1 week's severance pay. He is therefore not owed any net backpay.

19. Catherine Moran

The backpay specification for Catherine Moran, as amended at the hearing, set forth a claim for backpay in the amount of $2709, representing gross backpay for the period from February 27 to August 24, allowing for a reduction in the amount of $258 for 2 weeks during which she was concededly unavailable for work. Interstate sent her a reinstatement mailgram on June 26, but she did not return to work for Interstate, for reasons discussed below; instead, she began work on August 24 at the executive dinning room of the Federal Reserve bank.

The Respondents, disputing her credibility, contend that Moran did not make reasonable efforts to obtain employment during the backpay period and that that period should be cut back to June 20 because her testimony indicates that she was not available for work after that date.

On direct examination, Moran testified that she visited and applied for employment at approximately 10 restaurants, which she named, and that she also applied to the caterers at a number of temples and one church. She further testified that she reviewed the advertisements regularly in the New York Times and in the Irish Echo; that she made three visits to the New York State Placement Service and that she collected unemployment insurance benefits throughout her backpay period. She responded affirmatively to the mailgram from Interstate, but advised Gerstein that she needed a 2-week delay in starting because two members of her family were ill at that time. On July 13, she filed an application for a position as an executive dining room waitress at the Federal Reserve bank.

I am not unmindful of the existence of some contradictions (seeming or actual) in Moran's testimony, but they are not material and do not detract from the essential credibility of her testimony as a whole. The Respondents, for example, call attention to testimony by her that they quote as being to the effect that she did not recollect whether she responded to advertisements in the New York Times and that the Irish Echo did not have a section devoted to advertisements for waitress' positions. Her actual testimony, however, was that she watched the New York Times and the Irish Echo that is published three times a week but she looked at it once a week. It was in response to a question whether she responded to any of the advertisements that she said, referring to the Irish Echo, that "there was no section of waitresses in there." This answer was patently the result of a misunderstanding of the question, because later in her testimony she explicitly stated that she read Irish Echo once a week and the New York Times three times a week, looking for a position as an executive dining room waitress.

The Respondents also seek to impeach the claimant's testimony that she was always available for work on the basis that she was not available during a period, in late June and early July, when her husband and her daughter were hospitalized or required care at home. It was plain to me, listening to her testimony, that Moran does not use the English language with the specificity that might be expected of lawyers, but that is not a sufficient basis for an attack on credibility.

The only serious question respecting Moran's credibility arose from her testimony that she made known to an interviewer at the unemployment insurance office the fact that Interstate had sent her a mailgram offering reinstatement. She continued to collect benefits thereafter. She testified that she returned to the unemployment insurance office the following week, but there was no followup respecting the job offer. She could not, however, recall what was said to her by the interviewer. She conceded that she did not tell the unemployment insurance interviewers that she had spoken to Gerstein by telephone and never revealed to them that she had told Gerstein that she was unavailable for work because she was taking care of members of her family.

I do not credit Moran's testimony that she advised the unemployment insurance interviewers that she had been offered a job, but I have no difficulty believing her testimony as to her efforts to find employment. Portions of a witness' testimony may be credited even though not all of it is believed. *L. D. Brinkman Southeast*, 261 NLRB 204, 205 fn. 5 (1982). Moran obviously did not seek employment during the several weeks that she was taking care of the two members of her family and that period of unavailability requires appropriate reduction of the gross backpay. However, her entitlement to backpay for the period prior to that time is not affected, and I do not agree with the speculative contention of the Respondents that she started actual work a month after she got the job at the Federal Reserve bank because she was taking care of her family. There is no record at the Federal Reserve bank that she had asked for deferral of her starting date there. Officials of the bank had no knowledge of the reason for the delay in putting her to work after she complied with the preliminary hiring requirements and was assigned to a position in accordance with the bank's routine hiring procedures.

I find, therefore, that Moran made reasonably diligent efforts to find interim employment.

Also at issue was the question of the proper cutoff date. Moran testified that she responded to Interstate's mailgram of June 26, but asked for an extension of time to return to work because two members of her family were ill. She had been caring for one of them since June 20. Moran testified that in a telephone conversation with Donald Gerstein, she was advised that if she did not return within the time specified in the mailgram, the job might not remain available for her. As she had to take care of her sick family members, she considered the opportunity at Interstate to have been extinguished, and counted on the promise of the job with the Federal Reserve bank. She started actual work there on August 24. The General Counsel therefore contends that August 24 is the cutoff date of the backpay period for Moran; the Respondents argue that, because she was not available from June 20, that is the cutoff date.

Unquestionably, Moran was not prepared to resume work when the offer of reinstatement was made by Interstate. She testified that her husband was hospitalized for 13 days, from June 20 to the middle of July, suffering from phlebitis, and that her daughter underwent surgery on June 28 and was hospitalized for 8 days thereafter. Other things being equal, her backpay period would end on June 20, in view of her testimony. However, the General Counsel contends that, because of what Gerstein said to her on the telephone, she was entitled to believe that she no longer had the Interstate offer, and had to continue job hunting. This she did successfully, landing the job at the Federal Reserve Bank. The problem there is that, though she asserted that she got the job in July, she did not begin until August 24. The Respondents contend she delayed beginning work in order to care for her husband and her daughter, but this is unproven speculation. The evidence indicates that the delay was not at all her fault.

Moran was interviewed and given a physical examination at the Federal Reserve bank, but was not directed to report until August 24. The bank personnel who hired her testified at the hearing that they were unable to explain the reason for the delay in her starting date. There is nothing in their records that would indicate that Moran asked for any delay in starting, and routine personnel procedures of the bank appear to have been followed in all respects, except for the delay in starting her. The Respondents have produced no evidence that the delay was Moran's fault, and the burden is on them to produce such evidence, if there is any.

I credit Moran's testimony respecting her telephone conversation with Gerstein. She therefore properly relied on the job offer from the Federal Reserve bank. Accordingly, her backpay period runs from February 27 to August 23, with deductions for severance pay, in the amount of $120, and for the period of unavailability from June 20 to July 12. I calculated her net pay in the amount of $2718 as set forth in Appendix A.

20. Sheila Nelson

The backpay specification for Sheila Nelson covers a period of 8 weeks from the first quarter through a portion of the third quarter in the total sum of $3744. There were no interim earnings. Her period of unemployment ended when she was reinstated by Interstate on July 6, 1981. The Respondents contend that she did not make a reasonable effort to find interim employment.

Nelson testified that she visited the personnel department at Continental Insurance Company seeking employment but did not file an application because no one gave her an application to fill out. She named the person to whom she spoke. The Respondents, however, produced two witnesses who worked in the Continental Insurance Company personnel department at the time Nelson says she filed her application, and who testified that the procedure of the office was that anyone who inquired about employment was routinely given an application to fill out. The company's affirmative action plan was cited as requiring that applications be given out. These witnesses also testified that there had never been a person employed in the personnel department with the name given by Nelson.

The Respondents also fault Nelson for failing to register with any private employment agency, failing to seek help through the Union, failing to answer any newspaper advertisements, and even failing to speak with any of her fromer coworkers in order to be kept informed. However, the test of whether a claimant has made reasonably diligent efforts to obtain employment is not what she failed to do, but what steps she actually took to secure interim employment. Nelson had been a cashier who worked in the office at the Continental facility. She testified that during the period from February 18 to July 6, 1981, she looked for employment by making personal visits to large stores and applying for whatever jobs they might have open. At the May's store in Brooklyn, New York, she was told that an opening for a cashier had just been filled, and told the interviewer that she would take any other job that they had. She went to another department store in downtown Brooklyn and applied for a position either as a cashier or as a floor girl; she was advised that there were no openings. She did not file written applications with either store and testified that this was because she was not asked to do so. She visited some of the jewelry stores in the downtown area of Brooklyn. She was unable to furnish the names of any of the stores she visited, but testified that they all said they had no openings. She went to 120 Broadway and applied for a job as a clerk. She was uncertain about when she did that, but thought it might have been in March. She could not state either the name of the company to which she made application or the name of the supervisor to whom she spoke. She did not fill out a written application. She described the incident as follows: She walked in and asked a man at the front desk if she could talk to a supervisor or anybody in charge because she was looking for a job. He called a lady who came out and spoke to her. Nelson testified that she made application for any position that was open at Macy's at 34th Street, New York City, but she could not fix the time when she did so and did not remember to whom she spoke. When asked if she went to the store's personnel department, her testimony was, "I really don't think I went to the Personnel Department." She then explained the procedure she followed when she visited stores looking for employment: "When I go inside, I always ask for the Information Desk, because I don't know where I'm going. I asked for the Personnel Department . . . and they said that the man was busy at the time, but they would have somebody to help me." A lady from the personnel department came out to talk to her and told her that there were no job openings but made a note of her telephone number and promised to call if they had any jobs. However, she never received a call. She testified that she applied for jobs in gorcery stores in the neighborhood where she lives; she thought she had done that in May. She asserted that she applied at Chemical Bank at 55 Water Street, New York City, but was not sure of the month in which she did so. She asserted that on her visits to the Chemical Bank, "I applied for anything." She followed the same procedure there that she had followed elsewhere: She asked at the information desk whether they knew of any job openings. She received a negative response. she had a conversation with somebody there about typing, but there were no typing jobs open. She did not know the name of the man to whom she spoke.

Nelson registered for unemployment insurance on March 2. She collected unemployment insurance and testified that on her visits to the unemployment insurance office she answered inquiries about her job search. She filled out slips that they gave her on which she indicated places that she had gone looking for work. They sent her to one location, where she had an interview, but she was not hired.

The claimant's testimony is not a model of precision and exactitude. Nevertheless, it sets forth a history of attempts to find employment. Though short on details, it is supported by her success in obtaining unemployment insurance benefits and by the fact that she accepted work when she was offered reinstatement. I conclude that her testimony should be credited despite absence of details that would permit easy verification. The fact that she did not pursue every avenue that a more alert job hunter might have pursued does not mean that she was untruthful with respect to her description of the efforts to find work that she testified she made. The burden of establishing lack of diligence is on the Respondents and doubts must be resolved in favor of the backpay claimant. Accordingly, I find that the claimant is entitled to net backpay in the amount of $3536, as set forth in Appendix A. Allowance has been made for severance pay that she received in the amount of $208.

21. Cornelius Noonan

The backpay specification for Cornelius Noonan claims net backpay of $2448 for an 18-week period extending from the first quarter into the third quarter of 1981. The claimant had no interim earnings. He accepted reinstatement by Interstate and returned to work on July 6. The Respondents assert that his efforts to obtain interim employment were not diligent because he limited his efforts to a search for a job as a security guard whereas he had worked for Marriott as a dishwasher and utilityman. He made no attempt to obtain work as a dishwasher.

A backpay claimant will not be held to have failed to make diligent effort to find interim employment merely because he sought a different type of position than that in which he had been employed when he was wrongfully terminated. He must seek employment, but not necessarily employment in an identical job. Seeking a somewhat different type of job does not disqualify a backpay claimant so long as he does not reject or fail to seek, in addition, employment substantially similar to his former employment. *Avon Convalescent Center*, 219 NLRB 1210 (1975), modified 549 F.2d 1080 (6th Cir. 1977). An assessment of the reasonableness of his effort requires consideration of his skills and qualifications and his age. *Flite Chief, Inc.*, 258 NLRB 1124 (1981), affd. mem. 696 F.2d 1003 (9th Cir. 1982). Noonan testified that his original field was security and he wanted to return to it, and that among his reasons were the fact that there seemed to be more positions in that field than there appeared to be openings for dishwashers and the fact that security positions pay more than dishwashers' positions. I credit this testimony. There being no evidence that Noonan failed to attempt to obtain employment, he is entitled to backpay. The amount will be reduced by the amount of the severance pay that he received in the amount of $136.

Accordingly, I compute his net backpay in the sum of $2312 as set forth in Appendix A.

22. Octavio Parra

The backpay specification for Octavio Parra called for payment of net backpay in the sum of $1440 for an 8-week period in the first and second quarters running from February 27 to April 26, when Parra suffered a heart attack that incapacitated him and tolled the backpay period. He had already accepted an offer of reinstatement and was due to return to work on April 27.

The serious problem in this instance is presented by the amendment of the specification at the hearing to include such amounts as Parra became liable for as expenses of his medical treatment. Parra is still under treatment and the ultimate total cost cannot presently be known, but at the time of the hearing Parra was indebted for medical expenses in a substantial amount. A portion of his medical expenses was paid by the Marriott Corporation Medical Benefits Plan (the Plan) and by Medicare. The group insurance carrier, however, disclaimed further liability after paying a portion of the initial expenses on the ground that Parra was no longer employed by Marriott at the time he became ill. Whatever amounts the carrier would have paid had Parra been on the Marriott payroll when he suffered his heart attack therefore become a liability of the Respondents in this backpay proceeding.

The Respondents stipulated that the provisions of the Plan would be applicable to Parra if he were an employee of Marriott. The insurance carrier's position that Parra's coverage ended when he was terminated on February 27 is not pertinent in this proceeding except insofar as it makes the amount of the medical expenses that would have been paid under the Plan a direct liability of the Respondents. Although conceding Parra's basic entitlement to backpay, the Respondents nevertheless contended that medical expenses should not be included because proof was lacking that Parra would actually have to pay the medical bills, some of which were 2 years old and, in Respondents' view, "stale" and because Parra was covered by Medicare.

It is well settled that in these circumstances a backpay claimant such as Parra is entitled to be reimbursed for medical payments for which he becomes liable during the backpay period and for all such expenses that accrue thereafter that would have been covered by the medical insurance but for his wrongful termination. With respect to medical expenses, incurring of liability for same by Parra is, for the purposes of these proceedings, the equivalent of having paid them, and creates liability on the part of the employer for their payment by inclusion of such expenses in the backpay award. See *Carter's Rental*, 250 NLRB 344, 352–353 (1980), and *Matlock Truck Body & Rental Corp.*, 248 NLRB 461, 473–474 (1980). The question of coordinating additional coverages for medical expenses is something that should be worked out later as a matter of mechanics.

Accordingly, the General Counsel's motion at the hearing was granted and the backpay specification was deemed amended to include all sums that would be paid by the Plan to cover Parra's medical expenses already incurred and to be incurred.

The Respondent introduced into evidence a booklet dated January 3, 1981, that summarized the Plan. Though it sets forth that the Plan documents control in the event of any conflict between the provisions of the Plan and the booklet, the Plan documents were not placed in evidence. Accordingly, for the purposes of this proceeding, the terms and conditions stated in the booklet must be deemed controlling insofar as they fix the minimum extent of the liability of the Respondents. Extracts of pertinent provisions of the Plan booklet are made part of this decision as Appendix B for the convenience of the compliance officer, who is, of course, not precluded thereby from having recourse to all other relevant provisions contained in the booklet or to the provisions of the Plan documents themselves.

The evidence in the record, including statements of account, bills, and correspondence from the providers of medical services to Parra, establishes that, as of the time of the hearing Parra was indebted to them for covered medical expenses in the total amount of $10,762.75. This indebtedness was incurred during the fiscal year of Marriott Corporation ending December 31, 1981, and during the fiscal year ending December 31, 1982, a fact that must be taken into consideration in applying the provisions of the Plan relating to yearly deductibles from benefits, because these are governed by Marriott Corporation's fiscal year.

As of June 5, 1983, when the hearing was concluded, the Plan had already paid $1650 to Cabrini Medical Center and a Medicaid allowance in the amount of $5,328.10 had been applied against the St. Vincent's Hospital & Medical Center bill of $5,766.10. Charges still open were as follows:

To Cabrini Medical Center:	
Hospital expenses	$9,304.75
X-Ray	440.00
Echocardiogram	200.00
To St. Vincent's Hospital:	
Hospital expenses	438.00
Clinic	300.00
Doctors' fees	80.00
	$10,762.75

The medical insurance carrier having disclaimed further liability, further contribution can only be foreseen from governmental coverages, and except as reduced by such coverages and the authorized deductibles, Respondents are liable for payment of the foregoing expenses, together with any additional expenses incurred since the close of the hearing or that accrue in the future and that would have been covered by the Plan.

Parra had no interim earnings. His gross backpay for the first quarter, in the amount of $792 must be reduced by the severance payment that he received in the amount of $180. His gross backpay for the second quarter, computed to the date his illness commenced, amounts to $648. I therefore compute his net backpay, exclusive of medical benefits, in the sum of $1260, as set forth in Appendix A.

The compliance officer will determine whether any deductions must be made from the amount awarded for medical expenses by reason of deductibles or of governmental or other private coverages for such expenses, and the amount thereof. The compliance officer will also have to ascertain whether there have been any additional medical expenses incurred by Parra and, if so, whether and to what extent those would have been covered under the Plan, taking into account the deductibles and the requirement for coordination with governmental coverage for such expenses. Any net sums found owing to Parra should be added to the aforesaid sum of $10,762.75. On the compliance officer's determination of the net amount owing to Parra on all the foregoing, he will effectuate payment of same by the Respondents, jointly and severally. The compliance officer will retain oversight to determine what additional sums if any, become owing to Parra from the Respondents as he continues his treatment and to ensure that payment of same is timely made and that coordination of benefits with governmental and other private coverages is implemented, in accordance with this decision.

23. Donna Stallone

Backpay in the amount of $1320 is alleged to be due to Donna Stallone for the period February 27 to March 30. Respondents dispute her entitlement on the ground that prior to the termination she had given Marriott notice that she was resigning to take another job.

The posture of the case with respect to Stallone is somewhat unusual. She was not called on to testify by the General Counsel but by Respondent Marriott, by whom she is currently employed. She has worked for Marriott since February 1976 and worked in the office at the Continental facility for approximately 3 years. She took a 2-week vacation after it closed, worked 3 weeks for a company in New Jersey, and then returned to work for Marriott. She testified that she had not responded to letters concerning backpay because she did not feel that Marriott owed her anything, for she had given notice to Marriott 2 weeks prior to the closing that she was resigning to take a position with the company in New Jersey and, in addition, had declined an offer of a position at another Marriott unit made by Marriott's district manager on or before February 27.

The General Counsel concedes that if the facts were as testified to by the backpay claimant she would not be entitled to backpay, but argues, without any factual basis whatsoever, that Stallone's testimony was a fabrication advanced by the Respondents to embarrass the General Cousnel by creating the appearance that the General Counsel had failed to make adequate efforts to determine the interim earnings of the claimants. Quite aside from the fact that I find such a suggestion highly implausible, I cannot ignore Stallone's testimony or her demeanor while testifying. No information was elicited on cross-examination that indicated any reason to disbelieve her testimony or to believe that she had deliberately committed perjury for the benefit of the Respondents. She testified explicitly that she gave 2 weeks' notice that she was resigning, that she expressly declined a position with another Marriott unit in which she cold have started work immediately, and that she did so because she was interested in trying out a job in New Jersey. Her testimony was plausible and believable. I am thus compelled to deny backpay as alleged in the specification for this claimant. I do not see anything in this particular situation that suggests that the claimant's own needs should be transcended in order to ensure adequate enforcement of the National Labor Relations Act. The claimant's undisputed testimony indicates she is not eligible for backpay and it would be perversion of the aims of the Act to award backpay in the face of such evidence.

24. Ervin Terry

The backpay specification alleges the sum of $2457 to be owed to Ervin Terry for a 21-week period extending from the first quarter through the third quarter of 1981, from February 27 to July 27. Terry, who had been employed as a food server, testified with respect to his efforts to find interim employment. The Respondents contend that his testimony is altogether incredible and that, therefore, backpay should be denied because he must be found to have made no diligent effort to obtain employment. The General Counsel takes the position that Terry's credibility, if it was impeached, was only impeached with respect to irrelevant collateral matters and that the Respondents did not meet the burden that the law places on them of presenting evidence to prove willful loss of earnings.

I concur in the Respondents' view that a great deal of the testimony of the backpay claimant respecting his efforts to get employment is not credible. That failure of credibility manifestly does not relate to a collateral matter, but to a central issue, whether the backpay claimant did or did not make diligent efforts to find interim employment. The most cursory examination of Terry's testimony raises doubts respecting his credibility strong enough to require rejection of all of his testimony. For example, he testified that over the course of a 5-month period he did not see a single newspaper advertisement in the New York Post or the New York Daily News to which he felt he could respond, though he read both of these newspapers two or three times each week. Another example is the conversation Terry claimed to have had with a friend, while sitting in the friend's automobile. Terry testified that his friend referred him to a store in a shopping mall where he might obtain employment. He went to the store in the shopping mall but was told by someone there that no job openings existed.

What makes the story incredible is that the person at the store who told Terry that there were no job openings was his friend, the same person who, sitting in the car with him, had suggested that he apply for employment at that store. Then again, Terry testified that he attempted to obtain work as a security guard by talking to a friend who was a security guard at the World Trade Center. He could not remember the name of the friend. He made no inquiry at any employment office at the World Trade Center while he was there.

The credibility of Terry's testimony that he applied for a job at a nursing home in Freeport, Long Island, while staying at his uncle's place in that area, was undermined by other testimony by him to the effect that he would not travel to that same area to borrow money, a subject that came up because he claimed that he was unable to look for work because he did not have carfare. He had, of course, received a week's severance pay, so he had some money, and he testified that his Freeport relatives lent him money to help pay his rent. They are the relatives who had referred him to the nursing home in Freeport. He testified that he did not attempt to borrow more money from them because it would have taken money to get out to see them on Long Island. He did not explain why he could not telephone them to ask them for help.

Terry's testimony that he went to an employment agency in March 1981 is suspect because of his complete inability to remember the name of the agency. He testified that that agency and five or six other agencies to which he applied requested their fees in advance, but he was unable to pay the fees. As I have just noted, he was not completely without funds.

Having disclosed his inability to pay fees to advertising agencies, and despite his assertion that he did not have the necessary carfare to hunt for employment in March and April, Terry proceeded to testify that he nevertheless gave an unnamed person $25 as a fee at a construction site in the Borough Hall area of Brooklyn and was instructed by him to report to work the following Monday. It turned out that Terry had been victimized by a fraud, for when he went to the jobsite that person was nowhere to be found. However, while he was there he did not talk to anybody else at the jobsite about possibly working at the construction site and he did not look for any other work in the Borough Hall area. His failure to do so makes it impossible for me to believe this portion of his testimony.

Terry testified that he attempted to obtain a job with a taxi company, but conceded that he did not have the special driver's license needed to operate a taxicab and that he never made any attempt to obtain one.

Terry, along with other former employees, was sent a mailgram by Interstate on June 26, offering reinstatement. It took him a month to respond. He testified that he did not receive it until July 24. His explanation for the delay was wholly unsatisfactory, especially because it appeared that he received mail from the Regional Office of the Board without difficulty.

The General Counsel argues that the backpay claimant's lack of understanding and the fact that he is ill-equipped to complete forms, such as the statement of claim, should not be factors that are utilized to reduce or eliminate his backpay award. The problem that exists in this case, however, is whether the claimant is credible. His whole story is unrealistic, vague, inherently self-contradictory, and unbelievable.

Accordingly, I find the backpay claimant, Ervin Terry, ineligible for backpay.

25. Malcolm Thomas

The specification for Malcolm Thomas alleges net backpay of $2146 owing for the first and second quarters, with an offset for interim earnings in the amount of $399. A further deduction was necessitated by disclosure at the hearing of additional earnings of $108. The claimant obtained his interim employment through an agency specializing in temporary jobs known as the Tip Top Agency. The Respondents contend that Thomas is ineligible for backpay because he limited his efforts to that agency, and that did not constitute a reasonable effort to obtain interim employment.

The circumstances are not unlike those in the case of George Bacote, considered above, in which I have denied backpay. Thomas initially obtained his employment as a dishwasher at the Continental facility through Tip Top, which sent him to Marriott as a temporary worker. He was paid directly by the agency on a daily basis. Marriott hired him as a full-time employee. During the backpay period, he went out on jobs to which Tip Top referred him. Almost every day, at 5 a.m., he presented himself at the office of Tip Top to be sent out for a day's work. This bespeaks a willingness on his part to work when he is put to work, but such willingness is not synonymous with the making of a reasonable effort to find interim employment.

I do not credit the claimant's testimony that he sought assistance in finding work of friends and of the boarders at the rooming house where he lived, and that he checked the New York Post every day for employment opportunities. He testified that he made an application to a messenger service, and I am willing to credit that testimony because it fits in with his pattern of search for only temporary employment. The General Counsel, in fact, conceded that that was the limit of his effort, arguing that Thomas tried to obtain employment solely through the Tip Top Agency because he knew no other method. The General Counsel makes an argument akin to the one he employed in the case of George Bacote, that the claimant must be taken as we find him, and asserts that the restriction of his effort to find employment to the temporary employment agency was reasonable because he was "obviously beaten down by sixty-four years of living [and] knew only one way of surviving—shaping up at a temporary agency." However, shaping up at a temporary agency was not, as the General Counsel argued, the only way he knew how to survive, for having had the experience of working for Marriott on a permanent basis he could have tried to do so again. He obviously did not want to have a permanent job.

Sympathy for a claimant's limitations does not require gullible acceptance of the argument that he made reasonably diligent effort to mitigate the wage loss when his testimony and the evidence indicates the reverse.

Thomas did not file for unemployment insurance benefits. I do not credit his explanation for omitting to do so, which was to the effect that he did not believe he was eligible for it because he had only worked for Marriott for 2 months. He never bothered checking with the Unemployment Insurance Division to find out if he was eligible and made no attempt to utilize the facilities of its placement service to try to find a job.

Thomas did believe he was eligible for social security retirement benefits, and filed for those. He explained that he did so in order to obtain a steady income without having to run to the agency every morning for a relatively uncertain income. (That testimony also undermined the General Counsel's argument that he limited his effort to get work to visits to the agency because that was the only way he knew how.)

When Thomas was offered reinstatement by Interstate, he declined the offer. He testified that the reason he declined the job was because he was discouraged with Marriott, inasmuch as he had been fired after he had worked hard for Marriott. If this were true, his failure to accept reinstatement would not necessarily disqualify him from receiving backpay. However, I find his testimony in this regard unpersuasive and incredible, by itself and in view of his testimony, given subsequently, that he found it too much of a hardship to run to the agency every morning only to be sent out on an occasional basis.

Accordingly, I find that the claimant, Malcolm Thomas, is not eligible for backpay.

26. Mary Towey

It is alleged that the sum of $3697 is owing to Mary Towey as net backpay for the period February 27 to June 29, when she received the mailgram from Interstate offering reinstatement and declined to accept the position. Respondents' objection rests on the fact that though she made a number of employment inquiries, she did not follow them up and she expressed lack of interest in a number of job opportunities that Respondents claim she could have had if she had wanted to work. However, Towey testified as to the reasons why she did not follow up certain apparent job opportunities or why she declined them after obtaining more detailed information about them. Her testimony was specific with respect to each instance. Her reasons appeared to be sound in every case. Thus, she turned down a job that would have provided her with a net income considerably less than what she had earned at Marriott; she declined a position in Manhattan that required night work and travel by subway; she declined a position with a caterer that would have required her to work through the night; and, in a number of instances, she made inquiries of prospective employers only to discover that there were no job openings. Her willingness to work is apparent from her 12-year work history at Continental and her completely credible testimony.

Accordingly, I find Mary Towey entitled to backpay, reduced by the amount of $261 severance pay that she received, and calculate the same in the net amount of $3436 as set forth in Appendix A.

27. Lila Victorio

The backpay specification for Lila Victorio, as amended at the hearing, alleged net backpay owing in the amount of $2484, for the period February 27 to August 7, when, Victorio testified, she obtained a job at Mandalay Caterers on Staten Island. The Respondents contend that her backpay period should be tolled as of sometime prior to July 1, when she ceased to be available for employment. The Respondents asserted that she was offered reinstatement to an equivalent position at the same location with the same hours as her former job.

During and after the time she worked for Marriott, Victorio attended the Parsons School of Design in New York City. She had classes 2 days a week from 3 to 8 p.m. At Continental, she was an executive dining room waitress. She testified that she searched unsuccessfully for similar employment throughout the backpay period, making inquiry of a number of concerns located in Manhattan, Queens, and Staten Island, where she lived. She testified that she also attempted to obtain a position as a layout artist with the Staten Island Advance. However, she could not accept the position because the hours conflicted with her school schedule. She collected unemployment insurance benefits until she commenced work at Mandalay Caterers. She reported to the New York State Placement Service, which referred her to a position with the Queensborough Public Library on one occasion. She did not accept the job because it would have involved 6 hours of traveling each day. When she received the mailgram from Interstate offering reinstatement, she went in for an interview and was offered a position in which the working hours were from 9 a.m to 4 p.m. Her work hours at Continental had been from 10 a.m. to 2:30 p.m. She testified that she explained to Leslie Karen, the Interstate interviewer, that the conflict with her school schedule prevented her from taking the job and also told the interviewer that she was contemplating taking a vacation in Florida, where her parents resided, and that she would not return to New York until September.

Ronald Gerstein testified that he was the one who interviewed Victorio and that he offered her a job with the same hours at Continental that she had previously worked, but that Victorio declined the offer with the explanation that she might not be available until September as she was probably going to Florida for the summer. Gerstein testified that he was left with the impression that she would call him if she changed her mind.

Elaine Hickey had worked with Victorio prior to their termination, and for a time had shared living quarters with Victorio. She testified that while employed at Continental, Victorio had also worked nights at a cafe on Staten Island and that she continued working there after the Continental layoff. I reject Respondents' contention that this affects the merits of her case, either from the standpoint of entitlement or from the standpoint of the amount of backpay owing. The additional job existed prior to the layoff and did not supercede the employment from which she had been barred by the layoff. The earnings from her extra employment are therefore not an offset against any backpay entitlement. However, before the existence of the second job had been disclosed in the hearing, Victorio had testified that she told the Interstate representatives on July 9 that she was immediately available for employment and did not have another job. (Actually, the interview at Interstate occurred on July 1.) Her credibility is thereby brought into question. Other aspects of the evidence raised further doubts about her credibility.

Besides the testimony that Victorio said she was not available for employment during the summer of 1981, the evidence establishes that she did not attend summer school at the Parsons School of Design during that summer. The spring term having ended in mid-May, she was available for the job offered by Gerstein because there was no class schedule with which its hours might conflict. While she was entitled to an offer of employment at hours and pay comparable to those of her former job, there is no requirement that the offer be of a precisely identical job, and the circumstance that she was not in fact attending school destroys her credibility in ascribing reasons for her rejection of the Interstate employment offer and that circumstance also contradicts her stated reason for declining the job at the Staten Island Advance.

On the job application that she filed with Interstate on July 1, she stated flatly that she was not available for work until September 1, 1981. The Respondents argue that this casts doubt on her availability at any period prior to July 1. This is pure speculation, and it would be just as easy to speculate that she made the decision to go to Florida on that very date and had therefore been available and able to work up to July 1. Such speculation is unnecessary. Legitimate doubts about her asserted efforts to obtain interim employment in the preceding months are raised by the other evidence in the record and the contradictions in her own testimony.

On the application filed with Interstate, Victorio indicated that she had a job as of July 6. The Respondents contend that this negates the possibility that her employment with Mandalay Caterers began as late as August 7. She was making this statement as of July 1. While it is possible that her arrangements underwent a change, it would appear that had there been any change she would have notified Interstate if she were interested in obtaining employment.

Falsehoods contained in her written statement respecting her efforts to obtain employment cannot be overlooked. Respondents have pointed out that she listed, as one of the places to which she had applied for employment, the cafe where, according to her roommate, she was actually already working. That written statement also omits any mention of the job applications with the Staten Island Advance and the Queensborough Public Library.

The inconsistencies in Victorio's testimony and her demeanor while testifying convinced me that she was not being truthful about her efforts to obtain interim employment. In this instance, it may reasonably be argued, in the light of all the other circumstances, that her income from her second job and the unemployment insurance benefits that she collected seemingly removed the stress from her period of unemployment and lessened her motivation to seek interim employment. She testified candidly that she contemplated spending the entire summer in Florida, possibly even seeking employment down there. I cannot find on this record that she was available for employment throughout the backpay period at the same hours that she had previously worked, or that she made reasonable efforts to obtain employment in a job calling for her to work similar hours.

Accordingly, I find that Lila Victorio is not eligible for backpay.

28. Leonora Vilabrera

Leonora Vilabrera was allegedly owed $1422 net backpay for the period February 27 to May 5, when she obtained a job. The matter has been tried on the basis of a cutoff date of May 5, with no interim earnings, though she accepted an offer of reinstatement from Interstate and returned to work for Interstate on July 6. There is no data respecting her earnings from May 6 through July 3, her backpay period being deemed to end with May 5.

Besides asserting that gross backpay should be reduced by the amounts of severance pay and vacation pay that Leonora Vilabrera received, the Respondents advance the argument that unemployment insurance benefits that she collected should be deducted from backpay because she rejected what they characterize as suitable employment.

In the first week after the layoff, Vilabrera visited Interstate at the Chase Bank on William Street in downtown Manhattan. She spoke to the manager and told him she was looking for the same type of job that she had had at Continental. There she had worked from 6 a.m. to 2:30 p.m., 5 days a week. He called her a few days later and offered her a part-time job, 4 hours a day. She turned it down because the money was insufficient; in fact, it amounted to less then her unemployment insurance benefits.

The Respondents assert on the basis of this testimony that, because she never inquired as to the pay rate and could not therefore be certain that her earnings would be less than the unemployment insurance benefits, the amount of those benefits should be deducted from gross backpay. This argument fails because I credit her testimony that she assumed that Chase would start her at the minimum hourly wage rate. She was entitled to make that assumption, for that is what had happened when she began work at Marriott. She was receiving approximately $90 per week in unemployment insurance benefits. The job that she was offered involved working half the number of hours of her former job, 20 hours instead of 40. She could reasonably concluded that the job would make her economic position worse instead of better.

Unemployment insurance benefits are not interim earnings and are not normally offset against backpay liability. No reason to apply a different rule has been demonstrated in this case.

The sincerity of the claimant's efforts to find interim employment is manifest from the fact that she found a permanent job and started on it on May 5, substantially reducing the Respondents' backpay liability.

Accordingly, I find that Leonora Vilabrera is entitled to the net backpay a alleged in the specification, reduced by severance pay that she received in the amount of $158. Accordingly, I calculate her net backpay at $1264 as set forth in Appendix A.

29. Simona Vilabrera

Simona Vilabrera is alleged to be owed net backpay in the amount of $3888 for the period February 27 to July 6, when she returned to work on Interstate's offer of reinstatement. The Respondents contend that her testimony respecting efforts to obtain interim employment is not credible. They unquestionably have plenty of ammunition with which to work, but my own appraisal of her overall testimony leads me to accept it as credible.

There are a number of points about Vilabrera's testimony that the Respondents rightly point to as raising questions. After testifying that she did not speak to other Marriott ex-employees prior to testifying at the hearing, she admitted she had discussed the case with some of them. She appeared to be evasive about the manner in which she had obtained a copy of the backpay specification and about the date when she first saw it. First she testified that she saw it posted on a bulletin board; then she testified that she received it in the mail, but was unable to furnish a lucid explanation of how that had come about. She appeared also to have contradicted herself specifically with respect to whether she had discussed her testimony with Rupert Cayenne, another backpay claimant. There was also a contradiction between her testimony and that of Cayenne respecting a conversation they had. She testified that he obtained a job as a chef and told her that there was no position open for her in the place where he was working. He testified that he did not find work until 2 weeks before he was called back by Interstate and that the job he obtained was in a paper factory.

Some of her testimony appeared to me to be improbable, such as her testimony that the General Counsel did not prepare her in any way for her appearance at the hearing in this backpay proceeding. She later modified that testimony.

The items of testimony that I have just cited and Simona Vilabrera's demeanor while testifying convinced me that she was not a completely truthful witness with respect to those matters. However, the troublesome portions of her testimony, to which I have just alluded, were given along with a great deal of creditable testimony, and those portions of her testimony, while vague with respect to some particulars, created a believable picture of reasonably diligent effort to obtain interim employment. Significantly, almost all that testimony was uncontroverted.

Simona Vilabrera testified that she was a second cook. She asked Carol Kramer about another job with Marriott. Though she could not remember Kramer's response, it was apparently not encouraging and Kramer, who testified at the hearing, said nothing that contradicted Simona Vilabrera's testimony. The first week of her unemployment she telephoned the manager of the new operation at Continental at 80 Maiden Lane, New York City, to see if there was any work, and was advised that there were no openings. She followed newspaper ads in the New York Times and the New York Daily News and made telephone calls. She made a long subway trip to investigate a babysitting job, which she turned down because the pay was insufficient. She spoke to other former Marriott employees and to her friends, Cayenne and Ermine Blades, asking for their help in finding a job. At the suggestion of another friend, she put in an application at the new Hyatt Hotel in New York City. At the suggestion of yet another friend, she applied for a job at a hospital on Jamaica Avenue in Queens, New York (she could not recall the name of the hospital but later referred to it as a nursing home). She went to only one employment agency, in April. She paid a $20 fee and was sent out to be interviewed for two nonexistent jobs and, after great difficulty, obtained refund of the fee. She applied to Consolidated Edison.

She applied for, and received, unemployment insurance benefits. Here again, her testimony raised, as well as answered, questions. She asserted that she went out looking for a job two or three times a week. That should have created a substantial job-hunting history at the Unemployment Insurance Division which, even if not directly available, should have left a lot of information in her own memory. She testified that she reported her efforts to find employment to the interviewers at that agency. However, her recollection was that the unemployment insurance interviewers only asked her if she had been looking for work and did not ask where she had looked. The entire conversation would consist of her being asked if she had been looking and her affirmative reply; there was no curiosity on their part as to where she had looked or as to the identity of the firms to which she had made application.

Careful consideration of Simona Vilabrera's testimony indicates to me that most of the problems with it result from her extreme vagueness respecting dates and the substance of conversations. There are, as I have stated, some actual contradictions in her testimony. Nevertheless, vagueness as to details is not synonymous with falsehood, and not all contradictions mean that the witness was lying. For example, the claimant gave additional testimony that I think clarified seeming inconsistencies regarding her conversation with Cayenne and the manner in which she had been prepared for the hearing by the General Counsel. She testified that the General Counsel had told her to try to remember the past and to tell the truth and to remember where she had gone to apply for jobs. That testimony seemed altogether reasonable and truthful. As to her testimony about the conversation with Cayenne, it is to be noted that her testimony that he had a job cooking was actually given after she had stated several times that she was vague about the kind of work he was doing. In response to a question put to her as to whether he had told her he had obtained a job, she first answered simply that he had told her that "he had something," but she did not know what it was, but thought it was in cooking. She did not even know whether he was working full time or part time. Although this may seem surprising, considering that Cayenne and Blades were friends of hers to whom she spoke frequently, it is apparent that her testimony became contradictory as to immaterial details under repeated questioning and an apparent desire on her part to supply answers, rather than as a result of any deliberate attempt to distort the truth.

The claimant's testimony as a whole is imprecise, but not incredible. Almost all of it is uncontroverted. In its important details it was consistent and remained unshaken on cross-examination. She collected unemployment insurance benefits throughout the entire backpay period, and Respondents conceded that the procedure followed by the Unemployment Insurance Division of the New York State Department of Labor is to inquire periodically of recipients of unemployment insurance benefits whether they have made efforts to find employment and to refer them to a State-operated placement bureau to be sent out on job prospects. I do not find that the claimant's credibility regarding the main issue has been at all eroded. I find that she made the efforts to find employment to which she testified and I find that those were reasonably diligent efforts to secure interim employment, and that she is therefore eligible to receive backpay. I note again that in this backpay proceeding, doubts are resolved in favor of the claimant and against the Respondents, and that the burden of showing failure to make reasonable efforts to find interim employment is on the Respondents.

The claimant received a severance payment in the amount of $216. Accordingly, I have calculated her net backpay in the sum of $3672 as set forth in Appendix A.

THE REMEDY

The Respondents' obligations to the backpay claimants will be adequately discharged by their payment to the claimants of the respective amounts set forth in the attached Appendix A, which is based on the amounts set forth in the specification, as amended by the General Counsel and as modified by me in accordance with my findings. Interest, computed in the manner prescribed in *Florida Steel Corp.*, 231 NLRB 651 (1977), and *Isis Plumbing Co.*, 138 NLRB 716 (1962), shall be payable on such amounts, commencing with the last day of each calendar quarter of the backpay period on the amount due and owing for such period, as set forth in Appendix A, and continuing until the date of payment thereof. There shall be deducted from such payments and taxes required to be withheld pursuant to Federal, state, and local laws.

Appendix A sets forth the gross backpay, interim earnings, and severance pay, and net backpay for each claimant whom I have ascertained to be entitled to payment of backpay. No claimant who had interim earnings submitted evidence respecting expenses incurred in connection therewith, and therefore the earnings figures presented represent net earnings.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[2]

ORDER

The Respondents, Continental Insurance Company, Division of Continental Corporation; Marriott Food Service, Inc., a Division of Marriott Corp.; and Interstate United Corporation, and their officers, successors, and assigns, shall make whole the following named backpay claimants involved in this proceeding by payment to them of the following amounts of net backpay set forth opposite their names together with interest to be computed in the manner set forth in the remedy section of this decision, minus tax withholding as required by Federal, state, and local laws:

Eric Allen	$3,468.00
Lewis Barbee	1,360.00
Marie Bellisi	960.00
Ermine Blades	168.00
Angelo Bonomo	5,779.00
Rupert Cayenne	4,100.00
Phillip Deutsch	2,527.00
Bertha DePalma	2,416.80
Alice Fox	210.00
Louise Fuller	900.90
Gerald Furby	2,312.00
Nicholas Graham	672.00
Esther Gutnick	188.00
Curtis Hailey	2,252.00
Eddie Hall	2,172.00
Celia Hassett	1,001.00
Elaine Hickey	1,944.00
Geoffrey Hill	292.00
Jenny Irizarry	204.00
Anna Jankunis	560.24
Tina Lindsey	1,285.00
Evelyn Major	2,186.00
Bridget McNamara	238.00
Betty McPherson	1,620.00
Catherine Moran	2,718.00
Sheila Nelson	3,536.00
Cornelius Noonan	2,312.00
Octavio Parra	1,260.00
Blanca Schauer	1,836.00
Elenora Sukovich	250.00
Gregory Taylor	164.00
Mary Towey	3,436.00
Maria Unterreiner	39.00
Leonora Vilabrera	1,264.00
Simona Vilabrera	3,672.00
George Whitehead	65.00

It having been determined that the backpay claimant, Octavio Parra, incurred liabilities for medical expenses that, as of July 5, 1983, amounted to $10,762.75, in an illness covered by the Marriott Corporation Medical Benefits Plan (the Plan), and that the said amount is the net amount owing after payment of the sum of $1650 by the Plan and payment of the sum of $5,328.10 by a Medicaid allowance, it is further Ordered:

(a) That the compliance officer ascertain whether any further deductions should be made from the aforesaid sum of $10,762.75 to comply with deductibles provided for in the Plan or to allow for coordination with payments that have been made by reason of coverage under any Federal or state medical insurance programs, and compute the net balance thereof that shall be promptly paid by the Respondents to the backpay claimant, Octavio Parra.

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[2] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

(b) That the compliance officer ascertain the amount of any medical expenses incurred by Octavio Parra since July 5, 1983, which are covered by the Plan, and the amount of any deductibles or payments made pursuant to any other private or governmental insurance coverage, and compute the net balance thereof, which shall be promptly paid by the Respondents to the backpay claimant, Octavio Parra.

(c) That the compliance officer retain oversight to determine what additional sums, if any, become owing to Parra from the Respondents as he continues his treatment, to ensure that coordination of benefits with governmental coverages is implemented and that payment to Parra of the net balances due is promptly made by the Respondents.

The Regional Director for Region 2 is directed to place in escrow for a period of 1 year from the date of this Order the total amounts of backpay plus interest, without excluding tax withholdings required by Federal, state, and local laws, awarded Lewis Barbee, Ermine Blades, Betty McPherson, and George Whitehead and to make suitable arrangements for examination of these four claimants by the Respondents and the General Counsel respecting their interim earnings and efforts to procure interim employment during the backpay period. In the event the Respondents choose to conduct such examination and any of the said former employees fail to submit to such examination or cannot be located within the escrow year, the amount of backpay placed in escrow for such employee shall be returned to Respondents. Regarding those employees who appear and submit to examination, the Regional Director shall make a final determination whether such employee had interim earnings or received any other moneys that are deductible from the backpay award of the claimant, such determination to be made in accordance with existing Board precedent. On such determination, the Regional Director shall make such deductions as are appropriate, return the amounts deducted to the Respondents, and pay the net backpay to the claimant. The Regional Director is further directed to report to the Board when these matters have been fully resolved but in no event later than 1 year from the date of the Board's Supplemental Order, the status of these cases at such time.

Claimant	*Yr. & Qtr.*	*Gross Backpay*	*Severance Pay*	*Net Interim Earnings*	*Backpay Net*
Eric Allen	1981-1	$ 898.00	$204.00	None	$ 694.00
	1981-2	2,652.00		None	2,652.00
	1981-3	122.00	None	None	122.00
Total					$3,468.00
Lewis Barbee	1981-1	$598.00	$136.00	Unknown	$462.00
	1982-2	898.00	—	Unknown	898.00
Total					$1,360.00
Marie Beliisi	1981-1	$ 810.00	$184.00	None	$626.00
	1981-2	2,392.00	—	$2,076.00	316.00
	1981-3	110.00	—	92.00	18.00
Total					$960.00
Ermine Blades	1981-1	$ 364.00	$196.00	Unknown	$168.00
Angelo Bonomo	1981-1	1,478.00	336.00	None	1,142.00
	1981-2	4,637.00	—	None	4,637.00
Total					$5,779.00
Rupert Cayenne	1981-1	$1,056.00	$240.00	None	$1,056.00
	1981-2	3,120.00	—	$88.00	3,032.00
	1981-3	144.00	—	132.00	12.00
Total					$4,100.00
Phillip Deutsch	1981-1	$ 686.00	$156.00	None	$ 530.00
	1981-2	1,997.00	—	None	1,997.00
Total					$2,527.00
Bertha DePalma	1981-1	$ 627.00	$114.00	None	$ 513.00
	1981-2	1,852.50	—	None	1,852.50

Claimant	*Yr. & Qtr.*	*Gross Backpay*	*Severance Pay*	*Net Interim Earnings*	*Backpay Net*
	1981-3	85.50	—	None	51.30
Total					$2,416.80
Alice Fox	1981-1	$324.00	$114.00	None	$ 210.00
Louise Fuller	1981-1	210.60	117.00	None	93.60
	1981-2	456.30	—	None	456.30
	1981-3	351.00	—	None	351.00
Total					$900.90
Gerald Furby	1981-1	$ 598.00	$136.00	None	$ 462.00
	1981-2	1,768.00	—	None	1,768.00
	1981-3	82.00	—	None	82.00
Total					$2,312.00
Nicholas Graham	1981-1	$704.00	$160.00	None	$544.00
	1981-2	128.00	—	None	128.00
Total					$672.00
Esther Gutnick	1981-1	$ 376.00	$188.00	None	$ 188.00
Curtis Hailey	1981-1	686.00	156.00	None	530.00
	1981-2	2,028.00	—	$400.00	1,628.00
	1981-3	94.00	—	None	94.00
Total					$2,252.00
Eddie Hall	1981-1	$ 766.00	$160.00	None	$ 606.00
	1981-2	1,566.00	—	None	1,566.00
Total					$2,172.00
Celia Hassett	1981-1	$234.00	$130.00	None	$104.00
	1981-2	507.00	—	None	507.00
	1981-3	390.00	—	None	390.00
Total					$1,001.00
Elaine Hickey	1981-1	$ 367.20	108.00	None	$ 259.20
	1981-2	1,404.00	—	None	1,404.00
	1981-3	280.80	—	None	280.80
Total					$1,944
Geoffrey Hill	1981-1	$438.00	$146.00	None	$292.00
Jenny Irizarry	1981-1	408.00	204.00	None	204.00
Anna Jankunis	1981-1	475.00	108.00	None	367.00
	1981-2	108.00	—	None	108.00
	1				85.24
Total					$560.24
Tina Lindsey	1981-1	$449.00	$102.00	None	$347.00
	1981-2	1,306.00	—	$938.00	938.00
Total					$1,285
Evelyn Major	1981-1	$ 568.00	$136.00	None	$ 432.00
	1981-2	1,677.00	—	None	1,677.00
	1981-3	77.00	—	None	77.00
Total					$2,186
Bridget McNamara	1981-1	$ 346.00	$108.00	None	$ 238.00
Betty McPherson	1981-1	475.00	108.00	Unknown	367.00
	1981-2	1,253.00	—	Unknown	1,253.00

Claimant	*Yr. & Qtr.*	*Gross Backpay*	*Severance Pay*	*Net Interim Earnings*	*Backpay Net*
Total					$1,620.00
Catherine Moran	1981-1	$ 567.60	$120.00	None	$ 447.60
	1981-2	1,496.40	—	None	1,496.40
	1981-3	774.00	—	None	774.00
Total					$2,718.00
Sheila Nelson	1981-1	$ 915.00	$208.00	None	$ 707.00
	1981-2	2,704.00	—	None	2,704.00
	1981-3	125.00	—	None	125.00
Total					3,536.00
Cornelius Noonan	1981-1	$ 598.00	$136.00	None	$ 462.00
	1981-2	1,768.00	—	None	1,768.00
	1981-3	82.00	—	None	82.00
Total					$2,312.00
Octavio Parra	1981-1	$792.00	$180.00	None	$612.00
	1981-2	648.00	—	None	648.00
Sub Total					$ 1,260.00
Medical Expenses					10,762.75
Total					$12,022.75
Blanca Schauer	1981-1	$ 475.00	$108.00	None	$ 367.00
	1981-2	1,404.00	—	None	1,404.00
	1981-3	65.00	—	None	65.00
Total					$1,836.00
Elenora Sukovich	1981-1	$ 375.00	$125.00	None	$ 250.00
Gregory Taylor	1981-1	328.00	164.00	None	164.00
Mary Towey	1981-1	957.00	261.00	None	696.00
	1981-2	2,740.00	—	None	2,740.00
Total					$3,436
Maria Unterriner	1981-1	$233.00	$194.00	None	$ 39.00
Leonora Vilabrera	1981-1	695.00	158.00	None	537.00
	1981-2	727.00	—	None	727.00
Total					$1,264.00
Simona Vilabrera	1981-1	$ 950.00	$216.00	None	$ 734.00
	1981-2	2,808.00	—	None	2,808.00
	1981-3	130.00	—	None	130.00
Total					$3,672.00
George Whitehead	1981-1	$ 598.00	$136.00	$ 577.00	
	1981-2	1,768.00	—	1,706.00	$62.00
	1981-3	82.00	—	79.00	3.00
Total					$65.00

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[1] Health insurance

APPENDIX B

Hospital Room and Board: Plan Benefits pay up to the semi-private room rate for up to 60 days for each necessary hospital confinement. Necessary confinements continuing beyond a 60 day period may be covered by Major Medical Benefits.

> If a participant is in a private room or in the intensive or coronary care unit of a hospital, the Plan will pay a daily rate equal to the hospital's average room and board charge for a semi-private room. If confined in an intensive or coronary care unit, or in a private room because of contagious disease, the difference between the average semi-private room rate and the charge for the private room will be covered by Major Medical Benefits.
>
> If a participant re-enters the hospital for treatment of the same or related condition within 90 days following the initial discharge, it will be considered the same continuous period of confinement. Otherwise, readmission will be treated as a new confinement.
>
> . . . .
>
> Other Hospital and Anesthesia Expenses: For any one hospital confinement period. Basic Plan Benefits cover up to the first $500 in expenses for the following:
>
> 1. operating room, recovery room, surgical supplies, anesthesia supplies, drugs, dressings, oxygen, and antibiotics:
> 2. diagnostic tests, radiology services, and physical therapy:
> 3. anesthesiologist's services: and
>
> . . . .
>
> In most cases, after payment of the yearly deductible, Major Medical Benefits pay 80% of the next $5000 and 100% of almost all other covered expenses incurred during each Plan Year.

The Plan year is the same as the Company's fiscal year, which ends on the Friday closest to December 31.

> The yearly deductible is the first $100 for covered medical expenses not included in Basic Plan Benefits. While it applies separately to each covered family member, the maximum deductible a family must pay is $200.
>
> With Major Medical Plan Benefits on top of Basic Plan Benefits, the most you would have to pay for any one member of your family each year is $1,100 of covered medical expenses (the $100 deductible, plus 20% of the next $5000). Major Medical Benefits provide up to $1,000,000 in coverage for each participant. Major Medical Benefits for psychiatric care, however, are limited to a lifetime maximum of $5000 per person.

What expenses are covered by Major Medical Plan Benefits?

> Major Medical Plan Benefits provide coverage for the reasonable and customary charges for the following services, supplies and treatment when recommended as medically necessary by a doctor for the care and treatment of a covered illness or injury. (Covered Major Medical expenses do not include charges eligible for or reimbursed by Basic Plan Benefits.)
>
> Hospital Expenses:
>
> 1. Hospital room and board expenses, including any excess in the daily room rate for coronary or intensive care units over the average semi-private room rate. Additional charges for a private room are not covered unless required by health regulations due to contagious disease.
> 2. Other hospital and anesthesia expenses over $500 per confinement. (Covered services, supplies and treatment are described under "Other Hospital and Anesthesia Expenses.")
> 3. Services, supplies, and treatment rendered by a hospital's outpatient facilities or an ambulatory surgical center.
>
> Professional Expenses:
>
> 1. Diagnosis, treatment, and surgery by a doctor in connection with a covered illness or injury. This includes oral surgery performed by a Doctor of Dental Surgery, which (1) results from an accidental injury occurring after the patient's effective date of participation in the Plan or (2) is due to a nondental impairment requiring hospitalization for dental surgery.
>
> . . . .
>
> 6. Private duty nursing services directed by the attending physician.
>
> . . . .
>
> Other Covered Expenses:
>
> . . . .
>
> 2. Prescription medication:
>
> . . . .
>
> 4. Medical laboratory tests ordered by a doctor.
> 5. Oxygen, including the rental of equipment for administration:
>
> . . . .
>
> The Plan has a "coordination of benefits" provision designed to reduce Plan costs to you and the Company by preventing the duplication of benefits payments.
>
> . . . .

The term "other plan or plans" includes (1) Parts A and B of the Federal Medicare program:

> . . . .
>
> If charges are subject to deductibles under the Medical Benefits Plan, the deductibles must be paid before Plan benefits are payable. The coordination of benefits provision applies separately to each type of service and date of treatment.
>
> If more than one plan covers a particular charge, responsibility for payment will be assigned in the following order:
>
> If the other plan or plans either (1) do not have a coordination of benefits provisions, or (2) is the Federal Medicare program . . . its benefits will be applied to the charges first before payments can be made from the Medical Benefits Plan . . . .

Air Express International Corporation *and* Freight Drivers, Warehousemen and Helpers Local Union No. 390, an affiliate of International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, AFL-CIO. Case 12-CA-12758

June 30, 1988

DECISION AND ORDER

BY CHAIRMAN STEPHENS AND MEMBERS JOHANSEN AND CRACRAFT

On December 15, 1987, the General Counsel of the National Labor Relations Board issued a complaint alleging that the Respondent has violated Section 8(a)(5) and (1) of the National Labor Relations Act by refusing the Union's request to bargain following the Union's certification in Case 12-RC-6715. (Official notice is taken of the "record" in the representation proceeding as defined in the Board's Rules and Regulations, Secs. 102.68 and 102.69(g); *Frontier Hotel,* 265 NLRB 343 (1982).) The Respondent filed its answer admitting in part and denying in part the allegations in the complaint.

On January 25, 1988, the General Counsel filed a Motion for Summary Judgment. On January 27 the Board issued an order transferring the proceeding to the Board and a Notice to Show Cause why the motion should not be granted. The Respondent filed an opposition to the General Counsel's Motion for Summary Judgment and cross-motion for revocation of the certification.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

Ruling on Motion for Summary Judgment

The Respondent denies its alleged refusal to bargain,[1] and also attacks the validity of the certification on the basis of its objections to the election in the representation proceeding. Specifically, the Respondent alleges that during the critical period between the filing of the petition and the election, rumors circulated among employees in the unit falsely attributing to Silver, the Respondent's operations manager, statements indicating animus toward persons of Cuban origin (who made up a majority of the unit employees). Thus, according to the credited testimony, Silver was alleged to have said, inter alia, that "these four f— Cubans won't do this to me"; "the f— Cubans were not going to put the Union in there," and even that he "[Silver] was going to terminate all the f— Cubans." The Respondent contends that those rumors, by inflaming ethnic animosities and making the employees believe that Silver would retaliate against them, destroyed the "laboratory conditions" necessary for a valid election.[2]

All representation issues raised by the Respondent were or could have been litigated in the prior representation proceeding. The Respondent does not offer to adduce at a hearing any newly discovered and previously unavailable evidence, nor does it allege any special circumstances that would require the Board to reexamine the decision made in the representation proceeding.

However, the Respondent, citing the Eleventh Circuit's recent decision in *M & M Supermarkets v. NLRB,*[3] contends that the Board in the representa-

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[1] In its answer the Respondent denies that it has information sufficient to admit or deny the allegations of the complaint concerning the filing and service of the charge. The answer further denies that the Union is the exclusive bargaining representative of employees in the unit, that the Union has requested bargaining, and that the Respondent has violated the Act by refusing to bargain.

Concerning the Respondent's qualified denial of the allegations of the complaint relating to the filing and service of the charge, we note that the exhibits accompanying the General Counsel's motion include (1) a copy of the Regional Director's letter to the Respondent, dated November 13, 1987, and marked, "CERTIFIED MAIL—RETURN RECEIPT REQUESTED," stating that the charge in this case has been filed and that a copy of the charge is enclosed; and (2) a copy of a letter from the Respondent's counsel to the Regional Office, dated December 11, 1987 (4 days prior to the issuance of the complaint), stating (inter alia) that "the instant charge is without merit." Although the exhibits contain no return receipt establishing that service of the charge was perfected, neither is there any indication that the charge was not delivered to the Respondent. Moreover, the Respondent does not specifically deny having been served with the charge; it denies having information sufficient to admit or deny *either* the filing *or* the service of the charge (or the dates thereof). Although the Respondent may lack first-hand, personal knowledge of the filing of the charge, or of the date of filing, the matter of the service of the charge surely is within its knowledge, and therefore it is not unreasonable to suppose that, if the charge had not been served, the Respondent would have explicitly so stated in its answer or would have pursued this denial further in response to the Motion for Summary Judgment. On the basis of all the foregoing, we conclude that there is no genuine issue of fact concerning the service of the charge.

Concerning the Respondent's denial of having received a request to bargain and having refused to do so, we note that the exhibits appended to the motion include (1) a copy of a certified letter from the Union's counsel to the Respondent, dated October 27, 1987, demanding bargaining; (2) a copy of a letter from the Respondent's counsel to the Union's counsel, dated November 5, 1987, stating that the Respondent "declines" to recognize and bargain with the Union; and (3) counsel for the Respondent's December 11, 1987 letter to the Board Office (discussed above), stating that the Respondent "declines" to recognize and bargain with the Union. The Respondent's answer also admits that the Respondent issued "a document dated November 5, 1987, to which the Board is referred for a true and accurate recitation of its contents." From all the above, we conclude there is no genuine issue of fact that the Union did, indeed, make a demand for bargaining that was refused by the Respondent.

Although the Respondent denies that the Union has been the exclusive representative pursuant to Sec. 9(a) of the unit employees since August 20, 1987, it has admitted the appropriateness of the unit and the issuance and correction of the certification.

In any event, in its opposition to the Motion for Summary Judgment, the Respondent does not rely on any of the above denials, but instead argues only that the election should be set aside because of certain allegedly inflammatory remarks of an ethnic nature made during the critical period before the election. Accordingly, we find that the Respondent's denials raise no material issues of fact warranting a hearing.

[2] *General Shoe Corp.*, 77 NLRB 124, 127 (1948).

[3] 818 F.2d 1567 (1987).

289 NLRB No. 78

tion proceeding erred in failing to apply the standard for evaluating potentially inflammatory statements based on race, as set forth in *Sewell Mfg. Co.*[4] We disagree, because we are satisfied that the hearing officer, whose report was adopted by the Board in all relevant respects, did apply *Sewell* to the rumors at issue here. After summarizing the *Sewell* standard set forth in footnote 4, the hearing officer found that those rumors were based on a statement actually made by Silver;[5] that the Union did not make the statement part of its campaign; that there was no systematic attempt to inject the "racial" issue into the campaign; but that the employees probably had blown the statement out of proportion in the retelling of it. Thus, the hearing officer not only applied the *Sewell* standard,[6] but also properly found that, under that standard, the rumors imputing ethnic prejudice to Silver did not warrant setting aside the election.[7]

We therefore find that the Respondent has not raised any representation issue that is properly litigable in this unfair labor practice proceeding. See *Pittsburgh Plate Glass Co. v. NLRB*, 313 U.S. 146, 162 (1941). Accordingly, we grant the Motion for Summary Judgment.

On the entire record, the Board makes the following

FINDINGS OF FACT

I. JURISDICTION

The Respondent, a Delaware corporation, engages in the business of air freight forwarding at its facility in Miami, Florida, where in the 12 months preceding the issuance of the complaint, it derived revenues in excess of $50,000 from the transportation of freight and commodities from the State of Florida directly to points outside the State. We find that the Respondent is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act and that the Union is a labor organization within the meaning of Section 2(5) of the Act.

II. ALLEGED UNFAIR LABOR PRACTICES

A. *The Certification*

Following the election held May 8, 1986, the Union was certified August 20, 1987, as the collective-bargaining representative of the employees in the following appropriate unit:

> All drivers and warehousemen; excluding all supervisors, office clerical employees, managerial, confidential employees, and guards as defined in the Act.

On October 8, 1987, the Board issued an order correcting the certification by striking the unit just described and substituting the following appropriate unit:

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[4] 138 NLRB 66 (1962). In *Sewell* the Board announced that

> So long, therefore, as a party limits itself to *truthfully* setting forth another party's position on matters of racial interest and does not deliberately seek to overstress and exacerbate racial feelings by irrelevant, inflammatory appeals, we shall not set aside an election on this ground. However, the burden will be on the party making use of a racial message to establish that it was truthful and germane, and where there is doubt as to whether the total conduct of such party is within the described bounds, the doubt will be resolved against him.

Id. at 71–72 (emphasis in original).

[5] The Respondent contends that the hearing officer held that Silver did not make any anti-Cuban remarks. That contention misstates somewhat the hearing officer's actual findings, which were, in pertinent part:

> It is the finding of the undersigned that Silver did make a statement in effect stating what has been imparted [sic] to him. *I do not feel it was borne of malice* but merely an attempt by Silver to respond to a question as to who was involved in the organizing drive.[24]
>
> [24] The thrust of the Employer's argument at the hearing and in its brief was that it would be implausible and illogical for Silver to make an anti-Cuban, bigoted remark, and I agree. I find the *intent* was not anti-Cuban. In effect, Silver by responding in this manner conveyed to the person who asked the question, that he was aware of who was behind the organizing drive, as identified as Cuban and his displeasure with them for this activity.

(Emphasis added.) It is apparent that the hearing officer found that, irrespective of Silver's attitude toward Cubans, Silver was overheard to make a remark that was interpreted as anti-Cuban.

[6] The hearing officer did set forth the Board's standard for determining whether to invalidate an election because of "third party" conduct, i.e., whether the conduct created a general atmosphere of fear and reprisal, rendering a free choice of representative impossible. See, e.g., *Price Bros. Co.*, 211 NLRB 822, 823 (1974). However, the hearing officer made no finding concerning whether such an atmosphere of fear and reprisal had been created in this case. Instead, he turned to a discussion of *Sewell* and found the conduct in question here to have been unobjectionable under the *Sewell* analysis.

[7] We also reject the Respondent's contention that *M & M Supermarkets* requires that the election in this case be set aside. In *M & M Supermarkets*, a prounion employee deliberately injected the subject of religion into the campaign by making gratuitous remarks concerning the employer's religion; the court of appeals found those remarks to be so inflammatory as to invalidate the election. Here, by contrast, the employees merely repeated (with varying degrees of accuracy) the claim by Vasquez, an employee of another company, that he had overheard Silver say that he had no problems with Puerto Ricans, and that the only problems he had were with the "f— Cubans" who were trying to cause problems with the union matter in the warehouse. Thus, to the extent ethnic concerns were introduced into the campaign, they were introduced by Silver himself, not by the employees. See *Singer Co.*, 191 NLRB 179, 180 (1971) (declining to set aside election on the basis of inaccurate rumors that the employer's attorney was anti-Spanish, when the rumors arose out of a misunderstanding concerning the attorney's precipitous ejection of a Spanish-language interpreter from the polling area).

In *NLRB v. Bancroft Mfg. Co.*, 516 F.2d 436 (5th Cir. 1975), cert. denied 424 U.S. 914 (1976), a union organizer warned black employees on several occasions that "if the blacks did not stay together and the Union lost the election, all the blacks would be fired." 516 F.2d at 440. The court of appeals found those statements, *although untrue*, not to be racially inflammatory, or even to constitute attempts to incite racial passions, id. at 442–443, and therefore that they did not invalidate the election. Here, a fortiori, we found not only that no systematic attempt was made to inject ethnic issues into the campaign, but also that rumors about the Respondent's attitudes or intentions concerning Cubans actually originated in a statement by one of the Respondent's own high-ranking managers. The actions of the employees in circulating such rumors do not constitute the kind of gratuitous appeal to ethnic prejudice that *Sewell* brands as objectionable conduct. See *Beatrice Grocery Products*, 287 NLRB 302 (1987).

> All warehousemen employed by [Air Express] at its facility located at 2652-2658 N.W. 74th Avenue, Miami, Florida, excluding all other employees including drivers, office clerical employees, professional employees, guards and supervisors as defined in the Act.

The Union continues to be the exclusive representative under Section 9(a) of the Act.

B. *Refusal to Bargain*

Since October 27, 1987, the Union has requested the Respondent to bargain, and since November 5, 1987, the Respondent has refused. We find that this refusal constitutes an unlawful refusal to bargain in violation of Section 8(a)(5) and (1) of the Act.

CONCLUSIONS OF LAW

By refusing on and after November 5, 1987, to bargain with the Union as the exclusive collective-bargaining representative of employees in the appropriate unit, the Respondent has engaged in unfair labor practices affecting commerce within the meaning of Section 8(a)(5) and (1) and Section 2(6) and (7) of the Act.

REMEDY

Having found that the Respondent has violated Section 8(a)(5) and (1) of the Act, we shall order it to cease and desist, to bargain on request with the Union, and, if an understanding is reached, to embody the understanding in a signed agreement.

To ensure that the employees are accorded the services of their selected bargaining agent for the period provided by law, we shall construe the initial period of the certification as beginning the date the Respondent begins to bargain in good faith with the Union. *Mar-Jac Poultry Co.*, 136 NLRB 785 (1962); *Lamar Hotel*, 140 NLRB 226, 229 (1962), enfd. 328 F.2d 600 (5th Cir. 1964), cert. denied 379 U.S. 817 (1964); *Burnett Construction Co.*, 149 NLRB 1419, 1421 (1964), enfd. 350 F.2d 57 (10th Cir. 1965).[8]

ORDER

The National Labor Relations Board orders that the Respondent, Air Express International Corporation, Miami, Florida, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Refusing to bargain with Freight Drivers, Warehousemen and Helpers Local Union No. 390, an affiliate of International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, AFL-CIO as the exclusive bargaining representative of the employees in the bargaining unit.

(b) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) On request, bargain with the Union as the exclusive representative of the employees in the following appropriate unit on terms and conditions of employment and, if an understanding is reached, embody the understanding in a signed agreement:

> All warehousemen employed by [Air Express] at its facility located at 2652-2658 N.W. 74th Avenue, Miami, Florida, excluding all other employees including drivers, office clerical employees, professional employees, guards and supervisors as defined in the Act.

(b) Post at its facility in Miami, Florida, copies of the attached notice marked "Appendix."[9] Copies of the notice, on forms provided by the Regional Director for Region 12, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material.

(c) Notify the Regional Director in writing within 20 days from the date of this Order what steps the Respondent has taken to comply.

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

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[8] The General Counsel requests that the remedy include a visitatorial clause authorizing the Board, for compliance purposes, to obtain discovery from the Respondent under the Federal Rules of Civil Procedure under the supervision of the United States court of appeals enforcing this Order. Under the circumstances of this case, we find it unnecessary to include such a clause, and we deny the General Counsel's request. *Cherokee Marine Terminal*, 287 NLRB 1080 (1988).

[9] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

WE WILL NOT refuse to bargain with Freight Drivers, Warehousemen and Helpers Local Union No. 390, an affiliate of International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America AFL-CIO as the exclusive representative of the employees in the bargaining unit.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL, on request, bargain with the Union and put in writing and sign any agreement reached on terms and conditions of employment for our employees in the bargaining unit:

> All warehousemen employed by us at our facility located at 2652-2658 N.W. 74th Avenue, Miami, Florida, excluding all other employees including drivers, office clerical employees, professional employees, guards and supervisors as defined in the Act.

AIR EXPRESS INTERNATIONAL CORPORATION

Corporacion de Servicios Legales de Puerto Rico *and* Union de Abogados de Servicios Legales de Puerto Rico, Petitioner. Case 24–RC–6913

June 30, 1988

DECISION ON REVIEW

BY CHAIRMAN STEPHENS AND MEMBERS JOHANSEN AND BABSON

On August 14, 1984, the Regional Director for Region 24 administratively determined that the collective-bargaining agreement then in effect between the Employer and the Intervenor, Union Independiente de Trabajadores de Servicios Legales, covering a combined unit of all the Employer's professional and nonprofessional employees, constituted a bar to the conduct of an election herein. Accordingly, she dismissed the instant petition.

Thereafter, in accordance with Section 102.71 of the National Labor Relations Board Rules and Regulations, the Petitioner filed a timely request for review, maintaining, inter alia, that the contract cannot bar its petition to represent only the Employer's professional employees as those professional employees have never had the opportunity to vote for inclusion in a combined unit pursuant to Section 9(b)(1) of the Act.[1]

The Board, by telegraphic order dated November 21, 1984, granted the Petitioner's request for review solely as to this issue and expressly invited the parties to brief the issue on review with particular attention to the policies expressed in *Retail Clerks Local 324 (Vincent Drugs)*, 144 NLRB 1247 (1963), and *Pennsylvania Power & Light Co.*, 122 NLRB 293 (1958), as compared with those expressed in *Utah Power & Light Co.*, 258 NLRB 1059 (1981), and *Wells Fargo Corp.*, 270 NLRB 787 (1984), affd. 755 F.2d 5 (2d Cir. 1985).

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has carefully considered the entire record, including the briefs on review, and has decided to affirm the Regional Director's conclusion that the existing collective-bargaining agreement between the Employer and the Intervenor constitutes a bar to the conduct of an election and, therefore, that the petition must be dismissed.

The basic facts are not in dispute. From 1977 to the date this petition was filed, the Employer and the Intervenor have had successive collective-bargaining agreements that specifically included both professional and nonprofessional employees in a single bargaining unit. The then-current contract, executed on October 14, 1980, expired by its terms on July 1, 1983, but was extended for an additional 3 years by stipulation of the parties. The all-inclusive unit described in the contract was incorporated by reference from the unit originally certified in 1976 by the Puerto Rico Labor Relations Board (Junta de Relaciones del Trabajo de Puerto Rico).[2] It is undisputed that the Puerto Rico labor statutes did not mandate any type of self-determination election before the combined unit was certified, and that none was held.

In finding that the contract barred the election petition, the Regional Director relied on the Board's decision in *Pennsylvania Power*, supra, in which the petitioner sought to represent a professional unit of engineers and scientists, and the employer sought to include its junior engineers, inasmuch as they also were professional employees who had never voted in a professional unit. The junior engineer classification, however, already was covered by a contract between the employer and another union in a unit that included professional employees. Although conceding the junior engineers were professionals, the Board excluded them from the unit sought on contract-bar grounds.[3]

This policy was reaffirmed in *Vincent Drugs*, supra, in which the Board distinguished the issue in that case (the validity of an existing contract covering a unit of both professionals and nonprofessionals that had been established by the parties) from the issue presented in *Leedom v. Kyne*, 358 U.S. 184 (1958) (whether a combined unit of professionals and nonprofessionals could be established initially

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[1] Sec. 9(b)(1) provides, in pertinent part, that the Board shall not decide that any unit is appropriate for the purposes of collective bargaining ". . . if such unit includes both professional employees and employees who are not professional employees unless a majority of professional employees vote for inclusion in such unit."

To carry out the statutory requirement, the Board has adopted a special type of self-determination procedure known as a *Sonotone* election, whereby the ballots used for the professional employees ask two questions: (1) whether they desire to be included in a group composed of nonprofessional employees; and (2) their choice with respect to a bargaining representative. See *Sonotone Corp.*, 90 NLRB 1236 (1950). If the majority of professionals vote "yes" on inclusion, their votes are counted with those of the nonprofessionals; if the majority vote "no," their votes are counted separately to determine which labor organization, if any, they want to represent them in a separate unit.

[2] The Board will recognize the validity of a state certification where the election procedure was free of irregularities and reflected the true desires of the employees. See *St. Luke's Hospital Center*, 221 NLRB 1314, 1315–1316 (1976), enfd. 551 F.2d 476 (2d Cir. 1976). The record in this case does not disclose the circumstances under which the parties became subject to the jurisdiction of the National Labor Relations Act.

[3] 122 NLRB at 294 fn. 2. The Board found no merit in the contention that, because the junior engineers had never exercised their right to vote as professional employees under Sec. 9(b)(1) of the Act, the contract bar rule did not apply. Accord: *Westinghouse Electric Corp.*, 116 NLRB 1545, 1546 (1956); *Westinghouse Electric Corp.*, 112 NLRB 590, 592 (1955), enfd. 236 F.2d 939 (3d Cir. 1956). See also *S.S. White Dental Mfg. Co.*, 109 NLRB 1117, 1118 fn. 3 (1954) (petition for severance of professional employees from mixed unit having previous bargaining history with employer was filed at a time following expiration of the collective-bargaining agreement; election directed).

289 NLRB No. 79

by the Board without first affording the professional employees a self-determination election).[4]

In requesting that the parties brief the issue on review, the Board was concerned that *Utah Power*, supra, and *Wells Fargo*, supra, may have undermined the application of the contract-bar rule as applied to a mixed professional-nonprofessional unit where a separate professional unit is sought. However, a close reading of those cases has shown that the holding of *Pennsylvania Power*, supra, and its forerunners has not been so eclipsed.

Utah Power involved the separate and distinct question of what is the appropriate unit in a decertification election where the recognized unit was a mixed one of professionals and nonprofessionals. In decertification elections, the voting unit generally must be coextensive with the certified or recognized unit;[5] however, because the professional employees had never had an opportunity to vote in a self-determination election as authorized by Section 9(b)(1), the Board concluded that an exception to the general rule was warranted and therefore the professionals by themselves could vote on continued representation and it was not necessary that the election be conducted in the existing, all-inclusive unit.

The facts of the instant case parallel *Utah Power* only insofar as it is the professional employees here who seek to take themselves out of the mixed unit. Thus, while *Utah Power* would authorize the Board to entertain a decertification petition seeking a unit of only the professional employees, we find nothing in that opinion which suggests that such a petition may be filed at *any* time, even during the period of a collective-bargaining agreement. Indeed, the Board in *Utah Power* observed that the petition there "was initiated at an *appropriate* time,"[6] although it cannot be determined from the decision the status of the contract at the time of the filing. In any event, if the Board in *Utah Power* intended to remove the contract-bar rule as a impediment in such cases, it surely would have done so in a more forthright manner, particularly in the face of *Pennsylvania Power* and other authorities.

Similarly, *Wells Fargo* offers no support for overruling *Pennsylvania Power* and *Vincent Drugs*. That case involved an interpretation of Section 9(b)(3), which bars the Board from certifying a mixed unit of guards and nonguard employees, or from certifying a union as the representative of a guard union if the union admits nonguards as members. The Board specifically noted in *Wells Fargo* that Section 9(b)(1) was inapplicable to that case, and that it would not read into Section 9(b)(3) the various legislative comments directed toward Section 9(b)(1) of the Act.[7] If *Wells Fargo* has any pertinence to the instant case, it actually buttresses the applicability of the contract-bar doctrine here. In enforcing the Board's conclusion in *Wells Fargo* that the employer was privileged, following expiration of its collective-bargaining agreement with the mixed guard union, to withdraw recognition, the Second Circuit specifically noted the continuing viability of the Board's decision in *Burns Detective Agency*,[8] that "[a]n employer who voluntarily recognizes a mixed guard union may not *discontinue* the relationship during the *contract period*."[9]

Finding contract-bar principles inapplicable to the present case would be contrary to the Board's general approach toward employers' voluntary recognition of collective-bargaining representatives. In a mixed unit of professional and nonprofessional employees, as with most other units, an employer under the general rules of voluntary recognition need only be satisfied that the union has the majority support of the entire unit.[10] Board law has never intimated that an employer can predicate voluntary recognition only on separate demonstrations of majority support from professionals and nonprofessionals. Moreover, as the Board explained in *Vincent Drugs*, the legislative history of Section 9(b)(1) does not demonstrate an outright hostility to voluntarily recognized mixed units. Neither *Utah Power* nor *Wells Fargo* presented any new evidence to impeach this earlier interpretation.

We point out that in the instant case there were legally recognized opportunities during the window periods in 1980 and again in 1983 in which to file a timely petition. There is no evidence to suggest that the professional employees were precluded from availing themselves of those opportunities. Given this bargaining history, we conclude that it is not unreasonable to defer the exercise of the professional employees' right of self-determination until the end of the then-current contract.

Further, we note that the contract-bar doctrine is but another instance of the Board's striking an accommodation among three competing interests: the freedom of an employer and a union to enter into a collective-bargaining relationship, the stability of bargaining relations once established, and employee freedom of choice—all of which underlie the Act's ultimate goal of fostering industrial peace.[11] Thus, for a limited period of time, employee choice as to union representation is subordinated to the goal of fostering the stability that can come about through a freely established bargaining contract. Accordingly, and inasmuch as Congress, in its enactment of Section 9(b)(1) in 1947, said nothing to restrict the application of the contract-bar doctrine, we conclude that it is applicable in this case, or perhaps more accurately, that this case does not constitute an exception to that established doctrine, and we affirm the Regional Director's dismissal of the petition.

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[4] 144 NLRB at 1253–1254. In *Vincent Drugs*, the specific issue before the Board was whether the union had violated Sec. 8(b)(1)(A) and (2) of the Act by attempting to have a professional employee who had never joined the union discharged through use of the union-security clause in a contract covering a combined unit.

[5] See generally *Campbell Soup Co.*, 111 NLRB 234 (1955).

[6] 258 NLRB at 1061 fn. 14 (emphasis added), citing *International Telephone & Telegraph Corp.*, 159 NLRB 1757, 1764 fn. 15 (1966), enfd. as modified 382 F.2d 366 (3d Cir. 1967) (professionals in mixed unit may seek self-determination "at an appropriate time and in an appropriate proceeding"). In *ITT*, the Board noted that it was not an appropriate time for professionals to seek a self-determination election because the employer there had not remedied its unfair labor practices.

[7] 270 NLRB at 787–788 fn. 6.

[8] 134 NLRB 451 (1961).

[9] *Wells Fargo*, supra, 755 F.2d at 10 (emphasis added).

[10] See *Garment Workers v. NLRB*, 366 U.S. 731 (1961).

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[11] The contract-bar doctrine was first articulated in *National Sugar Refining Co.*, 10 NLRB 1410, 1415 (1939). See also *Deluxe Metal Furniture Co.*, 121 NLRB 995 (1958), as modified by *Leonard Wholesale Meats*, 136 NLRB 1000 (1962) (time for filing petitions). The legislative history of the 1947 Taft-Hartley amendments shows that the amendments authorizing employer and employee representation petitions (Sec. 9(c)(1)(A) and (B)) were not intended to affect the contract-bar rule. The House bill, H.R. 3020, as reported, did not explicitly address the continuing applicability of the contract-bar doctrine, but the bill was attacked on the grounds that it would effectively eliminate the rule and allow the processing of a representation petition at any time. H. Rep. No. 245, 80th Cong. 1st Sess. 88-89 (1947) (minority report), reprinted in 1 Legislative History of the Labor-Management Relations Act of 1947, at 376-377 (1959) (Leg. Hist.). Sec. 9(c)(1) in the Senate bill, S. 1126, as reported and passed by the Senate as an amendment to H.R. 3020, referred to the filing of petitions "in accordance with such regulations as may be prescribed by the Board" (1 Leg. Hist. 245), and the Senate report expressly stated that nothing in Sec. 9(c)(1) was intended to affect "the present Board's rules of decisions with respect to dismissal of petitions by reason of . . . an outstanding collective agreement as a bar to an election." S. Rep. No. 105, 80th Cong., 1st Sess. 25 (1947). "In other words," the report explained, "the Board could still dismiss an employee or employer petition if a valid contract were still in effect." Id. It was the Senate language that was finally enacted. (We note, of course, that in 1947 the bar period was only 1 year. It was not until 1962, in *General Cable Corp.*, 139 NLRB 1123 (1962), that the Board extended the bar period to 3 years.)

WXON-TV, Inc. *and* **National Association of Broadcast Employees and Technicians, AFL-CIO.** Case 7-CA-25199

June 30, 1988

DECISION AND ORDER

BY CHAIRMAN STEPHENS AND MEMBERS JOHANSEN AND BABSON

On July 29, 1986, Administrative Law Judge James L. Rose issued the attached decision. The Respondent filed exceptions and a brief, the General Counsel filed cross-exceptions and a brief, and the Respondent, the General Counsel, and the Charging Party filed answering briefs.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions, cross-exceptions, and briefs and has decided to affirm certain of the judge's rulings, findings, and conclusions and to reverse others, as set forth below.

1. The Respondent operates a television broadcasting station. At the hearing the parties stipulated that about August 30, 1985, the Respondent eliminated unilaterally its production department without bargaining with the Union as bargaining representative of the employees[1] and that the decision to eliminate the department resulted in the layoff of three bargaining unit employees. The judge found that the failure to bargain over this decision violated Section 8(a)(5) and (1) of the Act. The Respondent contends that the decision to eliminate the production department did not turn on labor costs within the meaning of *Otis Elevator Co.*, 269 NLRB 891 (1984), and, therefore, there was no duty to bargain regarding this matter. We find merit in the Respondent's contention and find that the decision to eliminate the production department was not a mandatory subject of bargaining.

In addition to its broadcasting of television programing and the sale of commercial air time, the Respondent also maintained a production department that produced commercial and public affairs programing. In February 1985 the Respondent's general manager-vice president, Douglas Johnson, met with two of the three employees in the production department, Carl Scott and Robert Schade. According to Scott, Johnson indicated that the Respondent was concerned with the falling revenues of the production department. Johnson produced accounting ledgers to the employees and stated, according to Scott, that in 1984 production income had fallen to $6900 while production salaries had reached $184,000. Johnson pointed out that since 1982 production income had "gone way down" and production salaries had "gone way up." It is undisputed that production income formerly was in the range of $100,000 annually.

Johnson asked Scott and Schade to survey the production rates that production companies and other television stations charged their clients. Johnson also asked the production employees to work more closely with the Respondent's sales department in order to help generate more production income. Scott testified that Johnson advised them that unless the production department generated greater income, continuation of the production department would be in jeopardy.[2] The record shows, and the judge found, that the Respondent thereafter increased its efforts to obtain additional customer use of its production department and to increase commercial production. General Manager Johnson testified in this regard that many of the Respondent's competitors had special effects equipment that the Respondent did not possess, but that it was determined that obtaining such equipment was not economically justified.

The uncontroverted testimony of General Manager Johnson establishes that 6 months after his February 1985 meeting with Scott and Schade, and despite the increased efforts to increase commercial business, production "did not increase one iota." Indeed, the judge found that the production department was not economically viable.[3] On August 30, 1985, the Respondent decided to eliminate the production department and did so without bargaining with the Union. The production department's three employees were terminated.

In *Otis Elevator Co.*, 269 NLRB 891 (1984), the Board held that management decisions that affect the basic direction or nature of the business are excluded from the mandatory bargaining subjects described in Section 8(d). The critical factor, as identified by the Board plurality, is whether the decision turns upon a change in the nature or direction of the business, or turns upon labor costs. Id. at 892. In the instant case, the judge found summarily that "the primary factor appears to have been the production department salaries against revenues"

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[1] The parties stipulated that on August 30, 1985, the Union was certified as bargaining representative of all employees of the Respondent directly involved in the production, presentation, and transmission of programs.

[2] The judge concluded erroneously that there was no discussion at this time concerning the possibility of eliminating the production department.

[3] There is no contention that the decision to eliminate the production department was motivated by anything other than valid business reasons. Accordingly, we disavow the judge's comments that the timing of the decision in relation to the employees' designation of the Union as their bargaining representative "suggests discrimination in the Respondent's August 30 decision."

and that the decision, therefore, turned substantially upon labor costs. Thus, the judge found that General Manager Johnson's express reference to salaries in relation to declining income at the February 1985 meeting with employees Scott and Schade established that the predominant reason for elimination of the production department was labor costs. We disagree.

Contrary to the judge, we are unable to find under the circumstances of this case that the Respondent's decision turned upon labor costs simply by virtue of General Manager Johnson's reference to salaries at the February 1985 meeting. Thus, the evidence is clear that the production department had suffered a precipitous decline in revenues from approximately $100,000 to, at most, $6900.[4] General Manager Johnson attempted to increase revenues thereafter through increased sales efforts to no effect. Further, it is uncontradicted that the Respondent's efforts to do so were limited by the absence of certain special effects equipment that it decided was not cost effective to procure. After a 6-month effort, income generated by the production department remained unchanged.

On these facts, we find that the essence of the decision to eliminate the production department was based on the failure of that department to generate revenues sufficient to justify its continued existence; that consequently it did not constitute a mandatory subject of bargaining because it turned on a fundamental change in the direction of its business.[5] Thus, the Respondent was faced with a situation in which a department employing three employees and utilizing equipment at hand generated income that was, beyond question, extremely low and essentially nominal in character. Although Johnson made specific reference at the February 1985 meeting to $184,000 in production department salaries, and perhaps this played a role in triggering an attempt to increase revenues, it does not follow that the decision, therefore, must have "turned upon" labor costs. *Inland Steel Container Co.*, 275 NLRB 929, 937 (1985), enfd. sub nom. *Steelworkers Local 2179 v. NLRB*, 822 F.2d 559 (5th Cir. 1987). Rather, it appears that production revenues were so low that, in the absence of a substantial increase in income, the department was not economically viable irrespective of salary levels. In this context, the logical import of Johnson's reference to increasing salary levels, in relation to decreasing income, was to demonstrate the plight of the *department and to impress on the employees* the need to increase revenues. This likelihood is supported by Johnson's contemporaneous instructions to coordinate matters with the Respondent's sales department and by Johnson's comments that, unless the production department generated greater income, its future would be in jeopardy. Accordingly, we shall dismiss that portion of the complaint alleging that the Respondent unlawfully eliminated the production department without bargaining with the Union.

2. The judge also found that even if the decision to eliminate the production department was not a mandatory subject of bargaining, the Respondent still had the obligation to negotiate with the Union concerning the effects of that decision on wages, hours, and employment conditions of bargaining unit employees. The Respondent contends in its exceptions that the complaint did not encompass any allegations that the Respondent failed to bargain over effects, as found by the judge. We find merit in the Respondent's exception.

With regard to the elimination of the production department, the complaint alleged in its entirety that the Respondent violated Section 8(a)(5) and (1) when it "unilaterally eliminated the production department, resulting in the lay off of three employees without bargaining with the Charging Party." As contended by the Respondent, the complaint does not allege a separate unlawful refusal to bargain over the effects of the elimination of the department on wages, hours, and employment conditions. More particularly, the allegedly unlawful conduct placed in issue by the General Counsel was the Respondent's failure to bargain over the decision to eliminate the production department, i.e., the unilateral discontinuance of the production department without first bargaining with the Union. Indeed, at the hearing the parties limited the factual issues to be litigated by stipulating that the Respondent took unilateral action without bargaining "over the decision to eliminate the department." Further, neither the General Counsel nor the Union contended at the hearing or in their posthearing briefs that the Respondent had not only failed to bargain over the decision to eliminate the production department but also separately failed to bargain in violation of the Act over the effects of that decision.[6] Accordingly, we agree with the Respondent that the issues litigated did not encompass the effects-bargaining violation found by the judge, and we shall delete those findings from our Order.[7]

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[4] Although employee Scott testified that Johnson described 1984 production income as $6900, Johnson testified that it was in the range of $4000–5000.

[5] These findings are warranted under any of the views expressed in *Otis Elevator Co.*, supra.

[6] We also note that although both the General Counsel and the Union filed answering briefs in response to the Respondent's exceptions, neither party took issue with the Respondent's contentions regarding the judge's allegedly erroneous findings as to effects bargaining.

3. By letter dated November 11, 1985, the Union requested certain information from the Respondent pertaining to the following matters: the reasons for the termination of bargaining unit employees Joseph Pzenowagis, Robert Schade, and Carl Scott; accompanying documents referring to that decision; the status of in-house production work; the status of public service broadcasting spots; production service subcontracting; duties of the chief operator; and bargaining unit work being performed by supervisory personnel.

That same day, November 11, 1985, the Union signed the unfair labor practice charge, officially filed on November 12, 1985, alleging that the Respondent violated Section 8(a)(1), (3), and (5) by unilaterally changing terms and conditions of employment of bargaining unit employees, assigning quasi-supervisory duties to unit employees, terminating and discriminating against employees, and refusing to provide requested information.

By letter dated December 4, 1985, the Respondent, through Labor Relations Director Shirley Moore, responded to the Union's information request. The letter, noting that the request was filed only 1 day prior to the filing of the unfair labor practice charge, advised the Union that most of the requested information would be provided to the Board in the course of the investigation and that, as a result, the Respondent would not provide the information directly to the Union. By letter of December 6, 1985, the Union demanded that the requested information be supplied directly to the Union. On December 31, 1985, the Regional Director for Region 7 issued the complaint in this case. Thereafter, by letter of January 8, 1986, counsel for the Respondent provided the Union with a copy of its position statement submitted to the Region in connection with the investigation of this case. Counsel for the Respondent indicated in the letter that the Union should advise her in the event that additional questions remained unanswered and that an attempt would be made to provide appropriate responses. The parties stipulated that there was no response to the January 8, 1986 letter. There is no evidence that the Union otherwise sought to bargain over the matters contained in the unfair labor practice charge and in the November 11, 1985 request for information.

The judge found that the Respondent violated Section 8(a)(5) and (1) by not providing the requested information. The Respondent excepts to that finding, contending that under the circumstances presented in this case, the Union's request for information was not for the purpose of collective bargaining but was for a purpose related to its unfair labor practice charge. We find merit to this contention and reverse the judge's finding of a violation.

It is axiomatic that a collective-bargaining representative is entitled to information relevant and necessary to the proper discharge of its duties as the collective-bargaining representative. *NLRB v. Truitt Mfg. Co.*, 351 U.S. 149 (1955). In the instant case, however, it appears that the Union elected to pursue resolution of the matters sought in its November 11, 1985 request for information through the Board's unfair labor practice procedures rather than through the collective-bargaining process. Thus, on the same day that it requested information from the Respondent, the Union signed, and by the next day had filed, an unfair labor practice charge raising virtually the identical matters sought in the information request—the unilateral elimination of the production department, the elimination of unit work by unilateral creation of a supervisory position, and the discriminatory termination of employees because of their union activities. Indeed, the unfair labor practice charge alleges that the Respondent unlawfully failed to provide information, pertaining to the very matters contained in the information request made on the same day that the charge was prepared.

Thus, before the Respondent even had knowledge of the request for information, let alone an opportunity to respond, the Union was charging it with violating the Act by failing to provide the requested information. Further, apart from the information request itself, there is no evidence that the Union initiated any contact whatsoever with the Respondent in any bargaining context regarding the matters contained in the information request and the unfair labor practice charge. Thus, it is evident that the Union chose to prosecute these matters through the Board's unfair labor practice procedures rather than to bargain with the Respondent. Its information request, therefore, under the facts of this case, was akin to a discovery device pertinent to its pursuit of the unfair labor practice charge rather than to its duties as collective-bargaining representative. *Huck Mfg. Co.*, 254 NLRB 739, 755 (1981); *American Oil Co.*, 171 NLRB 1180, 1188 (1968). Accordingly, we shall dismiss that portion of the complaint alleging that the Respondent violated Section 8(a)(5) and (1) by failing to provide information.[8]

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[7] We find this case factually distinguishable from the Board's recent decision in *Litton Business Systems*, 286 NLRB 817 (1987). In that case, the Board found that an employer violated Sec. 8(a)(5) and (1) by refusing to bargain over its decision to lay off unit employees as an effect of its decision to convert its plant machinery to a new process. In *Litton*, however, in contrast to the instant case, the complaint separately alleged an unlawful failure to bargain over "the decision to lay off employees," and effects bargaining issues were fully litigated. Id. at fn. 7. Further, in *Litton* the General Counsel did not contend to the Board that the underlying decision to convert the machinery was a mandatory subject of bargaining, thereby framing the issue to be decided, under the facts of that case, as pertaining to the decision to lay off employees. Here, the issue litigated by the General Counsel was whether the unilateral decision to eliminate the department entirely was a mandatory subject of bargaining because it turned on labor costs; and, as noted, neither the General Counsel nor the Union made any specific contention regarding an effects bargaining violation.

4. We agree with the judge that the Respondent violated Section 8(a)(3) and (1) by refusing to reinstate employee JoAnn Thompson.[9] In adopting the judge's findings, however, we note, in addition to the judge's analysis of the Respondent's defense,[10] the following with respect to the evidence pertinent to the Respondent's evidentiary burden under *Wright Line*, 251 NLRB 1083 (1980)—a burden which, like the judge, we find the Respondent has not carried.

Thompson began her employment with the Respondent in 1983. On September 6, 1985, Thompson commenced an approved unpaid pregnancy leave of absence for the birth of her child. For several weeks prior to her leave of absence, she worked in the Respondent's traffic department as a traffic assistant preparing "facility sheets." The facility sheets prepared by Thompson contain titles and segment times for commercials and instruct the station's engineers when commercials are to be aired.

Commercials, however, are often not aired, and during each month the Respondent prepares "preemption forms" that contain information concerning each commercial that was not broadcast. Preemptions may occur in connection with an error in the preparation of facility sheets in the traffic department or they may occur because of broadcast scheduling that does not permit the commercial spot. It is clear, however, that they occur in the regular course of business. It is also clear that the airing of commercials provides the principal source of income for the Respondent, and that when a commercial is not broadcast, i.e., "preempted," the Respondent does not get paid for it.

About November 1, 1985, Thompson sought to return to her traffic assistant position. Her request was denied. The Respondent, through General Manager Douglas Johnson, advised Thompson by letter of November 1, 1985, that she would not be reinstated because her job performance prior to the approval of her leave had been unsatisfactory. Johnson indicated further that Thompson's former position would be eliminated shortly and would be performed automatically by computer.[11]

The Respondent contends that Thompson was not reinstated because of her unsatisfactory job performance in the preparation of facility sheets. More specifically, the Respondent asserts that it lost substantial revenues from Thompson's errors in preparing facility sheets, as a result of which a number of commercials were preempted, and hence no payment was received. Contrary to the Respondent, we find that the Respondent has failed to establish that Thompson would not have been reinstated, for the reason asserted by it, even without her union activities.

At the outset, we note that, as the judge found, the amount of revenue loss caused by the failure to broadcast preempted commercials normally is in the range of approximately $3000 monthly. During Thompson's tenure in writing facility sheets, essentially around August 1985, the revenues lost because of preempted commercials totaled $3630. According to the preemption forms for that period, $2060 was attributed to facility sheets prepared by Thompson and $1570 to other sources. Critically, the Respondent presented no documentary evidence for any *other* monthly period detailing the usual monthly breakdown of revenue losses contained in its preemption forms, notwithstanding that the Respondent admittedly had in its possession thousands of commercial contracts for a 12-month period, containing numerous preemption forms.[12]

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[8] Further, to the extent the November 11, 1985 request pertained to the decision to eliminate the production department, it did not concern a mandatory subject of bargaining and, therefore, the Respondent was not obligated to provide requested information bearing on that decision. *UOP Inc.*, 272 NLRB 999, 1000 (1984); *Otis Elevator Co.*, supra at 894.

In agreeing with his colleagues that the Respondent did not violate Sec. 8(a)(5) and (1) by failing to furnish the requested information, Member Johansen relies on the fact that there had been no refusal to the Union's sole request for the information when it filed its charge alleging such a refusal.

[9] We adopt the judge's findings that the General Counsel met her burden under *Wright Line* to establish that Thompson's union activities were a motivating factor in the failure to reinstate, noting Thompson's role as a union activist, the Respondent's knowledge of Thompson's role, and the disparate treatment directed toward Thompson in comparison to all other employees who took pregnancy leave, all of whom were reinstated upon application.

[10] In rejecting the Respondent's defense for not reinstating Thompson, the judge concluded "that the Respondent's contention that Thompson was an incompetent employee was a pure fabrication." He deemed the evidence submitted to show her alleged incompetence to be "unpersuasive" and "not credible." Although these conclusions of the judge suggest that he viewed the Respondent's assertions as purely pretextual, he nevertheless appears to have considered the merits of those assertions on their own terms.

[11] The parties stipulated that about November 19, 1985, the Respondent unsuccessfully attempted to use a computer program to automate the "facility function" in the traffic department and that the department has operated subsequently in the same manner as it had prior to August 1985.

[12] The judge noted that the Respondent "brought forth approximately nine boxes of materials representing contracts for about 6 months before and 6 months after the events of this matter which contained many of the preemption sheets." The only preemption sheets introduced into evidence, however, were the sheets placed in Thompson's file during the period she was employed in the traffic department.

More particularly, the record contains no probative documentary evidence concerning relative percentage of revenue losses normally attributable to the errors in the traffic department, as distinguished from scheduling events, or the relative percentage of traffic department errors normally attributable to the employee occupying the position occupied by Thompson during her tenure in the traffic department.[13] Further, the total amount of revenue lost during Thompson's traffic department tenure ($3630) is not disproportionate to the norm ("approximately" $3000), and $1570 of the revenue losses during that period was attributable to other sources. Indeed, even if it is assumed that the total revenue losses during the period Thompson performed as a traffic assistant exceeded the monthly average by $630, that amount conceivably may have been wholly or primarily attributable to disproportionate losses from sources outside the traffic department during that period.

In short, even assuming that revenue losses of $2060 were attributable to Thompson's preparation of facility sheets, the Respondent has not demonstrated that Thompson's job performance exceeded the usual range of preemption losses which the Respondent itself tolerated in the normal course of business.[14] Accordingly, we adopt the judge's finding that the failure to reinstate Thompson violated Section 8(a)(3) and (1) of the Act.

5. We agree with the judge that the Respondent coercively interrogated employee Carl Scott in violation of Section 8(a)(1). The record shows that several days before the Board-conducted election in August 1985, pursuant to which the Union was certified as bargaining representative, General Manager and Vice President Douglas Johnson called production department employee Carl Scott into a management office. This meeting was one of a series of meetings conducted by Johnson with individual employees during the week preceding the election. At the outset of the meeting with Scott, Johnson indicated that he did not care one way or the other about the Union and that if it was time for the Union to come in or not, it did not make much difference. Johnson then asked Scott whether he was in favor of the Union. After Scott indicated he was not in favor of the Union, Johnson stated that Scott should not worry about their conversation the previous February regarding the future of the production department. Johnson also stated, in reference to the Union, that "he wanted to squash this thing and squash it big." The judge also found that Johnson told Scott that voting the Union in was akin to a slap in the face to management.[15]

Applying *Sunnyvale Medical Center*, 277 NLRB 1217 (1985), we find that Johnson's interrogation of Scott under the circumstances reasonably tended to restrain, coerce, or interfere with Section 7 rights. First, we note that the inquiry was made by a high management official, Johnson, who occupied the positions of general manager and vice president and who, the previous February, had informed production employee Scott that the future of the production department was in jeopardy. Thus, at the time of the inquiry, Scott was aware that Johnson essentially was reevaluating the future of Scott's job status. Indeed, Johnson's oblique reference to their February conversation served to emphasize this reality. Second, the inquiry took place in a one-to-one encounter in a management office only days before the representation election, and the nature of the information sought in this encounter concerned Scott's preference in that election. Third, considering the encounter as a whole, the interrogation occurred in the context of Johnson's highly charged expressions of hostility toward the Union. Thus, Johnson indicated to Scott that he wanted to "squash" the Union and "squash it big" and expressed the view that a favorable vote for the Union would be a slap in the face to management. Although at the outset of the encounter Johnson expressed assurances of neutrality regarding the Union, these assurances were directly contradicted by his subsequent comments, and could not be taken at face value. In these circumstances, we agree with the judge that the interrogation violated Section 8(a)(1) of the Act.[16]

REMEDY

Having concluded that the Respondent has engaged in certain unfair labor practices, we shall order the Respondent to cease and desist and to take certain affirmative action designed to effectuate the policies of the Act.[17]

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[13] The traffic department is composed of a traffic manager, a traffic assistant, and another individual whose specific duties are not detailed in the record.

[14] We also note that apart from the absence of probative documentary evidence, the judge found that Traffic Manager Petrykowski's testimony regarding Thompson's job performance was not credible.

[15] In finding that an interrogation regarding Scott's union sympathies took place, it appears that the judge credited elements of both Scott's version of the conversation and elements of Johnson's version. Thus, the judge found that Johnson stated that employees' voting for the Union would be considered a slap in the face of management, which is consistent with Johnson's version, whereas Scott's version is that Johnson indicated that if the employees voted in the Union, "it was just like the employees saying, fuck you, management." Further, Scott testified, as found by the judge, that Johnson asked him whether he was for the Union, whereas Johnson testified that he did not ask Scott what his feelings were with regard to the Union and that Scott voluntarily indicated he was not for the Union. None of the parties filed exceptions to the judge's resolutions of credibility.

[16] We find no merit to the Respondent's contention that the judge erred in not permitting the Respondent's counsel to question Scott regarding whether he subjectively perceived himself to be coerced.

Having concluded that the Respondent violated Section 8(a)(5) and (1) of the Act by unilaterally creating a new supervisory position to include bargaining unit work, without bargaining with the Union,[18] we shall order the Respondent, if the Union so desires, to rescind the position of assistant chief operator. *Kendall College*, 228 NLRB 1083 (1977).

Having concluded that the Respondent violated Section 8(a)(3) and (1) of the Act by refusing to reinstate employee JoAnn Thompson to her former position, we shall order the Respondent to offer JoAnn Thompson immediate and full reinstatement to her former job or, if that job no longer exists, to a substantially equivalent position, without prejudice to her seniority or any other rights or privileges previously enjoyed, and make her whole for any loss or earnings and other benefits she may have suffered in accordance with the provisions of *F. W. Woolworth Co.*, 90 NLRB 289 (1950), with interest to be computed in the manner prescribed in *New Horizons for the Retarded*.[19]

ORDER

The National Labor Relations Board orders that the Respondent, WXON-TV, Inc., Southfield, Michigan, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Coercively interrogating employees concerning their interest or their activity on behalf of the Union.

(b) Unilaterally creating a new supervisory position to include bargaining unit work without bargaining with the Union.

(c) Refusing to reinstate an employee who took maternity leave of absence because of her interest in and activity on behalf of the Union.

(d) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) If the Union so desires, rescind the position of assistant chief operator, and accord recognition to the Union as the collective-bargaining representative of the former occupant of that position who was in the bargaining unit.

(b) Offer JoAnn Thompson immediate and full reinstatement to her former job or, if the job no longer exists, to a substantially equivalent position, without prejudice to her seniority or any other rights or privileges previously enjoyed, and make her whole for any loss of earnings and other benefits suffered as a result of the discrimination against her, in the manner set forth in the remedy section above.

(c) Remove from its files any reference to the unlawful refusal to reinstate JoAnn Thompson and notify her in writing that this has been done and that her alleged poor work performance will not be used against her in any way.

(d) Preserve and, on request, make available to the Board or its agents for examination and copying, all payroll records, social security payment records, timecards, personnel records and reports, and all other records necessary to analyze the amount of backpay due under the terms of this Order.

(e) Post at its Southfield, Michigan facility copies of the attached notice marked "Appendix."[20] Copies of the notice, on forms provided by the Regional Director for Region 7, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material.

(f) Notify the Regional Director in writing within 20 days from the date of this Order what steps the Respondent has taken to comply.

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

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[17] Under the circumstances of this case, and given the nature of the violations found, we have substituted a narrow cease-and-desist order for that recommended by the judge. We have also deleted the judge's recommended inclusion of a visitatorial clause. *Cherokee Marine Terminal*, 287 NLRB 1080 (1988).

[18] No exceptions were filed to the judge's findings on the merits regarding this allegation.

[19] 283 NLRB 1173 (1987). Interest will be computed at the "short-term Federal rate" for the underpayment of taxes as set out in the 1986 amendment to 26 U.S.C. § 6621.

[20] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

WE WILL NOT coercively interrogate employees concerning their interest in or activity on behalf of National Association of Broadcast Employees and Technicians, AFL-CIO.

WE WILL NOT unilaterally create a new supervisory position to include bargaining unit work without bargaining with the Union.

WE WILL NOT refuse to reinstate an employee who took maternity leave of absence because of her interest in or activity on behalf of the Union.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL, if the Union so desires, rescind the position of assistant chief operator and WE WILL accord recognition to the Union as the collective-bargaining representative of the former occupant of that position who was in the bargaining unit.

WE WILL offer reinstatement to JoAnn Thompson to her former job or, if that job no longer exists, to a substantially equivalent position of employment and WE WILL make her whole for any loss of wages or other rights and benefits she may have suffered as the result of our discrimination against her, less any net earnings, plus interest.

WXON-TV, INC.

Mark D. Rubin, Esq., for the General Counsel.

Elaine Grand Stulberg, Esq. (Sommers, Schwartz, Silver & Schwartz), of Southfield, Michigan, for the Respondent.

Samuel C. McKnight, Esq. (Klimist, McKnight, Sale & McClow), of Southfield, Michigan, for the Charging Party.

DECISION

STATEMENT OF THE CASE

JAMES L. ROSE, Administrative Law Judge. This matter was tried before me at Detroit, Michigan, on 14 and 15 April 1986, on the General Counsel's complaint that alleged that the Respondent engaged in certain violations of Section 8(a)(1), (3), and (5) of the National Labor Relations Act (29 U.S.C. § 151 et seq.)[1]

In brief it is alleged that the Respondent unlawfully interrogated an employee, discriminated against an employee by refusing to reinstate her following a maternity leave of absence, and breached its obligations to bargain in good faith by: unilaterally eliminating the production department (resulting in the layoff of three bargaining unit employees), unilaterally creating a supervisory position and vesting it with bargaining unit duties, unilaterally transferring bargaining unit work to supervisors, and refusing to furnish the Charging Party certain requested information.[2]

The Respondent generally denied that it committed any unfair labor practices and affirmatively contends that JoAnn Foggie Thompson[3] was not reinstated following her maternity leave of absence because of poor work performance. The Respondent contends that whether to eliminate the production department was not a mandatory subject of bargaining, and therefore its decision could be made unilaterally. The Respondent contends that during the course of the investigation of the charges it furnished the information requested by the Charging Party. The Respondent argues there was no change in the bargaining unit work done by supervisors; and finally, the Respondent denies that the interrogation of employees was unlawful.

On the record as a whole, including my observation of the witnesses, briefs, and arguments of counsel, I issue the following

FINDINGS OF FACT AND CONCLUSIONS OF LAW

I. JURISDICTION

The Respondent is a Michigan corporation engaged in the operation of an independent UHF television broadcasting station. In this business, the Respondent annually has gross revenues in excess of $500,000, and broadcasts nationally advertised products the revenue from which exceeds $50,000, utilizes national news services for which it pays in excess of $10,000, and has purchased goods, products, and materials with value in excess of $50,000 directly from points outside the State of Michigan. The Respondent admits, and I find, that it is an employer engaged in interstate commerce within the meaning of Section 2(2), (6), and (7) of the Act.

National Association of Broadcast Employees and Technicians, AFL-CIO (the Union) is admitted to be, and I find is, a labor organization within the meaning of Section 2(5) of the Act.

II. ALLEGED UNFAIR LABOR PRACTICES

A. *Background Facts*

Douglas Johnson is the Respondent's vice president and general manager. A. J. Johnson, his father, is the chairman of the board of directors and president. In February 1985,[4] Douglas Johnson called into his office Carl Scott and Bob Schade, two of the three production department employees, and discussed with them the general lack of productivity in that department. According to Scott's testimony, Johnson said that for 1984 the production department salaries were $184,000 while the department income was $6900. This compared unfavorably with the preceding years, but was consistent with the trend. Revenues for the production department had been going down with the salaries going up.

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[1] The charge was filed on 12 November 1985, and the complaint issued on 31 December 1985.

[2] Other allegations of 8(a)(5) violations were alleged in the complaint but either were withdrawn or no evidence was offered concerning them. Thus, the allegations summarized above were the only ones litigated.

[3] This spelling is from her signature on an exhibit. The transcript is in error and is corrected.

[4] All dates are in 1985 unless otherwise indicated.

Notwithstanding these figures, there apparently was no discussion at that time between management and employees concerning the possibility of eliminating the production department. Indeed, the Respondent's sales manager, Sandy Henry, testified that during the spring, the sales department was increased and sales efforts included pitching to potential customers the fact that the Respondent had its own production capability.

Other than these two events, the record is devoid of any evidence concerning the status of the production department from early 1985 until the Respondent determined to eliminate it on 30 August.

Sometime in 1985, the Union began an organizational campaign among the Respondent's employees. Active in this campaign was bargaining unit employee JoAnn Thompson. A representation hearing was held on 7 June at which she appeared as a witness on behalf of the Union. Although it is unclear from the record the disposition of that hearing, an election was in fact held among the Employer's bargaining unit employees[5] in which a majority voted in favor of representation by the Union. Thus, the parties stipulated that on 30 August the Union was certified as the employees' bargaining representative.

On that date, as noted above, the Respondent eliminated its production department and subsequently the three production department employees were terminated—Carl Scott and Robert Schade effective 13 September and Joe Dzenowagis effective 20 September.

Prior to the election, which apparently was sometime in August, Douglas Johnson individually called into his office most, if not all, of the bargaining unit employees and asked them, according to his testimony, about their "concerns." Johnson's discussion with Scott along these lines is alleged to have been violative of Section 8(a)(1) of the Act.

On 23 September, the Respondent created a new supervisory position of assistant chief operator, which job included supervisory responsibilities as well as duties previously performed by the bargaining unit position of assistant chief operator. It is agreed that the Respondent gave no notice to the Union prior to creating this position.

And in connection with this, Gary King was promoted from the bargaining unit position of assistant chief operator to the supervisory position of chief operator but he continued to perform bargaining unit duties in addition to those supervisory duties of chief operator. The promotion and the continued performance of these duties by King was without notification to or bargaining with the Union.

On 11 November, counsel for the Union wrote Douglas Johnson asking to be furnished certain information with regard to the termination of the production department employees and the promotion of Gary King and another employee. This letter was answered on 4 December by Shirley L. Moore, the Respondent's director of labor relations, who stated that as a result of the Union having filed a charge with the Board, the information requested would be furnished during the course of the investigation and "as a result, we will not be providing the information directly to you."

On 6 December, counsel for the Union replied to that letter stating that the Union demanded the information be furnished directly. On 8 January 1986, counsel for the Respondent sent to the Union a position statement that had been submitted to the Board in connection with the investigation of the instant matter. The Respondent contends that this position statement contains all the information requested by the Union to which it is entitled.

JoAnn Thompson was hired as a film editor in 1983 and worked in that job until July 1985, at which time she was transferred to the traffic department, apparently as a result of reduced work available for film editors. In the traffic department Thompson, along with others, was responsible for writing up "facility sheets." These are instructions to the engineering department concerning the time when certain commercials are to be aired. According to the Respondent, in this work Thompson made a "costly amount of errors," whereas for others with the same training "errors were few."

On 16 August, Thompson wrote a memo to her supervisor stating that "as per company policy" (which she testified, uncontradictedly, she learned from A. J. Johnson) she wished to take pregnancy leave for 90 days beginning with the date of her delivery, which was estimated to be 28 August. She in fact left work on 6 September.

About 1 November she requested her job back effective 4 November but was advised by letter of 1 November from Douglas Johnson that she would not be rehired in the traffic department because "the work you were assigned was not done properly and accurately." He went on to say that the job was going to be computerized, and thus there would be no work for her in that department in any event. He indicated that should a job come open for which she was qualified, she would be considered.[6]

B. *Analysis and Concluding Findings*

1. Interrogation

Douglas Johnson testified in connection with his interrogation of Carl Scott, as well as the others, "that I was not concerned with how they voted. I wanted to make that perfectly clear at the outset, that I wasn't concerned about their feelings about the union." He went on to testify, however, that he had set up these meetings individually with the employees the week prior to the election in order to discuss "their individual needs and concerns," and "was the primary reason to find out if there were any common elements that in fact were taking place or in fact any individual concerns."

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[5] It is alleged and admitted that the appropriate bargaining unit within the meaning of Sec. 9(b) of the Act is:

> All employees employed by WXON-TV, Inc., in Southfield, Michigan, who are directly involved in the production, presentation and transmission of programs, including on-air personnel, technicians, production technicians, maintenance technicians, film editors and the shipping and receiving clerk; but excluding clerical employees, salespersons, guards and supervisors as defined in the Act.

[6] Although Johnson in his letter refers to Thompson's job as being a "clerical position," which apparently would be one excluded from the bargaining unit, there is no contention that Thompson was not in fact a bargaining unit employee at the time she entered on maternity leave, nor that the position for which she sought reinstatement following her pregnancy is a bargaining unit position.

Johnson further testified he told Scott, "that in fact if they voted in the Union, it could be construed as a slap in the face to management. That is what I said."

According to Scott, Johnson called him into the chief engineer's office and asked if he was "in favor of the union coming in." Scott said, " no." Johnson then told Scott not to worry about what had happened in February (apparently referring to the discussion concerning the production department) and, according to Scott, Johnson said, "He wanted to squash this thing and squash it big."

Although the testimony of Scott and Johnson concerning this event differ in some minor respects, Johnson did not deny Scott's testimony that he said he wanted "to squash this thing and squash it big." That statement, along with Johnson's admission that a vote by employees for the Union would be considered "a slap in the face of management," clearly removes the interrogation from the type approved by the Board in *Rossmore House*, 269 NLRB 1176 (1984).

The interrogation concerning an employee's union sympathies took place the week prior to an election during which the Company's chief operating officer stated that he wanted to squash the Union and that voting for the Union would be considered a slap in the face of management. Such aggressive comments imply more than innocent inquiry. Johnson's systematic interrogation of employees was not the benign, trivial, or isolated type of interrogation that sometimes the Board has concluded is not unlawful. Here, Johnson in fact interrogated employees in an effort to assure them that their "concerns" were being considered, while at the same time suggesting to them how unhappy management would be were they to vote for the Union. I believe and conclude that Johnson's interrogation of Scott in July 1985 was violative of Section 8(a)(1) of the Act.

2. Elimination of production department

The Respondent stipulated that it unilaterally terminated the production department on 30 August, and that the three production department employees were discharged. The Respondent admits by stipulation that it did not bargain or attempt to bargain with the Union concerning this matter.

The Respondent argues that its decision to eliminate the production department is not a mandatory subject of bargaining. Inasmuch as the decision involved a change in the course of its business, such was therefore not the type of matter about which it is required to bargain with the Union, citing *First National Maintenance Corp. v. NLRB*, 452 U.S. 666 (1981), and *Otis Elevator Co.*, 269 NLRB 891 (1984). I disagree.

At the outset it should be noted that whether the Respondent was economically justified in eliminating the production department is not an issue. Indeed, from the scanty facts of record, it appears that the production department was not economically viable and that the Respondent could have its needs better met by outside production. Nevertheless, the question is whether the Respondent's decision to eliminate three bargaining unit jobs was the type of thing about which it was obligated to bargain with the Union.

Although the allegation on this issue involves the Respondent's alleged refusal to bargain in good faith, I note that the decision was made after the employees designated the Union as their bargaining representative, even though the facts concerning the low productivity of the production department had been known for many months. Such suggests discrimination in the Respondent's 30 August decision. But discrimination in this respect was not alleged.

There is scanty evidence concerning the basis of the Respondent's decision. The principal evidence is that the production department's revenues for some time had been less than the production department salaries. Johnson testified that some of the equipment needed for production was not cost justified. Since the primary factor appears to have been the production department salaries against revenues, it is clear that the Respondent's decision from a business standpoint turned substantially on labor costs. Although there may have been other factors involved, on this record I conclude that labor costs were predominating.

In *Otis Elevator*, the Board, in expanding on the rationale of the Supreme Court in *First National Maintenance*, stated that under certain circumstances a company's determination to change the course of its business, notwithstanding loss of bargaining unit jobs, was not a mandatory subject of bargaining. The Board noted that the "decision did not turn upon labor costs," though such may have been a factor. Thus, the decision was not one that the company had an obligation under Section 8(a)(5) of the Act to negotiate with the union. Nevertheless, the employer had a duty to bargain over its effects.

And in any event, even if the initial decision to eliminate the production department was not a mandatory subject of bargaining, the Respondent had the clear obligation under the Act to negotiate with the Union concerning the effects of the decision that in this case included the termination of three bargaining unit employees. In no respect did the Respondent negotiate or even tell the Union of its plans to eliminate the production department, nor give the Union an opportunity to negotiate concerning the effects of this decision on wages, hours, and employment conditions of bargaining unit employees. Accordingly, I conclude that by failing to bargain with the Union concerning its decision of 30 August to eliminate the production department and its failure to bargain with the Union over the effects of this decision, the Respondent violated Section 8(a)(5) of the Act. I shall recommend an appropriate remedy.

3. Creating the supervisory position

It is alleged in paragraph 12(c) of the complaint that about 23 September, the Respondent created a new supervisory position (assistant chief operator), the job duties of which included bargaining unit work.

It is further alleged in paragraph 12(e) that about 30 August, the Respondent unilaterally transferred bargaining unit work to supervisory employees.

At the outset of the hearing the parties stipulated:

> Two, on or about September 23, 1985, Respondent created a new supervisory position of Assistant Chief Operator, vesting the job with supervisory responsibilities and with the work previously performed by the bargaining unit position of Assistant Chief Operator without prior notice to or bargaining with the Charging Party.

At that time the assistant chief operator was Gary King. Although the only evidence concerning the allegation of paragraph 12(c) of the complaint is the stipulation, it is clear that the Respondent made Gary King's job as assistant chief operator a supervisory position where before it had been included in the bargaining unit. Presumptively then, and undeniably, following 23 September, King was a supervisor but continued to perform some of the work (if not all the work) that he had performed while a member of the bargaining unit. It is therefore clear that as a result of the Respondent's unilateral action, from and after 23 September the bargaining unit suffered a loss of work.

The "loss of work is a change in the terms and conditions of employment which under Sec. 8(d) of the Act, the employer is obligated to bargain over with the union. Respondent's failure here to bargain over that change thus violates Sec. 8(a)(5)." *Lutheran Homes, Inc.*, 264 NLRB 525 at fn. 2 (1982). Although the Respondent contends that to be a mandatory subject of bargaining such a loss of unit work would have to be "substantial," there is no evidence to rebut the reasonable presumption that in a small bargaining unit such as here, the loss of one job would not be substantial.

Although the record is sparse on this issue, I do conclude that the Respondent's decision to make the assistant chief operator a supervisor had the result of reducing the amount of work available to bargaining unit employees by one job. Such therefore was the type of decision over which the Respondent had a mandatory obligation to bargain. By unilaterally creating the job of assistant chief operator as a supervisory position, the Respondent violated Section 8(a)(5) of the Act and an appropriate remedy will be recommended.

About this time, the chief operator resigned and on 23 September King was promoted to that job. This is alleged in paragraph 12(d) to have been a unilateral act on the part of the Respondent violative of Section 8(a)(5), again under the rationale of *Lutheran Homes*, supra. The parties stipulated:

> Number four, on or about September 23, 1985, Gary King was promoted from the bargaining unit position of Assistant Chief Operator to the supervisory position of Chief Operator. Following said promotion, King continued to perform his former duties and [sic] in addition the supervisory duties of Chief Operator. This took place without notification to or bargaining with the Union.

It appears the General Counsel has alleged both (a) the assistant chief operator was removed from the bargaining unit and (b) when King was promoted he continued to do the work of assistant chief operator, which had been bargaining unit work. Thus, it appears that the very same work was lost to the bargaining unit twice on the same day.

The two stipulations appear simply to be two ways of stating the same violative conduct engaged in by the Respondent. King, the assistant chief operator, who had been a bargaining unit employee, was taken out of the bargaining unit along with the work he was performing. Even if, as may be the case, on King's promotion Tom Bader was made assistant chief operator, there is still only one violation of the Act. The bargaining unit lost the work of the assistant chief operator. The chief operator was always a supervisor. Though it is possible there was additional loss of work to the bargaining unit, this record does not reflect it.

I conclude that the Respondent did, in fact, violate Section 8(a)(5) of the Act by unilaterally creating a supervisory position and including in the duties of that position work that had previously been done by the bargaining unit.[7]

4. The request for information

It is alleged that by letter of 11 November, referred to above, the Charging Party made a request for information relevant to the performance of its duties as the certified representative of the bargaining unit employees, and that the Respondent's refusal to furnish such information was violative of Section 8(a)(5). The parties stipulated to the general facts involved in this matter. The Respondent, however, takes the position that inasmuch as the Charging Party received this information during the course of this proceeding, specifically in the form of a copy of counsel's position statement to the Board, its obligations under Section 8(a)(5) have been met.

There can be little doubt of the Respondent's general obligation under the Act to furnish the Union information it requests that is relevant to performance of its obligations as the employees' bargaining representative. *NLRB v. Acme Industrial Co.*, 385 U.S. 432 (1967), and *NLRB v. Truitt Mfg. Co.*, 351 U.S. 149 (1956).

The Respondent does not argue this proposition nor does the Respondent contend that the information requested by the Charging Party was not in fact relevant, except as to that relating to closure of the production department. The Respondent contends that it ultimately furnished the information by giving a position statement to the Board, which later made its way to the Union.

The Board has long held that the mere fact that the Union may have obtained the information subsequent to its request does not militate against a finding that the employer violated the Act in not being forthcoming when the information was requested. E.g., *K & K Transportation Corp.*, 254 NLRB 722 (1981). In addition, here the Respondent never in fact furnished the information to the Union. It maintains that the Union came on the information through other sources. Such is clearly not responsive to the Employer's obligations under the Act.

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[7] It is alleged in par. 12(b) that the Respondent unilaterally subcontracted bargaining unit work, which paragraph of the complaint was withdrawn. Similarly, it was alleged in par. 12(d) that on 8 November the Respondent unilaterally changed bargaining unit positions from full time to part time thereby reducing bargaining unit work. Neither the General Counsel nor the Charging Party offered any evidence to support this allegation. Accordingly, it will be recommended that pars. 12(b) and (d) be dismissed.

I therefore conclude that by failing to furnish the information outlined in paragraph 12(f) of the complaint in a timely fashion, the Respondent violated Section 8(a)(5) of the Act. An appropriate remedy will be recommended.

5. Refusal to reinstate JoAnn Thompson

As outlined above, JoAnn Thompson was the principal organizer of the union activity and appeared as a witness on behalf of the Union at the representation hearing on 6 June. When the work of the film editing department, of which she was a member, substantially dissipated, she was transferred to the traffic department in July, under the supervision of Kim Petrykowski.

Thompson testified credibly and without contradiction that she talked to Company President A. J. Johnson who told her that she could have a 90-day leave of absence without pay and to communicate this to the office manager, Garnet Bowden (stipulated to be a supervisor). Thompson wrote a memo to this effect and on 6 September left work to have her baby. When she applied for reinstatement in November she was denied. Douglas Johnson took the position, as he set forth in his letter, that she was an incompetent employee in the traffic department and that even if she could do the work, the Respondent intended to computerize that job and thus there would be no work for her.[8]

The evidence of Thompson's alleged incompetence is the testimony of Kim Petrykowski to the effect that during the month that Thompson worked in the traffic department she made more errors than other employees. Petrykowski, however, did testify that errors were made routinely.

As best I can determine, employees in the traffic department write instructions, on a "facility" sheet, to the engineering department as to when to put certain commercials on the air. The Respondent's principal, if not sole, source of income is from the airing of commercials, and if a commercial does not for some reason, the Respondent does not get paid. Commercials that do not make it on the air are considered to have been "preempted." Thus, when a commercial has not been broadcast, a preemption sheet is attached to the commercial contract and where known, the reason for the preemption is stated. The preemption can be the result of an error in the traffic department (which the Respondent contends was the case regarding the preemptions for which Thompson was allegedly responsible) or because the commercial time was used for some other reason such as a speech by the President.

In any event, at the end of each month, the traffic department is furnished all the preemption sheets and for 1 or 2 days Petrykowski will go over these in the presence of all the traffic department employees while they are doing their regular duties, and critique them. Petrykowski calls out to various employees their errors. According to Petrykowski, Thompson was not the only employee who committed errors. Indeed, the Respondent brought forth approximately nine boxes of materials representing contracts for about 6 months before and 6 months after the events in this matter, which contained many preemption sheets. No attempt was made to analyze all the preemptions on all of these contracts, but suffice it that there were many preemptions of commercial spots.

During Thompson's leave, Respondent put in her file 18 preemption sheets, which totaled $3630 of lost revenue. Douglas Johnson testified these preemption sheets cover the month Thompson was employed in the traffic department. Johnson testified that the station's revenue is approximately $700,000 per month.

Of 18 preemption sheets in Thompson's file only 12 have her name. These 12 total revenue losses of $2060. The other six preemption sheets, showing revenue losses of $1570, do not contain any reference to Thompson, nor is there any indication from the testimony of Johnson or Petrykowski as to why these particular sheets were in Thompson's file. It appears, and I believe, that the Respondent placed in Thompson's personnel file all the preemption sheets for the month of July, regardless of whether the Respondent knew or had reason to believe that Thompson was responsible for the fact that the commercial did not run. Further, from Johnson's testimony it is unclear whether the preemption forms really establish revenue-losing mistakes, or if so, who, if anyone, was responsible.

The preemption sheets in Thompson's file simply do not prove, as contended by the Respondent, that she was a poor employee.

Thompson was known by management personnel, including Kim Petrykowski and Douglas Johnson, as an activist on behalf of the Union. The Respondent harbored animus against the Union, as demonstrated by its interrogation of Scott as well as its refusal to bargain with the Union subsequent to the 30 August certification. And Thompson was treated differently from all other employees who took pregnancy leave (the parties stipulated that every other employee who had asked for a leave of absence for pregnancy was in fact reinstated on application). From these facts I conclude that the General Counsel made out a prima facie case of discrimination against JoAnn Thompson.

The burden therefore shifted to the Respondent to demonstrate that it would have refused to rehire Thompson even absent her having engaged in union activity. *Wright Line*, 251 NLRB 1083 (1980). I conclude that the Respondent failed to meet its burden. Indeed, I conclude that the Respondent's contention that Thompson was an incompetent employee was a pure fabrication. The alleged evidence of incompetence was not only unpersuasive but is not credible. The testimony of Petrykowski suggests that Thompson committed no more errors than other employees in the traffic department, if she in fact committed any errors. It is impossible to tell from the preemption forms whether in fact the spots did not run as a result of an error or for some other reason. In any event, it is clear that in the regular course of business commercial spots are preempted. Johnson testified that the amount of revenue loss averages in the range of $3000 a month, or about the amount totaled on the preemption sheets that were attached to Thompson's file. The point is, preemption is common and is not in and of itself an employment error. There is no persuasive evidence that Thompson committed any more employment errors than others and absent such, I find that Petrykowski's testimony and her self-serving memo to Johnson incredible.

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[8] At the time, the Respondent intended to computerize the work Thompson and others had done in the traffic department but was unable to do so. Since at least mid-November the work has been performed as it was prior to Thompson's leaving in September.

I believe that the Respondent refused to rehire the principal known activist on behalf of the Union following her pregnancy leave because of her union activity and because the employees had voted to select the Union as their bargaining representative. Accordingly, I conclude that by failing to reinstate JoAnn Thompson on her request, effective 4 November, the Respondent violated Section 8(a)(3) of the Act, and I shall recommend an appropriate remedy.

III. THE EFFECT OF THE UNFAIR LABOR PRACTICES ON COMMERCE

The unfair labor practices found above, occurring in connection with the Respondent's business, have a close, intimate, and substantial relationship to trade, traffic, and commerce among the several States, and tend to lead to labor disputes burdening and obstructing commerce and the free flow of commerce within the meaning of Section 2(6) and (7) of the Act.

THE REMEDY

Having concluded that the Respondent has engaged in certain unfair labor practices, I shall recommend that it cease and desist therefrom and take certain affirmative action designed to effectuate the policies of the Act, including offering immediate and full reinstatement to Carl Scott, Robert Schade, Joseph Dzenowagis, and JoAnn Thompson to their former jobs or, if those jobs no longer exist, to substantially equivalent positions of employment without loss of seniority, wages, or other rights and benefits and make them whole for any losses they may have suffered in accordance with the provisions of *F. W. Woolworth Co.*, 90 NLRB 289 (1950), with interest as provided for in *Florida Steel Corp.*, 231 NLRB 651 (1977). See generally *Isis Plumbing Co.*, 138 NLRB 716 (1962). Backpay for Scott and Schade is to commence 13 September, Dzenowagis 20 September, and Thompson 4 November.

[Recommended Order omitted from publication.]

E. I. DuPont de Nemours *and* Walter J. Slaughter. Case 4-CA-9821

June 30, 1988

SECOND SUPPLEMENTAL DECISION AND ORDER

By Chairman Stephens and Members Johansen, Babson, and Cracraft

I. PROCEDURAL HISTORY

On July 20, 1982, the National Labor Relations Board issued a Decision and Order in the above-entitled proceeding adopting the judge's finding that the Respondent violated Section 8(a)(1) of the National Labor Relations Act by discharging employee Walter J. Slaughter for refusing to submit to an investigatory interview without the presence of a fellow employee.[1] Thereafter, the Respondent filed a petition for review of the Board's Decision and Order, and the Board filed a cross-application for enforcement with the United States Court of Appeals for the Third Circuit. On December 29, 1983, a panel majority of the court enforced in full the Board's Order.[2] On February 1, 1984, the Respondent filed a motion for panel rehearing and rehearing en banc, and on February 17, 1984, the Board moved the court to vacate its decision and remand the matter to the Board for further consideration. Thereafter, on May 14, 1984, the Court granted panel rehearing, vacated its opinion at 724 F.2d 1061, and remanded the case to the Board for reconsideration.[3]

The Board thereafter invited the parties to file statements of position. The Board considered the record and the statement of position filed by each party, and on March 22, 1985, issued a Supplemental Decision and Order reversing the administrative law judge and finding that the Respondent did not violate Section 8(a)(1) of the Act by discharging Slaughter.[4] In reversing the administrative law judge, the Board relied on *Sears, Roebuck & Co.*, 274 NLRB 230 (1985), which held that the Act compels a finding that unrepresented employees are not entitled to the presence of a coemployee during an investigatory interview. Thereafter, the Charging Party filed a petition for review of the Board's Supplemental Decision and Order with the United States Court of Appeals for the Third Circuit. On June 27, 1986, the court remanded the case on the grounds that the Board erroneously assumed that the Act mandated its interpretation.[5] Consequently, the court directed the Board to consider whether it would be a permissible interpretation of the Act to conclude that unrepresented employees are not entitled to the presence of a coemployee during an investigatory interview.

On October 1, 1986, the Board notified the parties that it had accepted the remand from the court of appeals and invited the parties to submit statements of position regarding the remand issues. Thereafter, all parties filed statements of position.

II. THE CREDITED EVIDENCE

The record shows that on November 17, 1978,[6] Walter Slaughter, an employee who was on probation for extensive absenteeism, posted an NLRB notice to employees in the Respondent's canteen.[7] Thomas Farley, the Respondent's supervisor of operations and services, saw Slaughter post the notice and told him to take it down because it had not been approved for posting pursuant to company policy. Slaughter refused to remove the notice and left the canteen area to begin work for the day.

Throughout the course of the morning, Farley contacted Slaughter on several occasions to discuss the posting incident. On each occasion Slaughter stated that he would not discuss union business without a third party present. Slaughter solicited two employees who agreed to act as witnesses for him; however, Farley declined to meet in the presence of the coemployees. After lunch, Farley offered Slaughter another opportunity to meet with him and, at that time, advised Slaughter that his act of insubordination was jeopardizing his job. Slaughter continued to refuse to meet with Farley. Slaughter was then escorted off the property and subsequently discharged. The Respondent's work force is not represented by a collective-bargaining agent.

III. DISCUSSION

We agree with the judge that Slaughter was discharged solely for his refusal to meet with the Respondent to discuss the posting incident unless a coemployee was present to serve as a witness. Consequently, the only question before us is whether, in a nonunion setting, an employer violates Section 8(a)(1) by discharging an employee for refusing to submit to an interview without the presence of a fellow employee.

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[1] 262 NLRB 1028. In so finding, the Board relied on *Materials Research*, 262 NLRB 1010 (1982), in which the Board held that an employer violates Sec. 8(a)(1) by denying to an unrepresented employee the presence of a fellow employee during an investigatory interview.

[2] 724 F.2d 1061.

[3] 733 F.2d 296.

[4] 274 NLRB 1104.

[5] 794 F.2d 120.

[6] The judge inadvertently found that the incident occurred on November 15, 1978.

[7] The notice stated that a petition for election had been filed with the Board when, in reality, no petition had been filed.

289 NLRB No. 81

In *NLRB v. J. Weingarten*, 420 U.S. 251 (1975), the Supreme Court affirmed, as a permissible construction of the Act, the Board's finding that Section 7 embodies a statutory right for an employee to refuse to submit, without union representation, to an interview by employer representatives that he or she reasonably fears may result in discipline. It therefore upheld the Board's conclusion that an employer violates Section 8(a)(1) of the Act when it denies an employee that right by seeking to compel his or her attendance at such an interview without the presence of a requested union representative. The Court noted that in recognizing such a right the Board had departed from its earlier precedents; but the court expressed the view that the Board was free to reexamine past constructions of the Act, as it is in the nature of administrative decision-making to proceed through a gradual process, based on "cumulative experience" and "trial and error" in construing and applying the Act. *Weingarten*, supra, 420 U.S. at 265–266, quoting *NLRB v. Seven-Up Co.*, 344 U.S. 344, 349 (1953).

That process has continued since the decision in *Weingarten*. Thus, in *Materials Research Corp.*, 262 NLRB 1010 (1982), the Board extended what had come to be known as "the *Weingarten* right" to employees in nonunion settings. In *Sears, Roebuck & Co.*, 274 NLRB 230 (1985), the Board reexamined the question, overruled *Materials Research*, and held that the Act compelled the conclusion that the right could not be thus extended. 274 NLRB at 230 fn. 5. As noted above, under the terms of the court of appeals' remand in this case, we are revisiting the question again on the premise, which we adopt, that the holding in *Materials Research* represented a permissible construction of the Act, but not the only permissible construction.[8]

In undertaking the present reexamination, we are mindful of the Supreme Court's observation in *Weingarten* that our decisions in this area involve us in the difficult task of "reconciling conflicting interests of labor and management." Id. at 267. In *Weingarten*, the Court concluded that the Board had struck "a fair and reasoned balance" between those interests. Id. We in no way retreat from the balance struck there, but for the reasons stated below, we believe that in a workplace in which employees are not represented by a union, we are more assured of striking a "fair and reasoned balance" between the conflicting interests by not imposing the constraints on investigatory interviews that recognition of "the *Weingarten* right" entails. Therefore, while recognizing that the statute might be amenable to other interpretations, we decline to return to the rule of *Materials Research*, and we hold that an employee in a nonunionized workplace does not possess a right under Section 7 to insist on the presence of a fellow employee in an investigatory interview by the employer's representatives, even if the employee reasonably believes that the interview may lead to discipline.

As the Supreme Court's reference to the balancing of interests suggests, this is not an issue that can be resolved by resort to plain language. A literal reading of Section 7 might indeed suggest that it bestows on nonunion employees the right in question here, because an employee who insists on the presence of another employee when facing the employer in a matter that may lead to discipline thereby attempts to engage in concerted activities for "mutual aid or protection," insofar as there is an implicit promise that the employee enlisting support would offer his own support were the other facing such an interview. See *Weingarten*, supra, 420 U.S. at 261, citing *NLRB v. Peter Cailler Kohler Swiss Chocolates Co.*, 130 F.2d 503, 505–506 (2d Cir. 1942); *Slaughter v. NLRB*, 794 F.2d 120, 123 (3d Cir. 1986). But this is not necessarily the end of the analysis. For example, an employee who solicits his fellow employees in support of a union during working time is literally engaged in concerted activity for mutual aid or protection, but that does not establish that he enjoys a statutory right to engage in such activity without interference by the employer. Rather, the Board has balanced employers' interests in maintaining "discipline in their establishments" against employees' interests in engaging in the activities covered by the broad language of Section 7, and it has thereby arrived at an appropriate rule governing in-plant solicitations. *Republic Aviation Corp. v. NLRB*, 324 U.S. 793, 797–798 (1945).[9]

In determining the proper balance in the present case, we must first outline the contours of the *Weingarten* right as originally set out by the Board in *Quality Mfg. Co.*, 195 NLRB 197 (1972), and *Mobil Oil Corp.*, 196 NLRB 1052 (1972). This was the right as it was understood by the Supreme Court in *Weingarten*. The right arises only when the employee requests the presence of a union representative at the interview and when the employee reasonably believes that the interview may lead to discipline. *Weingarten*, supra, 420 U.S. at 257. Furthermore it does not foreclose the employer from deciding not to conduct the interview at all and simply taking disciplinary action without hearing the employee's explanations. Similarly, the employee may waive the right to the presence of the union representative at the interview. Finally, if the employer does go forward with the interview with the requested employee representative present, the employer has no obligation to bargain with that representative. Id. at 258–259.

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[8] In so concluding, we overrule the Board's finding in *Sears Roebuck*, supra, that the Act compels a finding that unrepresented employees are not entitled to the presence of a fellow employee during an investigatory interview.

[9] Member Cracraft does not rely on the analogy to no-solicitation rules.

A review of the reasons specified by the Court in *Weingarten* as supporting the balance struck by the Board between the competing interests in that case reveals several interests favoring recognition of the right that are either not present or are less compelling in the nonunion setting. First, the Court noted that a union representative present at an investigatory interview might be able to safeguard "not only the particular employee's interest, but also the interests of the entire bargaining unit by exercising vigilance to make certain that the employer does not initiate or continue a practice of imposing punishment unjustly." 420 U.S. at 260–261 .[10] The Court placed this assistance to employees in the larger context of the basic purpose of the Act to redress "the perceived imbalance of economic power between labor and management." Id. at 262.

The Court also saw the presence of a union representative as serving the interest of the employer as well. Thus, it observed that a "knowledgeable union representative could assist the employer by eliciting favorable facts" that an inarticulate employee might be too fearful or otherwise unable to mention, thereby "sav[ing] the employer production time by getting to the bottom of the incident occasioning the interview." Id. at 263. In this regard, the Court viewed the "presence of the union steward . . . as a factor conducive to the avoidance of formal grievances through the medium of discussion and persuasion conducted at the threshold of an impending grievance." Id. at 262 fn. 7, quoting *Caterpillar Tractor Co.*, 44 Lab. Arb. 647, 651 (1965). Finally, the Court noted that permitting union representation at an investigatory interview was "in full harmony with actual industrial practice," noting both the inclusion of provisions in many "important collective-bargaining agreements" that grant "employees rights of union representation at investigatory interviews" and the existence of "arbitral authority" recognizing such a right. Id. at 267.

Examining the foregoing considerations in a nonunion setting, we conclude that many of the useful objectives listed by the Court either are much less likely to be achieved or are irrelevant. Thus, in a nonunion setting there is no guarantee that the interests of the employees as a group would be safeguarded by the presence of a fellow employee at an investigatory interview. Unlike a union steward (or his or her proxy), a fellow employee in a nonunionized work force has no obligation to represent the interests of the entire bargaining unit.[11] Furthermore, an employee in a nonunion work force would be much less able than a union representative to "exercis[e] vigilance to make certain that the employer does not initiate or continue a practice of imposing punishment unjustly,"[12] as it is unlikely that such an employee would have the benefit of a framework similar to that typically established in a collective-bargaining agreement in which acts amounting to misconduct and means of dealing with them are defined. Nor would an employee in a nonunion setting be likely to have access to information as to how other employees had been dealt with in similar circumstances; whereas a union representative would typically be entitled to information from which it could be determined whether the employer was maintaining consistency and fairness in discipline.

Regarding the Court's conclusion that a "knowledgeable union representative could assist the employer by eliciting favorable facts, and save the employer production time by getting to the bottom of the incident occasioning the interview"[13]—

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[10] Although, as noted above, an employer has no bargaining obligation in a purely investigatory interview, the presence of a union representative might be very important were the employer to seek to compel the employee whose conduct is under investigation to submit to investigatory procedures that are inconsistent with established conditions of employment, e.g., use of a polygraph or other testing procedure prohibited or limited by the collective-bargaining agreement.

[11] The Board has, in the past, found that an employer violated Sec. 8(a)(1) by denying to a represented employee the presence of a fellow employee who was not a union representative at an investigatory interview. See *Chromalloy American Corp.*, 263 NLRB 244 (1982); *Illinois Bell Telephone Co.*, 251 NLRB 932 (1980), modified 674 F.2d 618 (7th Cir. 1982). In *Illinois Bell*, supra at 934, however, the Board specifically relied on the lack of availability of a designated union representative at the time of the interview; the union steward's instruction to the employee several days before the interview that if called into an investigatory interview she could select any union member as her union representative; management's failure to attempt to locate a steward or offer to delay the interview after telling the employee that it would talk to her with her union steward but no one else; and the lack of evidence that the parties had negotiated in their collective-bargaining agreement a provision that would waive an employee's right to request a representative other than a union representative. In *Chromalloy American Corp.*, the Board majority relied on similar circumstances in finding that an employer violated Sec. 8(a)(1) by denying an employee the presence of a fellow employee during an investigatory interview. We note that in these circumstances, as the fellow employee is substituting for an absent union representive, the employee representative still has the responsibility of protecting the interests of the entire bargaining unit.

In light of the Board's qualifying statements, we do not read *Illinois Bell* and its progeny to support the position that an employee in a nonunion work force has the right to the presence of a fellow employee during an investigatory interview.

[12] *Weingarten*, 420 U.S. at 260–261.

[13] *Weingarten*, 420 U.S. at 263.

while such assistance might be rendered on some occasions by fellow employees, there is a smaller likelihood that this will be so. As former Member Hunter pointed out in his partial dissent in *Materials Research Corp.*, supra, 262 NLRB at 1021:

> [T]he employer in the nonunion situation is likely to find itself confronted by a "representative" who has few or even an absence of the skills or responsibilities that one would expect from a union steward. It must therefore deal with a person who has no experience in dealing with these situations and who, out of probable friendship for the interviewee, may be involved emotionally in the interview.

See also *Slaughter v. NLRB*, 794 F.2d 120, 124 fn. 3 (3d Cir. 1986). In short, a union steward—who, in addition to being familiar with the applicable collective-bargaining agreement and the underlying law of the shop, may also have been specially trained by his or her union in assisting employees at an investigatory interview and in helping to defuse potentially disruptive encounters—might well be able to help elicit facts and save "production time" as a result. It is unlikely that an employee in a nonunion setting would possess similar skills, and thus unlikely that his presence would save "production time."[14]

It is of course obvious that the value of representation at an investigatory interview as a means of heading off formal grievances has virtually no application in the nonunion setting. Even though an employer has no bargaining obligation at such interviews, a union steward might propose solutions that would avoid further conflict over the matter in question and his early involvement in the situation might enable him to discourage the employee from filing a frivolous grievance. In the nonunion workplace there typically is no enforceable grievance procedure through which the employee could seek further recourse and thus no question arises of discouraging the filing of grievances, frivolous or otherwise.

Finally, although most of the discussion in *Weingarten* and its progeny focuses on the benefits of representation when an employer actually goes forward with an investigatory interview (and the employee has decided not to waive the *Weingarten* right), it is well to consider also the consequences of an employer's decision *not* to conduct such an interview. If an employer with union-represented employees decides to forego an interview rather than conduct it with an employee representative present, the employee whose conduct was to be investigated will lose the chance to tell his or her side of the story at that interview; but if discipline ensues, he can (assuming relevant time limitations are met) have his defense presented thereafter in whatever framework for resolving grievances has been established within the collective-bargaining relationship. There is no such assurance for the employee in the nonunion setting. To the extent that recognition of a nonunion *Weingarten* right induces employees to insist on a condition that may in turn induce employers simply to cancel investigatory interviews (unless the employee waives his *Weingarten* right), there is a serious question whether extending the right to nonunion employees may not work as much to their disavantage as to their advantage.

In short, there is no denying that an employee in a workplace without union representation might welcome the support of a fellow employee at an interview he or she fears will lead to discipline and no denying that, in some circumstances, the presence of such a person might aid the employee or both the employee and the employer. But, for the reasons already stated, the interests in assuring such representation under Section 7 are less numerous and less weighty than the interests apparent in the union setting. Taking into account the more questionable value of such a right in the nonunion setting, we find that the interests of both labor and management are better served by declining to extend this right into that forum. In so holding, we also take into account the nonunion employers' interests in conducting investigations in accordance with their own established practices and procedures and in maintaining efficiency of operation.[15]

We believe this conclusion to be fully consistent with the Supreme Court's decision in *Weingarten*. It is not only that, as shown, the separate factors on which the Court rested its decision translate poorly into a case involving a nonunion workplace. It is that the terms of the Court's discourse throughout, and the framework in which it analyzed the relevant interests, presuppose union representation.[16] Thus, while nothing in *Weingarten*

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[14] As the administrative law judge in *Materials Research* noted concerning employee Hockman's request for the presence of a fellow employee at his interview with his department supervisor, not only was it unlikely that such an employee would be an "experienced representative who [could] save production time"; "his own time on the [plant] floor would be lost." 262 NLRB at 1026.

[15] Our finding that an employee in the nonunion setting does not enjoy the right to insist on the presence of a fellow employee at an investigatory interview should not be read as implying that an employee enjoys no protected right simply to *ask* for the presence of a fellow employee at such an interview. The mere act of making such a request in no way impairs the employer interests involved here and thus we would not need to strike the balance as we have done on the facts presented in this case.

[16] In Chairman Stephens' view, this is not surprising. Although the right at issue was clearly identified as a Sec. 7 right protected through the prohibitions of Sec. 8(a)(1), its historical roots were in the values pro-

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inexorably precludes us from extending the right, we are confident that in carrying out our responsibility here—defined by the Court as achieving a "fair and reasoned" balance between the conflicting interests of labor and management—we best effectuate the purposes of the Act by limiting the right of representation in investigatory interviews to employees in unionized workplaces who request the presence of a union representative. Cf. *Meyers Industries*, 281 NLRB 882, 883 (1986), affd. sub nom. *Prill v. NLRB*, 835 F.2d 1481 (D.C. Cir. 1987). Accordingly, we reaffirm our prior dismissal of the complaint.

ORDER

The complaint is dismissed.

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tected by Sec. 8(a)(5). See *Materials Research*, supra, 262 NLRB at 1017–1018 (former Chairman Van de Water, concurring and dissenting). In Chairman Stephens' view, the reasoning of both the Board and the Court in *Weingarten* in part echoed the rationale of the 8(a)(5) precedents.

Local 32B-32J, Service Employees International Union, AFL-CIO *and* Edwin Rodriquez. Case 2-CB-11879

June 30, 1988

DECISION AND ORDER

BY CHAIRMAN STEPHENS AND MEMBERS JOHANSEN AND CRACRAFT

On December 15, 1987, Administrative Law Judge Joel P. Biblowitz issued the attached decision. The Respondent filed exceptions and a supporting brief, and the General Counsel filed cross-exceptions and a reply brief.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings, and conclusions as modified and to adopt the recommended Order.

In agreeing with the judge's finding that the Respondent violated Section 8(b)(1)(A) and (2) of the Act by failing to give Rodriquez proper and adequate notice of his dues delinquency and by causing Brown, Harris, Stevens, Inc. to discharge him, we rely on the judge's finding that the Respondent did not correctly notify Rodriquez of the amount of his dues arrearage. Thus, the Respondent's notice, which incorrectly stated the number of months for which Rodriquez owed back dues did not meet the Respondent's "minimum obligation [of] giving . . . a statement of the precise amount and months for which dues were owed." *Teamsters Local 122 (August A. Busch)*, 203 NLRB 1041, 1042 (1973).

We also note that the Respondent's calculation of total dues owed is questionable even apart from the 1-month discrepancy. It appears that the Respondent operated under a presumption that Rodriquez had authorized a dues checkoff as evidenced by the fact that the dues reports that the Respondent sent the Employer each month listing the employees on whose behalf the Employer should submit dues included Rodriquez. Furthermore, the Employer's copies of these reports offered into evidence contained handwritten figures that Otto Helprin, assistant vice president for J. Clarence Davies Realty Co., Inc.,[1] testified represented the amount of the check submitted to the Respondent for dues. While no canceled checks were offered substantiating the amount tendered by the Employer to the Respondent, the handwritten figures on the dues reports suggest that the amount tendered to the Respondent covered Rodriquez' dues. With regard to some months, this was further substantiated by Rodriquez' paystubs indicating that deductions for union dues (UN) had been made. Despite the Respondent's continuing submission of dues reports that included Rodriquez among those for whom two successive employers were responsible for forwarding dues, and despite the absence of any evidence that the Respondent ever accused the employers of improperly withholding checked-off dues, the Respondent's accounting of the total dues owed by Rodriquez generally continued to increase each month.[2]

The timing of the Respondent's actions also indicate less than careful attention to its dues-collection processes. Rodriquez was notified by letter July 7, 1986, that he was delinquent in the payment of his dues for an 11-month period. This letter further stated that if Rodriquez did not reinstate himself in good standing with the Respondent within 15 days from the date of the letter, the Respondent would ask for his discharge from employment. But no further action was taken until 4 months later when the Respondent notified Brown, Harris, Stevens, Inc., that it was requesting that Rodriquez be terminated for his lack of good standing as a result of his nonpayment of dues and a reinstatement fee. Moreover, although Rodriquez made a $115 payment to the Respondent in response to the Respondent's July 7, 1986 letter, the Respondent apparently never recalculated Rodriquez' dues delinquency in light of this payment and never notified Rodriquez in any fashion of the amount still owed.

There is no evidence that Rodriquez was deliberately evading his union-security obligations or attempting to be a "free rider."[3] We do not minimize the significance of dues delinquencies such as those with which Rodriquez was charged; and we recognize the right of unions to cause the discharge of employees who fail to comply with their obligations under lawful union-security clauses. But causing an employee to be fired is a serious act, and a union that seeks to do so should accept its responsibility for maintaining clear and accurate records of the employee's dues-payment status and giving clear notice of the precise amount owed. The evi-

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[1] J. Clarence Davies Realty Co., Inc. was the managing agent for the building in which Rodriquez worked from mid- to late-1984 to about July 1, 1986.

[2] We are aware of the judge's discrediting of Rodriquez' testimony that he had executed a checkoff authorization, and we do not disturb that credibility finding. Our point concerns the conflicts in the Respondent's own records that, at the very least, suggest that the Respondent should have inquired of the employers why checks for dues payments did not cover Rodriquez, if in fact they did not.

[3] See *Teamsters Local 630 (Ralph's Grocery)*, 209 NLRB 117 (1974).

289 NLRB No. 83

dence here shows that the Respondent fell short of that responsibility.

Therefore, we find that the Respondent violated Section 8(b)(1)(A) and (2) by failing to give Rodriquez proper and adequate notice of his dues delinquency and by causing Brown, Harris, Stevens, Inc., to discharge him.

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge and orders that the Respondent, Local 32B-32J, Service Employees International Union, AFL-CIO, New York, New York, its officers, agents, and representatives, shall take the action set forth in the Order.

Gwynne A. Wilcox, Esq., for the General Counsel.
Ira A. Sturm, Esq. (Manning, Raab, Dealey & Sturm), for the Respondent.

DECISION

Statement of the Case

Joel P. Biblowitz, Administrative Law Judge. This case was heard by me on 26 October 1987[1] in New York, New York. The complaint and notice of hearing, which issued on 30 June and was based on an unfair labor practice charge and an amended charge filed on 3 March and 16 March by Edwin Rodriguez, alleges that Local 32B-32J, Service Employees International Union, AFL-CIO (Respondent) violated Section 8(b)(1)(A) and (2) of the Act by requesting and causing the discharge of Rodriguez, notwithstanding that its request of Rodriguez for the payment of back dues owed was flawed.

On the entire record, including my observation of the witnesses and the briefs received, I make the following

Findings of Fact

I. JURISDICTION

There being no dispute, I find that Brown, Harris, Stevens, Inc., is engaged in the business of managing residential apartment buildings and is an employer within the meaning of Section 2(2), (6), and (7) of the Act, and that Respondent is a labor organization within the meaning of Section 2(5) of the Act.

II. FACTS AND ANALYSIS

Rodriguez was employed at a condominium apartment building (the building) located at 55 East 86th Street in the City and State of New York for about 6 years until about 1 March. While there, he was employed as a porter, acting superintendent, and handyman. Respondent is the collective-bargaining representative of the employees in these job classifications at the building, which is covered by a multiemployer collective-bargaining agreement containing a union-security clause requiring membership in Respondent after the 30th day of employment as a condition of employment. The contract also states, inter alia:

> 5. Upon receipt by the Employer of a letter from the Union's Secretary-Treasurer requesting any employee's discharge because he has not met the requirements of this Article, unless the Employer questions the propriety of so doing, he shall be discharged within fifteen (15) days of said notice if prior thereto he does not take proper steps to meet said requirements.

When Rodriguez was first employed at the building, the managing agent (his employer) was Solomon Equities, Inc. (Solomon); about mid- to late-1984 J. Clarence Davies Realty Co., Inc. (Davies), became the managing agent for the building. About 1 July 1986 Brown, Harris & Stevens, Inc. (Brown Harris), became the managing agent for the building and has been the managing agent at all times relevant here. Rodriguez testified that while he was employed by Solomon he had to go to Respondent's office to pay his dues; when Davies and Brown Harris were managing agents for the building he executed dues checkoff authorizations and his dues were automatically deducted from his wages and sent to the Respondent.[2]

By letter dated 7 July 1986, Respondent wrote to Rodriguez:

> Dear Sir:
>
> Our records show that you are delinquent in your dues for the period July 1985 thru June 1986.
>
> Please be advised that, in accordance with Local 32B-32J's Constitution and Bylaws, your monthly dues are one and one-half (1-1/2) times your regular hourly wage rate, PLUS THREE DOLLARS $3.00, WITH A MINIMUM OF $14.00 PER MONTH AND A MAXIMUM OF $19.74 per MONTH.
>
> Local 32B-32J's Constitution and Bylaws further provides:
>
> > "Members who fall in arrears three months in dues or other financial obligations are automatically suspended as members of the Local."
>
> Therefore you are hereby advised that you have been suspended as a member of Local 32B-32J and that in the event of your failure to reinstate yourself in good standing in the Union within 15 days from the date of this letter, the Union will, in acorodance with the terms of the collective bargaining agreement with your employer, demand your discharge from your employment.
>
> Reinstatement requires the payment of a reinstatement fee of $34.48, which is the equivalent of two (2) times your regular monthly dues of $17.24 per month, as established by Local 32B-32J's Joint

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[1] Unless indicated otherwise, all dates referred to are for the year 1987.

[2] Otto Helprin, an assistant vice president for Davies, testified that Davies does check off dues and transmit the dues to Respondent. He did not testify whether Rodriguez executed a dues-checkoff authorization.

> Executive Board on July 31, 1980 pursuant to the provisions of Article XI, Section 4 of the Union's Constitution and Bylaws, plus all dues in arrears as described above and the current month's dues.
>
> In order to make payment, please appear at the Dues Department of Local 32B-32J, 1 East 35th Street, New York, N.Y.

Rodriguez testified that he never received this letter through the mail; rather, while he was at work his delegate, John Donnelly, gave him a letter and told him that he owed dues to Respondent and he should straighten it out before he got into trouble. He could recollect nothing else about the letter Donnelly gave him other than the fact that it was dated July 1986. He then went to Respondent's office (where he had previously gone to pay his dues while employed by Solomon); he gave the clerk $115 in cash and was told that he still owed approximately $185 for a fine: ". . . when you're late on the union dues, they give you a fine." There are some differences in Rodriguez' testimony regarding what the clerk told him after he paid the $115. On direct examination he testified that she said: "She'll take care of those fines for me, and then I went back to work." On cross-examination he testified that the clerk told him: "I'll see what I can do for you," and "she would take care of it." Rodriguez gave two affidavits to the Board in this matter. The earlier one states: "The cashier told me that the union would try to work something to cancel the fine, which totalled the majority of the difference between the $300 and the $115." The second affidavit states that the cashier said that she would see what she could do about canceling the fine. As to both, Rodriguez testified that what the cashier told him was "something like that."

By letter dated 11 November 1986, Respondent wrote to Brown Harris regarding Rodriguez:

> Please be advised that the above mentioned employee is no longer a member of Local 32B-32J in good standing due to the non-payment OF DUES AND REINSTATEMENT FEE.
>
> Therefore, in accordance with our agreement, we are requesting that he (she) be terminated immediately and replaced by another person whose employment will be in compliance with the agreement between the parties.

Sometime in December 1986 a resident of the building told Rodriguez that she heard that he was having trouble with his dues and that he should take care of it. At that time he went to Respondent's office and spoke to Feliciano, a delegate, because Donnelly was not available. Feliciano told him that he owed $300 and Rodriguez said that was impossible. Feliciano then called Lars Johansen, Brown Harris' district manager, but was told that he was on vacation and would not be returning until mid-January. Rodriguez asked if he could speak to someone higher at Respondent, and he spoke to Sampson, Respondent's district head in the area. Rodriguez told Sampson that there was a mistake—"I don't owe—that kind of money to the union. No way." Sampson said that, "you owe union dues," and that Brown Harris did not want him back at the building and so there was nothing he could do for him. Rodriguez then went to the Brown Harris office to attempt to straighten out the situation (before Johansen returned) but he was told that Johansen was the only person who could take care of the matter.

On 20 January, Rodriguez went to Johansen's office, pursuant to his request. At that time, Johansen gave him the following letter, dated 20 January:

> Dear Mr. Rodriguez:
>
> Please be advised that we have been instructed by the Union, Local 32B/J, to terminate your employment as Handyman, at 55 East 86th Street Condominum, for failure to pay your union dues.
>
> Furthermore, in evaluating your job performance and your mechanical skills and knowledge, we have found them to be far less than satisfactory.
>
> Finally, it has come to our attention, that on a couple of occasions, you have been seen leaving the building before the end of your shift.
>
> The termination will be effective March 1, 1987.

Rodriguez told Johansen that he thought he had done a great job at the building; he had been acting superintendent, at one time, and once received a $300 Christmas bonus. Johansen told him that he is a nice guy, but is not a qualified handyman. Rodriguez asked him to use him as a doorman or a porter at the building. Johansen said that they had enough porters at the building and "I don't think I can have you in that building," but that he would attempt to get him a job at another building if he desired. Rodriguez said that he did not want to work at another building. Rodriguez' last day of employment at the building was 1 March; on 28 April, at his request, Brown Harris gave him the following letter, signed by Johansen:

> To Whom It May Concern:
>
> Please be advised that Mr. Eddie Rodriguez, was employed as Handyman, at 55 East 86th Street, New York, for seven years.
>
> The reason for his departure was a personality conflict with another employee. His last day of work was March 1, 1987.

Sometime after 1 March, Rodriguez went to Respondent's office and spoke to Sampson and told him that he wanted his job back. Sampson called Johansen and asked him to put Rodriguez back to work at the building. After his conversation with Johansen, Sampson told Rodriguez that Johansen would not rehire him at the building because he felt that he was not a good handyman, but that he was willing to give him a job at a different building. Rodriguez refused this offer. By letter dated 13 July, Respondent wrote to Johansen stating that it "has no objection to the employment of Edwin Rodriguez and requests that Rodriguez be reinstated." By letter dated 15 July, Johansen wrote to Respondent that he is "pleased to hear" that the Respondent has withdrawn its complaint against Rodriguez and has no objection to his being employed again, but: "Presently we do not have any openings for Mr. Rodriguez, but will contact him the moment a suitable position becomes available."

As regards the contents of the 20 January and 28 April letters, and Rodriguez' 20 January conversation with Johansen, Rodriguez testified that he was never informed of any complaints aobut his work, nor did he ever receive a warning or suspension while employed at the building. He does not recall the superintendent talking to him about not being on the job when he was supposed to be there—"I'm always on my job." He testified that he does not know of any situation when the superintendent was looking for him and could not find him, and that he had no problems with the superintendent or his fellow employees. There were occasions when the superintendent asked him to do something a second time because he was not satisfied with the way it was done initially. When Johansen gave him the 20 January letter, he never questioned Johansen about the letter's references to his less than satisfactory mechanical skills and his occasional absence from the building.

Rodriguez testified that during the period of his employment at the building while Davies and Brown Harris were managing agents his dues were deducted from his pay and transmitted to the Respondent; "it was Solomon that was the one that I might have goofed up a little bit." He testified that he could not recall for how long a period he was delinquent while employed by Solomon, but "it couldn't be over a year."

Received into evidence were monthly dues reports for the building's employees for the period August 1985 through June 1986. These reports are prepared by Respondent (based on information supplied by the employer) to show what each employee owed, transmitted to the employer (in this case Davies), who then (supposedly) sent a check to Respondent covering the amounts (or at least, the current amounts) owed by the employees. The General Counsel introduced these documents through Helprin, who was not very familiar with them, and presented no supporting documents, like the canceled checks, for each of the months. These reports show the following for Rodriguez:[3]

Date	*Arrears*	*Reinstatement Fee Due*	*Current Month Dues*	*Total Dues*
8/85	$ 99.68	$27.48	$15.49	$142.65
9/85	115.17	27.48	15.49	158.14
10/85	130.66	27.48	15.49	173.63
11/85	130.66	30.98	15.49	177.13
12/85	130.66	30.98	15.49	177.13
1/86	149.65	11.39	15.49	177.13
3/86	177.13	30.98	15.49	223.60
4/86	161.64	31.48	15.74	208.86
6/86	178.13	32.48	16.24	226.85

Similar statements for Brown Harris for the months August 1986 through January were received. They state the following:

Date	*Arrears*	*Reinstatement Fee Due*	*Current Month Dues*	*Total Dues*
8/86	$179.63	$30.98	$17.24	$227.85
9/86	196.87	30.98	17.24	245.09
10/86	- 0 -	30.98	17.24	262.33
11/86	231.35	30.98	17.24	279.57
12/86	248.59	30.98	17.24	296.81
1/87	265.83	30.98	17.24	314.05

Another document received into evidence was Rodriguez' employee ledger card (from Davies), which states that in April and May 1986, $15.74 was deducted from his pay and in June 1986 $16.24 was deducted from his pay for "UN." It also states that for "year to date" (the end of June), $77.45 had been deducted from his pay for "Union." In addition, Rodriguez was able to locate some of his past pay stubs; the ones that show dues deduction are as follows:

Week Ending	*Amount Deducted*[4]
11/13/85	$15.49
12/18/85	15.49
2/17/86	15.49
3/3/86	15.49
3/17/86	15.49
4/21/86	15.74
5/12/86	15.74
6/23/86	16.24
11/3/86	17.24
2/2/87	17.24
3/2/87	17.24

A computer printout of Respondent, dated 10 April, that Respondent transmitted to the Board in its investigation of this matter, showing Rodriguez' union dues payments, and the months for which they were credited, shows the following:

Dues Credited To	*Amount*	*Date Paid*
1/85	$13.74	24 September 1985
2/85	13.74	5 November 1985
3/85	13.74	6 March 1986
4/85	13.99	6 March 1986
5/85	14.49	27 March 1986
6/85	14.49	6 May 1986
7/85	15.49	27 June 1986

No further payments are recorded.

The initial determination to be made here is the cause of Rodriguez' discharge on 1 March. The General Counsel alleges that Rodriguez was discharged because of Respondent's letter of 11 November 1986 to Brown Harris demanding his discharge for nonpayment of dues and reinstatement fee. Respondent, while admitting that it sent the 7 July 1986 letter to Rodriguez, and the 11 November 1986 letter to Brown Harris, defends that Rodriguez was fired for reasons unrelated to these letters. The difficulty with this argument is that no witnesses were produced to support it. The only support for this argument are the "furthermore" and "finally" paragraphs in the 20 January letter, the accompanying conversation with Johansen, the 28 April letter and the postdischarge conversation between Sampson and Johansen, which question his ability as a handyman and that "on a couple of occasions" he was seen leaving the building prior to the end of his shift. The 28 April letter refers solely to a "personality conflict with another employee." Although these alleged complaints might otherwise be valid causes for a discharge, there is no evidence, whatsoever, to support these allegations. Rodriguez testified that he had never been warned about the quality of his work and, in fact, had been acting superintendent of the building, and no evidence was adduced to contradict this testimony. The fact that Rodriguez' shortcomings were first mentioned 2 months after Respondent requested Brown Harris to fire him convinces me that this was an afterthought and was used as a pretext for the true reasons for the discharge—the Respondent's letter. I, therefore, find that the General Counsel has sustained her initial burden under *Wright Line*, 251 NLRB 1083 (1980), which I find controlling in 8(b)(2) cases as well as 8(a)(1) and (3) cases. *Soft Drink Employees (Chattanooga Coca Cola)*, 264 NLRB 24 (1982); *Laborers Local 282 (Austin Co.)*, 271 NLRB 878 (1984). I also find that Respondent has not sustained its burden of establishing that Rodriguez would have been discharged even absent its 11 November 1986 letter. In his 6 years of employment at the building he had never been criticized for his attendance, work, or relationship with his fellow employees. It was not until 2 months after this letter that Respondent first informed Rodriguez of these problems. As stated, supra, I find these alleged complaints were a pretext, and cannot support Respondent's burden.

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[3] Reports for the months of February and May 1986 were not included.

[4] A check of the figure on these paystubs establishes that these amounts were actually deducted from his pay. No proof was offered to establish that these amounts were actually transmitted to Respondent. Additionally, the conflict between these figures and the "year to date" deduction of $77.45 from his employee ledger card, supra, was never explained.

The ultimate question, therefore, is whether Respondent, in its 7 July 1986 letter to Rodriguez, and its 11 November 1986 letter to Brown Harris requesting Rodriguez' termination, complied with the Board's rules in this regard. In *Teamsters Local 13 (Mobile Concrete)*, 268 NLRB 930 (1984), and *Helmsley-Spear, Inc.*, 275 NLRB 262 (1985), the Board set forth a "minimum level of conduct" (*Mobile Concrete*, supra at 931) that unions must comply with when they notify a member of his dues delinquency. This includes reasonable notice of the delinquency, including a statement of the precise amount and month for which dues were owed, and explanation of the method used in computing such amount, the precise amount of any reinstatement fee that may be required and notice of the possible consequences of nonpayment. By its letter to Rodriguez of 7 July 1986, Respondent set forth how his monthly dues are arrived at, the provision of Respondent's constitution and bylaws regarding delinquency, notice of what Respondent's reinstatement fee is and what Rodriguez had to do to avoid Respondent notifying his employer of his delinquency: pay the reinstatement fee, "plus all dues in arrears as described above and the current month's dues." This letter therefore informed Rodriguez of the months for which he was allegedly delinquent, how the monthly dues are arrived at, and the amount of the reinstatement fee. Although the letter did not contain a total amount due to Respondent, this was not necessary as it could have been arrived at easily enough with the facts and figures provided. The letter also informed Rodriguez of the consequences of nonpayment. The only question is whether Respondent was correct in identifying July 1985 through June 1986 as the delinquent months; if it was not, Respondent has violated Section 8(b)(1)(A) and (2) of the Act.

A review of the testimony and exhibits leads to some answers and considerable confusion. The principal confusion arises from the fact that the uncontradicted testimony establishes that Davies and Brown Harris each checked off its employees' dues and transmitted it to Respondent. Yet the monthly dues reports from Respondent for Davies and Brown Harris show that Rodriguez' arrears and total dues owed increased a majority of the time during the period August 1985 through January. This may be explained by the fact that Rodriguez did not execute a dues-checkoff authorization, although he testified that he did so; however, no documentary evidence was adduced to support this. A further complication, but more readily explainable, is the fact that while certain exhibits establish that dues were deducted from Rodriguez' pay, other exhibits state that his dues were not paid for that same period. For example, his employee ledger card and his paystubs from Davies state that dues were deducted from his pay for the payroll periods ending 13 November and 18 December 1985, 17 February, 3 and 17 March, 21 April, 12 May, and 23 June 1986, while his paystubs from Brown Harris state that union dues were deducted from his pay for the payroll periods ending 3 November 1986, 2 February, and 2 March. Yet the computer printout of Respondent on Rodriquez' dues history states that the last payment received by Respondent for Rodriguez was on 27 June 1986 and was credited to July 1985 dues. This appears to explain the lack of correlation of dues paid and months credited; apparently, no matter when Respondent received the dues, they credited the amount received to the oldest delinquent month. It does not explain why this printout (prepared 10 April for the Board's use) shows no dues payments for Rodriguez after June 1986, when his paystubs from Brown Harris show three subsequent deductions, one of which was prior to Respondent's 11 November letter to Brown Harris requesting Rodriguez' termination. Also unexplained is why, of Respondent's reports transmitted to Davies and Brown Harris (the ones in evidence through January), a majority do not reflect the 11 occasions, supra, where Davies and Brown Harris' records establish that dues were deducted from Rodriguez' pay.

Two points are clear, however. Even according to Respondent's records, dues were paid for July 1985 (deducted by Davies on 23 June 1986 and received by Respondent on 27 June 1986) and that, at the minimum, Respondent's 7 July 1986 letter was therefore incorrect in including that month as delinquent. The brief of counsel for Respondent, while acknowledging this error, argues:

> Technically, it would appear, therefore, that Rodriguez' letter of delinquency had one month extra listed as arrears. However, by the time the letter was received by Rodriguez, he became obligated to pay the July 1986 dues, which were not paid; and, hence, although by calendar calculations the latter was off, in terms of the actual dollars owed, the letter was absolutely correct.

This argument is not persuasive. The cases cited, supra, state that one requirement of a proper delinquency notice is that it include "a statement of the precise amount and months for which dues were owed." Respondent's 7 July 1986 letter did not do so correctly and therefore its causation of Rodriguez' discharge violated Section 8(b)(1)(A) and (2) of the Act. Three additional deductions from his pay, made by Brown Harris, occurred substantially after the 7 July 1986 letter and too late to affect Respondent's 11 November letter to Brown Harris, so it will not be considered here.

Although I have found that Respondent violated the Act, I am constrained to say that I have little sympathy for Rodriguez. Unions cannot live by its members' fervor alone, rather their dues payments are more important in paying the salaries of officers who negotiate contracts and handle grievances on behalf of their members and the salaries of office employees, who service the members and keep track of their fringe benefits. Rodriguez was substantially delinquent in his dues payments and was therefore not carrying his share of this burden. Although he testified that he executed a dues-checkoff authorization, I do not credit this testimony as the General Counsel never introduced such an authorization into evidence and, if he had authorized Davies and Brown Harris to check off his dues, he would not have fallen so far behind in his dues payments. I find it more likely that he paid his dues at Respondent's office when he felt so inclined, which appears to have been rarely. Be that as it may, the Board law on the subject is clear, and as Respondent inadvertently included July 1985 as a delinquent month in its 7 July 1986 letter to Rodriguez, his subsequent discharge violated the Act.

CONCLUSIONS OF LAW

1. Brown, Harris, Stevens, Inc. is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

2. Respondent is a labor organization within the meaning of Section 2(5) of the Act.

3. By failing to give Rodriguez proper and adequate notice of his dues delinquency, and by causing Brown, Harris to discharge him, Respondent violated Section 8(b)(1)(A) and (2) of the Act.

REMEDY

Having found that Respondent violated Section 8(b)(1)(A) and (2) of the Act, I recommend that it be ordered to cease and desist from engaging in such activity. While normally I would recommend that Respondent be ordered to notify Brown, Harris that it has no objection to the reinstatement and employment of Rodriguez, Respondent has already done this in its 13 July letter. I also recommend that Respondent be ordered to make Rodriguez whole for any loss he suffered as a result of Respondent's actions. I leave for the backpay hearing determinations on the effect of Respondent's post 1 March actions on behalf of Rodriguez and his refusal to accept employment at another building. The amount of backpay shall be computed in the manner set forth in *F. W. Woolworth Co.*, 90 NLRB 289 (1950), with interest as provided in *New Horizons for the Retarded.*[5]

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[6]

ORDER

The Respondent Union, Local 32B-32J, Service Employees International Union, AFL-CIO, New York, New York, its officers, agents, and representatives, shall

1. Cease and desist from

(a) Causing or attempting to cause Brown, Harris, Stevens, Inc. to discriminate against any of its employees in violation of Section 8(a)(3) of the Act.

(b) In any like or related manner restraining or coercing employees in the exercise of rights guaranteed by Section 7 of the Act, except to the extent that such rights may be affected by an agreement requiring membership in a labor organization as a condition of employment, as authorized by Section 8(a)(3) of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Make whole Edwin Rodriguez for any loss of wages or other rights and benefits he may have suffered as the result of its discrimination against him, in the manner set forth in the remedy section of this decision.

(b) Remove from its records any reference to the unlawful discharge of Rodriguez and notify him in writing that this has been done and that evidence of his unlawful discharge shall not be used as a basis for future action against him.

(c) Post at its business office and meeting hall copies of the attached notice marked "Appendix."[7] Copies of the notice, on forms provided by the Regional Director for Region 2, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to members are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material.

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[5] 283 NLRB 1173 (1987). Interest will be computed at the "short-term Federal rate" for the underpayment of taxes as set out in the 1986 amendment to 26 U.S.C. § 6621.

[6] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

[7] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

(d) Deliver to the Regional Director for Region 2 signed copies of the notice in sufficient numbers to be posted by Brown, Harris, Stevens, Inc., in all places where notices to employees are customarily posted, if it is willing. Ask Brown Harris to remove any reference to Rodriguez' unlawful discharge from its files and notify Rodriguez that it has asked Brown Harris to do this.

(e) Notify the Regional Director in writing within 20 days from the date of this Order what steps the Respondent has taken to comply.

APPENDIX

NOTICE TO MEMBERS
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

WE WILL NOT cause or attempt to cause Brown, Harris, Stevens, Inc. to discriminate against Edwin Rodriguez or any other employee in violation of Section 8(a)(3) of the Act.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce employees in the exercise of the rights guaranteed to them by Section 7 of the Act, except to the extent that those rights may be abrogated by an agreement requiring membership in a labor organization as a condition of employment, as authorized by Section 8(a)(3) of the Act.

WE WILL make whole Edwin Rodriguez for any loss of wages or other rights and benefits he may have suffered by reason of our discrimination practiced against him, with interest, until he has been reinstated by Brown, Harris, Stevens, Inc., or obtains substantially equivalent employment elsewhere.

WE WILL remove from our files any reference to the discharge of Edwin Rodriguez and notify him in writing that this has been done and that evidence of this unlawful discharge will not be used as a basis for future action against him and WE WILL ask Brown, Harris, Stevens, Inc. to remove any reference to Rodriguez' unlawful discharge from its files and will notify Rodriguez that we have done so.

LOCAL 32B–32J, SERVICE EMPLOYEES
INTERNATIONAL UNION, AFL–CIO

Industrial Supply Co., Inc. ***and*** **Carol Stickney.** Case 18–CA–10072

June 30, 1988

DECISION AND ORDER

By Members Johansen, Babson, and Cracraft

On October 21, 1987, Administrative Law Judge Frederick C. Herzog issued the attached decision. The Respondent and the General Counsel filed exceptions and supporting briefs.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings,[1] and conclusions[2] and to adopt the recommended Order.[3]

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge and orders that the Respondent, Industrial Supply Co., Inc., Plymouth and St. Paul, Minnesota, its officers, agents, successors, and assigns, shall take the action set forth in the Order.

Robert E. Omberg, Esq. and *James L. Fox, Esq.*, for the General Counsel.

Douglas P. Seaton, Esq. (Popham, Haik, Schnobrich, Kaufman & Doty, Ltd.), of Minneapolis, Minnesota, for the Respondent.

289 NLRB No. 84

DECISION

Statement of the Case

Frederick C. Herzog, Administrative Law Judge. This case was heard before me in Minneapolis, Minnesota, on 13 and 14 August 1987 and is based on a charge filed by Carol G. Stickney (Stickney), an individual, about 14 May 1987 alleging generally that Industrial Supply Company, Inc. (Respondent) committed certain violations of Section 8(a)(3) and (1) of the National Labor Relations Act (the Act). About 24 June 1987 the Regional Director for Region 18 of the National Labor Relations Board (the Board) issued a complaint and notice of hearing alleging violations of Section 8(a)(3) and (1) of the Act. Respondent thereafter filed a timely answer to the allegations contained within the complaint.

All parties appeared at the hearing through counsel, and were given full opportunity to participate, to introduce relevant evidence, to examine and cross-examine witnesses, to argue orally, and to file briefs. Based on the record, my consideration of the briefs filed by counsel for the General Counsel and counsel for Respondent, and my observation of the demeanor of the witnesses, I make the following

Findings of Fact

I. BUSINESS OF RESPONDENT

The parties agree, and I find, that Respondent is a Minnesota corporation with its principal place of business in Plymouth, Minnesota, and a branch office in St. Paul, Minnesota; that Respondent has been engaged in the distribution of bearings and power transmission components; that during the past calendar year Respondent in the course and conduct of its business operations purchased and received at its Plymouth facility products, goods, and materials valued in excess of $50,000 directly from points outside the State of Minnesota; that during the past calendar year Respondent in the course and conduct of its business operations sold and shipped from its Plymouth facility products, goods, and materials valued in excess of $50,000 directly to customers outside the State of Minnesota; and that Respondent is now, and has been at all times material, an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

II. THE LABOR ORGANIZATION

The parties agree, and I find, that Warehousemen, Drivers and Helpers Union Local No. 359, affiliated with International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, AFL–CIO (the Union) is now, and has been at all times material, a labor organization within the meaning of Section 2(5) of the Act.

III. THE ALLEGED UNFAIR LABOR PRACTICES

A. *Contentions of the Parties*

Counsel for the General Counsel contends that Respondent retaliated against Stickney's refusal to withdraw a grievance filed by her by imposing such new and onerous working conditions on her as to cause her constructive discharge. Respondent contends that whatever changes were made in Stickney's working conditions were not motivated by discriminatory or retaliatory intent, and were instead the valid result of changed circumstances in its business.

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[1] The Respondent has excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

[2] We find it unnecessary to find an additional, repetitive violation of Sec. 8(a)(1) based on the statements made by the Respondent's president Koch at the state unemployment compensation hearing. Such a finding would be cumulative and would not affect the Order.

[3] For the reasons set forth by the judge, employment positions at the Respondent's Plymouth, Minnesota facility are not substantially equivalent to discriminatee Carol Stickney's former office clerical position at the Respondent's St. Paul, Minnesota facility. Accord: *Professional Porter Co.*, 275 NLRB 12, 18 (1985). Furthermore, the Respondent has failed to prove in this proceeding that it would have eliminated Stickney's former position at any time in the absence of her statutorily protected grievance activity. Consequently, to the extent necessary to effectuate Stickney's remedial reinstatement right, the Respondent will be required to recreate her former position at its St. Paul facility. See *Larry Barnes Chevrolet Co.*, 174 NLRB 818, 822 (1969). We deny the request that the remedial order include a visitatorial clause. See *Cherokee Marine Terminal*, 287 NLRB 1080 (1988).

As a subsidiary issue, counsel for the General Counsel also contends that Respondent twice sought to coerce Stickney, first by threatening to terminate Stickney's position unless she dropped or withdrew the grievance referred to above, and later by stating to her that the reason why her position had been eliminated was because of her refusal to drop or withdraw the grievance. Respondent's answer denies that any such coercion occurred, but none of Respondent's witnesses testified concerning these matters and they are not mentioned in the brief of Respondent's counsel.

B. *The Facts*

Respondent's business of distributing bearings and power transmission components is headquartered at Plymouth, Minnesota, where it employs approximately 26 employees. It maintains branch offices in St. Paul, Minnesota, and Sioux Falls, South Dakota. Approximately seven employees work at the St. Paul facility.

Respondent and the Union are currently parties to a 3-year collective-bargaining agreement, due to expire in November 1987. The agreement, which covers a unit of clerical employees at the Plymouth and St. Paul facilities, contains a provision for grievance and arbitration. Stickney, at the relevant time of January 1987, was the only employee at Respondent's St. Paul facility covered by the agreement.

Stickney worked for Respondent from 1975 until January 1987. Throughout that time she worked in the St. Paul facility performing general office clerical work, including filing, typing, filling in for the salesman (city desk man), and working on computers. Her immediate supervisor was Keith Stutz, the office manager, and, in turn, was also responsible to Bob Engler, the St. Paul branch manager, as well as Paul Koch, Respondent's president. Respondent admits that throughout her employment she was an excellent employee and has never given cause for discipline. On the other hand, it is admitted by counsel for the General Counsel that Respondent has no history of unfair labor practices and has never otherwise evidenced union animus.

Throughout her employment until 1983 Stickney worked on a full-time, 40-hour-per-week basis. Thereafter, until the time of the incident alleged in the complaint, she worked on a part-time, 24-hour-per-week basis. This change came about when Respondent proposed to her that, in order to avoid the possibility that Respondent might be forced to lay off another employee who occupied the position of "city desk man," she no longer works on Monday or Friday, and instead works 8-hour days, Tuesday through Thursday. Stickney agreed. Stickney credibly testified that at the time Koch assured her that she would lose no benefits, including her vacation time, if she accepted this change. She conceded, however, that she had no recollection that Koch made any reference, one way or another, to the question of whether her vacation entitlement would be prorated to account for her new part-time status. Koch had no recollection of the conversation at all.

The collective-bargaining agreement between the Union and Respondent provides that employees are to receive 3 weeks' vacation after having served with Respondent for a period of 10 years. In apparent reliance thereon Stickney took, and was paid for without any questions being raised by Respondent, 10 days of vacation in 1984, and (having completed her 10th year of service) 15 days in 1985 and 1986.

Counsel for the General Counsel concedes that sometime during 1986 Koch talked to Stickney about a possible transfer from St. Paul to Plymouth. Stickney's recollection was that the conversation took place in April or May. Koch testified that it occurred in August or September; Respondent's brief simply notes that it occurred sometime during the summer of 1986. Thus, whether it be in the spring or the summer, it appears that all parties agree that the conversation took place roughly 4 to 6 months preceding the events of January 1987.

According to Stickney, Koch initiated the conversation by inquiring as to Stickney's thoughts concerning the possibility of reverting to full-time work, i.e., working a 40-hour week in 5 days. Stickney was initially receptive to the idea, but quickly and adamently expressed her opposition on being told by Koch that the new full-time position would be located in the Plymouth facility. Stickney credibly testified that she initially told Koch that she had no way of getting to Plymouth and explained to him that she did not drive a car or have a car, but was transported to and from work by her husband whose own route to and from work took him within a few blocks of the St. Paul facility. Stickney further testified that she told Koch that she would make inquiries into Minnesota, Ride-Share, which is evidently a volunteer or public organization that attempts to arrange for carpools to be formed. Stickney also said that she told Koch that she would check into the possibility of public transportation, such as the bus system. She promised to get back to him if suitable arrangements could be made. Stickney was adamant in her testimony to the effect that she expressly told Koch that there was no way that she could accept such a transfer absent resolution of her transportation difficulties.

Koch did not deny Stickney's testimony on any of these points. However, he did go on to testify that he explained, contrary to Stickney's recollection, that her job in St. Paul was being phased out and was to be abolished shortly. According to Koch, he did not insist that she give him an immediate answer, and he did not tell her of any specific date when her job was to be ended. He testified that he told her that the elimination of her job was "imminent."

Branch Manager Engler admitted that he had not been briefed by Koch concerning the possibility that Stickney's job in his branch would be eliminated. Thus, on Stickney's remarking to him following her conversation with Koch that "it looks like they are going to terminate my job," he felt justified in assuring her, as he did, that there was no reason to be very concerned about it. Stickney testified that she made no such statement to Engler, or even to Stutz. As she recalled it, she merely responded to questions from both Engler and Stutz when they expressed curiosity to her about the subject matter of her meeting with Koch; she went on to say that she wished they could explain it to her and than she asked Engler if he knew what Koch meant.

It is undisputed that in 1985 Respondent determined to modify its operation by installing more computer technology, pointing toward the goal of improving efficiency and coordination. The computer terminals installed were operated by service representatives, who performed the functions formerly performed by Stickney. Similarly undisputed is the fact that installation of the computers and their usage resulted in a lessened need by the Respondent for clerical assistance in billing and inventory control.

Also undisputed is the fact that Respondent began to experience financial difficulties that threatened to decrease its profitability during the fiscal year ending 31 March 1986. An internal review by Respondent's officials was undertaken to identify areas where costs could be cut. According to evidence supplied by Respondent, its Sioux Falls facility was identified as its greatest financial drain, but the effects of a general lack of growth were being felt throughout all the facilities of Respondent. Respondent's internal review ultimately led to the recommendation from its officials that seven positions be eliminated by Respondent, two of them being in the St. Paul facility where Stickney worked. These officials were in agreement that Stickney's position was one of those that could have been eliminated; the record is silent concerning just how many of the positions in the St. Paul facility beside Stickney's were also considered subject to possible elimination, if any. Similarly, the record is silent as to details of Respondent's determination concerning these recommendations, showing, for example, just when such recommendations were made, the precise recommendations made, which jobs were considered and affected by such recommendations, the timeliness or even deadlines when such recommendations were to be effected, and the economic benefits to be realized or the financial difficulties to be avoided in the event such recommendations were carried out.

In November 1986 Respondent learned of the impending loss of one of its major contracts, a contract previously handled from the St. Paul facility. However, despite the eventual loss of the contract, Respondent has continued to do business with the company that had previously awarded it the contract and, in approximately the same amount, as Koch explained, the "new" company had not yet "gotten on stream." Moreover, Stickney testified without rebuttal that Engler and Stutz both told her coincident with the time Respondent learned that it was not going to receive the contract referred to above that the St. Paul facility would be expected in the future to do its own invoicing and billing, thereby increasing the workload for her. She testified credibly that they told her that this would possibly necessitate her return to full-time status. Indeed, so Stickney testified, again without rebuttal, Engler told her that he would like to see her begin doing purchasing work in order to take some of the workload off the city desk man.

Thus, notwithstanding Koch's statements to her, Stickney continued to work in her usual part-time job, with no changes being made for several months following her conversation wih Koch until 15 January 1987.

On that date, however, she received a paycheck that she noted was extraordinarily small compared with its usual amount. A note from Respondent's controller, Rol, accompanied the paycheck, explaining that she had used, and been paid for, 15 days vacation during 1986 and that, according to Koch, she should have been paid for only 9 days due to the fact that, as a part-time employee, she worked only 3 days per week and, therefore, should have received only 60 percent of the contractually provided 15 days of vacation per year. Thus, pay for 6 days was deducted from her paycheck in order to reimburse Respondent for days previously paid her in error. Stickney's inquiries addressed to Stutz and Rol led her to speak to Koch.

According to Koch, he told Stickney that she had been getting benefits she had not been entitled to, but that Stickney responded by telling him that it was her understanding that she was entitled to full-time benefits pursuant to the discussion and understandings she had had at the time she was converted to the status of part-time employee. It is undisputed that neither Koch nor Stickney changed their positions with respect to this dispute during that conversation.

The next day, 16 January 1987, Stickney filed a grievance seeking to secure pay for the 6 days. According to Rol, when told that Stickney's claim accorded with procedures followed during the previous year, 1985, Koch responded that, regardless of what had happened in the past, he had no intention of paying full-time vacation benefits for part-time work.

On 22 January 1987, Koch telephoned Stickney. He apologized for the manner in which the deduction had been taken from her paycheck without warning or discussion. Stickney testified that Koch told her that she should drop her grievance, but she refused, unless she was paid for the time that had been deducted. Stickney recalled Koch telling her, and Koch never denied that he told her, that he would eliminate her job in St. Paul if she did not drop her grievance, and that only by dropping the grievance would she be allowed to continue to work, absent her acceptance of the transfer to the Plymouth facility. Stickney testified that she reminded Koch that she had no means of transportation to Plymouth, a fact that Koch admitted she stated to him. Nonetheless, Stickney testified and Koch did not deny that Koch then told her that in light of her refusal to drop her grievance that she no longer had a job in St. Paul and that, if she wished to continue to work, she would have to do so by coming to the Plymouth facility. Koch admittedly told Stickney that the grievance was not proper, that it would be costly to Respondent, that he thought that the grievance was unfounded, and that despite his claim that Stickney's receipt of full-time vacation benefits had been unfair, no one had ever complained to him about it. Koch admitted that he made no statement to Stickney during that conversation concerning the elimination of her position in St. Paul, and the resultant transfer to Plymouth, until after Stickney informed him that she refused to withdraw the grievance.[1]

On 19 March 1987 Koch testified at an unemployment compensation hearing in which Stickney was the claimant. He was asked about his conversation with Stickney of 22 January, and the inquiry was put to him about whether he had then told Stickney that he did not intend to pay to arbitrate a grievance such as hers. He responded that he had made that statement. He was then asked whether he told her that if she did not drop the grievance he was going to have to eliminate her position. His response was, "Uh, I guess I did, yeah." Then, when asked if it was not true that on that very same day, 6 days after Stickney had filed her grievance, Koch eliminated Stickney's position, Koch responded, "Uh huh, as I say, it brought it to a head. There's no secret about it."

Questioned along similar lines during the course of this trial, Koch admitted that Stickney's filing of the grievance moved the decision to terminate her St. Paul position "to a head," and that it was "the pre-empting factor." Koch admitted that, notwithstanding the evidence concerning the business justifications resulting from the internal analyses conducted by Respondent during the previous fall, and notwithstanding his own assertion to Koch sometime during the previous summer that her transfer in status to a full-time employee was "imminent," it was not until the conversation of 22 January (and then only following her refusal to withdraw her grievance) that Stickney was told that a definite decision had been made to terminate her position, and that she would have to transfer if she were to remain in the employ of Respondent.

Following her telephone conversation of 22 January with Koch, Stickney advised Engler and Stutz that she had lost her job in St. Paul. She telephoned Stutz on both Saturday and Sunday of that weekend telling him that she did not know what she was going to do. Stutz responded that he had talked to Rol and learned that there was no work for her as yet in Plymouth and that she could therefore come back to St. Paul for the following week. She did so, and performed her normal work during that week. Engler told her, in parting, that he would speak to Koch and let Stickney know what was going to happen.

Engler contacted Stickney the following Monday and told her Koch stood by his previously announced decision.

Stickney undertook an investigation to determine whether it would be possible for her to solve her transportation difficulties. As she testified, it was not possible for her husband to take her in the direction and over the distance that working at the new facility would require. She also learned that public transportation would have involved some 3 hours per day to go to and return from work by bus. (Even at that, the bus would have picked her up in her suburb, driven her to downtown Minneapolis, she would have awaited a transfer at that point, and then taken another bus out into the suburb of Plymouth.) Stickney also investigated the possibility of ridesharing, or of securing transportation from relatives.

It is undisputed that Stickney, though the possessor of a driver's license, has driving skills that might best be described as primitive, and certainly not sufficient to undertake a lengthy commute across a major portion of a metropolitan area. Nor is it disputed that Respondent, through Stutz, Engler, and Koch, had been long aware of Stickney's inability to drive herself to work, and/or were informed of her inability months before her conversation with Koch of 22 January.

Last, Koch testified that even had there been no dispute regarding the vacation grievance filed by Stickney, her job would have been eliminated no later than 1 March 1987. Such an opinion, however, was not voiced in either of the affidavits previously supplied by him to the General Counsel (one of which was prepared by Respondent's counsel). Neither was it contained within his testimony at the unemployment compensation hearing. And, as noted earlier, no records, memoranda, recommendations, or other financial data was brought forward by Respondent to corroborate the testimony of Koch, or any other of Respondent's witnesses, concerning the necessity for and timing of any actions taken concerning Stickney's position of employment, notwithstanding the inference that I draw from their collective testimony that such records and memoranda concerning financial distress, and proposed means of resolution, are generally maintained by employers. No explanation for the absence of such records was offered and no claim has been advanced that such records do not exist or were unavailable for trial.

Stickney has not worked for Respondent since 29 January 1987, the date when her position in the St. Paul facility of Respondent was terminated. She has consistently declined to accept the transfer to Plymouth, on the basis that she would have to depend on public transportation and that such transportation would impose on her too greatly.

C. *Analysis and Conclusions*

Based on my observance of her demeanor I find Stickney credible. She testified in a forthright and candid fashion, resisting several opportunities offered her to enlarge on or magnify her recital of the injustice, as she perceived it, of her Employer's position. Thus, I deem her to be a truthful person, whose testimony is reliable. My conclusion is especially valid as to instances where she was recounting events in a generalized way, as opposed to various instances where precision or detail was sought. As a result, I have determined to generally credit her testimony over that of Koch in areas where there is conflict.

I reach this conclusion not because I regard Koch as a person given to deliberate falsity. Instead, I viewed him as a person motivated by such determination, possibly rising to the level of stubbornness, that he found himself easily able to brush aside or ignore inconsistencies within his own position.

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[1] I purposefully foreshortened the recitation of facts concerning the merits of the grievance, inasmuch as the issue of whether Stickney's grievance did or did not have merit is not an issue to be determined by me in this case. Here, it suffices to say that Respondent has not asserted that there was no arguable merit to Stickney's grievance, or that it was filed maliciously or with intent to harrass.

In any event, my determination of the relative credibility of witnesses in this case need not rest on the admittedly inexact art of weighing their testimonial demeanor. I explain below.

It is an unfair labor practice for an employer to threaten an employee with retaliation because the employee has elected to file a grievance. Such threats are deemed violative of Section 8(a)(1) of the Act because of their tendency to negate the assurances of certain rights enjoyed by employees, as set forth in Section 7 of the Act. Among any litany of such rights must be included the right of employees to file grievances in efforts to resolve disputes arising under collective-bargaining agreements. Indeed, in any hierarchical ranking, the right to grieve must surely be near the top of any list. See, for example, *Stor-Rite Metal Products*, 283 NLRB 856, 858 (1987); *Dresser Industries*, 281 NLRB 132, 135 (1986); *Commercial Cartage Co.*, 273 NLRB 637, 647 (1984). See also *NLRB v. City Disposal Systems*, 465 U.S. 822 (1984), citing with approval *Interboro Contractors*, 157 NLRB 1295 (1966), enfd. 388 F.2d 495 (2d Cir. 1967).

Applying the principles of these authorities, I find and conclude that Koch violated Section 8(a)(1) of the Act both on 22 January 1987 when he told Stickney that he would eliminate her position and require her to transfer to the Plymouth facility unless she dropped her grievance, and also by his statement made in her presence at the 19 March 1987 state unemployment compensation hearing. I reach the conclusion that Koch made these statements based on the credible testimony of Stickney, and my review of the transcript of the sworn testimony taken from Koch at the unemployment compensation hearing. I note that neither statement was contradicted or denied by Koch during the course of the trial, and that, indeed, Koch essentially repeated the statement of 19 March during the course of this trial.[2]

Turning to the issue of whether Respondent constructively discharged Stickney, I first note that it is the counsel for the General Counsel's burden in such cases to prove two elements: (1) the burdens imposed on the employee must cause, and be intended to cause, a change in his or her working conditions so difficult or unpleasant as to force him or her to resign; and (2) it must be shown that those burdens were imposed because of the employee's union activities. *Reno Hilton*, 282 NLRB 819, 836 fn. 39 (1987), which recently cited with approval the Board's long held rule from *Crystal Princeton Refining Co.*, 222 NLRB 1068, 1069 (1976).

The second element is positively established by merely reciting the sworn testimony of Respondent's president, Koch. It was he who directly and immediately stated, "Uh, I guess I did, yeah," and "Uh huh. As I say, it brought it to a head. There's no secret about it," in response to questions concerning whether he told Stickney that if she refused to withdraw her grievance her position would be eliminated.

I cannot, and I do not, accept Respondent's contentions and arguments to the effect that Stickney's position was eliminated because of necessary or desired changes in Respondent's personnel needs or financial well-being. My reasons for finding such evidence unpersuasive will be discussed below, when treating of Respondent's burden of proof.

I also determine that, in abolishing Stickney's position and placing her in a position of being able to retain her employment with Respondent only by means of accepting a transfer to another facility some miles away, counsel for the General Counsel has satisfied all the requirements of the first element of a prima facie case of constructive discharge.

First of all, such a transfer would obviously constitute a burden of *some* sort. According to Stickney's credited testimony, she was able to reach her place of employment at St. Paul with a daily travel time of approximately 40 minutes (20 minutes each way), being driven by her husband. She had followed this procedure for a number of years and evidently it had worked very well, in light of Respondent's admission that she was regarded as an excellent employee (leading me to infer that she had no problems with absence or tardiness). Taking into account Stickney's credited testimony to the effect that, despite her holding a driver's license (primarily as a means of identification) her knowledge of, and skills at, operating a motor vehicle are so elemental and limited as, in my opinion, to label them as primitive, at best. Thus, it is clear that, in order for Stickney to drive herself to work, she would had to find some means of learning to drive and, having done so, would have also been compelled to purchase a motor vehicle to do that driving, because she also credibly testified that she owned no vehicle and that her husband required the family car to go to work himself. I also consider her credited testimony to the effect that she unsuccessfully checked into various means of transportation, including Minnesota Ride-Share, or securing rides from friends or relatives. These having failed, Stickney would have been required to spend approximately 3 hours per day in transit by means by bus.

Taking all this into account, I find and conclude that the change in her job status, imposed by Koch on 22 January, may legitimately be described as "a burden" on her employment status. I base this on both the required changes in reliability and comfort in her normal, past method of transportation, and also the net difference of approximately 2 hours and 20 minutes per day to spend in transit to and from the place of employment.

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[2] Peculiarly, counsel for the General Counsel quibbles with my ruling at trial in which I declined to allow him to place into evidence only a portion of the transcript of the unemployment compensation hearing. Instead, I required that the entire transcript be placed in evidence. Notwithstanding the authorities cited by counsel for the General Counsel on this issue, I regard my ruling as having been well within the areas of discretion afforded me in conducting a trial. Far from seriously burdening the record, or resulting in counsel for the General Counsel's prejudice, I raise the hypothetical question as to how counsel for the General Counsel might have hoped to prove that Stickney overheard (and was thereby interfered with, restrained, or coerced by) Koch's statements during the course of his testimony at the unemployment compensation hearing, had the entire transcript, showing her appearance and presence there, not been included in the record. I am unaware of any presumption that would have warranted a conclusion that Stickney had been subjected to a threatening statement in the absence of evidence to indicate that she was present and overheard it.

I expressly disavow any intent to find here that an employer is obliged under the Act to provide employment only on terms found comfortable and convenient by employees. My holding here is limited strictly to a situation in which I find that the employer imposed a change in working conditions precisely because the employee engaged in protected activities, knowing full well that the change would cause a burden on the employee, and with the express intent or hope that it would do so, and lead to the employee's resignation or serve as sufficient warning to deter the employee, or other employees, from thereafter engaging in activities protected under the Act. Certainly no employer is obliged to take an employee's commuting time into consideration when making decisions as to how to regulate its own business. But this general rule changes when it is shown, as it is here, by means of Stickney's credited testimony, and the admissions made by Koch, that Respondent's supervisors, including Koch personally, had been previously informed for months, if not years, of Stickney's inability to operate a motor vehicle.

Thus, taking into account Koch's admissions as to his motivation, and also taking into account his presumed general knowledge of the public transportation situation in the Twin Cities metropolitan area, I find and conclude that in abolishing her position and conditioning her further employment on accepting a transfer to the Plymouth facility, Koch intended to cause a burdensome change in Stickney's working conditions sufficiently difficult or unpleasant as to compel Stickney to resign. Compare *Kroger Co.*, 228 NLRB 149, 150 fn. 11, 152 fn. 19 (1977); *Olympic Limousine Service*, 278 NLRB 932, 939 (1986), and cases cited herein. The question is not whether the employee has been faced with a choice so aggravated as to be deemed egregious, but rather whether the employee was faced with any such substantial choice at all for reasons proscribed by the Act. *John Dory Boat Works*, 229 NLRB 844, 850–851 (1977).

Under all the circumstances of this case I find and conclude that counsel for the General Counsel has established a strong prima facie case in support of the allegations set forth in the complaint in all particulars.

D. *Respondent's Arguments in Rebuttal and Mitigation*

In *NLRB v. Transportation Management Corp.*, 462 U.S. 393 (1983), the Supreme Court reaffirmed the test ennuciated by the Board in *Wright Line*, 251 NLRB 1083 (1980), enfd. 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982), for determining whether an employee was discharged because of the exercise of Section 7 rights. Under *Wright Line* counsel for the General Counsel under Section 10(c) of the Act, has the burden of establishing the prima facie case that the employee's protected conduct was a substantial or motivating factor in the employee's discharge or other adverse action taken by the employer. But, once counsel for the General Counsel has satisfied this burden, as I have found that he has done above, an employer may still avoid liability under the Act by proving by a preponderance of the evidence an affirmative defense that it would have taken the same action even if the unlawful motivation had not existed.[3]

Counsel for Respondent argues vigorously that the evidence in this case satisfies its obligation under the *Wright Line* test. He further argues that, even if *Wright Line* has not been satisfied, the unrebutted testimony of Koch serves to demonstrate that Stickney's position would have been eliminated no later than March 1987 and, as a result, any order imposed on Respondent calling for backpay should extend no further than March 1987. Respondent's arguments are premised on the testimony of Koch, and other officials of Respondent, which showed (to my satisfaction I add) that sometime during 1986 Respondent undertook a review of its operations and that recommendations were made within Respondent's organization regarding improvements. Based on the evidence I neither could nor would reach the conclusion that no recommendation was made with respect to, among other things, the status of Stickney's position. Nor would I make any finding to the effect that Stickney's position would not have been terminated at some point relatively early in 1987.

Additionally, Respondent relies on evidence, recited earlier, to the effect that some months prior to 22 January 1987, Stickney was advised that the termination of her position was imminent, and that her transfer would be required. And, Respondent asserts that the evidence with respect to a dimunition in business clearly points toward dire financial prospects for Respondent.

However, I am not persuaded by any of these arguments, or the underlying evidence, that the change in Stickney's status would have occurred when it did, or in the manner that it did, had it not been for her engagement in protected activities and refusal to desist therefrom. Koch admits that her refusal to desist "brought it to a head." How am I then to conclude exactly when it would have been "brought to a head" had she been more compliant? How am I to tell what meaning Koch assigned to the word "imminent" when he used it months preceding 22 January 1987? And, how am I to factor in the credited testimony that Stickney's supervisors provided her with reassurances when she expressed her worry to them about her tenure sometime in the summer of 1986? It is my opinion and my conclusion that, just as I have acknowledged my unwillingness and inability to reach the conclusion that Stickney's job was secure, I am similarly unable to say that the evidence supports Respondent's contentions with respect to just when her job would have been terminated, if at all.

My inability to find that this record supports any such conclusions is hardened by my recollection that, despite my repeated inquiries concerning the existence and substance of business records tending to support Respondent's claims of business justification, Respondent never produced one bit of documentation underlying its rationale for the alleged business justification, or the financial data supporting the premises of any such rationale. Months after allegedly being presented with a picture of a dire and bleak financial future by virtue of the loss of a major contract, the evidence in this case demonstrates Respondent still doing business at approximately the same rate with that same contractor. I can only conclude that the acuity with which Respondent viewed its financial straits depended on the willingness of employees, or their refusal, to give up rights granted them under the Act. Further, whether viewed on 22 January or sometime in March 1987, Respondent's financial straits are inadequately demonstrated by what I regard to be as vague and self-serving testimony by Respondent's officials. This is doubly so when it is recalled that Respondent's officials were at pains to describe the care and businesslike nature of their analysis of Respondent's overall operations carried out in 1986, and that Respondent, though blameless, was presented with the prospect of lost revenues by virtue of losing an account in 1986. Yet, as I have stated, no records, no memoranda, no data, and no accountings were produced by Respondent to support its position and testimony. I find this failure to fully warrant the inference, that I draw, that the reason why such documentation was not produced was that its contents would have proven unfavorable to Respondent's case. *Textron, Inc.*, 199 NLRB 131, 134 (1972); *Custom Wood Interiors*, 248 NLRB 187 (1980); *American Lumber Sales*, 229 NLRB 414, 421 (1977). The obvious rationale underlying these cases is one that accords with common sense and experience, i.e., that if one asserts a fact to be true, and further asserts that documentation exists that would, if produced, corroborate one's assertion of that fact, and further, no explanation is offered of the failure to produce such documentation, and in fact, that documentation is not produced, the inference seems clear that the documentation either would not have supported the claim or would have supported the opposite point of view.

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[3] The Board's adherence to this test was recently demonstrated in *Joseph De Rario, DMD, P.A.*, 283 NLRB 592 (1987).

Accordingly, I reject as unproven, at this point in the case,[4] Respondent's contention regarding its affirmative defense or its arguments in mitigation of the backpay obligation.

Accordingly, I find and conclude that Respondent constructively discharged Stickney on 29 January 1987, thereby violating Section 8(a)(3) and (1) of the Act.

CONCLUSIONS OF LAW

1. Respondent is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

2. The Union is a labor organization within the meaning of Section 2(5) of the Act.

3. Respondent violated Section 8(a)(3) and (1) of the Act by constructively discharging its employee, Carol Stickney, about 29 January 1987 because she had engaged in union activities protected by the Act.

4. Respondent violated Section 8(a)(1) of the Act by threatening an employee with the termination of her position of employment if she failed or refused to cease engaging in activity protected by Section 7 of the Act, i.e., withdrawing her pending grievance; and Respondent further violated Section 8(a)(1) of the Act by imparting to an employee that her position had been abolished and that her continued employment with Respondent was contingent on her accepting a transfer to another facility, because she had engaged in the protected union activity of filing a grievance and refusing to withdraw it.

5. The above unfair labor practices have an effect on commerce as defined in the Act.

THE REMEDY

Having found that Carol Stickney was unlawfully constructively discharged, it shall be ordered that she be offered immediate reinstatement to her former position, displacing, if necessary, any replacement, or, if not available, to a substantially equivalent position, without loss of seniority and other privileges. It shall be further ordered that Carol Stickney be made whole for lost earnings resulting from the discrimination against her by payment of a sum of money equal to that she would have earned from the date of her constructive discharge to the date of a bona fide offer of reinstatement, less net interim earnings during that period. Backpay shall be computed in the manner prescribed by *F. W. Woolworth Co.*, 90 NLRB 289 (1950), with interest to be computed within the manner prescribed in *New Horizons for the Retarded*.[5]

It shall be further ordered that the Respondent be ordered to expunge from its records any references to the constructive discharge or transfer mentioned above and to provide Carol Stickney written notice of such expunction, and inform her that the Respondent's unlawful conduct will not be used as a basis for further personnel actions against her.[6]

On the basis of these findings of fact[7] and conclusions of law, and the entire record in this proceeding, I issue the following recommended[8]

ORDER

The Respondent, Industrial Supply Company, Inc., Plymouth and St. Paul, Minnesota, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Threatening employees that their positions of employment will be terminated if they continue to engage in protected union activities, such as filing and pursuing a grievance under the collective-bargaining agreement.

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[4] Respondent's contentions may well be more fully explored during the compliance stage of this proceeding. While this is Respondent's right, I trust and expect that, given my findings regarding Respondent's motives, those viewing such evidence will do so with a healthy amount of skepticism.

[5] 283 NLRB 1173 (1987). Interest will be computed at the "short-term Federal rate" for the underpayment of taxes as set out in the 1986 amendment to 26 U.S.C. § 6621.

[6] See *Sterling Sugars*, 261 NLRB 472 (1982).

[7] As it is clear from the context of the findings made above, I leave, as I believe I must, the questions of if or when Stickney's backpay would have been tolled to compliance proceedings to ensue.

[8] All outstanding motions inconsistent with this recommended Order are denied. If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

(b) Imparting to employees that the reason that any such employee's position has been abolished is because they failed and refused to cease engaging in protected, union activities, such as filing and pursuing a grievance under the collective-bargaining agreement.

(c) Reassigning, transferring, changing the work schedule or hours, discharging, laying off, or otherwise discriminating against employees with respect to their employment, in order to discourage their membership in or support for the Union.

(d) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Consistent with the terms and the provisions of the remedy section of this decision, offer to Carol Stickney immediate, full, and unconditional reinstatement to her former job in its St. Paul facility, or, if that job no longer exists, to a substantially equivalent position in its St. Paul facility, without prejudice to her seniority or any other rights or privileges previously enjoyed, and make her whole for any loss of earnings or other benefits that she suffered as a result of the discrimination practiced against her, and remove from its files any references to the unlawful abolition of her position, transfer, and constructive discharge, and notify her in writing that it has done so, and that it will not use those, or like or related, unlawful actions against her in any way.

(b) Preserve and, on request, make available to the Board or its agents for examination and copying, all payroll records, social security payment records, timecards, personnel records and reports, and all other records, financial data, and memoranda necessary or helpful to determine the amount of backpay due to Carol Stickney under this Order.

(c) Post at its facilities in St. Paul and Plymouth, Minnesota, copies of the attached notice marked "Appendix."[9] Copies of the notice, on forms provided by the Regional Director for Region 18, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material.

(d) Notify the Regional Director in writing within 20 days from the date of this Order what steps the Respondent has taken to comply.

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD

An Agency of the United States Government

After a trial at which all parties had the chance to introduce evidence and arguments, the National Labor Relations Board has found that we violated the National Labor Relations Act in January 1987 when we abolished the job previously held by employee Carol Stickney at our St. Paul, Minnesota facility and conditioned her further employment with us upon her accepting a transfer to our Plymonth, Minnesota facility, all because she had filed a grievance pursuant to her rights under the collective-bargaining agreement with the Union and had failed and refused to withdraw that grievance. It has also been found that we violated the law when we stated to Carol Stickney that her position would be terminated if she refused to withdraw the grievance, and thereafter, by telling her that the reason her position had been terminated was because she had failed to and refused to withdraw the grievance. In order to remedy these violations, the Board has ordered us to post this notice and to live up to it.

Section 7 of the Act gives employees these rights.

To organize

To form, join, or assist any union

To bargain collectively through representatives of their own choice

To act together for other mutual aid or protection

To choose not to engage in any of these protected concerted activities.

WE WILL NOT reassign, transfer, abolish the employment position of, discharge or otherwise discriminate against employees, for joining, supporting, or assisting Warehousemen, Drivers and Helpers Union Local No. 359, affiliated with International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, or any other labor organization.

WE WILL NOT threaten employees that management will take, or has taken, any such discriminatory steps against employees.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in Section 7 of the Act.

WE WILL offer Carol Stickney immediate and full reinstatement to her former job in our St. Paul, Minnesota facility without any prejudice to her seniority or other rights and privileges previously enjoyed, and WE WILL make her whole, with interest, for any loss of earnings or other benefits that she suffered when we constructively discharged her on 29 January 1987.

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[9] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

WE WILL remove from our files any references to the unlawful actions and constructive discharge we took against Stickney and WE WILL notify her in writing that we have done so, and that those actions will not in any way be used against her in the future.

INDUSTRIAL SUPPLY COMPANY, INC.

Quality C.A.T.V., Inc. *and* **Charles H. Boyle, Jr.** *and* **Jerry Reners.** Cases 25–CA–14714 and 25–CA–14714–2

June 30, 1988

SUPPLEMENTAL DECISION AND ORDER

BY MEMBERS JOHANSEN, BABSON, AND CRACRAFT

On March 27, 1986, the Board issued a Decision and Order in this proceeding[1] finding that the Respondent had violated Section 8(a)(1) of the Act by discharging two employees, Charles H. Boyle Jr. and Jerry Reners, when they refused to work on July 22, 1982. The United States Court of Appeals for the Seventh Circuit vacated the Board's Order and remanded the case to the Board for proceedings consistent with the court's opinion.[2] The Board accepted the court's remand and notified the parties that they could file statements of position. The General Counsel and the Respondent filed statements.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

We have reviewed the case and the parties' statements of position and, accepting the court's opinion as the law of the case, have decided to dismiss the complaint.

The complaint in the case alleged that certain employees of the Respondent "ceased work concertedly and engaged in a strike by refusing to perform physically dangerous work" and that the Respondent discharged them for engaging in that "protected, concerted activity."

The judge found that the only issue litigated in the case was whether the employees were discharged as a result of refusing to work because of their concern about safety conditions. He found that their reason for refusing to work did not stem from safety concerns and that no violation had been proved.

The Board disagreed with the judge and found that the Respondent violated the Act when it discharged the employees because they concertedly refused to work to protest the requirement that they climb utility poles while they were wet. The Board found that protesting over this employment condition was protected whether the protest was based on the employees' concern over safety, their personal comfort, or their supervisor's attitude. The Board viewed the complaint as broadly putting in issue whether the discharge of the employees for concertedly refusing to work violated the Act, and decided that the complaint encompassed the violation found. The Board further concluded that even under a narrower construction of the complaint, the finding of a violation was warranted because the parties had fully litigated the employees' reasons for refusing to work and the circumstances of the refusal and the discharges.

The court rejected the Board's decision and the Board's assessment as to the issues raised by the complaint. Relying in part on the fact that the General Counsel had not raised the alternative theory that the employees were discharged for concertedly refusing to work to protest "uncomfortable" working conditions until the General Counsel filed exceptions to the administrative law judge's decision, the court held that the violation found received fair notice of the alternative theory of a violation, and that the issue had not been fully and fairly litigated.

We conclude that the court's decision, which is the law of the case, precludes the Board from finding a violation on any theory except that the Respondent discharged employees for a concerted protest based on safety concerns.[3] As the evidence in the case does not establish that the protest was based on safety concerns, we shall dismiss the complaint.

ORDER

The complaint is dismissed.

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[1] 278 NLRB 1282.

[2] 824 F.2d 542 (1987).

[3] The court concluded that the General Counsel had not timely raised the alternative theory relied on by the Board. Accepting this finding as the law of the case, we do not find it appropriate to reopen the record to permit further litigation of the case on this alternative theory.

Haley & Haley, Inc. and Oceanway Transport, Inc. *and* **International Woodworkers of America, Local 3-140, AFL-CIO.** Case 36-CA-4967

June 30, 1988

DECISION AND ORDER

BY CHAIRMAN STEPHENS AND MEMBERS JOHANSEN AND BABSON

On December 13, 1985, Administrative Law Judge Gerald A. Wacknov issued the attached decision. The General Counsel filed exceptions and a supporting brief.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings,[1] and conclusions only to the extent consistent with this Decision and Order.

1. The complaint alleges that Respondent Haley & Haley, Inc., and Respondent Oceanway Transport, Inc., are alter egos and that they violated Section 8(a)(5) and (1) by transferring employees and equipment from Haley & Haley to Oceanway in order to perform log-hauling work. The judge recommended that the complaint be dismissed, but for the reasons given below we conclude that the Respondents' conduct violated Section 8(a)(5) and (1).

The central facts are not in dispute and are largely established by uncontradicted testimony. Haley & Haley is a family corporation engaged exclusively in the business of hauling logs. The Union has represented Haley & Haley's employees for many years, and the parties' most recent collective-bargaining agreement was effective from June 1, 1983, until June 1, 1986. Loren Haley (Loren) is Haley & Haley's president, his son Larry Haley (Larry) is its vice president, Duane Vergeer is its secretary, and Charles Ritchey is its treasurer. The parties stipulated that Loren owns 276 shares of Haley & Haley's stock, that Larry owns 191 shares, that Larry's wife Lucretia Haley (Lucretia) owns 4 shares, that Larry's sons Lee Haley (Lee) and Paul Haley (Paul) each own 2 shares, that family members Larry L. Haley and Jean L. Haley each own 2 shares, and that Duane Vergeer owns 1 share.[2] Until Haley & Haley ceased hauling logs on May 7, 1985,[3] Larry served as its manager and operated the Company on a day-to-day basis. In his absence, Supervisor Gary Sichting was responsible for daily operations. Loren is "semiretired," according to both Larry and Loren.

Oceanway is a wholly owned subsidiary of Haley & Haley and at the time of the hearing Oceanway operated both a log-hauling department and a "lowboy" department, which hauled general commodities, including heavy equipment.[4] Larry is the president of Oceanway, Loren is its secretary-treasurer, and Lucretia is a director.

Larry and Loren are also the officers of L & L Repair Incorporated, a corporation which performs repair work almost exclusively for Haley & Haley and Oceanway.[5] Until some time in 1985, Haley & Haley, Oceanway, and L & L Repair all operated on the same premises in Mapleton, Oregon. At the time of the hearing all three companies had relocated to Reedsport, Oregon.[6]

In 1984 and 1985, the logging industry in Oregon was experiencing serious economic difficulties, and in response to these difficulties Haley & Haley purchased Oceanway on March 30, 1984. Larry Loren and Lucretia negotiated the purchase. Larry testified that the purchase was necessary "[b]ecause I could see down the road by reading papers, and talking to people and watching TV, that the logging industry was going downhill." Oceanway was dormant at the time, and Larry testified that Haley & Haley purchased Oceanway in order to acquire its permit to haul general commodities other than logs. In June 1984 Oceanway acquired one lowboy truck from another company and began hauling such general commodities. In August 1984 Larry applied for and obtained a log-hauling permit for Oceanway, and he testified that he did so "for the future, I thought we might need it." Oceanway did not begin hauling logs until February 17.

Haley & Haley operated 21 log-hauling trucks, and until early in 1985 it had derived approximately 97 percent of its business from Champion Paper Company (Champion) and International Paper Company (International). Its remaining business was divided among several smaller companies. In

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[1] The General Counsel has excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

[2] Vergeer is the only shareholder who is not a member of the Haley family. The parties also stipulated that since July 24, 1985, there may have been some small stock transfers to the children of some of the shareholders.

[3] Unless otherwise specified, all dates refer to 1985.

[4] A lowboy truck hauls items other than logs. At the time of the hearing, Oceanway operated three lowboy trucks.

[5] L & L Repair is not a respondent in this proceeding.

[6] Larry testified that L & L Repair also has a facility in Oakridge, Oregon.

289 NLRB No. 87

late 1984 or early 1985, Champion announced that it intended to terminate its operations, and International curtailed its operations and announced its intention to reduce the rates that it paid for log-hauling services.[7] On April 12 Champion did terminate its operations, and on May 21 International's lower rates went into effect.

The financial difficulties of Champion and International had a serious impact on Haley & Haley. Larry testified that before April 12 Haley & Haley engaged in "very little" log hauling for International, and that after April 12 it no longer hauled for Champion. During this time, according to Larry, "we worked a few trucks" for small independent logging companies, or "gypos." Larry testified, however, that Haley & Haley was unable to "come out" with a profit because of its high contractual wage rates and the low rates paid by the gypos for log-hauling services.[8] In these circumstances, Larry recognized that Oceanway could "get more business" than Haley & Haley and that "we would sell our trucks to Oceanway."

On February 17 Haley & Haley sold 5 of its 21 log-hauling trucks to Oceanway,[9] and Oceanway immediately activated its log-hauling operation. Employees of L & L Repair removed Haley & Haley's name from the trucks and repainted Oceanway's name in its place. Larry testified, in reference to Oceanway, that "we" subsequently purchased two log-hauling trucks from Haley & Haley in March, one in April, eight in May, and the four remaining trucks on August 8.[10]

When the first trucks were sold on February 17, several of Haley & Haley's drivers withdrew from the Union and went to work for Oceanway.[11] Larry testified that "Oceanway wasn't supposed to be hiring Haley & Haley drivers. They belonged to the Union." However, he also testified that those Haley & Haley drivers who did go to work for Oceanway "were supposed to get a withdrawal from the Union." The Respondent's attorney, Duane Vergeer, stated at the hearing that some Haley & Haley drivers went to work for Oceanway, "but not until after they withdrew from the Union." Vergeer also stated that unless Haley & Haley's drivers "withdrew from the Union, they wouldn't have been working for Oceanway, because Oceanway is a non-Union concern."[12] Eleven of Haley & Haley's drivers eventually went to work for Oceanway, and eight were still employed by Oceanway at the time of the hearing.

Larry testified that he is not involved in the daily operation of Oceanway, although there is evidence that he is engaged to some extent in performing dispatching duties.[13] According to Larry's testimony, Lee and Paul operate Oceanway's log-hauling department, are responsible for hiring decisions in that department, and in fact "hired themselves" when Oceanway began hauling logs.[14] Larry also testified that an individual named Charles Carlow operates Oceanway's lowboy department and is responsible for its hiring decisions. Larry further stated that he initially hired Carlow in June 1984, that neither Lee nor Paul had had any previous management experience before going to work for Oceanway, and that Lee, Paul, and Carlow are all truckdrivers who regularly drive for Oceanway when work is available.[15] According to Larry, "that's all Oceanway has, is truck drivers," and he also asserted that Oceanway "[can't] afford to have people sitting in the office." Larry further testified that Lee, Paul, and Carlow ask him questions about operating the business, but do not necessarily follow his advice.

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[7] Haley & Haley's labor relations consultant, Gossard, testified that it was "common knowledge" that Champion was terminating its operations and that International's operations had been curtailed. Gossard indicated that prior to April 1985, he had discussed "several times" with the Haleys the financial situation of Champion and International. The Union's business representative, Letts, testified that in late 1984 there were "feelings out in the industry" that the large wood operators would either go out of business or seek to modify their contract.

[8] According to Larry, the gypos paid only $23 to $24 an hour for log-hauling services. By contrast, International formerly had paid approximately $39.60 an hour for such services. Haley & Haley's contractual wage and benefit rates totaled approximately $18 an hour and according to Larry, Haley & Haley was using approximately 100 gallons of diesel fuel a day.

[9] A sixth log-hauling truck was sold to Oceanway at the same time, but was converted to a lowboy truck.

[10] The Respondent's accountant, Charles Ritchy, testified that the trucks were sold on notes written from Oceanway to Haley & Haley, with an interest rate of 10.5 percent. According to Ritchey each note was written with a 1-year due date. Oceanway does not make individual monthly payments on each note, and the method of payment has changed over time. At first Oceanway made payments on the notes to Haley & Haley, apparently from an "intercompany account," which each company maintained to pay its debts to the other. On 8 August, when the final four trucks were sold, Oceanway instead began to assume some of Haley & Haley's obligations when the latter was no longer able to make payments on its own notes to its bank. Ritchey testified that this procedure constituted "automatic payment from Oceanway to Haley & Haley."

[11] Larry testified that Leland Gronnel, Lee, and Paul had been union members while driving for Haley & Haley. Those three, and two other individuals who apparently had not previously worked for Haley & Haley, were the first five log-hauling drivers hired by Oceanway.

[12] The complaint does not contain an 8(a)(3) allegation regarding with the hiring of these employees, or regarding any of the Respondent's other conduct.

[13] Robert Hensley, a driver for Haley & Haley, testified that Haley & Haley and Oceanway used the same radio frequency, and that he heard Larry engaging in radio dispatches of Oceanway drivers in approximately March 1985 and on and off over a period of months. Although Hensley indicated that anyone in the office could answer the radio, he also testified that he heard Larry relay messages and tell Oceanway drivers which log-hauling assignments to perform, where to pick up fuel, where to have a flat tire fixed, and where other trucks were located. Hensley further testified that "if you listened to the conversation, you could pretty well figure out who was in command." Larry testified that he did relay messages over the radio.

[14] Larry testified that Oceanway's log-hauling department was initially operated by Leland Gronnel and Paul, but that Lee replaced Gronnel when the latter quit.

[15] Lee, Paul, and Charles Carlow did not testify at the hearing.

As noted above, Oceanway activated its log-hauling operation when the first five trucks were sold on February 17, and Larry testified that Oceanway's business grew "gradually." According to Larry, Oceanway began to haul logs for employers "in different parts of the state that Haley & Haley ha[d] never been in." In addition, Oceanway began to engage in substantial log hauling for International at some point during 1985, although the record does not disclose the precise date. Larry testified that as of the day of the hearing, Oceanway operated five trucks out of International's facility at Gardiner, Oregon, and four trucks out of another International facility at Vaughn, Oregon.

There is no evidence that the Respondents notified the Union or requested bargaining prior to the events of February 17. However, as more fully explained in the judge's decision, the parties did engage in bargaining at a later point. Briefly, the Union's business representative, Letts, sent Haley & Haley a letter on March 13 that asserted that the removal of the trucks violated their contract. Haley & Haley's first approach to the Union came in April, when its labor relations consultant, Gossard, told Letts that wage reductions were necessary. On April 20 Larry sent the Union a letter asserting that "substantial changes" would be needed to enable Haley & Haley to compete for International's business. The letter further asserted that "[u]nless something happens soon, we will be forced to sell off more of our trucks or even consider going out of business."

On May 7, Haley & Haley ceased hauling logs, although its operations were not completely terminated. Rather, according to Larry, Haley & Haley simply parked its four remaining trucks while trying to find jobs that would permit it to pay its contractual wage rates. After May 7, the parties bargained on several occasions, but were unable to agree on a wage-reduction package. On May 28, the Union made a written request for certain information, but at a meeting on May 30, according to the credited testimony, Letts told Larry and Loren that the information need not be furnished until a meeting could be arranged with the Union's regional representative, Hubble. At the same meeting Letts also told Loren "not to worry" about the information request. For reasons not disclosed by the record, a meeting with Hubble was never arranged, and Haley & Haley did not provide the requested information. Following additional unsuccessful bargaining, as stated by Larry, "we just went ahead and sold" Haley & Haley's four remaining trucks to Oceanway on August 8, after concluding that "we couldn't get . . . anything out of Mr. Letts."

The judge found that Haley & Haley did not establish Oceanway as a "disguised corporation." He also found that no unit work was transfered outside the bargaining unit because the work that Oceanway obtained as a nonunion entity could not have been obtained by Haley & Haley because of the latter's contractual obligation to pay a higher wage rate. He then found that Haley & Haley had bargained in good faith to impasse with the Union. Relying on *Milwaukee Spring Division*, 268 NLRB 601 (1984), affd. 765 F.2d 175 (D.C. Cir. 1985), the judge concluded that Haley & Haley did not violate the Act by causing Oceanway to engage in log hauling.[16]

We find it appropriate to analyze this case under alter ego principles and not, as the judge essentially did, under the principles established in *Milwaukee Spring* and *Otis Elevator Co.*, 269 NLRB 891 (1984).[17] In *Milwaukee Spring*, the Board found that an economically motivated relocation of unit work is not a midterm contractual modification in the absence of a specific contractual provision restricting such a relocation. In *Otis Elevator* the Board considered management decisions having "a substantial impact on the continued availability of employment," as described by the Supreme Court in *First National Maintenance Corp. v. NLRB*, 452 U.S. 666 (1981).

The Respondents' conduct here is not the type of conduct that the Board considered in *Otis Elevator* and *Milwaukee Spring*. In those cases the management decisions at issue were based on economic considerations and were not the result of a proscribed motive.[18] Indeed, the Board plurality in *Otis Elevator* was careful to distinguish economically motivated decisions from situations in which an employer utilizes "alter ego or other sham devices . . . to disguise a unilateral reduction in labor costs in an operation over which the employer maintain[s] surreptitious control."[19] In light of all

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[16] The complaint also alleges that the Respondents violated Sec. 8(a)(5) and (1) by failing to comply with the Union's written information request, discussed above. The judge concluded that the Respondents' failure to furnish the information did not violate the Act. We agree with the judge in view of the credited testimony that Letts told Loren "not to worry" about the information, and that Letts stated that the information need not be provided until a meeting was held with the Union's regional representative, Hubble. As noted above, that meeting never took place for reasons that the record does not disclose.

[17] The judge did not cite *Otis Elevator*, but that decision is relevant to the manner in which he analyzed the case.

[18] We also note that in *First National Maintenance Corp. v. NLRB*, the Supreme Court "illustrate[d] the limits" of its holding by observing, inter alia, that the union did not claim that the employer's decision had been motivated by union animus. 452 U.S. at 687.

[19] 269 NLRB at 893. The Board made this statement in explaining why it would have reached a different result in *Adams Dairy*, 137 NLRB

Continued

the evidence analyzed below, including evidence establishing a proscribed motive, we conclude that Haley & Haley and Oceanway are alter egos and that it is not appropriate to analyze their conduct under the principles set forth in *Otis Elevator*, *Milwaukee Spring*, and *First National Maintenance Corp. v. NLRB.*[20] In *Otis Elevator* cases, the issue is whether there is a duty to bargain over the decision to transfer work out of a unit; in alter ego cases, the issue is whether the work is effectively still in the unit because the allegedly new employer is the same as the former employer.

In *Advance Electric*, 268 NLRB 1001, 1002 (1984), the Board stated that it will find alter ego status where two employers have "'substantially identical' management, business purpose, operation, equipment, customers, and supervision, as well as ownership." The Board also stated that among the other factors that must be considered is "whether the purpose behind the creation of the alleged alter ego was legitimate or whether, instead, its purpose was to evade responsibilities under the Act."[21]

At the outset we find that Haley & Haley and Oceanway share substantially identical ownership. Loren and Larry together own 467 of the approximately 480 outstanding shares of Haley & Haley, and 12 of the remaining 13 outstanding shares are owned by members of the Haley family. Haley & Haley purchased the stock of Oceanway and is its only stockholder. Where, as here, the stock of two companies is concentrated in members of the same family, the Board has found ownership to be "substantially identical," for purposes of determining alter ego status.[22]

We also find that Haley & Haley and Oceanway share substantially identical management. Loren is the president of Haley & Haley and the secretary-treasurer of Oceanway. Larry is the vice president of Haley & Haley and the president of Oceanway. Charles Ritchey is the treasurer of Haley & Haley and the accountant for both companies. Lucretia owns four shares of Haley & Haley and is a director of Oceanway.

In finding that Haley & Haley and Oceanway have substantially identical management, we particularly note that Larry was the dominant force in establishing the direction of both companies. In this connection, we find that Larry was the central figure in the decision-making process, which culminated in the sale of the trucks, the single decision that most affected the direction of the two companies. In support of this finding, we note the absence of evidence that any other management official from either company played a significant role in the decision to sell the trucks, and we also note that Larry's own testimony demonstrates his control over the decision-making process. Thus, Larry testified that in August 1984 he applied for and obtained Oceanway's log-hauling permit "for the future [because] I thought we might need it." When the financial difficulties of Champion and International became severe, Haley & Haley "worked a few trucks" for the gypos, the small independent companies. However, "we couldn't come out" with a profit because of Haley & Haley's high contractual wages and the low rates that it received from the gypos. Faced with these difficulties, Larry recognized that Oceanway could "get more business" than Haley & Haley, and that "we could sell our trucks to Oceanway." The first five trucks were sold on February 17 and, in reference to Oceanway, Larry testified that "we" added two trucks in March, one in April, and eight in May.[23] Oceanway's business grew "gradually" after its log-hauling operation was activated, and after May 7 "we just parked" the remaining four Haley & Haley trucks until profitable work could be found. On August 8, "we just went ahead and sold them to Oceanway" after concluding that "we couldn't get . . . anything out of Mr. Letts." Larry's extensive testimony, when coupled with the lack of evidence that other management officials participated in the decision-making process, clearly establishes that Larry was the central figure for both companies in the decision to transfer the trucks.

Larry also played a major role in Haley & Haley's purchase of Oceanway, another decision that greatly affected the direction of both companies. Oceanway was a dormant corporation in March 1984 when Larry, in conjunction with Loren and Lucretia, negotiated the purchase of Oceanway's stock. The purpose of the acquisition, according to Larry, was to obtain Oceanway's permit to haul general commodities, "[b]ecause I could see the road . . . that the logging industry was going downhill . . . ." In June 1984 Oceanway began hauling general commodities, including heavy equipment, with one driver hired by Larry. Larry's own testimony therefore establishes that he

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815 (1962), enf. denied in relevant part 350 F.2d 108 (9th Cir. 1965), cert. denied 382 U.S. 1011 (1966).

[20] We agree that the situation here is distinguishable from that in *Otis* under any of the views expressed in that case.

[21] 268 NLRB at 1002, quoting *Fugazy Continental Corp.*, 265 NLRB 1301, 1302 (1982).

[22] See *Advance Electric*, supra at 1004, and cases cited therein.

[23] Larry's testimony illustrates the close connection between the two companies and his role as the central figure in the decision. He first testified, in reference to Haley & Haley, that "we" sold "our" trucks to Oceanway. He then testified, in reference to Oceanway, that "we" added a number of trucks over a period of months.

played a major role in the acquisition of Oceanway.[24]

We accord little weight to Larry's general testimony that he is not involved in Oceanway's daily operation,[25] that Lee and Paul operate its log-hauling department, and that Charles Carlow operates its lowboy department. The evidence discloses that Larry spends a significant amount of time engaging in dispatching duties for Oceanway. Further, Lee and Paul, who purportedly are two of Oceanway's managers, did not even begin working for Oceanway until it began hauling logs on February 17; before that they had driven trucks for Haley & Haley. Besides their late involvement in the management of Oceanway and their lack of management experience, Lee and Paul, along with Carlow, continued to perform as truckdrivers, regularly driving for Oceanway when work was available. Indeed, Larry testified that "that's all Oceanway has, is truck drivers," and he also noted that Oceanway "[can't] afford to have people sitting in the office." Consequently, we find that Lee, Paul, and Carlow spend most of their time performing "hands-on" work.[26] In *Advance Electric*, supra at 1003, the Board was not persuaded that an individual played a significant managerial or supervisory role in light of the fact that he was primarily engaged in "hands-on" work. Similarly, we see little reason to give weight to Larry's conclusional testimony that Lee, Paul, and Carlow operate Oceanway, in view of his concession that they regularly perform "hands-on" work.

Nor is our finding that the two companies share substantially identical management affected by Larry's general testimony that he does not participate in Oceanway's hiring process; that Lee and Paul make the hiring decisions for Oceanway's log-hauling department; and that Carlow makes such decision for its lowboy department. First, it was Larry who hired Carlow in June 1984 to drive what was then Oceanway's only lowboy truck. Further, Larry's testimony that Lee, Paul, and Gronnel "hired themselves" when Oceanway began hauling logs in February 1984, falls of its own weight. Larry did not explain the process by which they "hired themselves," or how that could have occurred without his participation, as it was he who made the decision to activate Oceanway's log-hauling operation. It also is clear that, regardless of the hiring role played by Lee and Paul, Larry apparently set one of the conditions—no union members—by which the hiring of drivers in Oceanway's log-hauling department would be governed.[27] Thus, he testified in reference to the drivers in the log-hauling department: "Oceanway wasn't supposed to be hiring Haley & Haley drivers. They belonged to the Union." Regarding those Haley & Haley drivers who were hired by Oceanway, Larry testified that, "they were supposed to get a withdrawal from the Union."

Even if Larry had less influence in the daily operation and hiring process of Oceanway than he did regardingthat of Haley & Haley, we are convinced that that weight of the evidence supports a finding that Haley & Haley and Oceanway have substantially identical management.[28] First, the evidence establishes that he does maintain some role in Oceanway's daily operation and hiring process. More importantly, the record firmly establishes that Larry was a major force behind Haley & Haley's acquisition of Oceanway, and that he was the central force behind the decision to activate Oceanway's log-hauling operation and to phase out Haley & Haley's operation.

We also find that Haley & Haley and Oceanway share a substantially identical business purpose and mode of operation. Both companies have been engaged in the hauling of logs, and by August 1984 each had obtained a permit to haul logs throughout the State of Oregon. Both companies operated out of the same location in Mapleton, and sometime in

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[24] The role of other officials in the decision to purchase Oceanway is not clear. Larry testified that he negotiated the purchase with Loren and Lucretia, and Charles Ritchey testified that Larry and Loren had discussed with him "in broad terms" the possibility of "branching out from log trucking." However, Lucretia did not testify at all, Loren did not testify concerning the purchase of Oceanway, and Ritchey did not indicate the extent of his participation in the discussions leading to the decision.

[25] There is no question concerning his status as Haley & Haley's manager and operating head.

[26] The Union introduced into evidence a document prepared by Lucretia and Larry pursuant to a subpoena by the Union. The document lists the individuals who perform various duties for Oceanway and Haley & Haley. It indicates that Lee, Paul, Carlow and, until he quit, Gronnel, have been responsible for handling discipline and employee complaints at Oceanway. However, the record does not establish the number of employees, if any, who have been disciplined or who have registered complaints, and it does not establish whether these responsibilities consume any significant amount of these individuals' time. The same document also states that these individuals perform dispatching duties for Oceanway, but the record also does not establish what percentage of their time is occupied by these duties. Moreover, as noted above, the record demonstrates that Larry performs dispatching duties for Oceanway. Consequently, we find that the conclusional statements contained in the document do not tend to establish that Oceanway's management is different from Haley & Haley's.

[27] Regarding the lowboy department, Larry testified that Carlow hires the drivers, but the record establishes that the lowboy department operates only three trucks.

[28] We find that the record does not permit a conclusion whether the two companies share substantially identical immediate supervision, or even whether they draw a distinction between high level management and immediate supervision. Thus, Larry was Haley & Haley's vice president and was responsible for its daily operation. With the exception of Gary Sichting, who operated the Company in Larry's absence, Haley & Haley had no other supervisors. In addition, it is not entirely clear who exercises managerial and supervisory authority for Oceanway. Lee, Paul, and Carlow assertedly are responsible for daily operations, but they spend most of their time driving trucks. However, we note that supervision is merely one factor among many to be considered

1985 both relocated to Reedsport. The repair work for both companies has been performed by L & L Repair, which is owned by the Haleys and which also relocated from Mapleton to Reedsport.[29]

Our finding that the two companies share a substantially identical business purpose is not affected by the fact that Haley & Haley was engaged exclusively in the business of hauling logs, while Oceanway hauled both logs and general commodities such as heavy equipment. Oceanway operated only one lowboy truck for hauling heavy equipment from June 1984 until February. In February it purchased a second truck for that purpose and subsequently it purchased a third. However, between February 17 and August 8 it acquired 20 log-hauling trucks from Haley & Haley. Consequently, we think it clear that after February 17, Oceanway was engaged predominantly in the hauling of logs. In similar circumstances in *Advance Electric*, supra at 1002, the Board concluded that two enterprises had a substantially identical business purpose, and we reach the same conclusion here.

The record also establishes that Haley & Haley and Oceanway share a substantially identical customer base. As noted above, International had been one of Haley & Haley's major customers for several years. Although the record does not disclose the precise date, Oceanway also began to engage in substantial log hauling for International at some point during 1985. As of the day of the hearing, according to Larry, Oceanway operated five trucks out of one of International's facilities and four trucks out of another of its facilities.

Haley & Haley's other major customer, Champion, had experienced serious financial difficulties over an extended period of time and finally terminated its operations on April 12. In our view, a finding that Haley & Haley and Oceanway shared a substantially identical customer base is not precluded by the circumstance that Champion terminated its operations before Oceanway had any realistic opportunity to seek its business.

It is true that Haley & Haley performed much less work for gypos, the small independent businesses that paid a lower rate than the large companies for log-hauling services, than did Oceanway.[30] Noting this fact, the judge found that Oceanway was able to obtain this work because, as a nonunion company, its costs were less than Haley & Haley's, and for that reason, the work obtained by Oceanway was not work that Haley & Haley otherwise would have obtained. We, however, do not view this circumstance as precluding a finding that the two companies share a substantially identical customer base. As discussed infra, we find that Haley & Haley sold its equipment and transferred its employees to Oceanway for the proscribed purpose of evading its responsibility under the Act to adhere to its collective-bargaining agreement with the Union. Therefore, Oceanway obtained this work only after Haley & Haley chose to evade its collective-bargaining agreement rather than seek the concessions that might have enabled it to compete for the work. We shall not alter our conclusion that the two companies share a substantially identical customer base merely because Haley & Haley succeeded in achieving the outcome that its unlawfully motivated conduct was designed to achieve.

The record also clearly establishes that Haley & Haley and Oceanway have used substantially identical equipment. Haley & Haley sold all its trucks to Oceanway, and the trucks were merely repainted with Oceanway's name.[31] To operate this equipment, Oceanway employed 11 of Haley & Haley's drivers, 8 of whom it still employs.

Also relevant to the alter ego issue is the motive underlying the sale of the trucks and the activation of Oceanway's log-hauling operation. The record establishes that since at least March 1984 Larry had been aware that the logging industry was "going downhill." In August 1984 he obtained a log-hauling permit for Oceanway "for the [future] because I thought we might need it." Subsequently he learned that one of Haley & Haley's two primary customers intended to terminate its operations, and that the other intended substantially to lower the rate it would pay for log-hauling services. Haley & Haley's attempt to haul logs for the gypos proved unprofitable because of its contractual wage obligations and the low rate paid by the gypos.

Confronted with these circumstances, Larry chose to ignore Haley & Haley's obligations under the collective-bargaining agreement. Having previously laid the groundwork by obtaining Oceanway's log-hauling permit, he decided simply to sell

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[29] As noted above, L & L Repair also operates a facility in Oakridge, Oregon.

[30] Forrest Egli, a driver for Haley & Haley, testified that Oceanway hauled for gypos when it commenced operations, and Larry testified that Oceanway hauled for companies "in different parts of the state that Haley & Haley ha[d] never been in."

[31] A similar circumstance existed in *Advance Electric*, supra at 1003.

In *Advance Electric* the Board also noted that the transfer of equipment from one enterprise to another was not marked by such business formalities as contracts or bills of sale. In this proceeding Haley & Haley and Oceanway did execute bills of sale, but we see no significance to this distinction because we still would not characterize the sale as an arm's-length transaction. Larry, as the president of Oceanway and the primary manager of Haley & Haley, was the dominant figure in the decision to sell the trucks. There is no evidence that any negotiations over price took place, and the extent to which cash changed hands is unclear. Ritchey testified that some payments were made, but that on August 8 Oceanway simply assumed Haley & Haley's obligations when the latter could no longer make payments on its own debts.

Haley & Haley's trucks to Oceanway and operate the latter without the burden of a union contract. The record leaves no doubt that Larry intended to operate Oceanway as a nonunion enterprise. Larry testified that "Oceanway wasn't supposed to be hiring Haley & Haley drivers. They belonged to the Union." According to Larry, those Haley & Haley drivers who did go to work for Oceanway "were supposed to get a withdrawal from the Union." In addition, the Respondent's attorney stated at the hearing that some Haley & Haley drivers went to work for Oceanway, "but not until after they withdrew from the Union . . . . Unless they withdrew from the Union, they wouldn't have been working for Oceanway, because Oceanway is a non-union concern."

We find in these circumstances that Larry activated Oceanway's log-hauling operation for the purpose of enabling Haley & Haley to evade its responsibility under the Act to honor its collective-bargaining agreement with the Union. As we found in *Advance Electric,* supra at 1004, such a motive supports an alter ego finding.[32]

Because of the above analysis, we find that Respondent Oceanway is the alter ego of Respondent Haley & Haley. We also find that the Respondents violated Section 8(a)(5) and (1) by transferring equipment and employees from Haley & Haley to Oceanway to perform log-hauling work, for the purpose of avoiding their statutory responsibility to adhere to their collective-bargaining agreement with the Union.[33] We further find that Respondent Oceanway and Respondent Haley & Haley are bound to the collective-bargaining agreement between Respondent Haley & Haley and the Union, and that the Respondents violated Section 8(a)(5) and (1) by refusing to honor and apply that collective-bargaining agreement.[34]

CONCLUSIONS OF LAW

1. Respondent Haley & Haley, Inc. and Respondent Oceanway Transport, Inc. are employers engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

2. International Woodworkers of America, Local 3-140, AFL–CIO is a labor organization within the meaning of Section 2(5) of the Act.

3. Respondent Oceanway Transport, Inc. is, for the purpose of this proceeding, the alter ego of Respondent Haley & Haley, Inc.

4. All employees of Haley & Haley, Inc., and of its alter ego Oceanway Transport, Inc., excluding office clerical employees, professional employees, guards, and supervisors as defined in the Act, constitute a unit appropriate for collective bargaining within the meaning of Section 9(b) of the Act.

5. At all times material, the Union has been the exclusive collective-bargaining representative of the employees in the appropriate unit within the meaning of Section 9(a) of the Act.

6. By transferring equipment and employees from Respondent Haley & Haley, Inc. to Respondent Oceanway Transport, Inc., to perform log-hauling work to avoid their statutory responsibility to adhere to their collective-bargaining agreement with the Union; and by refusing to honor and apply that collective-bargaining agreement, the Respondents have violated Section 8(a)(5) and (1) of the Act.

7. The unfair labor practices are unfair labor practices affecting commerce within the meaning of Section 2(6) and (7) of the Act.

8. The Respondents otherwise have not violated the Act as alleged in the complaint.

THE REMEDY

Having found that the Respondents have violated Section 8(a)(5) and (1), we shall order them to cease and desist and to take certain affirmative action designed to effectuate the policies of the Act.

We have found that the Respondent Oceanway Transport, Inc. and the Respondent Haley & Haley, Inc. are alter egos. We have also found that they transferred equipment and employees from Respondent Haley & Haley, Inc. to Respondent

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[32] We are not persuaded that Haley & Haley's belated offer to bargain precludes a finding that it acted with a proscribed motive. Even if Haley & Haley had engaged in timely bargaining to impasse for concessions, it still would not have been privileged to create an alter ego for the purpose of evading its collective-bargaining agreement. The creation of an alter ego is not the type of management decision analyzed in *Otis Elevator,* where, for example, an employer may implement a decision to relocate unit work after it has bargained in good faith to impasse if the contract does not restrict the relocation.

Moreover, we note that Haley & Haley did not engage in timely bargaining. It began to implement its decision on February 17 without notifying or bargaining with the Union, and it did not contact the Union for several weeks following the Union's March 13 protest of the sale of the trucks. It was not until April that Haley & Haley expressed any willingness to bargain, when Gossard advised Letts that wage reductions were necessary. At that time, Haley & Haley's decision already had been substantially implemented. In addition, Haley & Haley's April 28 bargaining request was coupled with a reminder that some trucks already had been sold and a threat that more would be sold unless concessions were forthcoming. Only 9 days later Haley & Haley ceased hauling logs.

[33] See *G & M Lath & Plaster Co.,* 252 NLRB 969, 979–980 (1980).

[34] As noted above, we have found it appropriate to analyze this case under alter ego principles and not under the principles set forth in *Otis Elevator,* supra, and *Milwaukee Spring,* supra. We emphasize again that one factor that distinguishes this case from *Otis Elevator* is the Respondents' unlawful motive. The Board in *Otis Elevator* expressly noted that there was no allegation that the employer had acted for antiunion reasons. 269 NLRB at 892 fn. 4. In addition, as indicated above, the Supreme Court in *First National Maintenance* noted the absence of any claim that the employer's decision had been motivated by union animus. 452 U.S. at 687. Similarly, in *Milwaukee Spring* the Board noted the parties' stipulation that the employer's decision was not the result of union animus. 268 NLRB at 601.

Oceanway Transport, Inc., to perform log-hauling work to avoid their statutory responsibility to adhere to their collective-bargaining agreement. We have also found that they refused to abide by that collective-bargaining agreement. Having made these findings, we shall order the Respondents to honor the collective-bargaining agreement and apply it to their employees, and to make their employees whole, with interest,[35] for any losses they may have suffered because of the Respondents' failure to honor and apply the collective-bargaining agreement. In addition, we shall order the Respondents to make whole their employees by making payments to the various trust funds established by the collective-bargaining agreement,[36] and by reimbursing employees for any expenses ensuing from the Respondents' unlawful failure to make such required payments, as provided in *Kraft Plumbing & Heating*, 252 NLRB 891 fn. 1 (1980), enfd. 661 F.2d 940 (9th Cir. 1981).[37]

ORDER

The National Labor Relations Board orders that Respondents Haley & Haley, Inc. and Oceanway Transport, Inc., Reedsport, Oregon, their officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Transferring equipment and employees from Respondent Haley & Haley, Inc. to Respondent Oceanway Transport, Inc., to perform log-hauling work to avoid their statutory responsibility to adhere to their collective-bargaining agreement with International Woodworkers of America, Local 3-140, AFL–CIO.

(b) Refusing to honor and apply their collective-bargaining agreement with the Union described above. The unit is:

> All employees of Haley & Haley, Inc., and of its alter ego Oceanway Transport, Inc., excluding office clerical employees, professional employees, guards, and supervisors as defined in the Act.

(c) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Honor and apply the collective-bargaining agreement with the Union described above.

(b) Make whole the bargaining unit employees and reimburse the funds established by the collective-bargaining agreement, with interest, for any losses suffered as a result of the Respondents' failure to honor and apply the collective-bargaining agreement, in the manner described in the remedy section of this decision.

(c) Preserve and, on request, make available to the Board or its agents for examination and copying, all payroll records, social security payment records, timecards, personnel records and reports, and all other records necessary to analyze the amount of backpay due under the terms of this Order.

(d) Post at their facility in Reedsport, Oregon, copies of the attached notice marked "Appendix."[38] Copies of the notice, on forms provided by the Regional Director for Region 19, after being signed by the Respondent's authorized representative, shall be posted by the Respondents immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to Respondents are customarily posted. Reasonable steps shall be taken by the Respondents to ensure that the notices are not altered, defaced, or covered by any other material.

(e) Notify the Regional Director in writing within 20 days from the date of this Order what steps the Respondent has taken to comply.

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

WE WILL NOT transfer equipment from Haley & Haley, Inc. to Oceanway Transport, Inc., to perform log-hauling work to avoid our statutory responsibility to adhere to our collective-bargaining agreement with International Woodworkers of America, Local 3-140, AFL-CIO.

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[35] See *Ogle Protection Service*, 183 NLRB 682 (1970).

[36] Because the provisions of employee benefit fund agreements are variable and complex, the Board does not provide for interest at a fixed rate on fund payments due as part of a "make-whole" remedy. We therefore leave to further proceedings the question of how much interest the Respondents must pay into the benefit fund to satisfy our "make-whole" remedy. These additional amounts may be determined, depending on the circumstances of each case, by reference to provisions in the documents governing the fund at issue and, when there are no governing provisions, to evidence of any loss directly attributable to the unlawful action, which might include the loss of return on investment of the portion of funds and withheld additional administrative costs, but not collateral losses. See *Merryweather Optical Co.*, 240 NLRB 1213, 1216 fn. 7 (1979).

[37] See also *Advance Electric*, supra at 1005.

[38] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

WE WILL NOT refuse to honor and apply our collective-bargaining agreement with the Union described above.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL honor and apply our collective-bargaining agreement with the Union described above.

> The unit consists of all employees of Haley & Haley, Inc., and its alter ego Oceanway Transport, Inc., excluding office clerical employees, guards, and supervisors as defined in the Act.

WE WILL, in the manner prescribed by the National Labor Relations Board, make whole our bargaining unit employees and reimburse the funds established by the collective-bargaining agreement, with interest, for any losses suffered as a result of our failure to honor and apply our collective-bargaining agreement.

HALEY & HALEY, INC.

OCEANWAY TRANSPORT, INC.

Richard V. Stratton, Esq., for the General Counsel.

Duane Vergeer, Esq., and *Charles Huber, Esq.*, Portland, Oregon, for the Respondent.

Rick Roll, Esq., Tillamook, Oregon, for the Charging Party.

DECISION

STATEMENT OF THE CASE

GERALD A. WACKNOV, Administrative Law Judge. Pursuant to notice, a hearing with respect to this matter was held before me in Eugene, Oregon, on 1 October 1985. The initial charge was filed on 13 June 1985 by International Woodworkers of America, Local 3-140, AFL-CIO (the Union). An amended charge was filed by the Union on 31 July 1985.

Thereafter, on 31 July 1985, the Regional Director for Region 19 of the National Labor Relations Board (the Board) issued a complaint and notice of hearing alleging a violation by Haley & Haley, Inc. and Oceanway Transport, Inc. (Respondents) of Section 8(a)(1) and (5) of the National Labor Relations Act (the Act).

The parties were afforded a full opportunity to be heard, to call, examine and cross-examine witnesses, and to introduce relevant evidence. Since the close of the hearing, briefs have been received from the General Counsel, counsel for the Respondent, and counsel for the Union.

On the entire record,[1] and based on my observation of the witnesses and consideration of the briefs submitted, I make the following

FINDINGS OF FACT

I. JURISDICTION

Respondent Haley & Haley, Inc. is an Oregon corporation with an office and place of business located in Mapleton, Oregon, where it is engaged in the business of contract log hauling. In the course and conduct of its business operations, Haley & Haley, Inc. has provided services valued in excess of $50,000 annually to customers, including International Paper Company and Champion Paper Company, which enterprises were directly engaged in interstate commerce.

On the basis of the foregoing, I find that Haley & Haley, Inc. is, and has been at all times material, an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

It is admitted that the Union is, and has been at all times material, a labor organization within the meaning of Section 2(5) of the Act.

II. ALLEGED UNFAIR LABOR PRACTICES

A. *The Issues*

The principal issue raised by the pleadings is whether Haley & Haley, Inc. and Oceanway Transport, Inc., a corporation wholly owned by Haley & Haley, have violated Section 8(a)(1) and (5) of the Act by unilaterally transferring equipment and employees outside the bargaining unit, and by failing and refusing to abide by the provisions of a current collective-bargaining agreement.

B. *The Facts*

Haley & Haley, Inc. (Haley), a family corporation engaged in the log-hauling business, has maintained a collective-bargaining relationship with the Union for many years. The current collective-bargaining agreement extends from 1 June 1983 to 1 June 1986. Haley had two principal customers that accounted for approximately 97 percent of its business, each customer providing nearly half of Haley's business over the years. One of these customers was Champion Paper Company, which terminated its operations in January or February 1985. About the same time the other customer, International Paper Company, changed its method of compensating log-hauling contractors and announced that it intended to significantly reduce the fees it was willing to pay for this service.[2] Haley was economically unable to haul logs at the new rate. Moreover, because of the established contractual wage rate, Haley was unable to haul for "gypos," small independent nonunion companies, at a profit. As a result, Haley ceased hauling operations on 7 May 1985.

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[1] Errors in the transcript have been noted and corrected.

[2] Prior to this time, the Union's contract with International Paper provided that log-hauling work be contracted to union haulers, thus ensuring that Haley would retain the work.

Haley purchased Oceanway Transport, Inc. (Oceanway) on 30 March 1984. In June 1984 Oceanway commenced operations as a hauler of heavy equipment. It had no log-hauling permit until August 1984, and did not commence hauling logs until about 17 February 1985, when it purchased four log-hauling trucks from Haley. The names on these trucks were changed at Haley's premises to reflect that they were being operated by Oceanway. Thereafter the trucks were driven by the same drivers who had previously driven them for Haley. The drivers withdrew from the Union prior to their employment with Oceanway.

On 13 March 1985 the Union sent the following letter to Haley:

> It has come to the attention of this Local Union, I.W.A. 3-140, that you have moved several logging trucks out of the bargaining unit.
>
> This is in violation of our joint working agreement. Any truck drivers within the bargaining unit hauling for any company, or gypo, are to remain in Local 3-140's jurisdiction.

In April 1985 Jack Gossard, a labor relations consultant, spoke with Charles Letts, union business representative, concerning Haley's economic circumstances. Gossard advised Letts that contractual wage reductions were necessary. Letts indicated that discussions on this subject would be fruitless until the International Paper negotiations, which were then being conducted, had been finalized.

Larry Haley, vice president of Haley & Haley, Inc., sent a letter to the Union, dated 28 April 1985, as follows:

> We want to confirm and repeat recent requests to you from Jack Gossard and myself, for further discussions on how Haley & Haley can continue in business and compete for I-P's trucking business.
>
> If what we hear indirectly from I-P is true, then we are going to have to have substantial changes in order to compete for the I-P hauling. As I told you the last time I saw you, Haley & Haley cannot come close to competing for the hauling for other companies anywhere in this area.
>
> Unless something happens soon, we will be forced to sell off more of our trucks or even consider going out of business.
>
> We will appreciate hearing from you as soon as possible.

Thereafter, apparently being advised during a phone conversation between Gossard and Letts that the request for a meeting should be sent to the Union's regional council, Haley sent the following letter to the counsel on 6 May 1985:

> We are attaching a copy of a letter sent to IWA Local 3-140. We have been advised that our request for a meeting should be addressed to the Regional Council.
>
> We are requesting a meeting to discuss Haley & Haley's competitive position now that Champion International at Mapleton is closed and we believe that International Paper at Gardiner is putting its log trucking up for competitive bidding to nonunion truckers who are paying their drivers $7.00 an hour with few if any fringes.
>
> We will expect to hear from you soon.

On 18 May 1985, Larry Haley advised Union Representative Letts that Haley had been given a deadline by International Paper and would have to advise that Company by 21 May 1985 whether it would provide hauling at the newly established rate, which was significantly lower than the then-prevailing contract rate. Haley told Letts that the contract wage and benefit package would need to be reduced, and proposed a $10.50-an-hour package. Letts said he would get back to him over the weekend after holding a union meeting among the drivers for the purpose of voting on Haley's proposal. The union meeting was held, apparently on 18 May 1985, and the drivers refused to accept the package offered by Haley.

A meeting between the parties was held on 21 May 1985. The Union was advised that Haley, in order to survive, was going to need a reduced wage and fringe benefit package of around $10.50 an hour due to the new rates that International Paper was willing to pay for hauling. Letts, according to Gossard, stated that he had been negotiating with International Paper and knew what it would take to make Haley competitive. Letts' position was that the Union remained either unable or unwilling to grant any wage concessions.

On 22 May 1985 Letts wrote the Company the following letter:

> It has come to the attention of Local 3-140 that Haley & Haley Trucking has transferred logging trucks to a company under the name of Ocean Way [sic] of Mapleton, Oregon. We strongly believe this is a move to circumvent our joint working agreement and deprive the I.W.A. crew of wages and benefits due under the agreement.
>
> I.W.A. Local 3-140 requests a meeting on this issue. We suggest the date of May 28, 1985 at 4:00 pm at the I.W.A. Hall at 364 N. 4th Street in Reedsport, Oregon.
>
> Please advise as to your availability of time and place.

A meeting was held on 28 May. Larry Haley pressed the Union for a response to its wage concession proposal, and advised that Haley was in danger of going out of business. Gossard testified that he gave the Union a breakdown on the hourly costs of what it would take to operate profitably, and the Union was told there was no way Haley could continue in business under the current contract labor costs. Loren Haley, Respondent's president, said the Company was absolutely firm on its proposal. During the course of the meeting the Union's attorney asked for certain specific information, including the names of the stockholders of Haley and Oceanway; how many trucks Haley retained; how many trucks Oceanway operated; and Haley's projected costs. Haley's representatives answered these questions, and there is no contention that Haley refused to divulge whatever information the Union requested about either corporation. Letts said he was aware of much of the information, and recognized that Haley was probably in a loss position. The Union made no request for Haley's books and records to verify its economic position.

During the meeting, Letts stated that Haley's proposed wage package was not sufficient. However, he made no counteroffer or indicated that the Union would be receptive to another offer. The Union's attorney said the Union would not discuss the problem further until those trucks that had been sold to Oceanway were transferred back to Haley. At the end of the meeting a written request for information was handed the Company. The three-page request is extensive, listing some 20 separate items of information, some of which call for detailed reports on the operation of each log truck. The information was to be produced by 10 June 1985.

Larry Haley testified that there was not a total shutdown on 7 May 1985, the day Haley ceased its hauling operations. Rather, the Company parked the trucks while attempting to find hauling jobs at a rate that would enable it to pay the contractual wage rate to the drivers. Four trucks were kept until 8 August 1985 when Haley concluded that there would be no concessions from the Union.

Loren and Larry Haley met with Letts on 30 May 1985. The Union was unwilling to grant any wage concessions and made no counterproposals. Rather, Letts said he had no authority to grant any wage concessions. Letts said, according to Larry Haley, that the information requested at the earlier meeting did not need to be furnished until a subsequent meeting attended by another union representative, Hubble, could be held. Loren Haley testified that he advised Letts that it would probably take about 2 weeks to put the information together, and Letts, according to Loren Haley, said not to worry about it. Letts testified that he did not remember anyone mentioning the request for information at the 30 May meeting, but acknowledges that the Union was in no hurry for the information, and would have utilized it for bargaining purposes until such time as Union Representative Hubble was available to negotiate. The meeting with Hubble, however, was never held.

Another meeting occurred on 11 June. No progress was made, as the parties continued to maintain their prior positions.

C. *Analysis and Conclusions*

Oceanway is wholly owned by Haley and there is no dispute that the Haley family owns and controls both corporations. Clearly, if Haley has violated the Act as alleged, by unlawfully transferring unit work to Oceanway, both corporations would be jointly liable for participating in such unlawful activity.

It is clear that 97 percent of Haley's business has been with only two customers, each of which did about an equal amount of business with Haley. One of these customers, Champion Paper Company, totally discontinued its business operations. The other, International Paper Company, which was having severe financial difficulties and had been negotiating with the Union for concessions, had sharply curtailed its operations. This further reduced Haley's log-hauling work and resulted in a substantial number of idle vehicles and employees. Moreover, International Paper advised Haley that as of 21 May 1985, it would sharply reduce the hourly fees it would pay for log hauling and would contract out the work to the lowest bidders. Further, the record indicates that prior to 21 May there was not much hauling work contracted out by International Paper, and that Haley obtained whatever work was available and economically feasible during this period.

There is no dispute as to the economic hardship on the business operations of Haley due to the foregoing circumstances. That Haley needed midterm concessions from the Union is beyond dispute, and no evidence was presented that its wage and benefit proposal to the Union, although substantially less than the then-current contract rate, was unrealistic, advanced in bad faith, or was designed to ensure that it would be unacceptable to the Union. Indeed, it is significant that although union representatives were clearly and repeatedly advised of Haley's financial condition, no request was made to see the books or records of that corporation to verify Haley's representations in this regard.

The parties engaged in substantial negotiations during which Haley, which had been given a deadline by International Paper, desperately attempted to negotiate reduced contract wage rate, which would enable it to continue hauling logs for that customer. The Union, however, although it did not refuse to discuss the matter, simply had no authority to modify the contractual wage and fringe benefit terms.

Counsel for the General Counsel and the Union maintain that no impasse in negotiations could have been reached since certain unit work was transferred to Oceanway in February, prior to any negotiations and, moreover, because Haley failed to provide certain requested information. I do not agree. I find, as credibly testified to by Gossard, that Haley's representatives answered all questions asked regarding Haley's financial situation and its relationship with Oceanway. Nor does the record show that Haley's officers or representatives attempted to establish a disguised corporation to evade Haley's bargaining obligation. Indeed, the name of Oceanway Transport, Inc. was placed on many former Haley trucks at Haley's premises, and the same drivers were employed by Oceanway to drive them. Business Agent Letts' testimony that he was unaware of the relationship between the two entities is not persuasive. Moreover, I credit the Respondent's witnesses who testified that Letts told them the information need not be provided until a later event, namely, negotiations with Business Representative Hubble, which negotiations never took place. And, even if Letts had been given the information, the Union would admittedly not have been in a position to agree to contract modifications.

Oceanway, being operated as a nonunion entity, could simply obtain work at the prevailing "gypo" rate for log hauling, and Haley, under the current contractual wage and benefit constraints, could not. There is no showing that there would have been any additional work for

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Haley drivers subsequent to the time Haley commenced selling its trucks to Oceanway, other than the work Haley actually performed. Therefore, the work performed by Oceanway was not work that Haley's employees would otherwise have performed. Under these circumstances, it has not been shown that unit work was unlawfully transferred outside the bargaining unit, as alleged.

On the basis of the foregoing, I find that Haley engaged in good-faith negotiations for contract concessions, and that an impasse was reached. Further, under the precedent established in *Milwaukee Spring Division*, 268 NLRB 601 (1984), I find that Haley did not violate the Act as alleged by causing Oceanway, its wholly owned entity, to engage in log hauling. Indeed, such work under the prevailing contract rates would not have been performed by Haley. Moreover, Haley did not violate the Act, as alleged, by failing to furnish requested information, as the information had either been furnished to the Union or, under the circumstances, would have served no useful purpose.

CONCLUSIONS OF LAW

1. Haley & Haley, Inc. is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

2. The Union is a labor organization within the meaning of Section 2(5) of the Act.

3. Haley & Haley, Inc. has not engaged in conduct violative of the Act as alleged.

On these findings of fact and conclusions of law and on the entire record in this case, I issue the following recommended[3]

ORDER

It is recommended that the complaint be dismissed in its entirety.

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[3] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, and findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

May Department Stores Company, Venture Stores Division *and* United Retail Workers Union Local No. 881, chartered by United Food and Commercial Workers International Union, AFL-CIO, CLC. Cases 13-CA-21660 and 13-CA-21696

June 30, 1988

DECISION AND ORDER

BY CHAIRMAN STEPHENS AND MEMBERS BABSON AND CRACRAFT

On February 17, 1984, the National Labor Relations Board issued its Decision and Order[1] in these proceedings, finding that the November 1, 1981 affiliation between the United Retail Workers Union (URW) and the United Food and Commercial Workers International Union, AFL-CIO, CLC (UFCW) was improper because unit employees who were not members of URW were not given an opportunity to vote in the affiliation referendum. Accordingly, the Board found that the Respondent did not violate Section 8(a)(5) and (1) of the Act by refusing, among other things, to recognize the affiliated entity, i.e., the Charging Party (Local 881). The Board's Order dismissing the complaint was enforced sub nom. by the Seventh Circuit Court of Appeals.[2] Thereafter, on April 28, 1986, in light of its decision in *NLRB v. Financial Institution Employees*, 475 U.S. 192 (1986), the United States Supreme Court vacated the decision of the court of appeals and remanded the case to that court for further consideration. On reconsideration, the court of appeals on July 25, 1986, issued its decision,[3] holding that the Board cannot require the URW "to allow nonunion employees to vote on the merger before ordering [the Respondent] to bargain with the post-merger union."[4] Without expressing views whether the affiliation referendum was conducted with sufficient due process or whether there is sufficient continuity between the unions, or on any other remaining issues, the court of appeals remanded the case to the Board for further proceedings consistent with its opinion.

Following acceptance of the remand from the court of appeals, the Board notified the parties that they could file position statements with the Board. On November 10, 1986, the Respondent and counsel for the General Counsel each filed a timely statement of position, and the Respondent filed a Motion for Summary Judgment and a statement of material facts. UFCW filed a position statement of November 14. On November 20 and 28, respectively, counsel for the General Counsel filed his response in opposition to the motion and the Respondent filed its reply to the response.[5] Thereafter, following the Board's issuance of its Decision and Order in *Western Commercial Transport*, 288 NLRB 214 (1988), the UFCW requested permission to file a second position statement. The Board granted all parties in this proceeding an opportunity to file statements of position in light of the recent decision in that case, and all parties have exercised the opportunity to do so.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the record[6] in light of the position statements and briefs, and finds that the 1981 affiliation of URW with the UFCW was proper and that the Respondent has violated Section 8(a)(5) and (1) of the Act, as alleged, by taking the following actions: refusing to bargain with Local 881; engaging in direct dealing with employees; unilaterally terminating the grievance procedures set forth in the applicable collective-bargaining agreements and refusing to process grievances; refusing to grant Local 881 representatives access to stores; refusing to provide information about newly hired employees as required by the collective-bargaining agreements; and unilaterally changing the dues-checkoff provisions set forth in the collective-bargaining agreements and refusing to transmit to Local 881 dues and initiation fees deducted from employees' paychecks.

The Affiliation Referendum

The facts regarding the conduct of the affiliation referendum are set forth briefly in the Board's decision at 268 NLRB 979. The Respondent has recognized the URW as the exclusive bargaining representative of employees in its 10 Chicago area stores and its store in Decatur, Illinois, since 1978.[7] The most recent collective-bargaining agreement between the Respondent and URW covering the Chicago stores was effective from July 21, 1980,

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[1] 268 NLRB 979.

[2] *Retail Workers Local 881 v. NLRB*, 774 F.2d 752 (7th Cir. 1985).

[3] 797 F.2d 421 (7th Cir. 1986).

[4] Id. at 423. The court noted that the relevant considerations in both "merger" and "affiliation" cases are the same.

[5] In view of the procedural history of this case and the decision reached here, the Respondent's motion is denied.

[6] Per stipulation by the Respondent, Local 881, and the General Counsel, the record in this case consists of the charges, the consolidated complaint, the answer, and the stipulation of facts, with attachments, entered into by the parties and approved by the Board on April 23, 1982. (See 268 NLRB 979.) In the stipulation, the parties waived a hearing before an administrative law judge, agreed that oral testimony was neither necessary nor desired, and reserved the right to object to the materiality, relevance, or competence of any of the stipulated facts.

[7] In 1978, the Respondent recognized URW following the purchase of certain Turnstyle Stores from Jewel Companies, Inc. In 1962 Jewel had voluntarily recognized URW as the representative of its Chicago area Turnstyle employees and later recognized URW as the representative of its Decatur location employees pursuant to Board certification in 1972.

289 NLRB No. 88

through July 24, 1983. The most recent collective-bargaining agreement between the Respondent and URW covering the Decatur store was effective from January 1, 1981, through December 31, 1983. As discussed in more detail below, the Respondent failed to adhere to certain terms of the agreements following November 1, 1981.

In January 1981[8] and for approximately 6 months thereafter, URW National Executive Director Fred Burki and URW National Vice President/Treasurer Frank Koukl investigated the possibility of URW's affiliating with UFCW and met with UFCW officials. On June 11, Burki and Koukl presented their affiliation plan to, and received the unanimous approval of, the four URW local presidents. On June 22, UFCW International President William Wynn and URW's executive council, staff supervisors, and board of governors met and, with the exception of two absent persons who later gave their approval, unanimously endorsed and signed a "resolution of merger," adopting the proposed merger agreement between URW and UFCW. Thereafter, on June 23, Burki notified the Respondent that URW intended to seek affiliation and sent all URW members a letter informing them of the governing bodies' decision and recommendation on affiliation and explaining the reasons for it. On June 24 and 25, Burki held a press conference attended by officials of both unions to announce a mail ballot referendum on the affiliation question, and notified all stewards about a special affiliation conference scheduled for July 27. On July 1, Koukl sent letters about the special affiliation conference and special membership meetings to be held the same week to all employers with whom URW had collective-bargaining agreements and, under separate cover, Burki informed the employers about the proposed affiliation. On July 10, all URW members were mailed a "Notice of Meeting and Mail Ballot Referendum" and a copy of the merger agreement and appendices,[9] and 4 days later, reminders of the special meetings and the referendum were posted at all employers' facilities. Stewards and local union officers attended the special affiliation conference on July 27, and affiliation meetings were conducted, as announced, twice a day on July 28 through 31. The latter meetings were open to all URW members and the members were given an opportunity to question URW and UFCW officials about the affiliation.

On July 31, Walenza Direct Mail mailed affiliation referendum ballots with instructions and return envelopes enclosed to the 20,548 URW members deemed eligible to vote.[10] The preprinted return envelopes were addressed to LaSalle Bank, which URW had appointed to guard and tally the ballots. Although the return envelopes were imprinted with a store identification number, the ballots themselves bore no identification marks.

As of the close of business on August 20, the preestablished cutoff date for the election, LaSalle Bank had received 9235 ballots.[11] The following day, the bank opened and commingled and tabulated the ballots. The tally was 6823 for affiliation and 2344 against it, with 68 ballots declared invalid. Of the 1214 ballots mailed to members in the Respondent's employ, 389 were returned to the bank and tabulated. The URW and the General Counsel acknowledge that because of the commingling of the ballots, they have no way of determining (by employer, unit, or store) how the employees voted.

On August 21, URW telephoned the Respondent and other employers under contract with it and informed them of the result of the referendum. By letter dated August 31, the Respondent's vice president, Coleman Peterson, acknowledged receiving a telephone call concerning the results of the referendum, but requested that Burki advise him "officially of the current and future status" of URW, specifically, whether the "merger" was complete and, if not, what further steps were necessary, when any additional steps would be taken, the effective date(s) of the merger, and the tally of ballots among the Respondent's employees. Peterson's letter also stated that the Respondent needed to know that it was "dealing with the proper organization and its authorized representatives" in order to continue "routine" matters such as dues checkoff, handling of new checkoff authorizations, and grievances. Additionally, Peterson stated that he had instructed management to discontinue these functions as of September 5 but, pending official notification, would "reinstruct" the managers if the merger was not going to take place or would not be effective until a later date.

In a letter dated September 1, Burki responded that the effective date of the affiliation was November 1, requested that Peterson "reinstruct" the managers to "continue business as usual," and assured Peterson of answers to his questions prior to November 1. In letters dated September 24, Peterson acknowledged compliance with Burki's September 1 requests and Burki formally advised Peterson of the referendum results and the effects of the impending affiliation, including that "[o]n 1 November, the URW will become United Retail Workers Union Local No. 881, affiliated with the [UFCW]." Burki's letter further asserted that there would be no change in URW officers or structure for a period of 3 years, that as a UFCW local, URW would remain autonomous and would continue making all decisions regarding collective bargaining, grievance handling, and arbitration, and that there would be no change in the current collective-bargaining agreements with the Respondent.[12]

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[8] All dates refer to 1981 unless otherwise indicated.

[9] Appendices included the UFCW International constitution.

[10] URW contracted out the printing of ballots and labels as well as the mailing. Of the 22,412 employees represented by URW, the following individuals were eligible to vote:

> a. all active URW members on the payroll of an employer under contract with URW as of the last payroll date prior to July 31, 1981; and b. Non-members employed by an employer under contract with URW as of the last payroll date prior to July 31, 1981 who: (1) had not completed but would complete their 30-day probationary period before July 31; and (2) from whom URW had received a membership application before July 31, 1981.

[11] A total of 119 envelopes containing ballots and instructions were returned to URW as undeliverable.

On October 16, the Respondent's chairman, Thomas Rafferty, sent the following letter to Burki:

> Venture has been advised of the results of the mail referendum conducted among your membership on the issue of affiliation with the [UFCW]. We understand that among your total membership of approximately 22,000 persons, there were 6,823 votes cast favoring the affiliation and 2,344 votes opposed to the affiliation. This certainly does not represent an overwhelming level of participation, nor a clear mandate by your membership favoring affiliation.
>
> It is also our understanding that you are unable to separately determine the wishes of Venture associates[13] regarding representation by the UFCW, an issue of vital importance to our associates. We have asked for that information on several occasions and it has not been provided, and we have been led to believe it is unavailable. The history of your union's representation of Venture associates is such that few of them have ever had the chance to express their desires about representation by the URW, and this referendum has now deprived them of an opportunity for self-determination concerning representation by yet another union.
>
> The failure of the URW to conduct a separate referendum among Venture associates is made more unreasonable by the fact that even if all Venture associates had voted, they would have been so outnumbered by your members employed by other larger employers that there is no way the voice of Venture associates could have effectively been heard.
>
> We also understand that voting in the referendum was limited to URW members, a condition that excluded non-members from the opportunity to vote.
>
> In view of these considerations, and others arising out of the substantial difference between an independent [URW] and your new identity as a local of the United Food and Commercial Workers Union, the company has requested that the National Labor Relations Board conduct a vote among the associates in our union stores to allow them to indicate their desires regarding future union representation.[14] We will, as of November 1, 1981, suspend transmission of dues and initiation fees to the Union. Naturally, if our associates vote to select Local 881 of the [UFCW] as their bargaining representative, Venture will recognize and deal with that Union, as always in good faith. If on the other hand, they vote to reject such union representation, any union dues and fees deducted from our associates after the effective date of the affiliation . . . will be returned to them. Venture intends to create an escrow account for such purpose. In view of this action, Venture will decline to recognize Local 881 unless and until this question concerning representation is resolved. [Fns. added.]

Also, on October 16 the Respondent's store managers gave a scripted speech to employees, explaining its position regarding the affiliation, its request for a Board-conducted election, and its planned refusal to recognize Local 881 as the employees' collective-bargaining representative. Further, the Respondent mailed numerous letters to employees regarding its position on the affiliation.

On November 1, in accordance with the merger agreement between URW and UFCW, UFCW granted a charter to the URW officers, and successsors "under the title of United Retail Workers Union, Local 881."

The Pre- and Post-Affiliation Structure of Local 881

Prior to the effective date of the affiliation, URW was composed of four locals, each with a president, vice president, secretary, and sergeant-at-arms elected from among and by the respective local membership. Fourteen of the sixteen local officers were elected to and constituted the board of governors of the URW. Except in their capacity as members of the board of governors, the local leadership had no authority to pledge the credit or disburse funds of the URW or any local, negotiate contracts with employers, file or process grievances pursuant to collective-bargaining agreements, resolve disputes arising among members or locals, or discipline members for violating URW's constitution and bylaws. Although they received no compensation for their services as local officers, they received approximately $150 a month for their services on the board of governors.

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[12] In his letter, Burki also informed Peterson that contract ratification procedures would remain the same and that negotiation committees would be selected as in the past.

[13] The Respondent refers to its employees as "associates."

[14] The Respondent's request for an election, filed October 16, was dismissed by the Regional Director for Region 13 on December 10 pending resolution of the unfair labor practice charges in this case.

Administratively, the URW was further composed of the executive council and its professional staff. National Executive Director Burki and Vice President/Treasurer Koukl were the sole members of the council. The professional staff was made up of nine national officers and supervisors, including the comptroller and vice president of field operations, and nine field representatives. The board of governors and the executive council were responsible for the negotiation and administration of collective-bargaining agreements,[15] the execution and enforcement of contracts necessary for the Union's day-to-day operation, and the resolution of disciplinary matters. Pursuant to the URW constitution, collective-bargaining agreements were ratified by a majority vote of affected local members at a meeting called for this purpose.

Following the affiliation, URW's four locals were redesignated as administrative districts of Local 881. In accordance with the merger agreement, Local 881 is run by an executive council and general executive board. Burki, Koukl, and the nine officers and supervisors from URW's professional staff serve on the new executive council. The general executive board consists of the executive council members and all members of the former URW board of governors, i.e., the former URW local officers. Local 881 also retains the identical professional staff of URW. The executive council manages Local 881's daily affairs. The general executive board elects the executive council, conducts disciplinary trials, and hears appeals from Council/Board President Burki's findings in disciplinary proceedings. Burki and designated representatives continue to negotiate collective-bargaining agreements, and contract ratification is by a majority of affected membership; however, the UFCW International reserves the right to approve initial proposals and to approve contracts prior to their submission to members for ratification. Local 881 has the exclusive authority to interpret and enforce its collective-bargaining agreements, including processing, withdrawing, and settling grievances, and submitting them to arbitration.

The URW constitution permitted a strike on a two-thirds vote of the membership present at a special strike meeting. Pursuant to the merger agreement, Local 881 may strike on the two-thirds vote of affected membership at a special meeting and approval by Local 881's president or the UFCW International. URW dues were set by a simple majority of stewards and delegates attending the URW national convention; whereas, Local 881 members may establish dues at regular or special meetings, subject to minimums set forth in the UFCW constitution and approval by the UFCW president. Unlike the URW, UFCW charges a $4.70 per capita tax monthly. In accordance with the merger agreement, however, UFCW agreed not to institute the tax for a period of 3 years following affiliation.

The Positions of the Parties

The Respondent challenges the legality of the affiliation, asserting that due process was not observed in the conduct of the referendum and that there has been a substantial change in continuity of representative as a result of the affiliation. More specifically, the Respondent contends that a unit-by-unit vote should have been undertaken and that in the absence of proof that a majority of its employees voted in favor of affiliation, it has no obligation to recognize or bargain with Local 881. Further, the Respondent asserts that postaffiliation changes in the administrative structure of URW, as well as changes in, among other things, officers and their authority, dues, and fees and their use, contract ratification procedures, strike approval, and membership disciplinary rules have resulted in a substantial loss of autonomy and give rise to a question concerning representation. The General Counsel contends that due process was safeguarded, that unit-by-unit proof of approval of the affiliation is unnecessary under the circumstances, and that Local 881 is substantially the same as URW.

Analysis

A. *Due Process*

In conjunction with Section 9(a), Section 8(a)(5) of the Act provides that it shall be an unfair labor practice for an employer to refuse to bargain collectively with the exclusive representative of its employees. In matters of affiliation, the Board has long held that an employer's duty to bargain with the employees' representative continues so long as the employees have been given an adequate opportunity to vote and there is continuity in the pre- and post-affiliation representative.[16] In assessing the adequacy of the opportunity to vote on affiliation, the Board has traditionally examined whether due-process safeguards have been met, i.e., whether employees were given notice of the impending affiliation election and a sufficient opportunity to discuss the affiliation and to ask questions about it, and whether precautions were taken to preserve the secrecy of the ballot.

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[15] Burki and Koukl lead all collective-bargaining negotiations.

In the instant case, the record establishes that URW undertook elaborate preparations for the conduct of the mail ballot referendum. On June 23, following the unanimous approval of the affiliation plan by URW local presidents, the executive council, staff supervisors, and the board of governors, URW notified all members of the proposed affiliation, and on June 24 issued press releases regarding the August mail ballot referendum. On June 25, URW notified all stewards that a special affiliation conference for stewards would be held on July 27. On July 10, URW mailed all members a notice of special membership meetings and information about the referendum. Included in this notice was a copy of the merger agreement and its appendices. URW also posted notices concerning the meetings and referendum. All meetings were conducted as scheduled and members were given an opportunity to discuss the affiliation with URW and UFCW representatives. Instructions, ballots, and preprinted return envelopes were mailed to all URW members on July 31 by an independent direct mail company. During the balloting period, URW operated an affiliation "hot-line" to answer members' questions. The referendum closed on August 20, and on August 21, LaSalle Bank, the URW-appointed trustee of all mailed-in ballots, tabulated the ballots and issued its tally.

The foregoing events make it clear that URW members, including the Respondent's employees, were given sufficient notice of the election, an opportunity to discuss and make an informed decision regarding affiliation, and an opportunity to vote. It is equally clear that the integrity and secrecy of the ballots were maintained. Accordingly, we find that due process was observed in the conduct of the referendum.

Finally, there is no merit to the Respondent's contention that it has no duty to bargain with the Union because, as a result of the commingling of ballots in the affiliation vote, the precise vote in the Respondent's two bargaining units cannot be known. As it is clear, for the reasons discussed below, that the affiliation did not result in a lack of continuity in the representative, and as due-process safeguards on the affiliation election were clearly met, it is unnecessary to determine precisely how each unit of employees of each employer voted.[17] Where there is continuity of representative, an employer has no more right to seize the occasion for questioning majority sentiment in the unit than it would have if the bargaining representative had simply changed its own constitution. See *Financial Institution Employees*, 475 U.S. at 202. Continuity of representative was maintained in this case notwithstanding the affiliation with the UFCW.

B. *Continuity of Representative*

As we recently noted in *Western Commercial Transport*, 288 NLRB 214 (1988), the Supreme Court's decision in *NLRB v. Financial Institution Employees Local 1182*, supra, indicates that, at least with respect to the continuity factor, the general test for determining whether the affiliation of a bargaining representative with another labor organization raises a question concerning representation is whether the affiliation produces a change that is "'*sufficiently dramatic* to alter the union's identity.'" *Western Commercial Transport*, 288 NLRB at 217–218, quoting *Financial Institution Employees Local 1182*, supra, 475 U.S. at 206 (emphasis added). In *Western Commercial Transport*, the original union local lost virtually all its autonomy by being totally submerged in a district lodge local of the International labor organization with which it was affiliating. No role was open to the original union's officers except for the possibility that one of them could serve as a chief steward for the bargaining unit or as a unit representative to help create a local negotiating committee; but all day-to-day contract administration was to be taken over by a district lodge staff member.

In the present case no such dramatic alteration of identity has been shown. Rather, the record establishes some organizational changes with respect to relations between the four URW locals and a slight diminution in autonomy in relation to the UFCW International. Although URW's four locals representing the Respondent's employees were merged to form one UFCW Local—Local 881—this new local has four administrative districts corresponding to the old locals and their governance has remained substantially the same.

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[16] *Financial Institution Employees*, supra. In light of our finding below that the Board's traditional due-process requirements have been met in this case, we find it unnecessary to consider whether, in view of the Supreme Court's opinion in *Financial Institution Employees*, such requirements need be fulfilled in all instances where affiliations occur (id., 472 U.S. at 199 fn. 6).

[17] See *House of the Good Samaritan*, 248 NLRB 539 (1980) (no separate vote by employer's employees required where affiliation did not disturb continuity of representative); *American Enka Co.*, 231 NLRB 1335, 1337 (1977) (same). The same principle is implicit in the holding of *American National Insurance Co.*, 281 NLRB 713 (1986), in which the Board found the employer obligated to bargain with the union following a merger, notwithstanding that ballots in the nationwide balloting were commingled. 281 NLRB at 714.

Thus, despite the reconstitution, the local officers who were elected by the membership to URW's board of governors prior to affiliation, now serve on Local 881's general executive board. Likewise, the former URW executive council, composed of Burki and Koukl, and the former URW professional staff, now serve as Local 881's executive council and are also part of the general executive board. Clearly, only the names of the governing bodies and the organizational subgroupings have been altered; the leaders and the essential structures remain the same.

The authority of the pre- and post-affiliation leadership also remains constant, as evidenced by the fact that URW local officers had no authority other than that exercised in their capacity as members of the board of governors. Significantly, the authority of Local 881's leaders to negotiate collective-bargaining agreements and fashion bargaining proposals and discipline members, and the authority of members to ratify collective-bargaining agreements and call strikes, are virtually identical to their preaffiliation authority. Further, Local 881 has retained all URW property and assets, including the URW treasury. Additionally, although UFCW locals set initiation fees and dues by majority membership vote subject to minimums set forth in the UFCW constitution and although the International charges a monthly per capita tax, there is no evidence of an affiliation-related dues increase. The merger agreement explicitly states that no tax will be imposed on Local 881 members for a period of 3 years.[18] Also, we note that former URW members in good standing became members of UFCW and were eligible to run for UFCW office on affiliation. Finally, we note that Local 881 stood ready to assume the collective-bargaining agreements between URW and the Respondent at the time of the affiliation and attempted to do so.

In view of the retention of local officers and assets and the corresponding evidence showing that there has been no substantial impairment or reduction of local autonomy, we find that continuity of representative has been preserved. Further, this finding of Local 881's separate autonomy is not negated by the right of the International under its constitution to approve certain actions taken by the local, including approval of initial negotiated proposals drafted by the local, and collective-bargaining agreements negotiated by the local prior to submission to local union membership for ratification. These reserved rights of approval, allowing the International only to react to initiatives of the local, do not serve to supplant the local as the entity primarily responsible for the conduct of its affairs. Indeed, if such conditions were sufficient to warrant a finding that an affiliation had produced changes in the local that raised a question concerning representation, this would be tantamount to a conclusion that virtually any affiliation of a local with an International would raise such a question. We see no basis in either precedent or policy for such a rule.

Given that due-process safeguards in the affiliation referendum were observed and there exists a continuity of representative, we find that the affiliation of URW with UFCW was proper and raises no question concerning representation.

The Unfair Labor Practices

The Respondent admits in its answer to the complaint, and also acknowledges by way of the parties' joint stipulation, that it has refused to recognize and bargain with Local 881. Having found that the affiliation raises no question concerning representation, we find that the Respondent has violated Section 8(a)(5) and (1) of the Act by refusing to recognize and bargain with Local 881 as the exclusive bargaining representative of its employees in the units described above. The Respondent further admits and has stipulated, and we find, that since November 1 it has: (1) refused to process grievances filed by Local 881 pursuant to the applicable collective-bargaining agreements; (2) refused to grant Local 881 representatives access to its stores for purposes of administering the collective-bargaining agreements in accordance with those agreements; (3) refused to transmit initiation fees and dues to Local 881, as required by the collective-bargaining agreements; (4) refused to adhere to the union-shop provisions of the collective-bargaining agreements; and (5) refused to submit the names and addresses of newly hired employees in accordance with the collective-bargaining agreements. We find that by engaging in the enumerated conduct, the Respondent has unilaterally modified its collective-bargaining agreements with Local 881 and has violated Section 8(a)(5) and (1) of the Act.

CONCLUSIONS OF LAW

1. United Retail Workers Union, Local No. 881, chartered by United Food and Commercial Workers International Union, AFL-CIO, CLC is the ex-

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[18] According to the UFCW's International constitution, arts. 14-16, during this intervening 3-year period (specifically on or before August 1983) a convention of the International was scheduled to be held at which Local 881 would have the right to present resolutions to change the per capita tax requirement or any other provision in the International constitution.

clusive bargaining representative of all the Respondent's employees in the following units:

> (a) employees employed in the Venture operations at the following locations: 1) 9449 Skokie Boulevard, Skokie, Illinois; 2) 116 South Waukegan, Deerfield, Illinois; 3) 444 East Rand Road, Arlington Heights, Illinois; 4) 521 East North Avenue, Glendale Heights, Illinois; 5) 125 West 87th Street, Chicago, Illinois; 6) 11440 South Halsted Street, Chicago, Illinois; 7) 7601 South Cicero Avenue, Chicago, Illinois; 8) 6063 Broadway, Merrillville, Indiana; 9) 1311 Golf Road, Schaumburg, Illinois; and 10) 1740 North Kostner, Chicago, Illinois, but excluding all managers and other employees defined as supervisors, trainees (to a maximum of six per store) and department managers, office clerical employees, security personnel (including guards and watchmen), professional employees and craftsmen performing work in said stores, but who are not part of the facility's normal employee complement.
>
> (b) All employees employed in Venture operations located at 2800 North Water Street, Decatur, Illinois, but excluding all managers and other employees defined as supervisors, trainees (to a maximum of six per store) and department managers, office clerical employees, security personnel (including guards and watchmen), professional employees and craftsmen performing work in said store, but who are not part of the facility's normal employee complement.

2. By refusing on and after November 1, 1981, to recognize and bargain with Local 881 as the exclusive bargaining representative of the employees in the units described above, the Respondent has violated Section 8(a)(5) and (1).

3. By refusing to process grievances filed by Local 881, to grant Local 881 representatives access to its stores for purposes of administering its collective-bargaining agreements, to transmit initiation fees and dues to Local 881, to enforce the union-shop provisions of the collective-bargaining agreements, and to submit the names and addresses of newly hired employees—all in accordance with the applicable collective-bargaining agreements—the Respondent violated Section 8(a)(5) and (1) of the Act.

REMEDY

Having found that the Respondent has engaged in certain unfair labor practices, we shall order it to cease and desist and to take certain affirmative action designed to effectuate the policies of the Act. With respect to dues and fees collected by the Respondent pursuant to checkoff, but withheld from Local 881, we shall order that all such funds be remitted to Local 881, with interest to be computed in the manner prescribed in *New Horizons for the Retarded*.[19]

ORDER

The National Labor Relations Board orders that the Respondent, May Department Stores Company, Venture Stores Division, Chicago and Decatur, Illinois, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Refusing to recognize and bargain with Local 881 as the exclusive bargaining representative of the employees in the two units described in this decision.

(b) Refusing to process grievances filed by Local 881, pursuant to the applicable collective-bargaining agreements.

(c) Refusing to grant Local 881 representatives access to its stores for purposes of administering the collective-bargaining agreements.

(d) Refusing to transmit initiation fees and dues to Local 881, pursuant to the collective-bargaining agreements.

(e) Refusing to enforce the union-shop provisions of the collective-bargaining agrements.

(f) Refusing to submit the names and addresses of newly hired employees to Local 881, as required by the collective-bargaining agreements.

(g) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Recognize and, on request, bargain with Local 881 as the exclusive representative of all employees in the units described in this decision with respect to rates of pay, wages, hours, and other terms and conditions of employment and, if an understanding is reached, embody such understanding in a signed agreement.

(b) Process all grievances filed on or after November 1, 1981, by Local 881, pursuant to the applicable collective-bargaining agreements.

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[19] In accordance with our decision in *New Horizons for the Retarded*, 283 NLRB 1173 (1987), interest on and after January 1, 1987, shall be computed at the "short-term Federal rate" for the underpayment of taxes as set out in the 1986 amendment to 26 U.S.C. § 6621. Interest on amounts accrued prior to January 1, 1987 (the effective date of the 1986 amendment to 26 U.S.C. § 6621), shall be computed in accordance with *Florida Steel Corp.*, 231 NLRB 651 (1977).

(c) Allow Local 881 representatives access to its stores for purposes of administering the collective-bargaining agreements.

(d) Transmit to Local 881 all fees and dues collected on or after November 1, 1981, with interest, as set forth in the remedy section of this decision.

(e) Adhere to the union-shop provisions of the collective-bargaining agreements.

(f) Submit the names and addresses of newly hired employees to Local 881, as required by the collective-bargaining agreements.

(g) Post at its 10 Chicago, Illinois area stores and its Decatur, Illinois store copies of the attached notice marked "Appendix."[20] Copies of the notice, on forms provided by the Regional Director for Region 13, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material.

(h) Notify the Regional Director in writing within 20 days from the date of this Order what steps the Respondent has taken to comply.

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

WE WILL NOT refuse to recognize and bargain with United Retail Workers Union, Local 881, chartered by United Food and Commercial Workers International Union, AFL-CIO, CLC as the exclusive bargaining representative of our employees in the following units:

> (a) employees employed in the Venture Operations at the following locations: 1) 9449 Skokie Boulevard, Skokie, Illinois; 2) 116 South Waukegan, Deerfield, Illinois; 3) 444 East Rand Road, Arlington Heights, Illinois; 4) 521 East North Avenue, Glendale Heights, Illinois; 5) 125 West 87th Street, Chicago, Illinois; 6) 11440 South Halsted Street, Chicago, Illinois; 7) 7601 South Cicero Avenue, Chicago, Illinois; 8) 6063 Broadway, Merrillville, Indiana; 9) 1311 Golf Road, Schaumburg, Illinois; and 10) 1740 North Kostner, Chicago, Illinois, but excluding all managers and other employees defined as supervisors, trainees (to a maximum of six per store) and department managers, office clerical employees, security personnel (including guards and watchmen), professional employees and craftsmen performing work in said stores, but who are not part of the facility's normal employee complement.
>
> (b) All employees employed in Venture operations located at 2800 North Water Street, Decatur, Illinois, but excluding all managers and other employees defined as supervisors, trainees (to a maximum of six per store) and department managers, office clerical employees, security personnel (including guards and watchmen), professional employees and craftsmen performing work in said store, but who are not part of the facility's normal employee complement.

WE WILL NOT refuse to process grievances filed by Local 881, pursuant to the collective-bargaining agreements in effect with Local 881.

WE WILL NOT refuse to grant Local 881 representatives access to our stores for purposes of administering the collective-bargaining agreements.

WE WILL NOT refuse to transmit initiation fees and dues to Local 881, pursuant to the checkoff provisions of the collective-bargaining agreements.

WE WILL NOT refuse to adhere to the union-shop provisions of the collective-bargaining agreements.

WE WILL NOT refuse to submit the names and addresses of newly hired employees to Local 881, as required by the collective-bargaining agreements.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL recognize and, on request, bargain with Local 881 as the exclusive representative of all employees in the units described above with respect to rates of pay, wages, hours, and other terms and conditions of employment and, if an understanding is reached, embody such understanding in a signed agreement.

WE WILL process all grievances filed on or after November 1, 1981, by Local 881, pursuant to the applicable collective-bargaining agreements.

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[20] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

WE WILL allow Local 881 representatives access to its stores for purposes of administering the collective-bargaining agreements.

WE WILL transmit to Local 881 all fees and dues collected pursuant to checkoff on or after November 1, 1981, with interest.

WE WILL adhere to the union-shop provisions of the collective-bargaining agreements.

WE WILL submit the names and addresses of newly hired employees to Local 881, as required by the collective-bargaining agreements.

MAY DEPARTMENT STORES COMPANY, VENTURE STORES DIVISION

Toledo World Terminals, Inc. *and* **International Longshoremen's Association, Local Union No. 1982**

International Longshoremen's Association *and* **International Longshoremen's Association, Local Union No. 1982.** Cases 8-CA-16959, 8-CA-17769, 8-CB-4706, 8-CB-4769, 8-CB-5032, and 8-CB-5290

June 30, 1988

DECISION AND ORDER

BY CHAIRMAN STEPHENS AND MEMBERS BABSON AND CRACRAFT

On March 27, 1986, Administrative Law Judge Walter H. Maloney Jr. issued the attached decision. Respondent Toledo World Terminals, Inc. (TWT) and Respondent International Longshoremen's Association (ILA) filed exceptions and supporting briefs, and the General Counsel filed cross-exceptions, a supporting brief, and an answering brief. TWT and ILA subsequently filed answering briefs.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and briefs[1] and has decided to affirm the judge's rulings, findings,[2] and conclusions only to the extent consistent with this Decision and Order.

TWT is the lessee-operator of Facility One, the principal general cargo dock facility in the Port of Toledo, Ohio. TWT began negotiating to lease Facility One in the spring of 1981 when the predecessor operator, Toledo Overseas Terminal (TOT), closed because of financial difficulties. TOT had operated the dock under a contract with International Longshoremen's Association, Local Union No. 1982 (Local 1982). In considering a lease of Facility One, TWT decided it would not deal with Local 1982. TWT believed that TOT and prior operators failed in part because the Local 1982 contract was too costly and restrictive. Furthermore, an owner of TWT, Paul Wills, also owned Consolidated Dock Company (Con Dock), which operated in another part of the Port of Toledo and which had problems with Local 1982. In 1980, Local 1982, with ILA assistance, had established near the Con Dock facility a picket boat with informational signs alleging that Con Dock (which operated with Teamsters-represented stevedores) was not paying area standard wages. William Davis, chief operating head of Con Dock and TWT, estimated that Con Dock lost about $500,000 in ship revenues as a result of the picketing.

Having decided not to deal with Local 1982, TWT informed ILA of its position prior to signing the Facility One lease. ILA, fearful that TWT might use Teamsters labor, agreed to deal directly with TWT. ILA informed Local 1982 President Charles Moody of the decision and told him Local 1982 would be brought into direct dealing with TWT in the near future.

TWT informed ILA that it would recognize any union that presented cards for a majority of its employees. TWT informed ILA it intended to hire a core group of employees to be placed on a "preferred" list. Workers on the preferred list would be permanent TWT employees and not subject to the daily shapeup at which the union dock steward refers people to the Employer for work. TWT advised a number of unions of its intention to hire for its preferred list. Only former TOT employees belonging to Local 1982 applied. Starting April 15 or 16, 1981, TWT hired 13 employees[3] and gave their names to ILA. Moody obtained 13 signatures on union cards by April 20, 1981, the first day stevedores performed work for TWT. TWT and ILA executed a memorandum of understanding on that date that excluded Local 1982 as a party to the contract for the time being and that adopted, with modifications, the terms of the ILA Cleveland area

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[1] TWT has requested oral argument. The request is denied as the record, exceptions, and briefs adequately present the issues and positions of the parties.

ILA alleges in its exceptions that the judge was biased against the Respondents and their counsel. After carefully reviewing the record, we find no basis to support this claim.

[2] The Respondents have excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

Although the parties' exceptions allege many factual errors, those we do not address are not material to the conclusions we reach.

In accordance with our decision in *New Horizons for the Retarded*, 283 NLRB 1173 (1987), interest on and after January 1, 1987, shall be computed at the "short-term Federal rate" for the underpayment of taxes as set out in the 1986 amendment to 26 U.S.C. § 6621.

The General Counsel did not allege a violation of Sec. 8(a)(2) nor request a "fresh start" remedy. Accordingly, we do not adopt this portion of the judge's remedy.

We do not adopt the judge's recommended visitatorial clause because we find it to be unnecessary. See *Cherokee Marine Terminal*, 287 NLRB 1080 (1988).

The judge found ILA violated Sec. 8(b)(1)(A) by its discriminatory use of the grievance machinery. We adopt the judge's finding that ILA violated Sec. 8(b)(1)(A) by its discriminatory use of the grievance machinery and adopt the cease-and-desist order provided by the judge. In so doing, we find that no additional affirmative remedy is warranted for this violation in light of the predominant nature of the grievances and of the remedies provided for other violations found in this case.

Rather than the reinstatement language the judge uses, we shall substitute a remedy and Order that is more appropriate in the hiring hall setting.

[3] By the time operations began, TWT had 16 preferred employees.

289 NLRB No. 89

agreement. ILA appointed Moody as dock steward at TWT. His duties included making job referrals at the hiring hall shapeups.

Local 1982 was not brought into the bargaining relationship with TWT, and Local 1982 was not given receipt of and control over dues paid by Local 1982 members regarding their TWT employment. On September 10, 1981, ILA and TWT executed a contract covering the Port of Toledo. No mention of Local 1982 appeared in the contract. Thereafter, Local 1982's executive board decided to file unfair labor practice charges against TWT and a decertification petition. On September 23, 1981, a Local 1982 membership meeting attended by 80 members ratified the executive board's decision. On October 2, 1981, Moody filed unfair labor practice charges against TWT, a decertification petition, and a representation petition covering the TWT bargaining unit. Moody also filed internal union charges claiming ILA had placed Local 1982 in a de facto trusteeship. Around the beginning of November 1981, ILA placed Local 1982 in trusteeship and named Local 1982 member Cleo Syph as trustee and new dock steward.

Moody and Syph are leaders of rival factions within Local 1982. The conflict between them dates back to 1974 and has been ongoing and notorious. Stevedores, almost without exception, belong to one faction or the other, although some men have switched camps as the balance of power has shifted over the years. The record is replete with evidence of Syph's hostility to Moody and his followers. The judge lists 34 threatening statements by Syph to Moody or Moody supporters that constitute violations of Section 8(b)(1)(A) of the Act.

Two days after Syph became dock steward, Harold Chevalier, Syph's principal assistant, filed internal union charges against Moody and other officers of Local 1982. Although a hearing was held and evidence taken, no decision has been made by ILA regarding the charges. Also during November and December 1981, Syph obtained pledge cards from stevedores in support of Syph's plan to charter a new local at the Port of Toledo. On March 12, 1982, the ILA executive council authorized the issuance of a charter for a new local at Toledo, designated Local 2037. On March 23, 1982, the Moody faction, on behalf of Local 1982, filed for relief from a judge in Federal district court where litigation against ILA was pending. On April 2, 1982, the district court ordered ILA to terminate the trusteeship of Local 1982, to pay Local 1982 the checkoff dues that had been received since May 1981, and to rescind the charter granted to Local 2037.

Against this background of hostility, we consider the referral of employees for hire at TWT by Moody and Syph as ILA dock stewards. As long as TWT utilized the shapeup system, TWT provided a taped telephone message at night indicating the number of workers over and above the 16 preferred employees it anticipated would be needed the following day. At 7:30 each morning when TWT needed in excess of 16 workers,[4] stevedores, the dock steward, and a TWT foreman would gather at the hiring area on the dock. The dock steward would call a worker's name, who, if present and willing to work, would be assigned a job for the day.[5] Shapeup ended when all the jobs were filled. From 1981 through a revamping of the hiring system in 1984, the TWT foremen present during a shapeup never refused to hire any worker referred by the dock steward.

In addition to running shapeups, the dock steward controlled lines assignments, which involved the hiring of four workers each time a ship docks at Facility One to unload or leaves the dock after unloading. The four workers are guaranteed 4 hours' pay for a "tie-up" and 2 hours' pay for a "let-go." The work—securing the ship at the dock with cables from the ship or releasing the cables to let the ship depart—may take only a few minutes and generally is not difficult. Lines work is considered desirable, but it is sporadic unless the lines dispatcher gives an inordinate number of assignments to one worker.

From the beginning of the 1981 shipping season[6] until his removal as dock steward, Moody ran the shapeups and had David Ray Edwards make lines assignments. Moody referred men at shapeup by calling out names from the Local 1982 seniority list in order of seniority. He went straight down the list until all the jobs were filled. Each day Moody began at the top of the seniority list. Edwards' lines assignments were made on a random basis, but with an eye toward spreading out the assignments. Beginning November 2, 1981, Syph ran the shapeups and made lines assignments. For the remainder of the 1981 season, Syph essentially ran shapeups and made lines assignments as had Moody and Edwards.

Beginning in 1982, ILA and TWT orally established a new job-referral category of employees called "experienced" employees, individuals who had worked 350 or more hours in the 1981 season. Twenty-six men, over and above the 16 preferred employees, met this criterion. They were called first at shapeups. Syph was not required to refer men in any particular order within the experienced category, except that Edwards and Shirley Marsenburg, another Moody supporter, had to be referred first and second each day.[7] Other workers, called "casual" employees, were referred after all preferred and "experienced" employees had been offered work.

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[4] Preferred employees generally were notified at the end of the day of the next day's assignment.

[5] There is a conflict in the testimony over whether referred workers were allowed to pick their own assignments in 1981 or the TWT foreman made the assignment. We find it unnecessary to resolve this conflict.

[6] Because of ice, a shipping season at the Port of Toledo generally runs from April 15 to December 15.

In 1982 Syph discontinued use of the Local 1982 seniority list in making referrals at shapeup. The judge credited testimony that Syph said he was going to hire only his friends and relatives. In fact, Moody supporters on the experienced list were referred only after Syph supporters were called; Syph referred as casuals new men with no experience and no allegiance to either faction before referring Moody supporters; and, in 1982, Moody supporters received only 13 lines assignments, while Syph supporters received 496.[8]

Syph's hiring practices continued in 1983. Because of the decline in business in 1982, a worker needed only 200 hours to be on the experienced list. Five Moody supporters were removed from the experienced list because they had not worked enough hours, and three who were disabled or retired were removed. Eight Syph supporters were added to the list. Edwards and Marsenburg remained on the experienced list, but they lost their preference in order of call because they no longer had 1000 hours of work in the prior year.[9] Syph gave only five lines assignments to Moody supporters, although business increased in 1983 over 1982.

In 1984 TWT changed the method of hiring.[10] During negotiations for a new contract in January 1984, TWT advised ILA that TWT would do all the hiring if the NLRB issued a complaint against TWT for a hiring violation based on pending charges. After the first consolidated complaint issued on March 30, 1984, TWT, using a consulting firm, devised a system of selecting employees with essentially permanent status. Davis listed the 63 stevedores (including the 16 on the preferred list) he claimed performed 92 percent of the work for TWT from 1981 through 1983, and, with advice from 4 supervisors, ranked them. From the list of 63, Davis selected the top 50. In 1984 a TWT foreman (rather than Syph) at shapeups exhausted the list of 50 before turning to casuals, and he assigned lines on a rotating basis from the list of 50.

Beginning in 1982 Moody supporters reacted to Syph's hiring practices by filing grievances under the ILA-TWT contract. The grievances, mostly on forms provided by Moody, allege the grievant was not referred for work or not assigned lines, despite the referral and assignment of less senior men, because of his continued support for Local 1982.[11] None of the grievances alleging the hiring of or assignment of lines to less senior men were granted by TWT or pursued by ILA after TWT's denial. The TWT/ILA position on these grievances appears to be that the contract only required the referral of qualified men, and Syph never referred unqualified men; and the contract provided no standard for lines assignments.

ILA and TWT Liability for Hiring Practices from 1982 Through May 22, 1984

The judge found that ILA, through numerous statements by Syph, violated Section 8(b)(1)(A). The judge found that ILA violated Section 8(b)(1)(A) and (2) by discriminating for intraunion reasons in referring men to TWT for hire. We agree. The judge also concluded that TWT violated Section 8(a)(3) by virtue of his finding that Moody, Syph, and Edwards were TWT supervisors. Although we agree with the conclusion,[12] we do not agree with the judge's rationale.

We find, contrary to the judge, that ILA operated a hiring hall at TWT's Facility One. The shapeup process conducted by the ILA dock steward at the hiring area resembles the hiring halls operated by unions across the country.[13] It is clear from the above recitation of facts that TWT utilized ILA's referral system to obtain its employees. An employer is liable for union discrimination if it has actual knowledge or has reason to know of the discrimination. *Postal Service*, 254 NLRB 74 (1981). See also *Wolf Trap Foundation*, 287 NLRB 1040 (1988).

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[7] Edwards' and Marsenburg's special status was arranged because starting in the 1982 season they were removed from the preferred list, a great economic loss. Having worked daily during the 1981 season, Edwards and Marsenburg had in excess of the 1000 hours required by the written contract to be considered "experienced." They were replaced on the preferred list by two Syph supporters.

[8] These figures differ slightly from the judge's because the judge inadverently listed employee McVicker as a Moody supporter when compiling this statistic.

[9] In 1982 Edwards worked 301 hours and Marsenburg worked 243 hours.

[10] At the beginning of the 1984 shipping season, a worker needed 400 hours of work in 1983 to be on the experienced list. Three Moody supporters, including Marsenburg, were dropped from the experienced list because of their 1983 hours, and three Syph supporters were added. One Syph supporter was moved from the experienced list to the preferred list.

[11] There were 249 grievances filed in 1982, 1672 grievances filed in 1983, and 1486 grievances filed in 1984.

[12] The judge found that the Respondent's liability commences February 12, 1983, 6 months before August 12, 1983, when the initial charge against TWT was filed. The Respondent excepts, contending that there was no charge concerning TWT discrimination until the August charge (alleging supervisory threats) was amended in October 1983 to allege participation in operating a discriminatory hiring hall. The supervisory threats, however, were directed at employees for filing grievances alleging illegal operation of the hiring hall, and the original charge alleged these threats to be violations of Sec. 8(a)(3). Thus, although the original charge did not allege employment discrimination, we find sufficient legal and factual nexus between the supervisory threats about filing grievances and the complaint's discrimination allegation. We therefore agree with the judge that the Respondent's liability commences February 12, 1983.

[13] That ILA referring agents operated on TWT's property and did not use published objective criteria in making referrals is not evidence that the system was not a hiring hall.

In this case, ILA's conduct was widespread and notorious, and TWT's chief operating head and two foremen admitted knowledge of the factionalism underlying ILA's discrimination. Moreover, the thousands of grievances filed claiming employment discrimination because of the infighting belies any good-faith claim that TWT did not know of the factionalism and resulting discrimination.[14] Accordingly, we conclude TWT violated Section 8(a)(3) and (1) of the Act by accepting and condoning a discriminatory referral system.

Edwards and Marsenburg

As discussed above, Edwards and Marsenburg were removed from the preferred list and given a preferential order of call on the experienced list in 1982. Although TWT claims they were removed from the preferred list to make room for more versatile employees, the judge credited testimony that TWT Foreman Glenard Staler told Edwards that his removal was because of "politics" and the judge found both Moody supporters were removed for intraunion political reasons. Although the judge found that TWT was the moving party in the removal of Edwards and Marsenburg from the list, he concluded that ILA violated Section 8(b)(1)(A) and (2) by attempting to cause their demotions because of ILA's hostility to the Moody faction.[15]

We agree with the judge's finding that TWT was the moving party in deciding to remove Edwards and Marsenburg from the preferred list, and with his unstated finding that ILA made no request that the two be removed. We do not agree, however, that it is reasonable to infer from ILA's hostility to the Moody faction that ILA participated in their removal. To establish an "attempt to cause" violation, there must be some evidence of union conduct; it is not sufficient that an employer's conduct might please the union. See *Iron Workers Local 433 (Riverside Steel)*, 169 NLRB 667 (1968). In the absence of such evidence, we reverse the judge's findings of violations of Section 8(b)(1)(A) and (2).

The 1984 Hiring System

The judge found that TWT violated Section 8(a)(3) in revising its hiring system in 1984. In reaching this conclusion, the judge gave considerable weight to the fact that TWT, in choosing among the stevedores for permanent employees, "had given long and constant support to the Syph faction." We agree with the judge's 8(a)(3) finding for the reasons that follow.

We find the 1984 hiring system discriminatory because it represents the continuation of known, past discrimination. In 1984 TWT considered only the 63 men who did 92 percent of the work for TWT in the prior 3 seasons. TWT, however, was aware of and party to gross discrimination in 1982 and 1983 against Moody supporters who did not qualify for consideration in 1984 solely because of the past discrimination. Accordingly, TWT cannot evade continuing liability by using the product of its discrimination to establish a new system. Similarly, ILA remains jointly liable for discrimination beyond May 22, 1984, because its long pattern of discriminatory referrals made it all but impossible for TWT to devise a system that would avoid discrimination.[16]

The Removal of Moody as Dock Steward

The judge found that ILA violated Section 8(b)(1)(A) and (2) of the Act by removing Moody as dock steward and thus causing TWT to effectuate a substantial change in his employment status[17] in retaliation for his filing unfair labor practice charges and election petitions with the Board. To remedy the violation, the judge recommended ordering ILA to pay Moody the difference between what he actually earned and what he would have earned as dock steward. ILA defends its action by relying on *Teamsters Local 282 (General Contractors)*, 280 NLRB 733 (1986), remanded sub nom. *Kudla v. NLRB*, 821 F.2d 95 (2d Cir. 1987), in which the Board held that a union may consider loyalty in choosing individuals for policy-making, steward-type positions.

We agree with the judge's finding of a violation for the reasons that follow. ILA removed Moody as steward for filing an unfair labor practice charge, for filing a decertification petition, and for disloyalty. Because this case presents a dual-motive situation, a *Wright Line*[18] analysis is appropriate.[19] *Auto Workers Local 2017 (Federal Mogul)*, 283 NLRB 799 (1987).

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[14] As found below, we reverse the judge's finding that the dock stewards were TWT supervisors.

[15] The complaint contains no allegation of an 8(a)(3) violation for the demotions of Edwards and Marsenburg, and none can be found because TWT's actions occurred outside the 10(b) period.

Because we find no violation for the removal of Edwards and Marsenburg from the preferred list, we will order no special remedy for them. Inasmuch as they had a preference in order of call during the 1982 shipping season, the evidence does not support a finding of discrimination for the entire year. We will order that they receive the standard remedy, beginning from 1983, afforded the other discriminatees.

The judge found that TWT violated Sec. 8(a)(3) in 1983 by removing the two men's preference in order of call. As the make-whole remedy for the general class of discriminatees now covers Edwards and Marsenburg, we find it unnecessary to adopt this additional 8(a)(3) violation.

[16] Having found that ILA remains liable beyond the establishment of the new system, we find it unnecessary to pass on the extent of Syph's authority to refer or hire under the system.

[17] The dock steward works more hours under the ILA-TWT contract than any other stevedore.

A union violates Section 8(b)(1)(A) by removing a steward for filing an unfair labor practice charge against the Union. *Teamsters Local 79 (Carl Subler Trucking)*, 269 NLRB 1132 (1984); *Auto Workers Local 212 (Chrysler Corp.)*, 257 NLRB 637 (1981), enfd. 690 F.2d 82 (6th Cir. 1982). Thus, the General Counsel has made a prima facie showing that Moody's removal was unlawful.

The record shows, regarding the filing of the decertification petition and the loyalty issue, that Moody filed a petition to certify Local 1982 as the representative for the unit at the time he filed to decertify the International. Moody was not seeking to bring in a rival labor organization. District Court Judge Young found that ILA's claimed fear of Moody's disloyalty was "a trumped up justification to cloak their own wrong doing." This finding is amply supported by the record in the instant case. Accordingly, we find *General Contractors* is inapplicable and ILA has failed to show that it would have removed Moody as steward even in the absence of his protected conduct of filing an unfair labor practice charge.

AMENDED CONCLUSIONS OF LAW

1. Delete from Conclusion of Law 4: "and by agreeing to modify a collective-bargaining agreement with TWT in order to change a preferential status previously afforded to certain employees who were supporters of a dissident union faction."

2. Substitute for Conclusion of Law 5: "By maintaining and giving effect to an agreement or arrangement with the ILA to discriminate in employment against, and by perpetuating past discrimination in hire and tenure of, employees and applicants for employment whose names are listed in Appendix A of the judge's decision because of their membership in and support for Local 1982, Respondent TWT has violated Section 8(a)(3) of the Act."

ORDER

The National Labor Relations Board orders that

A. Respondent Toledo World Terminals, Inc., Toledo, Ohio, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Threatening employees with loss of work because they have filed grievances and continue to support International Longshoremen's Association, Local Union No. 1982.

(b) Discouraging membership in or activities on behalf of International Longshoremen's Association, Local Union No. 1982, or any group or faction within that Union, by maintaining and giving effect to any agreement or arrangement with International Longshoremen's Association that discriminates against employees and applicants for employment, or discriminating against them in their hire or tenure by perpetuating past discrimination.

(c) In any other manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Restore the 63 employees whose names are set forth in Appendix A to the judge's decision to their former or substantially equivalent employment status, without prejudice to their seniority or the other rights that they have previously enjoyed, and jointly and severally with International Longshoremen's Association make them whole for any loss of pay or benefits that they have suffered by reason of the discrimination found, in the manner described in this decision.

(b) Preserve and, on request, make available to the Board or its agents for examination and copying, all payroll records, social security payment records, timecards, personnel records and reports, and all other records necessary to analyze the amount of backpay due under the terms of this Order.

(c) Post at its Toledo, Ohio dock and warehouse copies of the attached notice marked "Appendix A."[20] Copies of the notice, on forms provided by the Regional Director for Region 8, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material.

(d) Notify the Regional Director in writing within 20 days from the date of this Order what steps the Respondent has taken to comply.

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[18] 251 NLRB 1083 (1980), enfd. on other grounds 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982).

[19] Contrary to the judge's finding, we find Moody, as well as Syph and Edwards, was not a TWT supervisor. The complaint does not allege that the dock stewards were supervisors and the record does not support such a finding.

[20] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

B. Respondent International Longshoremen's Association, New York, New York, its officers, agents, and representatives, shall

1. Cease and desist from

(a) Causing or attempting to cause Toledo World Terminals, Inc., or any other employer, to discriminate against employees or applicants for employment regarding their hire or tenure because they are members of International Longshoremen's Association, Local Union No. 1982 or have given support to any group or faction within that Union.

(b) Maintaining with Toledo World Terminals, Inc., or any other employer, a hiring practice or arrangement giving preference in employment to employees and applicants for employment over those whose names are listed in Appendix A to the judge's decision on the basis of intraunion factional considerations.

(c) Threatening employees of Toledo World Terminals, Inc., or applicants for employment with that Employer or any other employer, with loss of work or other reprisals if they continue to support the leadership of International Longshoremen's Association, Local Union No. 1982, or any group or faction within that Union, or if they engage in, or refuse to engage in, any other concerted activities that are protected by Section 7 of the Act, including the filing of intraunion charges, the filing of unfair labor practice charges and representation petitions with the Board, the filing of grievances, or the refusal to support efforts to charter another local union.

(d) Failing or refusing to process grievances because grievants are members of International Longshoremen's Association, Local Union No. 1982, or a group or faction within the Local.

(e) Placing International Longshoremen's Association, Local Union No. 1982 in trusteeship, removing its officers, or taking any steps to charter another local union at the Port of Toledo for the purpose of replacing International Longshoremen's Association, Local Union No. 1982.

(f) Replacing Charles Moody or any other member as dock steward because he has filed unfair labor practice charges under the Act.

(g) In any other manner restraining or coercing employees in the exercise of the rights guaranteed to them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Jointly and severally with Toledo World Terminals, Inc. make whole the 63 individuals whose names are listed in Appendix A of the judge's decision for any loss of pay or benefits they may have suffered by reason of the discrimination found in this case, as set forth in this decision.

(b) Within 15 days after receipt thereof, mail postage prepaid to every living person whose name is found on the seniority list of International Longshoremen's Association, Local Union No. 1982 a signed copy of the attached notice marked "Appendix B."[21] Copies of the notice shall be furnished to the Respondent by the Regional Director for Region 8.

(c) Notify the Regional Director in writing within 20 days from the date of this Order what steps the Respondent has taken to comply.

IT IS FURTHER ORDERED that the complaint allegations not specifically found are dismissed.

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[21] See fn. 20.

APPENDIX A

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

WE WILL NOT threaten employees with loss of work because they have filed grievances or continue to support International Longshoremen's Association, Local Union No. 1982, or any group or faction in that Local.

WE WILL NOT discourage membership in or activities on behalf of International Longshoremen's Association, Local Union No. 1982, or any group or faction in that Local, by maintaining and giving effect to any agreement or arrangement with International Longshoremen's Association that discriminates against employees or applicants for employment, or by discriminating against them in their hire or tenure by perpetuating past discrimination.

WE WILL NOT in any other manner interfere with, restrain, or coerce employees in the exercise of the rights guaranteed you by Section 7 of the Act. Those rights include the right to form, join, or assist labor organizations, to bargain collectively through representatives of your own choosing, and to engage in other concerted activities for your mutual aid or protection.

WE WILL restore the 63 employees whose names are set forth in an appendix to the judge's decison to their former or substantially equivalent employment status, without prejudice to their seniority or to other rights that they have previously enjoyed, and WE WILL, jointly and severally with International Longshoremen's Association, make them whole for any loss of pay or benefits which they may have suffered by reason of the discrimination against them, with interest.

TOLEDO WORLD TERMINALS, INC.

APPENDIX B

NOTICE TO MEMBERS
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

WE WILL NOT cause or attempt to cause Toledo World Terminals, Inc. to discriminate against employees or job applicants regarding their hire or tenure of employment because they are members of or have supported International Longshoremen's Association, Local Union No. 1982, or any group or faction in that Local.

WE WILL NOT maintain with Toledo World Terminals, Inc. a discriminatory and unlawful hiring arrangement giving preference to employees and applicants for employment on the basis of intraunion factional considerations over those whose names are listed in an appendix to the judge's decision.

WE WILL NOT threaten employees and prospective employees of Toledo World Terminals, Inc. with loss of work or other reprisals if they continue to support International Longshoremen's Association, Local Union No. 1982, or any group or faction in that Local.

WE WILL NOT threaten employees or prospective employees of Toledo World Terminals, Inc. with loss of work or other reprisals because they have filed intraunion charges, unfair labor practice charges, grievances, or representation petitions, or because they have refused to support an effort to charter another ILA local at the Port of Toledo.

WE WILL NOT fail or refuse to process grievances because grievants are members of International Longshoremen's Association, Local Union No. 1982, or a group or faction within that Local.

WE WILL NOT attempt to place International Longshoremen's Association, Local Union No. 1982 in trusteeship and remove its officers.

WE WILL NOT replace any dock steward because he has filed unfair labor practice charges under the Act.

WE WILL NOT grant a charter to a new local in order to replace International Longshoremen's Association, Local Union No. 1982 as the potential collective-bargaining representative of the employees of Toledo World Terminals, Inc.

WE WILL NOT in any other manner restrain or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act. Those rights include the right to form, join, or assist a labor organization, to bargain collectively through representatives of your own choosing, and to engage in other concerted activities for your mutual aid and protection, or to refrain from doing so.

WE WILL, jointly and severally with Toledo World Terminals, Inc., make whole the 63 employees whose names appear in an appendix to the judge's decision for any loss of pay or benefits that they have suffered by reason of the discrimination against them, with interest.

INTERNATIONAL LONGSHOREMEN'S ASSOCIATION

Paul C. Lund, Esq. and *Nathan W. Albright, Esq.*, for the General Counsel.

Thomas M. Seger, Esq., of Cleveland, Ohio, for Respondent TWT.

Herzl S. Eisenstadt, Esq., of New York, New York, for Respondent ILA.

Jeffrey Julius, Esq., of Toledo, Ohio, for the Charging Party.

DECISION

STATEMENT OF THE CASE

WALTER H. MALONEY JR., Administrative Law Judge. These consolidated cases came on for hearing before me at Toledo, Ohio, on a consolidated unfair labor practice complaint,[1] issued by the Regional Director for Region 8, which alleges that Respondent Toledo World Terminals, Inc. (TWT)[2] violated Section 8(a)(1) and (3) of the

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[1] The principal docket entries in this case are as follows:

Charge filed by International Longshoremen's Association, Local Union No. 1982 (Local 1982 or the Charging Party) against ILA on April 5, 1982, in Case 8-CB-4706; charge filed by Local 1982 against the ILA on July 9, 1982, in Case 8-CB-4769; charge filed by Local 1982 against the ILA on August 12, 1983, in Case 8-CB-5032, and amended on October 4, 1983; charge filed against TWT by Local 1982 on August 12, 1983, in Case 8-CA-16959, and amended on October 4, 1983; consolidated complaint issued by the Regional Director for Region 8, against both Respondents on March 30, 1984, in the foregoing CA and CB cases; Respondent ILA's answer filed on April 20, 1984; Respondent TWT's answer filed on April 10, 1984; charge filed by Local 1982 against TWT on September 4, 1984, in Case 8-CA-17769, and against the ILA in Case 8-CB-5290 on September 4, 1984; second consolidated complaint issued against both Respondents by the Regional Director on April 30, 1985; Respondent TWT's answer to the second complaint filed on May 8, 1985; Respondent ILA's answer to the second complaint filed on May 8, 1985; counsel for the General Counsel's memorandum and bill of particulars filed on June 5, 1985, and amended bill of particulars filed on June 11, 1985; hearing held in Toledo, Ohio, on 25 days between July 22, 1985, and October 17, 1985; briefs filed with me by the General Counsel and both Respondents on or before March 14, 1986.

[2] Respondents admit, and I find, that TWT is an Ohio corporation that maintains an office and place of business in Toledo, Ohio, where it is en-

Continued

Act, and that Respondent International Longshoremen's Association (ILA) violated Section 8(b)(1)(A) and (2) of the Act. More particularly, the amended consolidated complaint alleges that Respondent ILA, acting out of discriminatory motives and in an effort to eliminate a hostile faction within Local 1982, attempted to place Local 1982 in trusteeship and remove its elected officers; removed Charles C. Moody, the leader of the dissident faction, as its dock steward; modified its collective-bargaining agreement with TWT with a view toward eliminating a preferential status of dissident members; granted a new charter to another local in order to replace Local 1982 as the general cargo local in the Port of Toledo; operated a discriminatory hiring hall or hiring arrangement with TWT; failed to use objective criteria and maintain the records necessary to operate a nondiscriminatory hiring arrangement; failed to refer for employment members and others who had filed grievances and had taken other actions politically inimical to the ILA-backed leadership on the docks; repeatedly threatened members with loss of work and other reprisals because they filed unfair labor practice charges and grievances and failed to support the ILA effort to replace Local 1982 with another local; and refused to process the grievances of dissident members. The amended consolidated complaint also alleges that TWT, for its part, threatened an employee with loss of work if he continued to file grievances and discriminated against active Local 1982 members by refusing to hire them or by giving others preferential hiring status based on intraunion factional considerations. Both Respondents deny that they or their agents made any unlawful threats. Respondent ILA states that any actions taken by it were aimed solely at preserving work opportunities at the Port of Toledo for its members in the face of a purported effort by a rival union to claim jurisdiction over work being performed by TWT employees. TWT insists that its hiring decisions were made solely on the basis of the ability of job applicants who proferred themselves for employment. Other defenses will be discussed in the course of this decision. On these contentions, the issues were joined.[3]

FINDINGS OF FACT

A. *The Unfair Labor Practices Alleged*

1. Background

After the St. Lawrence Seaway opened in 1959, the Port of Toledo became a deep-sea port. Its principal general cargo dock facility (Facility One) is located on the east side of the Maumee River near the point where the river empties into Lake Erie.[4] It is owned by a public agency called the Toledo-Lucas County Port Authority (Port Authority). Over the years the Port Authority has leased these premises to private stevedoring companies and has also leased adjacent properties that constitute an international trade zone called the World Trade Center. The docking facilities consist of about 40 acres and include 7 piers, a large warehouse and office complex, and a large, open area simply referred to as the field. Since 1959, the general cargo facility has successively been leased to Toledo Morain, Ceres, Oglebay-Norton, Toledo Overseas Terminal (TOT) (sometimes referred to as the DeBartolo Company, of which TOT was a subsidiary), and the present lessee, TWO, which leased Facility One to the Respondent in this case, Toledo World Terminals, Inc. (TWT), in the spring of 1981.[5] The companies who took over these operations at the beginning of the 1981 season under lease from the Port Authority are separate corporations, but are closely intertwined, having in part common principals and interchangeable management. The most prominent of these principals is Paul Wills, an owner of Wills Trucking Company, who was also the owner of the Consolidated Dock Company (Con Dock), another stevedoring company that operated in the Port of Toledo at another location until the end of 1984. Wills is the sole owner of TWT. The chief operating head of Respondent TWT and Con Dock is and has been William H. Davis.

Many of the employees involved in this dispute have worked on the docks in Toledo since 1959 and have been employees of each successive stevedoring company that has received a contract from the Port Authority. Their names appear in order from 1 to 154 on a seniority list frequently referred to in the record as the Local 1982 seniority list. In fact that list, with the minor exceptions of those who have recently died or retired from gainful employment, was the agreed-on seniority list that TOT and Local 1982, the collective-bargaining representative for TOT's stevedore employees, utilized in assigning work until TOT left the Port of Toledo in the spring of 1981. This list should more accurately be designated as the TOT-Local 1982 list. Respondent TWT has sought to escape from any responsibility to abide by that list, and its effort in this regard has been a contributing factor to the embittered and enduring dispute that is spelled out in the record of this case. These longtime stevedores, to whom port seniority is a treasured status, all have at least 9 years' experience on the Toledo docks. Since the Port of Toledo has experienced a marked decline in shipping volume over the last 10 years, the question of seniority has become most acute. Part of the fallout from this decline in business is the lack of opportunity for new employees to work on the port and the gradual aging of the complement of stevedores available for hire. In the mind

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gaged in the stevedoring business. In the course and conduct of this business TWT provides stevedoring services to shipping companies that are engaged in interstate and foreign commerce. From these services each year it derives income in excess of $50,000. Accordingly, Respondent TWT is engaged in commerce within the meaning of Sec. 2(2), (6), and (7) of the Act. Respondent ILA and Charging Party Local 1982 are, respectively, labor organizations within the meaning of Sec. 2(5) of the Act.

[3] Errors in the transcript have been noted and corrected.

[4] General cargo includes such items as zinc and steel coils, potash, urea, nickel, hemp, molasses, and household goods belonging to military personnel. Large amounts of grain are shipped from the Port of Toledo, but grain is handled by other companies whose employees are represented by another ILA local.

[5] Although leasing the docking facilities to TWT, TWO leased the World Trade Center across the road to another affiliated company, Toledo World Industries (TWI).

of TWT, strict observance of such seniority, the willingness of its predecessor to observe various uneconomical hiring and manning practices insisted on by the ILA and by Local 1982, and TOT's defined benefit retirement plan for stevedores were among the reasons TOT and other stevedoring companies failed to operate at a profit and ultimately went out of business. Many of these manning practices created situations in which large numbers of employees were paid high hourly wages when there was no work available for them to perform. TWT was determined not to make the same mistakes.

Beginning at a time long before TWT came to the Port of Toledo,[6] stevedores in the Port of Toledo had become divided into two factions. It must be remembered that many of the individuals involved in this factionalism have known each other and their families for a generation or more, and their acquaintanceships are not solely limited to contacts on the job during the shipping season. The acknowledged leader of what has become the incumbent faction is the current ILA dock steward for TWT, Cleo J. Syph. The leader of the challenging faction is and has been Charles C. Moody, who was the ILA dock steward at TWT until internal difficulties within the ILA brought about his removal from that position by the ILA on November 3, 1981.

The enmity between these individuals dates back to about 1974, at which time the ILA merged black and white locals (Locals 1317-A and 1972) at the Port of Toledo into Local 1982. Although Moody and Syph both came from Local 1317-A, the black local, a dispute arose between them following the merger over seniority within the new local. Syph proposed that the seniority lists of the two former locals be dovetailed on a one-to-one basis, resulting in an amalgamated list that would show one black stevedore, then one white stevedore, and so forth, irrespective of length of service on the port. The Moodys, including Charles Moody's older brother Robert Moody, insisted on "date of rank" at the Port as the sole determinant of seniority, meaning that seniority on the merged list would not be strictly apportioned among black and white stevedores, leaving racial composition to fall where it might in the order of listing. Ultimately port seniority won out, but the bruises that resulted from this dispute lived on. The factionalism that was thereby generated carried over into subsequent contests for Local 1982 offices. Such contests between the Moody and the Syph factions were quite frequent.

Using the "Local 1982" seniority list as a guide, Charles Moody recited his estimate of the political sentiments of each of the 154 stevedores named thereon. Although Syph testified at great length on a variety of matters, he never disputed any of Moody's evaluations, so I regard this classification as a reliable guide concerning which individuals support which faction. One caveat suggested by Glen Staler and Floyd "Fats" Tefft, both longtime stevedores in Toledo and now marine foremen for TWT, is that factional sentiment on the part of some individuals tends to fluctuate, depending on which leader is perceived at any given moment to be holding the most power. When, in 1982, an internal union dispute gave rise to the submission of various petitions to the ILA both by Syph and Moody followers, some objective evidence came into being that confirms Moody's political assessments, although it is also clear that some individuals simply wished to hedge their bets by signing petitions circulated on behalf of both factions. If animus could be quantified, hostility between the principal adherents of these factions should be rated as a 10 on a scale of 10, although feelings on the part of others caught up in this Hatfield-and-McCoy rivalry might not, in any given instance, be quite so intense. Suffice it to say that all stevedores have been called on to choose up sides, and choose they have.[7]

Over the years, and until the beginning of the 1982 season when TWT told Syph that he could ignore the Local 1982 list, seniority rankings were of crucial importance in obtaining daily employment. This was true because stevedoring companies, including TWT, observed the practice of daily shapeups to hire employees assigned to load and unload vessels that called at the Port of Toledo. This practice, so commonplace in the longshore industry, means that when employees are needed to load or unload ships, they gather together at scheduled times in a hiring area and are selected for 4- or 8-hour shifts. The same process is repeated the next day a ship is in port. If the list is called from the top each day, then high seniority is a guarantee of more-or-less steady employment during the shipping season. Those lower on the list are called only when there are several ships in port or when a higher-ranked man does not show up for work. On very busy days, men who were not on the list at all would be hired. These individuals are usually referred to as "casuals."

Stevedores are also hired for certain work apart from the shapeup procedure. When a ship arrives in port or is about to leave, stevedores are hired for a "tie-up" or a "let-go." According to the TWT-ILA contract, four individuals are hired each time there is a tie-up or a let-go. The work during each call normally lasts only a few minutes, although, on a tie-up, a crew can be kept waiting at dockside while the ship makes it up the river to the dock. During high winds or bad weather, linesmen can also experience other problems while mooring the vessel. However, they are entitled to 4 hours' pay for each tie-up and 2 hours' pay for each let-go, regardless of how long their efforts might take. Assignments to this work are sporadic and may occur at any time of day or night, because the coming and going of ships is sporadic and not entirely predictable. Normally this work, referred to in the testimony as "lines," is regarded as highly desirable work because an employee is paid for time that, in large part, is not spent in active labor. However, it is also work that comes about only occasionally, so lines constitute only a small part of a stevedore's annual employment, unless the lines dispatcher chooses to give him an inordinate number of assignments. Until May 23, 1984, when TWT made a substantial revision in its hiring practice, the selection of employees for lines was left entirely to the discretion of the lines dispatcher or the dock steward. They were under no restrictions, contractual or otherwise, in how they went about selecting linesmen,[8] so long as they produced enough qualified men to do the job.

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[6] TWT was not incorporated in the State of Ohio until March 6, 1981, when Wills and his associates, including Frank Miller and William Davis, decided to make a bid for the stevedoring work at the Port of Toledo, which was then being abandoned by TOT (i.e., DeBartolo).

[7] One employee now on the preferred list of TWT employees, Gerald Berg, was listed by Moody with a question mark, and there is little objective evidence to dispute this listing. Accordingly, he has been regarded in this decision as a neutral in the factional dispute. He is the only person actively employed who has been able to attain or retain this standing.

One further item by way of background should be noted. Between December 15 and April 15, the Port of Toledo is virtually shut down except for an occasional ship engaged in intra-Great Lakes traffic, because the locks on the St. Lawrence Seaway are closed and the lakes are, by and large, iced over. During this period of time, only a small crew of TWT employees high on the preferred list work with any regularity. They are assigned to the warehouse, which is adjacent to the piers. At the onset of the shipping season in mid-April, there is a burst of stevedoring activity to handle ships laden with goods designed to replenish inventories of various items that have fallen in short supply over the winter. Business tapers off during the midsummer months and picks up again in the fall. In November and early December, there is a rush of work from ship owners anxious to discharge their cargoes and remove their vessels from the lakes before the Seaway closes in mid-December. The pattern of hours worked by TWT employees, both on unloading and on lines, necessarily follows this cycle, although those on the TWT preferred list enjoy a partial immunity from such fluctuations. Although Great Lakes shipping in the early 1980s has not been what it was in earlier decades, referred to by Davis as the "glory years," TWT's business has recently been on the upswing after a disappointing year in 1982. The total number of hours worked by TWT's stevedoring employees is as follows, using the total hours worked in 1981, TWT's initial year, as the base year for measuring percentages of decline or improvement:

Year	*Total Hrs. Worked by TWT Stevedores*	*% Increase or Decrease*
1981	43,994	
1982	32,241	- 26.7
1983	49,546	+ 12.6
1984	59,687	+ 35.9

Total hours worked in 1985 were not available at the time of the hearing in this case.

2. Events leading up to the opening of the 1981 season

In 1980, the facility taken over by TWT in April 1981 was operated by TOT, which was then in its seventh or eighth year as the general cargo stevedoring company at Facility One.[9] TOT had a contract with Local 1982 and did its hiring by daily shapeups in accordance with the seniority list that it established in agreement with the Union. This list essentially recognized port seniority rather than company seniority. Local 1982's elected dispatcher, David Ray Edwards, did the hiring, both at shapeups and for lines. From time to time, disputes arose concerning individual placements on this list, and these disputes were adjusted by a joint union-management committee that applied certain rules to determine when those who left the docks and returned might claim their old ranking and when they were required to go to the bottom of the list.

In 1980, TWT principal Wills and TWT President Davis operated a general cargo company, Con Dock, at a location across the Maumee River from Facility One further upstream near the I-280 Bridge. Con Dock employed only seven stevedores who were represented by Teamsters Local 20. Late in 1980, Local 1982, with the active assistance of the ILA and its Great Lakes District (GLD),[10] established a picket boat near the Con Dock premises and picketed Con Dock with informational signs, claiming that Con Dock was not paying its employees in accordance with area standards. Late in the 1980 season, Con Dock filed 8(b)(4) and (7)(C) charges against the ILA and Local 1982. These charges were dismissed by the Board's Regional Office in Cleveland or were withdrawn.[11] However, the effect of the picket boat on the business of Con Dock was severe. Davis estimated that this effort by the ILA and Local 1982 cost Con Dock about half a million dollars in lost revenues from ships destined for the Con Dock facility that were diverted to competitors in order to avoid the picket line. Con Dock took two further steps as a result of this incident. It revised the pay scale for its Teamster-represented stevedores to eliminate future contentions that Con Dock was not in fact paying its employees area standards (which the ILA has always equated with ILA wages and benefits). It also filed a civil damage suit against the ILA and Local 1982 under Section 303 of the Labor-Management Reporting and Disclosure Act for damages arising from an assertedly illegal picket line.

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[8] The only limitation imposed on the lines dispatcher or the dock steward is that a linesman is normally reprimanded if he is selected for a given crew but does not show up for work. No stevedore has to accept lines and a few do not, but those who do accept an assignment were and are usually removed from further consideration if they miss an agreed-on date. The dispatcher or steward is considered a fifth man on the crew and is compensated accordingly for his services in calling out the crew, although he normally did not appear at dockside while the crew is working.

[9] During the 1970s, the Port Authority reserved a public berth at Facility One for any stevedoring company wishing to unload a ship on an incidental or single-shot basis. The rest of the piers were leased to TOT for its exclusive use.

[10] The Great Lakes District is one of three subdivisions of the ILA. It is composed of about 66 locals whose members are employed at various American and Canadian ports throughout the Great Lakes. From time to time, John Baker, of Cleveland, and his brother, Chauncey Baker, have held office in the GLD, but its principal leader is and has been its longtime secretary-treasurer, Patrick J. Sullivan. Sullivan maintains the GLD office in Buffalo, New York, but also has an office in Washington, D.C., where he serves as director of the International's national legislative office.

[11] Cases 8-CC-1042, 8-CC-1043, and 8-CC-1047; 8-CP-234 and 8-CP-235.

When TOT let it be known to the Port Authority and others that it was not going to lease Facility One for the 1981 season, Wills and Davis were interested in picking up the lease. They took several actions in the late winter and early spring in order to be in a position to submit a competitive bid and to operate the facility when vessels started to arrive in mid-April. As noted above, Wills and his associates were interested in the World Trade Center as well as the docking area. They were equally concerned that picketing would not resume at Con Dock, which they planned to operate in 1981, and did, in fact, operate until 1984.

On April 1, Davis, who was president of Con Dock and executive vice president of Wills Trucking Company, went to Washington with his attorney, Victor Strimbu, to meet with Sullivan and John Baker. They met at Sullivan's Washington legislative office, which is located in the AFL-CIO headquarters building. The principal thrust of this meeting was to discuss the pending civil suit against the ILA and Local 1982 growing out of the 1980 picketing of Con Dock and to inform Sullivan that Wills and his associates were negotiating with the Toledo Port Authority for a lease of the TOT-occupied premises for the 1981 shipping season. At this time, Sullivan told Davis that his information was that a DeBartolo Corporation subsidiary would continue to operate the dock under the management of Colonel Zeplien, who had been in charge of the TOT operation in previous years. Sullivan was concerned that, if TWT took over Facility One, Teamsters-represented Con Dock employees might be hired at Facility One ("brought across the River" was his expression) and replace the ILA-represented employees who had been employed by TOT. In Sullivan's mind, TWT and Con Dock were essentially one and the same corporation. Strimbu told Sullivan that the Wills group envisioned the new operation not so much as a general cargo facility but as a bulk cargo unloading dock. He said they needed to hire about 20 employees right away but felt that the employee complement would eventually reach 40 or 50. He said they would like to hire the seven or so Teamsters-represented stevedores who had been working for Con Dock. Sullivan told Strimbu emphatically that there was no way that the ILA would roll over and permit his clients to take the jobs of ILA members, and that the ILA was not going to permit nonunion or substandard companies to enter the stevedoring business in the Port of Toledo. Strimbu told Sullivan on this occasion that, if TWT was awarded the lease on Facility One, under some circumstances the Wills corporation would recognize the ILA. Strimbu was emphatic that the Wills organization did not want to recognize Local 1982 because they felt that the relationship between this local and other companies that had operated previously in Toledo was the reason those companies were forced to go out of business. He said he needed flexibility in manning to make the operation work and did not want to be in a position of guaranteeing jobs for 28 stevedores as TOT had been doing. He also insisted that there was no way that TWT would accept the Local 1982 seniority list. Faced with those prospects, TWT would not even go into business in Toledo. Strimbu informed Sullivan that TWT would be interviewing 15 or 16 TOT employees, all ILA members, with a view toward hiring them.

Sullivan received a telegram, dated April 4, from ILA General President Thomas W. Gleason in which Gleason informed Sullivan that TWO was going to receive the stevedoring contract at Toledo. Gleason directed Sullivan to meet with TWO representatives and to conclude an agreement with them that was in line with the wages and benefits being paid in Cleveland. On April 13, these same individuals met again in Sullivan's office in Washington. By this time, it appeared more likely that TWO was going to be awarded the lease for Facility One. In fact, the Port Authority held a hearing on that same day and announced the award. Sullivan was also satisfied, to use his words, that "TWT was not going to discriminate (in hiring) against ILA members," an expression that actually meant that TWT was not going to hire any Teamsters to man its docks. In addition to Sullivan, both Bakers were also present on this occasion. These individuals then spent several hours together, going over item by item the provisions of the TOT-Local 1982 contract that governed these operations in 1980 and also reviewing an agreement between ILA Local 1317 and the Great Lakes Association of Stevedores (GLAS) covering port operations in Cleveland. Both Bakers were from Cleveland and were familiar with the operations of that port and the provisions of the Local 1317 contract, which was then about to expire.[12]

Davis and Strimbu were anxious to conclude some kind of understanding with ILA officials immediately because they expected the first ship of the season to arrive at the Port of Toledo on April 22, the Wednesday of the following week. It was Baker who suggested that TWT simply apply the Cleveland contract to the Toledo operation. This was not entirely acceptable to TWT but the suggestion formed the basis of negotiations that took place there and then. The normal pattern followed by the ILA in negotiating a contract with a new employer is to obtain recognition and then turn the matter of representing the individual bargaining unit over to the ILA local that has been chartered at the port in question. Strimbu and Davis were adamant that they would not extend recognition to Local 1982 and would not deal with it. They were amenable, however, to dealing with the ILA directly and they proceeded to do so.[13]

Sullivan told Strimbu that the ILA would insist that TWT hire its new employees from the old facility, i.e., from among the ILA-represented stevedores who had been employed by TOT. He insisted on the right of the ILA to nominate the dock steward, insisted that TWT observe standards on wages and benefits set forth in the master agreement covering most Great Lakes ports (the GLAS agreement), and stated that the ILA would agree to working arrangements then in effect at the Port of

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[12] John D. Baker is currently the president of the Great Lakes District. He was formerly an official of Local 1317 in Cleveland. Baker's evasive testimony at the hearing in this case was marked by large and selective lapses of memory. I place little reliance on what he had to say.

[13] My decision at the hearing to reject G.C. Exh. 158(b) is reversed, and that document is admitted into evidence as being a part of Baker's notes of the April 13 meeting.

Cleveland. Sullivan suggested that negotiations leading to a full, formal agreement begin within 30 days. Based on this broad outline, the parties then began to discuss the specifics of the memorandum of understanding that would be in effect by the time the first ship was scheduled to arrive at Toledo, and which would also form the basis of a formal, longterm contract covering the operation. There is ample evidence to corroborate Sullivan's admission that the parties had orally agreed on the terms and conditions of a contract before the first employee had been hired.[14] Strimbu told Sullivan at some point in these discussions that TWT would need to see ILA authorization cards signed by its new employees.

During the course of the April 13 meeting, the parties agreed to several specific provisions in the Cleveland contract. Baker's notes indicate as much. His notes also indicate a willingness either to consider or to check out other Cleveland contract provisions and indicate that certain other provisions would be left open for further discussion. These notes also indicate that the parties went over the provisions of the TOT-Local 1982 contract, agreeing to certain of those provisions, and agreeing to omit other TOT contract provisions from their memorandum of understanding.[15]

One significant departure from normal hiring practice at ILA-represented ports was agreed on by TWT and the ILA. TWT desired to hire a cadre of stevedores to whom it could give a sufficient number of working hours each year to establish what it hoped would be a small, stable, competent work force that would also be permanent in character. It felt that total reliance on the shapeup each morning did not produce these results. Accordingly, it proposed, and the ILA agreed, that TWT would be allowed to employ a small group of preferred employees who would be given work each day before the shapeup began. TWT hoped that such men would be encouraged by more or less steady employment to remain a regular part of its staff. Additional men, needed when extra crews were required, would then be hired at shapeup in the traditional fashion. The ILA has not permitted this practice at many ports, but it was anxious to get its foot in the door at TWT, so it acceded to TWT's proposal, feeling confident that all the employees on the preferred list would turn out to be ILA members.

TWT learned on the same day that they had been formally awarded the stevedoring contract for Facility One by the Port Authority. This announcement took place in Toledo. TWO, the actual recipient of the contract, was represented at the hearing by Frank Miller, who is a principal in TWI, its lessee for the foreign trade zone. Miller said that TWO intended to recognize current union jurisdiction, meaning ILA Local 1982 jurisdiction on berths A-1 through 7 and Teamsters Local 20 for the foreign trade zone. (The Teamsters represent about 10 employees employed by TWI at the World Trade Center.) Moody reported this statement by phone to Sullivan.

His happiness, however, at the prospective recognition of Local 1982 was to be short lived. On April 15 or 16, TWT began to hire employees for its preferred list. Davis testified that it notified various unions, including Con Dock employees, of its intention. No interview notices were placed on the former TOT premises at Facility One. Only former TOT employees applied, however. Moody learned quite by chance about the hiring interviews, which took place at a local Holiday Inn. Moody, Edwards, and former TOT employee Matthew Bennett went to the Holiday Inn and met Davis, Wills, and Marine Superintendent James Hardwick, who were engaged in conducting interviews. Moody noticed that they were using the Local 1982 seniority list during the interviews. In fact, no one was interviewed whose name did not appear on that list. Moody, Edwards, and Bennett all applied for jobs.

I credit Moody's testimony that, during the course of his conversation with Davis, he introduced himself as the financial secretary of Local 1982, informed Davis that Local 1982 actually worked the Toledo dock, and told him that Local 1982 was ready to sit down and negotiate with TWT. He indicated that Local 1982's attorney would contract TWT. Davis replied that TWT was dealing strictly with the ILA, that there was an understanding between TWT and the ILA, that Sullivan knew what they were doing, and, if Moody wanted to find out more about what was going on, he should contact Sullivan.

This is just what Moody did. Sullivan told Moody by phone to come to the Great Lakes District Office in Buffalo on Friday, April 17. Moody did so. In a conversation that took place on that date in Sullivan's Buffalo office, Sullivan told Moody that TWT was going to take over Facility One and was going to start hiring people. He informed Moody that the ILA agreed to let TWT pick 13 preferred men from the seniority list for initial hire each day. Moody protested that the ILA should not "allow" TWT to set up a preferred list. Sullivan's reply was that the ILA did not allow TWT to do anything because TWT would have to allow the ILA to go through the gate before it could object to anything. He advised Moody that it would be best to work from the "inside out," noting that the rest of the employee complement would be taken from the Local 1982 seniority list "unintegrated," i.e., without including any Teamster-represented employees from Con Dock. He further informed Moody that the ILA had agreed to accept the Cleveland agreement for the TWT operation, but assured him that Local 1982 would be brought in as bargaining agent within 30 days. He said that Wills and associates were going to close Con Dock, join the Illinois Great Lakes Association of Stevedores, and drop all charges and civil suits arising out of the 1980 picketing incident at Con Dock.

Following this conversation, Moody, Sullivan, and some other GLD officials who were with them in Buffalo engaged in a conference call with Strimbu and Gerald Lackey, the ILA's Toledo attorney. They discussed many of the points that Moody had previously discussed with Sullivan. Sullivan received confirmation from Strimbu that TWT had in fact secured a lease from the Port Authority and that it was intending to operate primarily as a bulk cargo facility. Sullivan reiterated his demand that TWT hire ILA members and threatened to picket TWT if it did not. They discussed the use of the Local 1982 seniority list. All agreed that the Company would be allowed to hire 13 preferred employees apart from the shapeup. On the next point, Moody's version and Sullivan's version of the conversation with Strimbu disagree. Moody testified that the parties also agreed that all employees hired after the preferred men were given work would be hired from the Local 1982 seniority list unintegrated, meaning that no Teamsters would be brought over from Con Dock. Sullivan testified that Strimbu adamantly refused to recognize or utilize the Local 1982 seniority list. I credit Moody's version, not only on the basis of demeanor, but also by virtue of the fact that Moody's version of this conversation described what eventually took place at the TWT operation throughout the 1981 shipping season. As more fully described later, Moody, as dock steward, utilized the Local 1982 hiring list for shapeups throughout 1981, calling off the names of members in the order they appeared on the list to hire nonpreferred TWT employees. In fact, Syph did the same thing for the balance of the 1981 season after he replaced Moody on November 3.

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[14] After a luncheon recess at the hearing, Sullivan backed away from this statement, insisting that the ILA knew better than to enter into a prehire agreement, but I credit his first statement, which was given without the opportunity for extensive reflection.

[15] Sullivan testified that, as early as February 1981, Strimbu had told him that TWT would hire ILA members but would not negotiate with Local 1982 or with Moody. This is exactly what TWT proceeded to do. Sullivan's testimony on this point is uncontradicted. Strimbu never testified, notwithstanding his intimate connection with many facets of the effort to bring TWT and the ILA together in 1981.

Strimbu told the ILA representatives in the course of this phone conversation that TWT would agree to the provisions of the Cleveland contract concerning working conditions, that TWT would interview employees from the ILA pool (it had already begun this process), would grant formal recognition to the ILA on the presentation of authorization cards signed by TWT employees, and would execute a memorandum of understanding when such cards were in hand. He also said that TWT would not recognize Local 1982, but agreed to recognize Moody as dock steward. Toward this end, Sullivan told Strimbu that he would have Moody get the authorization cards signed and leave them at Lackey's office in Toledo. They agreed that Davis would prepare a list of the 13 preferred men who had been selected for employment and that this list would be furnished to Moody to assist in the solicitation of signatures. Moody testified credibly that, at this time, no one on the union side knew the identities of the preferred men. In the course of the conference call, Sullivan informed Strimbu that he was appointing Moody as the dock steward.

After the call was completed, Moody obtained ILA pledge cards from Sullivan and returned to Toledo. On Saturday, April 18, he went to Lackey's office and picked up the list of preferred men. It contained 13 names, including Moody's, but it did not contain the names of Syph, Harold (Buck) Chevalier, who is Syph's principal assistant, and David Ray Edwards, who is a Moody partisan and who became lines dispatcher during the 1981 season. These three names were added to the list a few days later. During his visit to Lackey's office, Moody objected to Lackey that the names found on the preferred list were "company-oriented" individuals. Lackey's reply to Moody was to "cool it." He assured Moody that Local 1982 was going to be brought into the agreement in 30 days and it would be best simply to let things evolve into Local 1982 control.

On April 18, Moody obtained 12 signatures and was able to get one more on Monday, April 20. On that day he turned the cards in at Lackey's office. April 20 was the first day on which any stevedores actually worked for TWT. A total of seven employees were paid for work on that day. Company records in evidence indicate that a total of 92 employees were listed as having been hired on that date, including all the men on the preferred list. On that date, a memorandum of understanding was executed in Toledo by Davis for the Company and Lackey for the ILA. Two days later, the same document was re-executed in Washington by Wills for the Company and Sullivan for the ILA. About 6:30 a.m., Wednesday, April 22, the *Angel Glory* arrived at the TWT dock and was tied up at Facility One by a four-man crew dispatched by Ray Edwards. Some 49 men went to work that day for the Company. TWT was off and running.

A statistical summary of the facts surrounding the initial recognition of the ILA as the bargaining agent for TWT's stevedore employees is as follows:

> Total number of unit employees, preferred, nonpreferred, and casual, who worked for TWT during the 1981 season—158
>
> Total number of unit employees who worked more than 50 hours in 1981—85
>
> Total number of unit employees who worked more than 100 hours in 1981—74
>
> Total number of unit employees who worked more than 350 hours in 1981 and thereby qualified for preferential treatment in 1982 and for union fringe benefits—41
>
> Range in number of stevedores hired by TWT during the first 10 days of operation in April 1981—5 to 69
>
> Total number of ILA authorization cards furnished to TWT in support of the ILA claim for recognition—13

3. The 1981 season through November 3

a. *The memorandum of understanding*

On April 20, Davis and his attorney, Strimbu, met in Lackey's office in Toledo and reviewed the authorization cards that Moody had left with Lackey. There was some discussion about permitting Local 1982 to become a party to the agreement. Lackey told Davis that the ILA preferred to work through its locals because it was simply a more practical way to operate. He said that economic matters were normally worked out by the ILA and the trade association (GLAS), while the local takes care of local matters. TWT responded that conceivably this might be acceptable at some future time, but it was not acceptable then. They noted that Wills and associates were accustomed to operating under a single master agreement, namely a Teamsters agreement, and they were not used to local negotiations. They feared that local negotiations could go on for months while the Company was expecting a ship at the dock in 2 days. Lackey and Davis then signed a memorandum of understanding that had been prepared.

The memorandum of understanding recited the fact that TWT had entered into an agreement with TWO to operate the dock area and that another enterprise, TWI, had entered into an agreement with TWO, the lessee of the Port Authority, to operate the foreign trade zone. It further recited that TWT had secured experienced employees to perform longshore and warehousing work and had placed 15 of them on a preferred hiring list. The document noted that the ILA had presented cards signed by a majority of the men on the preferred list and that it was being recognized as the exclusive representative of TWT's employees. The memorandum explicitly forbade the ILA from assigning or delegating responsibility for the administration of the agreement to any local but stated that, at some future time, the parties would discuss the appropriateness of permitting Local 1982 to become a party.

The agreement incorporated by reference the Cleveland agreement covering contractors with Local 1317, but explicitly stated that TWT would not recognize any past practices or agreements that existed at the Port of Toledo. Certain specific revisions to the Cleveland agreement were then set forth, one of which was that there would be no guarantees of employment for crews and that the dock steward would obtain employees in excess of those named on the preferred list. TWT agreed to join GLAS and agreed to pay fringe benefits into an escrow account in the same amounts that were required under the Cleveland agreement. One hundred hours of work would be required as a miminum for eligibility for health and welfare coverage.

TWT also agreed to a checkoff on presentation of appropriate authorizations, stating that any dues and initiation fees checked off would be transmitted to the Great Lakes District of the ILA at Buffalo, New York. Both the terms of the agreement and the understanding of the parties were that the parties would meet again within 30 days to begin negotiations for a longterm agreement. After this memorandum had been executed in Toledo, it was taken to Washington, where Sullivan and Wills signed it on April 22.

In his testimony in this case, Davis asserted that the reason for TWT's refusal to recognize and deal with Local 1982 was that it held Local 1982 responsible for the picket boat incident in 1980, which resulted in a substantial financial loss to Con Dock. He also stated that he had grave reservations that he could negotiate a competitive contract with Local 1982, but felt he could do so with the ILA. He was upset with Local 1982 because of earlier litigation with Local 1982 over fringe benefit funds and because Local 1982 insisted on nine-man crews for unloading bulk ships, as compared with three-man crews that the Teamsters permitted. Davis also felt that employees supplied in years past by Local 1982 to other stevedoring companies had a tendency to "disappear" during the workday from their oversized crews and thus be paid for time never worked. Davis also made a similar statement in an affidavit, given on March 26, 1982, during the district court litigation between the ILA and Local 1982 members. In that affidavit Davis flatly stated that "Toledo World Terminal, Inc., would not have engaged in the stevedoring business in Toledo if a condition of doing so was recognition of and bargaining with Local 1982. Toledo World Terminal, Inc., will only deal with Local 1982 if required to do so by operation of law."

b. *The operation of the docks*

As ILA dock steward, Charles Moody operated the daily shapeups until November 3, 1981. Shapeups were normally held at 7:30 a.m. and occasionally at 12:30 and 6 p.m. They were held, however, only if there was loading or unloading work to be done and if there was work available in the warehouse. As a preferred man, Moody was assured of employment before any nonpreferred applicant was hired. As dock steward, Moody was contractually assured of employment so long as anyone was hired. If a total of nine or fewer men were hired, the dock steward was expected to do productive work. If more than that number were hired, he had no assigned duties but was paid simply to be on the premises. These same practices were followed after Moody was replaced by Cleo Syph.

Preferred men were normally notified as they left work the preceding evening, or possibly by phone, that they would be needed the following day. They reported to the dock and went directly to assigned crews. For the benefit of all other stevedores who wanted to work on a particular day, TWT placed a message on a telephone tape the previous evening giving notice whether there would be one or more shapeups, what time they would take place, and how many crews would be needed. Based on this information, a stevedore who was not on the preferred list could decide whether it was worth his while to go to the warehouse the following day and make himself available for employment at the shapeup.

At the appointed time, nonpreferred applicants for employment would gather about a podium erected in the hiring area where Moody and the marine superintendent began the shapeup process. It usually lasted 15–20 minutes. During the 1981 season, Glenard Staler normally attended shapeups in the capacity of marine superintendent or foreman, although Floyd "Fats" Tefft occasionally substituted for him. Both Staler and Tefft had served as foremen for TOT and had many years of supervisory experience on the docks in Toledo. In 1982, Tefft attended the majority of the shapeups, while Staler performed other duties.

It was the responsibility of the marine superintendent to determine in advance of the shapeup how many men would be needed for the day and what classifications of employees would be needed. He normally obtained this information by looking at a ship's manifest or its loading plan and occasionally by actual inspection of the cargo hatches. The more skilled classifications were crane operators and signalmen. TWT also hired forklift operators, front-end loaders, checkers, and ordinary laborers. Most experienced stevedores performed several jobs and normally preferred the highest paying slots available. The desirability of these jobs, however, could be affected by the length of time that work might be available for a particular crew. There were "short shots" and "long shots"—assignments lasting only 4 hours and assignments lasting 8 hours or more. A long shot as a laborer might, under some circumstances, be preferable to a short shot as a forklift operator, although the latter classification paid slightly more than ordinary labor. Over the years, stevedores became "type cast," i.e., they were normally regarded by the dock steward and the marine superintendent as checkers, forklift operators, crane operators, and the like. It goes without saying that some could perform these functions better than others, and some went about their tasks with greater interest and enthusiasm than others.

At the beginning of shapeups in 1981, the marine foreman furnished Moody with a handwritten list of the jobs available that day. Moody wrote or posted that list on a blackboard in plain view of the assembled stevedores. There is a conflict in the testimony about exactly what occurred at this point in the shapeup routine. I credit Moody's corroborated testimony[16] that he followed the same procedure that dock stewards or dispatchers had followed with the previous employer, TOT. Moody called off the names on the Local 1982 seniority list in order of their appearance on that list.[17] If an individual was present, he signified his availability for hire and stated the job he wanted. His name was then placed with the job requested and the job was stricken from the list of available openings. In order to be hired at shapeup, a stevedore had to be physically present. If he did not respond as his name was called, he was regarded as unavailable for hire and the dock steward proceeded to the next name on the list.

Lines assignments in 1981 until November 3 were made by Edwards, who was placed on the preferred list as the 16th man. After some misunderstanding, it was agreed between the ILA and TWT that Edwards, who had performed both this function and the shapeup hiring function for TOT, should be compensated as the fifth man at a "tie-up" and as the third man at a "let-go." He was paid, as were all linesmen, as a laborer, which is the lowest rate in the contract. Edwards was not required to be present as the ship was being docked or untied and he rarely was. It was his responsibility to provide lines crews as requested, regardless of the time of day or night the request might be made. He performed this function by obtaining a list of names and phone numbers of stevedores who sought lines assignments and by phoning them as requests for men were made by the Company. Edwards was free to hire whom he wanted for lines and he utilized the Local 1982 seniority list for this purpose. He did not hire individuals in the order that their names appeared on that list but attempted a rotation so that the work would be spread out. His testimony, which I credit, and the records that he submitted, which I find generally reliable (although they may have contained some incidental errors) indicate that, in 1981, Edwards made lines assignments to a total of 116 men. Most of the persons to whom lines were assigned received from 10 to 20 hours of employment. There is no evidence that Syph partisans were discriminated against in these assignments. Many received close to 20 hours of work and Syph himself, who was working only part time in 1981, received 10 hours of lines. It is arguable from these records that Edwards, a strong Moody partisan, gave a few hours above the average to Moody supporters in one or two instances.

Moody was anxious that Local 1982 be brought into the picture as the collective-bargaining representative in lieu of direct participation by the ILA itself. He repeatedly asked Sullivan when this would occur and Sullivan always gave him a standard reply that he was working on the matter and that it should happen soon. To press this point, Moody and his attorney, Ted Iorio, went to Washington on May 15 and met with Sullivan in the latter's office.

At this same time, Moody was given the task of soliciting and submitting checkoff authorization forms to TWT. He had been instructed by Sullivan to use Local 1982 checkoff forms and he did so, obtaining the signatures of all the stevedores who usually worked on the docks. These cards were given to TWT with a cover letter from Moody outlining what dues the ILA expected TWT to remit. He specified the Local 1982 bank accounts to which TWT should send pension and health and welfare payments. The normal ILA practice, embodied in the checkoff form, was that the local would receive 10 cents an hour for each hour worked by a member, that the International would receive 11 cents an hour, the Great Lakes District would get 3 cents an hour, and that the local would also receive, for each member, $6 per month for the 8 months that constituted the shipping season (April through November). Moody specified in his cover letter the account to which Local 1982 dues should be sent.

Early in May, Moody turned the authorization cards into the company office. Strimbu called Sullivan and told him that TWT would not recognize Local 1982 checkoff cards because it would not recognize Local 1982. Sullivan then asked him when TWT would recognize Local 1982. Strimbu simply said, "We're new. We're employing

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[16] Among the corroborating factors is the admission that, in 1981, there was in fact a blackboard available in the shapeup area that was used as part of the shapeup routine. It was later removed. Syph agreed with this facet of Moody's testimony. He recounted a trick played on him by members of the Moody faction when he took over the hiring function as dock steward on a busy day in November 1981. On the occasion in question, Syph called off the names of stevedores in order as they appeared on the Local 1982 seniority list. Moody partisans present whose names had been called all responded that they wanted laborers jobs, leaving open the more skilled positions that they normally claimed. This meant that Syph was put in the position of filling those jobs with men further down the seniority list who, in the judgment of the marine foremen, were less qualified than the Moody supporters who normally were hired for those positions. The foremen took Syph to task severely for failing to provide the Company with the best available employees and warned him not to let it happen again. It was not long thereafter that he stopped using the Local 1982 seniority list at shapeups. This incident could not have occurred unless job applicants at shapeups in 1981 were in the habit of selecting their own jobs from a list of available openings, contrary to the TWT contention that Moody merely called off names and left it to the marine foreman present to make assignments of applicants to available positions as the men responded.

[17] In 1981, the Local 1982 seniority list was posted on company premises in or near the hiring area.

Local 1982 members. We will consider it sometime in the future." On May 20, at a meeting attended by Moody, Baker, Davis, and James Hardwick, TWT's general manager, Moody, asked Davis why dues were not being deducted. Davis replied that no dues were being deducted under the checkoff authorizations because Local 1982's name appeared on those forms and TWT refused to recognize Local 1982 as the bargaining agent of its employees. What transpired then is set forth in findings made a year or so later by U.S. District Judge Don Young in litigation filed against the ILA by Moody and other Local 1982 members:

> Paragraph 7 of the Agreement . . . provides that upon receipt of proper authorization cards, TWT would deduct dues and transmit them to the Great Lakes District of (ILA).
>
> The evidence leaves no doubt that the plaintiffs and a large number of other members of Local 1982 did in fact sign authorization cards. Copies of one hundred and twenty-six (126) such cards were offered in evidence . . . . However, all of these cards provide that the dues are assigned to Local 1982. The uncontradicted evidence shows that when these cards were presented to TWT, it refused to accept them because of its hostility to Local 1982. The defendant's officers who were present at the meeting told TWT that it should strike out the name of Local 1982 and pay the moneys directly to the defendant (ILA).
>
> The evidence leaves no doubt that most, if not all, of the members who signed the cards would not have consented to any such change in the agreements which they had executed. To say the least, the action taken amounted to a conversion by the defendant, if not an embezzlement of the funds paid on the strength of these cards.[18]

As part of the agreement whereby Local 1982 was stricken from the checkoff authorization cards that Moody had presented to TWT, the parties agreed that the dues to be deducted should be placed in an escrow account in an Akron bank. On June 11, Moody and a company representative, Michael Hoff, signed a bank deposit card purporting to open a joint ILA or Local 1982-TWT account for receiving deposits of dues payments from TWT to the ILA. Moody found out in the fall of the year that in fact this account had never been opened and that all checked off dues had been directly remitted by TWT to the ILA's Great Lakes District. The disposition of those dues was one of the subjects of the aforementioned lawsuit, which Local 1982 members filed in the fall of 1981 against the ILA.[19]

Between June and August 1981 Davis and Strimbu met with ILA representatives, principally Lackey and John Baker, but excluding Moody, a total of five times for the purpose of working out the provisions of a formal contract between ILA and TWT.[20] On several of these occasions TWT was again requested by the ILA to recognize Local 1982, but each time TWT refused. I credit Moody that he did not learn that negotiations were in progress until he found out about it on August 11 from Strimbu at a grievance meeting. During this same period of time Moody and Baker had met with various TWT representatives to discuss grievances that were being filed by various TWT employees. Approximately 86 grievances had been referred for disposition at this level but, by the end of the summer, only a few had been resolved. Moody furnished Strimbu and Baker with copies of these grievances at the August 11 meeting.

When, in mid-August, Moody learned that negotiations were in progress for a new contract, he voiced strong objection, complaining that TWT was not even living up to its current agreement (the memorandum of understanding). Nevertheless, negotiations continued. On September 14, Hardwick received a letter from Moody informing him that certain pending grievances were going to be taken to arbitration. In fact, none were taken to arbitration and none of the 3700 grievances filed against TWT since its arrival at the Port of Toledo have ever gone to arbitration. Syph testified that, since he became dock steward in November 1981, the ILA has never disagreed with any company position on a grievance.[21]

On September 10, TWT and the ILA signed a contract covering the TWT operations in the Port of Toledo. Sullivan signed on behalf of the ILA and Wills signed for TWT. The contract was made retroactive to April 20 and was scheduled to expire on December 31, 1983. It was not referred to the membership for ratification, although ratification is the normal ILA practice and was the regular practice of Local 1982-before the advent of TWT. In explaining this departure from standard procedure, Sullivan testified that the September 10 contract was actually a local agreement concluded by the GLD, adding that there were no GLD procedures or bylaws covering referral of this particular kind of contract for ratification because it was an unusual type of agreement for the GLD to negotiate. Normally any agreement concluded by the GLD was districtwide in its application. One provision of the September 10 contract that was new and noteworthy was the provision giving hiring preference to so-called "experienced" men. The agreement continued the preferred listing of the 16 individuals referred to as "preferred" men but established a category of individuals who had worked an aggregate of 1000 hours or more during the preceding season. It required that these individuals be given preferment in hiring after the list of 16 preferred men was exhausted. After hiring all experienced men, as defined therein, the dock steward was then free to hire "from other available sources." This ranking applied only to hiring at shapeups. It did not govern selection of employees for lines. Because TWT did not have available to it the records of its predecessor, it necessarily had to leave to the judgment of the dock steward, for the balance of 1981, the determination of which candidates for employment had worked 1000 or more hours for TOT during the 1980 season. In fact, they ignored this provision entirely.

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[18] *Charles Moody v. Longshoremen ILA*, Case 81-712, U.S. District Court for the Northern District of Ohio, Western Division, memorandum and order of Judge Young dated April 2, 1982.

[19] The actual removal of the phrase "Local 1982" from the checkoff cards was accomplished by Davis' secretary on his instructions.

[20] Sullivan testified that, in his view, Moody's proper function was to enforce the contract at the dock and see to it that TWT did not hire "new people," meaning Teamsters.

[21] Occasionally Moody was able to adjust a grievance by discussing it with the marine foreman. Such grievances never came to the attention of the union-company committee at step 3 of the grievance procedure.

The contract also imposed on the Union the responsibility to maintain, administer, and operate an employment office and obligated the Company to obtain its employees from this employment office unless the Union was unable to furnish it with qualified individuals. The contract set forth the procedure outlined above for "requisitioning applicants." It required the Union to furnish the Company with a list of its members and their addresses and phone numbers, if any.

The contract made no mention of Local 1982 nor did it give any recognition to the steward or dispatcher elected by the membership of Local 1982. It did, however, set forth a rate of pay for stewards and outlined some of the steward's powers and duties. Shortly after the execution of this agreement, an executive board meeting of Local 1982 was convened. It was attended by Moody, Robert Highsmith, Richard McGoffney, Henry Swayze, James Del Rio, and Kermit Jones Sr. The sense of this meeting was that Local 1982 had been deceived into thinking that it would be brought into ILA-TWT negotiations as a party. To use Moody's words, "trusting the ILA did not appear to be the way to go." The executive board authorized the filing of unfair labor practice charges and a decertification petition. On September 23, a membership meeting was held that was attended by about 80 members of Local 1982. Those in attendance at this meeting ratified the action of the executive board and signed cards to be used as a showing of interest to support the holding of a representation election.

On October 2, 1981, Moody, in his own name, filed a decertification petition (Case 8-RD-1046) and a certification petition (Case 8-RC-12617) covering the TWT bargaining unit. He also filed an unfair labor practice charge against TWT (Case 8-CA-15245), alleging that TWT had violated Section 8(a)(1), (2), and (5) of the Act. The charge proceeded on a successorship theory, stating that TWT was a successor to TOT and was thereby obligated to recognize Local 1982. Having failed to do so and having recognized the ILA, TWT was, in Moody's view, guilty of violating the Act. Not long thereafter, Local 1982 also filed internal union charges under provisions of the ILA's constitution and bylaws, as well as the constitution and bylaws of the GLD, charging misconduct by the Great Lakes District executive board and the ILA for placing Local 1982 in a de facto trusteeship, by failing to make it a part of the TWT contract, and by usurping its functions as the local in charge of handling day-to-day union business in Toledo. On October 5, 1981, Robert L. Moody Jr., Charles Moody's older brother, also filed internal charges against 11 TWT employees, most of whom were preferred men,[22] claiming that they performed work outside their assigned classifications, thereby depriving other ILA members of work opportunities.

The filing of charges against TWT and the filing of two representation petitions, one of which would decertify the ILA, hit ILA offices in New York and Washington like a bombshell.[23] Immediately on receipt of the petitions, Sullivan phoned Moody and asked him what he was doing. Moody's reported reply was that filing petitions and a charge was his way of "getting the Company moving" in the direction of recognizing Local 1982. Sullivan told him in the course of the phone call that he did not think it was proper for Moody to do this because of all the effort the ILA had put forth to obtain recognition and to work out an agreement to protect ILA members. He flatly told Moody, "We can't stand for this." Moody's reply was that the members of Local 1982 did not want to displace the ILA but merely wanted recognition for the Local.

Sullivan then phoned Thomas W. Gleason, president of the ILA. Sullivan recommended to Gleason that Moody be replaced as dock steward. Gleason agreed. Sullivan also recommended an investigation be initiated to determine whether the ILA should place Local 1982 in trusteeship. Gleason agreed to that recommendation. On October 12, a committee was appointed by Gleason to determine whether a trusteeship should be established. The committee was composed of GLD officers John Baker, Chauncey Baker, and Harrison Tyler. Shortly after this committee was created, John Baker went to Toledo to conduct an investigation. His investigation consisted of going to Lackey's office, making copies of the charge and petitions (which he forwarded to Gleason and Sullivan), speaking to Syph, and returning to Cleveland. He did not notify Local 1982 or any of its officers that an investigation was underway nor did he seek any explanation from Local 1982 concerning the activities that were being questioned. On October 21, the committee sent a telegram to Gleason recommending that Local 1982 be placed in trusteeship, that its officers be removed, and that Moody be removed as dock steward.

Having learned of this effort, Moody took it on himself to call ILA officials to press his case. He got a runaround. On October 22, he called Sullivan. Sullivan told him to talk to John Baker. On October 23, he called Baker. Baker told him to call Lackey. On October 26, he again called Sullivan. They had an angry conversation in which each called the other various names. Sullivan accused Moody of dereliction of duty as a steward in not processing grievances. Moody reminded Sullivan that he had presented 86 grievances to John Baker and Strimbu at the meeting of August 11 and that nothing had been done about them. He also said he had 74 more grievances to take up at the ILA-company level. Sullivan hung up.

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[22] Those individuals named as Respondents by R. Moody to internal union charges were all Syph faction members—Bollman, Burkhard, Chevalier, Kutcher, Erichson, Kristoff, Loveless, Ludlow, J. Rizo, L. Victorian, and Cleo Syph.

[23] The first set of representation petitions were filed in C. Moody's own name. C. Moody was apparently afraid that, if the Local were placed under trusteeship, the trustee would withdraw any petition or charge filed in the name of the Local. On October 31, 1981, he filed additional petitions making it clear that he was seeking certification for Local 1982, not for himself personally, as the bargaining agent for TWT employees. These petitions are still pending and are blocked by the pendency of the charges in the present case (Cases 8-RD-1187 and 8-RC-12949).

During October, John Bowers, executive vice president of the ILA, phoned Cleo Syph from New York concerning the pending petitions. At that time Syph was on the executive council of the Great Lakes District, although he held no office in Local 1982. Bowers asked Syph what he knew about the petitions. Syph said he was unaware of them and expressed surprise and disbelief that Moody would have filed them.

On November 2, 1981, Gleason sent Syph a lengthy telegram, in which he informed Syph that the ILA executive council had approved the placing of Local 1982 in trusteeship. Copies of the telegram were sent to Moody and other officers of Local 1982. The stated reason for the trusteeship was "activities of the officers and certain members of the Local who are presently attempting to remove the ILA as the collective-bargaining representative with Toledo World Terminals, Inc." The telegram also stated that Syph was being appointed as the trustee for Local 1982. Gleason directed him to take charge of the books and assets of the Local and to arrange to conduct its internal affairs. Syph was also told that he would continue to act under Gleason's supervision and direction, and that he should make a written report to Gleason concerning the status of the Local's books and records and its affairs. The telegram served to suspend the Local's officers and to direct them to cooperate with Syph in the performance of his duties as trustee. In an affidavit given a few days later in the course of litigation in the U.S. district court, Sullivan stated Moody's removal came about, in part, because he had filed representation petitions and an unfair labor practice charge.

On the same day, Sullivan sent telegrams to Syph and Moody informing them that Moody was being removed immediately as ILA dock steward and that Syph was replacing him. TWT was also notified by Sullivan of this move. At that point a fratricidal war erupted on the Toledo waterfront. It is still in progress.

4. November 3, 1981, through the winter of 1981–1982

I credit the corroborated testimony of Moody and Edwards that, on the morning of November 3, 1981, Syph[24] arrived at the dock waving the telegrams he had received appointing him as trustee for Local 1982 and appointing him dock steward. He screamed at Edwards, "You—are done. You and the Moodys are done." He continued to rage and screamed at Edwards several times, "You're fired. You don't know how much power I got." Syph also screamed at Robert Moody, who was standing nearby, "I'm a professional —. I know how to — a —. You're through. You're fired, you s.o.b."

Later that morning Edwards reported these statements to Staler, the foreman, and asked Staler whether Syph had the power to fire him. Staler said that he did not. However, from that point forward Edwards ceased to act as lines dispatcher and worked as a laborer or forklift operator in the loading and unloading operation. Syph took over the job of hiring linesmen.

On the same day, Syph and both Bakers went to the Local 1982 business office, which is located in an old building on Summit Street a few miles from the dock. They entered the office, changed the locks on the doors, and phoned Moody at the dock. They told Moody that the Local had been placed in trusteeship, that they were taking over the office, and demanded all books and records. Moody objected to this procedure but to no avail. A week later, Moody gave Syph copies of the Local 1982 books and records, but retained the originals in his possession. TWT recognized this change in stewardship on the dock and immediately allowed Syph to replace Moody at the morning shapeup and to enjoy the privileges on its payroll reserved to the ILA dock steward. For the balance of the 1981 season Syph continued to call the roll of the Local 1982 seniority list at shapeups and to assign work in the same order that Moody had used. Moody was reduced to the status of an ordinary stevedore but retained, and still retains, his place on TWT's preferred list.[25]

On November 4, 1981, Chevalier, who later became assistant dock steward, filed with the ILA internal union charges against Moody and other officers of Local 1982. The text of his charges was drawn up by Lackey. Chevalier charged that Local 1982 officers were guilty of conduct detrimental to the welfare of the ILA by filing a decertification petition to remove the ILA as the bargaining representative of TWT employees, by calling and holding secret meetings and giving notice of those meetings only to those Moody wished to participate, by expending Local 1982 funds without proper authorization, and by failing to deliver books and papers to the trustee appointed to take charge of the Local. On November 9, Gleason appointed both Bakers and Tyler to a committee that was instructed to investigate and report to the ILA on Chevalier's charges. They were directed to hold a hearing, permit "Brother Moody and other suspended officers" to be heard, and file a written report with recommendations. Moody was notified that the hearing was scheduled to take place at a Holiday Inn in Toledo on November 18. It took place on that date. Over objection of one of the charged parties, Chevalier's original charges were amended to include, among the allegations of conduct detrimental to the ILA, that Moody had filed an unfair labor practice charge against TWT on October 2.[26] No decision has ever been made by the

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[24] Syph was a thoroughly unreliable witness. Not only was his demeanor bad, his testimony was replete with contradictions and failures to give explanations to basic questions posed to him. I would not credit any testimony given by Syph that was contradicted by any other witness.

[25] Because of contractual privileges accorded to the dock steward, the demotion of Moody to ordinary stevedore status carried with it a very substantial change in Moody's earnings. A comparison of those earnings with Syph's earnings for 2 years, for which documentation is found in the record, is: Moody—gross earnings for 1983, $18,351 and for 1984 $27,370; Syph—gross earnings for 1983, $52,259 and for 1984, $60,384.

[26] Baker testified at the hearing in this case that no evidence was adduced at the November 18 hearing that Moody had conducted any union meetings secretly or undemocratically or that Moody had spent union funds without proper authorization.

ILA concerning these charges, perhaps because of the suit in U.S. district court, which was filed by Moody and others against the ILA, and the order of the court, which was issued on November 19, the day following the hearing by the ILA committee.

As suggested previously, Moody's response to the ILA's imposition of trusteeship and the pressing of internal union charges against officers of Local 1982 was a suit in the U.S. District Court for the Northern District of Ohio (Western Division), filed in early November, to restrain the ILA from interfering with the operations of Local 1982. On November 19, Judge Young entered a preliminary injunction, accompanied by an opinion from the bench, restraining the ILA from imposing a trusteeship on Local 1982, from removing the officers of Local 1982, "and otherwise interfering with the operations of Local 1982." He made it clear that he was leaving a final resolution of the underlying dispute between Local 1982 and the ILA to the NLRB and was taking action solely to preserve the status quo because he felt, if he did not do so, that Local 1982 would cease to exist by the time the Board could resolve the issues between the parties and that any resolution it might make would be rendered moot by the march of events.

Immediately thereafter, Moody wrote letters to Syph and to ILA officials requesting that Syph refrain from making any further statements or taking any further action on behalf of Local 1982, that Local 1982 books, records, keys, and property be returned to Moody, and that Local 1982 be informed immediately of the present status of all pending grievances. Moody also wrote to Sullivan asking what had happened to money that had been deducted from employee checks pursuant to Local 1982 checkoff authorizations and that had supposedly been placed in an escrow account. He demanded specifics regarding name of the escrow agent, the number of the account, and the total amount of funds. In another letter, Moody asked Sullivan to remove Syph as dock steward and to substitute Edwards, the elected dispatcher of Local 1982, in his place.

The replies to Moody's various letters, as well as his earlier correspondence, came from different ILA officials and representatives. Lackey wrote Moody that henceforth his interest in the processing of grievances was wholly unofficial and merely that of any stevedore on the docks, since Local 1982 had no contractual relationship with TWT and had no authority to file or process grievances on behalf of any TWT employee. Lackey offered Moody an opportunity to sit down and discuss outstanding differences with Sullivan at Sullivan's office in Washington. Early in December, Gleason wrote to Moody and other Local 1982 officials stating that "it has always been the International's position that any grievances within the ILA should be handled in the first instance within our own organization, rather than be submitted to the National Labor Relations Board or other government agencies." Gleason then appointed both Bakers and Tyler to serve on a committee to investigate certain charges filed in October by Moody and about 100 members of Local 1982 against the ILA executive council, the Great Lakes District executive board, and various Syph supporters who were members of Local 1982. In a later communication, a hearing on those charges was set for December 18, although it was not held on that date because Moody requested a postponement. In fact, such a hearing has never been held.

During November and December 1981, Syph and his supporters were also engaged in a third alternative strategy aimed at securing their position as the representatives of Toledo stevedores. In addition to having Local 1982 placed in trusteeship and filing internal charges aimed at ousting Moody and other officers from positions of power in Local 1982, Syph filed with the ILA an application to charter another general cargo local at the Port of Toledo. This application was forwarded to ILA headquarters on December 23. On December 29, 1981, he sent to the ILA a list containing names of persons who had signed union authorization cards, styled "pledge cards," which designated the ILA as the bargaining representative of the signer without any reference to Local 1982. The collection of these pledge cards was an ongoing effort, which extended far beyond the day the initial set of cards was mailed to ILA headquarters in New York. In fact, Syph continued to solicit signatures on pledge cards up to 1984.

I credit Claude R. Tucker Sr. to the effect that, in December 1981, Syph phoned Tucker at his home, told Tucker that he had a card for him to sign, and said that he wanted to get as many signed as possible before going to New York to see Gleason. Syph added that if Tucker did not sign, he would be "left out." Tucker responded that he did not want to sign because the stevedores already had a local. Syph then told him that he was not going to have a local, that Syph was going to get another local, and that, if Tucker did not sign, he was not going to go to work.[27]

Sometime in 1982, Syph presented Nathaniel Levesque with a pledge card and said, "Sign this and you can work." Levesque refused. Syph emphasized that Levesque would have to sign a card stating, "I'm going to see that nobody is working but my friends and family." Syph approached Wesley W. Boyd on three occasions to solicit Boyd's signature on a pledge card. Each time Boyd refused. On the first such occasion Boyd told Syph that he was not signing anything to get a new local because he already belonged to Local 1982. He did not change his position when further requests were made. Shortly after the trusteeship was imposed, Syph asked Thomas W. Gaines to sign a pledge card. Gaines refused. Syph then told Gaines, "If you don't play ball with me, I'll get you off this dock if it's the last thing I do. All you will do is spend money buying gas coming back and forth from the dock." Toward the beginning of the 1982 shipping season, Syph met Gaylon Howard at L. C.'s, an establishment referred to either as a "speakeasy" or an "after-hours club."[28] Syph told Howard that he was organizing

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[27] Witness Claude *R.* Tucker denies ever having signed a pledge card for a new local. Syph said he did. There is a pledge card in evidence purportedly signed by Claude *W.* Tucker. The witness was never confronted with this card on cross-examination. I conclude that the card was signed by some other person and credit witness Tucker's assertion that he never signed a pledge card for Syph.

[28] 28 L. C.'s is actually a private home, located on Prospect Street, whose owner permits friends to come in late at night and play cards. He

Continued

a new local and that Howard would have to sign a pledge card, adding that if Howard did not sign now, "it would cost $600 after (the local) was formed." Howard refused.

On one occasion in 1982, Syph offered Paul Conley a pledge card and asked him to sign it. Conley refused, whereupon Syph told Conley that it was Conley's fault that he was not working every day. On two different occasions Syph asked Floyd Early to sign a pledge card. Early refused. A few months later, Syph asked him again. When Early refused a second time, Syph said to him, "Well, I can't hire you no more." In November 1981, Syph asked Raymond Merrill to sign a pledge card. Merrill refused. Syph then told Merrill that, if he did not sign a pledge card, he would never get another day's work. Late in 1981, Syph approached Richard "Lefty" Hollinger about signing a card. Syph told Hollinger that, "When the new local gets in, whoever doesn't sign a card wouldn't be working." Hollinger in fact signed a pledge card that was solicited by Julio Ramirez, a fellow employee. Sometime in 1982, Syph phoned Harkles Bacon at his home and asked Bacon to sign a pledge card. He told Bacon on this occasion that it would be necessary to sign a card to be a member of the new local and that, if Bacon did not sign, he would be "left out." Bacon replied that he could not become a member of a new local and still remain a member of an existing local.[29]

On receipt of Syph's application for a charter for a new local, Harry R. Hasselgren, secretary-treasurer of the ILA, wrote Sullivan a letter, dated January 12, 1982, in which he requested that Sullivan conduct an investigation concerning the merits of granting the application. Sullivan notified interested persons that he would hear their views concerning the chartering of a new local on January 29 at the Holiday Inn in downtown Toledo. On or about January 26, Moody submitted to Sullivan by letter a petition signed by about 110 members of Local 1982 protesting the granting of the application. Moody also met Sullivan personally on January 29 with other members of the Local 1982 executive board. He gave Sullivan a second copy of the petition opposing the creation of a new local and reaffirmed the loyalty of Local 1982 members to the ILA. Moody reminded Sullivan of a promise given to Moody in Buffalo the previous April that Local 1982 would be made the cobargaining agent of TWT employees within 30 days, and stated that Local 1982 members had been fighting for many years to maintain union standards at the Port of Toledo. Moody demanded bargaining rights for Local 1982 and complained that Syph had been coercing its members into signing pledge cards. He also complained that he had received no support either from Sullivan or Baker in enforcing the contract. Sullivan's reply was a noncommittal statement that he had come to Toledo just to solicit everybody's views.

Jeffrey Julius, Local 1982's lawyer, dispatched a letter the following day to Charles R. Goldberg, the attorney who represented the ILA in the suit before Judge Young, protesting the proposal to charter a new local and threatening to bring the ILA before Judge Young for contempt if such a charter were granted. Julius' letter also made reference to a meeting scheduled to take place on February 10 to discuss differences between the ILA and Local 1982, and expressed the opinion that an effort to charter a new local would completely undermine any possibility of harmonious resolution of the dispute.

During December and January, an exchange of correspondence between Moody, Gleason, and others had taken place with a view toward working out the differences that were dividing the parties. One of Moody's problems was that the treasury of Local 1982 was depleted and he was unable to travel at union expense to New York or Washington, where Gleason and others wished to hold such a meeting. At long last the parties agreed to meet on February 8 (not February 10) at the ILA office in Washington. Moody went to Washington and arrived for the meeting at the appointed time. He was kept waiting for 6 hours.

When the meeting finally took place, the ILA was represented by President Gleason, his son, Thomas W. Gleason Jr., who is the ILA's general counsel, Sullivan, and both Bakers. In the course of the meeting, Moody again reaffirmed his loyalty to the ILA and offered to drop all litigation if the ILA would secure for Local 1982 its bargaining rights with TWT. He reminded Gleason that Sullivan had promised Moody in April 1981 that Local 1982 would be brought in on the TWT contract within 30 days, but nothing had happened.

Gleason (Sr.) accused Moody of trying to turn the dock over to the Teamsters. Gleason (Jr.) said that the ILA could put Local 1982 into trusteeship either for filing a decertification petition or for filing an unfair labor practice charge against TWT. Sullivan merely stated that he had been personally hurt because the petition and charge had been filed. Moody complained that the ILA had tied the Toledo stevedores into a substandard contract, without benefit of ratification, and that the Cleveland agreement was nothing compared with the DeBartolo contract that had governed the port during the preceding years. The meeting ended in a hot argument and the ILA leadership just walked out of the room. Gleason (Sr.) returned and invited Moody to phone him in New York in a couple of days and they would work something out. Moody did so, but Gleason was on vacation when the call arrived. Moody then sent Gleason a letter that was never answered. On February 10, Sullivan forwarded a report to the ILA executive council recommending that a new charter be granted for a general cargo local at Toledo.

Moody attended the ILA annual convention early in March at the Diplomat Hotel in Hollywood, Florida, as a delegate from Local 1982, but was denied credentials and could not participate in the convention. He attempted to speak with Gleason personally concerning the out-

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then sells them liquor by the drink in order to support the operation. Moody referred to these individuals as "skinners" because of the name of the card game they played.

[29] Sometime later, in 1983, Syph renewed the effort to collect pledge cards for a new local. On one occasion, while soliciting a card from Charles Hampton, Syph told Boyd to sign the card or he would not be hired. Boyd refused.

standing differences between Local 1982 and the ILA, but was unable to do so. One of Moody's reasons for wanting to attend the International convention was that the ILA executive council would be in attendance, and he felt that they would be making a decision at that time on whether to issue a charter for a new general cargo at the Toledo Port. On March 3, Moody appeared before the executive council, pledged the loyalty of Local 1982 to the ILA, and said that all they wanted was their bargaining rights. He said that the Local wanted to keep its charter and complained that it had received no support from the Great Lakes District. Syph told the executive council that "Moody and his stoolies" were trying to turn the port over to the Teamsters. Before leaving Florida, Moody received word indirectly from Gleason that an answer to his complaints would be sent in the mail.

On March 12, the ILA executive council authorized the issuance of a charter for a new local at Toledo, designating it as Local 2037. On March 15, Gleason wrote Syph and informed him of this fact. He said that the new local would only cover employees of TWT and that the charter document itself would be forwarded to Syph on the payment of a standard $13.50 fee charged for the issuance of charters. Before receiving Gleason's letter, Syph distributed a notice, using his own name as vice president of the GLD, stating that there would be an organizational meeting of the newly chartered Local 2037 on March 19 at the MEBA hall. The notice also contained a proposed slate of officers for Local 2037, headed up by Syph for president, Julio Ramirez for vice president, and Chevalier for financial secretary-treasurer. When Moody heard about this meeting, he sent Gleason a telegram in which he threatened the ILA with further legal action. In fact, the charter for Local 2037 was never forwarded to Syph because of the pendency of litigation, so the March 19 meeting never took place.

On March 23, Local 1982 went back to district court and filed, within the framework of its pending suit, a motion for a temporary restraining order and preliminary injunction and a show cause order seeking to hold the ILA in contempt for violating the order of November 19. A hearing on this show cause order was held on March 29. Although not granting all of the relief prayed for, Judge Young held the ILA in contempt. In a decision dated April 2, he required the ILA to make a formal entry in its records terminating the trusteeship and providing Moody with a certified copy of the minutes taking such action. The ILA was further required to notify Syph that he was no longer trustee, and instructed the ILA to deliver to Local 1982 officers the books and records of the Local. Of considerable importance is that he directed the ILA to pay over to Local 1982 the portion of the checked off dues designated for Local 1982 in the checkoff cards that had been filed with TWT the preceding May, together with interest on dues at 8.25 percent. Until this time, the GLD had taken this money from TWT and had deposited it in the general account of the Great Lakes District along with other GLD funds. Young also ordered the ILA to rescind the charter granted to Local 2037 and to reimburse the plaintiffs for attorneys fees involved in prosecuting the contempt action. Certain quotations from Judge Young's opinion are pertinent here:

> In desperation, the plaintiff Moody filed with the National Labor Relations Board a complaint of unfair labor practices, and petitions to decertify the defendant (ILA) and to re-certify Local 1982 as the collective bargaining agent for the workers at TWT.
>
> The defendant falsely accused Moody of filing the proceedings on behalf of the Teamsters Union, a traditional rival of the defendant on the Toledo docks. Defendant's officers based this calumny on the fact that the current attorney for Local 1982 also represented the Teamsters Local in Toledo. The matter of what labor law firm represents which labor union and when is a very fluid one in Toledo. No one has ever questioned, however, the complete loyalty of each firm to each of the individual unions it happens to represent at a given time, unaffected by any rivalries among their clients.
>
> The events presented at the various hearings in this case leave no doubt of the almost pathetic loyalty of the members of Local 1982 to the defendant, in spite of its clear disloyalty to them. It is hard to believe that the defendant's officers truly thought that the plaintiffs were trying to act on behalf of the Teamsters Union. It seems more probable that this is a trumped up justification to cloak their own wrongdoing.

Judge Young found that certain actions of the ILA in fall 1981 and spring 1982 violated his November 19 Order restraining the ILA from interfering with the operations of Local 1982. That the ILA had chartered a new local, that it had denied Moody a seat at the International convention in Florida, and ——that the ILA had taken no affirmative steps to dissolve the trusteeship were deemed to be evidence of contumacious conduct.

> [T]his rejection of the plaintiff Moody as a delegate demonstrates that the defendant continues to treat Local 1982 as being under trusteeship, in complete defiance of this Court's order.
>
> It is clear from these facts, which are undisputed, that the defendant in fact continued to treat the trusteeship as if it were still in force, depriving Local 1982 and its officers and members of any autonomy. It is hard to imagine a more direct and flagrant contempt of a court order.

Regarding the new local, Judge Young went on to say:

> The undisputed testimony was that Mr. Syph had been threatening dire consequences, financial and otherwise, to any employee of TWT who did not sign applications for membership in the new local. The undisputed testimony was also that there is no other port on the Great Lakes where two general cargo unions exist at the same time. Attempts to shake the plaintiffs' testimony on cross-examination

> failed, and documentary evidence which perhaps could have refuted it was not offered.
>
> As a practical matter, the existence simultaneously in one seaport of two general cargo local unions, one recognized by the dock operators and other not so recognized, would be totally destructive of the unrecognized union. To say that chartering a new local would not interfere with the operations of Local 1982 is patently absurd.

The ILA appealed Judge Young's decision to the Sixth Circuit, where it was upheld in an opinion and order dated November 1, 1982 (Cases 82-3108 and 82-3220). The Great Lakes District, however, did not begin to remit back dues or current dues to Local 1982 until after the court of appeals had affirmed Judge Young's order. It continued to make those payments until spring 1984, when, at the outset of a new contract, TWT employees executed new checkoff authorizations. Most of those authorizations omitted any mention of Local 1982.

5. The 1982 shipping season

a. *On the waterfront*

The 1982 shipping season in Toledo began on April 23. Syph continued to act as dock steward at the morning shapeups and to assign lines. One new feature of the hiring process in 1982 was the establishment of a new category of employees referred to as "experienced" employees. The ILA and TWT agreed during the previous winter that the criteria for eligibility for health and welfare coverage should also be a criteria for preferential treatment in hiring in 1982. Notwithstanding the contractual provision designating employees with 1000 or more hours in the preceding season as experienced employees, the parties orally agreed that the figure should be adjusted to 350 hours. Accordingly, some 26 men who had worked 350 or more hours in 1981 were given preferment in hire after the 16 "preferred" men were hired. These 42 individuals constituted the core of the TWT labor force. Staler announced at a shapeup on that day that henceforth the Company would recognize only 41 employees regardless of seniority. (That figure eventually became 42.) A second change in the shapeup procedure was that Staler began to assign employees to job openings as their names were called. Syph's function was limited to calling the roll, although, as noted infra, he had some discretion in that regard.

Opening day was also marked by a spirited exchange between Syph and Charles Moody. After the evening shapeup was over, Levesque, a Moody supporter, asked Syph for a grievance form. Syph told Levesque that he was not Levesque's "g.d. steward" and told Levesque to get a form from Moody. He also told Levesque that he "didn't give a —" if the Company fired all the Moody people. Charles Moody jumped into the conversation at that point. He denounced Syph as a "rotten s.o.b.," accused Syph and the ILA of putting the men in a yellow dog contract, and finally referred to Syph as an "Uncle Tom" and a "company man." Syph admitted he was a company man and walked away.

As in other years, however, TWT was also forced to rely on casuals to fill out its hiring needs during peak intervals. All in all, TWT employed some 93 stevedores during the 1982 season, including 41 casuals. Some of the casuals worked only a few hours and some worked more than 100 hours, but none were hired until all of the 42 preferred and "experienced" men who had appeared at shapeup had been employed. Two individuals were removed from the list of preferred employees and placed in the list of "experienced" employees, namely Edwards and Shirley Marsenburg. Both were and are Moody supporters. As discussed more fully later on, Edwards and Marsenburg, both of whom had worked the contractual 1000 hours in 1981 required of experienced men, were replaced on the preferred list by Walter Sampsel and Joseph Victorian, both Syph supporters. Neither Sampsel nor Victorian had worked close to 1000 hours in 1981. Edwards and Marsenburg were given preferment in call among the 26 experienced men during the 1982 season, but their change in status, in addition to Edwards' removal as lines dispatcher, severely affected the number of hours both worked in 1982. Here is a comparison of the number of hours worked by both: Edwards worked 1559 hours in 1981 and 301 hours in 1982; Marsenburg worked 1254 hours in 1981 and 243 hours in 1982. Davis testified that he had discussed this move with John Baker before taking it. According to Davis, TWT initiated the request and Baker agreed. Later on, Edwards spoke to Staler and complained about being taken off the preferred list. I credit Edwards to the effect that Staler replied, "Well, Ray, it's just politics," to which Edwards stated, "I don't know what you're talking about. I thought you just wanted good workers."

This change in the preferred list by TWT meant that the only Moody supporter left on that list was Charles Moody himself. The political lineup among TWT's 42 preferred and "experienced" employees for the 1982 season was 22 Syph followers, 19 Moody followers, and one neutral. Among the 41 casuals, Moody sentiment was overwhelming although, in the next 2 years, Syph made a determined effort to hire as casuals new men who either had no particular allegiance to any faction or who could be relied on as his own supporters.[30]

At the outset of the 1982 season, Davis told Syph that he no longer had to use the Local 1982 seniority list at shapeup as he had in the fall of 1981. Accordingly, Syph discontinued using it. Although Syph had to hire preferred men, as well as Edwards and Marsenburg, before hiring any experienced men, within the ranks of 24 of the 26 experienced men Syph could hire in any order he chose and he admitted as much in his testimony. I credit corroborated testimony of other witnesses that the 41st and 42d men hired by Syph before reaching the casuals were always Gaylon Howard, a Moody supporter, and Robert Moody Jr.

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[30] During the 1984 season, for instance, a total of 114 individuals were employed on the docks by TWT. In that year, the number of employees given preferment in hire had been increased to 50, meaning that 64 casuals were employed at some time during the shipping season. Of those 64 casuals, 26 were men who had not been hired in the 1981 season and who were never on the Local 1982 seniority list. A number of them had family ties to Syph-faction employees, leadmen, and foremen. They were: S. Ballard, K. Barker, F. Bires, G. Campbell, D. Chevalier, R. Cleveland, F. Clinksdale, D. Cousins, J. Dalimer, R. Fisher, E. German, L. Gholston, T. Golebieski, E. Hemp, D. Hice, J. Hodge, P. Kristoff, H. Loveless, W. Momenee, D. Morris, J. Morris, D. Pitts, A. Seay, R. Spencer, and L. Staler. I credit the testimony of Levesque and others that, on busy days, casuals were hired at shapeup who were unknown to either Syph or the marine foreman. They were requested to state their names and, in some instances, to spell their names in order to be listed on the hiring sheet.

On lines Syph could hire whom he pleased and he repeatedly said so to various employees. Syph's own records, which are in evidence, indicate that in 1982 he made a total of 17 lines assignments to 11 Moody supporters[31] and a total of 492 lines assignments to 41 of his own supporters.[32] (Syph's records were kept in terms of number of assignments on particular ships and days rather than in terms of the number of hours worked by linesmen.) Syph concedes that he did not equalize hours of work for longshoremen through the assignment of lines because "that was not my job." He admitted that lines assignments he gave in 1982 to T. Syph, Spencer, M. Rizo, A. Rizo, J. Ramirez, and D. Tefft—all of whom were casuals during that season—materially helped them to work the 200 hours they needed to qualify as experienced men during the 1983 season. Syph also admitted that he assigned lines by using a list composed of the names of men who had signed his petition asking the ILA to charter a new local.

As previously noted, business declined in 1982 and the total number of man hours worked by TWT employees was reduced by 26.7 percent, from 43,994 man hours to 32,241 man hours. Some 20 TWT employees, however, all Syph supporters, experienced an increase in hours worked in 1982 over what they had worked in 1981. Those prospering in the face of adversity were:

Name	*1981 Hours*	*1982 Hours*
Cleo J. Syph (new steward)	741	2,914
Joseph Victorian*	225	872
Walter Sampsel*	358	918
Joseph A. Bollman	1,452	1,921
Robert W. Burkhard	1,248	1,799
Harold Chevalier	962	1,771
Joseph E. Cutcher	1,346	1,686
Charles P. Erichson	1,530	1,823
Keene Ludlow	1,532	1,891
Julio Ramirez	260	306
Alfonso Rizo	190	257
Miguel Rizo	208	256
Joseph M. Rucki	1,511	2,035
Charles R. Spencer	114	284
Fred Syph	40	194
Theodore Syph	137	200
Donald E. Tefft	163	300
Mark Turner	0	40
Sherrond Turner	0	78
Ledray Victorian	1,529	1,946

* New preferred man.

In marked contrast, all the 63 Moody supporters listed in Appendix A of this decision experienced sharp cuts in the number of hours worked in 1982 as compared with 1981. Charles Moody himself was reduced from 1578 to 725 hours in his new-found position as an ordinary stevedore.

I credit testimony in the record from Levesque, Howard, and others to the effect that Syph said flatly that he was going to hire his friends and relatives and that others would not work. A list of relatives of Syph and Company Foreman Glenard Staler and Floyd "Fats" Tefft, who were hired repeatedly in 1982 and thereafter, is as follows:

Fred Syph—Cleo Syph's brother
Ted Syph—Cleo Syph's brother
F. D. Syph—Cleo Syph's nephew
C. J. Syph—Cleo Syph's nephew
M. Turner—Cleo Syph's nephew
D. Turner—Cleo Syph's nephew
R. Moore—Cleo Syph's nephew
G. Foster—Cleo Syph's cousin
T. Fletcher—Cleo Syph's son

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[31] Moody supporters receiving lines assignments in 1982 from Syph are as follows: Bacon, Tucker (2), Barteck (2), McVicker (4), Hollinger, Spivey, Hood, Hicks, and R. L. Moody (2), Clemons and Edwards. Edwards claims that he was not paid for the only lines assignment he received, since it occurred during normal working hours. He was given this assignment rather than an unloading job and paid as if he were unloading a ship. Charles Moody received no lines assignments from Syph, notwithstanding that he was a preferred man. In fact, Charles Moody was the only preferred man who did not get a lines assignment in 1982. When asked why he did not assign any lines to C. Moody in 1982, Syph simply replied, "No reason." In the fall of 1982, Staler had told C. Moody that the Company was going to try to equalize lines assignments among preferred men. On December 10, 1982, C. Moody filed a grievance claiming that he had not been given any lines assignments in 1982 and that he was the only preferred man to be overlooked in this regard. On May 17, 1983, Davis wrote a letter to Lackey in which he stated that the contract did not require that preferred men be given lines.

[32] Syph supporters given lines assignments in 1982 are as follows:

L. Victorian (6 assignments)
Cutcher (11)
Rucki (12)
D. Tefft (24)
J. Victorian (24)
Ramirez (14)
A. Rizo (12)
M. Rizo (12)
Fred Syph (17)
Foster (6)
Lawler (16)
A. Victorian (12)
Serna (5)
Chevalier (39)
Antonacci (10)
J. Loveless (17)
J. Rizo (17)
Apodaca (17)
J. Turner (13)
Kristoff (17)
J. Syph (36)
Spencer (17)
Olivares (8)
Sutton (12)
Hansen (9)
Owens (8)
Beese (13)
R. Moore (5)
White (10)
Erichson (9)
W. Sampsel (14)
Torres (6)
Ludlow (8)
Bollmon (10)
Burkhard (7)
J. Bennett (4)
Berg (5) (neutral)
Ludlow (4)
S. Turner (2)
Sanders (2)
M. Turner (1)

On one occasion, Syph told Davis that he was rotating lines among "some" employees.

O. Sanders—husband of C. J. Syph's sister
C. Spencer—Staler's brother
R. Spencer—Staler's nephew
L. Staler—Staler's son
D. Tefft—F. Tefft's brother

Among Syph's tenants, in an apartment house owned by Syph on Fulton Street, who were hired were D. Hendricks, W. Ramsey, and F. Gholston. Among Syph's card-playing friends at L. C.'s who were hired were R. White, J. Hodge, and L. Jones. As noted above, F. Tefft was also involved in hiring a relative. Moody filed a grievance against Tefft for nepotism, but the grievance was rejected.

On one occasion, Davis spoke to Syph about hiring relatives and told Syph that he did not like the practice. Syph asked Davis if he should discontinue the practice and Davis replied, "No." When asked at the hearing for an explanation of why several Syphs received lines assignments in 1983 substantially larger than the assignments given to other employees, C. Syph replied simply that he had no explanation, denying that he ever took family relationships into consideration when making job assignments.

b. *More internal union charges*

In addition to the internal union charges filed by Robert Moody and various Moody faction stevedores in November 1981,[33] additional charges against the ILA and various of its officers and constituent bodies were filed in 1982. Each of these charges was signed by a large number of Moody adherents and was then forwarded either to ILA headquarters in New York City or to the GLD headquarters in Buffalo. A partial listing of charge signers is found in Appendix A of this decision. None of these charges has ever been acted on by the ILA.

On June 3, 1982, a charge was filed with the GLD demanding an accounting by the GLD for the collection of the tonnage incentive and the $10 container royalty, which the collective-bargaining agreement with TWT required the employer to pay to the ILA. On the same day, a charge was lodged with ILA headquarters against the ILA executive officer, executive council, GLD officers, and the GLD council alleging that ILA dock steward Syph had refused to process pending grievances filed by TWT employees. This charge asked that Syph be brought to trial, removed as dock steward, and be required to make grievants whole for any financial losses sustained because their grievances had not been properly processed. A third internal charge, filed on the same day and sent to ILA headquarters, named the same respondents as did the second charge and complained that Syph, as dock steward, had refused to enforce the hiring provisions of the collective-bargaining agreement between the ILA and TWT. Like the other charge involving Syph, this one requested that Syph be brought to trial, removed as dock steward, and required to make grievants whole for losses sustained by his asserted failure to enforce the contract.

A fourth charge filed on June 3, 1982, was forwarded to ILA headquarters in New York and named as respondent ILA and GLD officers and councils. It complained about the policy of the ILA in conducting an organized refusal to load Russian ships to protest the Russian invasion of Afghanistan. This boycott led to the filing and prosecution of secondary boycott charges and the issuance of a complaint that was ultimately upheld by the U.S. Supreme Court. The Moody charge sought an accounting of legal expenses incurred to defend the unfair labor practice complaint and requested the filing of a suit by the ILA against the ILA officers responsible for organizing the boycott of Russian ships to recover from them personally any sums expended from the union treasury to defend the secondary boycott complaint.

Late in December 1982, Moody sent off another internal charge to the ILA office in New York. It was signed by a large number of Local 1982 members. The thrust of this complaint was that ILA officialdom had violated the constitution and bylaws by refusing to permit Local 1982's elected dispatcher, Edwards, to function as such on the Toledo dock. They asked, among other things, that various named ILA officials be disciplined for this asserted violation of their rights as Local 1982 members.

6. Grievances

Between the beginning of the 1982 season and the time this case came on for hearing in summer 1985, TWT employees and applicants for employment filed a total of 3707 grievances, most of which dealt with the failure or refusal of TWT and the dock steward to hire them, either at shapeup or on lines. A summary of grievances filed by year is as follows:

1982	249
1983	1672
1984	1486
1985 (thru 7/8/85)	300
Total	[34]3707

Over this period of time, grievances were filed in the names of some 69 TWT employees and applicants for employment. It is fair to say that, both in 1982 and thereafter, the filing of these grievances constituted a major administrative headache both for Syph and for TWT. Davis testified that he assumed that Local 1982 was responsible for these grievances, since most of the grievants were either Local 1982 leaders or were associated with them. This assumption was the basis for an unfair labor practice charge that TWT filed against Local 1982 on August 4, 1982. The charge alleged that the Local was harassing it with false and frivolous grievances. The charge was dismissed (Case 8-CB-5026).

At the beginning of 1982, a large number of grievances were left unresolved from the 1981 shipping season, when Moody was dock steward. Moody had presented

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[33] At the hearing on August 29, 1985, I reserved ruling on the admission of G.C. Exh. 84. That document is now admitted into evidence.

[34] Regrettably, counsel felt called on to place each of these 3707 grievances in the record in this case, thereby clearing space in filing cabinets throughout the State of Ohio, but adding bulk to files elsewhere.

86 grievances to John Baker and Strimbu on August 11, 1981,[35] and had had 74 more in hand when he was ousted as steward on November 3. Copies of those grievances had been forwarded to Lackey by Moody under cover letter dated October 28, 1981. Twenty-six more grievances were signed by TWT employees and countersigned by Moody in November 1981, after he was removed as steward. In November 1981, Moody presented several of these grievances to Tefft and Staler, but both of them refused to accept them because Moody was no longer the steward. They required that all grievances be presented to them by Syph, the new dock steward. On November 5, and again on November 27, Moody gave several of these rejected grievances to Syph for presentation to the foremen, but Syph refused to take them, telling Moody that he was just trying to harass him with grievances. Syph denied that he had ever refused to accept a grievance, but I discredit him on this point as I do on many others. One of Moody's complaints against ILA officialdom was its failure to assist him in pressing grievances against TWT when grievances were taken beyond the stage of discussion between the steward and the marine foreman. It should be noted that a few of the 1981 grievances were filed by members of the Syph faction.

Sometime in the fall of 1981, Moody submitted to Lackey the grievances referred to in his letter to Hardwick. In a letter dated June 11 of the following year, from Davis to Syph and Lackey, Davis made reference to these grievances that "had been left on Jim Hardwick's desk on several occasions last fall." The grievances in question bore control numbers 81-86 through 81-152. Davis denied all of these grievances because they had been untimely filed and because they had been presented to TWT on Local 1982 grievance forms. He reminded Syph and Lackey that "Toledo World Terminal, Inc. does not recognize that local as a signator to the agreement between Toledo World Terminal and I. L. A."

TWT has never prepared a grievance form for the use of its employees, although previous employers at the Toledo dock had done so. At one time, Local 1982 had a secretary named Eunice who typed out complaints for the individual grievants who had come to the union hall to avail themselves of this service. However, sometime in 1981 or 1982, the Local had to discontinue this service and lay off their secretary because they had no funds to pay her. Beginning in 1982, Moody had blank grievance forms made up and kept them in his locker at the dock. These forms were altered slightly from time to time. Moody made these forms available to grievants on request. The normal practice was for a grievant to fill out a form in duplicate, present the original to Syph in the presence of a witness, and leave the copy with Moody.

Samples of grievance forms prepared by Moody and made available to dock workers are as follows:

> Date:
>
> This grievance is for ILA Dock Steward Cleo Syph and T.W.T. Inc. violating Sec. 5.3 A & B of the Agreement by and between I.L.A. and T.W.T., Inc.
>
> This violation occurred on or about [time] (am)(pm) in the hiring of line handlers for the M. V. [name of ship] and continuously thereafter. Men were hired as line handlers who have less experience in the industry than me. I was not hired because of this violation and my continued support for ILA Local 1982.
>
> (signature of grievant)

. . . .

> Date:
>
> This grievance is for ILA Dock Steward Cleo Syph and TWT, Inc violating Sec. 5.3 A & B of the Agreement by and between the ILA and TWT Inc.
>
> This violation occurred at the _____ (am)(pm) shapeup when men were hired to work the M.V. [name of ship] warehouse, and field areas.
>
> Some of the men hired to do this work have less experience in the industry than me. I was not hired because of these violations and my continued support of ILA Local 1982.
>
> (signature of grievant)

Some of the later forms were a "combination form" and could be used either for a linehandling grievance or a shapeup grievance. Beginning in 1984, the forms used added the phrase:

> This document is being given to you to initiate the grievance procedure. In the event that the Company does not give me a satisfactory answer please consider this a written grievance pursuant to Step 3 of the grievance procedure.

The latter phrase was added because of technical objections raised in 1982 and thereafter by TWT to the procedure used by many of Moody's supporters.[36] In the view of TWT, a grievant was first obligated to go to the dock steward and discuss his grievance orally with Syph. The dock steward and the grievant were then obligated to go to the marine foreman and discuss the grievance orally with him. Only after the marine foreman turned down the oral presentation of a grievance was the grievant entitled, in the estimation of TWT, to submit his grievance in writing.[37] If a grievant initiated the proce-

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[35] Moody's written demand to arbitrate these grievances, given to Hardwick in early September 1981, has never received a reply from TWT.

[36] In 1981, when Moody was the officially recognized ILA steward, such procedural objections were not raised by TWT. Moody never brought a grievant into the company office to discuss a grievance with the marine foreman, nor did TWT object to the fact that grievance forms used by Moody during that year were forms supplied by Local 1982 that bore its name.

[37] Syph had a slightly different understanding of the three steps of the grievance procedure. In his view, at step one he was required to present the grievance to the foreman, at step two to the superintendent, and at step three to the company president. In Syph's opinion, there was nothing in the contract requiring the grievant to be present in person at step

Continued

dure with a written grievance without going through the aforementioned steps, TWT would deny the grievance on procedural grounds, although it would frequently couple its procedural rejection with a further denial of the grievance on the merits. At one time, Moody added to the standard form a request for arbitration in the event that the grievance was finally rejected. Davis testified that, in his opinion, Syph had never presented to him a procedurally correct grievance during Syph's entire tenure as dock steward.

Grievants normally filed shapeup grievances immediately following a shapeup at which they were not hired and an individual, who was lower on the Local 1982 seniority list, was hired. This is what the forms meant by the standard phrase "less experience in the industry," which appeared on most if not all shapeup grievances. Lines grievances were usually submitted a day or two following a tie up or a let go for which the grievant was not hired.

During 1982 and 1983, Syph was furnished by TWT with a small office at the warehouse near the hiring area. (Later, when Syph's role in the shapeup process was sharply curtailed, this office was moved to a former guard shack located near the street entrance.) Stevedores frequented Syph's warehouse office to ask for work, to complain about not getting work, or to speak to Syph on a multitude of matters. Moody's followers disparagingly named Syph's office the "ass kiss room." They normally handed their written grievances to Syph in the ass kissing room.

Many of Moody's followers experienced great difficulty in filing grievances with Syph. Syph's conversation with Levesque on the opening day of the 1982 season was recited above. Between 1982 and 1984, Tucker filed 104 grievances. Syph told Tucker on more than one occasion that his hiring grievances had no merit because Syph was free to hire whom he pleased. When Tucker voiced a complaint that men lower on the Local 1982 seniority list had been hired in preference to himself, Syph simply told Tucker that he had torn up the Local 1982 seniority list. On one occasion Levesque went into Syph's office and asked him why he was not being hired.[38] Syph told Levesque that the Company said that he was not qualified. This remark started an exchange of curse words, in the course of which Syph told Levesque to "get (his) g.d. ass out of the office and don't come back no more. You're fighting the wrong battle and you're on the wrong team." Levesque protested that he was not on any team at all and was simply insisting on his rights and his seniority.

On May 19, 1982, Franklin D. Moody, Charles Moody's younger brother, turned in a written grievance to Syph. Syph told him that it was not necessary to file a written grievance and suggested to F. Moody that he just talk to him about his problem. F. Moody replied that he did not care to talk to Syph and that he would see him in court. Syph's reply was, "You smart-mouthed s.o.b. I'll see that you never get hired."[39] On another occasion, Syph told a group of employees who were turning in grievances that "you guys are making a play thing out of this." He told Levesque during one exchange that he was going "to get everyone of the g.d. Moodys off the docks and then retire and turn it over to Chevalier." In June 1985, Tefft asked Syph what the men were doing who were hanging around the hiring area. Syph replied, "They're grievants, but I don't owe those s.o.b.'s back there nothing." Once when Levesque had been hired by the foreman after TWT changed the hiring procedure in 1984, Syph complained to Staler, "You mean you hired that s.o.b. after all the grievances he filed."

Between 1982 and 1984, Robert Bradford filed an even 100 grievances. Sometime in 1983, Syph told Bradford that, if he kept filing grievances, he was not going to go to work. Bradford's reply was, "If this is all I have to go on, I'll do this because I want my job." On another occasion, while filing a grievance, Bradford was told by Syph that his grievance was no good, was illegal, and that Bradford was wasting his time.

During the 3-year period of time starting with the beginning of the 1982 season, Alexander Evans Jr. filed 100 grievances. Once, in 1984, Syph asked Evans, "Why are you filing a grievance? You ain't getting any money." Syph went on to tell Evans that the Moodys were going to starve him out and would cause him to lose his job. In May 1985, Evans went to the guard shack and presented Syph with a grievance for not being hired at shapeup. Syph told Evans, "I should have left you in prison."[40]

Wesley W. Boyd is 65 years old. He has filed a total of 149 grievances. On July 25, 1985, Boyd was hired directly by Tefft as an "extra" man. Syph told Tefft on this occasion that, if he had his way, he "wouldn't hire none of those black s.o.b.'s." Julio Ramirez,[41] a Syph follower, then said to Boyd, "What the hell are you doing here? We don't want no niggers driving for us." On that occasion Boyd was assigned to drive a 2600 diesel forklift whose power steering was broken. Because of this defect in the machinery, Boyd was hard put to wrestle with the truck as he steered it about the dock. On one occasion in 1984, when Boyd turned in a grievance to Syph, Syph told him to go see Moody because Moody was Boyd's dock steward.

Charles Hampton Sr. is functionally illiterate. Over the years he filed a total of 149 grievances. While presenting one of these grievances, Syph asked Hampton to read it to him. When Hampton was unable to do so, Syph called Hampton a "dumb—," told him he would not get hired, and threw him out of the office.

Thomas W. Gaines filed 46 grievances. He presented one of these grievances to Syph using Edwards as his witness. Syph's response was, "Let's go into the superintendent's office and settle it." When they arrived at the

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one when the steward spoke with the marine foreman. The contract itself imposes no obligation on a grievant to discuss his complaint orally with the steward before reducing it to writing. It merely says that he should present the grievance to the steward without specifying how that presentation should take place.

[38] Between 1982 and 1984, Levesque filed a total of 223 grievances.

[39] Between 1982 and 1984, Franklin Moody filed a total of 30 grievances.

[40] Syph claims credit for assisting Evans several years ago in obtaining release from the penitentiary.

[41] Ramirez was candidate for vice president on Syph's ticket for the election of officers in the aborted Local 2037.

office, Edwards started through the door and Syph objected to his presence. Gaines explained that Edwards was acting as his witness. When Syph said that Edwards was not coming in, Gaines asked why not. Syph replied, "Because he is one of those—who is trying to ruin things around here." A shouting match ensued in the course of which Syph called Gaines a "damn fool." All of them were thrown out of the office by the marine foreman.

Gaines had another encounter with Syph in which he asked Syph why he was not being hired. Syph's reply was that Gaines did not have any seniority and Syph could hire whom he pleased. On a third occasion Gaines met Syph at the union hall. Syph said to him and other stevedores who were present, "You monkeys don't take heed to your superior." On a fourth occasion, Syph told Gaines, "You won't get no work down here so you might as well quit."

On two occasions, Syph told Carl Foster Jr., a relative by a former marriage, that his grievances did not mean anything. On a third occasion, as Foster was turning in a grievance, Syph told him that Foster's association with the Moodys was one of the reasons why he was not being hired and that it would be helpful to him if he quit associating with them. Eventually Foster quit coming to shapeups because, as he put it, "I can't just live on grievance paper."

Gaylon Howard filed 116 grievances. One evening he spoke with Syph on the porch of L. C.'s where they had both gone to play cards. He asked Syph why he had not been getting hired. Syph told him that he did not represent anyone from Local 1982. He said to Howard, "Why don't you go to Moody. He's your rep, but he can't do a thing for you."

Lonis "Tony" Byrd filed about eight grievances. He testified that he did not appear regularly at shapeups in 1982 because of the controversy between the factions. Once during that year Syph spoke to Byrd in the shapeup room. Syph said that Byrd, who was number one on the Local 1982 seniority list among the active stevedores, was not being hired because he lacked experience. He accused Byrd of sticking with the Moodys and said he was going to get rid of the Moodys and "all the guys who stuck with the Moodys." On another occasion in the warehouse, when Byrd presented a grievance to Syph, Syph told him that he was not working because he stuck with the Moodys and directed Byrd to take his grievance to the Moodys. Byrd, who has worked on the docks since 1959, told Syph that he had done every job on the docks, but Syph merely replied that no one was going to work on the docks except his kinfolk and his friends. Byrd took his hiring complaint to Tefft and Staler, but both of them said they could not help him. On another occasion, Syph told Byrd and others that if Local 1982 were placed in trusteeship, he was definitely going to kick out the Moodys and anyone who stuck with them. He reiterated this threat in Byrd's presence on other occasions.

Paul Conley filed 25 grievances. At one shapeup in November 1982, Syph refused to hire him, so Conley presented a grievance. Syph told Conley that the grievance did not mean anything because Conley was on the wrong ball team, adding that he could not understand why Conley, a longtime associate of Syph, had teamed up with the Moodys. On another occasion, while the lawsuit in district court was pending, Conley handed Syph another grievance. Syph told him that he would not be hired as long as he had anything to do with the Moodys. Conley's reply was, "That remains to be seen." Syph insisted to Conley that his men were right, that the Moody faction was wrong, and that Judge Young would be the man to render that decision. Thereafter Syph told Conley several times when Conley was presenting grievances that he did not want the grievance, that the grievance did not mean anything, and that all he did was to throw them in a wastebasket.

Raymond Merrill filed a total of 139 grievances up to the close of the 1984 shipping season. One of these grievances was granted.[42] The rest were not. In August 1983, Syph told Merrill that he should not be hanging around with the Moodys because "they're a bunch of g.d. crazy fools." He included Edwards and Richard Staunton by name in this description. He also told Merrill, who is illiterate, that he was not following the proper procedure in filing grievances, but he did not outline what the proper procedure was. He did tell Merrill that he should not file any more grievances because it was causing him to lose work.[43]

During the 1982, 1983, and 1984 seasons, Milton Shoecraft filed a total of 175 grievances. On one occasion in 1983, Shoecraft and William McCully went into Syph's office to protest Syph's failure to hire them that morning. Syph's reply to Shoecraft was that he was only hiring experienced men. He also told Shoecraft that, "If you hang around the Moodys, you'll find yourself outdoors. They'll be making the money and you won't be making any money at all."

In June 1983, Syph announced that he would not accept any more grievances in the shapeup area and that all grievances had to be presented to him in his office. He did not always adhere to this rule. Edwards overheard Syph say to his brother near the employee lockers located next to the shapeup area that "if these s.o.b.'s keep filing grievances they are never going to work."[44]

Robert L. Moody Jr. filed 233 grievances in a 3-year span between April 1982 and the close of the 1984 season. In his testimony, Syph expressed even greater antipathy toward Robert Moody than he did toward his younger brother Charles. Having worked 350 hours in

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[42] Merrill suffered a fainting spell aboard a ship he was helping to unload and was assisted to the dock. Before he was allowed to come back, the Company insisted that he have a physical examination performed at a nearby VA hospital. (Merrill is retired from the service on disability.) Merrill grieved this requirement, so the Company relented and accepted him back without an examination.

[43] About this same point in time, Tefft took Merrill aside and gave him the same advice. Tefft explained on the stand that he felt that Merrill was "easily led." His advice to Merrill was that he should not be hanging around the Moodys because they were causing him to lose his job completely. Merrill's reply to Tefft was that it was a free country and he would associate with whom he pleased. Tefft also counseled Merrill that he should not be filing grievances.

[44] The General Counsel's witness Melvin L. Jones testified that Syph told him he was wasting time filing grievances and that as long as he filed grievances, he was not going to get hired. I discredit Jones on the basis of demeanor and conclude that he was an unreliable witness.

1981, R. Moody qualified as an "experienced" man during the 1982 season. However, his total number of hours worked dropped from 636 in 1981 to 233 in 1982. In 1981 R. Moody received 26 hours of work on lines. In 1982 he got only two lines assignments from Syph. Qualifying hours to remain an experienced man in the 1983 season were dropped from 350 to 200 hours because 1982 had been a disappointing season. Accordingly, R. Moody retained his status as an experienced man in 1983. However, he was concerned that his health insurance coverage would be in jeopardy because of the scarcity of work assignments he was receiving from Syph in early 1983.

On May 4, 1983, R. Moody went into Hardwick's office along with Edwards to complain about scarce work assignments and about their potential effect on his insurance coverage. Hardwick told him that he would not speak to him unless his steward was present, so R. Moody and Edwards went to get Syph. Syph came into the meeting, saying to R. Moody and Edwards, "They ain't going to talk to you s.o.b.'s unless I'm with you." At the meeting with Hardwick, R. Moody complained that he was steadily being assigned to "short shots" and, at that rate, he would not have enough qualifying hours in 1983 to retain his insurance coverage during the following season. He also complained that Syph was not giving him any lines to supplement the hours earned from shapeups. Hardwick merely replied that the dock steward had to call his name at shapeup when hiring experienced men, but that lines assignments were strictly up to Syph. Syph then said, "— you, Moody," to which Hardwick added, "Meeting adjourned."

On various occasions, when R. Moody presented grievances, Syph told him that his grievances were no good, that he (Syph) would hire whom he pleased, and that R. Moody's standing on the Local 1982 seniority list meant nothing.[45] R. Moody worked 381 hours in 1983. This was not enough for him to retain his place on the list of experienced employees in 1984, since the number of qualifying hours for 1984 was raised to 400 hours worked during the preceding year.

Richard "Lefty" Hollinger has worked for TWT sporadically since it took over the general cargo in 1981. Unlike many of the other witnesses for the General Counsel, Hollinger has filed only one grievance during that period of time. On several occasions, Syph, a lifelong acquaintance, told him to "keep a low profile" and refrain from filing any grievances. In 1984, when he was looking for work, Hollinger was told by Syph to "keep your nose clean and I'll see what I can do for you." Hollinger signed a couple of internal union charges that Moody circulated. Regarding this action, he heard Syph tell Ramirez, "Let Lefty suffer a little bit. He's with Moody and them guys. Let him suffer a little bit. He'll be back to work."

Robert Highsmith filed 100 grievances between the spring of 1982 and the fall of 1984. While filing one of these grievances, Syph told him that anyone who files a grievance would be fired.[46] During the same period of time Alvin Freeman filed 57 grievances. Syph rejected one of them, saying that he was not following the right procedure. When Freeman asked Syph what the right procedure was, Syph made no reply. On another occasion, when Freeman was acting as a witness for Marsenburg in filing a grievance, Syph denounced them as "scabs," saying that they would not get jobs until after the other men had been hired. On another occasion, while turning in a grievance, Freeman reportedly overheard Syph say that he would see to it that Gaines and Shoecraft would never work again on the docks. I discredit Freeman, however, and find that his testimony on this point was unreliable. Harkles Bacon filed a total of 88 grievances. He did so everytime he appeared at shapeup and witnessed the hiring of an applicant who had a lower ranking on the Local 1982 seniority list than he did. Once, in 1983, Syph told him that if he continued to file grievances, he would not be hired at all.

Matthew Bennett filed only a handful of grievances. One such grievance was denounced by Syph as "horseshit." He suggested to Bennett that he throw it away. Syph also made the same suggestion to Marsenburg when the latter tried to submit a grievance.

The Company's position respecting all lines grievances was that the steward had plenary authority to hire whom he pleased and that the cited provisions of the contract found on Moody's grievance forms were inapplicable to lines. Regarding shapeup grievances, TWT took the position that seniority on the docks was inapplicable to its operation and that no complaint existed merely because a person who had a lower rank on the Local 1982 seniority list was hired in preference to a higher ranking individual. It steadfastly refused to recognize the applicability of that list to its operation. TWT recognized three categories of employees and applicants—preferred men, experienced men (later called "qualified" men), and casuals. So long as an individual was properly hired in the order required by these three classifications, the contract had, in its opinion, been observed. Regarding grievances charging that the grievant had been discriminated against in employment because of his continued support for Local 1982, TWT first took the position that all employees and applicants were TWT members and hence no discrimination among them could occur simply because one member was hired in preference to another. When this response wore thin, it then took the position, stated by Davis at the hearing, that no actual evidence of any particular discrimination based on union or intraunion considerations had been personally brought to TWT's attention.

Syph testified that he never found merit in any grievance filed by Local 1982 members. He also admitted that he never made any independent investigation concerning the merits of a grievance and that his entire investigative effort consisted of talking to the company president. He simply gave batches of grievances to Hardwick. From time to time, he would discuss an individual grievance with Davis if it appeared to be unique or unprecedented. However, in none of these discussions did Syph ever take a position on the merits of the grievance or act as an advocate for granting it. But, for the most part, grievances were resolved by the Company without any face-to-face discussions at the third step, the final step before arbitration. Syph also testified that he never disagreed with any disposition the Company ever made of any grievance, even though, in some instances, such as a grievance filed by Robert Bradford, the Company failed to address or resolve the central allegation in the employee's complaint. To use Syph's words, "We made a practice of not violating the contract."

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[45] At a general meeting held by Local 1982 on January 22, 1982 (the occasion for signing the petition protesting the formation of a new local), Robert Moody was elected Local 1982 dock steward replacing Leroy Hunter and Kermit Jones Sr. This post was "without portfolio," however, since TWT refused to recognize Local 1982 or its dock steward.

[46] On one occasion late in 1981, Syph told certain of his supporters in the lunchroom at the warehouse that he was going to get rid of Highsmith and both Moodys.

Not all the grievances submitted dealt with hiring. A few dealt with improper manning. Some of these were granted. Moody filed one grievance asking to know why certain awards of money, which had been placed in escrow by the Company in 1982 when it upheld certain grievances based on improper manning, had never been distributed to the employees bringing the grievances. The amount in question was $2402.97. Although admitting that the money has remained in escrow for about 4 years, TWT said that it did not make distributions to specific individuals because it was unsure which employees were entitled to be paid because certain unloading gangs had not been sufficiently manned as required by the memorandum of understanding. Syph said he also knew about the money in the escrow account but he did not know to whom it should be distributed. He was unaware of whether it had been drawing any interest during the 3-1/2 years it had been on deposit. This grievance has never been resolved. When asked why he did not press the matter or take the Company to arbitration, Syph merely replied, "I just assumed that Mr. Davis was an honest man, and that when he got ready, we would get together and pay these people." At the hearing in October 1985, Baker testified that he did not know which individual grievants were entitled to the money and did not know when anyone might be paid. He admitted that he was not doing anything to resolve the question.

In 1982 and 1983, any responses made by TWT to pending grievances were made in letters sent by Davis to Lackey. Individual grievants were not given individual responses. In 1984, Davis began to provide specific replies to particular grievants. For the most part he used a form to do so, much as the grievants had used forms to submit their complaints.

7. The 1983 season

Because 1982 had been a poor year, TWT and the ILA agreed that eligibility for benefits and for placement on the list of experienced men entitled to preferment in hire during the 1983 season should be dropped from 350 to 200 hours. The Company again used the list of 16 preferred employees—men who were hired independently of the shapeup. The composition of this list was the same as in 1982. The list of experienced men remained at 26 men. Some changes, however, took place in the composition of that list.[47]

Edwards and Marsenburg, preferred men in 1981, were placed on the experienced list in 1982 but with preference in order of call. Toward the end of the 1982 season, Syph told Edwards that it would take 2000 hours to qualify as an experienced man in 1983 and that Edwards would never make it. Syph punctuated his statement by saying, "Edwards, you're through." In 1983 they remained on this list, but the preferment in order of call was removed. Accordingly, Syph was free to hire them in any order he chose so long as no casual employees were hired first.

Gaines, Glover, McCully, Highsmith, and Shoecraft, all Moody men, were removed from the list and became casual hires, ostensibly because they failed to have enough hours in 1982 to qualify for the 1983 list. Three other individuals, all Moody supporters, were listed as disabled or retired. In their places, eight Syph supporters were substituted.[48] Gaines missed "making the cut" by 25 hours, Glover by 157 hours, McCully by 32 hours, Highsmith by 2 hours, and Shoecraft by 5 hours. The effect of being reduced from experienced employees to casual employees was that these individuals worked far less in 1983 than in 1982, notwithstanding the fact that 1983 was a better year all around on the dock.[49] Most of them had to abandon their jobs with TWT and seek other employment.

I credit Howard to the effect that, in the fall of 1982, during a late-night card playing session at L. C.'s, Syph stated, "It's a damn shame. There's McCully. There's Gaines. There's Highsmith. There's Milton Shoecraft. They are all at the top of the seniority list. They are not going to get no bonus this year. They won't be hired next year off of the list. Milton Shoecraft, without a miracle, he won't get hired no more. When it comes to — a — around, I'm an expert."[50]

Toward the end of the 1983 shipping season, Syph made a statement of similar import during another card-playing session at L. C.'s. On this occasion he directed his remarks at Spivey and Robert Moody, stating in the presence of Howard and others that he had called Willie Spivey at his home because Spivey did not have enough hours. Syph wanted to encourage Spivey to come to late season shapeups in order to earn sufficient hours to be placed on the experienced list in 1984. Syph stated that he was urging Spivey to come to work in order to block Robert Moody from getting enough hours to qualify for any preferment in 1984. Syph's quoted phrase was that he was "watching them hours like a hawk watching chickens" to make sure his friends would get in and Moody supporters would be left out. Robert Moody ended up working 381 hours in 1983, some 19 hours short of the 400 hours that became the standard for experienced employees at the outset of the 1984 season. Having been reduced to the status of a casual employee, he was forced to seek other employment in 1984.

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[47] The 10(b) period on charges filed against the Employer began on February 12, 1983.

[48] Lawler, Oliverez, Ramirez, A. Rizo, M. Rizo, C. Spencer, T. Syph, and D. Tefft.

[49] In 1983, TWT employees worked a total of 49,546 hours, up by 17,305 hours from 1982 and by 5552 over the 1981 total.

[50] Syph included McGoffney in this list of employees who might lose their standing on the experienced list.

During the 1983 season, Syph continued to make lines assignments at his sole discretion. Notwithstanding the fact that 1983 was a better season than 1982, Moody supporters received only 5 lines assignments, i.e., 12 fewer assignments than they did in 1982. The overwhelming number of these assignments in that year went to Syph supporters. For this disparity Syph had no explanation.

One flurry of intraunion bitterness broke out in the summer of 1983 when Local 1982 held an election of officers. The Moody faction won and Chevalier, J. Victorian, and J. Turner filed charges with the International alleging that the election was improperly conducted because some of the candidates were not dues-paying members. The ILA president referred the charges to C. Moody who, as secretary-treasurer, was obligated under the ILA constitution to investigate such charges and to hold a hearing. When Moody failed to hold a hearing, these same members of the Syph faction filed internal union charges against C. Moody for failing to investigate the earlier election charge pertaining to the candidacies of persons who paid no dues. The second charge was referred by the ILA to the executive board of Local 1982 for investigation and a report.

Moody countered these charges by writing a letter to Gleason dated July 22, 1983, requesting that the ILA furnish Moody with detailed records specifying hours worked and dues deducted for each TWT employee. He complained that Local 1982 was never given such information, and that without such information pertaining to dues checkoffs, it would be impossible for him to respond to the initial charge and determine whether the candidates for union office were or were not dues paying members, as alleged by Chevalier, J. Victorian, and J. Turner. At a meeting late in August 1983, Sullivan told Moody that the ILA would not turn over the dues records to him because the information in question would "give him the edge" over Syph. Following this conversation, a hearing was held by the ILA on these charges on October 12, 1983, but no results have ever been announced.

8. The 1984 season

The 1984 shipping season was the best yet for TWT. The total man hours worked by its stevedores amounted to 59,687, up 10,141 hours from the previous year and 35.9 percent over its initial year. Several significant changes in hiring procedures took place during 1984. The old contract between TWT and ILA expired on December 31, 1983, and negotiations commenced on January 12, 1984, for a new one. At that meeting Davis told John Baker and other ILA negotiators that, if the Board issued a complaint against TWT for a hiring violation based on charges that were then pending, TWT would thenceforth insist on doing all the hiring. Baker objected, saying that the ILA operated hiring halls throughout the ports of the United States and that it would not relinquish this prerogative in Toledo.

When the shipping season began in April, hiring procedures in effect during 1983 continued to be followed for a short while. The number of hours necessary to be on the experienced list was raised from 200 to 400 hours worked during the preceding season. Following this change, certain changes in the composition of the list took place. Moody supporters Howard, Marsenburg, and Robert Moody were dropped to the ranks of casual employees, while Syph supporters J. Beese, F. Syph, and A. Victorian became experienced men. Syph supporter John R. Bennett was promoted from the experienced list to the preferred list. The total number of employees having preferment at shapeup remained at 42 and Syph continued during April and early May to control both the shapeups and the assignment of lines.

On March 30, 1984, the Regional Office issued the first consolidated complaint against TWT and ILA. Shortly thereafter, TWT engaged a consulting firm to devise a system of selection of employees who would have more or less permanent status. On May 2, Davis gave Hardwick, Tefft, Staler, and Warehouse Foreman Darby Lovicott a sheet containing the names of 63 stevedores listed in alphabetical order. The names were drawn from the list of employees who had worked for TWT during the past three seasons. Davis maintains that these 63 employees performed 92 percent of the work during those years, but this percentage is disputed by the General Counsel. Davis instructed each of these individuals to make individual ratings for each of the 63 named employees regarding ability, productivity, and quality of work, and to work independently of other rating supervisors. They were also asked to rate each employee regarding attitude. Davis admitted that the "attitude" rating reflected, in large part, whether the employee in question was in the habit of filing hiring grievances. The ratings requested to be made were excellent, good, fair, and poor. Davis assigned numerical weights to each of these ratings, made up a composite rating sheet, and selected from this list of 63 the 50 highest rated individuals. These were the men to whom he assigned preferment under the forthcoming contract. He also sought to establish an order of call among all but the 16 preferred men. Among the other 34 individuals, who would now be referred to as qualified rather than experienced employees, there were five subclassifications—power operator, checker, signalman, laborer, and front-end loader. In each subcategory, men were given a ranking. Because of their ability to do more than one job, some men were listed in more than one subclassification, thereby enhancing their opportunities for employment at shapeup.

The net effect of this effort was to add three Moody supporters—Tucker, Bacon, and Hood—to the list of qualified employees and to add four Syph supporters to this list (McVicker, Torres, M. Turner, and S. Turner). Merrill and Ben, both Moody supporters, were dropped into the ranks of casual employees. Among the 13 individuals on Davis' list who did not "make the cuts" and who became or remained casual employees were 3 Syph supporters—Apodaca, R. Moore, and G. Foster—and 10 Moody supporters—Ben, M. Bennett, Czizi, Gaines, Glover, Howard, Merrill, R. Moody, Nolan, and Shoecraft. The political lineup of the 50 individuals selected by Davis and his foremen was 37 Syph supporters, 11

Moody supporters, and 1 neutral, a considerable change from the 22–19–1 lineup that existed at the beginning of the 1982 season among stevedores on the preferred and experienced lists.

Davis wrote John Baker a letter in which he outlined what had taken place and insisted that these 50 named individuals be given preferment in employment as preferred and qualified men, that the order of call proposed by the Company for qualified men be recognized, and that the Company be allowed to do the hiring with its own foremen both at shapeup and at lines. For lines assignments TWT proposed a simple rotation among the 50 listed employees, who would be entitled to earn seniority with the Company.[51] The ILA reluctantly agreed to this proposal and a contract was concluded containing these provisions.

At TWT's insistence the contract was submitted to the stevedores for ratification. At TWT's further insistence, the ratification vote was limited to the 50 persons whom it had selected as its permanent cadre. Casuals were not allowed to vote. The vote took place at a meeting held on the evening of May 22, 1984, in a portion of the office building where Local 1982 rented space for its office. Chevalier acted as election clerk, flanked by a deputy sheriff whose function was to keep out members of Local 1982 who appeared to vote, but whose names did not appear on the TWT eligibility list. A large number of these individuals did appear and attempted to gain admission but were not permitted to do so. The contract was ratified and became effective at the shapeup the following morning.

No explanation exists in the record from the Company about why, in May 1984, it raised the number of employees entitled to preferment in hire from 42 to 50. I credit Hollinger's testimony that Syph told him the Company was adding more men at that time to make sure that the contract was ratified.

Beginning with the shapeup on May 23, the marine foreman took charge of the daily hiring. Syph rarely attended shapeups from that point forward although he was required to be on the premises to earn any money. The first 50 men to be hired were the individuals selected by TWT as preferred and qualified men. Accordingly, the shapeup became little more than a roll call and an attendance check regarding the list of 50. After that list was exhausted, casual employees would then be hired. They were often selected by the marine foremen from men who were present on the premises. Regarding the hiring of casuals after May 23, 1984, Tefft and Staler were at odds in their testimony. One said that, if he needed "extra" men, he would ask Syph and Syph would obtain them wherever he could. The other said that he would simply give Syph the name of an extra man and ask Syph to phone him and tell him to come to work. Syph admitted that, from time to time, he was requested to provide extras and would obtain them from any source available, including relatives, tenants at his apartment building, hangers-on at the Consaul Tavern, people lingering about the premises after the shapeup had concluded, or men whose names were on a list of casual employees that he maintained.

On lines, the practice under the new contract was for the foreman who needed a linehandling crew to give Syph the names of 8 or 10 men in alphabetical order and tell Syph to call either 2 or 4, depending on whether it was a tie-up or a let-go. Syph did so, exercising some discretion within the limited list regarding whom he would call. The list was ultimately called in rotation. Records in evidence indicate that in 1984 and thereafter, lines assignments have been apportioned among the 50 preferred and qualified men more or less equally, within a range of difference of 1 or 2. Both before and after the 1984 contract, casual employees were almost never called on to work lines.

After the 1984 contract was ratified, new checkoff authorization forms were circulated. The form distributed by Syph made no mention of Local 1982 or of a checkoff of $6 per month for any local. Moody circulated his own checkoff form, which did include Local 1982 as the recipient of monthly dues. From that point forward, no dues were transmitted by the GLD to Local 1982 so its sources of revenue have almost completely dried up.

9. Casual employees

Like all stevedoring companies, TWT is forced to use the services of casual[52] or "extra" employees during peak periods to supplement its normal complement. During the first 4 years of its operations on the Port of Toledo, TWT has hired the following number of stevedores during the respective shipping seasons:

1981	158
1982	93
1983	126
1984	114

Most of these individuals worked in the early spring or late fall, when the weather was bad and a combination of absenteeism among regular employees and the arrival of large numbers of ships in concentrated periods of time made jobs available for them at shapeup. They were and are almost always assigned to laborers' jobs.

So long as the Local 1982 seniority list was used as the basis for hiring at shapeups, nonpreference employees who were selected came from that list. (By Local 1982's definition, a "casual" was a temporary employee whose name was not found on its seniority list.) Moody testified without contradiction that no one on the Local 1982 seniority list had less than 9 years' experience on the port.

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[51] The term "seniority" as used in the company proposal—which later became embodied in the contract—did not have the broad or expansive meaning that it does under most collective-bargaining agreements. The concept had no applicability to layoffs and recalls but merely applied to promotions and training for new jobs, something that rarely, if ever, takes place on the docks because of the surplus of employees already available to fill any job classification.

[52] The use of the word "casual" in this decision, regarding job applicants who did not enjoy some kind of preferment in hire, does not constitute a determination that such persons were or are casual employees as the Board uses that term to designate persons who are ineligible to vote in representation elections because of their tenuous relationship to an employer. In fact, as discussed later, a number of these casuals I regard as discriminatees and hence "employees" within the meaning of Sec. 2(11) of the Act.

Only after the list was exhausted were incidental casuals hired for the day. This practice meant that the cadre of casuals available to TWT, and utilized by it at the outset of its operation in Toledo, was a fairly standard and predictable group of people who were well known in the industry both by union and management officials. Only after Syph took over the hiring and began to hire whom he chose after exhausting the list of 42 preferential hires were men hired who were new to the docks.[53]

Various Moody supporters who testified recounted numerous instances when casuals having little or no experience on the docks were hired by Syph in preference to themselves, even though they were present at shapeup. On some occasions, they were denied employment and found that Syph had phoned other men and asked them to come in to fill in a vacancy in a crew. Syph testified that he hired as casuals the men who showed up most frequently at shapeups. Until the consolidated complaint in this case was issued, TWT kept no records concerning the identity of stevedores present for shapeup who had not been hired. They recorded only the names of those who had been hired. Thereafter, Tefft or Staler made handwritten notations at the bottom of daily hiring sheets indicating whom they saw in the area that were not hired. For the most part, these lists included only Moody supporters.

Syph did not maintain daily sign-in sheets for job applicants and kept no other records of unsuccessful job seekers, until it appeared that this information might be needed for purposes of litigation. Thereafter, he made sporadic lists. Over the years C. Moody did compile such information on a daily basis. As a preferred man, C. Moody was almost always on the job and was in a position to observe who was hired and who was not. Some errors in these sheets were pointed out at the hearing but, by and large, they constitute a reliable record of daily hiring events from 1982 to the present. Another source of information concerning who was present but not hired are the 3707 grievances themselves. Those that dealt with shapeups—and most of them did—indicate that the grievant was (with few exceptions) present on the day noted on the grievance for hire but was not selected. Although the Company routinely rejected these grievances for reasons relating to contract interpretation, none of its rejections ever attacked the basic factual premise of the grievance, namely that the signer was actually present for shapeup, but did not go to work.[54] Accordingly, I also regard them as reliable records establishing these facts.

TWT maintains that, after it took over the hiring in 1984, it established a rule requiring casuals to stand at a particular spot in the warehouse hiring area at the risk of being deemed unavailable for hire at shapeup. No such rule was ever posted. The spot in question was immediately around the podium used by the foreman and inside a mesh fence that divided the hiring area from the locker and lunchroom area beyond. This area was always congested with job seekers who wanted to be next to the foreman on the podium. As described in the record, the new rule did not pertain to men on the list of 50 who were free to stand or sit anywhere within earshot of the foreman, so long as they responded when their names were called. Tefft and Staler indicated that the rule was aimed at various individuals who "filed grievances" and who were in the habit of congregating each morning near the shapeup, area but beyond a mesh fence in the lunchroom.[55] Although many witnesses testified that they had never heard of the rule, or had heard a foreman make mention of it only shortly before the hearing began in this case, Tefft and Staler testified that, on three or four occasions between May 1984 and the summer of 1985, they had told assembled applicants at shapeups that, if they wanted to be hired, they had to come over and stand next to the hiring podium. Several witnesses testified that they regularly stood in that spot, but their presence did not result in employment. There is little doubt that, on various occasions when the Company needed day laborers, foremen (and particularly Syph) rounded them up wherever they could be found, either on or off company premises. Davis testified that it was acceptable to TWT if a casual were denied employment because he was an active supporter of Local 1982, adding that a person so affected had no remedy under the grievance procedure.

B. *Analysis and Conclusions*

1. The supervisory status of Moody, Syph, and Edwards

Both the original memorandum of understanding and the first contract between TWT and the ILA, incorporating by reference the terms of the Cleveland agreement, spoke in terms of a union employment office and a hiring hall system. These contracts envisioned a system under which TWT would first seek employees, other than preferred employees, from an ILA office under a referral system that would give preference in referral to experienced employees, i.e., those having 800 or 1000 hours of employment on the docks in the preceding season. TWT would then be free to hire from "any other available source" after exhausting referrals available from the "employment office." In fact, the hiring provisions of the memorandum of understanding and the Cleveland contract, as well as later ILA-TWT agreements, were never carried into effect in Toledo. The ILA has never operated an employment office in Toledo during any period of time pertinent to this case. There has never been a conventional hiring hall arrangement in effect between these parties, and the hiring procedure that was followed until May 23, 1984, was one in which TWT simply hired the ILA dock steward and lines dispatcher as its own supervisors and allowed them to perform TWT's daily hiring function in the manner outlined earlier in this decision. There is no dispute that Moody, during his term as dock steward, and Syph thereafter, were agents of the Respondent ILA for whose acts and conduct the ILA is vicariously responsible. The same holds true for Edwards in 1981. It is equally clear that they were supervisors for TWT within the meaning of Section 2(11) of the Act, for whose statements, acts, and omissions TWT was also vicariously responsible. The fact that these individuals were agents of the ILA for hiring purposes does not preclude them from being agents of TWT as well, since a hiring official can be a dual agent. *Master Stevedores Assn.*, 156 NLRB 1032 (1966); *Daugherty Co.*, 147 NLRB 1295 (1964); *Plumbers Local 17 (FSM Mechanical Contractor)*, 224 NLRB 1262 (1976); *Southern Stevedoring Co.*, 230 NLRB 609 (1977); *IATSE Local 592 (Saratoga Performing Arts)*, 266 NLRB 703 (1983).

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[53] A list of 26 casuals hired during the 1984 season who had not worked at all in 1981 is set forth, supra at fn. 30.

[54] Davis testified that he assumed, as a matter of fact, that any grievant had presented himself for hire and was not hired.

[55] When asked why these individuals repeatedly showed up each day at shapeup time if they did not want to be hired, neither Tefft nor Staler had an answer.

While bearing the title of dock steward, both Moody and Syph were regularly employed by TWT—the first to be hired and the last to be discharged. Their annual incomes far exceeded the incomes of the working stevedores whom they selected each day for employment. So long as any stevedoring employee worked on any given day, Moody (and later Syph) were entitled to be paid. I credit an abundance of testimony in this record that, in 1981, Moody (and later Syph) actually did the hiring of all experienced and casual employees who were hired at shapeup. Their daily function was to call the roll and to allow those who answered their names to select a day's work from among the jobs still unfilled. In 1981 the marine foreman who was present was merely an observer. His function amounted to little more than notifying the steward what jobs he wanted filled and to see to it that the steward filled those jobs. No one whose name was called by any steward was ever denied employment. Regarding casuals hired after exhausting the Local 1982 seniority list, both Syph and Moody had plenary hiring authority.

When the system changed in 1982, Syph still retained the authority to call the list of 26 experienced employees in any order he chose and thereby retained substantial discretion to designate who would be hired and who would not. His authority to designate who would receive lines was plenary, and the Respondent emphasized that authority every time it responded to a lines grievance.

In 1981, Edwards had the same plenary authority to hire whom he pleased on lines. No one hired by him was ever denied a place on the Respondent's payroll as a linesman. It should be noted that Edwards also worked in 1981 as a preferred man and earned a substantial amount of money as a rank-and-file employee loading and unloading ships. In that capacity he was plainly not a supervisor. It was as a nonsupervisory preferred man that he finished the 1981 season because, on November 3, 1981, he lost his position as lines dispatcher to Syph when Syph became dock steward.

After the parties revised the hiring procedure in May 1984, Syph still played a role in the hiring process and retained some discretion in selecting who would be hired and who would not. After shapeups were completed, marine foremen looked to Syph to supply them with casual employees to fill any crew vacancies that still remained, and at least Tefft looked to Syph to obtain these men from any source available to Syph. Then, as before, any person selected by Syph was routinely employed. On lines, Syph summoned linesmen by phone from a list supplied by the foremen. Although his discretion was narrowed, he was more than just a phone operator. He could decide who, on a list of 8 or 10 men designated by TWT, would be called first. Thus, he could influence who got more favorable lines assignments, including those that carried weekend premium pay. If, after May 23, 1984, Syph did not actually hire individuals on behalf of TWT, he effectively recommended them for hire and so remained a supervisor within the meaning of Section 2(11) of the Act.

2. Discriminatory motive

The pleadings and some of the General Counsel's evidence dwell on when Syph took over as steward, he hired relatives and cronies at shapeup and on lines. There is no doubt that this was a pervasive practice on the part of Syph, and he said as much to various Moody supporters. The General Counsel points out that the ILA never adopted objective criteria, other than an hours-of-work requirement, governing the hiring arrangement that existed at TWT, and that it never posted any such criteria for the benefit of job applicants. Because the ILA never operated an employment office or hiring hall, there was no place for it to post any hiring hall rules, except perhaps on company premises. The theory advanced by the General Counsel presumes the existence of a conventional hiring hall situation at the Port of Toledo during the period here in question, which never came into being. Such an arrangement presumes the existence of a union hall, apart from company premises, which is operated by one or more union officials who are paid by the union, not the employer, to operate that hall. In the course of their duties, they are obligated to send men to a company personnel office or to a hiring foreman, who is then obligated either to put them on the company payroll by virtue of the fact of referral or to call for more men. Here the dock steward doubled in brass as a company supervisor. If the theory underlying the General Counsel's contention were to be followed, it would be necessary first to find that the dock steward-supervisor referred men to himself and then hired them. This is conceptually absurd. It also results in giving the term "discrimination," as used in Section 8(a)(3) of the Act, a totally different meaning depending on whether it is to be applied to an employer or to a labor organization.[56] Moreover, such a theory is wholly unnecessary to the General Counsel's case under the facts in this record.

Syph made it quite clear what he was about. He repeatedly said to friend and foe alike that he was going to drive the Moodys off the docks, that eventually only his relatives and friends would be working, and that he was doing so in order to "build me a union." He even criticized a marine foreman for hiring Moody supporters, because placing them on the payroll would undermine his ongoing effort to use company employment as patronage to build a political following and to secure his status and that of the ILA among Toledo dockworkers. The hiring of friends and relatives, most of whom could presumably be counted on to support Syph in any confrontation with the Moody faction, is direct evidence of an illegal motive since discriminations arising out of intraunion political activities are as violative of the Act as are discriminations based on animosity toward all union activity. *Operating Engineers Local 675 (Multi-Craft)*, 271 NLRB 1227 (1984); *Laborers Local 282 (Austin Co.)*, 271 NLRB 878 (1984), and cases cited at 883. Similarly, threats directed at a member's employment status arising out of intraunion friction, if uttered by an official who is in a position to carry out the threats, are a violation of the Act. *Carpenters Local 1281 (Raber-Kief, Inc.)*, 152 NLRB 629 (1965).

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[56] See *IATSE (Saratoga Performing Arts)*, supra at 708–710.

If coercive or discriminatory deeds can be linked to intraunion animus, then a violation of the Act has also been made out. It is a violation of the Act for a union to retaliate against a member for filing a complaint concerning the manner in which his business agent handled a grievance,[57] for filing an intraunion charge or grievance,[58] or for filing an unfair labor practice charge with the Board.[59] It is also an unfair labor practice for an employer to threaten reprisal or take reprisal against employees for circulating a decertification petition or a showing of interest petition in support thereof, and there is no reason to believe that such reprisals are any the less coercive if uttered by union officials.[60] Union stewards enjoy the same protections from coercion or reprisal arising from intraunion rivalries that ordinary members do.[61]

3. Independent violations of Sections 8(b)(1)(A) and 8(a)(1) of the Act

This record is replete with statements by Syph that constitute violations of Section 8(b)(1)(A) of the Act. Such statements are also a demonstration of deep and abiding animus on the part of the ILA toward dissident Local 1982 members and constitute compelling evidence of the motivation that prompted other substantive violations alleged in the amended consolidated complaint. The General Counsel did not see fit to allege in the complaint that such statements, when uttered within the 10(b) period, also amounted to a violation of the Act on the part of TWT, notwithstanding the fact that Syph was its supervisor and agent and that his statements are vicariously attributable to TWT as well. Accordingly, no violations on the part of TWT arising out of Syph's remarks will be found. His statements, however, constitute evidence of animus on the part of TWT toward Local 1982 dissidents, irrespective of whether the statements were made before or after the commencement of the 10(b) period, and they will be relied on to lay bare any putative unfair labor practices committed by TWT within the 10(b) period.[62]

I credit the testimony of Merrill that, sometime in the summer of 1983, he had occasion to talk with Marine Foreman Tefft concerning the filing of grievances. As noted above, Merrill had filed a number of grievances on forms provided by Moody and, in fact, continues to do so. Tefft, who regarded Merrill as an individual who is "easily led," told Merrill that he should not be hanging around the Moodys because they were a bad influence and might cause him to lose his job completely. Tefft also warned Merrill that he should not file any more grievances. Merrill rejected Tefft's warning, telling him that this was a free country and he would associate with whom he pleased. These warnings and threats on the part of Tefft constitute a violation of Section 8(a)(1) of the Act and are direct evidence of animus on the part of TWT.

I also find that the ILA violated Section 8(b)(1)(A) of the Act by the following statements, outlined above, which were uttered by Syph to several members of Local 1982 on various occasions from late in 1981 until the time of the hearing in this case.

(a) Syph's tirade at the docks on taking over on November 3, 1983, directed toward R. Moody and Edwards, that "You—are done. You and the Moodys are done . . . . You're fired. You don't know how much power I got. . . . I'm a professional —. I know how to — a —. You're through. You're fired, you s.o.b."

(b) Syph's telephone statement to Tucker that, if Tucker did not sign a pledge card for a new local, he would be "left out," and his later direct statement to the same effect, namely that Syph was going to organize another local and that if Tucker did not sign a pledge card for it, was not going to work.

(c) Syph's statement to Levesque to "sign this card and you can work" and his further statement that "I'm going to see that nobody is working but my friends and family."

(d) Syph's statement to the foreman at the dock, when the latter had hired Boyd and other Moody partisans as casuals, that "If I had my way, none of those s.o.b.'s would be working."

(e) Syph's statement to Gaines, on requesting him to sign a pledge card for a new local, that "If you don't play ball with me, I'll get you off this dock if it's the last thing I do."

(f) Syph's statement to Howard that, if he did not sign a pledge card for a new local immediately, it would eventually cost him $600 to join.

(g) Syph's statement to Conley, after Conley had refused repeatedly to sign a pledge card, that "I can't hire you no more."

(h) Syph's statement to Merrill that, if Merrill did not sign a pledge card, he would never get another day's work.

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[57] *Plumbers Local 121 (M. J. Doyle, Inc.)*, 223 NLRB 1250 (1956).

[58] *Groves-Granite*, 229 NLRB 56 (1956).

[59] *Tawas Tube Products*, 151 NLRB 46 (1965); *Telephone Workers of Pennsylvania Local 58*, 194 NLRB 461 (1971); *Electrical Workers IBEW Local 481 (Amick Electric)*, 196 NLRB 104 (1972); *Painters Local 1555 (Alaska Constructors)*, 241 NLRB 741 (1979).

[60] *Molders' Local 125 (Blackhawk Tanning)*, 178 NLRB 208 (1969); *Television Wisconsin*, 224 NLRB 722 (1976); *Machinists Local 66 (Smith-Lee Co.)*, 182 NLRB 849 (1970).

[61] *NLRB v. UAW Local 212*, 690 F.2d 82 (6th Cir. 1982); *Teamsters Local 79 (Carl Subler Trucking)*, 269 NLRB 1132 (1984).

[62] See *IATSE (Saratoga Performing Arts)*, supra at 702 fn. 2.

(i) Syph's statement to Hollinger that, when a "new local gets in, whoever doesn't sign a pledge card wouldn't be working."

(j) Syph's statement to Bacon that, if Bacon did not sign a pledge card, he would be "left out."

(k) Syph's statement, on the opening day of the 1982 season, to C. Moody, Levesque, and others, that he "didn't give a — if the Company fired all the Moody people" and that he was not Levesque's "g.d. steward."

(l) Syph's statement to Levesque when the latter presented a grievance, to "get (his) g.d. ass out of the office and don't come back no more. You're fighting the wrong battle and you're on the wrong team."

(m) Syph's statement to Franklin D. Moody, on the presentation of a grievance, that "You're a smart-mouthed s.o.b. I'll see that you never get hired."

(n) Syph's statement to Levesque that he was going "to get everyone of the g.d. Moodys off the docks and then retire and turn it over to Chevalier."

(o) Syph's statement to Tefft in the presence of various members of Local 1982 that "They're grievants, but I don't owe those s.o.b.'s back there nothing."

(p) Syph's complaint to Staler about Levesque that "You mean you hired that s.o.b. after all the grievances he filed."

(q) Syph's statement to Bradford that, if Bradford kept on filing grievances, he was not going to work.

(r) Syph's statement to Evans, on presentation of a grievance, that he (Syph) should have left Evans in prison.

(s) Syph's statement to Hampton, on presentation of a grievance, that Hampton, a Moody supporter, was a "dumb —"who would not get hired.

(t) Syph's refusal to permit Edwards to serve as a witness at a grievance meeting because Edwards was "one of those — who is trying to ruin things around here."

(u) Syph's statement to Gaines, a Moody supporter, that "you won't get no work down here so you might as well quit."

(v) Syph's statement to Foster that Foster's association with the Moodys was one of the reasons he was not being hired, and that it would be helpful to Foster if he stopped associating with the Moodys.

(w) Syph's statement to Howard, when the latter presented him with a complaint about not being hired, that Syph did not represent anyone from Local 1982.

(x) Syph's statement to Byrd that he was going to get rid of the Moodys and "all the guys who stuck with the Moodys."

(y) Syph's further statement to Byrd that, if a trusteeship over Local 1982 was imposed, he was going to kick out the Moodys and anyone who stuck with them.

(z) Syph's statement to Conley, on the presentation of a grievance, that Conley's grievance did not mean anything because he was on the wrong ball team, and his reiteration of this threat during the course of the same conversation.

(aa) Syph's statement to Shoecraft and McCully, on presentation of a grievance, that "If you hang around the Moodys you'll find yourself outdoors. They'll be making the money and you won't be making any money at all."

(bb) Syph's statement to his brother, in the presence of Edwards, that "If those s.o.b.'s keep filing grievances, they are never going to work."

(cc) Syph's warning to Hollinger to "keep a low profile" and refrain from filing grievances, and his further statement to "keep your nose clean and I'll see what I can do for you."

(dd) Syph's statement to Ramirez, in the presence of Hollinger, "Let 'Lefty' suffer a little bit. He's with the Moodys and them guys. Let him suffer a little bit. He'll be back to work."

(ee) Syph's statement to Highsmith that anyone who files a grievance would be fired.

(ff) Syph's statement to Edwards at the end of the 1982 season regarding Edwards' hours, "Edwards, you're through."

(gg) Syph's statement in the presence of Howard that he was discriminating in employment against named Moody supporters and that some of them would not, in the absence of a miracle, have enough hours in 1983 to be hired in the future. His phrase was, "When it comes to — a — around, I'm an expert."

(hh) Syph's statement in the presence of Howard that he was taking steps to see to it that Robert Moody would not work sufficient hours in 1983 to remain on the "experienced" list for 1984, and that he was "watching (hours) like a hawk watching chickens" to make sure that his friends would be included and that Moody supporters would be left out.

(ii) Syph's statement that the Company was enlarging the ranks of "experienced" or "qualified" men in 1984 so that ratification of the new contract would be insured.

Shortly after the consolidated complaint issued in this case in the spring of 1984, Syph had occasion to discuss this case with Howard and to compare it with the U.S. district court proceeding before Judge Young, which had taken place in 1981 and 1982. Syph told Howard that District Judge Young would not have a "damn thing" to do with the forthcoming NLRB proceeding and that "I'm going to have *my* federal judge" hear the Board case. No authority has been presented to the effect that a statement reflecting on the impartiality of a forthcoming Board proceeding constitutes a violation of the Act, so I will not find a violation based on these remarks. However, Syph's statement is further evidence of animus and will be regarded as such.

4. The removal of Charles Moody as dock steward

On November 3, 1981, Charles Moody was removed as dock steward and became a rank-and-file employee enjoying "preferred" status in hire. He retains that position today. This action brought about a substantial change in Moody's employment situation and his annual earnings. There is no doubt why he was so treated.

Acting in response to a vote of the executive board and of the membership of Local 1982, Moody filed two representation petitions and an unfair labor practice charge on October 2. He followed up this action by filing two additional representation petitions on October 31. The ILA's response was swift and angry. Sullivan called Moody, asked him what he thought he was doing, and told him bluntly, "We can't stand for this." Sullivan then recommended to the ILA's general president that Moody be removed, and the general president agreed. A pro forma investigation ensued and an expected recommendation was returned to the ILA executive council recommending removal. Moody was removed. Shortly thereafter, he was summoned to face internal charges seeking to discipline him both for filing representation petitions and an unfair labor practice charge. The outcome of that effort was stymied only because Moody and others obtained a district court injunction, still in effect, which prevented the ILA from going any further.

Cases cited above make it abundantly clear that taking internal union action or causing the discharge or other adverse personnel action against a member because he seeks to vindicate his rights or the rights of others before the Board is an unfair labor practice. Shop stewards are not exempted from this protection. It is true that Moody, in addition to being a shop steward, was ipso facto a supervisor at the time of his removal. This does not exempt him from the protection of the Act. In a long line of cases beginning with *Better Monkey Grip Co.*, 115 NLRB 1170, enfd. 243 F.2d 836 (5th Cir. 1957), the Board extended the mantle of the Act's protection to supervisors who are discharged for union activities, including but not limited to the filing of charges or petitions.[63] Recent revisions of the Act have not withdrawn that protection from supervisors who file charges and petitions or who testify before the Board, either in representation or in unfair labor practice proceedings. *Parker-Robb Chevrolet*, 262 NLRB 402 (1982); *A & E Stores*, 272 NLRB 737 (1984). Accordingly, by its action in removing Charles Moody as dock steward and causing TWT to effectuate a substantial change in Moody's employment status, Respondent ILA violated Section 8(b)(1)(A) and (2) of the Act.[64]

5. The demotions of Edwards and Marsenburg

Both Edwards and Marsenburg, staunch Moody supporters, were "preferred" men in 1981. Edwards was and still is generally recognized as the number two man in the Moody faction. Both Edwards and Marsenburg worked well in excess of the 1000 qualifying hours demanded of experienced employees under the contract. There is no suggestion in the record that either was an unsatisfactory employee. Edwards was, during 1981, both the lines dispatcher and a laborer and forklift operator. On November 3 he lost his position as lines dispatcher and was thereby stripped of any indicia of supervisory authority. Marsenburg worked mostly as a checker, but was also assigned to work as a forklift operator and as a laborer. At the beginning of the 1982 season, they were replaced on the preferred list by two Syph supporters—Walter Sampsel and Joseph Victorian—who, in 1981, had worked 358 and 225 hours, respectively. To cushion this blow, Edwards and Marsenburg were both given preference in order of call among the 26 experienced employees, but this preference availed them little. Edwards worked 301 hours in 1982 and Marsenburg worked 243 hours. Neither received any compensated lines assignments, although Sampsel received 44 hours of lines and J. Victorian got 99. As a result, Edwards' total hours declined 74 percent, while Marsenburg's loss of hours was 81 percent, in a year when the overall decline in hours worked by stevedores was 26.7 percent.

Their preference in call as experienced men was short-lived. In 1983, both lost this standing at the beginning of the season and were assigned by Syph among the 26 experienced men in any order he saw fit. As a result, by the beginning of the 1984 season, Marsenburg lost all preferment and became a casual while Edwards came within 94 hours of losing his experienced rating. Edwards testified without contradiction that he never missed a shapeup. Marsenburg's 1980 operation and subsequent health difficulties accounted for only a few absences at shapeup.

The background of animosity toward all Moody supporters was, as outlined above, both deep and abiding. The day that Syph took over as dock steward he threatened to drive Edwards off the docks and told Edwards that he was fired. Syph's animus toward Marsenburg was also expressed on at least one occasion when he called Marsenburg a scab. As noted above, this animus on the part of Syph is attributable to both Respondents.

TWT justified its action in replacing Edwards and Marsenburg with Sampsel and Victorian on the basis that it needed more versatility. Sampsel was a checker and J. Victorian could operate a crane as well as other machinery. If it wanted to place J. Victorian and Sampsel or anyone else on the preferred list for any reason, TWT was contractually free to do so. What TWT never explained is why it felt called on to remove Edwards and Marsenburg from that list in 1982 in order to make room for two Syph supporters. TWT was contractually free to maintain a preferred list of any size. Early in the 1981 season, it started operations with a list of 13 and quickly increased that number to 16. In 1982, it was free to enlarge that list to any other number it chose. Instead of increasing the size of the list when it wished to add the names of J. Victorian and Sampsel, TWT opted to remove two men, and the two it chose to remove were the only Moody supporters on that list other than Charles Moody himself. It strains credulity to believe that this selection was mere coincidence.

Staler told Edwards that he had been removed from the preferred list because of politics. It is equally clear that Marsenburg was removed for the same reason. Davis admitted that he discussed the proposed revision with ILA officials before making it and they agreed. Their agreement indicates collusion with this action, although it suggests that TWT rather than the ILA was the moving party. However, the ILA cannot absolve itself from responsibility for what occurred. If the ILA was not the efficient cause of this substitution, its hostility toward Local 1982 and the Moody faction was at least the material cause for the selection of Edwards and Marsenburg, rather than 12 or 13 other preferred men, for demotion to make room for Sampsel and J. Victorian. Accordingly, its participation in the event was sufficient to constitute "an attempt to cause" TWT to discriminate on the basis of union considerations, in violation of Sections 8(b)(1)(A) and (2) of the Act.

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[63] See, e.g., *VADA of Oklahoma*, 216 NLRB 750 (1975); *Donelson Packing Co.*, 220 NLRB 1043 (1975).

[64] The actions of the ILA directed against Moody cannot be excused, as the ILA argues in its brief, because Moody was a union official whose action in filing a decertification petition struck at the core of the Union's status as bargaining representative. Moody's removal as dock steward was not a mere internal union matter. It had a devastating effect on Moody's employment status and, over the years, it cost Moody many thousands of dollars in lost income. A union is not free under the Act to effectuate internal union policies by actions that detrimentally affect a member's employment status.

Because of limitations, TWT cannot be charged with a violation for the 1982 demotion of Edwards and Marsenburg from preferred status. At the beginning of the 1983 season, however, TWT discontinued their preference in order of call on the experienced list. On that occasion, it committed a further discrimination in employment based on union considerations, and it did so less than 6 months before the filing of the CA charge in August 1983. Accordingly, by removing the preference in order of call that Edwards and Marsenburg enjoyed up to the beginning of the 1983 season because of intraunion factional considerations, TWT violated Section 8(a)(1) and (3) of the Act.[65]

6. Grievances

In *Miranda Fuel Co.*,[66] and its progeny, the Board took on itself the task of policing the relationship of labor organizations to their members to insure that members are not subjected to actions that, in a general sense, are taken or acquiesced in for reasons that are "irrelevant, unfair, or invidious." Such actions include adjustments of seniority, referral to jobs, and negotiation of contract terms. For the most part, this doctrine has been used to police the processing of grievances and the taking of grievances to arbitration. Because the processing of grievances, as well as many other aspects of union representation, involve nice questions of judgment and discretion, the Board has had to second-guess the judgment and discretion of business agents and union officers in many concrete situations to determine if their acts were performed in good faith or were marred by "irrelevant, unfair, or invidious" considerations.

The simple fact is that grievances lodged by individual union members can be frivolous or have questionable merit, and problems of proof can be difficult or impossible to overcome in cases that appear on their face to have merit. Unions have limited resources to devote to their responsibilities and cannot take every grievance to arbitration. Moreover, union officials are fallible and most lack legal training, so they sometimes make mistakes as they undertake the representation of a member. If the Board required every grievance to be processed to the highest step of the grievance procedure or beyond, employers would be inundated with complaints by union officials acting out a scenario in order to avoid liability for "irrelevant, unfair, or invidious" behavior. Moody testified that he felt it was a union official's responsibility to process every grievance filed by a member, regardless of whether the grievance had merit. As a statement of personal philosophy, his position is outside the realm of official comment. As a matter of law, it is simply untrue.[67]

The ILA seeks to escape liability for the mishandling of grievances filed by Local 1982 members and others on the basis that it was overwhelmed with a plethora of complaints that were filed for political purposes, that most grievances were taken to the third step and were denied, that most grievances were in fact without merit under the contract as the ILA construed that contract, and that repeated grievances on the same decided points were filed by grievants who knew their complaints were without foundation, but who filed them just to harass the dock steward and the Company. Respondent ILA seeks to come under the umbrella of several decisions in the *Miranda Fuel* line of cases to the effect that a union is under no obligation to process unmeritorious grievances or to take frivolous complaints to arbitration, and that most of the complaints filed by "Moody men" were just that—frivolous and unmeritorious.

Miranda Fuel and succeeding cases are of consequence only when a union's conduct or misconduct is unaffected by conventional union or intraunion considerations, thus forcing the Board to look to other factors to determine if a violation of the Act has taken place. Indeed, it was this fundamental distinction that the Second Circuit deemed to be controlling when it reversed the Board in *Miranda Fuel*. Where, as here, a respondent union's handling of grievances is permeated by factional considerations and animosity growing out of intraunion political considerations, the *Miranda Fuel* doctrine is simply inapplicable and it is unnecessary to inquire whether, in addition to its flagrantly discriminatory motivation, the actions of the ILA were also invidious, unfair, or irrelevant. If the grievance machinery is operated to the detriment of grievants because the union wishes to punish them or to dissipate the strength of political dissidents, then the correctness of the judgment and discretion of union agents who handled the grievances, or their diligence in pursuing them, is itself irrelevant.

Syph admitted that he never made any investigation into the merits of any grievance that had been filed with him, other than to consult the Company. He admitted that he never argued the merits of a grievance to the Company in the posture of an advocate. He never took a grievance to arbitration because he never disagreed with the company position regarding any of the 3700 grievances that were filed between 1981 and 1984. He never pursued the question of payment of a sum held in escrow as the result of the granting of a grievance by the Company in 1981, because he had faith that the Company would get around to paying when it felt like it. He made an effort to discourage grievants from filing grievances by telling them at one time that he would only be available to receive grievances after shapeup, and grievants would have to come to his office to file. Although the Company insisted that oral presentation of a grievance to the foreman was an essential first step in processing, Syph never took up any grievance with any foreman, other than on one or two occasions discussed in this decision. For that matter, the company president never took up the merits of any grievance with any of the foremen either. Foremen were simply out of the picture in processing grievances, although the contract indicates quite clearly that they should be an integral part of step one.

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[65] TWT's insistence that it could not discriminate among its employees on the basis of union considerations because all of its employees were members of Local 1982 deserves only a short footnote. TWT was well aware of the factional fight between Moody and Syph supporters. Its marine foremen, Staler and Tefft, were old hands on the Toledo docks and were well aware of who was in which faction. Edwards' removal as lines dispatcher on the arrival of Syph as dock steward was a matter of prominent company and general knowledge on the Toledo waterfront, and Syph's intimate knowledge of who belonged to which camp is imputable to TWT because of Syph's status as a TWT supervisor.

[66] 140 NLRB 181 (1962), enf. denied 326 F.2d 172 (2d Cir. 1963).

[67] *Auto Workers (North American Rockwell)*, 194 NLRB 1085 (1972); *Retail Clerks Local 1357 (Lit Bros.)*, 192 NLRB 1171 (1971); *Postal Workers Local 4193 (U.S. Postal Service)*, 226 NLRB 1000 (1976); *Brewery Workers (Miller Brewing Co.)*, 195 NLRB 772 (1972); *Teamsters Local 542 (Golden Hill)*, 223 NLRB 533 (1976).

Syph often referred to grievants as scabs, dummies, s.o.b.'s, and in other perjorative terms. On occasion, he told grievants that their written grievances had not been presented in proper form, but he did not bother to assist in writing them in an acceptable format. On occasion, Syph's contempt for grievants sounded a peculiarly insulting and demeaning note as he handed men whom he knew were illiterate blank sheets of paper and told them to write out their complaints in longhand instead of using forms provided to them by his arch rival.

However, his conduct need not be evaluated merely on the basis that it was unfair, invidious, or discriminatory in some general ethical sense. Syph behaved as he did for conventional discriminatory motives and he was not bashful about saying so. The 30 or more instances of 8(b)(1)(A) conduct found above are the proper measure of his attitude toward union dissidents, both in administering the grievance machinery and otherwise. Syph told Tefft on one occasion that he did not owe grievants anything, punctuating his comment by calling them s.o.b.'s. He told one grievant that he was "on the wrong team." He told another that he should have left him in prison. Syph threatened a grievant that he would not be hired at shapeup if he continued to file grievances. He told another to go see Moody because Moody was his steward. He told yet another that, if the grievant continued to hang around the Moodys, he would find himself outdoors. It would serve no purpose to reiterate any more of the other findings made above concerning Syph's illegal statements to and about grievants. Suffice it to say that they place beyond all prudent doubt the fact that Syph and the ILA operated the grievance machinery established by the ILA-TWT contract in a manner calculated to restrain and coerce union members in the exercise of rights guaranteed to them by Section 7 of the Act and, in so doing, violated Section 8(b)(1)(A). I so find and conclude.

7. Discrimination in employment

The question of discrimination in employment since November 3, 1981, is the core of this case and this issue is a vexing one, not because of any scarcity of evidence of animus, but because of the impact of shapeup procedure employed by TWT (and traditionally by most employers in the stevedoring business). In a factory or store setting, employment is a continuum that proceeds from day to day and week to week. Employees are not hired at the beginning of each day and laid off at the end of the day. If they are terminated, for discriminatory reasons or any reasons, an abrupt halt comes about in their relationship with their employer at a particular time, and the reason for the termination can be assessed on the basis of evidence available. As a result, when a backpay remedy for illegal conduct is appropriate, the beginning and end of the backpay period normally can be determined quite easily, although offsets and other defenses may cause a supplementary proceeding to be hotly litigated in a few instances.

In an industry employing a daily shapeup, no one is really hired until he is told, either at shapeup or at some other point in time, to go to work at a particular job on a particular day. Employees are essentially ongoing applicants whose prospects for a day's work may, in some instances, be quite good, but who are never wholly assured of working on any given day until their application is accepted in some manner and they are instructed what job to take for the day. If an individual does not show up at shapeup for any reason, he is normally not hired. With the exception of preferred men, there is usually no work between December 15 and April 15 of the following year. Regarding lines, the procedure in effect before May 23, 1984, was that every employee was essentially on call, but had no work until he was called. Although Edwards made some effort to equalize lines, the result of his effort was at best a rough approximation of a norm. Syph made no such effort at all.

Moody testified that Local 1982 now has 135 paid up members. In his view, most if not all of them are discriminatees. In his bill of particulars, the General Counsel narrowed this number to some 107 Local 1982 members who could properly be deemed "Moody men" and discriminatees. The problem with both of these contentions is that, in order to become a discriminatee, one must be an employee first. Long ago that term was construed broadly enough to include job applicants.[68] There are only about 50 regular or semiregular job slots at TWT, however. Only 90–110 different individuals are hired in the course of an entire shipping season, and this fact alone limits the number of those who can lay any claim to be bona fide applicants in any realistic sense. These factors pose problems in determining who is an employee. One cannot be deemed a discriminatee simply by being a member of Local 1982, while making no effort to apply for work. The question of how to compute backpay for such sporadic applicants further muddies the waters, as does the contention of the General Counsel that many Moody men simply stopped coming to shapeup because they knew that Syph would not hire them, arguing from this premise that their nonappearance should not be deemed a failure to seek daily employment under normal shapeup practice. This contention is well founded. *Crawford Container*, 234 NLRB 851 (1978).

One can hardly claim discrimination in employment on the basis of loyalty to Local 1982 or to the Moody faction if one did not acquire with TWT some kind of employment status in 1981 when Moody was doing the hiring, or if one's employment status in 1981 was limited to one or two calls for lines. The core of company employment is the loading and unloading of ships, for which shapeup appearances or status on the preferred list was a requisite. Lines simply provided a few extra hours of pay to supplement earnings derived from the principal part of a day's work.

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[68] *Phelps Dodge Corp. v. NLRB*, 313 U.S. 177 (1941).

If one worked at shapeup in 1981 and then worked fewer hours in 1982 there is a solid basis for claiming a discrimination in hire or tenure, within the meaning of Section 8(a)(3) of the Act. TWT's argument that stevedores got less work in 1982 because there was less work to do cuts little ice because some 20 TWT employees received more hours of employment that year than they did in 1981. There was in fact less work to do in 1982, but there was *much* less work to do for many individuals because working hours had been rearranged to suit political needs and desires of both respondents. The 63 individuals listed in Appendix A of this opinion were all Moody men. Moody acknowledged them as such and Syph did not contest his evaluations. Each of them signed one or more petitions that were forwarded to the ILA or the GLD in support of Moody positions taken in the factional fight that erupted anew in fall 1981. Accordingly, their sentiments were well known to ILA and GLD officials, including Syph.[69] Each of those 63 worked at shapeup (or on the preferred list) in 1981 and most worked on lines as well. A company record in the form of a printout indicates that all 63 were hired either on April 20, 1981, the first day of hire in the 1981 season, or at some later date during the 1981 season. Each received fewer hours of work in 1982 than in 1981. As a class all were the subject of the intense anti-Moody sentiment that has been detailed above. Many were personally disparaged and berated by Syph for their support of the Moodys. These factors taken together are sufficient to make them both TWT employees and men who suffered discrimination on the basis of intraunion factionalism. By discriminating or causing TWT to discriminate against them in hire or tenure on the basis of union considerations, Respondent ILA violated Sections 8(b)(1)(A) and (2) of the Act.[70]

Because of limitations contained in Section 10(b) of the Act, TWT may feel that a comparison of hours worked in 1981 against hours worked in 1982 cannot form a basis for a finding of discrimination on its part, since such a finding includes operative facts that predate the time in which TWT has any exposure under the Act. A similar comparison between the hours worked in 1981 by Moody supporters listed in Appendix A and the hours worked by those same individuals in 1983, after TWT's potential liability began, tells the same story. The 1983 shipping season was a better season than 1981. Employment opportunities, measured in total hours worked by all TWT employees in those 2 years, improved, in that there was 10.5 percent more work available in 1983 than in 1981. Notwithstanding this fact, 61 of the 63 Moody men listed in Appendix A worked fewer hours in 1983 than in 1981. For many of them, the decline in employment was precipitous. Only Merrill and Ben among all Moody supporters worked more hours in 1983 than in 1981. Merrill worked 10.5 percent more hours in 1983 than in 1981, less than the overall average, and Ben worked 17 percent more hours in 1983 than in 1981. Interestingly enough, both of these men were dropped from the ranks of experienced employees in the following year when TWT went about its evaluation procedure in May 1984, because TWT supervisors rated them as poor employees who could not do much of anything and who were too weak to perform any jobs that required exertion and heavy lifting. In short, the same enduring animus that TWT has exhibited toward Moody followers throughout its tenure on the docks resulted in the same discriminatory conduct in 1983 that took place in 1982, and thus forms a basis for finding an 8(a)(1) and (3) violation on the part of TWT in that year, as it did for an 8(b)(1)(A) and (2) finding against the ILA based on events in 1982.

Once an employee becomes a discriminatee, he remains a discriminatee until his discrimination is fully remedied. It is not necessary to follow his progress or decline into future seasons in order to have this status renewed. The question then becomes an issue of the quantum of backpay to be received, not of basic entitlement to an unfair labor practice remedy. As a matter of fact the discrimination practiced on the Toledo docks was such that it continued to bear bitter and continuing fruit during all ensuing shipping seasons. Those who failed to work 350 and then 200 hours because of discrimination practiced on them in a prior season thus became further disadvantaged in the following year. By failing to work the qualifying number of hours, an individual could lose his position on the experienced list and, having lost that preferment, would predictably work even less and have an even flimsier chance of qualifying for preferment a year later. In short, the discriminations practiced in this case had a snowballing effect. Syph's statement that he was watching hours of employment like a hawk so that his family and friends would prosper and Moody's followers would suffer, is a clear indication of ongoing discrimination, as is the fact that his plenary power to assign lines in 1982 and 1983 gave him the procedural device to carry out his announced intention.

Because of limitations discussed above, the exposure of TWT to unfair labor practice findings and a consequent financial liability can only extend back to February 12, 1983, some 6 months prior to the filing of the first CA charge. TWT's liability should begin promptly on that day. Within 6 weeks of the issuance of the first consolidated complaint in this case, Davis wrote a letter to three of his supervisors in which he told them that the Company was being forced to "change our entire approach to hiring to avoid being victimized by the long existing political history of various dock factions . . . . Therefore, it is our intention to assume total control of hiring practices, based upon qualifications of the individuals who, during our time as operators, have worked for TWT." This paper trail led to an evaluation by 3 foremen of some 63 individuals for 50 slots, 16 of which were preferred and the others of which were denominated as "qualifying." These evaluations established a permanent cadre of employees who then became eligible to gain "seniority" under a contract that took effect on May 22, 1984, and is still in operation.

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[69] Most significant of these petitions was the one submitted by Moody to the ILA on January 22, 1982, well in advance of the 1982 season, in which Moody protested the effort of the Syph faction to form another local.

[70] Under well-established law, these 63 individuals, as discriminatees, would be eligible to vote in any representation election conducted by the Board among the ranks of TWT's stevedores. *O'Keeffe Electric Co.*, 158 NLRB 434 (1966); *L. B. Foster Co.*, 192 NLRB 319 (1971); *Atlantic Foundry & Pattern Corp.*, 192 NLRB 745 (1971); *Gary Aircraft Corp.*, 193 NLRB 108 (1971); *Truck & Trailer Service*, 239 NLRB 967 (1978); *El Fenix Corp.*, 234 NLRB 1212 (1978); *Simley Corp.*, 233 NLRB 391 (1977); *Koehring Co.*, 193 NLRB 513 (1971); *Pace Motor Lines*, 260 NLRB 1395, 1413–1414 (1982).

In fact, TWT was not a victim of a long-existing political history of political warfare between dock factions. TWT was and remains an active and knowing perpetrator of discriminatory practices on the Toledo docks, and the hiring system it established to replace the daily shapeup is as much a part of those practices as was the shapeup. TWT attempted to arrange for ILA recognition for its dock employees before it ever received a contract to operate on the docks. Arranging for an ILA contract, including ILA recognition, was as much a part of TWT's preliminary startup activity in 1981 as submitting a bid to the Toledo-Lucas County Port Authority. Seeing to it that neither Moody nor Local 1982 had any say in contract negotiations was equally a part of that effort.

TWT first negotiated an oral contract, then assisted in securing authorization cards that would permit the contract to take effect, and then memorialized its agreement with the ILA in a memorandum of understanding. The basis for its recognition of the ILA was 13 authorization cards in a unit that numbered more than 100 employees during the first season, but this formality relating to recognition was merely a technicality that was observed to insure that it would not be faced with a negotiator who might insist on contract terms that TWT regarded as undesirable. It is obvious that TWT looked to Sullivan and others in the ILA hierarchy to keep Moody under wraps during the first season, and their confidence was not misplaced.[71]

As discussed above, TWT cooperated with the ILA over the years by using ILA dock stewards as TWT hiring supervisors. As long as peace with the ILA meant tolerating Moody and the Local 1982 seniority list, TWT did so. When it meant doing business with the Syph faction, TWT had no difficulty whatsoever in changing its factional allegiance. Only after the consolidated complaint in this case issued did TWT take any steps at all to relieve a situation that it helped to create, and it did so then in such a manner as to insure that the political gains that the Syph faction had made over a period of 2-1/2 years remained intact. Because TWT used ILA stewards as its supervisors, it is not necessary to address the arguments raised by the General Counsel or TWT relating to liability for discrimination in union hiring hall operations arising out of employer acquiescence. There was no hiring hall in operation. TWT's liability for discrimination in employment arose directly out of the daily participation of its supervisor Syph in discriminatory favoritism toward his own supporters to the detriment of Moody followers.

When it took over the dock operation in 1981, TWT was under no legal obligation to recognize the TOT-ILA Local 1982 seniority list or to recognize seniority on any other basis. Moody and his followers presumed, in filing a multiplicity of grievances, that TWT somehow acquired the Local 1982 seniority list when it acquired the dock operation, but such is not the law. Seniority arises only by virtue of contract, and TWT took great pains to state in its memorandum of understanding with the ILA that it recognized no past practices.

Having made an express disclaimer in April 1981 of any obligation to recognize the Local 1982 list, TWT went on to give that list recognized status as its own hiring practice and procedure because its own supervisors, Moody and Syph, regularly used that list throughout the 1981 season to hire all nonpreferred stevedoring employees who appeared at shapeup. As a result, at the beginning of the 1982 season, the Syph faction outnumbered the Moody faction 23 to 19 among preferred and experienced men. Two years later, in May 1984, the score was 37 to 12.

The result of discontinuing the use of the Local 1982 list at the beginning of the 1982 season and substituting in its place a list of experienced men who would be hired after preferred slots were filled was to accommodate the building of the Syph "machine" and the systematic elimination of Moody followers from the hands of TWT employees. By agreeing to this revision in TWT's hiring practice, Respondent ILA agreed to a discriminatory contractual arrangement and thereby violated Section 8(b)(1)(A) and (2) of the Act. I so find and conclude. The bar erected by Section 10(b) of the Act prevents a corollary finding of a violation on the part of TWT until 1983.

In 1982, TWT eliminated two of the three Moody supporters it had placed a year earlier on its preferred list. Before the beginning of the 1982 season, TWT created a new category of employees with hiring preferment and entered into an oral agreement with the ILA, in derogation of the written contract, which resulted in a selection criteria giving the Syph faction a slight edge among TWT's 42 permanent group of stevedores. TWT allowed Syph to manipulate hours in 1982 to increase the chances that Syph supporters would gain slots as experienced men in the following year. In 1983, TWT placed eight Syph supporters on that list while removing five Moody men. The same ball was still rolling during the 1983 season and, at the beginning of the 1984 season, three more Syph supporters were placed on the experienced list, while two more Moody men were dropped.

Then came the personnel evaluations that shortly predated the implementation of the new hiring system in May 1984. I place little weight on the General Counsel's argument that the selection was illegal because the pool from which selections were made was discriminatorily arranged. I place considerable weight on the fact that the employer who was making the selection had given long and constant support to the Syph faction and had allowed Syph to build up a political following by supplying him with political patronage in the form of employment on the docks. Moreover, the size of the permanent crew was enlarged from 42 to 50, and the only explanation in the record for this increase was TWT's desire to pack the bargaining unit with individuals who would be disposed to ratify the contract, an event that TWT also orchestrated.

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[71] In light of Sullivan's well-corroborated statement that TWT and ILA had agreed on the basic terms and conditions of a contract, as well as the granting of recognition on the basis of 13 cards in a unit many times that size, it is difficult to understand why the Regional Office, and ultimately the Office of Appeals, dismissed Moody's timely filed charges against TWT alleging unlawful assistance to the ILA.

Davis, who arranged for the selection process and ultimately made the determinations regarding who would be selected, gave evidence of his personal animus toward Moody in an affidavit to the district court. In that statement he said that TWT would not have come to Toledo if that had meant doing business with Moody and Local 1982. Tefft and Staler were individuals whose relatives were being accommodated by Syph in the same manner that Syph's relatives were being accommodated. Tefft's animus toward the Moody faction was clearly displayed in his conversation with Merrill, recited previously, and by a gratuitous comment he uttered during the course of his testimony in which he referred to Local 1982 as the "damn union." Staler fairly bristled toward Local 1982 in his testimony. It was these three men, plus Hardwick and Lovicott, who evaluated the 1984 group of TWT employees in 1984. It is not surprising that, among those who did not make either list, Moody men outnumbered Syph supporters 11 to 2. Nor is it mere coincidence that the ultimate composition of the list contained 37 Syph supporters and only 12 Moody men, thus radically changing the political complexion of TWT's permanent work force in a short space of 2 years. The combination of biased evaluators and a discriminatory result is enough to make out a violation of the Act. In revising its hiring system, TWT perpetuated the discriminatory features of its previous one in order that it might enjoy the benefit of patsy negotiators across the bargaining table and a patsy steward on the docks. In so doing, it violated Section 8(a)(1) and (3) of the Act. I so find and conclude.

Consideration must be given to the 44 members or former members of Local 1982 whom the General Counsel believes to be discriminatees, but whom I find are not.[72] Ten of these individuals are dead[73] and one is listed as disabled (Fred Carswell). Most of them did not work at all during 1981 when Moody was running the shapeup and Edwards was dispatching lines. Accordingly, it is difficult to assert that the failure of TWT to hire them in future years was the result of discrimination based on membership in Local 1982 or adherence to the Moody faction. Cross signed Syph's petition to establish a new local and can hardly be deemed a Moody follower. Only 11 of this number worked at all in 1981 and, for the most part, this work consisted of one or two lines assignments of 4 hours' duration. This is hardly enough to establish their status as an employee of TWT. Of these 44 individuals, only 9—Brock, Coleman, Conley, Corggens, Green, Hardy (Sr.), Sampsel, Stollar, and Swayze—filed any grievances after Moody was removed as steward, a fact that clearly suggests that the rest were not even applicants for employment during the period of time for which grievances can be found in this record. Of these nine, only Coleman filed more than a handful. It might be argued that these nine had some standing as employees who suffered discrimination, in that they were applicants for employment who were not hired on the dates indicated in their grievances. In light of the vast surplus of applicants who frequently besieged TWT for jobs, however, it is hard to find a preponderance of evidence that supports the view that these nine applicants did not get jobs because they were Moody men rather than because there were no jobs to be had. Accordingly, I conclude that these 44 individuals were not denied employment for discriminatory reasons under any theory, and would dismiss the consolidated complaint regarding all of them.

On the foregoing findings of fact and on the entire record considered as a whole, I make the following

CONCLUSIONS OF LAW

1. Respondent Toledo World Terminals, Inc. (TWT), is now and at all times material has been, an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

2. Respondent International Longshoremen's Association (ILA) and International Longshoremen's Association, Local Union No. 1982 are, respectively, labor organizations within the meaning of Section 2(5) of the Act.

3. By causing or attempting to cause Respondent TWT to discriminate against employees and job applicants whose names are listed in Appendix A of this decision or any other employees regarding the hire or tenure of their employment because of intraunion factional considerations; and by maintaining with TWT a discriminatory and unlawful hiring arrangement giving preference to employees and applicants for employment on the basis of intraunion factional considerations over those whose names are listed in Appendix A of this decision, Respondent ILA violated Section 8(b)(2) of the Act.

4. By the acts and conduct set forth above in Conclusion of Law 3; by threatening employees of TWT and prospective employees of TWT with loss of work and other reprisals if they continued to support the leadership of Local 1982; by threatening them with loss of work and other reprisals for filing intraunion charges, unfair

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[72] These individuals are: H. Bates, Clarence Beese, Robert Brock, Alonzo Brown, Fred Carswell, Isaac Cobb, Ronald Coleman, Paul Conley, Lester Corggens, Millard Garner, Fred R. Green, Roosevelt Hampton, LeRoy Hardy Sr., Steven Lee Hardy Sr., Steven Lee Hardy Jr., Harry Hensley, Harry Hite, Maurice Hollinger, Alvin C. Johnson Jr., Kermit Jones Jr., Kermit Jones Sr., Timothy Jones, R. Logan, Hercules Long, Charles Lolow, Jose Lopez, William Moore, A. Murphy, L. Oxner, Charles Phillips, F. Quinney, Levi Randall, John G. Rhodes Jr., Leonard Russell, William A. Sampsel, J. Smith, R. Stollar, Henry Swayze, Charles Thomas, Clarence Turner, Alfonso Williamson, Archie D. Williamson, Charles Young, and Sam Young.

[73] H. Bates, Clarence Beese, Alonzo Brown, Fred R. Green, Harry Hensley, Maurice Hollinger, Kermit Jones Sr., Charles Phillips, F. Quinney, and R. Stollar.

labor practice charges, representation petitions (including decertification petitions), and for refusing to support an effort to charter another ILA local; by threatening them with loss of work and other reprisals for filing grievances concerning the dock steward's conduct in hiring applicants for employment; by failing to process grievances filed by the TWT bargaining unit because said grievants are members of Local 1982 or a group or faction therein; by placing Local 1982 in trusteeship and attempting to remove its officers; by replacing Charles Moody as dock steward because he filed charges and representation petitions under the Act; by granting a charter to a new local in order to prevent Local 1982 from becoming the collective-bargaining representative of TWT's employees; and by agreeing to modify a collective-bargaining agreement with TWT in order to change a preferential status previously afforded to certain employees who were supporters of a dissident union faction, Respondent ILA violated Section 8(b)(1)(A) of the Act.

5. By discriminating against employees and applicants for employment whose names are listed in Appendix A to this decision because of their membership in and support for Local 1982; and by maintaining and giving effect to an agreement or arrangement with the ILA to discriminate in employment against employees and applicants for employment whose names are listed in Appendix A of this decision, because of their membership in and support for Local 1982, Respondent TWT, Inc., has violated Section 8(a)(3) of the Act.

6. By the acts and conduct set forth above in Conclusion of Law 5 and by threatening employees with loss of work if they continued to file grievances and give support to Local 1982, Respondent TWT, Inc., has violated Section 8(a)(1) of the Act.

7. The aforesaid unfair labor practices have a close, intimate, and adverse effect on the free flow of commerce within the meaning of Section 2(6) and (7) of the Act.

THE REMEDY

Having found that both Respondents have engaged in certain unfair labor practices, I will recommend that they be required to cease and desist therefrom and to take other affirmative actions designed to effectuate the purposes and policies of the Act. Because the unfair labor practices found demonstrate on the part of both Respondents a deep and abiding disregard for the fundamental rights of their employees and members, I will recommend to the Board broad 8(a)(1) and (b)(1)(A) remedies designed to suppress any and all violations of those sections of the Act. *Hickmott Foods*, 242 NLRB 1357 (1979). I will recommend that Respondent TWT be required to offer to the 63 individuals named in Appendix A of this decision full and immediate reinstatement to their former or substantially equivalent employment and to make them whole for any loss of earnings that they may have suffered by reason of the discriminations found. In the case of Marsenburg and Edwards, a reinstatement remedy means restoring their preferment in order of call among all employees whose names are not on the preferred list. Because Section 10(b) of the Act precludes any finding that TWT violated the Act by removing Marsenburg and Edwards from the preferred list in 1982, the remedy relating to their status can only address the violation found, namely that TWT, in 1983, eliminated their order of call among experienced employees. Accordingly, I must decline the General Counsel's request to direct reinstatement of these individuals to the preferred list.

I will also recommend that Respondent ILA share jointly and severally in the payment of backpay due and owing since TWT's liability commenced on February 12, 1983, and that it bear full responsibility for any losses occasioned by its unlawful conduct before that date. I recommend that Respondent ILA bear full liability for compensating Charles Moody for any losses he may have sustained because of the discrimination in employment that was caused by his removal as dock steward. All backpay should be computed in accordance with the quarterly method set forth in *F. W. Woolworth*, 90 NLRB 289 (1950), with interest at the adjusted prime rate used by the Internal Revenue Service for assessing interest on tax payments. *Olympic Medical Corp.*, 250 NLRB 146 (1980); *Isis Plumbing Co.*, 138 NLRB 716 (1962). This recommended remedy contains no cutoff date regarding backpay liability.

Having recited this almost ritual language governing remedies in discrimination cases, I feel that it is necessary to go further in this case. Normally the formula to be applied for computing backpay is a matter left to supplementary proceedings, but such is not always the case.[74] In the case of Charles Moody, the formula is a relatively simple one—the difference between what he would have earned as dock steward after November 3, 1981, less what he actually earned. In the case of Edwards and Marsenburg, who are the subjects of specific individual findings of discrimination, the formula is also relatively straightforward—the difference between what they would have earned from 1982 onward as preferred men, less what in fact they actually earned. An equitable number of lines assignments must also be cranked into this computation.

The other 60 individuals constitute a class of discriminatees whose individual members have been identified. Accordingly, it would both be equitable and in keeping with Board practice to provide them a remedy that has been designed for them as a class, rather than require the General Counsel to probe into each day's hiring over a period of 4 years to determine what money is due and owing on a daily basis to each of 60 persons. Such a probe would be particularly difficult in this case because of the failure of both Respondents to keep sign-in sheets or other records (at least until May 1984) showing who had appeared at shapeup, but had not been hired. Such a remedy would also avoid endless controversy concerning which Moody followers had failed to attend shapeups on which days because they had been discouraged from attending by previous discriminatory practices, who had been forced to seek other employment, and who stood on which side of the fence at the daily shapeup.[75]

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[74] See, for instance, *Iron Workers Local 373 (Building Contractors)*, 232 NLRB 504 (1977); *Boilermakers Local 154 (Service Contractors)*, 253 NLRB 747 (1980), and cases cited at 758 fn. 17.

In fashioning a backpay remedy, it is well to heed the words of Administrative Law Judge Thomas A. Ricci in the above-cited *Iron Workers Local 373* case:

> This case at bar brings to light still another instance of such widespread flouting of the law, such longstanding, repetitious, and pervasive violations of the statute that the normal or usual remedial Board techniques are pointless. In fact, the record, as a whole strongly suggests that these two local unions are counting upon standard procedural delays inevitably tied to the usual Board practices in order to continue right on with their now long-established practice of denying work to any hiring hall applications but their own members. It is for this reason that Respondents demand to be shown now each and every instance where they in fact prejudiced a man. That infinitessimal question alone, were it to be permitted to stall this proceeding, would mean months of detailed bookkeeping before a Board finding of any kind could issue—with Respondents all the while continuing the illegal practices of the past. This is why I think finding a few hundred separate violations suffices instead.
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> But the same delay—reaching into years—is sought obliquely via the make-whole route. In the normal case, after the Board finds an unfair labor practice was committed, a check is made to ascertain how much the discriminatees lost in wages. The standard backpay specifications detail to the penny precisely how much Smith "would have earned" had the union not ignored his right to work. In this case it is not possible to restructure the past—i.e., it is not possible to determine with any rational degree of certainty how much each of the 22 . . . individuals named in the complaints—to say nothing of those in fact discriminated against but not yet identified!—would have earned had they been sent to work in proper rotation. The inquiry in each of maybe a thousand instances would become so ramified and speculative that in the wasted morass of time and energy the misconduct would simply remain unremedied. Counsel for the locals correctly said, at the hearing: "Neither of us are that young to do that." Supra at 517-518.

Judge Ricci went on to outline what he called "a guess—but a rational, educated, justified, and unavoidable guess." His guess was upheld by the Board. He found both the average yearly earnings of illegally treated nonmembers and the average yearly earnings of favored members who regularly received referrals, deriving those figures from union fringe benefit fund records. He then compared the average earnings of discriminatees with an average yearly earning of all employees—both favored and disfavored. The difference between the overall average yearly earnings and the average for discriminatees formed the basis for backpay calculations. To the claim that this formula was speculative and contained guesswork that would prejudice the respondents, the administrative law judge simply cited the holdings in several court and Board cases to the effect that the burden is on the wrongdoer to establish facts that would mitigate its liability and that, in case of doubt, it is the wrongdoer who should suffer because it is he who is responsible for the existence of any uncertainty involved in the computations. *NLRB v. Brown & Root, Inc.*, 311 F.2d 447 (8th Cir. 1963); *United Aircraft Corp.*, 204 NLRB 1068 (1973); *J. H. Rutter-Rex Mfg. Co.*, 194 NLRB 19 (1971).

The same general approach, prompted by the same factors and considerations, should be applied to the formulation of a backpay remedy for the 60 discriminatees who, as a class, were the victims of illegal conduct on the part of both Respondents. Record evidence contains the total number of hours that each of these individuals worked in 1981, when presumably they were hired at shapeup and called out on lines without discrimination based on factional considerations (except, perhaps, for the last month of that year). Those hours worked should constitute the base figure for each individual backpay computation. It was established that the Company suffered a decline in business in 1982, followed by increases in each of the following years. That decline and those increases, measured in terms of overall hours worked by all TWT employees during each season, has been set out in detailed percentage points in this decision. Based on these figures, each of the 60 discriminatees should be held to have worked, had he not been denied employment for illegal reasons, the same number of hours each season as he did in 1981, subject to a percentage reduction or increase for each ensuing season reflecting the annual business decline or improvement for that year. Individual offsets, such as interim earnings or time missed because of illness, can then be adjusted after these initial calculations are made. I recommend this formula to the Board as part of the remedy in this case.

A further remedial point must be addressed. Because violations of the Act tend to become stylized in Board decisions, remedies for those violations tend to become stereotyped. The Act does not require this result but years of practice have generated it. While reinstatement and backpay are the commonplace remedies for discrimination in employment, in proper cases the Board has issued a bargaining order to complement its finding of an 8(a)(3) violation, without ever finding that a refusal to bargain in violation of Section 8(a)(5) has occurred.[76] When such a remedy was challenged as inappropriate, the Third Circuit stated:

> The design of the Board's order in directing Piasecki to bargain is to deprive it of the advantage gained in violating the Act.
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> We cannot agree with Piasecki that because the Board found no violation of Section 8(a)(5) it could

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[75] Issues concerning earnings derived from other employment and loss of time due to injury and illness can be asserted as offsets against gross backpay. These and similar matters are traditional questions that are litigated in supplementary proceedings when they cannot be adjusted administratively.

[76] *Piasecki Aircraft Corp.*, 123 NLRB 348 (1959); *Editorial "El Imparcial," Inc.*, 123 NLRB 1585 (1959), enfd. 278 F.2d 184 (1st Cir. 1960).

not resort to this order as a remedy for the violation of Section 8(a)(3).[77]

More closely in point to the matters litigated in this case and to the remedy being recommended is the Board's recent decision in *Longshoremen ILA Local 1814 (Jackson Engineering)*, 265 NLRB 1688 (1982). In that case the Board ordered the employer respondent to cease and desist from recognizing the union that represented its bargaining unit employees, although there was no evidence in that case that the union failed to represent the majority of the employees in question or that the unlawful assistance found had any bearing on the union's majority status. When this remedy was challenged as punitive, the District of Columbia Circuit upheld the Board with the following comments:

> This Court recognizes . . . that the fashioning of remedies in the field of labor relations frequently calls for flexible application of familiar statutory policies to novel factual situations, and that the Board possesses broad discretion in the matching of remedies to wrongs. Cognizant of such administrative discretion, and attentive to the central policy of the NLRA—to allow workers free exercise of their rights to bargain collectively—we rule that the remedies ordered by the Board bear a reasonable relation to the violations found. Where corruption is endemic to the relations between an employer and union, the Board is justified in requiring a fresh start under which employees may freely designate a collective bargaining representative of their choice.
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> . . . .
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> The Board has the remedial authority and responsibility to apply its discretion to all factual configurations that come before it; issuance of certain remedies is not limited to standard factual situations. *Longshoremen's Local 1814 v. NLRB*, 735 F.2d 1384, at 1387, 1388, 1402 (1984).

In this case, the General Counsel did not allege that TWT had, over the years, given unlawful assistance and unlawful recognition to the ILA in violation of Section 8(a)(2) of the Act. Evidence adduced in support of the 8(a)(3) violation, however, clearly points to such unlawful assistance and continued recognition. A "fresh start" remedy has a stronger basis in this record than it did in the *Jackson Engineering* case, for there is considerable doubt that the ILA obtained sufficient cards to acquire majority status among all stevedoring employees to support its original demand for recognition, and there is an abundance of evidence demonstrating a refusal by the ILA to fulfill its duty to represent fairly all the members of the TWT bargaining unit.

TWT began to operate in Toledo in 1981 with the fixed intention of avoiding the institutionalized boondoggling that had spelled ruin for its predecessors. Having avoided certain mistakes of earlier stevedoring companies, TWT then went on to make some of its own. Principal among TWT's own mistakes was an equally determined effort to choose a bargaining agent for its employees and to maintain that bargaining agent in power. As noted before, TWT arranged its hiring pattern to favor the Syph faction. Over the years, it supplied Syph with the patronage to build his political faction. Davis stated categorically that TWT would not have come to Toledo if doing business on that port meant recognizing Local 1982 and bargaining with Charles Moody. TWT enlarged its bargaining unit in 1984 to make sure that the current contract would be ratified by the Syph followers, whom it added to its payroll just before the contract ratification date. To permit TWT to continue to discriminate in this manner, for its own advantage and to the detriment of many Local 1982 members, and then to allow the passage of time to cement in the Syph faction as the dominant faction on the docks, would be nothing less than a reward both for violating the Act and for longterm persistence in doing so. Accordingly, I will recommend to the Board that TWT be required to put an end to its collusive relationship with the ILA and to the Syph faction and to withdraw recognition from the ILA as the bargaining agent for its stevedoring employees, unless and until the ILA becomes certified as the result of a Board-conducted election. In no other way can any semblance of industrial democracy be restored to the Port of Toledo.

I will also recommend that the respondents be required to post the usual notices, advising their members and employees of their rights and of the remedy in this case. Because Respondent ILA has no office or hiring hall in the Toledo area, I would direct it to mail a copy of its notice to every living person whose name appears on the Local 1982 seniority list. The General Counsel has requested that the remedy include a so-called visitatorial clause permitting the use of court-supervised discovery to determine whether the parties have complied with the terms and conditions of this remedy. Because of the complicated and detailed nature of this case and the obdurate behavior of both respondents, I will recommend this remedy to the Board. See *NLRB v. Steinerfilm*, 702 F.2d 14 (1st Cir. 1983).

[Recommended Order omitted from publication.]

Appendix A Explanation

A. Place on old Local 1982 seniority list, as the entry suggests, the order in which the discriminatee's name was found on the seniority list that was used in 1981 by Moody to call off the names of all nonpreferred TWT employees at shapeup. (G.C. Exh. 3.)

B. The date of hire noted under the names of the discriminatees was taken from a printout prepared by TWT from its records. (C.P. Exh. 3).

C. Summary of anti-Syph or anti-ILA activity is as follows, all in 1982:

1. Indicates that the individual was the signer of a petition submitted to the ILA by Moody about January 22, 1982, in opposition to the effort then underway to charter another ILA general cargo local in the Port of Toledo. (G.C. Exh. 105.)

2. Indicates that the individual was a signer of an internal union charge submitted to the ILA alleging that

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[77] *Piasecki Aircraft Corp. v. NLRB*, 280 F.2d 575, 591 (1960).

Syph, as ILA dock steward, refused to process grievances. (G.C. Exh. 118(b).)

3. Indicates that the individual was a signer of a petition submitted to the ILA alleging that Syph, as dock steward, was derelict in enforcing the hiring provisions in the TWT-ILA contract. (G.C. Exh. 118(c).)

4. Indicates that the individual was a signer of a petition submitted to the ILA allegedly protesting a policy inaugurated by the ILA, at the International level, in refusing to load ships to or from the Soviet Union in order to protest the Russian invasion of Afghanistan.

5. Indicates that the individual was the signer of a petition submitted to the ILA alleging that it had failed to collect and remit to TWT employees certain tonnage incentive and container royalties that were levied under the TWT-ILA contract as part of the compensation of TWT employees. (G.C. Exh. 118(a).)

6. Indicates that the individual was a signer of a petition submitted to the ILA and was refusing to ensure that the elected dispatcher (Edwards) was given recognition by TWT and allowed to function under Local 1982 bylaws. (G.C. Exh. 118(e).)

D. The hours of work set forth for each year by each named employee are taken from a list prepared by TWT from its records and submitted by TWT. (R. Exh. 25.)

E. The number of hours worked on lines in 1981 and set forth in parentheses () after the number of hours worked in 1981 up to November 3, 1981, is taken from a summary prepared by Edwards, who was lines dispatcher in 1981. (G.C. Exh. 149.)

P - Indicates that the employee in question was on the TWT list of preferred employees for that season.

E - Indicates that the employee in question was on the TWT list of experienced employees for that season. An asterisk * after the name indicates that the employee in question had preference among experienced employees in order of call.

Q - Indicates that the employee in question was on the TWT's 1984 list of 50 qualified employees who were selected and named in the 1984 contract. The notation (added) or (dropped) indicates his status was changed from the preceding list of experienced employees that was utilized during the first 6 weeks of the 1984 season under the old hiring arrangement.

The designations P, E, and Q are also used in the summary of activities of Syph supporters found in Appendix B.

APPENDIX A

Place on old Seniority List	*Name*	*Summary of Anti-Syph (or anti-ILA) activity*	*Hours Worked*				
			1981	*(lines)*	*1982*	*1983*	*1984*
81	Harkles Bacon, hired 4/20/81	1,2,3,4,5,6	272	(20)	117	178	535-Q (Added)
40	Joseph Barteck, hired 4/20/81	1,2,3,4,5,6	559	(22)	248-E	500-E	559-Q
89	Elijah Barton, hired 4/20/81	1,2,3,4,5,6	95	(24)	2	45	12
55	Paul Ben, hired 4/20/81	2,3,4,5,6	374	(55)	208-E	439-E	161-E (Dropped)
37	Matthew Bennett, hired 4/20/81	1,2,3,4,5,6	363	(37)	83-E	-	-
21	Malcolm Bey, hired 4/20/81	1,2,3,4,5,6	105	(4)	-	-	-
43	Joseph Boyd, hired 4/20/81	1,3,4,5,6	118	(12)	-	-	-
56	Wesley Boyd, hired 4/20/81	1,2,3,4,5,6	195	(16)	-	-	8
116	Robert Bradford, hired 4/20/81	3,4,5,6	82	(20)	2	8	19
2	Lonis Byrd, hired 4/20/81	1,2,3,4,5,6	230	(14)	48	-	-
146	Nathan Campbell, hired 4/20/81	1,3,4,5,6	39	(12)	-	-	-
151	Lloyd Cathey, hired 4/20/81	1,3,4,5	68	(16)	19	-	-
10	Johnnie Clemons, hired 4/20/81	1,2,3,4,5,6	503	(16)	214-E	485-E	216-E
12	James Cook, hired 11/20/81	1,2,3,4,5,6	272	(16)	-	-	-
50	M. Csizi, hired 4/20/81	1,3,4,5,6	471	(20)	-E	-	-
131	Edward Dailey, hired 11/19/81	1,4,5,6	53	(4)	2	-	-
98	James Del Rio, hired 4/20/81	1,2,3,4,5,6	223	(20)	6	-	-
53	Joseph Duris, hired 4/20/81	3,4,5,6	197	(20)	11	-	-
150	Floyd Early, hired 4/20/81	1,3,4,5,6	85	(12)	59	30	-
82	David Edwards, hired 4/20/81	1,2,3,4,5,6	1559-P	301-E*	494-E	800-Q	
14	Dan Emery, hired 4/20/85	1,2,3,4,5,6	215	(14)	-	-	-
136	Alexander Evans, hired 10/26/81	1,3,4,5,6	46	(4)	2	-	18
70	Carl Foster, Jr., hired 4/20/81	1,3,4,5,6	212	(12)	-	-	-
24	Alvin Freeman, hired 4/20/81	2,3,4,5,6	559	(18)	209-E	211-E	278-Q
17	Tommy Gaines, hired 4/20/81	1,2,3,4,5,6	499	(20)	175-E	12	-
105	James Gant, hired 4/20/81	1,3,4,5,6	68	(22)	-	-	-
103	Benito Garcia, hired 4/20/81	1,2,3,4,5,6	20	(12)	-	-	-
15	Herman Glover, hired 4/20/81	1,2,3,4,5,6	355	(8)	43-E	-	
32	Charlie Hampton, hired 4/20/80	2,3,4,5,6	307	(14)	6	28	16

APPENDIX A—Continued

Place on old Seniority List	Name	Summary of Anti-Syph (or anti-ILA) activity	Hours Worked				
			1981	*(lines)*	*1982*	*1983*	*1984*
86	Robert Hicks, hired 4/20/81	1,3,4,5,6	79	(4)	39	–	–
13	Robert Highsmith, hired 4/20/81	1,2,3,4,5,6	672	(18)	198–E	28	664–Q (Added)
41	Richard Hollinger, hired 4/20/81	1,6	147	(12)	56	88	137
45	Gerald Holman, hired 4/20/81	1,3,4,5,6	36	(20)	–	–	–
80	Cecil Hood, hired 4/20/81	1,2,3,4,5,6	260	(24)	93	85	293
19	Gaylon Howard, hired 4/20/81	1,2,3,4,5,6	483	(4)	200–E	376–E	–
1	Leroy Hunter, hired 4/20/81	1	16	(0)	–	–	–
115	Willie Jackson, on roll	1,2,3,4,5,6	49	(20)	19	8	12
127	Acy Johnson, Sr., on roll	1,3,4,5,6	18	(12)	–	–	–
120	Melvin Jones, hired 5/5/81	1,3,4,5,6	28	(0)	–	–	–
114	Robert Kirkwood, on roll	1,3,4,5,6	50	(20)	17	–	–
87	Nathaniel Levesque, hired 4/20/81	2,3,4,5,6	301	(20)	104	50	26
4	William McCully, on roll	1,2,3,4,5,6	458	(Refused)	168–E	–	220–Q (Added)
111	Richard McGoffney, hired 4/20/81	1,2,3,4,5,6	20	(16)	7	10	–
42	Gerald Markowski, hired 4/20/81	1,2,3,4,5,6	300	(16)	–	–	–
11	Shirley Marsenburg, hired 4/20/81	1,2,3,4,5,6	1254	(14)–P	243–E*	307–E	492–Q (Added)
48	Raymond Merrill, hired 4/20/81	1,3,4,5,6	381	(10)	225–E	426–E	247–E (Dropped)
94	Charles C. Moody, hired 4/20/81	1,2,3,4,5,6	1578	(20)–P	725–P	1284–P	1811–P
88	Franklin Moody, hired 4/20/81	1,2,3,4,5,6	221	(20)	6	–	–
34	Robert L. Moody, Jr., hired 4/20/81	1,2,3,4,5,6	636	(26)	233	381	–
112	Gregory Mroczkowski, hired 4/20/81	6	9	(4)	2	2	–
49	Harry Nolan, hired 4/20/81	1,3,4,5,6	362	(16)	–E	–	–
75	John Nyers, hired 4/20/81	1,2,3,4,5,6	283	(16)	–	–	–
7	Warren Orth, hired 7/2/81	1,2,3,4,5,6	244	(22)	–	–	–
134	Gerald Reynolds, hired 4/20/81	1,2,3,4,5,6	42		–	–	–
119	Willie Sanders, hired 4/20/81	1,3,4,5,6	31	(6)	–	8	42
8	Milton Shoecraft, on roll	1,2,3,4,5,6	490	(14)	195–E	69	12
47	Sam Smithson, hired 7/6/81	1,3,4,5,6	176	(6)	8	–	–
35	Willie Spivey, hired 4/20/81	1,2,3,4,5,6	420	(18)	235–E	401–E	608–E
79	Richard Staunton, hired 4/20/81	1,2,3,4,5,6	294	(22)	21	40	4
83	Claude Tucker, Sr., on roll	1,2,3,4,5,6	311	(20)	95	108	552
142	Jonas Tucker, hired 5/7/81	1,2,3,4,5	8		–	–	–
54	Ronald Van Buren, hired 4/20/81	1,2,3,4,5,6	175	(10)	6	8	–
135	G. Washington, on roll	1,6	14	(8)	–	–	–

APPENDIX B.—SUMMARY OF HOURS WORKED 1981, 1982, 1983 and 1984 CALENDAR YEARS

Name	Position on Local 1982 Seniority List	*1981*	*1982*	*1983*	*1984*
David Antonnacci, Sr.	NOL	442	304	664	665
Rudy Apodaca	85	210	195	308	46
Jack Beese	73	340	173	417	565
John R. Bennett	44	510	285–E	641–E	1715–P
Joseph A. Bollman*	67	1452–P	1921–P	1923–P	2160–P
Robert W. Burkhard*	6	1248–P	1799–P	2222–P	1899–P
Donald Chevalier	NOL	–	–	174	371
Harold Chevalier*	66	962–P	1771–P	1752–P	2196–P
Joseph E. Cutcher*	5	1346–P	1686–P	1348–P	1825–P
Randy Dazell	NOL	–	–	219	281
Charles P. Erickson*	60	1530–P	1823–P	1755–P	2208–P
Lloyd Hansen*	31	570	301–E	688–E	992–Q
Archie Haynes*	NOL	38	19	192	166
Francis L. Kristof*	69	1372–P	1321–P	1554–P	1885–P
Phillip Kristof	NOL	–	–	–	52

APPENDIX B.—SUMMARY OF HOURS WORKED 1981, 1982, 1983 and 1984 CALENDAR YEARS—Continued

Name	*Position on Local 1982 Seniority List*	*1981*	*1982*	*1983*	*1984*
Edward Lawler*	178	269	236-E	549-E	699-Q
James S. Loveless*	74	1187-P	607-P	1072-P	8-P (Disabled)
Keene Ludlow*	29	1532-P	1891-P	2239-P	2268-P
Dennis J. McVicker*	46	164	100	150	473-Q
Telesforo M. Oliverez*	90	234	208	717-E	885-Q
Zelmer L. Owens	61	426	303-E	614-E	747-Q
Julio Ramirez*	52	260	306	505-E	176-Q
Alfonso Rizo*	106	190	257-E	762-E	929-Q
Juan Rizo*	99	1275-P	1065-P	1465-P	1845-P
Miguel S. Rizo*	100	208	256-E	758-E	862-Q
Joseph M. Rucki*	9	1511-P	2035-P	2201-P	2187-P
Walter Sampsel*	20	358	918	1331-P	1738-P
Oree Sanders*	109	96	18	4	24
Domingo Serna*	18	469	205-E	538-E	849-Q
Charles R. Spencer*	101	114	284	720	885-Q
Mearl Sutton, Sr.*	27	489	286-E	552-E	817-Q
Charles J. Syph	125	-	-	352	300
Cleo Syph*	16	741-P	2914-P	3064-P	3338-P
Fred Syph*	95	40	194	525	659-Q
Theodore Syph*	102	137	300-E	643-E	670-Q
Donald E. Tefft*	108	163	300	731-E	834-Q
Salome Torres*	71	296	117	103	615-Q
James Turner*	22	1333	1126-P	1586-P	1813-P
Mark Turner*	NOL	-	40	353	552-Q
Sherrond Turner*	118	-	78	306	670-Q
Alton Victorian*	107	215	193	446	535-Q
Joseph L. Victorian*	92	225	872-P	1326-P	2176-P
Ledray Victorian*	36	1529-P	1946-P	2299-P	2421-P
Robert White	NOL	469	322-E	711-E	924-Q

* Signed Syph's December 29, 1981, application to ILA to charter a new general cargo local in the Port of Toledo.
** NOL—Not on Local 1982 Seniority List.

APPENDIX C.—PREFERRED LIST

Name	*Faction*	*Years*			
		1981	*1982*	*1983*	*1984*
John R. Bennett, Jr	(Syph)	N/A	N/A	N/A	X
Joseph A. Bollman, Jr	(Syph)	X	X	X	X
Robert W. Burkhard	(Syph)	X	X	X	X
Harold L. Chevalier	(Syph)	X	X	X	X
Joseph E. Cutcher	(Syph)	X	X	X	X
David Ray Edwards	(Moody)	X	N/A	N/A	N/A
Charles D. Erichson	(Syph)	X	X	X	X
Francis L. Kristof	(Syph)	X	X	X	X
James Loveless	(Syph)	X	X	X	X*
Keene T. Ludlow	(Syph)	X	X	X	X
Shirley Marsenburg	(Moody)	X	N/A	N/A	N/A
Charles C. Moody	(Moody)	X	X	X	X
Juan Rizo	(Syph)	X	X	X	X
Joseph M. Rucki	(Syph)	X	X	X	X
Walter E. Sampsel	(Syph)	N/A	X	X	X
Cleo Syph	(Syph)	X	X	X	X
James Turner	(Syph)	X	X	X	X

APPENDIX C.—PREFERRED LIST—Continued

Name	*Faction*	*Years*			
		1981	*1982*	*1983*	*1984*
Joseph L. Victorian	(Syph)	N/A	X	X	X
Ledray Victorian	(Syph)	X	X	X	X
Total		16	16	16	17

At the beginning of 1982, J. Victorian and W. Sampsel were added to the list.

At the beginning of 1984, J. Bennett was added to replace J. Loveless, who was classified by TWT as permanently disabled during 1984.••

• Indicates insufficient hours.

•• Any notation here or on Appendices B and D that an individual was "disabled" or "retired" is a contention on the part of Respondent TWT rather than a determination by the undersigned, who regards such questions as best left to a supplementary proceeding.

APPENDIX D.— "EXPERIENCED" AND QUALIFIED EMPLOYEES

	X	*1981*	*1982*	*1983*	*1984*	
					April-May	*May-Dec.*
Preferred List-Schedule A		*16*	*16*	*16*	*17*	*17*
Name	Faction	Note 1	Note 2	Note 3	Note 4	Note 5
David Antonnacci	(Syph)	X	X	X	X	
Joseph F. Barteck, Jr	(Moody)	X	X	X	••	
Paul Ben	(Moody)	X	X	X		
John R. Bennett, Jr	(Syph)	X	X	To Preferred	Preferred	
Matthew Bennett	(Moody)	X	Disabled	Disabled	Disabled	
Gerald Berg	?	X	X	X	X	
Johnnie Clemons	(Moody)	X	X	X	X	
M. Csizi	(Moody)	X	Retired	Retired	Retired	
David R. Edwards	(Moody)	X	X	X	X	
Alvin R. Freeman	(Moody)	X	X	X	X	
Tommy Gaines	(Moody)	X	•	•	••	
Herman Glover	(Moody)	X	•	•	••	
Lloyd R. Hansen	(Syph)	X	X	X	X	
Robert L. Highsmith	(Moody)	X	•	•	X	
Gaylon Howard	(Moody)	X	X	•	••	
Shirley M. Marsenburg	(Moody)	X	X	•	X	
William S. McCully	(Moody)	X	•	•	X	
Raymond Merrill	(Moody)	X	X	X	••	
Robert L. Moody	(Moody)	X	X	•	••	
Harry Nolan	(Moody)	X	Retired	Retired	Retired	
Zelmer L. Owens	(Syph)	X	X	X	X	
Domingo S. Serna	(Syph)	X	X	X	X	
Milton Shoecraft	(Moody)	X	•	•	••	
Willie M. Spivey	(Moody)	X	X	X	X	
Mearl E. Sutton, Jr	(Syph)	X	X	X	X	
Robert G. White	(Syph)	X	X	X	X	
Total		26				
Edward Lawler	(Syph)			X	X	X
Telesforo Oliverez	(Syph)			X	X	X
Julio C. Ramirez	(Syph)			X	X	X
Alfonso S. Rizo	(Syph)			X	X	X
Miguel S. Rizo	(Syph)			X	X	X
Charles R. Spencer	(Syph)			X	X	X
Theodore R. Syph	(Syph)			X	X	X
Donald E. Tefft	(Syph)			X	X	X
Total				26		

APPENDIX D.— "EXPERIENCED" AND QUALIFIED EMPLOYEES—Continued

	X	*1981*	*1982*	*1983*	*1984*	
					April-May	*May-Dec.*
Jack L. Beese	(Syph)				X	X
Fred Syph	(Syph)				X	X
Alton B. Victorian	(Syph)				X	X
Total					25	
Preferred List-Schedule A		*16*	*16*	*16*	*17*	*17*
Name	Faction	Note 1	Note 2	Note 3	Note 4	Note 5
Harkles Bacon	(Moody)					X
Cecil Hood	(Moody)					X
Dennis J. McVicker	(Syph)					X
Salome Torres	(Syph)					X
Claude R. Tucker, Sr	(Moody)					X
Mark A. Turner	(Moody)					X
Sherrond J. Turner	(Moody)					X
Total			42	42	42	50

Note 1—First year of operation. No special list of employees utilized other than "preferred" men.
2—Individuals who qualified as "experienced employees" in 1982 (350 hours or more in 1981).
3—Individuals who qualified as "experienced employees" in 1983 (200 hours or more in 1982).
4—Individuals who qualified as "experienced employees" in 1984 (400 hours or more in 1983).
5—Individuals who became "qualified" employees under the 1984 contract.

* Indicates insufficient hours.

** Indicates individual did not qualify among top 50 under the May, 1984, TWT rating.

Biltmore Construction Company, Inc. ***and*** **Iron Workers Local Union No. 10 affiliated with the International Association of Bridge, Structural and Ornamental Iron Workers, AFL–CIO.** Case 17–CA–13638

June 30, 1988

DECISION AND ORDER

BY MEMBERS JOHANSEN, BABSON, AND CRACRAFT

Upon a charge filed by the Union December 17, 1987, the General Counsel of the National Labor Relations Board issued a complaint against Biltmore Construction Company, Inc., the Respondent, alleging that it has violated Section 8(a)(1), (3), and (5) of the National Labor Relations Act. Although properly served copies of the charge and complaint, the Respondent has failed to file an answer.[1]

On February 22, 1988, the General Counsel filed a Motion for Summary Judgment. On February 29, 1988, the Board issued an order transferring the proceeding to the Board and a Notice to Show Cause why the motion should not be granted. The Respondent filed no response. The allegations in the motion are therefore undisputed.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

Ruling on Motion for Summary Judgment

Section 102.20 of the Board's Rules and Regulations provides that the allegations in the complaint shall be deemed admitted if an answer is not filed within 14 days from service of the complaint, unless good cause is shown. The complaint states that unless an answer is filed within 14 days of service, "all of the allegations in the Complaint shall be deemed to be admitted to be true and shall be so found by the Board." Further, the undisputed allegations in the Motion for Summary Judgment disclose that counsel for the General Counsel, by letter dated February 12, 1988, notified the Respondent that unless an answer was received by February 16, 1988, a Motion for Summary Judgment would be filed.

In the absence of good cause being shown for the failure to file a timely answer, we grant the General Counsel's Motion for Summary Judgment.

On the entire record, the Board makes the following

FINDINGS OF FACT

I. JURISDICTION

The Respondent, a Missouri corporation, is engaged in the construction industry and has an office and place of business in Sedalia, Missouri. Based on a projection of its operations since about October 1, 1987, at which time the Respondent commenced its operations, the Respondent, in the course and conduct of its business operations, will annually perform services valued in excess of $50,000 in States other than the State of Missouri and will annually provide services valued in excess of $50,000 to other enterprises located within the State of Missouri, which meet the Board's jurisdictional standards. We find that the Respondent is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act and that the Union is a labor organization within the meaning of Section 2(5) of the Act.

II. ALLEGED UNFAIR LABOR PRACTICES

Since about December 1987, the Union has been recognized by the Respondent as the designated collective-bargaining representative of the employees in the following appropriate bargaining unit:

> All employees of Respondent performing all types of construction work within the established craft jurisdiction of the International Association of Bridge, Structural and Ornamental Iron Workers, and in the following counties in Missouri: Andrew, Atchison, Barton, Bates, Benton, Buchanan, Caldwell, Carrol, Cass, Cedar, Chariton, Christian, Clay, Clinton, Cooper, Dade, Dallas, Daviess, Dekalb, Gentry, Greene, Grundy, Harrison, Henry, Hickory, Holt, Howard, Jackson, Johnson, Lafayette, Linn, Livingston, Mercer, Moniteau, Morgan, Nodaway, Ozark, Pettis, Platte, Polk, Randolph, Ray, St. Clair, Saline, Sullivan, Taney, Vernon, Webster, Worth, Wright and portions of Boone, Camden, Douglas, Laclede and Miller; and the following counties in Kansas: Allen, Anderson, Atchison, Bourbon, Brown, Coffey, Doniphan, Douglas, Franklin, Jackson, Jefferson, Johnson, Leavenworth, Linn, Lyon, Marshall, Miami, Nemaha, Osage, Pottawatomie, Riley, Shawnee, Wabaunsee, Wyandotte, and portions of Neosho and Crawford counties, but

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[1] On January 26, 1988, the Regional Director for Region 17 issued a complaint and notice of hearing in this proceeding, pursuant to Sec. 102.15 of the Board's Rules and Regulations. A copy was sent to the Respondent by first class mail and was served on counsel for the Respondent by certified mail on the same date. By letter dated February 12, 1988, counsel for the Respondent withdrew as the Respondent's representative in this proceeding. Thereafter, the General Counsel sent to the Respondent a copy of the Motion for Summary Judgment by certified mail with a copy of the complaint attached, but these documents were returned "unclaimed." The Respondent was thereafter served with a copy of the order transferring proceeding to the Board and Notice to Show Cause, by certified mail, on March 11, 1988. The record indicates no attempt was made by the Respondent to respond to this Notice to Show Cause.

289 NLRB No. 90

excluding supervisors within the meaning of the Act, and all other employees.

About December 3, 1987, the Union and the Respondent reached full and complete agreement regarding terms and conditions of employment of the employees in the agreed-on unit to be incorporated in a collective-bargaining agreement between the Union and the Respondent, and executed a contract stipulation binding the Respondent to the current collective-bargaining agreement between the Union and the Builders' Association of Missouri, effective by its terms for the period April 1, 1987, until March 31, 1990. Since December 10, 1987, the Respondent has failed and refused to recognize and bargain with the Union and has refused to abide by and adhere to the collective-bargaining agreement.

We find that by the acts and conduct described above the Respondent has failed and refused to bargain collectively and is failing and refusing to bargain collectively with the representative of its employees, and the Respondent has been engaging in unfair labor practices within the meaning of Sections 8(a)(5) and (1) and 8(d) of the Act.

About December 10, 1987, the Respondent, acting through Foreman Robert Cecil, at a jobsite located at 49th and Parallel in Kansas City, Kansas, informed prospective employees that they would not be hired because of their affiliation with a labor organization. We find that by such conduct the Respondent has interfered with, restrained, and coerced employees in the exercise of the rights guaranteed them in Section 7 of the Act, and that the Respondent thereby has engaged in unfair labor practices within the meaning of Section 8(a)(1) of the Act.

About December 10, 1987, the Respondent refused to hire job applicants Edward Anderson, William Billings, and Robert Williams because these applicants joined, supported, or assisted the Union and engaged in concerted activities for the purpose of collective bargaining or other mutual aid or protection and in order to discourage employees from engaging in such activities or other concerted activities. We find that by these acts the Respondent has discriminated, and is discriminating, regarding the hire or tenure or terms or conditions of employment of its employees, thereby discouraging membership in a labor organization, and the Respondent thereby has been engaging in unfair labor practices within the meaning of Section 8(a)(1) and (3).

CONCLUSIONS OF LAW

1. The Respondent has engaged in unfair labor practices affecting commerce within the meaning of Section 8(a)(5) and (1) and Section 2(6) and (7) of the Act by failing and refusing to recognize and bargain with the Union and failing and refusing to adhere to the contract stipulation executed about December 3, 1987.

2. The Respondent has engaged in unfair labor practices affecting commerce within the meaning of Section 8(a)(1) and Section 2(6) and (7) of the Act by informing prospective employees that they would not be hired because of their affiliation with a labor organization.

3. The Respondent has engaged in unfair labor practices within the meaning of Section 8(a)(1) and (3) and Section 2(6) and (7) of the Act by refusing to hire applicants because they joined, supported, or assisted the Union and engaged in protected concerted activities.

REMEDY

Having found that the Respondent has engaged in certain unfair labor practices, we shall order it to cease and desist and to take certain affirmative action designed to effectuate the policies of the Act.[2]

Having found that the Respondent failed to hire Edward Anderson, William Billings, and Robert Williams in violation of Section 8(a)(3) and (1) of the Act, we shall order that the Respondent offer them employment[3] and make them whole for any loss of wages and other benefits resulting from its failure to hire them starting December 10, 1987, by payment to them of a sum of money equal to the amount they would have earned in wages and other benefits from that date to the date on which employment is offered, less net earnings. The amount of backpay shall be calculated in the manner set forth in *F. W. Woolworth Co.*, 90 NLRB 289 (1950), with interest to be computed in the manner prescribed in *New Horizons for the Retarded*.[4]

Having further found that the Respondent unlawfully refused to abide by and adhere to the terms and conditions of its collective-bargaining agreement with the Union, we shall order the Respondent to make its employees whole for any loss in wages or other benefits due to the Respondent's refusal to apply the terms of the collective-bargaining agreement, as prescribed in *Ogle Protection*

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[2] The General Counsel requested a visitatorial clause. In the circumstances of this case, that clause is unwarranted. See *Cherokee Marine Terminal*, 287 NLRB 1080 (1988).

[3] The complaint does not state the specific type of employment the applicants were seeking. We shall leave to compliance the factual inquiry into the specific jobs sought and wages and other benefits. See, e.g., *Dean General Contractors*, 285 NLRB 573 (1987).

[4] 283 NLRB 1173 (1987). Interest on and after January 1, 1987, shall be computed at the "short-term Federal rate" for the underpayment of taxes as set out in the 1986 amendment to 26 U.S.C. § 6621.

Service, 183 NLRB 682 (1970), and *Kraft Plumbing & Heating*, 252 NLRB 891 (1980), with interest as prescribed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987).[5]

ORDER

The National Labor Relations Board orders that the Respondent, Biltmore Construction Company, Inc., Sedalia, Missouri, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Failing and refusing to bargain collectively and in good faith with the representative of its employees in the following appropriate bargaining unit:

> All employees of Respondent performing all types of construction work within the established craft jurisdiction of the International Association of Bridge, Structural and Ornamental Iron Workers, and in the following counties in Missouri: Andrew, Atchison, Barton, Bates, Benton, Buchanan, Caldwell, Carrol, Cass, Cedar, Chariton, Christian, Clay, Clinton, Cooper, Dade, Dallas, Daviess, Dekalb, Gentry, Greene, Grundy, Harrison, Henry, Hickory, Holt, Howard, Jackson, Johnson, Lafayette, Linn, Livingston, Mercer, Moniteau, Morgan, Nodaway, Ozark, Pettis, Platte, Polk, Randolph, Ray, St. Clair, Saline, Sullivan, Taney, Vernon, Webster, Worth, Wright and portions of Boone, Camden, Douglas, Laclede and Miller; and the following counties in Kansas: Allen, Anderson, Atchison, Bourbon, Brown, Coffey, Doniphan, Douglas, Franklin, Jackson, Jefferson, Johnson, Leavenworth, Linn, Lyon, Marshall, Miami, Nemaha, Osage, Pottawatomie, Riley, Shawnee, Wabaunsee, Wyandotte, and portions of Neosho and Crawford counties, but excluding supervisors within the meaning of the Act, and all other employees.

(b) Failing and refusing to abide by and adhere to the collective-bargaining agreement between the Union and the Builders' Association of Missouri, which became binding on the Respondent when it executed a contract stipulation with the Union about December 3, 1987.

(c) Informing prospective employees that they will not be hired because of their affiliation with a labor organization.

(d) Failing and refusing to hire Edward Anderson, William Billings, and Robert Williams because they joined, supported, or assisted the Union and engaged in concerted activities for the purpose of collective bargaining or other mutual aid or protection and in order to discourage employees from engaging in such activities.

(e) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Offer Edward Anderson, William Billings, and Robert Williams employment and make them whole, with interest, in the manner set forth in the remedy section of this decision.

(b) On request, bargain collectively with the Union as the exclusive representative of the employees in the above-described unit.

(c) Abide by and adhere to the terms and provisions of the collective-bargaining agreement reached with the Union, which is effective April 1, 1987, through March 31, 1990.

(d) Make employees whole for any loss of earnings and other benefits, plus interest, as set forth in the remedy section, due to the Respondent's failure to abide by and adhere to the collective-bargaining agreement with the Union.

(e) Remove from its files any reference to the unlawful refusal to hire the above-named employees and notify them in writing that this has been done and that it will not use the refusal to hire them against them in any way.

(f) Preserve and, on request, make available to the Board or its agents for examination and copying, all payroll records, social security payment records, timecards, personnel records and reports, and all other records necessary to analyze the amount of backpay due under the terms of this Order.

(g) Post at its facility in Sedalia, Missouri, copies of the attached notice marked "Appendix."[6] Copies of the notice, on forms provided by the Regional Director for Region 17, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material.

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[5] Further, under *Merryweather Optical Co.*, 240 NLRB 1213 (1979), we leave the determination of any additional amounts due employee benefit funds to the compliance stage.

[6] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

(h) Notify the Regional Director in writing within 20 days from the date of this Order what steps the Respondent has taken to comply.

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

WE WILL NOT fail and refuse to bargain with the Iron Workers Local Union No. 10 affiliated with the International Association of Bridge, Structural and Ornamental Iron Workers, AFL–CIO as the exclusive bargaining representative of the employees in the following appropriate bargaining unit:

> All employees of Respondent performing all types of construction work within the established craft jurisdiction of the International Association of Bridge, Structural and Ornamental Iron Workers, and in the following counties in Missouri: Andrew, Atchison, Barton, Bates, Benton, Buchanan, Caldwell, Carrol, Cass, Cedar, Chariton, Christian, Clay, Clinton, Cooper, Dade, Dallas, Daviess, Dekalb, Gentry, Greene, Grundy, Harrison, Henry, Hickory, Holt, Howard, Jackson, Johnson, Lafayette, Linn, Livingston, Mercer, Moniteau, Morgan, Nodaway, Ozark, Pettis, Platte, Polk, Randolph, Ray, St. Clair, Saline, Sullivan, Taney, Vernon, Webster, Worth, Wright and portions of Boone, Camden, Douglas, Laclede and Miller; and the following counties in Kansas: Allen, Anderson, Atchison, Bourbon, Brown, Coffey, Doniphan, Douglas, Franklin, Jackson, Jefferson, Johnson, Leavenworth, Linn, Lyon, Marshall, Miami, Nemaha, Osage, Pottawatomie, Riley, Shawnee, Wabaunsee, Wyandotte, and portions of Neosho and Crawford counties, but excluding supervisors within the meaning of the Act, and all other employees.

WE WILL NOT fail and refuse to abide by and adhere to the terms of our collective-bargaining agreement with the Union.

WE WILL NOT inform prospective employees that they will not be hired because of their affiliation with a labor organization.

WE WILL NOT fail and refuse to hire Edward Anderson, William Billings, and Robert Williams because they joined, supported, or assisted the Union and engaged in concerted activities for the purpose of collective bargaining or other mutual aid or protection and in order to discourage employees from engaging in such activities.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL, on request, bargain with the Union as the exclusive representative of our employees in the unit and honor the collective-bargaining agreement effective April 1, 1987, through March 31, 1990.

WE WILL offer Edward Anderson, William Billings, and Robert Williams employment and WE WILL make them whole for any loss of earnings and other benefits resulting from our refusal to hire them, less any net interim earnings, plus interest.

WE WILL remove from our files any reference to the unlawful refusal to hire the above-named employees and WE WILL notify each of them in writing that this has been done and that evidence of the unlawful refusal to hire will not be used against them in any way.

WE WILL make our employees whole for any loss of wages or other benefits, with interest, due to our failure to abide by and adhere to the terms of our collective-bargaining contract with the Union.

BILTMORE CONSTRUCTION COMPANY, INC.

System 99 ***and*** **Walter Manning.** Case 32–CA–4055

June 30, 1988

DECISION AND ORDER

BY MEMBERS JOHANSEN, BABSON, AND CRACRAFT

On September 30, 1982, Administrative Law Judge Timothy D. Nelson issued the attached Decision in this proceeding. The Respondent filed exceptions.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and has decided to affirm the judge's rulings, findings,[1] and conclusions,[2] and to adopt the recommended Order as modified[3] and set out in full below.

ORDER

The National Labor Relations Board orders that the Respondent, System 99, Oakland, California, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Refusing to allow an employee, on his request, the right to consult privately with an employee representative before submitting to an investigatory interview or meeting, which the employee reasonably believes may result in disciplinary action.

(b) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Post at its Oakland, California freight terminal copies of the attached notice marked "Appendix."[4] Copies of the notice, on forms provided by the Regional Director for Region 32, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material.

(b) Notify the Regional Director in writing within 20 days from the date of this Order what steps the Respondent has taken to comply.

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[1] In agreeing with the judge's findings that deferral to the arbitration award upholding Manning's discharge is not appropriate, we have applied the principles enunciated in *Spielberg Mfg. Co.*, 112 NLRB 1080 (1955), and affirmed in *Olin Corp.*, 268 NLRB 573 (1984). In this regard, the General Counsel demonstrated that deferral is unwarranted because the facts relevant to resolving the statutory issue relating to Manning's *Weingarten* rights were not presented to or decided by the arbitrator, and the contractual question decided by the arbitrator is not factually parallel to the *Weingarten* issue presented here.

[2] The judge correctly concluded that the interview at issue here was investigatory in nature, and we note that this case does not involve merely a physical examination or a "fitness for duty" examination, which is not within the purview of *NLRB v. J. Weingarten*, 420 U.S. 251 (1975). See, e.g., *Postal Service*, 252 NLRB 61 (1980).

[3] On our review of the record, we find that Manning was terminated because of the Respondent's belief that he had arrived to work intoxicated, and the Respondent's interpretation of Manning's conduct as a refusal to take the sobriety test. Thus, Manning's request for the right to consult with Pinkston did not form a basis for Manning's termination. In accord with *Taracorp*, 273 NLRB 221 (1984), which issued subsequent to the judge's decision, we find that the recommended remedy of reinstatement and backpay is inappropriate here because the Respondent discharged Walter Manning for cause. We shall modify the recommended Order by deleting provisions for make-whole relief and we will substitute a notice reflecting these modifications.

Member Johansen concurs in finding that a make-whole remedy is not appropriate where an employee has been disciplined for lawful reasons.

[4] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

289 NLRB No. 91

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

WE WILL NOT refuse to allow an employee, on request, the right to consult privately with the employee's representative before submitting to an investigatory interview or meeting, which the employee reasonably believes may result in disciplinary action.

WE WILL NOT in any like or related manner restrain or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

SYSTEM 99

Bernard T. Hopkins, Esq., for the General Counsel.

William E. Gore, Esq., of San Francisco, California, for the Respondent.

DECISION

STATEMENT OF THE CASE

TIMOTHY D. NELSON, Administrative Law Judge. Pursuant to timely unfair labor practice charges filed by Walter Manning, an Individual, on November 10, 1981,[1] against System 99 (Respondent), the Regional Director for Region 32 of the National Labor Relations Board (Board) issued a complaint and notice of hearing against Respondent on December 28. The complaint alleged in substance that Respondent had discharged Manning in violation of Section 8(a)(1) of the National Labor Relations Act (Act) as a result of a disciplinary interview between Manning and Respondent's agents during which Respondent refused—also allegedly in violation of Section 8(a)(1) of the Act—Manning's request for a private consultation with a union representative.

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[1] All dates are 1981 unless otherwise specified.

Respondent answered the complaint, admitting that its operations were subject to the Board's jurisdiction, but denying all wrongdoing.

I heard the matter in trial at Oakland, California, on June 17, 1982. At the trial, Respondent asserted as a separate affirmative defense to potential liability that the Board should defer to the results of an arbitration decision in its favor, pursuant to the policy enunciated in *Spielberg*.[2] This defense was litigated.

The parties filed timely posttrial briefs, which I have carefully considered.

On the entire record, I make these

FINDINGS OF FACT

I. BACKGROUND

Respondent is a California corporation providing interstate freight-hauling services by truck.[3] It has a freight terminal at Oakland, California, where Charging Party Walter Manning had been employed for about 5 years before he was fired on August 21.

The facts are disputed among the witnesses only at their marginally relevant fringes. Blending the most deliberate recollections of the witnesses and ignoring contrary testimony, which was improbable and/or incredibly uttered, I find that the essential facts bearing on the lawfulness of Respondent's actions are as follows:

Shortly after Manning had arrived at the Oakland terminal on the evening of August 21 to begin a swingshift of dockwork, Respondent's terminal manager, Daniel Maher, formed the impression that Manning was intoxicated. Maher conferred with George Gallioto, Respondent's assistant vice president for operations, and then summoned Manning to a meeting in Maher's office. Maher's admitted intention was to ask Manning whether he would submit to a sobriety test and, if Manning refused, to fire Manning, treating his refusal as presumptive evidence of intoxication. Respondent's agents believed that the collective-bargaining agreement between Respondent and Teamsters Local 70, Manning's bargaining agent, authorized summary dismissal of a worker in the bargaining unit for intoxication, that it permitted the employer to request a worker to take a sobriety test, and, if the worker refused to take the proposed test, that it permitted the employer to treat such refusal as presumptive evidence of intoxication warranting the worker's termination.[4] Similarly, Respondent's agents believed that they would not be able to sustain a discharge decision, if it were challenged and brought to arbitration, based simply on the testimony of management witnesses that a worker appeared to be intoxicated. Rather, there were only two practical means of sustaining an "intoxication" discharge, so Respondent's agents believed; either that the worker submit to and fail some scientifically respectable sobriety test, or that he refuse to submit to it, thereby creating a presumption that management would be sustained in acting on.

Maher arranged for the presence of witnesses in the meeting room to avoid any question about the adequacy of Respondent's warning and/or the nature of Manning's reply. In addition to Maher and Manning, the meeting was also attended by Terminal Operations Manager Ron Bruno and by two employees, Gordon Pinkston and Larry Dietrich. Maher explained that Pinkston and Dietrich were intended to function merely as nonparticipating "witnesses for Manning" and that the others would be witnesses for management. According to Maher, Pinkston and Dietrich were selected, rather than Chief Steward Bailey or the swingshift steward Redding, because neither steward was then available.[5] Pinkston, says Maher, had served in a kind of "acting steward" capacity in the past when regular stewards were not available.[6]

When the meeting began, Gallioto explained to Manning that management believed that he was intoxicated, that he was being requested to take a sobriety test, and that he would be fired if he refused to do so because his refusal would cause management to presume that he was intoxicated. Manning admittedly at least dodged—if not refused—the initial request that he submit to the test, protesting that he saw no need to and that he had been on medication for a recent injury.[7] The matter did not end, here, however. Rather, for at least another 30 minutes, by all accounts,[8] Respondent's agents (mostly Gallioto) continued to ask Manning to take the sobriety test, warning of the consequences if he refused, and urging him that it was in his best interests that he do so. All parties agree, moreover, that Manning neither directly refused nor assented to these latter requests.[9]

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[2] *Spielberg Mfg. Co.*, 112 NLRB 1080 (1955).

[3] In the year before the complaint issued, Respondent performed more than $50,000 worth of services in States other than California.

[4] The union contract was not put in evidence. All parties agree, however, that the contract is not explicit, but that Respondent's agents' beliefs are well supported by the history of practice and arbitration rulings under the pertinent contract clause.

[5] Bailey was then on a driving run. Redding was not working that evening.

[6] This is a disputed fact, one that I need not decide in view of my recommended disposition below.

[7] The record is not as clear as it might be whether Manning initially expressed a clear refusal to submit to the sobriety test. Respondent's witnesses use conclusionary language in so testifying. Manning's testimony does not expressly deny this, but it also suggests that he implicitly declined the request by dodging the subject. The General Counsel concedes on brief (at Br. 2) that Manning "refused" at this juncture. I assume hereafter that Manning did so, although it is clear, as detailed below, that Respondent's agents were not content with this preliminary indication of refusal.

[8] I accept this unanimous minimum estimate, although with reservations, because it is difficult on this record to envision how the limited amount of conversation that has been described by the witnesses would require 30 or more minutes to conclude.

At some point, unnecessary to determine with precision, Gordon Pinkston made some remark to Manning tending to echo Maher's warnings that Manning could be fired for not taking the test and that taking the test might well vindicate Manning in his implicit claim that it was his recent use of a medication that accounted for management's misperception that he was intoxicated. At some neighboring point, Manning stated that he would like to talk to Chief Steward Martin Bailey, making some additional complaint to the effect that Pinkston and Dietrich were not providing him with much representation. Maher or Gallioto turned down Manning's request to see Chief Steward Bailey. Maher recalls, consistent with Manning's recollection, and I find, that either Maher or Gallioto explained to Manning that "we couldn't do that for two reasons. Number 1, that we didn't really know when Martin [Bailey] would be in, it could be another hour, it could be longer. And the second reason was that Martin couldn't do anything further than what Mr. Pinkston and Mr. Dietrich could do simply because we weren't asking [Manning] to do something that was unreasonable or out of the contract."[10]

Eventually, and after he had been denied his request to confer with Chief Steward Bailey, Mainning asked if he could step outside the office to confer with Pinkston.[11] Pinkston agreed that he would be willing to do this, but Gallioto turned down this request, as well, insisting that whatever could be said could just as well be said in front of everyone in the office.[12]

Maher or Gallioto asked Manning at least once more after the foregoing whether Manning would take the test. When Manning was again silent, he was informed by Maher or Gallioto that his initial refusal would be treated as his last word on the subject. He was then informed that he was discharged.

Respondent subsequently issued this termination memorandum to Manning:

> On August 21, 1981, you came into the terminal at 5:00 p.m., behaving in an incoherent manner, slurring your speech and smelling of alcohol. Further, after questioning you, it was management's opinion that you were unable to perform the functions of your job and could have possibly injured yourself or someone else in the workplace if allowed to continue to work.
>
> While still on duty, you were requested to take a sobriety test to determine if you were under the influence of alcohol. Even though it was fully explained to you that refusal to take this test would result in discharge, you refused to do so in the presence of two Local Union employees. Your refusal to take a sobriety test constitutes a presumption of drunkeness under Article 44.
>
> Therefore, you are hereby discharged accordingly under Articles 42 and 44 of the Joint Council Seven Local 70 Local Pick-up and Delivery Supplemental Agreement.
>
> All monies due you are enclosed on check numbers 081354 and 081555.

Manning's discharge was grieved by his Union. After deadlock at an intermediate stage, the matter was referred for arbitration, and an arbitration hearing was held on October 24. The details of the presentation to the arbitrator are not part of this record. The two witnesses who testified about that hearing, Gallioto and Union Representative Bud Pratt, each tended to be impressionistic in their accounts. Pratt's account was somewhat more detailed, though still summary in tone. He testified that three basic arguments were presented to the arbitrator on Manning's behalf: That the company did not advise Manning what type of sobriety test it wanted him to take; that the company did not take into account Manning's "medication" excuse and failed similarly to give weight to the fact that Manning was "still on disability" on the day he was fired; and that Manning had not received proper union representation—with the emphasis here being on the assertion that Gordon Pinkston was not an authorized steward or representative of the Union for such purposes.

The arbitrator issued a brief, handwritten decision, stating as follows:

> The company is entitled, when it has reasonable cause to believe that an employee is intoxicated, to require him to take a sobriety test. If the employee refuses, in the teeth of a warning and with proper union representation, he may be discharged. Applying these principles to this case, I find that the termination of Walter Manning was proper.

II. ANALYIS AND CONCLUSIONS

This case raises questions under *Weingarten*[13] concerning Respondent's right to insist that Manning answer the implicit question, "Will you submit to a sobriety test?" without allowing Manning to consult privately with either his designated union steward or with fellow employee Gordon Pinkston, the employee whom Respondent brought to the interview to play a "witness" role "for" Manning. The General Counsel makes several related claims. Initially, the General Counsel asserts that the meeting in Maher's office was "investigative" in character, carrying with it the clear potential for disciplinary action against Manning, and that, accordingly, it was not merely for the ministerial purpose of communicating a disciplinary decision already decided. Cf. *Baton Rouge Water Works Co.*, 246 NLRB 995 (1979). Thus, argues the General Counsel, it was a classic situation in which Manning's *Weingarten*-established right under Section 7 of the Act to the assistance of an employee representative was triggered. The General Counsel makes two alternative *Weingarten*-related contentions in this regard: First, that Manning had a right to the assistance of authorized Union Representative Martin Bailey even if it might require a delay in the proceedings while awaiting Bailey's return from a driving run. Alternatively, the General Counsel contends that Manning was entitled to a private consultation with coemployee Pinkston before replying with finality to Respondent's attempt to get an answer regarding Manning's willingness to take a sobriety test. Pursuing these points, the General Counsel argues that Manning was privileged in refusing to answer the question with finality after being denied the right to consult; and that Respondent could not, under *Weingarten,* treat his refusal to answer as itself constituting grounds for disciplinary action. Finally, the General Counsel argues under *Kraft Foods,*[14] that Respondent must remedy its denial to Manning of *Weingarten* rights by reinstating Manning and making him whole with backpay.

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[9] Maher explained that management went to great lengths to repeat its warnings and requests so that it would be "very obvious and apparent that [Manning] was given a number of choices and opportunities to comply with that request."

[10] Gallioto testified that his reason for denying this request was because he viewed Manning's request as a stalling tactic, calculated to allow the passage of enough time so that his body would have metabolized any excess alcohol in his blood. Crediting Maher, and treating Gallioto's statement of his subjective intentions on the subject as just that, I find that no such reason as Gallioto described was, in fact, given to Manning as a basis for denying him a conference with Bailey.

[11] Crediting Maher's deliberate testimony and ignoring Manning's equivocal testimony implying that Pinkston—not Manning—initiated this request.

[12] Respondent's agents contradict themselves and one another on the precise reasons, if any, that were given by Gallioto when he turned down the request for consultation between Manning and Pinkston. There is some suggestion that Gallioto made reference to the request as a stalling tactic. Elsewhere, however, Maher implied that no reason was given and that the denial of this request was because management did not think that such consultation was appropriate to the "witness" function, which it had predetermined that Pinkston would fulfill. I conclude and find on equivocal evidence that Gallioto's suspicion that Manning was stalling was not expressed as a reason for denying the consultation request.

[13] *NLRB v. J. Weingarten, Inc.*, 420 U.S. 251 (1975).

A. *The Question of Deferral Under Spielberg*

Under *Spielberg*, supra, the Board will refrain from deciding the statutory merits of an alleged unfair labor practice and will defer to an arbitration decision that effectively decides the same issue, provided that the arbitration proceedings were conducted in a "fair and regular" manner and that the result reached by the arbitrator was not "repugnant" to the Act. And, as the Board has subsequently made clear, a necessary condition to deferral under *Spielberg* is that the "statutory" or "unfair labor practice" issue be "both presented to and considered by the arbitrator," the burden being on the party urging deferral to "prove that the [statutory] issue . . . was litigated before the arbitrator."[15]

I conclude that deferral to the October 24 arbitration decision would not be appropriate since it has not been shown that the statutory issue under *Weingarten* was either presented to or decided by the arbitrator. Respondent's showing on these points was simply too vague about what, precisely, was presented to and considered by the arbitrator.[16] Neither does the arbitrator's decision itself reveal that he considered or decided *any* statutory question, let alone the many-faceted questions presented relating to Manning's *Weingarten* rights. Granted, the arbitrator used the expression "proper union representation" within his decision; and, implicitly, it appears that in sustaining Manning's discharge, the arbitrator concluded that Manning had somehow been accorded "proper union representation." What is missing from the record, however, is any indication that the arbitrator intended the quoted expression to refer to the statutory propriety of the "representation" that Respondent allowed Manning to have. To the contrary, if the record reveals anything of substance on the question, it is that the issue of the "propriety" of Pinskton's "representation" was cast and decided in terms of whether Pinkston had any "official" status as a steward. This is not the central issue raised by the complaint, nor is it the one I decide below. Accordingly, I would not defer to the arbitration decision.

B. *The Merits*

So far as my own research and the parties' briefing efforts have revealed, there are no factual precedents for this case. It may therefore be said to present another unique twist to the interpretation and application of employees' *Weingarten* rights. In essential agreement with the General Counsel, however, and for reasons explicated below, I conclude that Respondent violated Section 8(a)(1) of the Act at least by refusing Manning's request to consult privately with Pinkston before responding finally to the implicit question: "Will you submit to a sobriety test?" I further conclude that a make-whole remedy under *Kraft Foods*, supra, is appropriate.

It is necessary to my ultimate conclusions that Respondent's attempts to get Manning to answer the question whether he would take a sobriety test be interpreted as having an "investigative" quality to them. In this regard, it must be borne firmly in mind that Respondent did not believe itself privileged in firing Manning based simply on the perceptions of its own agents that he was intoxicated. The right of an employer to take such action for that reason is unquestioned, but Respondent's reservations were practical in character. It wanted any such decision to "stick"; and it believed, justifiably on this record, that it needed either proof in the form of test results or "constructive proof" in the form of Manning's refusal to submit to a test, creating a recognized *presumption* of intoxication. In these circumstances, Manning's answer to the question posed at the meeting in Maher's office was fraught with significance. Respondent's agents knew it and went to extraordinary and formal lengths to ensure that there would be no doubt about what had happened in the meeting. The meeting was therefore confrontative in character, and Manning's refusal to accept the invitation to take the sobriety test would be an "admission" for disciplinary purposes equal in strength to an employee's outright admission of misconduct in a meeting called to investigate whether the employee had engaged in misconduct.[17]

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[14] *Kraft Foods,* 251 NLRB 598 (1980).

[15] *Suburban Motor Freight,* 247 NLRB 146, 147 (1980).

[16] This conclusion obtains even if one considers the testimony of Union Representative Bud Pratt, who was called by the General Counsel—not Respondent—regarding the details of the arbitration session.

Accepting these interpretations makes it simpler to conclude under *Weingarten* that Manning was entitled to the assistance of an employee representative. *Weingarten* makes clear that an employee who is asked to answer questions in an interview about his suspected misconduct is entitled to insist on union representation at such a meeting and that he is further insulated from discipline for refusing to participate if the employer refuses his demand for such representation. Where, as here, an employee is advised by his employer—and therefore he "reasonably believe"—that he may be disciplined if he refuses to submit to a proposed set of tests, there appears to be no reason for concluding that he should not be entitled to the services of representative before deciding what he will do. Indeed, it is commonplace for employers to tell employees that their "rights" in a given situation are limited to a single set of alternatives. And it is equally a phenomenon common to industrial life that employees will mistrust such "either/or" statements as correctly expressing their legal or contractual options. It is therefore evident that, as an exercise of the Section 7 right of employees to engage in mutual aid and protection, an employee may wish to consult with an employee representative before accepting an employer's ultimatum; and, being denied that request, that he may wish to "dummy up" in the face of further attempts by his employer to question him. Viewed this way, there is no apparent basis for distinguishing Manning's interest in representation from the interests under Section 7 that *Weingarten* recognizes. I therefore conclude that under these circumstances, Manning enjoyed the panoply of *Weingarten* protections during the meeting in Maher's office. The remaining question is whether those protections included the right to consult, and if so, with whom.

Whether Manning had a *Weingarten* right to delay the interview until Chief Steward Bailey returned, the question is doubtful, considering that Bailey was not expected back for perhaps an hour, so far as this record shows;[18] and the passage of that much time has made the results of any sobriety test to which Manning might ultimately agree to submit largely useless (although no record was made on this question). See, e.g., *Coca-Cola Bottling Co.*, 227 NLRB 1276 (1977). I need not decide this question, however, because I conclude that Respondent was obligated to provide Manning with an opportunity to consult with Pinkston once Manning requested that right.

I note first in this regard that Respondent has insisted throughout these proceedings that Pinkston was a suitable "alternate" union representative. It is equally clear from Maher's testimony on cross-examination, however, that Respondent was not prepared to allow even Pinkston to play any truly "representative" role in the interview. Rather, Maher's avowed intention was simply that Pinkston would be a "witness for" Manning.

Respondent had no right to impose such limits on the function of the employee "representative" for Manning, however. Rather, it is now settled that an employee has the right to consult with an employee representative before undergoing an interview when *Weingarten* protections apply. *Climax Molybdenum Co.*, 227 NLRB 1189, 1190 (1977), enf. denied 584 F.2d 360 (10th Cir. 1978); *Pacific Telephone & Telegraph Co.*, 262 NLRB 1048 (1982).

It was evidently the view of Respondent's agents Gallioto and Maher[19] that no amount of "consultation" between Manning and *any* representative could have changed the picture or altered the alternatives open to Manning as Respondent had presented them, and that any such consultation would therefore have been a waste of time.[20] This is not a judgment for Respondent to make, however. Rather, it is an employee's right under Section 7 of the Act to act in concert with fellow employees, which is the source of *Weingarten* protections, and, like other Section 7 rights, an employee's exercise of them is not subject to the employer's agreement that the exercise would be worthwhile. Clearly, in any case, Manning was on the spot; and it was hardly unreasonable of him to believe that a private, candid conference with an employee representative might give him a more reliable basis for deciding how to answer Respondent's question than would the statements made by the managers who had declared their inclination to fire him. The cited cases appear to contemplate exactly this kind of consultation; and it should be recalled that Respondent had the right, acknowledged by *Weingarten*, to proceed on the basis of information it could obtain through other means, if it did not wish to accord Manning the right to consult.

Respondent would probably argue here that there were no other means by which it could sustain Manning's discharge if he refused to take a sobriety test. But, if true, this was a dilemma of Respondent's own creation. First, if Respondent indeed has no contractual right to fire employees for perceived intoxication, it is because it has waived the right, either expressly, or by its failure to obtain more favorable contract language at the bargaining table after arbitration rulings interpreted the contract as a waiver of such rights. Second, Respondent could have accorded to Manning the right to consult an employee reprenstative, and, having done so, could have acted on the postconsultation response of Manning. I find no suggestion in *Weingarten* nor in the construing cases that would permit an employer to ignore an employee's *Weingarten* rights simply because it has waived the right at the bargaining table to act on other evidence available to it (presumably doing so to obtain some balancing concession). Rather, having made such a waiver, it is not our concern that Respondent may find it difficult to sustain an intoxication discharge unless it accords *Weingarten* rights of consultation before requiring an employee to make an election whether to take the sobriety test.

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[17] Respondent nowhere argues that Manning's refusal to take a sobriety test would be treated as punishable "insurbordination" and it is clear on this record that Manning was not fired because of his failure to follow an order. Rather, it bears repeating that Respondent's agents were looking for proof that Manning was intoxicated, which "proof" could be supplied by his refusal to take the test.

[18] Company testimony to this effect is not impeached by Manning's testimony that he met Bailey at the terminal about 15 or 20 minutes after he was discharged. By any account of the timing, this was at least 20 or 30 minutes after Manning requested Bailey's services.

[19] See especially testimony of Maher on cross-examination.

[20] I have concluded above that Respondent's agents did not express any particular concern—at least in the case of the request to "step outside" to talk to Pinkston—about the delay that granting that request might entail. Equivocal testimony by Respondent's agents supports this conclusion. I conclude here that Respondent's agents were not, in fact, particularly concerned that the request to step outside to talk with Pinkston was intended as a stall or would undermine any ultimate test results. Equivocal testimony by Respondent's agents likewise supports this conclusion. This conclusion is buttressed, moreover, by the fact that Respondent, for tactical reasons of its own, was willing to spend at least 30 minutes in attempting to extract from Manning an unequivocal refusal to submit to a sobriety test.

It is clear that Respondent chose not to fire Manning based on any impressions formed by its agents that he was intoxicated. Rather, it treated his very refusal to say whether he would take the test as tantamount to a refusal to take the test and relied on that constructive refusal as proof of intoxication, independent of its suspicions. This may, in itself, render its discharge decision unlawful as constituting, in effect, punishment for his privileged silence after being denied *Weingarten* rights to consult.[21] This question need not be decided, however, because the remedy would be the same in these circumstances even if Manning's discharge was for alleged misconduct, which was the subject of the August 21 meeting. *Kraft Foods*, supra. There, the Board held that a traditional make-whole remedy is presumptively appropriate once the General Counsel has "prov[ed] that respondent conducted an investigatory interview in violation of *Weingarten* and that the employee whose rights were violated was subsequently disciplined for the conduct which was the subject of the unlawful interview." On such a showing, the Board noted, "the burden shifts to the respondent . . . [who] must demonstrate that its decision to discipline the employee . . . was not based on information obtained at the unlawful interview." 251 NLRB at 598.

The prima facie basis for a make-whole order is found in the conclusion above that Respondent owed a duty to permit Manning the right to consult with Pinkston before he decided how to answer management's question, coupled with the undisputed evidence that Manning was "subsequently disciplined for the conduct [intoxication] which was the subject of the unlawful interview." Respondent came forward with no evidence in support of its own burden. To the contrary, everyone agrees that it was Manning's construed refusal to take the test that was the effective basis for his discharge. This, clearly, was "information obtained at the unlawful interview." See, especially in this regard, *L. A. Water Treatment*, supra at 245 fn. 9.

Respondent has also claimed—and it is tempting to conclude—that Manning's initial "refusal" to submit to the test, expressed before he made any *Weingarten* request, was the "independent" and real reason it relied on in firing him, and that the reason was not a product of the succeeding, unlawful portion of the interview. Whatever might have been management's right at that preliminary stage is, however, an academic question; for it is equally clear—and Maher expressly acknowledges it—that if Manning had, at any subsequent stage, indicated a willingness to take the test, he would not have been fired unless and until he failed the test. It must be recalled in this regard that if Manning had been permitted to consult with Pinkston, the latter might well have pointed out that, under the circumstances, Manning had nothing to lose by taking the test. Hearing this from a fellow employee in a candid, private setting might well have caused Manning to agree to the test, rather than remaining silent on the question. And if he had so agreed, he might have passed the test. Respondent's refusal to accord Manning those consultation rights has therefore made it impossible to know whether Manning would have been fired based on evidence other than that "evidence" which it obtained through Manning's silence—evidence that was itself tainted by its unlawful conduct. In such circumstances, under *Kraft Foods*, supra, Respondent has not carried the burden that shifted to it.

Conclusions of Law

1. Respondent is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

2. By denying to Walter Manning the right to consult privately with a fellow employee before deciding how to respond to Respondent's request that he take a sobriety test, Respondent has interfered with, restrained, and coerced an employee in the exercise of the rights guaranteed in Section 7 of the Act and thereby has engaged in and is engaging in unfair labor practices within the meaning of Section 8(a)(1) of the Act.

[Recommended Order omitted from publication.]

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[21] E.g., *Garment Workers Union v. Quality Mfg. Co.*, 420 U.S. 276 (1975); but see *L. A. Water Treatment*, 263 NLRB 244 (1982).

B and R Coal Co., Inc. *and* District 30, United Mine Workers of America. Case 9–CA–23286

June 30, 1988

SUPPLEMENTAL DECISION AND ORDER

By Chairman Stephens and Members Johansen and Cracraft

On December 16, 1986, the National Labor Relations Board issued its Decision and Order[1] in which it directed, inter alia, that the Respondent make whole unit employees for any losses they may have suffered as a result of the Respondent's unfair labor practices in violation of Section 8(a)(1) and (5) of the National Labor Relations Act. On May 14, 1987, the United States Court of Appeals for the Sixth Circuit issued its judgment enforcing, among other things, the backpay provisions of the Board's Order.[2] A controversy having arisen over the amount of backpay due under the Order, the Regional Director for Region 9, on January 5, 1988, issued a backpay specification and notice of hearing and on February 23, 1988, issued an amended backpay specification and an order rescheduling hearing setting forth allegations with respect to the amounts of backpay due. The Respondent was duly served with copies of each specification. The Respondent has not filed an answer to either specification and the allegations in the backpay specification, as amended, therefore stand uncontroverted.

On April 7, 1988, the General Counsel filed directly with the Board a motion to transfer proceeding to the Board and Motion for Summary Judgment with exhibits attached. Subsequently, on April 8, 1988, the Board issued an order transferring proceeding to the Board and a Notice To Show Cause why the General Counsel's Motion for Summary Judgment should not be granted, which were served by certified mail on the Respondent. The Respondent has failed to file a response to the Notice To Show Cause.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

On the entire record in this proceeding, the Board makes the following

Ruling on the Motion for Summary Judgment

Section 102.54 of the Board's Rules and Regulations provides in relevant part with respect to a backpay specification:

> (a) . . . The respondent shall, within 21 days from the service of the specification, if any, file an answer thereto . . . .
>
> . . . .
>
> (c) . . . If the respondent fails to file an answer to the specification within the time prescribed by this section, the Board may, either with or without taking evidence in support of the allegations of the specification and without notice to the respondent, find the specification to be true and enter such order as may be appropriate . . . .

The amended backpay specification specifically states that, pursuant to Section 102.54 of the Board's Rules and Regulations, the Respondent shall file an answer with the Regional Director and to the extent that such answer fails to deny allegations of the specification in the manner required under the Board's Rules and Regulations, and the failure to do so is not adequately explained, such allegations shall be deemed to be admitted to be true and the Respondent shall be precluded from introducing any evidence controverting them. According to the uncontroverted allegation of the Motion for Summary Judgment, counsel for the General Counsel informed the Respondent, by letter dated March 22, 1988, of the requirement to file an answer to the specification and of the General Counsel's intention to move for summary judgment in the above-styled case if no answer was filed. The letter was sent to the Respondent on the same date by certified mail. To date, Respondent has not filed an answer to the amended backpay specification, nor a response to the Notice To Show Cause.

Because the Respondent has not filed an answer to the amended backpay specification or offered any explanation for its failure to do so, in accordance with the rules set forth above the Board deems the Respondent to have admitted all allegations of the specification to be true and that there are no matters in issue requiring a hearing. Accordingly, we grant the General Counsel's Motion for Summary Judgment.[3]

ORDER

The National Labor Relations Board orders that the Respondent, B and R Coal Co., Inc., Weeksbury, Kentucky, its officers, agents, successors, and assigns, make whole the discriminatees named below, by payment to them of the amounts following their names plus interest accrued to the date of payment to be computed in the manner prescribed in *New Horizons for the Retarded*,[4] until payment of all backpay due is made, less tax withholdings required by Federal and state laws:

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[1] 282 NLRB No. 68.

[2] Unpublished.

[3] The amended backpay specification contained several mathematical errors that have been corrected in this Supplemental Decision and Order.

George Branham	$7,348.24
Hayden Burke	6,285.28
Dean Counts	6,285.28
Terry Johnson	13,046.59
Jesse Little	6,764.33
Jerry Johnson	4,648.12
Fon Martin	5,076.96
Claude Moore	6,285.28
Vincent Blevins	6,051.20
Jerry Hurt	6,285.28

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[4] 283 NLRB 1173 (1987). Interest will be computed at the "short-term Federal rate" for the underpayment of taxes as set out in the 1986 amendment to 26 U.S.C. § 6621.

Preece Coal Company *and* District 30, United Mine Workers of America. Case 9–CA–24228

June 30, 1988

DECISION AND ORDER

BY CHAIRMAN STEPHENS AND MEMBERS JOHANSEN AND CRACRAFT

On March 21, 1988, Administrative Law Judge Richard H. Beddow Jr. issued the attached decision. The Respondent filed exceptions and a supporting brief.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and brief and has decided to affirm the judge's rulings, findings, and conclusions[1] and to adopt the recommended Order as modified.[2]

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge as modified below and orders that the Respondent, Preece Coal Company, Turkey Creek, Kentucky, its officers, agents, successors, and assigns, shall take the action set forth in the Order as modified.

1. Substitute the following for paragraph 2(a).

"(a) Offer James David Smith immediate and full reinstatement to his former job or, if that job no longer exists, to a substantially equivalent position, without prejudice to his seniority or any other rights or privileges previously enjoyed, and make him whole for any loss of earnings and other benefits suffered as a result of the discrimination against him, in the manner set forth in the remedy section of this decision."

2. Substitute the following for paragraph 2(e).

"(e) Notify the Regional Director in writing within 20 days from the date of this Order what steps the Respondent has taken to comply."

3. Substitute the attached notice for that of the administrative law judge.

289 NLRB No. 93

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

Section 7 of the Act gives employees these rights.

To organize

To form, join, or assist any union

To bargain collectively through representatives of their own choice

To act together for other mutual aid or protection

To choose not to engage in any of these protected concerted activities.

WE WILL NOT bargain directly with any employees in the bargaining unit.

WE WILL NOT discharge or lay off any employees for engaging in activities protected by Section 7 of the Act.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL offer James David Smith immediate and full reinstatement to his former job or, if that job no longer exists, to a substantially equivalent position, without prejudice to his seniority or any other rights or privileges previously enjoyed and WE WILL make him whole for any loss of earnings and other benefits resulting from his discharge, less any net interim earnings, plus interest.

WE WILL remove from our files any reference to the layoff of James David Smith on April 31, 1987, and notify him in writing that this has been done and that evidence of this unlawful layoff will not be used against him in any way.

PREECE COAL COMPANY

Linda B. Finch, Esq., for the General Counsel.
Ray Blankenship and *Gary Wang*, of Greenwood, Indiana, for the Respondent.

DECISION

STATEMENT OF THE CASE

RICHARD H. BEDDOW JR., Administrative Law Judge. This matter was heard in Williamson, West Virginia, on 20 October 1987. Briefs subsequently were filed by both parties. The proceeding is based on a charge filed 24

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[1] In affirming the judge's conclusion that Smith's termination violated the Act, we do not rely on the judge's finding that the Respondent allowed Preece, a truckdriver who had been convicted of vehicular homicide, to continue working for the Company as a contract hauler was evidence of disparate treatment. One of the Respondent's contentions was that its insurance company would not insure Smith because of his DWI conviction. As the record fails to show that contract haulers are covered under the Company's insurance policy, we cannot find that Respondent's treatment of Preece is relevant to the inquiry of how Smith's situation was handled.

[2] We shall modify par. 2(a) of the judge's recommended Order to conform his reinstatement language to that customarily used by the Board. We shall also modify par. 2(e) to correct an inadvertent error.

April 1987,[1] by District 30 United Mine Workers of America. The Regional Director's complaint, dated 12 June, alleges that Respondent Preece Coal Company of Turkey Creek, Kentucky, violated Section 8(a)(1), (3), and (5) of the National Labor Relations Act by discharging employee James David Smith, by bypassing the Union, and by dealing directly with its employees concerning wage and benefit reductions.

On a review of the entire record in this case and from my observation of the witnesses and their demeanor, I make the following

FINDINGS OF FACT

I. JURISDICTION

Respondent is a Kentucky corporation engaged in the mining and sale of coal under contract with Island Creek Coal Company. During the past 12 months Respondent provided services valued in excess of $50,000 for Island Creek, an Illinois corporation that annually sells and ships coal valued in excess of $50,000 directly to points outside Kentucky. Respondent admits that at all times material it has been an employer engaged in operations affecting commerce within the meaning of Section 2(2), (6), and (7) of the Act, and that the Union is a labor organization within the meaning of Section 2(5) of the Act.

II. THE ALLEGED UNFAIR LABOR PRACTICE

Island Creek holds a lease on coal located in Hatfield, Kentucky. Respondent has a contract to mines and delivers this coal for Island Creek, and to conduct no other operations. Since June 1975, Respondent has recognized District 30 United Mine Workers of America as the collective-bargaining representative of all of its employees working at the Hatfield mine location.

Under its January 1985 contract with Island Creek, Respondent was paid $23 per ton of clean coal, however, effective November 1985 Respondent's payment was reduced to $22 per ton, effective August 1986 to $20 per ton, and effective December 1986 to $19.50 per ton. Its latest contractual arrangement, effective in March 1987, provides $18.50 per ton of clean coal for the first 5000 tons monthly, and a 50-cent reduction for each 5000 tons produced thereafter.

James David Smith began working for Respondent in October 1978 and worked at varying times as either a truckdriver or loader operator. Since 1979, Smith has been the union mine committeeman at Respondent's facility. He also has been the president of Local 1532 since June 1984. In 1986 Smith was employed as a truckdriver but was discharged in November 1986. Pursuant to an arbitration award dated 8 December 1986, Smith was reinstated as a truckdriver. Thereafter, in mid-January 1987, Respondent assigned Smith to operate the loader. Smith continued as a loader operator until he was discharged in April (he previously had performed the loader operator job for approximately 6 months in 1984 and 1985).

In late March, Paul Lawson, Respondent's accountant, came to the mine, met with the day-shift employees, and told them that Respondent was having financial problems and they needed to try to find a solution. Lawson explained that the problem was not a pressing one at the time, but Island Creek Coal Company was reducing the amount it paid per ton of coal and he suggested that the employees consider purchasing Respondent's stock. Lawson did not discuss the financial problems or his suggested stock purchase plan with any authorized union official prior to meeting with the employees.

Between 27 and 30 March, Mine Superintendent Jimmy Webb called Smith to the office and told him he wanted a meeting with the employees to discuss their taking a pay cut. Smith replied that it was a contract violation and he could not and would not discuss it. Webb then told Smith he had an insurance company letter saying he could not be a truckdriver. Smith replied he was not a truckdriver but a loader operator and walked away.

On Friday, 3 April, Webb met with the employees at the end of the day shift and told eight or nine day-shift and four second-shift employees that Respondent had been having financial problems and could not afford to buy supplies. He said that Respondent would close its mine if the employees did not reduce their daily wage rate to $100 per day and freeze all of their sick and personal days (daily wage rates were all more than $100 prior to this time). The discussion between Webb and the employees was underway when Smith, who had not been at work that day, joined the meeting. Smith told the other employees that Webb was violating the contract by making such a proposal, and it was a violation for Respondent to negotiate outside of the contract. Some employees suggested accepting Webb's proposal for a 30-day period, under certain conditions. This was conveyed to Webb, who refused this offer. The employees told Webb that they would not agree to a wage reduction and he responded by saying that there would be no more work. Smith instructed the men to report to work as usual on Monday, 6 April, to cover themselves, and to verify whether Respondent was going to close its operations. On Sunday evening, Respondent notified some employees to report to work the next day. On Monday, Webb also telephoned roof bolt operator Roger Stepp and told him to return to work the following day. Smith was not called to report back to work, but reported to the mine on 6 April on his own. When he went to his loader he was told to wait, and that Webb wanted to talk to him. Smith testified that Webb said, "David, I told you in the meeting the other day, if you'd stay out of this meeting and kept quiet that you'd be working. The other men are working and you're not." Smith again reported to work the following day, but was not allowed to work. Later that day Smith filed two grievances. A third grievance was filed on Friday, 10 April. Webb disagreed with each grievance on behalf of the Employer. Smith asked Webb why he would not let him work, and Webb grinned, and said that there was just no work for him and walked out.

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[1] All following dates will be in 1987 unless otherwise indicated.

On 15 April, Union Field Representative Vernon Adkins held a third-step grievance meeting with Webb. Smith and Lawson also were present. Adkins and Smith both testified that Adkins asked if there could be a settlement to get Smith back to work. Adkins testified that Webb said "There's no way. David would have been working, if he had kept quiet." Smith recalled that Webb replied "No, if he would have kept his mouth shut, this all could have been avoided," and that Adkins looked at him a little bewildered and asked what he had said, and Webb again said, "If they would have kept quiet, this all could have been avoided and we'd all be working now." Adkins said Webb made a similar statement three times during this discussion. One time saying "David would have been okay if he had kept quiet," and "If he would have kept his mouth shut, he would have been okay." During this meeting, Webb commented that Respondent had received a letter from its insurance company stating that they could no longer insure Smith as a truckdriver because he had been arrested for driving under the influence of alcohol and, therefore, he could not be returned to work. Adkins argued that Smith was not a truckdriver but a loader operator. Webb responded, "That makes no difference."

Smith testified that he was convicted of driving his own vehicle under the influence of alcohol on 10 February 1986. The subject was published in the local paper and the Company was aware of it. He attended school, had the points removed, and did not lose his license. He continued driving a truck for Respondent under a lease-purchase arrangement, in which he reimbursed Respondent for insurance cost for a policy through Respondent's insurer, Justice and Stamper Insurance Agency, until 15 November 1986. When the lease- purchase arrangement was ended, he apparently was laid off but after an arbitration proceeding in November he was returned to work on 8 December 1986. He was employed as a driver of one of Respondent's trucks until his January assignment as a loader operator.

On 11 March, the insurance agency notified Respondent that it would not reinsure Respondent unless Smith was deleted from the policy. Respondent promptly signed a waiver to that effect.

Respondent asserts that because of lower production under the sales contract, which became effective in March, it no longer required a full-time loader operator, and it resumed the practice of having truckdrivers load their own vehicles.

Mackey Preece is a truckdriver for the Company and continues to work as a contract hauler (along with one other driver with a similar arrangement), even though he was convicted of vehicular homicide in 1985. Preece Coal currently owns 4 trucks but owned as many as 17 in 1983 and 1984. It currently considers Smith to be on layoff status.

III. DISCUSSION

The issues in this case arose after the Respondent sought wage and benefit concessions from its employees, and thereafter laid off the union mine committeeman who opposed this action.

First, it is undisputed that both the mine superintendent and Respondent's accountant met directly with employees, discussed the Company's financial problems, and promoted changes (reductions in pay and leave benefits and a proposal for a new stock purchase program) in terms and conditions of employment. It appears that Superintendent Webb mentioned Respondent's plan to meet directly with the men to Smith, who promptly informed him that it would be contrary to the contract. Otherwise, it is shown that Smith had no authority to negotiate a change in the existing collective-bargaining agreement on behalf of the Union and, accordingly, I find that it is irrelevant that Smith was aware of or present during Respondent's meeting with the employees.

The clear purpose and effect of the meetings were to obtain changes in wages and benefits directly from the employees, regardless of the contract and bargaining agreement with the Union. It is well established that direct dealings with employees tend to undermine a union's status as exclusive representative and to inhibit parties from reaching agreement. See *Tralas Meat Co.*, 239 NLRB 1400 (1979). Although the Respondent asserts that its conduct was mandated by severe economic conditions, this factor does not allow an employer to repudiate or modify an existing collective-bargaining agreement, and bypass the process of negotiation with the designated bargaining representative.

Under these circumstances, I find that Respondent met and bargained directly with the employees concerning changes in terms and conditions of employment at a time when it was bound by an existing union contract and bargaining agreement and, accordingly, I conclude that Respondent is shown to have violated Section 8(a)(1) and (5) of the Act, as alleged.

At the end of Webb's meeting the employees made a counteroffer; however, Webb refused to accept their conditions and told them there would be no more work, thereby effectively laying off all the employees on Friday, 3 April. The following Sunday and Monday Respondent called most employees back to work. However, when Smith made repeated attempts to report to his usual job, he was specifically told by Webb that there was no work for him because he had interjected himself into the meeting on Friday.

In a discharge or layoff case of this nature, applicable law requires that the General Counsel meet an initial burden of presenting sufficient evidence to support an inference that the employee's union or other protected concerted activities were the motivating factor in the employer's decision to lay off and not recall the employee. Here, the record shows that Smith was the minesite union committeeman, that he objected to the Company's direct negotiations with the employees, and that he was told by the mine superintendent that he would be working if he would have kept quiet and stayed out of the meeting with employees. Under these circumstances, I find that the General Counsel has met his initial burden by presenting a prima facie showing sufficient to support an inference that Smith's union activities were the motivating factor in Respondent's decision to terminate him. Accordingly, the testimony will be discussed and the record evaluated in keeping with the criteria set forth in *Wright Line*, 251 NLRB 1083 (1980), see *NLRB v. Transportation Management Corp.*, 462 U.S. 393 (1983), to consider Respondent's defense, and to consider whether the General Counsel has carried her overall burden.

Respondent rests its defense on a claim that a reduction in its work force was required because of a decline in both the price it was paid for its coal and in its apparent level of production. It further asserts that Smith's job as a loader operator was not a regular job, and that because of the decreased volume of production, truckdrivers could do their own loading without the help of a full-time loader operator.

Although it is apparent that the Respondent did have financial difficulties, and subsequently experienced a decline in production, it is equally apparent that these concerns were not the primary reason for its decision on 6 April and thereafter to keep Smith from coming back to work.

The unrebutted,[2] credible testimony of both Smith and Union Field Representative Adkins shows that during the course of a grievance proceeding on 15 April Superintendent Webb repeatedly said that if Smith had "kept quiet" and had "kept his mouth shut" he would have been okay and would be working. Although Respondent asserts that Smith was laid off because there was no need for a loader operator, and because he could not be used as a truckdriver because of an insurance problem, there is no indication that Smith was ever given any formal notification of his layoff or that he was notified of this rationale for his layoff until the close of the grievance proceeding when his DWI conviction was mentioned. The facts surrounding the conviction show that it had occurred over a year earlier and that Smith had been employed as a truckdriver of Respondent's equipment during December 1986 and January 1987, and that Smith had cleared his record by attending traffic school. No effort was made by Respondent to investigate whether Smith's insurance status could be reconsidered, and no attempt was made to discuss the possibility of offering Smith other work or the opportunity to drive a truck as a contract hauler, as he previously did and as driver Macky Preece continued to do, despite a conviction for vehicular homicide. Moreover, an employee with 14 years' experience testified that immediately after Smith's layoff there continued to be enough coal being run to keep a full-time loader operator busy, as the operator also usually performs other maintenance type tasks around the minesite. Under these circumstances, I find that the reasons offered as justification for Smith's layoff, especially its opportunistic reliance on the action of its insurance company, clearly are inconsistent with the unrefuted reasons stated by its mine superintendent, and I conclude that Respondent's reasons are pretextual.

Respondent clearly knew of Smith's union position as mine committeeman, and his opposition to its attempt to bargain directly with the employees. It is well settled that an employee who invokes the provisions of a collective-bargaining agreement or otherwise engages in activities on behalf of a labor organization is engaged in protected concerted activity. The Company responded to the employees' refusal to accept concessions by announcing that there would be no more work but it then recalled all employees except Smith.[3] As discussed above, it is clear that the motivating factor behind Respondent's action was Smith's affrontary in opposing the Company's attempt to bypass the Union and obtain concessions directly from the employees.

Under all these circumstances, I conclude that Respondent has not met its burden of showing that Smith would have been laid off and not recalled, absent his union and protected concerted activity. The General Counsel otherwise has met its overall burden of proof, see *Chestnut Ridge Mining Corp.*, 268 NLRB 374 (1983), and I further conclude that Respondent is shown to have violated Section 8(a)(1) and (3) of the Act, as alleged.

CONCLUSIONS OF LAW

1. Respondent is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

2. The Union is a labor organization within the meaning of Section 2(5) of the Act.

3. By bargaining directly and unilaterally with employees in regard to wages and benefits, Respondent violated Section 8(a)(1) and (5) of the Act.

4. By laying off employee James David Smith on 3 April 1987, the Respondent engaged in unfair labor practices in violation of Section 8(a)(1) and (3) of the Act.

THE REMEDY

Having found that Respondent has engaged in an unfair labor practice, I recommend that Respondent be ordered to cease and desist therefrom and to take the affirmative action described below, which is designed to effectuate the policies of the Act.

With respect to the necessary affirmative action, I recommend that Respondent be ordered to reinstate James David Smith to his former job or to a substantially equivalent position, without prejudice to his seniority or other rights and privileges previously enjoyed, and make him whole for any loss of earnings he may have suffered because of the discrimination practiced against him by payment to him of a sum of money equal to that which he normally would have earned from the date of the discrimination to the date of reinstatement, in accordance with the method set forth in *F. W. Woolworth Co.*, 90 NLRB 289 (1950), with interest as computed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987),[4] and that

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[2] Webb did not testify. However, accountant Lawson, who also was present during the grievance proceeding, did testify but did not address or rebut the testimony of Smith and Adkins on this subject.

[3] Contrary to Respondent's assertion, the Company did make a threat of reprisal when Webb told the employees there would be no more work if they did not agree to a wage reduction and that this threat in fact was carried out against Smith when he was singled out to be omitted from the general recall back to work.

[4] Under *New Horizons*, interest is computed at the "short-term Federal rate" for the underpayment of taxes as set out in the 1986 amendment to 26 U.S.C. § 6621. Interest accrued before 1 January 1987 (the effective date of the amendment) shall be computed as in *Florida Steel Corp.*, 231 NLRB 651 (1977).

Respondent remove from its files any reference to the layoff and notify him in writing that this has been done and that evidence of this unlawful layoff will not be used as a basis for future personnel action against him.

Otherwise, it is not considered to be necessary that a broad order be issued.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[5]

ORDER

The Respondent, Preece Coal Company, Hatfield, Kentucky, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Bargaining directly with any employee in the bargaining unit.

(b) Discharging or laying off any employee for activity protected by Section 7 of the Act.

(c) In any like or related manner interfering with, restraining, or coercing its employees in the exercise of rights guaranteed to them by Section 7 of the Act.

2. Take the following affirmative action neccessary to effectuate the policies of the Act.

(a) Offer James David Smith immediate and full reinstatement and make him whole for the losses he incurred as a result of the discrimination against him in the manner specified in the remedy section of this decision

(b) Remove from its files any reference to the layoff or discharge of James David Smith on 3 April 1987, and notify him in writing that this has been done and that evidence of this unlawful layoff will not be used as a basis for future personnel actions against him.

(c) Preserve and, on request, make available to the Board or its agents for examination and copying, all records, reports, and other documents necessary to analyze the amount of backpay due under the terms of this decision.

(d) Post at its Hatfield, Kentucky facility, copies of the attached notice marked "Appendix."[6] Copies of the notice, on forms provided by the Regional Director for Region 9, after being signed by Respondent's authorized representative, shall be posted by Respondent immediately on receipt and maintained for 60 consecutive days in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by Respondent to ensure that the notices are not altered, defaced, or covered by any other material.

(e) Notify the Regional Director in writing within 20 days from the date of this Order what steps the Respondent has taken to comply.

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[5] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

[6] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

Pepsi-Cola Bottling Co. of Los Angeles *and* James H. Abernathy, Petitioner and Sales Drivers and Dairy Employees Union, Local 166, affiliated with International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, AFL-CIO.[1] Case 31-RD-1060

June 30, 1988

DECISION AND DIRECTION OF SECOND ELECTION

BY CHAIRMAN STEPHENS AND MEMBERS BABSON AND CRACRAFT

The National Labor Relations Board, by a three-member panel, has considered objections to an election held May 22, 1987, and the hearing officer's report recommending disposition of them. The election was conducted pursuant to a Stipulated Election Agreement. The revised tally of ballots shows 28 for and 26 against the Union.[2]

The Board has reviewed the record in light of the exceptions and brief and has adopted the hearing officer's findings and recommendations only to the extent consistent with this Decision and Direction of Second Election. The Board finds that the election must be set aside and a new election held.

The Employer filed the following objection:

> During the day before the election, the Union, through its agents and supporters, gathered in front of the Employer's facility and engaged in and created the impression of intimidating surveillance with the use of a video camera in front of employees. By this and other conduct, the Union intimidated employees, interfered with the employees' free choice, and made a free and fair election impossible.

The hearing officer recommended that the Employer's objection be overruled and that a Certification of Representative be issued. We disagree.

On the day before the election, representatives of the Union and other Teamsters' locals staged a rally for approximately 2 hours in front of the Employer's premises. Lenny Moore, the Union's vice president, business agent, and organizer, testified that he organized the rally at which there were 11 union representatives present. Jim Santangelo, secretary-treasurer of another local and trustee of the Joint Council of Teamsters, brought and operated a video camera. Santangelo did not testify, and no other union official offered any legitimate justification for having the video camera at the rally.

Four drivers in the bargaining unit testified that they saw a group outside the plant the day before the election. The drivers' testimonies reveal that several of the individuals in the group were wearing Teamsters jackets, that the drivers recognized Lenny Moore and Bob Isbell as union representatives but did not know the rest of the group, and that individuals handed out leaflets urging the drivers to support the Union.

Two drivers specifically testified that they thought they were videotaped. According to their testimony, as they were exiting the Employer's premises, individuals approached their vehicles and handed them union leaflets. At the same time, the video camera appeared to have been pointed in their direction.

Three drivers testified that they discussed the incident with other employees. Some drivers told other employees that their pictures had been taken. The Union had not provided the employees with any explanation for the videotaping, and the employees questioned whether the purpose of the picture taking was for future retaliation.

Tom Murphy, a supervisor, testified that when he saw the union officials outside, he went out and spoke to them and observed someone videotaping him along with Moore and other union officials. Murphy also testified that he did not see any threatening or violent behavior.

Summarizing the testimony, the hearing officer found that "it is undisputed that a Teamsters representative had a video camera at the Union rally." The hearing officer further found that because the camera appeared to be aimed at drivers, "at least two . . . drivers who testified at the hearing" believed that they had been taped.

The hearing officer concluded that the election need not be set aside because the videotaping did not create "an atmosphere of fear and coercion." The standard enunciated by the hearing officer is the standard applicable to conduct by employees or other third parties. When, as here, the allegedly objectionable conduct is attributable directly to union officials, the proper test is whether the "conduct reasonably tends to interfere with the employees' free and uncoerced choice in the election."[3]

Applying the proper standard, we find that the election must be set aside. Here, it is undisputed that on the day before the election a union representative appeared to videotape at least two employees as they exited the Employer's premises and were handed union leaflets. No legitimate explanation for the videotaping was offered to the employees at the rally, and none was proffered at the hearing. Under these circumstances, we find that the videotaping intruded on the employees' Section 7 right to refrain from any or all union activities, including the union rally then in progress. Absent any legitimate explanation from the Union, we find that employees could reasonably believe that the Union was contemplating some future reprisals against them. Clearly, such conduct would be intimidating and would reasonably tend to interfere with employee free choice in the election. Furthermore, the conduct cannot be dismissed as isolated or de minimis.[4] The incident was disseminated among employees in the unit, and a change in only one vote would have altered the election's outcome. Accordingly, we find that the election held May 22, 1987, must be set aside and a new election held.

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[1] On November 2, 1987, the Teamsters International Union was readmitted to the AFL-CIO. Accordingly, the caption has been amended to reflect that change.

[2] Of the 57 eligible voters, 54 cast ballots. The original tally of ballots showed 27 for and 26 against the Union with 1 determinative challenged ballot. The parties then stipulated that the challenged voter was eligible and the challenge to his ballot should be overruled. The challenged ballot was opened and counted and a revised tally issued June 18, 1987.

[3] *Baja's Place, Inc.*, 268 NLRB 868 (1984). Accord: *Bristol Textile Co.*, 277 NLRB 1637 (1986).

[Direction of Second Election omitted from publication.]

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[4] The cases cited by the hearing officer are distinguishable. *Friendly Ice Cream Corp.*, 211 NLRB 1032 (1974), did not involve union conduct, but employee conduct, and it was decided under the third-party standard of whether an atmosphere of fear and coercion was created. In *Interstate Cigar Co.*, 256 NLRB 496 (1981), the incidents in question were found to be isolated and did not involve photographing of unit employees.

David Vainio, H. Marie Vainio, Kevin Vainio and Leonard Vainio, d/b/a Professional Eye Care and d/b/a Eye Care *and* International Association of Machinists and Aerospace Workers, Local Lodge 88, affiliated with International Association of Machinists and Aerospace Workers, AFL-CIO *and* District Lodge 85, Local 88, International Association of Machinists and Aerospace Workers, affiliated with International Association of Machinists and Aerospace Workers, AFL-CIO. Cases 19-CA-18510, 19-CA-18646, 19-CA-19043, and 19-CA-19067

June 30, 1988

DECISION AND ORDER

BY MEMBERS JOHANSEN, BABSON, AND CRACRAFT

On September 1, 1987, Administrative Law Judge Richard D. Taplitz issued the attached decision. The Respondent filed exceptions, a supporting brief, and a motion to reopen the hearing; and the General Counsel filed a brief in support of the judge's decision and an opposition to the motion to reopen.[1]

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings,[2] and conclusions and to adopt the recommended Order.

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge and orders that the Respondent, David Vainio, H. Marie Vainio, Kevin Vainio and Leonard Vainio, d/b/a Professional Eye Care and d/b/a Eye Care, Butte and Missoula, Montana, its officers, agents, successors, and assigns, shall take the action set forth in the Order.

Eduardo Escamilla, Esq., for the General Counsel.
Kevin Vainio, Esq., of Butte, Montana, pro se.
Gary A. Taylor, of Butte, Montana, for the Charging Parties.

DECISION

STATEMENT OF THE CASE

RICHARD D. TAPLITZ, Administrative Law Judge. These cases were tried in Butte, Montana, on March 26, April 7 and 8, and June 30, 1987. The charge in Case 19-CA-18510 was filed on August 4, 1986, by Local Lodge 88, International Association of Machinists and Aerospace Workers (Lodge 88). A complaint issued in that case on September 10, 1986, alleging that David Vainio d/b/a Professional Eye Care violated Section 8(a)(5) and (1) of the National Labor Relations Act (the Act). The charge in Case 19-CA-18646 was filed on September 29, 1986, by District Lodge 85, Local Lodge 88, International Association of Machinists and Aerospace Workers (the Charging Parties). An order consolidating those two cases and an amended complaint issued on November 5, 1986. That amended complaint was further amended on December 19, 1986. The charge in Case 19-CA-18646 was amended on January 2, 1987, and a second order consolidating cases and second amended consolidated complaint issued on March 9, 1987, against David Vainio, H. Marie Vainio, Kevin Vainio and Leonard Vainio, d/b/a Professional Eye Care and d/b/a Eye Care (Respondents). The charge in Case 19-CA-19043 was filed by the Charging Parties on April 7, 1987, after the hearing on the other cases had begun. On April 7, 1987, a motion to consolidate all three cases and to amend the consolidated complaint was granted. The complaint as then amended alleged violations of Section 8(a)(1), (3), (4), and (5) of the Act. After the hearing on those cases had closed the General Counsel moved to reopen the hearing in Cases 19-CA-18510, 19-CA-18646, and 19-CA-19043 and to consolidate the complaint in those cases with a new complaint that had issued on May 12, 1987, in Case 19-CA-19067. The complaint in Case 19-CA-19067, which was based on a charge filed by the Charging Parties on April 15, 1987, against David Vainio, H. Marie Vainio, Kevin Vainio and Leonard Vainio, d/b/a Professional Eye Care (Professional Eye Care) alleged an additional violation of Section 8(a)(1), (3), and (4) of the Act. On May 15, 1987, I issued an order to show cause why the motion should not be granted. No opposition to the motion was heard and the General Counsel's motion was granted by order dated June 1, 1987. The hearing resumed and was completed on June 30, 1987.

Issues

The primary issues are

1. Whether Professional Eye Care (which is located in Butte as well as a number of other places in Montana) is

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[1] The Respondent has moved to reopen the hearing to introduce into evidence the final decision of the State of Montana Department of Labor and Industry, Unemployment Insurance Board, regarding the unemployment claim of Leonard Dalasera. We grant the Respondent's motion to the extent that we take notice that the unemployment decision (already entered into the record) is now final. There is nothing in the Respondent's motion that requires reopening the hearing or adds probative value to the unemployment compensation decision already considered by the judge. See *Supreme Dyeing & Finishing Corp.*, 147 NLRB 1094, 1095 fn. 1 (1964).

[2] The Respondent has excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

The Respondent alleges in its exceptions that the judge was biased against the Respondent. After carefully reviewing the record, we find no basis to support this claim.

289 NLRB No. 95

a single employer with Eye Care (which is located in Missoula, Montana).

2. Whether the laboratory employees at Eye Care in Missoula comprise an independent bargaining unit or whether the bargaining unit for the laboratory employees of Professional Eye Care in Butte should be extended to cover the Eye Care laboratory employees.

3. Whether Professional Eye Care discharged and Eye Care refused to hire Matt Grigsby because of his union activity.

4. Whether David Vainio, one of the owners of Professional Eye Care and Eye Care, assaulted John Flynn because he testified in these proceedings.

5. Whether Professional Eye Care discharged Leonard Dalasera because of his union activity and because he gave testimony in Board and Board-related proceedings.

6. Whether Professional Eye Care reduced the number of hours that employees worked without bargaining with the Union.

7. Whether Professional Eye Care bargained with the Union concerning a decision to move certain operations to Billings, Montana.

8. Whether Professional Eye Care bargained with the Union about a decision to lease or close its Butte lab.

9. Whether Professional Eye Care refused to give the Union information necessary for bargaining.

10. Whether Professional Eye Care refused to bargain in good faith with the Union.

All parties were given full opportunity to participate, to introduce evidence, to examine and cross-examine witnesses, to argue orally and to file briefs. Briefs, which have been carefully considered, were filed on behalf of the General Counsel and the Respondents.

On the entire record of the case and from my observation of the witnesses and their demeanor, I make the following

FINDINGS OF FACT

I. JURISDICTION

Professional Eye Care is an optical business with an office and place of business in Butte, Montana. It is owned and operated by David Vainio, H. Marie Vainio, Kevin Vainio, and Leonard Vainio (the Vainio family) and is engaged in the business of preparing, repairing, and selling eyeglass lenses and contact lenses. The Vainio family has operated Professional Eye Care and other affiliated business enterprises, with common ownership, directors, management, and supervision; has formulated and administered a common labor policy affecting employees in such enterprises; has common bank accounts and purchasing accounts; has shared common premises and facilities; has provided services for and made sales to each other; has interchanged personnel with each other; and has held themselves out to the public as a single, integrated business enterprise. Professional Eye Care and its affiliated enterprises constitute a single, integrated business enterprise and a single employer within the meaning of the Act. During the 12 months immediately preceding issuance of complaint, Professional Eye Care and its affiliated enterprises collectively had gross sales of goods and services valued in excess of $500,000 and sold and shipped goods and provided services to customers outside of Montana or to customers within Montana who were themselves engaged in interstate commerce by other than indirect means, of a total value in excess of $50,000. Professional Eye Care and its affiliated enterprises also meet the Board's jurisdictional standards regarding the inflow of goods and materials into Montana. Professional Eye Care is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

The above findings are based on allegations of the complaint in Case 19-CA-19067 which were admitted by Professional Eye Care. Respondents acknowledge that Professional Eye Care, as well as a number of affiliated enterprises owned by the Vainio family, constitute a single employer and are subject to the Board's jurisdiction. However, Respondents consistently maintained that Eye Care in Missoula is not such an affiliated concern and is not a single employer with or successor or alter ego of Professional Eye Care. The General Counsel has introduced no evidence to indicate whether Eye Care independently meets the Board's discretionary jurisdictional standards. Therefore, jurisdiction depends solely on whether the General Counsel had established a sufficient nexus between Eye Care and Professional Eye Care to demonstrate that jurisdiction should be taken over Eye Care because of Professional Eye Care's impact on interstate commerce. For the reasons set forth in detail below, I find that Eye Care is a single employer with Professional Eye Care and jurisdiction must therefore be asserted over both.

Local Lodge 88, International Association of Machinists and Aerospace Workers, AFL-CIO (the Union) is a labor organization within the meaning of Section 2(5) of the Act.

II. THE ALLEGED UNFAIR LABOR PRACTICES

A. *Background*

On April 24, 1985, after an election held by the National Labor Relations Board in Case 19-RC-11136, the Board certified the Union as the collective-bargaining representative of the employees of David Vainio d/b/a Professional Eye Care in the following bargaining unit:

> All laboratory employees employed by David Vainio d/b/a Professional Eye Care at the facility located at 225 South Idaho, Butte, Montana; but excluding all office clerical employees, guards and supervisors as defined in the Act.

The Union's organizational drive led not only to the certification but to a plethora of litigation. On May 13, 1986, Administrative Law Judge Clifford H. Anderson issued his decision in David Vainio, H. Marie Vainio, Kevin Vainio and Leonard Vainio, d/b/a Professional Eye Care, Cases 19-CA-17267, 19-CA-17445, 19-CA-17511, 19-CA-17569, 19-CA-17570, 19-CA-17833, and 19-CA-17913 (JD-(SF)-52-86, Butte, Montana). Judge Anderson found that Professional Eye Care violated Section 8(a)(1) of the Act "by interrogating employees about their union activities and sympathies and the sympathies of other employees, by soliciting employee complaints and grievances and promising to remedy such grievances, by threatening employees with closure of the facility or the subcontracting out of work if employees selected the Union as their collective-bargaining representative, by harassing employees because of the employees' union activities or because of their testimony in Board representation hearings, by informing its employees that it would be futile to choose the Union as [their] collective-bargaining representative, by threatening to bargain in bad faith, and by changing the shifts and holiday pay of employees because of their support for the Union." He found that Professional Eye Care violated Section 8(a)(3) and (1) of the Act by discharging employees Beverly Riley and Leonard Dalasera because of their union activities or because of the union activities of other employees.[1] Judge Anderson further found that Professional Eye Care violated Section 8(a)(5) and (l) of the Act:

> a. By transferring personnel and work from its Butte, Montana lab to its Idaho Falls, Idaho facility without notice to the Union and without affording the Union an opportunity to bargain concerning the decision and the effects of such removal.
>
> b. By unilaterally changing employees' terms and conditions of employment without first bargaining with the Union in good faith regarding those changes.
>
> c. By engaging in a course of conduct designed to undermine the Union and to avoid reaching agreement with the Union, including dilatory communication and scheduling of meetings with the Union, failure to conduct bargaining in a businesslike fashion, making regressive proposals while failing and refusing to supply specific information concerning those proposals or current conditions of employment of unit employees.

Judge Anderson recommended that the Board issue a broad order that would prohibit Professional Eye Care from in any manner interfering with, restraining, or coercing employees in the exercise of rights guaranteed under Section 7 of the Act.

In addition, Judge Anderson found that Professional Eye Care did not violate the Act as alleged in certain allegations of the complaint. One of those allegations was that Matt Grigsby was discharged because of his union or protected activity. Professional Eye Care reinstated Grigsby as part of a settlement agreement, after further litigation in the United States District Court and the Ninth Circuit Court of Appeals. The reinstatement preceded the issuance of Judge Anderson's decision and it was the understanding of Professional Eye Care that Grigsby was to be reinstated pending that decision. However, Professional Eye Care kept Grigsby in its employ after Judge Anderson's decision issued. Gary Taylor, business representative for the Union, credibly testified that in July 1986 he had a conversation with David Vainio in which Vainio said that he had no more trouble with Grigsby since he came back to work but that Grigsby's job would be phased out when the lab in Missoula started. Subsequently Grigsby was discharged from Professional Eye Care. The complaint in the instant case alleges that Professional Eye Care discharged him and Eye Care in Missoula refused to hire him because of his union activity.

Exceptions were filed to Judge Anderson's decision and the Board has not yet ruled in those cases. Although I have taken official notice of Judge Anderson's decision, in the absence of resolution by the Board, I have not based my findings in this case on any of his findings. The findings set forth below are based solely on the testimony of witnesses who appeared before me and the documentary evidence that was introduced in this case.

B. *The Single Employer and the Single Bargaining Unit Issues*

1. Factual findings

The Vainio family, through Professional Eye Care, which is also known as American Eye Care, owns and operates approximately 16 eye care centers located throughout Montana.[2] The Vainio family consists of optometrists David and Leonard Vainio, Attorney Kevin Vainio, and their mother H. Marie Vainio. Glasses are fitted at all Professional Eye Care centers. However before Eye Care in Missoula began operating a laboratory in early October 1986, substantially all the laboratory work flowing from the Professional Eye Care stores was performed in Professional Eye Care's laboratory in Butte, Montana. Two types of work were done at that Butte laboratory. One involved surfacing in which curves were ground into the lenses. That work required expensive heavy-duty equipment such as generators, cylinder machines, and cutters. The other type of work involved finishing and hardening. That consisted of laying lenses out according to prescription, marking them, edging them, shaping them to the shape of the frame and, regarding plastic lenses, hardening and scratch-coating them. Shortly before the Eye Care Missoula laboratory opened, the surfacing equipment that had been located in Professional Eye Care's Butte laboratory was moved to the Missoula lab. Butte had duplicate finishing machinery and one set of that machinery was also sent to Missoula. At the time the Eye Care Missoula laboratory opened, it was capable of performing both surfacing and finishing work while Professional Eye Care's Butte laboratory, which no longer had the surfacing equipment, was only capable of doing the finishing work. Surfacing has to be performed on about 25 percent of the jobs, as most lenses come from stock and only have to be finished. Butte now works with stock lenses and finishing while Missoula works with stock lenses, surfacing, and finishing.

At the time the Missoula laboratory opened, there were four employees working at Professional Eye Care's Butte laboratory. They were Matt Grigsby, Mike King, Leonard Dalasera, and Richard Delano. One of those employees, King, ceased working for Professional Eye

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[1] Dalasera was reinstated thereafter. It is alleged in the instant case that he was once again unlawfully discharged.

[2] The addresses are set forth in R. Exh. 2.

Care in Butte and began working for Eye Care in Missoula. Missoula is approximately 120 miles from Butte. As is discussed in detail below, Matt Grigsby was discharged by Professional Eye Care and was refused employment by Eye Care. For the reasons also set forth below, I have found that the discharge by Professional Eye Care was not violative of the Act but that Eye Care's refusal to hire him was a violation. In analyzing whether a majority of the employees at the Eye Care lab desired union representation, Grigsby must be considered an employee of Eye Care. The two other employees of Professional Eye Care in Butte were, at the time of the opening of the trial, still employed by Professional Eye Care.[3]

The Eye Care lab in Missoula opened with three or four employees.[4] The normal employee complement in the Eye Care lab is four or five and at the time of the trial there were four employees, one of whom was King who previously had worked at Professional Eye Care. All four of the employees work in the lab and none are supervisors. The Eye Care facility in Missoula consists of both a store and a lab. Two of the laboratory employees sometimes go into the store and handle a problem there. However, they are not engaged in dispensing or selling in the retail outlet on a routine basis. At the Butte lab also, the employees did not work strictly at the lab.[5]

For a number of years Professional Eye Care had been trying to open an optical store at the Southgate Mall in Missoula. No lease was obtainable because another optical store already had a lease at the mall with a 3-year "no competition" clause. After the 3 years expired, David Vainio, through John Flynn, Professional Eye Care's business manager, approached the mall's management about a lease. The management of the mall was not interested in another optical store but indicated that it would be interested in a full service operation which included examination, frames, and a complete lens preparation laboratory. David Vainio came to an agreement with the mall management to open such a full-service establishment and signed a lease in his own name. He and his wife were the only owners of the new facility that was named Eye Care. The other members of the Vainio family had no ownership interest in Eye Care.[6]

David Vainio owned half of the laboratory equipment at the Professional Eye Care Butte laboratory. The other half was owned by his brother Leonard Vainio. The two brothers negotiated for David Vainio to buy Leonard Vainio's half. The value of the equipment was put at $60,000 and David Vainio gave Professional Eye Care a check for $30,000 to pay for Leonard Vainio's interest. However, the transaction was not fully at arm's length. Both David and Leonard Vainio had access to the Professional Eye Care account so that David Vainio in effect was putting money into an account that he could draw out of. David Vainio testified that the $30,000 was allocated to Leonard Vainio even though it was in a joint account with David Vainio.

On occasion David Vainio put his personal money into the Professional Eye Care account on a temporary basis.

Before Eye Care opened at the mall, Professional Eye Care had a retail store at that location. The store lost its lease and discontinued business there. However, Eye Care used the same phone number that had been assigned to the Professional Eye Care store.

David Vainio is fully in charge of the Eye Care facility in Missoula. He and his wife own it, he hired the manager there, and he makes all key decisions including those regarding labor relations. David Vainio is also the primary person in charge of Professional Eye Care's Butte laboratory. As is apparent from the discussion below relating to the collective-bargaining negotiations, David Vainio sets labor relations policies there as well as in Missoula. Except when the position of business manager is vacant, as it has been from time to time, there is one business manager at the Professional Eye Care Butte laboratory and another one at the Eye Care Missoula laboratory. The business managers take care of the day-to-day operations.

Eye Care and Professional Eye Care keep separate records and use separate checking accounts. The government ID number used at Eye Care is a personal one that David Vainio had.

Gerald Baker, the accountant for both Professional Eye Care and Eye Care, testified in some detail concerning the books of both companies. He averred that when Eye Care first opened, he was instructed by David and Leonard Vainio that Eye Care was to be separate from Professional Eye Care and the accounting records and everything else were to be completely separate. He testified to a number of things, however, that raised questions as to their separate identities. He averred that he was paid by both Eye Care and Professional Eye Care but then he acknowledged that he had not received any checks from Eye Care. Professional Eye Care has an in-house computer in Anaconda that is used by both Eye Care and Professional Eye Care. The Anaconda facility makes the payroll for both companies though Eye Care reimburses Professional Eye Care for the expenses. Professional Eye Care does most of the purchasing of the supplies for both companies because it can do so on a mass basis. Baker testified that Eye Care reimburses Professional Eye Care for such items as frames and lenses that it receives from Professional Eye Care but the manner of the payment indicates that there is less than an arm's-length arrangement. Apparently there is no inventory of the actual goods that are passed on from Professional Eye Care to Eye Care. The computation for the payment by Eye Care to Professional Eye Care is based on a percentage of sales made by Eye Care in relation to the sales made by Professional Eye Care. Because Eye Care purchases some of its materials from sources other than Professional Eye Care, the use of the retail sales percentages would not appear to give an accurate result in determining how much Eye Care owed Professional Eye Care for supplies.

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[3] During the course of the trial the complaint was amended to allege that Dalasera was discharged in violation of the Act. As is discussed in detail below I have found that he was unlawfully discharged. However, before the last day of trial he was reinstated.

[4] At one point in his testimony, David Vainio testified that the Eye Care lab opened with four employees, one of whom was Craig Tolman, the manager. However, later in his testimony, he averred that the lab opened with four rank-and-file employees and that the usual employee complement was four or five, all of whom are nonsupervisory. At one point in his brief, counsel for the General Counsel states that the Missoula lab opened with four "individuals," including an admitted supervisor. At another point in his brief he states that the lab opened with two full-time "lab employees" and two part-time "employees." I credit David Vainio's testimony that the usual employee complement was four or five. The Eye Care store opened on August 28, lab equipment was moved there about September 10, and the lab began operating in October 1986.

[5] Counsel for the General Counsel, in his brief, states that when Eye Care commenced its lab operation, it had two full-time lab employees and two part-time employees who also worked in the retail outlet operation. He argued that the part-time employees were not in the bargaining unit. The case law does not support that proposition. *Fleming Industries*, 282 NLRB 1030 (1987).

[6] These findings are based on the credited testimony of David Vainio. Though I do not believe that David Vainio was always fully credible, there was no evidence to contradict his testimony in this regard and I credit him.

Eye Care does separately pay such items as rent, advertising, insurance, and telephone. Baker testified that Eye Care does a lot of work for Professional Eye Care and that Eye Care pays its own employees and charges Professional Eye Care for the labor costs.

John Flynn was the business manager for Professional Eye Care. He credibly and in detail testified about the relationship between Eye Care and Professional Eye Care. He averred that on at least three occasions he went to the Eye Care store in Missoula to work on their accounts receivable. He testified that even though he was business manager of Professional Eye Care, he had never seen a billing for the supplies that Eye Care had received from Professional Eye Care. Professional Eye Care purchased supplies such as frames, lenses, contact lenses, and solutions that were sent to the Butte facility from where they were distributed to most of the other stores and the Eye Care lab facility. He testified that Eye Care ordered some of its own inventory and also took some of the inventory from Professional Eye Care. He also testified that Professional Eye Care has obtained supplies and inventory from the Eye Care lab in Missoula and that there never has been an accurate billing between the two facilities. He credibly testified that pursuant to the instructions of David Vainio, he has on occasion withdrawn money from other accounts including Eye Care's and put it into the Professional Eye Care Butte account when there was not enough money in the Professional Eye Care account to pay bills.

There is one medical insurance policy that covers all Professional Eye Care employees. The employees of Eye Care do not participate in that insurance plan except for Craig Tolman, the business manager of Eye Care.

David Vainio often takes work from the Professional Eye Care Butte lab to the Eye Care Missoula lab to have it worked on and also takes work in the opposite direction. Two of the Professional Eye Care stores, Helena and Great Falls, send all their work to the Eye Care lab in Missoula. The rest of the work from the Professional Eye Care operation goes to the Butte lab and David Vainio then decides where he wants to take the work.

For the purpose of this case it must be assumed that the opening of the Eye Care lab and the transfer of equipment from Professional Eye Care to Eye Care were wholly lawful. Unlawful conduct can only be found after a respondent has been properly informed of an allegation of wrongdoing and after that allegation has been fully litigated. There is no allegation in the complaint that the opening of the Eye Care lab was unlawfully motivated, that the transfer of equipment was in any way unlawful, or that there was a failure to bargain about such matters. Testimony was allowed concerning the opening of the Eye Care lab but solely in relation to allegations of single employer, alter ego, or successor. (Jurisdiction over Eye Care was alleged on the basis of its connection to Professional Eye Care and Eye Care allegedly violated Sec. 8(a)(3) of the Act by refusing to hire Grigsby.) In his brief, counsel for the General Counsel inexplicably states "additionally at least one of the reasons why Eye Care lab facility was established was Respondents' desire to rid itself of any union obligation." That assertion is totally inconsistent with the position that counsel for the General Counsel repeatedly took during the trial. In his opening statement, counsel for the General Counsel specifically said that there was no issue regarding the failure of Respondents to notify the Union about the move of the lab to Missoula, that there was no allegation that the transfer was in itself unlawful, and that there was no allegation that the move was a violation of the Act. In the course of the trial, counsel for the General Counsel repeated that there was no allegation in the complaint that the opening of the Missoula store or the removal of the equipment to Missoula was a violation of the Act. Indeed, at one point Respondents attempted to introduce evidence relating to their motivation in moving equipment to Missoula and the General Counsel objected on the ground that there was no allegation that the move was unlawful. The objection was sustained and Respondents were denied the opportunity to adduce testimony as to the motivation for the move. At the General Counsel's own request, the matter was not litigated. The General Counsel cannot now successfully claim that the Eye Care lab facility was established because Respondents wanted to rid themselves of any union obligation.

2. Analysis and conclusions with regard to single employer issue

In *Blumenfeld Theatres Circuit*, 240 NLRB 206, 214-215 (1979), enfd. 626 F.2d 865 (9th Cir. 1980), the Board adopted my decision which read as follows:

> In *Radio & Television Broadcast Technicians Local Union 1264, IBEW v. Broadcast Service of Mobile, Inc.*, 380 U.S. 255, 256 (1965), the Supreme Court held that in determining whether enterprises constitute a single employer: "The controlling criteria, set out and elaborated in Board decisions, are interrelation of operations, common management, centralized control of labor relations and common ownership."[16] Though the Board and the courts have not always agreed on how to apply the standards enunciated by the Supreme Court, the decision of the Court of Appeals for the District of Columbia in *Local No. 627, International Union of Operating Engineers, AFL-CIO* [*South Prairie Construction Company and Peter Kiewit Sons' Co.*] *v. NLRB*, 518 F.2d

1040 (1967), appears to be controlling. In that case the court of appeals reversed the Decision of the Board in *Peter Kiewit Sons' Co. and South Prairie Construction Co.*, 206 NLRB 562 (1973). Part of the circuit court's decision was affirmed by the United States Supreme Court in *South Prairie Construction Co. v. Local No. 627, International Union of Operating Engineers, AFL-CIO*, 425 U.S. 800 (1976). The Board had made two separate findings. The first was that two entities did not constitute a single employer and the second was that each entity had a separate appropriate bargaining unit for collective-bargaining purposes. The court of appeals disagreed and found both a single employer and a single unit. On appeal the Supreme Court affirmed that part of the court of appeals' decision which found that the two entities were a single employer and reversed and remanded to the court of appeals that part of the decision which related to the unit question.[17] As the Supreme Court has affirmed the circuit court's decision with regard to the single employer, the language of the circuit court is of particular importance. That circuit court held 518 F.2d at 1045–46:

Guidelines for "Single Employer" Status

In *Radio Union v. Broadcast Service of Mobile, Inc.*, 380 U.S. 255 . . . (1965), the Supreme Court, in a *per curiam* opinion affirming a "single employer" holding below, said:

> "The controlling criteria, set out and elaborated in Board decisions, are interrelation of operations, common management, centralized control of labor relations and common ownership."

The court cited several NLRB decisions including one affirmed in *Sakrete of Northern California, Inc. v. NLRB*, 332 F.2d 902 (9th Cir. 1964), *cert. denied*, 379 U.S. 961 . . . (1965). In *Sakrete*, the Ninth Circuit stated, at 907:

> "even if the substantial evidence shows interrelationship of operations, centralized control of labor relations, or common management only at the executive or top level, we do not agree that this precludes application of the single employer concept."

It pointed out that these three criteria "deal not with power and authority, as such, but with its exercise," and that such criteria, "on any level, are considerations in addition to the factor of common ownership or financial control."[8]

Although the Supreme Court in *Radio Union, supra*, commented that the record in that case was more than adequate to show that all of the four "controlling criteria" were present, it does not appear that all four criteria must be present. In one of the NLRB cases cited, *Canton, Carp's*, 125 NLRB 483 (1959), the Board observed that it had on several occasions made a finding of a single employer status in the absence of a common labor relations policy, and even when it had been affirmatively shown that each of two corporations held to be a single employer established its own labor relations policy. In another of the NLRB cases cited, *V.I.P. Radio, Inc.*, 128 NLRB 113 (1960), the Board found that there was little or no employee interchange; but 90 percent stock ownership of the second corporation, the same officers and directors, and centralized control of "general labor policy" and operations resulted in a "single employer" holding. In still another cited NLRB case, *Overton Markets, Inc.*, 142 NLRB 615 (1963), the Board noted, at 619, that the circumstances were not "characteristic of the arm's length relationship found among unintegrated companies."[9] Its conclusion that there was a "single employer" for purposes of the Act rested on consideration of "all the circumstances" of the case.

From the foregoing, we conclude that "single employer" status, for purposes of the National Labor Relations Act, depends upon all the circumstances of the case, that not all of the "controlling criteria" specified by the Supreme Court need be present; that, in addition to the criterion of common ownership or financial control, the other criteria, whether or not they are present at the top level of management, are "controlling" indicia of the actual exercise of the power of common ownership or financial control; and that the standard for evaluating such exercise of power is whether, as a matter of substance, there is the "arm's length relationship found among unintegrated companies."[10]

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[8] In a later decision, *NLRB v. Welcome-American Fertilizer Co.*, 443 F.2d 19, 21 (9th Cir. 1971), the Ninth Circuit, citing *Sakrete*, said that no one of the four criteria is controlling.

[9] The "arm's length" test makes meaningful the Board's reference in *Canton, Carp's, Inc., supra* at 484, to "realities of commercial organization." It was applied by this court in *American Fed of Television & Radio Artists v. NLRB*, 149 U.S. App. D.C. 272, 462 F.2d 887 (1972).

[10] Petitioner relied heavily on *NLRB v. Royal Oak Tool & Mach. Co.*, 320 F.2d 77 (6th Cir. 1963) in which the court said, at 81:

> "It requires a greater degree of credulity than is possessed by this Court to accept the view that [the subsidiary's operating officers] could inaugurate or establish a labor policy . . . that did not meet with the absolute approval [of the board of directors of the parent company]."

So too, we are persuaded that South Prairie's president, having decided or, at least, recommended that South Prairie be activated in Oklahoma, was not a free agent to alter South Prairie's nonunion policy.

[16] See also *Sakrete of Northern California, Inc.*, 140 NLRB 765 (1963), enfd. 332 F.2d 902 (9th Cir. 1964), cert. denied 379 U.S. 961 (1965).

[17] On remand the Board issued a Supplemental Decision reported at 231 NLRB 76 (1977) in which it noted that the Supreme Court had affirmed the circuit court's finding that the two entities were a single employer. The Board reconsidered the single-unit question and concluded that, even though the entities were a single employer, separate units were appropriate.

The Board has consistently followed those guidelines. *Malcolm Boring Co.*, 259 NLRB 597 (1981). The principles were restated in *Airline Bus Service*, 273 NLRB 561 (1984), in which the Board used the same criteria in determining whether nominally separate businesses operating simultaneously are sufficiently interrelated so that they may be treated as a single, integrated business enterprise. See also *Emsing's Supermarket*, 284 NLRB 302 (1987).

In the instant case Professional Eye Care and Eye Care are interrelated in their operations. Both do the lab work that is generated by the Vainio family stores. Supplies are purchased by Professional Eye Care and distributed to Eye Care. Work coming into Eye Care is often sent to be done at Professional Eye Care and vice versa. Professional Eye Care has drawn money from an Eye Care account when Professional Eye Care's funds were short. There is a clear functional relationship between Eye Care and Professional Eye Care that can only be described as an interrelation of operations. Eye Care and Professional Eye Care have common management at the decision-making level. David Vainio is the "boss" at both enterprises. In addition, he controls labor relations at both enterprises. He makes all such decisions at Eye Care and, as indicated by his conduct in the negotiations discussed below and by his and Flynn's testimony, he has the final voice regarding labor relations at Professional Eye Care. Regarding "common ownership" David Vainio and his wife own all Eye Care while David Vainio and three other members of his family own all Professional Eye Care. Moreover, as is set forth above, the practices of Professional Eye Care and Eye Care as well as the casual arrangements for the distribution of work and supplies strongly indicate that the two organizations do not have an arm's-length relationship but deal on a family basis.

The situation in the instant case is similar to that which was present in *Hahn Motors*, 283 NLRB 901 (1987). There, the same person was the chief executive officer for each of the companies involved; that person exercised virtually unrestricted operational, financial, administrative, and labor relations control over both companies; that person and his wife owned all of one company and 35 percent of the other company with practically the entire remainder of the other company inuring to the beneficial interest of that person's mother and sister; and there was functional integration of the two companies. Taken as a whole, the Board found that the two companies did not maintain an arm's-length relationship such as is found among unintegrated companies, and that the two constituted a single employer.

Applying the case law cited above to the instant case, I find that Eye Care and Professional Eye Care constitute a single employer. As such they are jointly and severally liable for any backpay due and for otherwise remedying their unfair labor practices. *Emsing's Supermarket*, supra.

In his brief, counsel for the General Counsel presents a number of alternative theories regarding the relationship between Eye Care and Professional Eye Care. The thrust of one of those theories is that Eye Care is the successor of Professional Eye Care. I find that theory unpersuasive. In *United Food & Commercial Workers (R & F Grocers)*, 267 NLRB 891, 892–893 (1983), the Board adopted that part of Administrative Law Judge William J. Pannier III's decision which held that the successorship doctrine applies where there is a bona fide change in ownership of an enterprise and there is a substitution of one employer for another under circumstances where the predecessor employer either terminates its existence or otherwise ceases to have any relationship to the ongoing operation of the successor employer. In the instant case, Eye Care and Professional Eye Care are both in existence. It is true that in *Louis Pappas' Restaurant*, 275 NLRB 1519 (1985), the Board held that a successor obligation is not defeated by the mere fact that only a portion of a former union-represented operation is subject to sale or transfer to a new owner. However in that case the employees in the conveyed portion constituted a separate appropriate unit and those employees comprised a majority of the unit under the new operation. As the United States Supreme Court held in *NLRB v. Burns Security Services*, 406 U.S. 272 (1972), a successor employer finding is appropriate where a bargaining unit remains unchanged and a majority of the employees hired by the new employer are represented by a recently certified bargaining agent. As found below in the instant case, the lab employees of Professional Eye Care constitute an independent and separate unit from the lab employees of Eye Care and a majority of the employees in the Eye Care bargaining unit did not come from Professional Eye Care. There is no basis for finding a successorship.

Counsel for the General Counsel also argues that Eye Care is an alter ego of Professional Eye Care. Once a single employer is found there is little need to resolve the question of alter ego. In both situations there is a finding that there is only one enterprise. However, in both situations the one enterprise can have operations at two different locations and the case will often turn on whether the two locations constitute a single bargaining unit in which the enterprise has to bargain with the union or constitute two independent bargaining units where bargaining is only required in one. In *Hahn Motors*, supra, the Board, after finding a single employer relationship, went on to conclude that it was unnecessary to reach the question whether an alter ego relationship existed. In any event, I do not believe that the facts as set forth above warrant a finding of alter ego. The criteria used in determining alter ego were reiterated by the Board in *Continental Radiator Corp.*, 283 NLRB 234 (1987), in which it was held:

> In *Advance Electric*, 268 NLRB 1001, 1002 (1984), the Board stated that it will find alter ego status where two employers have "'substantially identical' management, business purpose, operation, equipment, customers, and supervision, as well as ownership." In addition, the Board considers whether there has been any hiatus in operations, whether the companies use the same building, and "whether the purpose behind the creation of the alleged alter ego was legitimate or whether, instead, its purpose was

to evade responsibilities under the Act."[6] No one factor is determinative of alter ego status.

An alter ego theory is generally used where an employer disguises its continued operation of a facility by the creation of another entity in order to evade bargaining responsibility. That is not the situation in the instant case. Though David Vainio owns Eye Care and he along with other family members (two brothers and a mother) own Professional Eye Care, there is not a substantial identity of ownership. The two facilities are 120 miles apart, they maintain their own identities, and there is no finding that Eye Care was opened for any improper reason. As set forth above, I must assume that Eye Care was opened for lawful reasons. *O. Voorhees Painting Co.*, 275 NLRB 779 (1985).

3. Analysis and conclusions with regard to the separate bargaining unit issue

In *Peter Kiewit Sons' Co.*, 231 NLRB 76 (1977), enfd. 595 F.2d 844 (D.C. Cir. 1979),[7] the Board emphasized the difference in approach in resolving a single employer question and a scope of unit question, holding:

> In determining whether a single employer exists we are concerned with the common ownership, structure, and integrated control of the separate corporations; in determining the scope of the unit, we are concerned with the community of interests of the employees involved.

The Board goes on to indicate that in resolving the unit question where there is more than one operation of a single employer, such factors as bargaining history, functional integration of operations, differences in the types of work and skills of the employees, extent of centralization of management supervision, and the extent of interchange and contact between the groups of employees are to be considered. Some of those factors are discussed above. There is a bargaining history at the Professional Eye Care lab but none at the Eye Care lab; there is some functional integration of operations as discussed above; there is centralization of top management but not of day-to-day operations; and there is no interchange or contact between the groups of employees except for some of the initial hiring.

The relocation of a bargaining unit does not necessarily destroy that unit. In *Hahn Motors*, supra, the Board found that two companies constituted a single employer and that the relocation of service department employees to a new facility 7 miles away did not destroy the community of interest that had existed within the plantwide unit so as to justify depriving those employees of continued representation. There the Board found that the respondents' efforts to fragment the unit by unilaterally imposing the geographical separation of 7 miles could not defeat the employees' right to representation.

In the instant case, the single employer has two lab facilities. They are located 120 miles apart so that it may be assumed that they draw from different labor pools. The normal or representative employee complement at the Eye Care lab in Missoula is four or five employees. As found below Matt Grigsby, who had formerly worked for Professional Eye Care, was unlawfully denied employment at Eye Care. For the purposes of determining the employee complement of Eye Care, Grigsby must be added to the list. If he is added then the normal employee complement would be five or six. One employee, King, who had worked for Professional Eye Care, left his work there and began working for Eye Care. Thus for our purposes two employees out of the five or six in the Eye Care lab bargaining unit were formerly in the Professional Eye Care lab bargaining unit. There is no evidence that any of the other employees in the Eye Care lab bargaining unit desired the Union to represent them. No matter how it is counted, the Union has not been selected by a majority of the Eye Care lab employees to represent them.[8] If the General Counsel's contentions are correct, then those employees will not have an opportunity to express their wishes as to representation. Under all the circumstances of this case and with particular reliance on the fact that the two laboratories are separated by a distance of 120 miles, that there is no basis for assuming that the Missoula lab was opened to thwart union activity or in violation of the Act, and that there is nothing to indicate that a majority of the employees at the Missoula lab desire union representation, I do not believe that Respondents' obligation to bargain at Butte, Montana, should be extended to cover the employees employed in Missoula, Montana.[9] In reaching this conclusion I have also considered the fact that the outstanding certification by the Board is limited to employees "employed by David Vainio d/b/a Professional Eye Care at the facility located at 225 South Idaho, Butte, Montana."

The complaint as amended alleges that the laboratory employees of Professional Eye Care and Eye Care constitute an appropriate bargaining unit; that the Union requested Professional Eye Care and Eye Care to recognize and bargain with it as the representative of the employees in that unit, which included employees of Eye Care; and that Professional Eye Care and Eye Care violated Section 8(a)(5) of the Act by refusing to recognize and bargain with the Union in that unit. As I have found that the Eye Care laboratory unit is a separate bargaining unit and that the Union does not represent a majority of the employees in that unit, those allegations in the complaint must be dismissed. The complaint as amended also alleges that as a result of Professional Eye Care's and Eye Care's refusal to bargain in that unit, Grigsby was terminated from his employment with Professional Eye Care. As I have found that Respondents had no duty to bargain in the Eye Care lab unit, that allegation must also be dismissed. The amended complaint also alleges that Grigsby was discharged from Professional Eye Care and refused employment by Eye Care in violation of Section 8(a)(3) of the Act. Those allegations are discussed in detail below.

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[6] 268 NLRB at 1002, quoting *Fugazy Continental Corp.*, 265 NLRB 1301, 1302 (1982), enfd. 725 F.2d 1416 (D.C. Cir. 1984).

[7] See also *Malcolm Boring Co.*, supra.

[8] Even if the lab opened with three employees, one of whom had worked for Professional Eye Care, and Grigsby is added to make four, there would only be two out of the four employees who indicated a desire for union representation. That is less than a majority.

[9] The complaint does not allege and the General Counsel does not contend that the Eye Care lab is an accretion to the Professional Eye Care bargaining unit. That issue will therefore not be addressed except to note the Board's holding in *Melbet Jewelry Co.*, 180 NLRB 107 (1969), that:

> We will not, however, under the guise of accretion, compel a group of employees, who may constitute a separate appropriate unit, to be included in an overall unit without allowing those employees the opportunity of expressing their preference in a secret election or by some other evidence that they wish to authorize the Union to represent them.

C. *The Discharge of Grigsby by Professional Eye Care and the Refusal to Hire Him by Eye Care*

1. Factual findings

Matt Grigsby began working for Professional Eye Care as a surface grinder in January 1985. After the Union began its organizational drive, Grigsby engaged in union activities. In the summer of 1985 Professional Eye Care discharged Grigsby. The legality of that discharge was litigated before Judge Anderson. In January 1986, before Judge Anderson's decision issued, Grigsby was reinstated pending that decision. Judge Anderson found that Grigsby's discharge was not in violation of the Act. However, Professional Eye Care kept Grigsby in its employ thereafter. In July 1986, which was several months after Judge Anderson's decision issued, David Vainio told Union Business Representative Gary Taylor that Professional Eye Care did not have any more trouble with Grigsby since he came back to work, but that Grigsby's job would be phased out when the lab in Missoula started. At the time Grigsby was reinstated, Professional Eye Care knew of his union activity. Grigsby became a union officer in the summer of 1986.

About August 18, 1986, Grigsby was told by Craig Tolman, who was to become the business manager for Eye Care, that there was a lab opening up in Missoula and that Grigsby could apply. The following day he picked up an application from his business manager, John Flynn, and sent it in. About August 29, 1986, Grigsby received a letter signed by Business Manager John Flynn notifying him of the termination of Grigsby's job specialty area at the American Eye Care (Professional Eye Care) lab due to the sale of the surfacing equipment to another optical practice. The letter went on to state that it was anticipated that Grigsby's job would last from 7 to 14 days depending on when the equipment was delivered to the buyer's location. The equipment was delivered from Professional Eye Care's lab in Butte to Eye Care's lab in Missoula about September 10, 1986. On September 13, 1986, Grigsby spoke to David Vainio about working for Eye Care and David Vainio said that he would have to talk to Craig Tolman. On September 15, 1986, about 5 days after the equipment was removed from Butte, Grigsby was discharged. He was told that his services were no longer needed and the equipment that he had operated had been removed from the premises.[10] After Grigsby applied for work at Eye Care, he spoke to Tolman, who informed him that Tolman would have to talk to David Vainio about the application. Grigsby was not employed by Eye Care.

John Flynn, the business manager for Professional Eye Care, had a number of conversations concerning Grigsby's application with both Tolman, the business manager of Eye Care, and with David Vainio. In one conversation with Tolman, Tolman asked Flynn to evaluate Grigsby's application and Flynn replied that he thought Grigsby ought to go with the piece of equipment because he had worked on it for a long time, knew it well, and could do a good job. Tolman said, "Well, what about his union deal?" and Flynn replied by saying that he did not think Grigsby would bring the Union over there. In another conversation Tolman told Flynn that he was not going to hire Grigsby because he had too many doubts about him.

Flynn also talked to David Vainio about bringing Grigsby from Butte to Missoula. David Vainio said that he did not want to take Grigsby over there because he would start the Union there. Flynn replied that he did not think that he would start the Union. Thereafter, Flynn had several conversations with David Vainio in which Flynn requested that Grigsby be taken over to Missoula and in which David Vainio said that he would not do so because he did not want Grigsby to start the Union over there.[11]

2. Analysis and conclusions

The complaint alleges two separate violations of the Act regarding Grigsby. One is that Professional Eye Care fired him in violation of the Act and the other is that Eye Care refused to employ him because of his union activity. The legal analysis to be applied in cases of allegedly unlawful discharge or refusals to employ was recently restated by the Board in *Joseph De Rario, DMD, P.A.*, 283 NLRB 592 (1987), in which it was held:

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[10] Grigsby credibly testified that about a week and a half before his termination, members of the Vainio family saw him picketing on behalf of the Union at an establishment that was unconnected with the Vainio family. I credit that testimony despite the denials of some of the Vainios. However, that additional union activity occurred after he had been notified in writing that he was to be terminated.

[11] These findings are based on the credited testimony of Flynn. Tolman did not testify. David Vainio did not specifically deny that he made the remarks attributed to him by Flynn. David Vainio testified in effect that he left the decision regarding Grigsby's hiring to Tolman. He averred that he discussed that subject with Tolman and he told Tolman to talk to Grigsby about the possibility of fitting him into the lab. He further averred that he did not have any feelings one way or another about hiring him. He denied that he had any discussion with Tolman about refusing to hire Grigsby because of his union involvement. Kevin Vainio's testimony in that regard was not consistent with that of David Vainio. Kevin Vainio averred that David Vainio felt that they should not hire Grigsby in Missoula because of something Grigsby did in the past. I do not credit either Kevin or David Vainio. Flynn, as business manager of Professional Eye Care, was testifying in a manner adverse to his own interest and his demeanor as he testified was such as to convince me that he was a forthright witness who was prepared to tell the truth regardless of the consequences to himself. His testimony concerning his conversations with Tolman and David Vainio was fully credible.

In *NLRB v. Transportation Management Corp.*, 462 U.S. 393 (1983), the Supreme Court affirmed the test enunciated by the Board in *Wright Line*[10] for determining whether an employee was discharged because of the exercise of Section 7 rights. Under *Wright Line* the General Counsel, under Section 10(c) of the Act, has the burden of establishing a prima facie case that the employee's protected conduct was a substantial or motivating factor in the employee's discharge or other adverse action taken by the employer. Once the General Counsel satisfies this burden, the employer can avoid liability under the Act by proving by a preponderance of the evidence an affirmative defense that it would have taken the same action even if the unlawful motives had not existed.

Consideration will be given first to the allegation that Professional Eye Care discharged Grigsby because of his union activity. The General Counsel has established that Grigsby was active on behalf of the Union; that Professional Eye Care knew of that activity; that David Vainio, who set labor policy for Respondents, was extremely hostile toward employees who engaged in union activity (as demonstrated by his statements to Flynn); and that Grigsby was discharged. The General Counsel has established a prima facie showing that Grigsby was discharged because of his union activity.[12] However, I believe that Respondents have proved by a preponderance of the evidence that Grigsby would have been discharged from Professional Eye Care even if the unlawful motives had not existed. Grigsby was a surface grinder. The machines on which he worked were taken from Professional Eye Care's Butte lab and moved to Eye Care's lab in Missoula 120 miles away. The two labs constitute separate bargaining units. As set forth in detail above, the removal of the equipment was not a violation of the Act and Respondents did not unlawfully refuse to bargain about the removal. Grigsby's position was not filled by any new hire. There simply was no work for Grigsby to do in the Butte lab after the equipment he normally worked on was removed. Under these circumstances, I believe that Respondents have sustained their affirmative defense. I therefore recommend that that allegation of the complaint be dismissed.

Regarding Eye Care's refusal to hire Grigsby, an entirely different question is presented. Regarding that issue, the General Counsel again has established a prima facie case that Grigsby was not hired because of his union activity. However, here, Respondents have not established their affirmative defense. The credible evidence establishes that Grigsby was not hired because David Vainio feared that he would bring the Union from Butte to Missoula. David Vainio admitted as much to Flynn.[13] I find that Eye Care refused to hire Grigsby on and after September 15, 1986, because of Grigsby's union activity and thereby violated Section 8(a)(3) and (1) of the Act.

D. *The Violence Against Flynn*

Professional Eye Care's business manager John Flynn[14] testified in this proceeding on March 26, 1987. He was called as a witness for the General Counsel. The hearing took place in an upstairs courtroom at a State of Montana courthouse in Butte, Montana. During his direct testimony Flynn gave evidence that was adverse to the interests of his Employer, Professional Eye Care. He testified in substance that David Vainio had admitted to him that Grigsby was not hired at Eye Care because David Vainio feared that Grigsby would bring the Union there. He also testified to details of the relationship between Eye Care and Professional Eye Care which helped establish that they are a single employer. When he finished his direct examination, the hearing was recessed for lunch and he left the courtroom and walked downstairs in the courthouse to use the telephone. He entered the telephone booth and picked up the receiver. Before he could close the door to the telephone booth, David Vainio propped himself against the open door. Flynn asked David Vainio to please move so that he could make his call and David Vainio stood there with his arms folded so that Flynn could not close the door. David Vainio stood there with his mouth set and a mean look in his eye. He did not respond to Flynn's request that he move so that the door could be closed. Flynn asked David Vainio once again to move and again Vainio did not answer. Flynn then lifted his arm to try to close the door and in the process he touched David Vainio on the arm or shoulder with two fingers. At that point David Vainio punched Flynn in the mouth. Flynn momentarily blacked out and when he came to he was sitting in the phone booth with his glasses off and his lip bleeding. David Vainio was standing over him in front of the phone booth saying, "He hit me first, he assaulted me." Kevin Vainio then came to the phone booth and said that Flynn had hit David Vainio first and that he was filing charges against him.

These findings are based on the credited testimony of Flynn. Flynn denied that he actually pushed David Vainio but he acknowledged in his testimony that he tried to "nudge" David Vainio out of the way and he put two fingers on his shoulder or arm. Captain Albert Johnson, a detective captain for the Butte Silver Bow Law Enforcement Agency, interviewed Flynn about the incident. He testified that Flynn told him that when he tried to close the door, he touched David Vainio on the shoulder to try to push him out of the way but that he did not even put a full hand on his shoulder. Captain Johnson also testified that Flynn told him that he did not make any gesture that might make David Vainio think that he was about to hit him. It is clear that Flynn did touch David Vainio before David Vainio punched him. It is also clear, however, that the touching was simply part of an attempt to close the telephone booth door and whether it could be characterized as a "pushing" or a "nudging" or simply an accident, it was not of such a nature as to give David Vainio any reason for concern or any reason to believe that he had to protect himself.

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[10] *Wright Line*, 251 NLRB 1083 (1980), enfd. 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982), approved in *NLRB v. Transportation Management Corp.*, 462 U.S. 393 (1983).

[12] See *Associated Milk Producers*, 259 NLRB 1033, 1035 (1982), enfd. 711 F.2d 627 (5th Cir. 1983), in which the Board held:

> The elements of protected activity on the part of the discharged employee, employer knowledge of the protected activity, and employer animus toward the Union, taken together, are sufficient to establish a *prima facie* case of unlawful discharge.

[13] For the weight that the Board and the courts have given to such "outright confessions" of unlawful conduct, see *Advance Installations*, 257 NLRB 845, 848 (1981), enfd. 698 F.2d 1231 (9th Cir. 1982).

[14] There was some confusion about Flynn's title. He was business manager from February 1986 until March 1987 when he was verbally informed by David Vainio that his duties were changed to that of rental property manager. However Kevin Vainio testified that Flynn's job title did not change. When Flynn questioned the Vainios about the matter, Kevin Vainio wrote to him saying that he was still business manager. That letter was received by Flynn on March 30. On that day Flynn left Respondent's employ.

The Vainio family lined up en masse to support David Vainio. David Vainio testified in substance that he walked over to the telephone booth to ask Flynn a question concerning certain documents and that Flynn, without any provocation, punched him in the jaw. David Vainio acknowledged that he did strike Flynn but he testified that he did so only after Flynn had punched him. Kevin Vainio, David Vainio's brother, and H. Marie Vainio, their mother, testified that they witnessed the entire event and that Flynn punched David Vainio on the jaw while David Vainio stood there with his hands in his pockets and that David Vainio then replied by striking Flynn. Marie Vainio, David Vainio's wife, testified that when he came home that night he had a mark on the left side of his chin that was not there when he had left that morning. Between the testimony of Flynn and the four Vainios, who testified about the incident, I unhesitantly credit Flynn and discredit the Vainios. David Vainio's version of the incident, as corroborated by the rest of his family, is inherently implausible. Flynn had just testified in a manner that was damaging to David Vainio. As indicated above, I believe he did so because he was an honest witness. There is no indication that he had any reason to bear the type of anger against David Vainio that would lead to an unprovoked assault. If David Vainio is to be believed, then Flynn punched his boss with no apparent motive. On the other hand, it is easy to understand why David Vainio would have been extremely angry with Flynn. Flynn had just testified in a way that could have hurt David Vainio very badly. Immediately after that testimony was given, according to the testimony of Flynn, David Vainio followed him to the telephone booth, blocked the door of that booth, and punched him in the mouth. My observation of the demeanor of the witnesses as they testified also supports what I believe to be the inherent probabilities of the situation. Flynn was an extremely convincing witness. His demeanor was such as to lend credence to his testimony. That was not true regarding the Vainios. They appeared to be circling the wagons to defend the family without too much concern over the accuracy of the facts they presented.

After the luncheon recess Flynn resumed the stand to give a short description of what happened. He was then excused so that he could get medical attention and the case was put over for several weeks. On the resumption of the trial, Flynn resumed the stand and was cross-examined by Respondents.

The complaint alleges, the answer admits, and I find that Professional Eye Care's business manager John Flynn was a supervisor within the meaning of the Act. Supervisors are generally excluded from protection under the Act but there are several exceptions to that general rule. Those exceptions relate to situations in which the action against a supervisor interferes with the exercise of employees' Section 7 rights. Where, as here, the supervisor was assaulted for giving testimony adverse to the employer's interest at an NLRB proceeding, the supervisor must be protected because of the need to vindicate the rights of employees. *Pontiac Osteopathic Hospital*, 284 NLRB 442 (1987). As the Board held in *Parker-Robb Chevrolet*, 262 NLRB 402 (1982), enfd. 711 F.2d 383 (D.C. Cir. 1983):

> an employer may not discharge a supervisor for giving testimony adverse to an employer's interest . . . at an NLRB proceeding. . . . [T]he protection afforded supervisors stems not from any statutory protection inuring to them, but rather from the need to vindicate the employees' exercise of their Section 7 rights.

I find that Respondents, through David Vainio, violated Section 8(a)(1) of the Act by assaulting Flynn because Flynn gave testimony adverse to Respondents' interest at an NLRB proceeding.

E. *The Discharge of Dalasera*

Leonard Dalasera is an optician who is employed by Professional Eye Care. He was active on behalf of the Union and Respondents were aware of that activity.[15] He testified on behalf of the General Counsel in the instant case and also in an NLRB injunction proceeding before a United States district court judge.

Dalasera was discharged on April 10, 1987. The reason given for the discharge was that he had falsified his timecard by not showing that he left work for about 20 minutes at the request of the police to be interviewed concerning cross-charges filed by Flynn and David Vainio in the assault incident discussed above.

Dalasera was reinstated on May 26, 1987. The General Counsel took the position that Dalasera was reinstated subject to the outcome of this case and, in effect, that Dalasera is entitled to an unconditional offer of reinstatement.

On March 13, 1987, Dalasera appeared before U.S. District Court Judge James Batt in Billings, Montana, where he testified about matters relating to an injunction obtained by the Board against Respondents. After the trial David Vainio refused to speak to him. When he asked David Vainio a question, Vainio would just whistle and walk away. Dalasera had to get another person who worked with him to ask David Vainio a question so that he could get an answer. That refusal to talk to him lasted until April 9, 1987, when David and Leonard Vainio spoke to him about an alleged falsification of his timesheet. He was discharged the following day.

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[15] In the case heard by Administrative Law Judge Anderson, it was alleged that Dalasera was discharged in violation of Sec. 8(a)(3) of the Act. The judge found merit to that contention. Whether that finding is sustained in the exceptions before the Board, Respondents knew from its participation at that trial that Dalasera was a union activist.

David Vainio assaulted Flynn in the phone booth on March 26, 1987. The following Monday, March 30, 1987, Flynn returned to work at Professional Eye Care. Dalasera was also working that day. That morning Dalasera received a phone call at work from Albert Johnson, the Butte, Montana chief of detectives. Johnson said he was conducting an investigation into the alleged assault and he asked Dalasera to come to the police station to give a statement concerning what he saw.[16] Dalasera asked Johnson whether he could come during his lunchbreak or after work. Johnson replied that those times were not acceptable and he asked Dalasera to come right away. He told Dalasera that Dalasera only worked a half a block away and it should not be a problem.

At that time Flynn was the only management official on the premises. Both David and Leonard Vainio were out of town. Flynn was a supervisor. Dalasera called Flynn from the lab and reported to him what Johnson had said. Dalasera asked Flynn for permission to go to the police station and Flynn told him he could go. Flynn also told him that whatever time he lost from work he could make up the same day. Flynn credibly testified that when he spoke to Dalasera about going to the police station, he assumed that Dalasera would not log the time in and out to reflect that meeting and that Dalasera would make up the time during lunch or after work. That procedure had been followed before and there had been no problems.

Dalasera left the lab at 11:23 a.m. and drove his car a half block or a block to the police station where he arrived at 11:25 a.m. Detective Johnson taped an interview and Dalasera left the police station at 11:43 a.m. He drove directly back to the lab where he arrived at about 11:45 a.m. All in all he was gone from the lab about 22 minutes.

Dalasera made up the lost time on the same day. That morning he had reported for work about 7:50 a.m. which was 10 minutes before his normal time. He left for lunch about 12:05 or 12:10 p.m., instead of 12 noon.[17] At the end of the day Dalasera worked till 5:05 or 5:10 p.m.[18]

The employees of Professional Eye Care fill in their own time records. Dalasera filled in his time report for March 30 with the hours 8 to 12 and 1 to 5. He had received permission to go to the police station from Supervisor Flynn; he had made up the missed worktime as he had been instructed to do by Flynn; and he filled out the time records as both he and Supervisor Flynn understood they should have been filled out. Flynn credibly testified that on a number of occasions he had authorized employees to take off from work for about 15 minutes for personal reasons and to make up the time the same day without showing the short "in and out" periods on the time records. Flynn also credibly testified that on occasion he told David Vainio that that procedure was being used.[19]

On April 9, 1987, David, Kevin, and H. Marie Vainio met with Dalasera. Union Representatives Taylor and Duggan were also present. The Vainios accused Dalasera of falsifying his time records by not putting down the time he had been away from work at the police station. Dalasera replied that he had Flynn's permission to go and that he had made up the time.

The Vainios took action against Dalasera the next day, without discussing the matter with Flynn, who had given permission for Dalasera to leave, or with the detective, who had requested him to come to the police station. On April 10, 1987, Dalasera was given a letter signed by David Vainio stating that he was suspended without pay from his employment because of misstatements on his timecard for hours worked on March 30. The letter stated that the suspension would continue indefinitely until Dalasera or his representatives produced cause why he should continue in employment. The letter referred to a statement on the bottom of the timecard that indicated that falsification of hours was cause for immediate discharge and went on to state that at the March 9 meeting, the sole justification offered for Dalasera's conduct was that he was requested by a police officer to be at the police station and that he had the permission of Flynn to go there. The letter then stated that Dalasera was not justified in falsifying the hours on the timecard.

The sequence of events set forth above establishes that Dalasera did not falsify his timecard. He correctly understood from Flynn and from observing the past experiences of other employees that short periods of absence from work that were authorized by Flynn could be made up without encumbering the time records with the details of the minutes "in and out." It is not unusual for employers to have some "de minimis" procedure regarding bookkeeping. Otherwise an employee would have to punch in and out every time he went to the bathroom. Supervisor Flynn had established such a procedure and David Vainio was aware of it because Flynn had on occasion told him of it. Yet, the Vainios discharged Dalasera without even interviewing Flynn about the incident. Respondents did introduce some evidence to show that employees were disciplined for abusing worktime but none of those situations were comparable to the instant case. One employee, Pam Kroll, was discharged on April 26, 1987, because her office in Helena was closed and the lights were off when that office was supposed to be open. There was no indication that she was absent with supervisory approval. Another employee, Lavon Huninghake, was removed from her position as office manager in Copper City and transferred to Butte because she took time off while on the clock. Again, there is no indication that she had the permission of a supervisor to take the time off.

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[16] Dalasera did not witness the actual assault but he did see some incidents that led up to it.

[17] Flynn testified that he saw Dalasera leave at 12:05 or 12:10 p.m. and Dalasera testified that he left about 12:10 p.m. Marie Vainio, David Vainio's wife, testified that she went to the lab at 12:05 that day and Dalasera was not there. I believe that the testimony of Flynn and Dalasera was more reliable than that of Marie Vainio and I find that Dalasera did work some 5 or 10 minutes during his lunch hour.

[18] This finding is based on the credited testimony of Dalasera. Marie Vainio said that she came to the lab at 5:05 p.m. and found that the door was locked. She averred that she did not see Dalasera's car outside. To the extent that Marie Vainio's testimony is inconsistent with that of Dalasera, I credit Dalasera.

[19] I do not credit David Vainio's testimony to the effect that he had no knowledge that such a procedure was being used.

David Vainio testified that prior to February 4, 1987, the payroll was made up before work for the payroll period had actually been completed. In substance, an employee was guessing as to what his hours would be near the end of the payroll period. Under such circumstances an employee could not be criticized if the time he anticipated to work was incorrect. A new system was instituted whereby all payroll reports were completed before the payroll was made up. Respondents contend that they held employees much more accountable for their timecards after the change. However, that would have little to do with the instant case. Dalasera was fully accountable for properly filling out his time reports. Under the circumstances set forth above, he simply did nothing wrong.[20] I find that the reasons advanced by Respondents for the discharge of Dalasera were purely pretextual.

The General Counsel has established that Dalasera was active on behalf of the Union and testified on behalf of the General Counsel in Board and Board-related court hearings; that Respondents had knowledge of Dalasera's activities; that Respondents harbored a virulent animosity against people who engaged in such activities (as indicated by David Vainio's actions in assaulting Flynn); that Dalasera was discharged a short time after he gave testimony at a Board hearing; and that the Respondents' asserted reason for the discharge was pretextual. Regarding Respondents' defense, it is also noted that the chain of events leading to Dalasera's leaving work to go to the police station was triggered by Respondents' own misconduct (David Vainio's assault on Flynn). The General Counsel has established a strong prima facie case to establish that Dalasera was discharged because of his union activity and his testimony before the Board and court. Respondents have come forward with no credible evidence to rebut that case.[21] Using the criteria set forth in *Wright Line*,[22] I find that Respondents discharged Dalasera on April 10, 1987, because of Dalasera's union activity and because he gave testimony in Board and Board-related court proceedings. In doing so, Respondents violated Section 8(a)(1), (3), and (4) of the Act.

F. *The Refusal-to-Bargain Allegations*

1. Background

The complaint alleges that Respondents unlawfully refused to bargain in a number of different ways. One primary allegation is that Respondents refused to extend the Butte bargaining unit to Missoula when the Eye Care lab began operations. As is discussed in detail above, that allegation has been found to lack merit. The complaint also alleges that Professional Eye Care unlawfully refused to provide information to the Union, made unlawful unilateral changes in the hours of employment at the Butte lab, and refused to bargain in good faith with the Union. For the reasons set forth in detail below, I believe that those allegations are meritorious. In addition, the complaint, as amended, alleges two other incidents that General Counsel contends constituted refusals to bargain. They relate to a decision to move to Billings and a decision to lease or close the Butte lab. Those allegations have not been sustained.

2. The decision to move to Billings

The complaint, as amended, alleges that on or about March 3, 1987, Respondent informed the Union of its decision to remove unit work and equipment from its Butte, Montana facility to a new facility in Billings, Montana.

On January 26, 1987, Kevin Vainio wrote to the Union saying that American Eye Care was considering installing a lab in Billings, that American Eye Care did not have a present intention to close the lab in Butte, and that it was hoped that the workload in Butte would not be reduced. The letter went on to state that American Eye Care hoped that final arrangements could be made within 2 weeks, that the Union could bargain within that timeframe, and that it would welcome any input the Union had.

Representatives of Respondents and the Union met to discuss the letter on March 4, 1987. Kevin and David Vainio told Union Representatives Duggan and Taylor that they had taken over a laboratory in the Billings area and that they had made a deal to put some of the equipment from Butte in that lab. David Vainio said that they had to talk about that to the Union to get the Union's approval. Duggan replied that Respondents always managed to notify them after they had already decided to do something rather than to negotiate. Kevin Vainio said that nothing was in concrete and they could revoke the action. Either Kevin or David Vainio said that they were going to establish an optical outlet in Billings, that it would have laboratory equipment similar to Butte, and that they wanted to move some equipment from the Butte lab there.[23]

In fact no equipment was ever moved from Butte to Billings. Professional Eye Care had purchased another company's practice in Polson, Montana, and the equipment from that practice was moved to Billings. That equipment was never set up in Billings, but as of the date of the trial was still sitting on the floor. The only lab work that was done in Billings was the retinting of lenses that come from the Butte or Missoula labs and had not been done properly there. Instead of inconveniencing the patient for 4 or 5 days by shipping the lenses back to the other labs, they were retinted in Billings. There is no edging, finishing, hardening, or grinding done in Billings.

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[20] In a proceeding before the Montana Labor Department, it was held that Dalasera was disqualified from receiving unemployment benefits because he was discharged for violating company policy regarding falsification of timecards. I have fully considered that decision, which was based on a hearing held on the telephone. Nonetheless, I must give primary reliance to the record in this case that led to the findings set forth here.

[21] I do not credit David Vainio's assertion that he disregarded Dalasera's union activity in deciding to suspend him.

[22] See the analysis set forth in C, 2, above.

[23] These findings are based on the credited testimony of Duggan. Taylor's testimony was somewhat different from that of Duggan. Taylor averred that the Vainios said that there might be a reduction of work and the number of people at Butte, that Duggan objected to the loss of work and said they had a right to negotiate before they made the move and not after, and that the Vainios said that they had not made the move and were contemplating it, but that it did not matter because they were going to make the move. I believe that Duggan was a more accurate witness than Taylor and I credit him, particularly with reference to Duggan's assertion that the Vainios said that nothing was in concrete and they could revoke the action.

The amount of tinting done at Billings does not cause the employees at the Butte lab to lose any hours of work and no hours were cut at Butte because of that tinting.[24]

The complaint does not allege that the removal of the tinting work was a violation of the Act. It is limited to the assertion that on or about March 3, 1987, Respondents informed the Union of the decision to remove unit work and equipment to Billings. The facts set forth above establish that what Respondents did was inform the Union of their intention to take certain actions. Their subsequent conduct clearly established that that statement of intention was nothing more than a proposal for bargaining. After negotiating with the Union, Respondents did not carry out their stated intention. No equipment was moved from Butte to Billings and the Billings laboratory was not opened except to the very limited extent that retinting work was performed where it had been improperly performed in the other labs. I therefore find that Respondents did not unlawfully inform the Union of its decision[25] to remove unit work and equipment from Butte to Billings as alleged in the complaint.

3. The decision to lease or close the Butte lab

The complaint, as amended during the course of the hearing, alleges that on or about March 26, 1987, Respondents informed the Union that they were closing their lab facility in Butte, Montana.

On March 25, 1987, Union Business Representative Taylor received a telephone call from Kevin Vainio who told him that the Vainios were thinking about leasing the lab. Kevin Vainio also told Taylor that they were going to give Dalasera the first option to lease the lab and that they were contemplating getting out of the laboratory business altogether in Butte. He said that they were going to lease it out and if they could not lease it out, they were going to close it.[26]

Later in the day on March 25, 1987, Vainio wrote to Taylor "to confirm dates for bargaining on the lease of the laboratory and equipment." The letter goes on to give dates that Respondents were available for bargaining. The letter was delivered to the Union that day. The following day, March 26, 1987, Taylor replied to the Respondents' March 25 letter saying that he could not meet immediately because of prior scheduling and he needed up to 3 weeks to schedule meetings.

On March 25, 1987, David Vainio spoke to Leonard Dalasera about leasing the lab. David Vainio said that he was going to lease the lab and that Dalasera had the first option to lease it. He also told Dalasera that he would lease it to someone else if Dalasera was not interested. David Vainio told Dalasera that if he leased it, he could negotiate with the Union.

As of the last day of the trial Respondents were still operating the Butte lab. There is no indication in the record that there was any further discussion between Respondents and the Union over Respondents' proposal to lease or close the Butte facility.

The complaint alleges that Respondents violated the Act by informing the Union that they were closing their lab facility in Butte. Assuming for the purpose of argument that Respondents had an obligation to bargain about going out of the lab business as well as the effect of such a lease or closure on the bargaining unit employees, the facts set forth above do not establish a violation of the Act. There are two parts to a decision-making process. An employer must make a decision with regard to what he wants to do. That decision deals with his own mental processes and is not subject to bargaining. It is quite another matter when the employer takes action based on that decision. At that point there may well be a duty to bargain. In the *Lange Co.*, 222 NLRB 558, 563 (1976),[27] the Board affirmed the decision of Administrative Law Judge William J. Pannier III, which held in part as follows:

> Counsel for the General Counsel, however, argues that Respondent's conduct is tainted by virtue of the fact that it had already made the decision to transfer and lay off employees before advising the Union. Yet, in no case has the Board held that an employer must defer making a decision concerning terms and conditions of employment until it has first conferred with the representative of its employees. The requirement is that, after reaching the decision, the employer must then notify the representative and afford the opportunity to discuss that decision and to consider alternative proposals. Thus, in *Ozark Trailers, Incorporated*, 161 NLRB 561 (1966), the Board made it clear that the illegality lay not in the fact that the employer had first made the decision before consulting with its employees' representative. The illegality lay in the implementation of that decision prior to affording the representative an opportunity to advance and discuss alternative courses of action. Id. at 568.
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> This is also illustrated in *Moffitt Building Materials Company, et al.*, 214 NLRB [655] (1974), where the Board found that the employer had not violated the Act even though it had made a decision to liquidate its business without so much as a fare-thee-well to the bargaining representative, and where the latter then learned of that decision, but made no

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[24] These findings are based on the uncontradicted testimony of Flynn and David Vainio.

[25] See the discussion of "decision" bargaining in the following section.

[26] These findings are based on the credited testimony of Taylor. David Vainio testified that they anticipated leasing out the Butte lab, that he and his brother felt they should divest themselves of the lab in general and spend most of their time doing examinations, and that they seriously considered leasing the Butte lab, the Missoula lab, and any other lab that they might have. David Vainio acknowledged that they notified the Union of their intention to lease the Butte lab, but he denied that he said anything about closing the lab. Where David Vainio's testimony conflicts with that of Taylor, I credit Taylor.

[27] See also *Lemon Tree*, 231 NLRB 1168 (1977), enfd. 618 F.2d 51 (9th Cir. 1980).

> effort to bargain with the employer. Id. Similarly, in *Association of Motion Picture and Television Producers, Inc.*, 204 NLRB 807 (1973), the representative first learned of the decision when it was announced by the employer. Nonetheless, no violation was found as no bargaining was thereafter requested by the representative. If, as is contended in the instant case, it were the making of the decision prior to consulting with the representative that constituted the violation, then violations would have been found in both of these cases. See also: *A-V Corporation*, 209 NLRB 451, 453–454 (1974).
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> Indeed, to accept the General Counsel's argument in this matter would be to create great instability in bargaining relationships, for if formulation of decisions had to be deferred, then bargaining would be reduced to being conducted hypothetically in a vacuum. Employers are entitled to first reach a decision. This provides the starting point for any bargaining which then might follow. However, employers must then be willing to consider the alternatives proposed by the bargaining representatives before implementing those decisions.

Respondents have not implemented any decision they may have made to lease or close their Butte lab and have given the Union advance notice of their intention and have provided the Union with a fair opportunity to bargain. Respondents have not violated the Act by informing the Union of a decision to lease or close their lab facility and that allegation of the complaint must be dismissed.

4. The request for information

The complaint, as amended, alleges in substance that the Union requested and Respondents refused to furnish the sales agreement for the equipment that was transferred from the Butte lab to the Missoula lab, as well as the lease agreement between David Vainio and the Southgate Mall in Missoula for the Eye Care Missoula lab. The background facts needed to put that information in context are set forth in detail above. Also as found above the Eye Care lab in Missoula constitutes part of a single employer with Professional Eye Care in Butte even though each has a separate bargaining unit for laboratory employees.

At a negotiating session in September 1986 Kevin Vainio took the position that Professional Eye Care had no duty to bargain about the Missoula lab. He told the union representatives that the equipment from Butte had been sold to David Vainio and that David Vainio was the sole operator of the Missoula lab. Union Representative Duggan asked to see a copy of the sales agreement and a copy of the lease on the Missoula lab. Kevin Vainio replied that it was none of the Union's business. However, a few moments later, Kevin Vainio had Flynn bring a copy of what appeared to be the last page of a lease. In addition, at some undisclosed time after the bargaining session, Kevin Vainio called the union office and told Taylor that the lease would be made available for a certain cost. Taylor offered to let Respondents use the Union's copying machine. By letter dated November 12, 1986, Kevin Vainio offered the Union a copy of the lease and the related documents. However, the letter went on to state:

> When we receive payment of the sum of $26.50, which represents a reasonable cost for copies and copying by our employees, we will be happy to provide you with a copy. This amount is for 53 pages at the rate of $.50 per page, which is the amount charged by the federal courts for copies.

By letter dated November 17, 1986, Taylor informed the Respondents that he would not pay any money or fees for any documentation that the Union needed from the Respondents. In the letter Taylor stated that the Union had its own copying machine and if Respondents brought the documents to the Union office, the Union would make a copy for itself and another for Respondents. The evidence does not indicate that any further action was taken by either Respondents or the Union and the documents were not given to the Union.

The information sought by the Union was reasonably related to its need to evaluate whether work was being unlawfully diverted from the Butte lab to the Missoula lab, whether Eye Care was part of a single employer with Professional Eye Care, and whether the Union had the right to represent the lab employees of Eye Care. A union may require information that will help determine whether a recipient of transferred work is in some way related to the transferring employer where it represents the employees of the transferring employer. *Bentley-Jost Electric Corp.*, 283 NLRB 564 (1987). Information that goes to the core of the employer-employee relationship is presumptively relevant. Where the information sought goes to matters occurring outside of the unit, relevance must be proven. *Calmat Co.*, 283 NLRB 1103 (1987). Here the General Counsel has established that the requested information was needed by the Union for it to evaluate how it should proceed with its collective-bargaining responsibilities. However, the finding that the information sought was relevant does not end the inquiry. As the Board held in *Century Air Freight*, 284 NLRB 730 (1987), an employer and a union should bargain in good faith regarding conditions under which relevant information is to be furnished. Here the condition that Respondents imposed was that the Union pay $26.50 for 53 pages of photocopies at 50 cents a page. Though the Union refused to pay that amount, it did offer to make the photostats itself. Respondents neither accepted that offer nor made any counterproposal. It simply did not furnish the documents. As the Board held in *Tower Books*, 273 NLRB 671 (1984), enfd. mem. 772 F.2d 913 (9th Cir. 1985):

> Here, the Union requested information such as the names, addresses, and job classifications of only 12 employees, and their wages, hours, and other terms and conditions of employment. The information sought was basic and encompassed matters which employers are required to provide to enable unions to bargain intelligently and to fulfill their obligations as the selected representative of the employ-

er's employees.[3] The cost and burden of compliance ordinarily will not justify an initial, categorical refusal to supply relevant data.[4] "If there are substantial costs involved in compiling the information in the precise form at the intervals requested by the Union, the parties must bargain in good faith as to who shall bear such costs . . . ."[5] The Respondent expressed no willingness to bargain about costs. Additionally, the onus is on the Respondent to show that production of the data would be unduly burdensome. There is nothing in the record to substantiate such a claim. On the contrary, it can be inferred from the Respondent's failure to produce evidence of substantial cost in response to the Union's claim that the cost would be "de minimis," that the costs for compiling basic information on only 12 employees was indeed negligible. Mindful that each case of what constitutes good-faith bargaining must turn on its particular facts, it is clear that the Respondent's refusal to supply the information—while neither justifying its request for costs nor offering to bargain over the matter—was unreasonable. A lack of good faith can be inferred therefrom.

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[3] See, e.g., *Union Carbide Corp.*, 197 NLRB 717 (1972).

[4] See *Electrical Workers IUE v. NLRB*, 648 F.2d 18 at 26 (D.C. Cir. 1980).

[5] *Food Employers Council*, 197 NLRB 651 (1972). Contrary to the assertion of our dissenting colleague, this case indicates that there is indeed a sound basis in the law for the Union's request that the Respondent demonstrate a burdensome financial impact before the Union would discuss costs.

I believe that case is controlling in the instant situation. Here Respondents started with an outright refusal to furnish the relevant information. Later Respondents offered to furnish information at a set fee but did not propose to bargain about the fee. When the Union offered to make the photocopies itself, Respondents did not accept the offer or make any counterproposal. Under these circumstances, a lack of good faith can be inferred.

I find that Respondents violated Section 8(a)(5) and (1) of the Act by refusing to furnish the Union with photocopies of David Vainio's lease on the Eye Care Missoula facility and the sales agreement under which David Vainio purchased equipment from Professional Eye Care.

5. The changes in hours

Until June 16, 1986, Respondents' employees at the Butte lab worked a regular 8-hour day, 40-hour week. On June 16, 1986, their hours were reduced to 6 hours a day.

Sometime in May 1987 Business Manager Flynn had a conversation with Leonard Vainio in which they discussed the possibility of a cut in hours. Leonard Vainio told Flynn that the Department of Labor might require substantial back wages for overtime, but it was not a problem because they would cut hours until they made up the lost wages. On June 15, David Vainio instructed Flynn to cut the hours of the lab employees to 6 hours a day. The same day Flynn told employees Leonard Dalasera, Mike King, Gregg Wedlek, and Matt Grigsby that their hours were to be reduced. The cut in hours was put into effect the following day. No notice was given to the Union about Respondents' intention to change the hours, and the Union did not become aware that the hours had been changed until June 25, 1986.

Except for a few exceptional days where the employees worked 8 hours, the 6-hour workday remained in effect until August 20, 1986, when the workday was reduced to 5 hours. Not long before that, the Labor Department issued an order requiring the payment of back wages for overtime. On August 19, Leonard Vainio told Flynn to reduce the hours and David Vainio authorized him to send out a notice to that effect.

On August 19, 1986, Flynn drafted a letter to Union Representative Taylor telling him that due to economic and business considerations, the hours worked in the Butte lab "have been" reduced to 5 hours a day effective August 20. The following day, August 20, Flynn distributed a notice to employees Dalasera, King, Grigsby, and Valeno, which stated in part that their hours were reduced to a 5-hour day effective immediately. After notifying the employees that their hours had been reduced, Flynn notified the Union of the change by delivering the letter that he had drafted the previous day.

The 5-hour day for Butte lab workers remained in effect until September 5 or 6, 1986, when the hours were raised to 8 hours a day. They remained at that level thereafter.

There is no contention by the General Counsel that the change in hours was motivated by antiunion considerations. The sole question presented is whether the changes in hours were unlawful because Respondents made them unilaterally without giving the Union an opportunity to bargain about them. Respondents justified their action on several grounds. None were persuasive. Both Kevin and David Vainio testified that before reducing the hours they made a number of phone calls to the Union but were unable to reach Union Representative Taylor because he was out of town. They both asserted that Taylor did not always respond to the telephone messages they left with his office.[28] Taylor's telephone records establish that the Vainios did call him and did leave messages. Kevin Vainio testified that on one occasion he left a message that he wanted to talk to Taylor about reduction in hours. I do not credit Kevin Vainio's testimony in that regard. Other than that evidence, there is nothing to indicate that the Union was informed of Respondents' desire to reduce hours until after the hours were in fact reduced. Regarding the August 20 reduction in hours, Respondents did notify the Union in writing, but only after the change had been put into effect. Obviously, Respondents knew how to use the mail. Under these circumstances, I do not believe that Respondents made a reasonable effort to notify the Union of their intention to reduce the hours and did not give the Union any opportunity to bargain about the matter until after the hours were changed.

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[28] I credit Taylor's testimony to the effect that he always did answer his messages. However, he acknowledged that he was often out of town. His delays in returning calls might well have led the Vainios to believe that he was ignoring their calls.

Respondents also contended that there was a time lag between the time they requested bargaining and the time that the Union would make its representatives available for bargaining. However, Respondents cannot be heard to complain about the possibility of the Union's delaying a response to a notice of intention to reduce hours when such a notice was never given. The Union was never given an opportunity to bargain.

Respondents also contend that they had the right to change the hours because of an agreement on a management-rights clause. Prior to the events in question here, the Union had proposed a management-rights clause that included the right of the employer to schedule the work subject to the terms of the agreement. Initially, Respondents said they had no objection to that clause but then in a counteroffer Respondents proposed a management-rights clause that would specifically have given them the right to determine "employee hours" as well as the scheduling of work. The Union never agreed to that change. There was no agreement either on that clause or on a contract in general. Even if there were an agreement on that clause and the clause was subject to the interpretation that Respondents wish to give it, the clause would have no operative effect until an agreement was reached on a contract as a whole. Agreement on one part of a contract is in the usual case contingent on agreement concerning the rest of the contract. Respondents did reduce the hours of work of the employees in the Butte lab without notifying the Union of their intention to do so and without affording the Union an opportunity to bargain about it.

Where, as here, an employer is bargaining with a Board-certified union, it violates Section 8(a)(5) and (1) of the Act if it unilaterally and in the absence of impasse makes changes in the terms and conditions of employment of its employees. *NLRB v. Katz*, 369 U.S. 736 (1962); *St. Elizabeth Community Hospital*, 240 NLRB 937 (1979). The Union is the duly certified representative of Professional Eye Care's laboratory employees; hours of work constitute a mandatory subject of bargaining; though the unit was small, the change in the number of hours worked was substantial and applied to the entire bargaining unit; the changes were made without prior notice to the Union and without any opportunity on the part of the Union to bargain about them before they were put into effect; and Professional Eye Care has not come forward with any credible defense that would justify the unilateral change in hours. By reducing the number of hours worked as set forth above, Professional Eye Care has violated Section 8(a)(5) and (1) of the Act.

6. The failure to bargain in good faith

The second amended consolidated complaint alleges that Respondents failed to bargain in good faith with the Union. The general law regarding good-faith bargaining has been set forth at length in such cases as *West Coast Casket Co.*, 192 NLRB 624 (1971), enfd. in pertinent part 469 F.2d 871 (9th Cir. 1972), and *Borg-Warner Controls*, 198 NLRB 726 (1972). Section 8(d) of the Act requires the employer and the union to confer in good faith with respect to wages, hours, and other terms and conditions of employment. That section does not compel either party to agree to a proposal, but there must be a good-faith effort to reach an agreement. Each case stands on its own and good faith must be determined by scrutinizing the totality of the parties' conduct. As was held in *West Coast Casket Co.*, supra at 636:

> From the context of an employer's total conduct, it must be decided whether the employer is lawfully engaged in hard bargaining to achieve a contract that it considers desirable or is unlawfully endeavoring to frustrate the possibility of arriving at any agreement. *Sunbeam Plastics Corporation*, 144 NLRB 1010.

Professional Eye Care and the Union held bargaining sessions on July 24 and September 19, 1986. The complaint alleges that Respondents manifested bad faith in those sessions. The parties had engaged in bargaining for some time before then. By December 13, 1985, at least some progress had been made. At that meeting Kevin Vainio told the union representatives that there was agreement regarding union security, hours of work, foremen working, discrimination, posting of contract, bimonthly pay periods, successor clause, grievance and arbitration, moonlighting clause, management rights, funeral leave, jury duty, civil rights clause, minimums, and language concerning the length of the agreement. Kevin Vainio also told the Union that open issues included wages, vacation, insurance, holidays, report and callout, and jurisdiction. At that meeting Union Representative Duggan asked Kevin Vainio for a written counterproposal before the next meeting. They met again on January 17, 1986. Professional Eye Care had no counterproposal and once again Duggan asked for one. David Vainio was present at that meeting. He said that his bottom-line position was that wages and costs had to be frozen, but later David Vainio proposed to cut Dalasera's pay from $7 to $5 and the pay of other lab employees from $4.50 an hour to $4 an hour. David Vainio said that all Professional Eye Care had to do was talk to the Union about those things and it did not have to agree with the Union on anything. He told the union representatives that John Flynn would talk to them until 5 p.m. and he left the meeting.

On June 25, 1986, David Vainio called the Union and asked to schedule a meeting. The following day Union Representative Duggan wrote to David Vainio. The letter said that the Union could not meet on such short notice and that the Union's schedule did not allow a meeting at that time or the following week. It went on to state that during the meeting of January 17, 1986, the Union had requested a written counterproposal, which had not yet been received. In the letter Duggan took the position that a written proposal was needed for any meaningful negotiations to take place and reference was made to David Vainio's verbal rescission of certain actions taken by Kevin Vainio at the previous meeting of December 13, 1985.

The parties did meet for a bargaining session on July 24, 1986. David Vainio and Flynn represented Professional Eye Care. Duggan and Taylor represented the Union. David Vainio arrived at the meeting 15 or 20 minutes after it was scheduled to start. He began by complaining about Dalasera's work. He said that Dalasera was going to have to be reprimanded or have his wages cut to $5 an hour. Duggan replied that they would have a grievance and disciplinary procedure if a contract was agreed to, but at that point they should discuss negotiations. There was discussion about the opening of the Missoula lab and how it would affect the Butte lab.

In mid-1985 the Union had given Professional Eye Care a proposed contract. At the July 24, 1986, meeting Professional Eye Care gave the Union a document entitled "Changes to Machinists Union Contract." The document was an article by article response to the Union's original proposal showing "no change," "omit," or proposing new language. The Professional Eye Care's proposal called for $5 an hour for people able to perform all lab duties, and $4 an hour for people able to perform only certain duties. The Union's original proposal called for a full grievance procedure culminating in binding arbitration. Professional Eye Care's counterproposal allowed for the filing of grievances, but contained a provision stating that if no agreement was reached on the grievance, the decision of the employer prevailed. Professional Eye Care's proposal also provided that all costs of grievances were to be borne by the Union. Under Professional Eye Care's proposal there would be no binding arbitration, all costs of arbitration would be on the Union, and the decision of an arbitration board would be taken into consideration by the employer but not be binding on it. The Union's proposal allowed authorized representatives of the Union to contact employees during shop hours as long as the contacts did not unreasonably interfere with the duties of the employees and as long as other conditions were met. Professional Eye Care's proposal was that no agent of the Union could contact employees during work hours. Professional Eye Care's proposal ended with a clause that would provide for costs incurred by careless acts of employees being recorded and subtracted from the employees' pay.

Flynn also gave the Union a document entitled "Lab Quality Guidelines" which set forth procedures for quality control and employee discipline. During the course of the meeting David Vainio stated that there would be no contract unless he was permitted to recover any costs that were brought about by either negligence or the willful destruction of property by his employees. Duggan questioned the legality of that type of clause.

Less than an hour after negotiations began, David Vainio left the meeting. Before he left, Duggan requested that he be given something in writing to show that Flynn had authority to bargain. David Vainio signed a document stating that he authorized Flynn to bargain in his place when necessary.[29] After David Vainio left, the meeting only lasted another half hour. During that time they discussed Professional Eye Care's proposals. Duggan said that they had already reached agreement on a clause for working foremen. Flynn replied that David Vainio now wanted that clause out. Duggan said that Professional Eye Care's wage proposal was less than the one that it had proposed on two previous occasions. Flynn replied that the Union would have to talk to David Vainio about wages. Duggan referred to a number of other proposals that Professional Eye Care had at one time agreed to and now wanted deleted, and Flynn replied each time that he could not do anything about it because David Vainio wanted it out. There was talk about the jurisdiction clause originally requested by the Union. That clause was not geared to the work of laboratory employees. Duggan said that he recognized that some of the Union's proposals were boilerplate and did not apply to an optical lab so that before the next meeting he would draft another document that better described the work of people the Union was bargaining for. He sent a full contract proposal to Professional Eye Care on August 13, 1986.[30]

The next negotiating session was scheduled to take place at 9 a.m. on September 19, 1986. In arranging for the meeting, the Union had requested that Professional Eye Care furnish a written counterproposal in advance. David Vainio arrived for the meeting half an hour late. At that time he and his brother Kevin met with Duggan, Taylor, and Matt Grigsby, one of Professional Eye Care's employees. David Vainio said that there would be no negotiations as long as Grigsby was in the room. Duggan replied that it was the Union's prerogative to decide who would be on the negotiating committee. David Vainio then said that there would be no agreement unless there was some method for him to recover losses that employees were responsible for. Duggan said that it was not appropriate to talk about employee deficiencies at that time because they were there to negotiate a labor agreement. Duggan brought up the subject of the Missoula lab and Kevin Vainio said that the Union already had had an opportunity to negotiate on that.

About 15 minutes after the negotiating session began, David Vainio and Flynn left the meeting. Shortly thereafter Kevin Vainio left. He came back with Flynn and Flynn said that he was not representing Professional Eye Care and he had no authority to do so. Duggan reminded Flynn that at the July 24 meeting David Vainio had given the Union a written document authorizing Flynn to bargain. Flynn replied that he was only authorized to talk to the Union and that he was not able to strike any deal. At that point Duggan asked Kevin Vainio to supply a document authorizing him to bargain. Kevin Vainio obtained a statement signed by David Vainio saying that Kevin Vainio was authorized to bargain as the need arose. At that point Kevin Vainio asked Duggan to show his authority to bargain for the Union. Duggan showed him his union credential card.

The meeting resumed with Kevin Vainio and Flynn representing Professional Eye Care. Duggan asked for Professional Eye Care's written proposal and Kevin

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[29] Flynn credibly testified that the only authority he had at the July 24 negotiating session was to finish the discussion and to obtain knowledge.

[30] These findings are based on the credited testimony of Duggan. He appeared to have a very good memory and his demeanor was such as to indicate that full reliance could be placed on his testimony. His testimony was in part corroborated by that of Taylor and Flynn. To the extent that testimony of David and Kevin Vainio is inconsistent with that of Duggan, I credit Duggan and do not credit David and Kevin Vainio.

best copy available

Vainio gave him another copy of the "Changes to Machinists Union Contract" that had been discussed in the previous meeting. There was talk about the Missoula lab and Kevin Vainio asserted that the Union had abandoned its right to negotiate.

While the parties were going over Professional Eye Care's proposals, David Vainio returned to the meeting and asked how things were going. David Vainio said, "Have we reached a stalemate yet? Let's get these pickets going. I'm tired of fooling around." Duggan answered that there was a long way to go in negotiations before there was any kind of impasse. David Vainio then said that he was getting tired of all the time he was spending with this "thing." He asked why they did not call the thing "quits." David Vainio then went on to say that they would never have any agreement unless the agreement prohibited union representatives from being on the premises. David Vainio said that he did not want to see "you people" on the premises any more. He then left the meeting.

After David Vainio left, Kevin Vainio discussed some of the Union's proposals. He said that Professional Eye Care did not agree to the union shop proposal. Duggan replied that Professional Eye Care had agreed to it on three other occasions. Kevin Vainio said that Professional Eye Care wanted to make sure that the Union was not treating any of the people with favoritism and that all of them were paying dues. Duggan replied that they could accomplish that by agreeing to a checkoff provision. Kevin Vainio said that that was not what he meant and that he wanted the right to inspect the union records. Duggan replied that the internal union records were none of his business and that they were not even a proper subject for bargaining.

After further discussion concerning the Missoula lab, the parties went on to direct their attention to the management-rights clause that had been proposed by the Union and that had previously been agreed to by Professional Eye Care. Kevin Vainio said that he wanted to add something to the management-rights clause concerning employee hours. Duggan said that the Union's management-rights clause had been tentatively agreed to at three or four previous meetings. Kevin Vainio replied that he wanted to change it "because it's September 19." They then spoke about hours and overtime. Duggan said that the Union's proposal accommodated a complaint that Professional Eye Care had made in previous meetings by allowing a 6 to 10 a.m. starting time, which he understood Flynn had wanted at the July 24 meeting. Kevin Vainio took the position that it should be a 6 a.m. to 10 p.m. starting time. When Duggan said that Professional Eye Care was taking a regressive position, Kevin Vainio replied that times do change. As the meeting progressed, Kevin Vainio retreated from other offers that he had previously made.

The parties broke for lunch at 12:15 p.m. that day, at which time Duggan again reminded Kevin Vainio that he expected copies of the lease and sales agreements on the Butte equipment. Kevin Vainio said that he had no intention of giving either of those documents, but that he would have a proposal for the Union when he got back. They returned from lunch about 1:40 p.m. and Kevin Vainio gave Duggan a five-page handwritten document called "Labor Agreement," that was extremely difficult if not impossible to read. It was accompanied by three pages of the Union's proposal on which handwritten changes were made. Kevin Vainio said that the union-security clause meant that he wanted the right to inspect internal union records to determine that the Union was not lying to him about people paying dues and how much they paid. In the management-rights clause, he specifically added the right to determine hours. The meeting adjourned about 2 p.m.[31]

I find that Professional Eye Care did not engage in good-faith bargaining. David Vainio, the key negotiator for Professional Eye Care, was late for meetings and left them early; he went through the motions of giving authority to bargain to Flynn when Flynn had no real authority (i.e., Flynn told the Union that it would have to talk to David about wages); David Vainio played cat-and-mouse games with the Union in which his brother Kevin would agree to a union proposal and then David would veto it; many of Professional Eye Care's offers appeared to be whimsical rather than serious (a 6 a.m. to 10 p.m. starting time for employees in a business that appeared to be open from 8 a.m. to 5 p.m.); David Vainio's remarks indicated that he was not serious about negotiations (he was tired of fooling around and wanted to get the pickets going); David Vainio made statements about prohibiting union agents from coming on the premises; and Professional Eye Care insisted on inspecting internal union records. In addition, as found above, Professional Eye Care demonstrated its bad faith by refusing to furnish documents needed by the Union to intelligently bargain. Taken as a whole, Professional Eye Care's conduct indicates that it had no desire to reach an agreement but was taking whatever actions were necessary to thwart one. I find that Professional Eye Care did not bargain in good faith and therefore violated Section 8(a)(5) and (1) of the Act.

CONCLUSIONS OF LAW

1. Respondents Professional Eye Care and Eye Care constitute a single employer and are jointly and severally liable for any backpay due and for otherwise remedying their unfair labor practices.

2. Eye Care violated Section 8(a)(3) and (1) of the Act by refusing to hire Matt Grigsby on and after September 15, 1986, because of his union activity.

3. Respondents, through their agent David Vainio, violated Section 8(a)(1) of the Act by assaulting John Flynn because Flynn gave testimony adverse to Respondents' interest at an NLRB hearing.

4. Professional Eye Care violated Section 8(a)(1), (3), and (4) of the Act by discharging Dalasera on April 10, 1987, because of Dalasera's union activity and because he gave testimony in Board and Board-related court proceedings.

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[31] These findings are based on the credited testimony of Duggan, which was substantiated in part by Taylor and Flynn. To the extent that the testimony of David and Kevin Vainio is inconsistent with that of Duggan, I do not credit Kevin and David Vainio.

5. Professional Eye Care violated Section 8(a)(5) and (1) of the Act by

(a) Refusing to honor the Union's request to supply it with photocopies of David Vainio's agreement to buy equipment from Professional Eye Care and with David Vainio's lease on Eye Care's Missoula premises.

(b) Changing the hours of employment of employees in the Professional Eye Care laboratory bargaining unit without notifying the Union and affording it an opportunity to bargain about the change.

(c) Failing to bargain in good faith with the Union.

THE REMEDY

Having found that Respondents engaged in unfair labor practices, I shall recommend that they be ordered to cease and desist therefrom and to take certain affirmative action designed to effectuate the policies of the Act.

Having found that Eye Care violated the Act by refusing to hire Matt Grigsby on and after September 15, 1986, because of his union activity, I recommend that Respondents be ordered to offer him immediate employment at the Eye Care laboratory and to make him whole for any loss of earnings resulting from the refusal to hire him by payment to him of a sum of money equal to the amount he normally would have earned as wages and benefits from September 15, 1986, which was the date he would have been hired absent the unlawful refusal to hire him, to the date on which an offer of employment is made, less net earnings during that period. The amount of backpay will be computed in the manner set forth in *F. W. Woolworth Co.*, 90 NLRB 289 (1950), with interest thereon to be computed in the manner prescribed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987).[32]

Having found that Professional Eye Care discharged Leonard Dalasera in violation of Section 8(a)(1), (3), and (4) of the Act, I recommend that Respondents be ordered to unconditionally offer him reinstatement at the Professional Eye Care laboratory, if they have not already done so, and to make him whole for any loss of earnings resulting from his discharge by payment to him of a sum of money equal to the amount he normally would have earned as wages and other benefits from April 10, 1987, which was the date of his discharge, to May 26, 1987, when he returned to work. The amount of backpay shall be computed in the manner set forth in *F. W. Woolworth Co.*, 90 NLRB 289 (1950), with interest thereon to be computed in the manner prescribed in *New Horizons for the Retarded*, supra.[33]

Having found that Professional Eye Care violated Section 8(a)(5) and (1) of the Act by refusing to honor the Union's request to supply certain photocopies, I recommend that Respondents be ordered to furnish the Union with photocopies of David Vainio's agreement to buy equipment from Professional Eye Care and with David Vainio's lease on the Eye Care premises.

Having found that Professional Eye Care violated Section 8(a)(5) and (1) of the Act by changing the hours of employment of employees in the Professional Eye Care laboratory bargaining unit without notifying the Union and affording it an opportunity to bargain about the change, I recommend that Respondents be ordered to make the employees in that bargaining unit whole for any loss of earnings resulting from their reduction in hours by payment to each of them of a sum of money equal to the amount he or she normally would have earned as wages and other benefits if they had worked full 8-hour days between June 16, 1986, when the hours of work were first reduced, until September 6, 1986, when the employees were once again put on an 8-hour day, with interest thereon to be computed in the manner prescribed in *New Horizons for the Retarded*, supra.

Having found that Professional Eye Care violated Section 8(a)(5) and (1) of the Act by failing to bargain in good faith with the Union, I recommend that Respondents be ordered to bargain in good faith with the Union as the exclusive representative of their employees in the following bargaining unit:

> All laboratory employees employed by David Vainio d/b/a Professional Eye Care at the facility located at 225 South Idaho, Butte, Montana; but excluding all office clerical employees, guards and supervisors as defined in the Act.

It is further recommended that Respondents be ordered to preserve and, on request, make available to the Board or its agents, for examination and copying, all payroll records, social security payment records, timecards, personnel records and reports, and all other records necessary to analyze the amount of backpay.

It is further recommended that Respondents be ordered to expunge from their files any reference to the failure to hire Grigsby or the discharge of Dalasera and to notify them in writing that that has been done and that evidence of those unlawful actions will not be used as a basis for future personnel action against them.

As Respondents' acts demonstrated a tendency to behave in total disregard of the rights of their employees, I recommend a broad 8(a)(1) remedy to enjoin any and all violations of that section of the Act. *Hickmott Foods*, 242 NLRB 1357 (1979); *Goren Printing Co.*, 285 NLRB 38 (1987).

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[34]

ORDER

The Respondents, David Vainio, H. Marie Vainio, Kevin Vainio and Leonard Vainio, d/b/a Professional Eye Care, and Eye Care, Butte and Missoula, Montana, their officers, agents, successors, and assigns, shall, jointly and severally

1. Cease and desist from

(a) Refusing to hire any applicant for employment because of that applicant's union activity.

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[32] See generally *Isis Plumbing Co.*, 138 NLRB 716 (1962).

[33] See fn. 32.

[34] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

(b) Assaulting any person because that person gave testimony adverse to Respondents' interest at an NLRB hearing.

(c) Discharging any employee because of that employee's union activity or because that employee gave testimony in Board or Board-related court proceedings.

(d) Failing to bargain in good faith with Local Lodge 88, International Association of Machinists and Aerospace Workers, AFL-CIO in the following bargaining unit:

> All laboratory employees employed by David Vainio d/b/a Professional Eye Care at the facility located at 225 South Idaho, Butte, Montana; but excluding all office clerical employees, guards and supervisors as defined in the Act.

(e) Refusing to honor the request of that Union to supply it with photocopies of David Vainio's agreement to buy equipment from Professional Eye Care and with David Vainio's lease on Eye Care's Missoula premises.

(f) Changing the hours of employment of employees in the Professional Eye Care laboratory bargaining unit without notifying the Union and affording it an opportunity to bargain about the change.

(g) In any other manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them in Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Offer Matt Grigsby immediate employment at the Eye Care laboratory and make him whole with interest for lost earnings in the manner set forth in the remedy section of this decision.

(b) Offer Leonard Dalasera unconditional reinstatement at the Professional Eye Care laboratory, if that has not already been done, and make him whole with interest for lost earnings in the manner set forth in the remedy section of this decision.

(c) Preserve and, on request, make available to the Board or its agents, for examination and copying, all payroll records, social security payment records, timecards, personnel records and reports, and all other records necessary to analyze the amount of backpay.

(d) Expunge from their files any reference to the failure to hire Grigsby and the discharge of Dalasera and notify them in writing that that has been done and that evidence of those unlawful actions will not be used as a basis for future personnel action against them.

(e) Bargain in good faith with Local Lodge 88, International Association of Machinists and Aerospace Workers, AFL-CIO in the following bargaining unit:

> All laboratory employees employed by David Vainio d/b/a Professional Eye Care at the facility located at 225 South Idaho, Butte, Montana; but excluding all office clerical employees, guards and supervisors as defined in the Act.

(f) Honor the request of that Union to supply it with photocopies of David Vainio's agreement to buy equipment from Professional Eye Care and with David Vainio's lease on Eye Care's Missoula premises.

(g) Make the employees in the above-described bargaining unit who were employed between June 16 and September 6, 1986, whole for their reduction in hours, with interest, as is set forth in the remedy section of this decision.

(h) Post at their Butte and Missoula, Montana facilities copies of the attached notice marked "Appendix."[35] Copies of the notice, on forms provided by the Regional Director for Region 19, after being signed by the Respondents' authorized representative, shall be posted by the Respondents immediately on receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondents to ensure that the notices are not altered, defaced, or covered by any other material.

(i) Notify the Regional Director in writing within 20 days from the date of this Order what steps the Respondents have taken to comply.

IT IS FURTHER RECOMMENDED that those allegations of the complaint as to which no violations have been found are dismissed.

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[35] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

WE WILL NOT refuse to hire any applicant for employment because of that applicant's union activity.

WE WILL NOT assault any person because that person gave testimony adverse to our interests at an NLRB hearing.

WE WILL NOT discharge any employee because of that employee's union activity or because that employee gave testimony in Board or Board-related court proceedings.

WE WILL NOT fail to bargain in good faith with Local Lodge 88, International Association of Machinists and Aerospace Workers, AFL-CIO in the following bargaining unit:

> All laboratory employees employed by David Vainio d/b/a Professional Eye Care at the facility located at 225 South Idaho, Butte, Montana; but excluding all office clerical employees, guards and supervisors as defined in the Act.

WE WILL NOT refuse to honor the request of that Union to supply it with photocopies of David Vainio's agreement to buy equipment from Professional Eye Care and with David Vainio's lease on Eye Care's Missoula premises.

WE WILL NOT change the hours of employment of employees in the Professional Eye Care laboratory bargaining unit without notifying the Union and affording it an opportunity to bargain about the change.

WE WILL NOT in any other manner interfere with, restrain, or coerce employees in the exercise of the rights guaranteed them in Section 7 of the Act.

WE WILL offer Matt Grigsby immediate employment at the Eye Care laboratory with backpay plus interest.

WE WILL offer Leonard Dalasera unconditional reinstatement at the Professional Eye Care laboratory with backpay plus interest.

WE WILL expunge from our files any reference to the failure to hire Grigsby and the discharge of Dalasera and WE WILL notify them in writing that that has been done and that evidence of those unlawful actions will not be used as a basis for future personnel action against them.

WE WILL bargain in good faith with Local Lodge 88, International Association of Machinists and Aerospace Workers, AFL-CIO in the bargaining unit set forth above.

WE WILL honor the request of that Union to supply it with photocopies of David Vainio's agreement to buy equipment from Professional Eye Care and with David Vainio's lease on Eye Care's Missoula premises.

WE WILL give backpay plus interest for their reduction in hours to employees in the Professional Eye Care laboratory bargaining union who are employed between June 16 and September 6, 1986.

DAVID VAINIO, H. MARIE VAINIO, KEVIN VAINIO AND LEONARD VAINIO, D/B/A PROFESSIONAL EYE CARE

EYE CARE

Wolf Trap Foundation for the Performing Arts *and* Regina M. Becker

Ford's Theatre Society *and* Regina M. Becker

513 13th Street, N.W., Inc., t/a Warner Theatre *and* Regina M. Becker

The New National Theatre Corporation t/a National Theatre *and* Regina M. Becker

International Alliance of Theatrical Stage Employees and Moving Picture Operators of the United States and Canada, Local 22, AFL-CIO (Wolf Trap Foundation for the Performing Arts) *and* Regina M. Becker

International Alliance of Theatrical Stage Employees and Moving Picture Operators of the United States and Canada, Local 22, AFL-CIO (Ford's Theatre Society; The New National Theatre Corporation, t/a National Theatre; 513 13th Street, N.W., t/a Warner Theatre) *and* Regina M. Becker. Cases 5-CA-13813, 5-CA-13836-1, 5-CA-13836-2, 5-CA-13836-3, 5-CB-3889, and 5-CA-3898

June 30, 1988

SUPPLEMENTAL DECISION AND ORDER

By Chairman Stephens and Members Johansen and Cracraft

On January 13, 1988, the National Labor Relations Board issued a Decision and Order in the above-entitled proceeding[1] in which it affirmed, in part, the rulings, findings, and conclusions of the administrative law judge and adopted his recommended Order with certain modifications. The Board found, inter alia, that the Respondent Union and Respondent Employers Wolf Trap and Ford's Theatre violated Sections 8(b)(1)(A) and 8(a)(1), respectively, by maintaining closed-shop provisions in their collective-bargaining agreements that gave work preference to union members. We further held that by refusing to refer Charging Party Regina Becker for employment pursuant to a lawful hiring hall arrangement between the Respondents because of her nonunion status the Union violated Section 8(b)(2). Finally, we announced a new policy of finding employers jointly and severally liable for a union's discriminatory operation of a hiring hall only if they know or can be reasonably charged with notice of a union's discrimination. Previously, the Board had adhered to the principle of strict liability and held employers responsible even if they had no knowledge, either actual or constructive, of a union's discriminatory operation of a referral system. Applying the new standard, we found that despite the absence of actual knowledge on the part of Respondents Wolf Trap and Ford's Theatre it was, nevertheless, reasonable to charge them with notice of the Union's discriminatory treatment of Becker because they knowingly agreed to the unlawful closed-shop clause.[2] We therefore found these Respondents violated Section 8(a)(3) of the Act and ordered them to cease and desist, to post a notice to employees, and to make Becker whole for any losses she may have suffered as a result of the discrimination practiced against her.

On February 8, 1988, Respondents Wolf Trap and Ford's Theatre filed a "Joint Motion to Reconsider and Stay Further Proceedings" stating various reasons for the Board to reconsider its finding of violations against them. Alternatively, the Respondent Employers submit that even if the Board adheres to its decision, their backpay liability should be limited to the duration of the contracts that contained the unlawful closed-shop clauses. In addition, Respondent Ford's Theatre contends that, in any event, the 10(b) date for imposing liability against it is May 2, 1981, rather than April 20, 1981, as set forth in the notice to employees that the Board ordered to be posted.

The Board has considered the Respondent's motion and finds merit in their contention that their liability for the Union's discrimination against Regina Becker should cease upon expiration of the contracts, which contained unlawful closed-shop provisions in their contracts with the Union. The sole basis for assessing liability against Wolf Trap and Ford's Theatre was the presence of the closed-shop provisions in their contracts with the Union. It follows that such liability should extend no longer than the life of the contracts containing those unlawful clauses, i.e., December 31, 1981, in Ford's Theatre's case and April 30, 1982, for Wolf Trap.

Thus, on reconsideration, we shall modify our original Order by limiting the Respondent Employers' backpay liability in accordance with the above dates. In addition, Respondent Ford's Theatre correctly points out that the charges against it were not filed until November 2, 1981, and, therefore, we shall amend the 10(b) date set out in the notice to read May 2, 1981, rather than April 20, 1981.

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[1] 287 NLRB 1040.

[2] Conversely, we dismissed the complaint against Respondent National Theatre because it had neither actual knowledge of the Union's discrimination nor a closed-shop bargaining agreement under which it could be reasonably charged with notice of the unlawful conduct. The General Counsel did not contend, and there is no evidence to support a finding, that any Employer Respondents had actual knowledge of the Union's discrimination.

289 NLRB No. 96

We have modified our Order to reflect the changes made in accordance with this decision and to more accurately reflect our original Decision and Order. The Order as so modified is set out below as well as the attached notices, which are substituted for those that are attached as appendices to our original Decision and Order.

In all other respects, the Respondents' motion raises no other issues not previously argued and fully considered by the Board and is denied.

ORDER

The National Labor Relations Board orders that:

A. Respondent International Alliance of Theatrical Stage Employees and Moving Picture Operators of the United States and Canada, Local 22, AFL-CIO, Washington, D.C., its officers, agents, and representatives, shall

1. Cease and desist from

(a) Discriminating in the operation of a hiring hall system against Regina Becker or any other person on the basis of gender or nonmembership in a union.

(b) Agreeing to and maintaining provisions in collective-bargaining agreements that give preference for employment to members of a union over nonmembers.

(c) Making statements to employees that other employees would be discriminated against because of their gender and their nonmembership in a union.

(d) Proclaiming a referral policy that gives preference to union members and their sons.

(e) In any like or related manner restraining or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Jointly and severally with Ford's Theatre and Wolf Trap Foundation make whole Regina Becker for any loss of wages and other benefits she may have suffered by reason of the Respondent Union's discriminatory failure to refer her to employment after April 20, 1981. Backpay shall be computed as described in the remedy section of the judge's decision with interest thereon to be computed in accordance with footnote 3 of our original Decision and Order. In addition, jointly and severally with Ford's Theatre and Wolf Trap Foundation, make whole Regina Becker by making contributions on her behalf to any funds to which such contributions would have been made had she been lawfully referred to employment.

(b) Preserve and, on request, make available to the Board or its agents for examination and copying, all payroll records, social security payment records, timecards, personnel records and reports, and all other records necessary to analyze the amount of backpay due under the terms of this Order.

(c) Post at its business offices, union halls, and any other places where it customarily posts notices to members, copies of the attached notice marked "Appendix A."[3] Copies of the notice on forms provided by the Regional Director for Region 5, after being signed by an authorized representative of the Respondent Union, shall be posted by the Respondent Union immediately upon receipt thereof in the places provided above. Notices are to be posted for 60 consecutive days, in conspicuous places. Reasonable steps shall be taken by the Respondent Union to ensure that the notices are not altered, defaced, or covered by any other material.

(d) Forward signed copies of the notice to the Regional Director for Region 5 for posting by Respondents Wolf Trap and Ford's, at all locations in their places of business where notices to employees are customarily posted.

(e) Notify the Regional Director in writing within 20 days from the date of this Order what steps the Respondent has taken to comply.

B. Respondent Wolf Trap Foundation for the Performing Arts, Washington, D.C., its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Agreeing to and maintaining provisions in collective-bargaining agreements that give preference for employment to members of a union over nonmembers.

(b) Maintaining with Respondent Local 22 or any other labor organization an exclusive hiring hall system under which applicants for employment are discriminated against because of their gender or nonmembership in a union.

(c) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Jointly and severally with International Alliance of Theatrical Stage Employees and Moving Picture Operators of the United States and Canada, Local 22, AFL-CIO, and Ford's Theatre make whole Regina Becker for any loss of earnings and benefits she may have suffered between April 20, 1981, and April 30, 1982, by reason of the discrimination against her. Backpay shall be computed as described in the remedy section of the judge's decision with interest thereon computed in accordance with footnote 3 of our original Decision and Order. In addition, jointly and severally with Ford's Theatre and the Union, make whole Regina Becker by making contributions on her behalf to any funds to which such contributions would have been made had she been lawfully referred to employment.

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[3] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

(b) Preserve and, on request, make available to the Board or its agents for examination and copying, all payroll records, social security payment records, timecards, personnel records and reports, and all other records necessary to analyze the amount of backpay due under the terms of this Order.

(c) Post at its place of business copies of the attached notice marked "Appendix B."[4] Copies of the notice, on forms provided by the Regional Director for Region 5, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In addition, post in such places copies of "Appendix A," which are forwarded to Respondent Wolf Trap by the Regional Director for Region 5.

(d) Notify the Regional Director in writing within 20 days from the date of this Order what steps the Respondent has taken to comply.

C. Respondent Ford's Theatre Society, Washington, D.C., its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Agreeing to and maintaining provisions in collective-bargaining agreements that give preference for employment to members of a union over nonmembers.

(b) Maintaining with Respondent Local 22 or any other labor organization an exclusive hiring hall system under which applicants for employment are discriminated against because of their gender or nonmembership in a union.

(c) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Jointly and severally with International Alliance of Theatrical Stage Employees and Moving Picture Operators of the United States and Canada, Local 22, AFL–CIO, and Wolf Trap Foundation make whole Regina Becker for any loss of earnings and benefits she may have suffered between May 2 and December 31, 1981, by reason of the discrimination against her. Backpay shall be computed as described in the remedy section of the judge's decision with interest thereon computed in accordance with footnote 3 of our original Decision and Order. In addition, jointly and severally with Wolf Trap and the Union make whole Regina Becker by making contributions on her behalf to any funds to which such contributions would have been made had she been lawfully referred to employment.

(b) Preserve and, on request, make available to the Board or its agents for examination and copying, all payroll records, social security payment records, timecards, personnel records and reports, and all other records necessary to analyze the amount of backpay due under the terms of this Order.

(c) Post at its place of business copies of the attached notice marked "Appendix C."[5] Copies of the notice, on forms provided by the Regional Director for Region 5, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In addition, post in such places copies of "Appendix A," which are forwarded to Respondent Ford's by the Regional Director for Region 5.

(d) Notify the Regional Director in writing within 20 days from the date of this Order what steps the Respondent has taken to comply.

APPENDIX A

NOTICE TO MEMBERS
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

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[4] See fn. 3, supra.

[5] See fn. 3, supra.

WE WILL NOT discriminate against Regina Becker or any other applicants for referral to employment because of their gender or their nonmembership in our Union or any other union.

WE WILL NOT agree to or maintain with employers any collective-bargaining agreements that contain provisions giving preference for employment to members of our Union or any other labor organization.

WE WILL NOT tell employee that other employees will be discriminated against because of their gender or nonmembership in a labor organization.

WE WILL NOT announce at membership meetings or elsewhere a policy of giving preference to union members and their sons over nonmembers.

WE WILL NOT in any like or related manner restrain or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL jointly and severally with Ford's Theatre and Wolf Trap Foundation make Regina Becker whole, with interest, for any losses suffered as a result of our discrimination against her after April 20, 1981.

INTERNATIONAL ALLIANCE OF THEATRICAL STAGE EMPLOYEES AND MOVING PICTURE OPERATORS OF THE UNITED STATES AND CANADA, LOCAL 22, AFL-CIO

APPENDIX B

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

WE WILL NOT maintain with International Alliance of Theatrical Stage Employees and Moving Picture Operators of the United States and Canada, Local 22, AFL-CIO, or any other labor organization, a collective-bargaining agreement that contains provisions giving preference in employment to union members over nonmembers.

WE WILL NOT maintain with Local 22 or any other labor organization an exclusive hiring hall arrangement that discriminates against applicants for referral to employment on the basis of their gender or nonmembership in a union.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL jointly and severally with Ford's Theatre and the Union make whole Regina Becker for any losses she may have suffered as a result of the discrimination against her by Local 22 after April 20, 1981, until April 30, 1982, plus interest.

WOLF TRAP FOUNDATION FOR THE PERFORMING ARTS

APPENDIX C

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

WE WILL NOT maintain with International Alliance of Theatrical Stage Employees and Moving Picture Operators of the United States and Canada, Local 22, AFL-CIO, or any other labor organization, a collective-bargaining agreement that contains provisions giving preference in employment to union members over nonmembers.

WE WILL NOT maintain with Local 22 or any other labor organization an exclusive hiring hall arrangement that discriminates against applicants for referral to employment on the basis of their gender or nonmembership in a union.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL jointly and severally with Wolf Trap and the Union make whole Regina Becker for any losses she may have suffered as a result of the discrimination against her by Local 22 after May 2, 1981, until December 31, 1981, plus interest.

FORD'S THEATRE SOCIETY

American Fleet Maintenance Company, Inc. *and* **International Association of Machinists and Aerospace Workers, AFL–CIO, CLC.** Cases 7–CA–27039 and 7–CA–27144

June 30, 1988

DECISION AND ORDER

BY CHAIRMAN STEPHENS AND MEMBERS JOHANSEN AND CRACRAFT

On April 12, 1988, Administrative Law Judge Marvin Roth issued the attached decision. The Interim Trustee in Bankruptcy filed exceptions limited to the issue of whether the Board could require a liquidating trustee to take the affirmative actions necessary to comply with the recommended Order against the Respondent in this case.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings, and conclusions and to adopt the recommended Order.

The Interim Trustee does not except to the judge's findings that the Respondent committed violations of the Act. Rather, in her exceptions the Trustee merely asserts that an involuntary Chapter 7 bankruptcy petition was filed against the Respondent on February 26, 1988, in the United States Bankruptcy Court for the Eastern District of Michigan, Southern Division, in Detroit, Michigan, which automatically stayed all legal proceedings against the Respondent under the provisions of 11 U.S.C. § 362(a). Board proceedings, however, fall within the provisions of 11 U.S.C. § 362(b)(4) and (5), which specifically except proceedings by a governmental entity to enforce its police or regulatory powers from the automatic stay provisions in 11 U.S.C. § 362(a). *Phoenix Co.*, 274 NLRB 995 (1985). Furthermore, the institution of bankruptcy proceedings does not deprive the Board of jurisdiction or authority to entertain and process an unfair labor practice case to its final disposition. *Antoine's of Beverly Hills*, 280 NLRB No. 142, slip op. 2 (July 31, 1986), not reported in Board volumes.

The Interim Trustee also asserts that the Respondent no longer has any employees, the Respondent's business operations have ended, and the Trustee only has the authority to liquidate the Respondent's business but has no authority to operate the former business. The Trustee contends that she has no authority to undertake the affirmative actions required to comply with the recommended Order in this case and that it is therefore inappropriate for the Board to impose such affirmative provisions on a liquidating trustee. We disagree. Consideration of the unsupported assertions in the Trustee's exceptions is best left to the compliance stage of this proceeding, when the Respondent can introduce evidence about the closing of its business.

289 NLRB No. 97

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge and orders that the Respondent, American Fleet Maintenance Company, Inc., Detroit, Michigan, its officers, agents, successors, and assigns, shall take the action set forth in the Order.

John Ciaramitaro, Esq., for the General Counsel.
Stanley C. Moore III, Esq., of Detroit, Michigan, for the Respondent.
Joseph Postas, of Detroit, Michigan, for the Charging Party.

DECISION

STATEMENT OF THE CASE

MARVIN ROTH, Administrative Law Judge. These consolidated cases were heard at Detroit, Michigan, on October 5, 6, and 7, 1987.[1] The charge in Case 7–CA–27039 was filed on June 10 by International Association of Machinists and Aerospace Workers, AFL–CIO (the Union). The Charge and amended charge in Case 7–CA–27144 were filed by the Union respectively on July 16 and August 19. The consolidated complaints, which issued in Case 7–CA–27039 on July 24 and in Case 7–CA–27144 on August 26, allege that American Fleet Maintenance Company, Inc. (Respondent or the Company) violated Section 8(a)(1), (3), and (5) of the National Labor Relations Act. The gravamen of the complaint is that the Company allegedly unlawfully withdrew recognition from the Union as representative of a unit of its employees, unilaterally discontinued paying health insurance provisions and unilaterally granted the employees a wage increase, engaged in unlawful acts of retaliation, interrogation, and promises of benefits, and discriminatorily disciplined and terminated employees Donald Cooper and Pete Sype because of their union activities. The Company's answers deny the commission of the alleged unfair practices. All parties were afforded full oppportunity to participate, to present relevant evidence, to argue orally, and to file briefs. The General Counsel and the Company each filed a brief.

On the entire record in this case[2] and from my observation of the demeanor of the witnesses, and having considered the briefs and arguments of the parties, I make the following

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[1] All dates are in 1987 unless otherwise indicated.

[2] The official transcript of proceedings is noted and corrected.

FINDINGS OF FACT

I. THE BUSINESS OF THE COMPANY

The Company, a Michigan corporation with its princi-l office and place of business in Detriot, Michigan, is gaged in the rebuilding of diesel transmissions and en-nes, principally for the city of Detroit's public trans-ortation system. In the operation of its business the ompany annually purchases and receives at its Detroit ace of business transmission and engine parts and other oods and materials valued in excess of $50,000 directly om points outside of Michigan. I find, as the Company lmits, that it is an employer engaged in commerce ithin the meaning of Section 2(6) and (7) of the Act.

II. THE LABOR ORGANIZATION INVOLVED

The Union is a labor organization within the meaning f Section 2(5) of the Act.

III. THE ALLEGED UNFAIR LABOR PRACTICES

A. *Preliminary Findings: the Company's Operations, the Union Organizational Campaign, the Negotiations Between the Parties, and the Question of Whether the Company Validly Recognized the Union*

The Company's facility is located on Meyers, in De-roit. The Company previously operated a facility on East Warren in Detroit. The Company commenced operations at the Meyers facility in December 1985, and con-inued to operate at East Warren until July 1985. In March 1987, the Company's supervisory hierarchy con-isted of: President Richard Topolewski; his stepfather Eugene Kopcik, who was board chairman; Topolewski's cousin, William Dinardi, who was vice president; and Foreman Gil Davis Sr. All four performed hands-on work in the shop in addition to their supervisory duties. William Dinardi Sr., Topolewski's uncle, was sales manager. As of March 19 the Company had 12 shop employees. Topolewski testified that all 12 could be described as mechanics, although not all performed mechanical work. Most had a principal job function, although they did not work exclusively at the function. Stantley Marchelwicz worked at teardown and inspection, and James Celani cleaned the engines after they arrived at the facility. Ronald Carter worked at assembly, including the "Supercharger." Donald Cooper and Peter Sype, the alleged discriminatees, were engine builders. Walter Klatzke worked at transmission building, including teardown and inspection of transmissions. Robert Swigert operated the engine dynomometer (testing machine). (The transmission dynomometer might be operated by any one of several persons.) Kendall Magee removed and reinstated engines, and Jerome Kennedy helped install engines, among other tasks. Gil Davis Jr. functioned as a general helper, and Mark Palkowski was parts clerk. Charles Brown did janitorial work. President Topolewski and Board Chairman Kopcik worked on parts in the machine shop. The supervisors, including Topolewski, worked on assigned tasks as needed. The Company also had sales and clerical personnel who worked in the office, including Topolewski's mother and wife.

On March 12, in response to call from one of the employees, Union Business Agent Joseph Potas met with Sype, Cooper, Davis Sr., and Davis Jr. Davis Sr. told Potas that he was a leadman and had no authority to hire and fire. Potas testified that on the basis of what Davis Sr. told him, he concluded that Davis Sr. was a supervisor. Sype testified that this was also his understanding. However, at the present hearing the parties stipulated that Davis Sr. was a supervisor who had authority to hire and fire. Potas distributed union authorization cards and all four present signed cards. Cooper ad Sype took extra cards and the next day, solicited seven additional employees (Klatzke, Brown, Palkowski, Celani, Swigert, Magee, and Carter) to sign authorization cards. Cooper, who neglected to date his initial card, signed a second card on March 13. Cooper and Sype turned in all cards to the Union. Davis Sr. did not solicit any cards. As of March 13, 10 of the 12 shop employees (all but Marchelwicz and Kennedy) had signed union authorization cards.

By letter dated March 19 to the Company, the Union asserted that a majority of the Company's maintenance employees designated and bargaining as set forth in an attached "Recognition Agreement." The agreement provided that the Company agreed to recognize the Union as a representative of "all its employees employed as: leadmen, diesel mechanics, automotive machinists, journeymen mechanics, general maintenance, apprentice mechanics, stockroom clerks, parts pickup men, helpers and porters, but excluding office-clerical employees, truck drivers, dock and warehousemen, supervisory employees, salesmen and guards are defined in the Act." The proposed agreement provided that the parties would negotiate a collective-bargaining contract, whose terms would be retroactive, and also provide for a card check in the event the Company has a good-faith doubt concerning the Union's majority status. The agreement also provided that any "arbitrary action" by the Company against union adherents would be considered by the Union as a basis for filing an unfair labor practice charge.

After receiving the Union's letter, President Topolewski telephoned Business Agent Potas and requested a meeting with him. Potas said that they could go to an election and sign the recognition agreement, and (in the latter event) the parties could first have a card check by an outside person. Topolewski replied that he did not doubt the Union had a majority and an election would be a waste of time. The parties met late in the week of March 23 at the Company office. Potas was accompanied by Business Agent John McDonald and Topolewski by Kopcik and Denardi Jr. Topolewski complained that the Company was a small firm, had financial problems, and questioned why the Union wanted to organize it. He showed Potas the Company's financial statements, and said that he changed his mind and wanted to go to an election. McDonald said that the parties could go to an election, sign the recognition agreement, or the Union could strike. Topolewski testified that he was ready to sign the agreement but that Kopcik balked. Potas suggested that Topolewski think it over. On March 30 Denard Jr. telephoned Potas and said the Company was ready to sign. Potas immediately went to the Company's facility. Topolewski again stated that he changed his mind and wanted to go to an election. Potas returned to his office. About 1 p.m. Denardi again called and again said that they changed their minds, and Potas should return to the facility. Pitas immediately did so. They discussed the recognition agreement. Topolewski objected to the retroactivity clause. Potas agreed to strike it, which he did. They also discussed the bargaining unit. Topolewski said that some of the job classifications in the recognition clause were not accurate, e.g., the Company did not have any "apprentice mechanics" as such. Potas replied, and Topolewski agreed, that this was no problem because both parties understood that the agreement covered all shop employees, and excluded supervisors, sales, and office personnel. Topolewski testified that he did not consider the unit description to be a problem, and therefore did not request any change in the language.[3] Topolewski also told Potas that Davis Sr. was a foreman. Potas replied that they could resolve his status in the contract negotiations. Topolewski questioned Potas about the clause on "arbitrary action," saying that he wished to avoid such accusations. Potas advised Topolewski to document any disciplinary action. At the conclusion of their meeting the parties signed the recognition agreement, as modified to delete retroactivity.[4] In the meantime, on March 26, Topolewski discussed unionization with Cooper and Sype. Their conversation will be discussed in the next subsection of this decision.

At a union meeting on April 7, the employees elected Sype as steward and member of the negotiating committee, and Cooper as shop committeeman and alternate member of the negotiating committee. Thereafter, Sype attended negotiating sessions. Davis Sr. was present at the meeting, and Topolewski immediately learned of the election, although he was not then officially notified, and was not certain of the respective positions held by Cooper and Sype. the next day he asked Sype who informed him of their respective positions.

The Company and the Union next met on April 13. Potas brought a copy of a contract between the Union and an employer association, which he proposed as a basis for contract negotiations. Potas said he wanted the contract language, but they could discuss economics. Topolewski and Denardi Jr. objected to the wage and fringe benefit amounts, and said they did not understand the contract language, but agreed to read the contract. Potas explained the functions of the steward and committeeman, and they discussed minor matters (Potas questioned why the Company did not provide a pay phone and soap in the washroom). The parties agreed to meet next on April 15. Shortly before that meeting Denardi Jr. asked Potas to bring a copy of a contract between the Union and another employer (Cummins Michigan, Inc.), which Potas did. At the April 15 meeting the parties did not discuss contract proposals. However, they did discuss shop problems, and particularly as this concerned individual grievances. They discussed the fact that Ron Carter was paid less than the rate of his job. (The Carter problem will be considered later in connection with the complaint allegations of discriminatory conduct.) They discussed grievances pertaining to employees Brown and Pulkowski. They also discussed the matter of discipline. (The Company gave Cooper a written disciplinary warning on April 7 for absenteeism and another written warning on April 15.) Potas recommended a progressive disciplinary system. The Company did not say whether it had written shop rules, and that matter was not discussed. The parties next met on May 1. Topolewski was obviously preoccupied with another unrelated matter, and Potas suggested that they schedule another meeting. Again they did not discuss specific contract proposals. The Company never presented any specific proposals. There was some general discussion about seniority and job classifications. Potas testified that Topolewski and Denardi told him that Blue Cross-Blue Shield coverage was "gone by May 1 or it was about to be gone," the Company was negotiating with Blue Cross-Blue Shield for employee self-insurance, and was also looking for a cheaper policy, and the Company gave the employees a 50-cent-per-hour increase to help defray the cost of health insurance. Potas replied that the employees needed health insurance. Potas testified that this was the first notice the Company gave him concerning these changes, although he had recently heard rumors from the employees about these changes.

The parties next met, as scheduled, on May 14. In the meantime, the Company discharged Cooper on May 4, laid off Sype on May 5, and gave him two disciplinary notices and discharged him on May 14, and gave disciplinary notices to Ronald Carter on April 15 and 30 and to Stanley Marchelwicz on April 23. When the parties met, Pitas attempted to commence contract negotiations. Instead, the Company presented the Union with a copy of a petition dated May 8 from employee Robert Swigert to Potas, signed by seven employees (Carter, Klatzke, Davis Jr., Marchelwicz, Magee, Swigert, and Celani), stating that they no longer wished to be represented by the Union. Potas had not previously received the petition although he found the petition in his mail when he returned to the union hall that day. Topolewski said that in view of the petition he did not think that the Company was obligated to bargain. Potas disagreed and left. By letter dated May 18 the Union demanded a resumption of bargaining. Potas also telephoned the Company, but Topolewski said there was no change in the Company's position. On July 23, after the Union filed its charge in Case 7-CA-27039, and the Regional Director determined to issue a complaint, Denardi told Potas that because of the Board's preliminary determination the Company would resume negotiations. The parties met shortly thereafter. They discussed Cooper and Sype. Topolewski said he would close before taking them back. Potas sought to discuss a contract. They agreed on some lanuage in principle, but the Company did not submit any roposals. The parties did not meet again in negotiations.

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[3] The alleged appropriate bargaining unit as stated in the complaint differs slightly in form, but without any substantive difference, from unit defined in the recognition agreement. At the hearing the parties stipulated that the unit described in the complaint covered all shop employees as of March 19.

[4] Topolewski testified that he thought they met and signed the agreement on March 31. However, Potas testified that they did so on March 30. The agreement is dated March 30. I credit Potas.

In its answers to the complaints, the Company denied at it entered into a legally valid recognition agreement ith the Union, that the Union was the representative of s shop employees, and that the union stated in the comlaint was an appropriate unit for collective bargaining. lowever, in its brief the Company does not dispute that validly recognized the Union on March 30. Rather, the ompany contends in sum that it was entitled to withraw recognition from the Union, on the basis of the lay 8 employee petition, because the Company allegedy had a good-faith doubt of the Union's majority status, ased on objective factors. I find that a majority of the ompany's shop employees validly designated the Union s their collective-bargaining representative, that on larch 30 the Company entered into a lawful and binding agreement whereby it recognized the Union as represntative of its employees in a unit appropriate for colective bargaining, and that by reason of such recogniion, the Union was from March 30 until at least May 8 he exclusive collective-bargaining representative of the employees in the appropriate unit. It is undisputed that 10 of the 12 shop employees signed union authorization cards. The Company did not until May 14 question the Union's majority status. That status was not tainted by the presence of Supervisor Davis Sr. at early union meetings. Davis Sr. did not solicit any employee to sign cards; indeed, he was not even present when seven of the employees signed authorization cards. Davis Sr.'s presence at union meetings could not reasonably be viewed by the employees as coercive, or indicating management endorsement of the Union. The employees assumed that Davis Sr. was a nonsupervisory leadman, and he so represented himself at the first union meeting. As will be discussed, the employees knew all along that the Company was opposed to unionization. Therefore, the authorization cards were valid. *Steward Sandwich Service*, 260 NLRB 805, 808 (1982). The Company and the Union understood and agreed that the Company recognized the Union for a unit of all shop employees, i.e., excluding supervisors, sales, and office personnel. The Company questioned the Union's choice of language in describing the unit, but accepted and agreed to that language. All the shop employees performed functions described in the recognition agreement. Therefore, it was immaterial that the Company did not then employ "apprentice mechanics."

The General Counsel contends (Br. 8) that apart from (or addition to) the Company's obligation under the recognition agreement, the Union is entitled to a *Gissel* remedial bargaining order (*NLRB v. Gissel Packing Co.*, 395 U.S. 575, 613-615 (1969)). The General Counsel argues that such offer would be effective from March 19, "at the outset of the [Company's] unlawful course of conduct." However, the first alleged unfair labor practice occurred on March 25. I shall defer this matter until after I have discussed the alleged unfair labor practices on which the General Counsel predicated her request.

B. *Alleged Unlawful Interrogation and Promises of Benefit*

Donald Cooper testified without contradiction that when he was initially hired by the Company (September 1985), Topolewski told him that he did not want a union and did not want to hire anybody who wanted a union. I credit Cooper, and I find that Topolewski's statement may properly be considered as background evidence in this case.

On March 25 or 26, after receiving the Union's request for recognition, Topolewski summoned employees Cooper and Sype to his office. Denardi Sr., Denardi Jr., and Kopcik were present. Until this time neither employee had informed management of their support for the Union. Cooper and Sype testified in sum as follows concerning the meeting: Topolewski asked why they were bringing in the Union, adding "am I that hard to work for?" The employees answered that they wanted job security, vacation time, air filters, a pay phone, and other improvements in working conditions. Denardi Jr. proceeded to do most of the talking. He said that the Company was having financial difficulties, and this was a bad time to have a union. Topolewski gave the employees a copy of the company financial statement. Denardi Jr. told them that the Company had considered an incentive program for engine builders, under which they would receive a bonus if they built more than two engines per week (Cooper and Sype were the only employees who worked regularly at engine building). The Company had not previously mentioned such a program. Denardi Jr. added that with a union coming in they might as well close the doors, there was no way they could financially make it. Cooper and Sype told other employees about this meeting. Topolewski, the Company's only witness, testified that after receiving the Union's request for recognition, he summoned Cooper and Sype to his office "to try to see what happened." Topolewski admitted that Davis Sr. told him that Cooper and Sype brought in the Union. In light of Topolewski's testimony, it is evident that he summoned the employees for the initial purpose of questioning them about the union organizational campaign. Topolewski testified in sum that he told the employees that he was not so bad an employer, that the Company was having financial difficulties, which he proceeded to explain, and he gave them a copy of the Company's latest financial statement. He testified that he told them he could bargain with the Union, but this would do no good if the Company could not pay for any agreed-on benefits. Topolewski testified that he did not otherwise discuss the Union. Topolewski did not testify concerning what, if anything, was said about an incentive program. He also did not testify concerning what, if anything, was said by Denardi Jr. or any of the other management officials present. As Denardi Jr. did most of the talking, Topolewski's testimony has limited evidentiary value.

I credit the testimony of Cooper and Sype as summarized above. In the context of the meeting, Denardi's suggestion of a bonus for engine builders constituted an implied promise of benefit to the two leading union adherents if they abandoned the Union. I further find that the Company, by Denardi, threatened the employees with plant closure if they continued to support the Union. Denardi Jr. did not make a prediction based on objective economic considerations related to specific union proposals. Rather he equated unionization with plant closure. As indicated, in the same conversation in which the Company pleaded poverty, Denardi Jr. proposed an incentive bonus as an alternative to unionization. As will be discussed, this was not the only instance in which the Company pleaded financial inability, while at the same time demonstrating its ability to provide employee benefits. In sum, the Company was demonstrating an example of the "fist inside the velvet glove." *NLRB v. Exchange Parts Co.*, 375 U.S. 405, 409 (1964). Although the complaint does not allege a threat of plant closure, the question of what transpired at the meeting was fully and fairly litigated, and Denardi's threat of plant closure was an intergral part of his remarks. I find that the Company violated Section 8(a)(1) of the Act by offering Cooper and Sype an incentive bonus plan if they abandoned their support for the Union and by threatening the employees with plant closure if they continued to support the Union.[5] I further find that Topolewski violated Section 8(a)(1) by coercively interrogating Cooper and Sype concerning their reasons for wanting a union. Topolewski had no legitimate reason for questioning the employees. He never questioned the Union's majority status. He interrogated the employees in an atmosphere of unnatural formality, specifically, in his office, where the employees were confronted by an array of top management. Topolewski did not give the employees any assurance against reprisals. On the contrary, he questioned the employees in the context of unlawful threats and promises of benefits, and against a background of employer hostility to unionization. During the same period of time whan Topolewski met with the employees he was equivocating about signing the recognition agreement. It is evident Topolewski was stalling to gain time to undermine the Union, and began his campaign by trying to pressure the leading union adherents into abandoning the Union. As will be discussed, when this tactic failed, the Company proceeded to the next step, namely, to apply pressure against all the employees.

C. *Discontinuance of Health Insurance Benefits and Wage Increases to Employees*

The complaint alleges that about April 30, the Company discontinued paying health insurance premiums for the unit employees, that about May 4 the Company granted the unit employees a wage increase, that the Company took those actions without prior notice to the Union and without affording the Union a meaningful opportunity to negotiate and bargain about the changes, and that the Company thereby violated Section 8(a)(1) and (5) of the Act.

The Company's personnel including the unit employees were covered by a Blue Cross-Blue Shield health insurance plan under which the Company and the employees each contributed a portion of the premiums. On March 25 or 26, shortly after meeting with Cooper and Sype, Topolewski assembled a meeting of all employees. Topoloweski and Denardi Jr. informed the employees that the Company was behind in premium payments, that the Company could not afford to pay the premiums, and therefore that the policy was being canceled. They said that the employees would have to get their insurance through the Union. This was the first notice given to the employees of such cancellation. Nothing was said at this time about a wage increase. Friday, March 27, was a payday. The employee's paychecks were accompanied by a notice from management to "all employees," dated March 27, the text of which stated as follows:

> Due to our inability to pay the Blue Cross-Blue Shield payment we are forced to let the policy lapse.
>
> Blue Cross will contact you individualy [sic] to see if you want to continue it personally.
>
> To help defer the added personal expense starting April 1, 1987, all hourly pays will be increased by $.50 per hour.
>
> I sincerely regret being forced to do this but it has become economically impossible to continue.

The announced wage increase was sufficient to compensate single employees for lost employer contribution, but was not sufficient to compensate for lost family coverage.

In fact, that Company never canceled health insurance coverage. Rather the Company permitted the Blue Cross-Blue Shield policy to lapse for nonpayment of premiums, effective as of May 1, i.e., more than a month after its announcement. The Company long had a policy of waiting until the last possible moment to forward premium payments. As a result the Company was always delinquent in premiums payments, and on at least two occasions was given notice of "cancellation" by the insurer. The Company did this, not because of inability to pay, but to maximize use and profit from its own funds and the employees' contributions. Thus, every time the Company was threatened with a notice of cancellation of policy, it would pay in as much as necessary to become current, the policy would remain in effect, and the Company would resume its delinquent ways. The Company received notice of cancellation from the insurers in November 1986 and again by notice dated March 16, effective as of February 1. However, the policy did not lapse on either occasion. It is undisputed that the insurer submitted statements which indicated that the policy was paid up through March, the employees were covered through April, and that the insurers billed the Company for premiums for the month of April. The Company used similiar tactics in connection with the announced pay increase. Donald Cooper testified that he did not receive the 50-cent-per-hour increase until the third payday in April (April 17). Topolewski in his testimony admitted that he did not grant all employees a wage increase as of

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[5] The Company argues (Br. 24-25) that it did not violate the Act because it never implemented the incentive bonus plan. The argument is without merit. Sec. 8(a)(1) prohibits both promises and grants of benefits to discourage unionization just as it prohibits both threats and retaliatory actions for that purpose.

April 1, either then or retroactively. Topolewski testified in sum that with respect to employees who had family coverage, he withheld the amount of the wage increase as a fund for payment of premiums they decided to renew coverage. When some employees did not renew coverage on an individual basis, the Company gave some of the money to the employees and paid the rest to the insurer.

I find that the Company violated Section 8(a)(1) and (5) of the Act by unilaterally discontinuing payment of health insurance premiums for the unit employees, and unilaterally granting the unit employees a wage increase. The Company independently violated Section 8(a)(1) by discontinuing payment of premiums because that action was discriminatorily motivated. The Company used its March 27 announcement as a club over the employees' heads. The Company did not act on its announcement. However, when the employees failed to abandon the Union, the Company retaliated by permitting the policy to lapse. Therefore the Company violated Section 8(a)(1), regardless of its bargaining obligations. Moreover, as found, the Company discontinued paying health insurance premiums and effectuated a wage increase after March 30. The Company did so unilaterally, without giving prior notice to the Union and without offering the Union a meaningful opportunity to negotiate and bargain about the changes. Instead, the Company falsely led the Union to believe that these changes were implemented prior to the recognition agreement. The Company did not even offer the Union, after the fact, an opportunity to negotiate about the changes. Instead, before the parties had an opportunity to engage in an indepth discussion of substantive matters, the Company discontinued bargaining. Therefore the Company violated Section 8(a)(1) and (5) of the Act by unilaterally discontinuing payment of health insurance premiums and by granting the employees a 50-cent-per-hour wage increase. If the Union is entitled to a remedial bargaining order under *Gissel*, then it would follow that the Company violated Section 8(a)(1) and (5) even if the changes were initiated on March 27 because the Company's bargaining obligation would commence from March 25 or 26, when it began engaging in unfair labor practice conduct.

D. *Written Reprimands to Cooper, Sype, and Other Employees, Discharge of Cooper, and Layoff and Discharge of Sype*

The complaint alleges that the Company violated Section 8(a)(1) and (3) of the Act by engaging in the following discriminatory actions: issuing written reprimands to Donald Cooper about April 5 and 15; presenting Pete Sype with a written reprimand about May 13; discharging Cooper about May 4; laying off Sype about May 5, and discharging him about May 15; and since about April 1, engaging in a retaliatory campaign against unit employees by issuing an increased number of written reprimands through various supervisors. As the evidence concerning these allegations is interrelated, I shall deal with them together.

On April 7 the Company issued the following written warning to Cooper:

> Subject: Absenteesim
>
> As you well know, in the last couple of months you have missed a number of days due to illness. These missed days for the most part have been documented by Doctors excuses.
>
> However, upon making an inquiry with your Doctor concerning your last excuse on 4/6/87, we discovered that he simply diagnosed you over the phone. Later that day your wife picked up your written excuse, which stated you were totally incapacitated with gastrointestinal flu, all of which he concludes without you being present.
>
> It is our contention that this excuse and the past excuses from this Doctor are not valid. American Fleet Maintenance is forwarding our complaint to the Doctor and the Licensing Board of Lansing.
>
> Any further disciplinary action may result in your dismissal.

On April 15 the Company issued another written warning to Cooper, which read as follows:

> Subject: Poor Workmanship
>
> Upon dyno testing Engine #6VA-JD6774 it was discovered that (2) two of the oil pump bolts were left out. As you know this causes the engine to leak oil, as well as a delay in turn-around time for that unit. Obvious errors of this nature must cease.

The Company terminated Cooper on May 4, giving him the following written notice:

> Subject: Termination
>
> Due to excessive and constant absenteeism we are forced to terminate your employment immediately.
>
> When employees are not on the job it seriously hampers production.

Topolewski testified that he terminated Cooper because he did not show up for work for 3 days. Topolewski denigrated the quality of Cooper's work performance, testifying that Cooper was "a good repairman," but could not really be considered an "engine rebuilder" because he could not "rebuild or remanufacture component parts." Just what Topolewski meant is not clear because only Topolewski and Kopcik normally remanufactured component parts as such, i.e., in the machine shop. Topolewski testified that Pete Sype also could not rebuild component parts. However, he admitted that he simply meant that Sype took too much time to rebuild a supercharger (which was normally Ronald Carter's work). However, Topolewski admitted that Cooper was told only that he was discharged for absenteeism, and Topolewski did not claim that he discharged Cooper for any other reason. He did not claim to know why Cooper was absent. However, the Company, in its cross-examination of Cooper, suggested that it has something to do with the fact that Cooper performed repair work out of his home.

Cooper began working for the Company in September 1985. He quit in March 1986, and was rehired in November 1986. He testified without contradiction that prior to April 7 he had never been given a written disciplinary notice of any kind, and that he was never given a disciplinary suspension. Cooper further testified that on every occasion, except one, when he was absent from work, the absence was caused by illness and that on each such occasion he presented a doctor's certificate. He testified that the one other occasion occurred in November 1986, shortly after he returned to work for the Company. Denardi Jr. gave him permission to be absent for 3 days to go deer hunting, as planned by Cooper before he returned to work. Denardi was present at this hearing, but was not called to testify. In the absence of Denardi's testimony, or that of any other actual or potential company witness, the assertion in the April 7 disciplinary notice that Cooper's absences due to illness, "for the most part have been documented by doctor excuses," is uncorroborated hearsay. I credit Cooper. I find that Cooper's absences due to illness were *always* documented by a doctor's certificate, and that Topolewski knew this to be the case.

With regard to the April 7 warning Cooper testified that on April 6 he was ill with a respiratory infection. Cooper testified in sum that in February he began doing repair work in his garage and yard, and that outside work the night before may have aggravated a cold, but that he did not stay home to work. He did not visit a doctor, but he telephoned a doctor and his wife picked up the doctor's certificate. The next day Cooper brought the certificate to work. Topolewski asked Cooper whether he had gone to the doctor. Cooper falsely answered that he had. Topolewski did not accept the answer. Instead, he called the doctor and learned that Cooper had not visited him. Topolewski then issued the warning notice, and filed a complaint against the doctor. Topolewski admitted in his testimony that this was the only time he questioned a doctor's ceteificate. He testified that he did so because he learned that Cooper was working at home, and that as a result of the April 6 incident he assumed that Cooper has lied about being sick on prior occasions. Cooper testified without contradiction that he was never before told that he had to personally visit a doctor to have his excuse accepted as valid. Cooper was next absent for 3 days beginning Monday, April 27 (he was not scheduled to work for the balance of that week). Cooper testified that he was sick with a stomach flu. This time Cooper visited a doctor and personally obtained a certificate. He reported to work on Monday, May 4, and found that his timecard had been pulled from the rack. He went to Topolewski, who told him that "he just couldn't put up with this anymore." Topolewski did not accept or even look at the doctor's certificate.

If Topoloweski issued the April 7 warning and discharged Cooper because of absenteeism, his action would be inconsistent with the Company's usual policy and practices in two important aspects. First, the Company had a progressive disciplinary practice for absenteeism which predated the Union's organization campaign. The General Counsel presented in evidence a three-page document addressed from Topolewski, to "All Employees," captioned "Shop Rules Restated." With respect to "Absenteeism," the document stated as follows:

> ABSENTEEISM
>
> A. First offense—Written warning
> B. Second offense—Day off
> C. Third offense—3 days off
>
> D. Fourth offense—Misconduct, subject to discharge. Bonafide sickness with doctors slip is excuseable. Without doctors slip is unexcused and subject to absenteeism remedies.
>
> 2 days off without notification considered voluntary quit.
>
> Any time off during 1st 30 days is subject to immediate discharge.
>
> 3 lates in 90 days is subject to review and possible discharge.

Topolewski testified that the Company has written work rules, including the above rules on absenteeism, until the end of 1985, which were used only at the East Warren facility. He testified that they were not "really" distributed, but posted on a bulletin board. However, he testified that the rules were posted at East Warren and Meyers. He further testified that after his attorney advised him to discontinue using the rules, he told his supervisor not to distribute them "anymore." If the rules had been posted and never distributed, there would have been no need to give such an instruction. The rules as presented in evidence by the General Counsel were headed with the Meyers' address. Pete Sype testified that when he began working for the Company in April 1986, then-foreman John Denardi gave him a copy of the rules, and he was never told they were no longer in effect. Employee Walter Klatzke testified that when he was rehired by the Company in May 1986, Denardi Jr. gave him a copy of the rules, he was never told they were no longer in effect and, to his knowledge, the rules were being distributed as late as January 1987. Cooper also testified that he was given a copy of the rules when he was hired. In the absence of any testimony by Denardi Jr., Klazke's testimony stands unrefuted. According to Topolewski, he discontinued using the rules after his attorney advised him they were ineffective. In fact, as Topolewski admitted, he had a very good reason for using a progressive disciplinary system for absenteeism. Topolewski testified that he instituted this system because of disputed claims for unemployment compensation "so that I could cover myself if I had a problem down the road." Thus it is not surprising that after Cooper was discharged, and Sype protested that Topolewski had violated his own rules by not following the disciplinary procedure, Topolewski answered that he had "already been to court on that once" and "wasn't worried about it." In essence, Topolewski was boasting that he was covered because he had reduced his action to writing.

Second, as the Company's own rules indicate, the Company treated "bona-fide sickness with doctors slip" as an excusable absence not subject to discipline. The rule did not require that the employee personally visit the doctor for the slip to be acceptable. Thus, under the Company's own rules, neither of Cooper's absences in April warranted any disciplinary action. Therefore, the reasons given by Topolewski for both the April 7 warning and Cooper's discharge were demonstrably pretextual. This is graphically demonstrated by a written notice that the Company gave to employee Stanley Marchelwicz on April 23. The text of the notice was as follows:

> Subject: Absenteeism
>
> On March 21st and 22nd you were not at work due to an illness for which you called in. By calling in you had followed proper procedure. But, in the future when you are out sick, upon returning you must furnish the Company with a Doctor's excuse in order for the missed day or days to be considered an excused absence.

Topolewski, in his testimony, professed to be unable to explain why the Company took over a month to give a warning to Marchelwicz. It is evident from the warning that the Company did not even enforce its requirement of a doctor's slip, let alone require a visit to the doctor. However, after discharging Cooper, the Company belatedly issued a warning to Marchelwicz to bolster its pretext for Cooper's termination.

At the hearing evidence was presented concerning the work and attendance record of employees Ronald Carter, in part as a basis from comparison with Cooper. Carter began working for the Company in 1981, and quit shortly before the present hearing. It is undisputed that Carter had an atrocious attendance record. Carter's personnel file contained a string of written warnings dating back to 1984. Most concerned absenteeism and tardiness, although several were for substandard work. Some warnings for absenteeism indicated that Carter would be discharged for the next offense. As Topolewski put it, Carter was "fired and rehired several times." There were no doctors to call. Carter "had his grandmother and grandfather die seven or eight times each." However, Topolewski testified that he was lenient with Carter because he was a longtime employee and the least dispensible employee, e.g., the only one who could satisfactorily rebuild a supercharger. At one point Topolewski was prepared to really discharge Carter. Instead they struck a deal. Carter agreed to take a pay cut from $9 to $7 per hour. However, he would get $9 per hour for any week in which he had perfect attendance. Between July 21, 1986, and April 15, 1987, Carter did not receive any written warnings. That day, when the Company and the Union met, the Union questioned Carter's rate of pay, and Topolewski explained their arrangement. That same day, and again on April 30, the Company gave Carter written warnings for absenteeism, each of which threatened discharge for future offenses. On July 27, shortly after the Regional Director issued the first complaint in this case and the Company and the Union met again, the Company gave Carter another written warning, this time for tardiness, and threatening discharge for the next instance of absence of tardiness. In view of the wage arrangement between Topolewski and Carter which resolved the matter of his attendance, the Company had no legitimate reason to issue written warnings to him. Rather, the timing of the actions and the context in which they occurred, including the Company's other unlawful actions calculated to undermine the Union, indicate that the Company was using these warning notices as a means of pressuring Carter and other employees to abandon or withhold support from the Union (Carter signed the May 8 antiunion petition).

At this point, I shall return to the circumstances of Cooper's termination. Topolewski testified in sum that on May 4 the Company was behind schedule in production for the city of Detroit, and had been so for several months, that this could cost the company substantial penalties, and that by his absence Cooper cut the company production of engines in half. However, the next day (May 5), the Company laid off Pete Sype. Topolewski testified that he laid off Sype because of "lack of money and work." The Company thereby almost simultaneously removed from its shop the only two employees who regularly worked at engine rebuilding. Topolewski's explanations for terminating Cooper and laying off Sype are mutually inconsistent. If the Company were so busy and behind schedule as described by Topolweski, than it would make no sense to remove both engine rebuilders from the shop. In an effort to bolster his explanation for laying off Sype, Topolewski testified that he had only 92 series Detroit diesel engines to be worked, and Sype had only worked on 71 series Detroit diesel engines. The difference in numbers designated reflects the number of cubic inches per cylinder. However, Sype testified that on May 5 there were 71 series engine blocks in the shop, which indicated that they were there for engine rebuilding. Moreover, although Sype had not worked on 92 engines in the shop, he was trained and qualified to perform such work. Therefore, it would have been a simple matter to give Sype such on-the-job instruction as were necessary to enable him to work on 92 series engines. Topolewski testified that after Cooper and Sype were gone, he assigned Stantley Marchelwicz, among others (including supervisory personnel) to rebuild the engines. Topolewski initially testified that besides Cooper and Sype, only himself, Denardi Jr., Davis Sr., and Carter were qualified to rebuild engines. However, Topolewski subsequently testified that Marchelwicz was an engine rebuilder. In fact, as previously indicated, Marchelwicz worked at teardown and inspection. It is evident that Marchelwicz was less qualified to rebuild engines than either Cooper or Sype, whether 71 or 92 series. I find that the Company's professed reason for laying off Sype was pretextual. Topolewski's action becomes understandable when one considers that by discharging Cooper and laying off Sype, Topolewski removed the two leading union adherents from the shop, and thereby demonstrated to the remaining employees the length to which he would go to break the Union.

To sum up at this point, I find, in light of the Company's hostility toward unionization, including its expressed policy of not wanting union adherents, the timing of the action taken against Cooper and Sype, the Company's increasingly severe campaign of unlawful conduct designed to undermine the Union, and the demonstrably prextextual reasons for its actions, that the Company issued the April 7 warning to Cooper, discharged Cooper, and laid off Sype because of their leading role in supporting the Union. The Company therefore violated

Section 8(a)(1) and (3) of the Act. I further find that the Company violated Section 8(a)(1) and (3) by issuing warning notices to Carter to pressure him to abandon his support for the Union, and by giving Marchelwicz a warning notice to conceal the ture reason for discharging Cooper. "In cases where an employer terminates an employee as part of an effort to camouflage the discriminatory discharge of a known union activist, the Board has held that all that is required is finding that the discharge of the one was undertaken in an attempt to validate or support the discharge of the other." *L. C. Cassidy & Son*, 272 NLRB 123, 131 (1984), and cases cited. It follows that lesser discipline for the same purpose would also be unlawful. Concerning all these matters, for the reasons discussed above, the General Counsel presented a prima facie case that the Company engaged in such actions because of protected employee union activity, and the Company failed to meet its burden of establishing that it would have engaged in such conduct in the absence of pretextual activity. Further, I find the discriminatory actions against Cooper, Sype, and other employees discussed above may properly be considered as evidence of the Company's motivation for the remaining actions against Cooper and Sype.

As indicated, the complaint alleges that since on or about April 1, the Company discriminatorily issued an increased number of written reprimands to unit employees. In addition to the reprimands discussed above (all were found unlawful) and the April 15 warning to Cooper, and warnings issued to Sype (which will be discussed), the company personnel records presented in evidence indicate only one other use of written discipline since April 1. That was the discharge of Charles Brown on April 15, assertedly for unexcused absence (not for illness). In January prior to the union campaign, Brown was given a 2-day suspension for loafing on the job after being verbally warned. April 15 was a day marked by discussion between the Company and the Union concerning the problems of individual employees, including Brown. (Brown had been returned to janitorial work with reduction in pay, after an unsuccessful try at engine teardown.) April 15 was also marked by company disciplinary action against employees whose individual concerns were discussed that day (Carter, Brown, and Cooper). The complaint does not allege that Brown was unlawfully terminated, and the General Counsel does not discuss the matter in her brief. I find that Brown's discharge was not litigated in this case and, therefore, I am making no findings whether the action taken against him was lawful.

Before returning to the April 15 warning to Cooper, I shall discuss the Company's next actions against Sype. He was never recalled to work. On May 15 Sype went to the plant to attend the negotiation session. The next day he went to pick up his vacation paycheck and was summoned to the office where Topolewski and Denardi Jr. handed him two disciplinary notices. The first, dated May 9, read as follows:

> Subject: Poor Workmanship
>
> On May 6, 1987 Engine #6VA-49347 was put on the dyno. After approximately on (1) hour the unit would not pull any oil, upon tear down it was discovered that the oil pump was not packed with lube for initial start. This cost American Fleet Maintenance 1/2 day for 2 men to R&R unit. This is not consistent [sic] with proper work standards.
>
> Any further work quality problems may result in you [sic] dismissal.

The second, dated May 14, read as follows:

> Subject: Poor Workmanship
>
> On May 8, 1987, Unit #6VA-88471 would not draw oil. Upon inspection it was not that the oil pump was not packed, this caused 1/2 day for 2 men to repair this problem.
>
> On May 6, 1987, in the afternoon same engine would not start. Cause timing. Upon tear down it was found that there were two timing marks on crank gear and wrong marks used, even though we had studied this same problem 2 week porior [sic] you still did not check your work. This caused 25 man hours to correct.
>
> Due to your disregard of work quality your services are no longer required.

There was no discussion at that time of either notice, although Topolewski had mentioned the crank gear at the negotiating session. As indicated, Sype did not work after May 5. The Company never asked Sype about any of the matters, or invited him to examine or explain any of the alleged problems.

On the basis of Topolewski's own testimony, the discharge notice was demonstrably false, at least insofar as the first paragraph suggested that Sype had done something wrong. Topolewski testified in sum that the notice was true, including the dates and order in which the events occurred. Topolewski testified in sum as follows: Ron Carter told him that the motor would not start. Topolewski concluded that one of three things must be missing, namely, air, fuel, or compression. He knew that the motor had air and fuel. However, if the oil timing was off, there would be no compression. Topolewski described the correction process as follows:

> Q. So what was involved in correcting the problem?
>
> A. Oh, you have to remove the unit from the dyno, remove the bell housing, you have to remove the oil pan, you have to remove the fall wheel, you have to remove the fall wheel housing, you have to get into gear. It's quite a lengthy job. You have to return racks, tune-up, everything. It's about a major a thing you could do short or rebuilting the motor.

If as indicated in the discharge notice, all this occurred on May 6, then plainly Sype could not be responsible if on May 8, after reassembly, the oil pump was not packed with lube. (This assumes that the pump was required to be packed with lube, a matter which is in dispute.) Rather, the fault would have been that of the person or persons who dismantled and reassembled the engine.

The false assertion contained in the discharge notice also casts doubt on Topolewski's assertion that the oil pump had to be packed with lube. Cooper and Sype testified in sum that the Company never instructed them to pack the oil pump with lube, and that such procedure was not necessary to draw or pump oil. In support of their testimony, the General Counsel presented in evidence a Detroit diesel manual that was made available by the Company to the shop personnel. The manual in pertinent part described the procedure for installation of the oil pump for Detroit diesel V-71 engine. The manual did not indicate that the pump had to be packed with lube. Sype testified that he referrd to the manual to resolve questions. Sype testified that, as indicated by the manual, they applied a light film of oil, but that this was not the same as packing the pump with lube, which is a heavier oil. Topolewski testified that the employees were required to pack the pump with a special lubricant designed for engine assembly, which was similar to heavy oil, and that this procedure was necessary to prevent a dry start, which could ruin the motor. Topolewski testified that the manual was not applicable because it was "more geared to the field repair" of engines rather than the Compnay's work of completely rebuilding engines. Topolewski also testified that the pumps on which the Company worked operated differently from those described in the manual. If so, then these distinctions would apply to all the engines on which Sype worked. If Topolewski were correct, then it is difficult to see why the Company would provide its personnel with a manual which was inapplicable to the Company's operations and therefore misleading. If this matter were all that was involved in the present case, then I would have greater difficulty in resolving the credibility question presented between the uncorroborated testimony of Topolewski and the testimony of Cooper and Sype, which is corroborated by the manual. However, as discussed, the evidence in the present case indicates that Topolewski was discriminatorily motivated toward Cooper and Sype because of their union activity and was looking for pretextual reasons to remove them from the shop. As also indicated, Topolewski's testimony was demonstrably not credible in several respects. I have no comparable reason to question the credibility of the employees. I credit Cooper and Sype. Therefore, it follows that the Company's professed reason for the disciplinary warning dated May 9 was false, and that the first paragraph of the termination notice was, for this additional reason, also false.

With respect to Sype, this leaves only the second paragraph of the discharge notice, i.e., the allegation that Sype used the wrong timing mark on the crank gear. The evidence indicates that this type of problem was unusual and difficult to avoid. A crank gear should normally have only one timing mark. Sometimes a crank gear had two timing marks, or a second mark that looked like a timing mark. These marks were small and difficult to locate and identify. In early March Donald Cooper had a problem with double marks. A crank gear had double marks, and he did not seee the second mark. When the gear was set in place, it put the engine out of time, and the engine did not run properly. As a result the engine had to be removed from the dynomometer (where it was being tested), and partially dismantled. After Cooper located the problem, he reassembled the engine, including the crank gear. Cooper was not warned verbally or in writing or given any other discipline as a result of this incident. He was simply told to pay more attention. Topolewski testified that he took no disciplinary action because: "You know, people are human. Mistakes do happen." Sype had no record of making such a mistake. Prior to the day of his termination he had never been given any written warning for poor workmanship or any other reason. Testimony and the Company's records fail to indicate that the Company ever discharged an employee solely for poor workmanship. As indicated, the Company simply demoted Charles Brown when it became apparent that he was not qualified to perform the work to which he was assigned. With respect to the problem of double timing marks, Topolewski initially testified that the solution was to index to gear by making a center punch mark to locate the correct position. Later he testified that the proper procedure was to discard the crank gear with double marks and get one with one mark. If Topolewski was confused about how to deal with this problem, then it is unlikely that, absent a discriminatory motive, he would write up or discharge an employee for dealing with the problem in the wrong way, when the employees had no prior record of making such a mistake. Sype testified that he had no recollection of double timing mark on the crank gear referred to in his termination notice. As indicated, Sype was not confronted with this matter until 10 days after he had last worked on the engine. Even if the problem developed as described, which is questionable, I find that the Company has failed to meet its burden of establishing that Sype would have even been disciplined, let alone discharged, in the absence of Sype's union activities. As the General Counsel presented a prima facie case that the Company acted against Sype because of the union activity, I find that the Company violated Section 8(a)(1) and (3) of the Act by issuing written warnings to Sype and by discharging him.

The remaining alleged 8(a)(3) violation is the April 15 warning to Cooper, alleging that oil leaked from an engine because two oil pump bolts were left out. There are 8 bolts that connect the oil pump to the engine, and a total of 14 bolts on the pump housing. There are two additional bolts that are used to connect the engine to the dynomometer. However, if these were not attached securely, the engine would not be secured to the dynomometer. Cooper was not shown the alleged problem, and he was not told which bolts were missing or when oil leaked (if it did). Topolewski testified that Ronald Carter, who was operating the dynomometer, told him about the problem (although Robert Swigert normally operated the engine dynomometer). Therefore, Topolewski's testimony substantially consists of hearsay. In the absence of any testimony by Carter, I am not persuaded that the Company has presented credible evidence concerning what, if anything, happened. As indicated, I have ample reason to question Topolewski's credibility. As found, the Company was looking for a pretext to get rid of Cooper, and shortly thereafter discharged him because of his union activity. I find that the Company issued the written warning of April 15 to Cooper because of his union activity, and thereby violated Section 8(a)(1) and (3) of the Act.

E. *Withdrawal of Recognition and Refusal to Bargain with the Union*

Under present Board law, a union that is lawfully recognized by the employer but not certified by the Board is conclusively presumed to have majority status for a reasonable period of time from the date of recognition. After that reasonable period of time expires, the union enjoys a rebuttable presumption of majority status, which can be overcome by the employer demonstrating that the union in fact does not have a majority representative status, or that the employer has a reasonably grounded doubt concerning the union's majority status, asserted in good faith, based on objective considerations, and raised in a context free of employer unfair labor practices. *Tajon, Inc.*, 269 NLRB 327 (1984); *Terrell Machine Co.*, 173 NLRB 1480, 1480–1481 (1969), enfd. 427 F.2d 1088 (4th Cir. 1970); *Hotel & Restaurant Employees of Pocatello*, 213 NLRB 651 (1974).

In the present case, as found, the Company lawfully and voluntarily recognized the Union as the exclusive representative of its employees in an appropoate unit. The Company contends (Br. 18–20) that it had a good-faith doubt of the Union's majority status, based on the May 8 petition and, therefore, was privileged to withdraw recognition and discontinue bargaining with the Union. The argument fails because the Company did not have a good-faith doubt. Rather, the Company withdrew recognition in the context of flagrant unfair labor practices that were calculated to undermine the Union's majority status. Even if the Company had not engaged in such unlawful conduct, the withdrawal of recognition would be premature because a reasonable point of time had not elapsed. "Absent a reasonable period of time for bargaining following recognition, the actual majority status of a union is immaterial. . . . [R]easonable time does not depend upon either the passage of time or the number of calender days on which the parties met. Rather, the issue turns on what transpired during those meetings and what was accomplished therein. . . . the test is what was accomplished at the meetings that were held." *Tajon, Inc.*, supra, 269 NLRB at 327–328. Measured by these standards, a reasonable period of time did not elapse. The parties never reached the point of serious and substantial discussion of contract provisions. That failure was caused primarily by the Company's delaying tactics repeated requests for sample contracts, and failure to submit any contract proposals. The Company did not remedy its unlawful conduct by agreeing to meet once with the Union after the first complaint was issued in this case. Indeed, the Company does not contend that this meeting constituted a resumption of recognition and bargaining. Therefore, a bargaining order is warranted. Having made such determination, I find it necessary to decide whether, in the absence of the recognition agreement, the Union would be entitled to a remedial order under the principles of *NLRB v. Gissel Packing Co.*, supra.

CONCLUSIONS OF LAW

1. The Company is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

2. The Union is a labor organization within the meaning of Section 2(5) of the Act.

3. All full-time and regular part-time diesel, automotive, journeymen and apprentice mechanics, leadmen, general maintenance, stockroom clerks, parts pickupmen, helpers, and porters employed by the Company at its Detroit, Michigan facility, excluding all office clerical employees, salesmen, truckdrivers, dock and warehousemen, guards and supervisors as defined in the Act constitute a unit approptiate for the purpose of collective bargaining within the meaning of Section 9(b) of the Act.

4. Since March 30, 1987, the Union has been and is the exclusive collective-bargaining representative of the Company's employees in the unit described above.

5. By failing and refusing to bargain in good faith with the Union as the representative of the employees in the appropriate unit, and by unilaterally changing terms and conditions of employment without prior notice to the Union and without affording the Union a meaningful opportunity to negotiate and bargain concerning such changes, the Company has engaged in, and is engaging in, unfair labor practices within the meaning of Section 8(a)(5) of the Act.

6. By discharging in regard to the terms, conditions, and tenure of employment of Donald Cooper and Pete Sype, and the terms and conditions of employment of Ronald Carter and Stanley Marchelwicz, thereby discouraging membership in the Union, the Company has engaged in, and is engaging in, unfair labor practices within the meaning of Section 8(a)(3) of the Act.

7. By interfering with, restraining, and coercing its employees in the exercise of the rights guaranteed by Section 7 of the Act, the Company has engaged in, and is engaging in, unfair labor practices within the meaning of Section 8(a)(1) of the Act.

8. The aforesaid unfair labor practices are unfair labor practices affecting commerce within the meaning of Section 2(6) and (7) of the Act.

THE REMEDY

Having found that the Company has committed violations of Section 8(a)(1) (3), and (5) of the Act, I shall recommend that it be required to cease and desist therefrom and take certain affirmative action designed to effectuate the policies of the Act. I shall recommend that the Company be ordered to recognize and on request bargain with the Union as the bargaining representative of the employees in the appropriate unit. Having found that the Company discriminatorily terminated Donald Cooper and Pete Sype, I am recommending that the Company be ordered to offer them immediate and full reinstatement to their former jobs or, if those jobs no longer exists, to substantially equivalent positions, without prejudice to their seniority or other rights and privileges previously enjoyed, and make them whole for any loss of earnings and benefits that they may have suffered from the time of their terminations to the date of the Company's offer of reinstatement, with interest. I shall also recommend that the Company be ordered to remove from its records any reference to the unlawful terminations of Cooper and Sype, and the unlawful written reprimands to Cooper, Sype, Carter, and Marchelwicz, to give each of them written notices of such removal, and to inform them that this unlawful conduct will not be used as a basis for future personnel actions against them. See *Sterling Sugars*, 261 NLRB 472 (1982). Backpay shall be computed in accordance with the formula approved in *F. W. Woolworth Co.*, 90 NLRB 289 (1950).

I am further recommending that the Company be ordered to reinstate Blue Cross-Blue Shield group health insurance for the union employees, and reimburse those employees for any medical or dental bills they have paid to health care providers that the policy would have covered, and for any premiums they may have paid to continue medical and dental coverage in the absence of the Company's required contributions, less the amount of the 50-percent-per-hour wage increase that the Company granted the employees to compensate for the loss of such coverage; such reimbursement to be with interest. Interest on backpay and reimbursement shall be as computed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987).[6] It is also recommended that the Company be required to preserve and make available to the Board, or its agents, on request, payroll and other records to facilitate the compution of backpay due.

I further find that the unfair labor practices in this case, which include flagrant and serious violations of three sections of the Act which were directed and committed at the highest level of management, demonstrate that the Company has a general disregard or hostility for the Act. Therefore, I am recommending that the Company be ordered to cease and desist from infringing in any manner on the rights guaranteed the employees by Section 7 of the Act.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[7]

ORDER

The Respondent, American Fleet Management Company, Inc., Detroit, Michigan, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Discouraging membership in International Association of Machinists and Aerospace Workers, AFL–CIO, CLC, or any other labor organization, by discriminatorily discharging, laying off, or disciplining employees, or in any other manner discriminating against them with regard to hire or tenure of employment or any term or condition of employment.

(b) Interrogating employees about their union attitude or activities or those of their fellow employees.

(c) Threatening employees with plant closure or other reprisal if they support the Union or any other labor organization; or promising them benefits if they refrain from supporting the Union or any other labor organization.

(d) Changing terms and conditions of employment to discourage support for the Union or any other labor organization; provided, however, that nothing in this Order shall be construed as requiring the Company to withdraw the 50-percent-per-hour increase that is granted in April 1987.

(e) Failing or refusing to recognize and bargain collectively in good faith with the Union as the exclusive representative of all its employees in the above-described appropriate unit.

(f) Unilaterally changing terms and conditions of employment of unit employees without prior notice to the Union and without affording the Union a meaningful opportunity to negotiate and bargain concerning such changes as the representative.

(g) In any other manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Offer Donald Cooper and Pete Sype immediate and full reinstatement to their former jobs or, if those jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority or any other rights or privileges previously enjoyed, and make them whole for any loss of earnings and other benefits suffered as a result of the discrimination against them, in the manner set forth in the remedy section of this decision.

(b) Remove from its files any reference to the unlawful terminations of Cooper and Sype, and the unlawful reprimands to Cooper, Sype, Ronald Carter, and Stanley Marchelwicz and notify each of them in writing that this has been done and that the unlawful conduct will not be used against them in any way.

(c) Recognize and, on request, bargain collectively with the Union as the exclusive representative of all employees in the appropriate unit described above, with regard to rates of pay, hours of employment, and other terms and conditions of employment and, if an understanding is reached, embody it in a signed agreement.

(d) Reinstate the Blue Cross-Blue Shield group health insurance coverage for the unit employees and reimburse those employees for any medical or dental bills they have paid to health care providers that the policy would have covered, and for any premiums they may have paid to continue health care coverage in the absence of the Company's required contributions, less the amount of the 50-cent-per-hour wage increase which the Company granted to compensate for the loss of such coverage; such reimbursement, with interest, as set forth in the remedy section of this decision.

(e) Preserve and, on request, make available to the Board or its agents for examination and copying, all payroll records, social security payment records, timecards, personnel records and reports, and all other records necessary to analyze the amount of backpay due under the terms of this Order.

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[6] Under *New Horizons*, interest is computed at the "short-term Federal rate" for the underpayment of taxes as set out in the 1986 amendment to 26 U.S.C. § 6621.

[7] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to the shall be deemed waived for all purposes.

(f) Post at its Detroit, Michigan place of business copies of the attached notice marked "Appendix."[8] Copies of the notice, on forms provided by the Regional Director for Region 7, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material.

(g) Notify the Regional Director in writing within 20 days from the date of this Order what steps the Respondent has taken to comply.

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[8] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

WE WILL NOT discourage membership in International Association of Machinists and Aerospace Workers, AFL-CIO, CLC, or any labor organization, by discriminatorily discharging, laying off, or disciplining you, or in any other manner discriminating against you with regard to your hire or tenure of employment or any terms or condition of employment.

WE WILL NOT interrogate you about your union attitude or activities or those of your fellow employees.

WE WILL NOT threaten you with plant closure or other reprisal if you support IAM or any other labor organization or promise you benefits if you refrain from supporting IAM or any other labor organization.

WE WILL NOT change terms and conditions of employment to discourage support for IAM or any other labor organization; provided, however, that this shall not be construed as requiring us to withdraw the 50-cent-per-hour wage increase we granted in April 1987.

WE WILL NOT fail or refuse to recognize and bargain collectively in good faith with IAM as the exclusive representative of all our employees in the following appropriate unit:

> All full-time and regular part-time diesel, automotive, journeymen and apprentice mechanics, leadmen, general maintenance, stockroom clerks, parts pickupmen, helpers and porters employed by us at our Detroit, Michigan facility, excluding all office clerical employees, salesmen, truckdrivers, dock and warehousemen, guards and supervisors as defined in the Act.

WE WILL NOT unilaterally change terms and conditions of employment of unit employees without prior notice to IAM and without affording IAM a meaningful opportunity to negotiate and bargain concerning such changes as the representative.

WE WILL NOT in any other manner interfere with, restrain, or coerce you in the exercise of your right to engage in union or concerted activities, or to refrain therefrom.

WE WILL offer Donald Cooper and Pete Sype immediate and full reinstatement to their former jobs or, if those jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority or any other rights or privileges previously enjoyed, and make them whole for any loss of earnings and other benefits suffered as a result of the discrimination against them, with interest.

WE WILL remove from our files any reference to the unlawful terminations of Cooper and Sype, and the unlawful reprimands to Cooper, Sype, Ronald Carter, and Stanley Marchelwicz and notify each of them in writing that this has been done and that the unlawful conduct will not be used against them in any way.

WE WILL recognize and, on request, bargain collectively with IAM as the exclusive representative of all employees in the appropriate unit described above, with regard to rates of pay, hours of employment, and other terms and conditions of employment and, if an understanding is reached, embody it in a signed agreement.

WE WILL reinstate the Blue Cross-Blue Shield group health insurance coverage for the unit employees and reimburse those employees for any medical or dental bills they have paid to health care providers that the policy would have covered, and for any premiums they may have paid to continue health care coverage in the absence of our required contributions, less the amount of the 50-cent-per-hour wage increase which we granted to compensate for the loss of such coverage; such reimbursement to be with interest.

AMERICAN FLEET MAINTENANCE COMPANY, INC.

Capitol Transit, Inc., and Transcontinental Leasing, Inc. *and* Local 124, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, AFL-CIO[1] and United Labor Associates International, Party in Interest. Case 7-CA-26211

June 30, 1988

DECISION AND ORDER

By Chairman Stephens and Members Babson and Cracraft

On May 14 and November 18, 1987, Administrative Law Judge James L. Rose issued the attached decision and supplemental decision,[2] respectively. The Respondents filed exceptions and supporting briefs, and the General Counsel filed an answering brief and cross-exceptions[3] with a supporting brief. Respondent Capitol Transit filed an answering brief to the General Counsel's cross-exceptions. Following the issuance of the judge's supplemental decision, Respondent Capitol Transit filed a reaffirmation of its exceptions to the judge's initial decision and exceptions to the supplemental decision. The General Counsel filed an answering brief and a motion to strike a portion of Respondent Capitol Transit's exceptions.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision, the supplemental decision, and the record in light of the exceptions[4] and briefs and has decided to affirm the judge's rulings, findings,[5] and conclusions as modified and to adopt the recommended Order as modified and set forth in full below.[6]

1. We agree with the judge that Respondent Transcontinental Leasing violated Section 8(a)(2) of the Act when it applied its collective-bargaining agreement with the United Labor Associates International to former Capitol Transit drivers and required them to sign applications for membership in ULAI and dues-checkoff authorizations. We find merit in the General Counsel's cross-exception and find that Transcontinental Leasing's conduct also violated Section 8(a)(3) because the collective-bargaining agreement contained a union-security clause. *Safeway Stores*, 276 NLRB 944 (1985). Further, by telling the Capitol Transit drivers that they must sign the membership application and dues-checkoff authorizations if they wanted to continue to work, we find that Transcontinental Leasing violated Section 8(a)(1).

2. The General Counsel cross-excepts to the judge's failure to find that Respondent Capitol Transit created the impression of surveillance of employees' union activity. The General Counsel alleges that Respondent Capitol Transit violated Section 8(a)(1) of the Act by stating that it was aware

289 NLRB No. 98

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[1] On November 2, 1987, the Teamsters International Union was readmitted to the AFL-CIO. Accordingly, the caption has been amended to reflect that change.

[2] By unpublished Order dated September 18, 1987, the Board remanded the case to the judge to make a credibility resolution regarding testimony related to the issue whether Respondent Capitol Transit had knowledge of union activity prior to its decision to enter into a leasing agreement and terminate its bargaining unit employees.

[3] The General Counsel seeks, inter alia, a visitatorial clause authorizing the Board, for compliance purposes, to obtain discovery from the Respondents under the Federal Rules of Civil Procedure subject to the supervision of the United States court of appeals enforcing this Order. Under the circumstances of this case, we find it unnecessary to include such an order. See *Cherokee Marine Terminal*, 287 NLRB 1080 (1988).

[4] The General Counsel's motion to strike a portion of Respondent Capitol Transit's exceptions is denied.

[5] Respondent Capitol Transit has excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

We have also reviewed the record and find no merit in Respondent Capitol Transit's argument that the judge demonstrated antiemployer bias.

We agree with the judge's conclusion that Cusmano's and Vitello's interrogation of employees regarding whether they signed union authorization cards violated Sec. 8(a)(1) of the Act. Those interrogations were initiated by Cusmano and Vitello (the owners of Capitol Transit) during the organizing campaign, were directed at employees who had not declared their union sentiments, and were accompanied, on at least two occasions, by the threat that employees would "all be walking" if they pursued the "matter."

The General Counsel cross-excepts to the judge's failure to find that Vitello also interrogated employee Earl Cathey on two occasions about his union activities. Because we find this allegation cumulative, we find it unnecessary to reach the issue whether Vitello unlawfully interrogated Cathey.

[6] In par. 1(d) of the recommended Order against Respondent Capitol Transit, the judge used the broad cease-and-desist language "in any other manner." We have considered this case in light of the standards set forth in *Hickmott Foods*, 242 NLRB 1357 (1979), however, and have concluded that a broad remedial order is inappropriate inasmuch as it has not been shown that Respondent Capitol Transit has a proclivity to violate the Act or has engaged in such egregious or widespread misconduct as to demonstrate a general disregard for the employees' fundamental statutory rights.

The judge also found that unfair labor practices committed by Respondent Capitol Transit were sufficiently egregious to support a bargaining order. In light of our reversal of the judge's finding that Respondent Capitol Transit violated Sec. 8(a)(3) of the Act when it executed a leasing agreement and thereby terminated the bargaining unit employees, we find that a bargaining order is inappropriate. We will issue an order in lieu of the judge's recommended Order eliminating both the broad cease-and-desist language and the bargaining order.

In par. 2(a) of his recommended Order against Respondent Transcontinental Leasing the judge ordered the deletion of certain portions of Respondent Transcontinental Leasing's collective-bargaining agreement with United Labor Associates International. Under the circumstances of this case we find a deletion of any language in the collective-bargaining agreement unnecessary, and shall modify the Order accordingly.

In accordance with our decision in *New Horizons for the Retarded*, 283 NLRB 1173 (1987), interest on and after January 1, 1987, shall be computed at the "short-term Federal rate" for the underpayment of taxes as set out in the 1986 amendment to 26 U.S.C. § 6621. Interest on amounts accrued prior to January 1, 1987 (the effective date of the 1986 amendment to 26 U.S.C. § 6621), shall be computed in accordance with *Florida Steel Corp.*, 231 NLRB 651 (1977).

who was passing out authorization cards. We find merit in the General Counsel's cross-exception. Employee Brad Burton testified that when he met with Vitello to discuss a problem with Vitello's son, Vitello told Burton that Burton's brother was passing out union cards and that if they kept pursuing the matter of signing authorization cards "you'll all be walking." The judge credited Burton's testimony that Vitello told him "you'll all be walking" and found that Vitello had made a clear threat that employees would be terminated for engaging in protected activity. However, the judge did not mention Burton's testimony regarding Vitello's statement during the same conversation that Burton's brother was passing out authorization cards. We find that the judge overlooked Burton's testimony regarding the passing out of authorization cards when he stated that the record offered no factual support for the surveillance allegation of the complaint. We further note that, while denying that he made any threats to Burton, Vitello testified that he asked Burton if his brother ever gave him a union card to sign. Relying on Burton's credited and uncontroverted testimony, we find that Respondent Capitol Transit created the impression of surveillance in violation of Section 8(a)(1) of the Act when Vitello advised Burton that Burton's brother was passing out union cards. Although the complaint alleged that this incident constituted unlawful surveillance, rather than impression of surveillance, it is well settled that "[a] variance between complaint and findings will not defeat a Board determination where the issue on which the findings were based was fully litigated." *REA Trucking Co. v. NLRB*, 439 F.2d 1065, 1066 (9th Cir. 1971).

3. We disagree with the judge's finding that Respondent Capitol Transit violated Section 8(a)(3) and (1) of the Act by changing its operation from one utilizing employee-drivers to one leasing drivers from another company in response to its employees' union campaign. A union organizational campaign among Capitol Transit's approximately 46 truckdrivers began in mid-August 1986.[7] On September 2 Capitol Transit executed a leasing agreement with Transcontinental Leasing, to become effective September 15, that provided for Transcontinental Leasing to furnish employees to do the hauling of freight and commodities for Capitol Transit. The effect of the leasing agreement was the termination of the entire bargaining unit at Capitol Transit.

Charles Garavaglia, Respondent Transcontinental Leasing's labor consultant, testified that on July 17 he met with Joseph Vitello, co-owner of Capitol Transit, at Vitello's office to discuss labor consultant work. In response to Vitello's major complaint that he could no longer devote time to trucking because he was spending all his time in administrative work, Garavaglia stated that he proposed the possibility of personnel leasing. According to Garavaglia, after Vitello expressed interest, Garavaglia set up a meeting on July 25 with a representative of Transcontinental Leasing, Vitello, and himself. Garavaglia further testified that following an in-depth discussion with the Transcontinental Leasing representative at the July 25 meeting, Vitello said that "he would go with" the program subject to working out comparable insurance coverage and employment protection for Respondent Capitol Transit's present employees.

The parties met again on August 29. Garavaglia testified that at the August 29 meeting the parties agreed that Transcontinental's insurance policy provided more coverage than Vitello's coverage and did so at a less expensive rate. Garavaglia informed the parties that agreement had been reached with the Union representing Transcontinental's employees to permit Capitol Transit employees to work for Transcontinental. Garavaglia stated, "With those two agreements, Mr. Vitello agreed to sign an agreement with Transcontinental." The leasing agreement was signed on September 2, to be effective September 15.

Pursuant to our remand instructing the judge to make a credibility resolution concerning Garavaglia's testimony, the judge credited Garavaglia's testimony concerning what was said at his meeting with Vitello and concerning the dates of their meetings. Although crediting Garavaglia, the judge nevertheless concluded that Vitello did not reach a decision to change his operation until August 29, i.e., after he learned of the organizational campaign on August 13. The judge found that while testimony regarding the July 25 meeting seemed to indicate that Vitello was seriously considering changing the method of his operation, the testimony was insufficient to conclude that, in fact, Vitello had made up his mind or had determined at that time to enter into an employee leasing arrangement. Rather, the judge concluded that as of July 25 those talks were still in a preliminary stage subject to resolution of issues Vitello raised and that agreement was not imminent. Noting that Vitello did not testify that he had made up his mind or that he had told Garavaglia that he had made up his mind at the July 25 meeting, the judge found the words "he would go with a progam" could reasonably merely convey interest although the judge stated that "it is possible" to conclude from those words that Vitello had made up his mind.[8]

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[7] All dates are in 1986.

Contrary to the judge, we find that the credited evidence, when viewed in its entirety, warrants the conclusion that on July 25 Vitello accepted Transcontinental's employee leasing arrangement, subject to certain conditions that were subsequently satisfied. We cannot agree with the judge that Garavaglia's testimony that Vitello said that "he would go with a program like that" conveys nothing more than Vitello's mere interest in a leasing agreement.[9] Rather, we interpret Garavaglia's testimony to mean that on July 25, well before the union organizing campaign began, Vitello made an initial decision to change to an employee leasing operation, subject to the satisfactory resolution of certain specific concerns. The issue is not, as the judge phrased it, whether Vitello "had made up his mind" on July 25 to enter into the employee leasing arrangement. The issue is whether Vitello's initial decision, which was not tainted by any motive proscribed by the statute, was thereafter influenced by the organizational campaign that commenced among Capitol Transit's employees.

We find that it was not. After July 25 events followed a logical progression with the parties meeting again on August 29 and Vitello agreeing to sign a leasing agreement on learning that his concerns about insurance coverage and employment protection for his employees had been satisfied. On September 2 the agreement was executed and thereafter put into effect. By mid-August, of course, the union campaign at Capitol Transit was underway, but there is no showing that it affected in any way the events that had their genesis in the meeting held the month before. Where, as here, an employer's initial decision to change its mode of operations is lawful, the Act does not prohibit the employer from carrying out that decision simply because the employer's employees choose to engage in union activities.

Our finding with respect to the date on which the decision concerning the leasing arrangement was effectively made weakens the General Counsel's prima facie case; but even assuming that the prima facie case was established simply by virtue of evidence of union animus and the occurrence of union activity prior to the signing of the lease agreement, we conclude that Respondent Capitol Transit has carried its burden by establishing that it would have signed the agreement even in the absence of union activity. Accordingly, we reverse the judge's finding that Respondent Capitol Transit violated Section 8(a)(3) of the Act by executing the leasing agreement with Transcontinental Leasing and thereby terminating all the bargaining unit employees.

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge as modified and set out in full below and orders that

A. Respondent Capitol Transit, Inc., Detroit, Michigan, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Interrogating employees concerning their union or other activity protected by Section 7 of the Act.

(b) Threatening employees with discharge or other retribution for their having engaged in union or other activity protected by Section 7 of the Act.

(c) Creating the impression that employees' union activities are under surveillance.

(d) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Post at its facility in Detroit, Michigan, copies of the attached notice marked "Appendix A."[10] Copies of the notice, on forms provided by the Regional Director for Region 7, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material.

(b) Notify the Regional Director in writing within 20 days from the date of this Order what steps the Respondent has taken to comply.

B. Respondent Transcontinental Leasing, Inc., Cleveland, Ohio, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Applying to former Capitol Transit employees who have not freely designated United Labor

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[8] The judge further found that those were Garavaglia's words and did not purport to be a quote from Vitello.

[9] Contrary to the judge, we place no significance on the fact that Garavaglia did not purport to quote Vitello's exact words. It is clear from Garavaglia's testimony, which the judge credited, that Garavaglia was giving his account of what Vitello said at the July 25 meeting.

[10] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

Associates International as their collective-bargaining representative its collective-bargaining agreement with United Labor Associates International; provided, however, that nothing contained herein shall be construed as requiring the Respondent to abandon or vary any wage, hour, seniority, or other substantive terms of employment that it may have established pursuant to the performance of the contract.

(b) Deducting dues from employees' wages based on checkoff authorizations of former Capitol Transit employees who have not freely designated United Labor Associates International as their collective-bargaining representative and who have not freely signed dues-checkoff authorizations.

(c) Telling former employees of Capitol Transit that they must sign the membership applications and dues-checkoff authorization cards for United Labor Associates International if they want to continue to work.

(d) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Withdraw and withhold all recognition from United Labor Associates International as the collective-bargaining representative of the former Capitol Transit employees unless and until that labor organization has been certified by the National Labor Relations Board as the exclusive representative of such employees.

(b) Remit to all former Capitol Transit employees from whom it deducted dues pursuant to dues-checkoff authorizations all moneys so deducted, with interest as provided for in *New Horizons*, supra.

(c) Preserve and, on request, make available to the Board or its agents for examination and copying, all records necessary to analyze the amount of funds to be remitted under the terms of this Order.

(d) Post at its facility in Cleveland, Ohio, copies of the attached notice marked "Appendix B."[11] Copies of the notice, on forms provided by the Regional Director for Region 7, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material.

(e) Notify the Regional Director in writing within 20 days from the date of this Order what steps the Respondent has taken to comply.

IT IS FURTHER ORDERED that those allegations of the complaint not found herein to have been sustained are dismissed.

APPENDIX A

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

WE WILL NOT interrogate our employees concerning their interest in or activity on behalf of Local 124, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, AFL–CIO or any other labor organization.

WE WILL NOT threaten our employees with discharge because they engage in any activity on behalf of the above-named or any other labor organization.

WE WILL NOT create the impression that our employees' union activities are under surveillance.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

CAPITOL TRANSIT, INC.

APPENDIX B

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

WE WILL NOT apply our collective-bargaining agreement with United Labor Associates International to former Capitol Transit, Inc. employees who have not freely designated United Labor Associates International as their exclusive bargaining representative; provided, however, that nothing herein shall be construed as requiring us to abandon or vary any wage, hour, seniority, or other substantive terms of employment that we may have established pursuant to the performance of the contract.

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[11] See fn. 10.

WE WILL NOT deduct dues from employees' wages based on checkoff authorizations of former Capitol Transit, Inc. employees who have not freely designated United Labor Associates International as their collective-bargaining representative and who have not freely signed dues-checkoff authorizations.

WE WILL NOT tell former employees of Capitol Transit, Inc. that they must sign the membership applications and dues-checkoff authorizations cards for United Labor Associates International if they want to continue to work.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL withdraw and withhold all recognition from United Labor Associates International as the collective-bargaining representative of the former Capitol Transit, Inc. employees unless and until that labor organization has been certified by the National Labor Relations Board as the exclusive representative of such employees.

WE WILL remit to all former employees of Capitol Transit, Inc. any moneys that we deducted from their wages and remitted to United Labor Associates International as dues pursuant to unlawful checkoff authorizations, with interest.

TRANSCONTINENTAL LEASING, INC.

Richard M. Whiteman, Esq., for the General Counsel.

David E. Jerome, Esq., of Northville, Michigan, for Respondent Capitol Transit, Inc.

Charles Garavaglia, of Milford, Michigan, for Respondent Transcontinental Leasing, Inc.

James Ball, of Dearborn Heights, Michigan, for the Charging Party.

Lawrence McHenry, of Melvindale, Michigan, for the Party in Interest.

DECISION

STATEMENT OF THE CASE

JAMES L. ROSE, Administrative Law Judge. This matter was tried before me on 28 and 29 January 1987 at Detroit, Michigan, on the General Counsel's complaint,[1] which alleged that the Respondents are joint employers of certain employees and that they engaged in violations of Section 8(a)(1) and (3) of the National Labor Relations Act.

The Respondents each generally denied that it engaged in any unfair labor practices and each contends that they are not joint employers of any employees. Each Respondent appeared by a representative at the hearing.

On the record as a whole, including my observation of the witnesses, briefs, and arguments of counsel, I issue the following

FINDINGS OF FACT AND CONCLUSIONS OF LAW

I. JURISDICTION

Capitol Transit, Inc. is one of several companies owned and operated by Clarence Cusmano and Joseph Vitello, engaged in the interstate hauling of various goods, products, and materials. Specifically, Capitol Transit is a Michigan corporation with offices in Detroit, which annually derives gross revenues in excess of $50,000 from the interstate transportation of freight and commodities as an essential link in interstate commerce pursuant to agreements with, among other employers, the Ford Motor Company, some of whom, including Ford Motor Company, ship directly from Michigan to points outside the State goods valued in excess of $50,000.

The parties agree, and I find, that Capitol Transit is an employer engaged in interstate commerce within the meaning of Section 2(2), (6), and (7) of the Act.

Transcontinental Leasing, Inc. is an Ohio company with its principal office and place of business in Cleveland. It is engaged in the business of providing employees to other employers for the performance of work.

About 2 September 1986, Capitol entered into an agreement with Transcontinental, in which Transcontinental was to provide employees to drive trucks for Capitol and has done so. The value of services to Capitol provided by Transcontinental during 1986 and to other employers directly engaged in interstate commerce or who serve as an essential link in the interstate transportation of freight and commodities exceeded $50,000.

The parties agree that Transcontinental is and at all times material has been an employer engaged in interstate commerce within the meaning of Section 2(2), (6), and (7) of the Act.

Prior to Capitol entering into the 2 September agreement with Transcontinental, Capitol employed approximately 46 truckdrivers in connection with its business of hauling freight and commodities. After preliminary discussions with representatives of Transcontinental, specifically its labor consultant Charles Garavaglia, Capitol entered into the agreement with Transcontinental in which Transcontinental would furnish employees to perform the duties theretofore performed by Capitol employees. Provisions were made to ensure that Capitol employees would have the first opportunity to work as employees for Transcontinental beginning 15 September, the effective date of the lease agreement.

Terminating the entire bargaining unit, which Capitol did, and entering into the lease agreement with Transcontinental is the gravamen of the unfair labor practices alleged in this matter. Preliminarily, however, there is a question of whether on these facts it can be concluded that the two Respondents are joint employers.

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[1] The original charge was filed on 15 September and amended on 1 October 1986. The complaint issued on 31 October 1986. All dates are in 1986 unless otherwise indicated.

Transcontinental, in addition to the 46 former employees of Capitol, has about 250 or so other employees working for various companies as leased employees, principally in Ohio and Michigan.

There is no indication in the record, other than the facts outlined above, suggesting that Capitol and Transcontinental are joint employers under Board law. There is no evidence that they jointly control the wages, hours, or other terms and conditions of employment of employees. Their relationship appears to be a bona fide arrangement for the leasing of employees. Indeed, the General Counsel does not allege that Transcontinental is a disguised continuance of Capitol or that the two companies are alter egos of each other. It is only alleged that they are joint employers, and on the facts of this record, I conclude they are not. Evidence that Capitol continued to exercise control over significant terms and conditions of employment is lacking. There is no evidence that any supervision by Capitol was more than routine. Nor is there evidence that Capitol hired, fired, or disciplined employees. *TLI, Inc.*, 271 NLRB 798 (1984).

II. THE LABOR ORGANIZATIONS INVOLVED

All parties agree that Local 124, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, AFL-CIO (Local 124), and United Labor Associates International (ULAI) are both labor organizations within the meaning of Section 2(5) of the Act.

III. THE ALLEGED UNFAIR LABOR PRACTICES

A. *The Facts*

The material facts in this matter are largely undisputed and may be summarized. Local 124 is a relatively small Teamsters local normally employing one full-time business agent who is also the president. Local 124 represents employees of sister companies of Capitol Transit but has never represented the Capitol Transit drivers. Periodically, however, and particularly in the few months prior to the events in this matter, Local 124's then president (William Klann) asked one of the owners of Capitol Transit (Joseph Vitello) to recognize Local 124 as the bargaining agent for the drivers.

Vitello's stated objection to signing such a recognition agreement had to do with the Teamsters' pension plan to which he would have to become a party, and the unfunded liability exposure attendant to signing on with that plan. In discussions with Klann, Vitello asked if they could negotiate a pension plan different from the basic Teamsters Central States Pension Plan and Klann stated they could not, and even if they did, such would not be approved by the International.

In any event, Klann asked that Vitello recognize Local 124 and Vitello refused. During this period, however, there is no indication that any Capitol employees were members of Local 124 or had ever authorized Local 124 to represent them for purposes of collective bargaining.

But sometime in the late summer Capitol employees, in fact, began to sign authorization cards designating Local 124 as their collective-bargaining representative. During the latter part of August and through September, approximately 30 such authorizations were signed.

The number of cards actually signed is not a matter of record inasmuch as it appears that not all of them were offered into evidence. Why this is so is unknown; however, it is noted that some of the cards in evidence have what appears to be altered dates. In addition, two cards that were purportedly signed in August were not datestamped received by the Board's Regional Office until 14 January 1987. All the other cards offered into evidence by the General Counsel were datestamped received on 24 September, the week following the filing of the charge.

Notwithstanding that the date on some of these cards is questionable, there is no question that employees of Capitol were engaged in an organizational campaign in late August and early September, and that cards were signed by the employees giving an unambiguous authorization to Local 124 to represent them. There is no indication or argument concerning the authenticity or unambiguity of the cards.

Nor is there any real dispute that during this period Cusmano and Vitello, the principal officers and managers of Capitol, interrogated employees concerning whether they had in fact signed authorization cards.

Thus, Mark Benedict testified that about a week before 14 September, at Capitol's dispatch room, Cusmano "asked me if I'd signed a card for the Teamsters or not." Benedict testified he told Cusmano that he had not.

Bradley Burton testified that during a discussion with Vitello, Vitello asked if he had signed a union card and then said "that it wouldn't do me no good at Hawk Trucking [a sister company of Capitol] because Hawk is non-union." Burton told Vitello that he had not signed a card. Burton further testified that during this conversation Vitello said, "Well, it's none of my business, but if you keep pursuing the matter, you'll all be walking." Sometime later in another conversation with Vitello, Burton testified:

> He asked me if I'd told any Union people that he said, if we didn't stop pursuing this matter, we'd all be walking. And I told him, "No, I never said no such thing." He said he had some witnesses stating that, you know, I had said this. And I said, "Joe, I don't know what you're talking about. I don't know where you got your witnesses from."

Finally, Burton testified:

> [Vitello] asked me the same thing, if I had said anything to any Union people or officials of him saying that, if we didn't stop pursuing the matter, he would—we'd all be walking. And, finally, I told him, I said, "Yes, Joe, I did say that; and yes, you did say that." He said, "Why are you telling me this now? You told me "no before?" And I said, "Joe, I was afraid for my job." He said, "Well, you ain't got nothing to be afraid of for your job."

While Vitello admitted to the interrogation of Burton and other employees, he denied the threats testified to by Burton.

William Johnson testified that Vitello talked to him about Local 124 and the Company and "tried to show me where it was better that I stay with the company like the company was rather than switch over to the Union. In other words, if it came down to a vote like where I would have to vote for the company or vote for the Union, that I should vote for the company instead the Union." During this conversation, Vitello asked Johnson if he knew about the cards that were being passed around and if he had signed one. Johnson told him no.

Similarly, Stephen Dudash testified that on two occasions Vitello asked him if he had signed a card and he told Vitello yes.

Victor Burton, an employee of Capitol Trucking (a sister company of the Respondent) and a Local 124 member, testified that he had passed out cards to Capitol drivers. Vitello "asked me what I was trying to do to his company."

As noted above, Capitol and Transcontinental signed the lease agreement on 2 September to be effective 15 September, and on Sunday, 14 September, representatives of Capitol and Transcontinental met with the employees to advise them of the change in operations. Drivers were told they could become employees of Transcontinental if they chose, although such was not required; but, if they wanted to work beginning the next day, they would have to do so.

At this meeting, employees were also told that Transcontinental had a collective-bargaining agreement with ULAI covering all its employees and, pursuant to the terms of that agreement, they would have to become members of ULAI. Thus, in addition to W-4 forms, representatives of Transcontinental also gave employees applications for membership in ULAI and for dues-checkoff authorizations. To that point, there had been no effort on the part of ULAI to organize these employees, nor had ULAI obtained any authorizations for representation from any of them.

Representatives of ULAI had met with representatives of Transcontinental, specifically Labor Consultant Garavaglia, and had negotiated a collective-bargaining agreement covering all of Transcontinental's employees effective 1 July. It provided, inter alia:

> The terms of this Agreement shall apply to all employees in the classifications of work set forth herein and shall cover all accretions to or relocations of bargaining unit operations, including newly established or acquired warehousing, transportation or processing operations of the Employer.

Beginning 15 September all (or substantially all) of Capitol's former driver employees began working as employees of Transcontinental, but doing the same work under essentially the same conditions as they had previously. Although unclear from the record, it appears that all the employees who began working for Transcontinental on 15 September signed applications for membership in ULAI and dues-checkoff authorizations, pursuant to which Transcontinental has made dues deductions from their wages and has remitted those amounts to ULAI.

B. *Analysis and Concluding Findings*

1. Interrogation

As noted above, there is no real dispute that on several occasions the owners of Capitol Transit interrogated employees concerning whether they had signed authorization cards on behalf of Local 124. Vitello admitted that he had asked employees whether they had signed authorization cards.

The allegation concerning interrogation by Cusmano was added as an amendment to the complaint at the outset of the hearing over objection by counsel for Capitol Transit. The amendment was received with leave for counsel to move for a recess following the close of the General Counsel's case if time was deemed necessary to prepare a defense to the allegation. No such motion was made.

Cusmano did not testify. Accordingly, the testimony concerning interrogation by him stands undenied on the record and I find that it occurred substantially as testified to.

There is therefore no question on this record that the Respondent's two principal officers in fact interrogated bargaining unit employees concerning their union activity. I conclude that this interrogation, occurring as it did in the context of the organizational campaign, and subsequent decision by Capitol Transit to terminate the entire bargaining unit, was unlawful and was violative of Section 8(a)(1).

The type of interrogation engaged in by Vitello and Cusmano was not the benign questioning found permissible by the Board in such cases as *Rossmore House*, 269 NLRB 1176 (1984), enfd. sub nom. *Hotel & Restaurant Employees Local 11 v. NLRB*, 760 F.2d 1006 (9th Cir. 1985). The interrogation here, I conclude, was part of Capitol's effort to thwart employees in the exercise of their Section 7 rights.

2. The threats

Although Vitello denied in general terms that he "threatened" employees, I find more believable the testimony of Bradley Burton that Vitello told him if they kept pursuing the matter of signing authorization cards, "you'll all be walking." Under these circumstances, such is a clear threat that employees would be terminated for engaging in protected activity. In making such a statement to Burton, which he did on two occasions, Vitello violated Section 8(a)(1) of the Act.

3. Other allegations of 8(a)(1) violations

The complaint also alleges that Respondents violated Section 8(a)(1) by stating it would be futile to engage in activity on behalf of Local 124, and that Respondents were engaged in surveillance of employees' union activity. The record does not offer factual support for these allegations. Accordingly, I shall recommend that paragraphs 12(a) and (d) be dismissed.

4. Termination of the bargaining unit

Although Klann had asked Vitello to recognize Local 124 as the bargaining agent for the Capitol Transit drivers in the spring and summer of 1986, there is no indication that Local 124 represented any of those employees then, nor was there any organizational activity on their behalf. However, by August, authorization cards were being distributed among the Capitol Transit drivers and they were being signed. This fact Vitello knew, as demonstrated by his interrogation of his employees in late August and September. Nor did Vitello deny knowledge that employees were signing authorizations for Local 124.

It is in the context of this organizational campaign, which included Vitello's interrogation and threats to employees that on 2 September he signed a lease agreement with Transcontinental, the effect of which was to terminate the entire bargaining unit. While the leasing of drivers, and the attendant dissolution of the bargaining unit as employees of Capitol Transit, may very well have been legitimate between Capitol Transit and Transcontinental, the conclusion is inescapable that it was precipitated by the employees' organizational activity.

At least, the General Counsel made out a prima facie case that Vitello determined to change from employee-drivers to leased drivers as a result of the employees' union campaign. Therefore, Capitol Transit has the burden to establish that even in the absence of the union activity it nevertheless would have entered into this arrangement and terminated the bargaining unit employees. See *Wright Line*, 251 NLRB 1083 (1980). Capitol Transit brought forth no persuasive evidence tending to support a conclusion that it would have negotiated such a leasing arrangement with Transcontinental in the absence of the employees' union activity. Indeed, the only evidence tending to support Capitol's position are the self-serving declarations of Vitello, which I discredit. *Shattuck Denn Mining Corp. v. NLRB*, 362 F.2d 466 (9th Cir. 1966). Accordingly, I conclude that by executing the lease agreement with Transcontinental and thereby terminating all of the bargaining unit employees, Capitol Transit violated Section 8(a)(3) of the Act.

5. The Transcontinental violations

Although not free from doubt, it is assumed for purposes of this decision that the recognition by Transcontinental of ULAI was lawful, there being no allegation of illegality in this relationship.

The collective-bargaining agreement between Transcontinental and ULAI purports to cover "all accretions to or relocations of bargaining unit operations, including newly established or acquired warehousing, transportation or processing operations of the Employer." There is no proviso that the agreement will be applicable only in the event that ULAI establishes that it represents a majority of the new employees. There is no evidence that ULAI was ever designated the bargaining representative of any Capitol employee. To the contrary, at the material time it was Local 124 that was obtaining authorization cards from these employees.

It is clear and long established that a collective-bargaining agreement is unlawful if it purports to apply to a newly acquired facility without the employees of that facility having had an opportunity to determine whether they in fact want to be represented by the labor organization. See, e.g., *Safeway Stores*, 276 NLRB 944 (1985).

Nor are there sufficient facts here to support the contention that a unit of drivers working exclusively for Capitol Transit would be an accretion to any other bargaining unit of Transcontinental employees. Though there is testimony of some interchange of employees as a general theory, there was no evidence of any specific interchange between employees working for Capitol Transit and any other operation for which Transcontinental supplies employees. There is no commonality of supervision between these employees and any other groups of Transcontinental employees. The employees at Capitol Transit were clearly a definitive bargaining unit prior to the time that Transcontinental and Capitol Transit entered into their arrangement.

In effect, Transcontinental and ULAI argue that the lease agreement between Transcontinental and Capitol Transit lawfully denied bargaining unit employees their right to self-organization. Such is clearly erroneous. See, e.g., *Towne Ford Sales*, 270 NLRB 311 (1984).

I conclude that ULAI, Transcontinental, and Capitol Transit could not legitimately deny the Capitol Transit drivers their right to self-organization.

By enforcing the collective-bargaining agreement as to the former Capitol Transit drivers, requiring them to sign applications for membership in ULAI and dues-checkoff authorizations and implementing those authorizations by withholding dues from the employees' wages and remitting them to ULAI, Transcontinental violated Section 8(a)(2) of the Act.

IV. THE EFFECT OF THE UNFAIR LABOR PRACTICES ON COMMERCE

The unfair labor practices found above, occurring in connection with Capitol Transit's and Transcontinental's respective businesses, have a close, intimate, and substantial relationship to trade, traffic, and commerce among the several States, and tend to lead to labor disputes burdening and obstructing commerce and the free flow thereof within the meaning of Section 2(6) and (7) of the Act.

V. THE REMEDY

Having concluded that Capitol Transit violated Section 8(a)(1) and (3), I shall recommend that it cease and desist therefrom and take certain affirmative action designed to effectuate the policies of the Act, including terminating its lease agreement with Transcontinental Leasing, Inc., and rehiring all its truckdriver employees and making them whole for any wages or other loss of benefits that they may have suffered as a result of their termination effective 15 September 1986, in accordance, if applicable, with *F. W. Woolworth Co.*, 90 NLRB 289

(1950), with interest as provided for in *Florida Steel Corp.*, 231 NLRB 651 (1977).[2]

In addition, inasmuch as I conclude that Local 124 in fact represented an uncoerced majority of the employees in the appropriate bargaining unit, Capitol Transit should be ordered to recognize and bargain with Local 124 as the exclusive representative of those employees.

Although it is questionable when some of the authorization cards offered into evidence were signed, it is clear that at least 26 of them were signed by bargaining unit employees prior to 24 September, the date those 26 were received at the Board's Regional Office in Detroit. The fact that some of these cards may have been undated or the date altered does not affect the authenticity of the card, the signature of the employee or the unambiguous nature of the card as designating Local 124 to be the exclusive bargaining agent for that employee. The precise date when these cards were executed is not particularly critical in this matter, although it is noted that most of them in fact were signed, according to the testimony of the cardsigner, on the date indicated on the card and this occurred in late August or early September.

The date a card is signed is important to establish when majority status is reached and to ensure a contemporaneous designation of representation. Where those factors can be independently established, as here, then whether each card is signed or a date is altered is not significant.

While altering dates on authorization cards or any other document is not to be condoned, the mere fact that some of the dates appear to have been is not of material importance. The point is, there is no argument that the individuals who purportedly signed the authorization cards in fact did so and did in fact understand that they were signing an authorization for exclusive representation by Local 124. Who altered the date or under what circumstances is not known. It would therefore be inappropriate to deny an employee his designation of the Union based on the fact of such alteration—especially if the date is not particularly material.

I therefore conclude that by at least 24 September a majority of the 45 or 46 employees in the appropriate bargaining unit had designated Local 124 as their bargaining agent.

Finally, the unfair labor practices here are sufficiently egregious to support a bargaining order. Not only did Vitello engage in interrogation and threats at the outset of the organizational campaign, he undertook to rid himself of the entire bargaining unit. I therefore conclude that a bargaining Order is appropriate. *NLRB v. Gissel Packing Co.*, 395 U.S. 575 (1969). The Order should be retroactive to 24 September, the first date it is clear that Local 124 had majority status. *Trading Port*, 219 NLRB 298 (1975).

[Recommended Order omitted from publication.]

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[2] See generally *Isis Plumbing Co.*, 138 NLRB 716 (1962).

Richard M. Whiteman, Esq., for the General Counsel.
David E. Jerome, Esq., of Northville, Michigan, for Respondent Capitol Transit, Inc.
Charles Garavaglia, of Milford, Michigan, for Respondent Transcontinental Leasing, Inc.
James Ball, of Dearborn Heights, Michigan, for the Charging Party.
Lawrence McHenry, of Melvindale, Michigan, for the Party in Interest.

SUPPLEMENTAL DECISION

Preliminary Statement

JAMES L. ROSE, Administrative Law Judge. On 18 September 1987, the Board remanded the subject case to me for the purpose of making a credibility resolution concerning the testimony of Charles Garavaglia, a labor consultant who represents Respondent Transcontinental Leasing, Inc. (Transcontinental).

The Board concluded that:

> (A) determination regarding the credibility of this testimony is necessary to resolving the issue of whether Respondent Capitol's decision to change from employee drivers to lease drivers occurred before the organizational drive began. Upon remand, the Judge is to make a credibility finding regarding Garavaglia's testimony.

A. *Brief Summary of the Facts and Analysis*

As more fully detailed in my initial decision, for a number of years Teamsters Local 124 (the Union) through then-president William Klann had attempted to get Respondent Capitol Transit, Inc. (Capitol) to sign a recognition agreement. To this end, occasionally Klann would meet with the president of Capitol, Joseph Vitello, who would refuse to grant recognition for a number of reasons, which are immaterial to the issues in this case. The most recent such attempt before the events in this matter occurred in early 1986.

Charles Garavaglia testified that beginning in July 1986 he had three meetings with Vitello, the ultimate purpose of which was to convince Vitello that he should use the services of Respondent Transcontinental, a company engaged in the business of furnishing employees to employers such as Capitol. According to Garavaglia, the first meeting was 17 July and involved the subject of Garavaglia becoming a labor relations consultant for Capitol. The second was 25 July and focused on the attempt by representatives of Transcontinental to convince Vitello to change his method of operations and use their service. The third was 29 August when an agreement between them was reached. It was executed on 2 September.

According to Garavaglia, on July 25 Vitello indicated that he was interested but did have four areas of concern, one of which involved insurance and another placing his current employees with Transcontinental so that they could continue to do his work. Garavaglia testified that he said he would look into these matters and specifically would contact the Union that represented the employees at Transcontinental (United Labor Associates International) to determine whether or not it would be permissible, in the event that Capitol and Transcontinental signed an agreement, for the then employees of Capitol to be offered employment with Transcontinental to work at Capitol.

Vitello testified to four meetings with Garavaglia. The first was in early July. The second was in late July at which Rogers of Transcontinental was also present and explained how Transcontinental worked. Then, according to Vitello, there was a third meeting, also with Rogers and Garavaglia, in early August at which time Vitello told Rogers "that I would be interested in going with his company on a couple of conditions."

In late August Vitello met again with Garavaglia and was told those conditions (insurance and hiring of his drivers) could be met and on 2 September the contract was signed.

Garavaglia testified to three meetings, omitting the one in early August. The substance of the late July and early August meetings testified to by Vitello occurred in one late July meeting according to Garavaglia. Though there is a conflict between the Respondent's principal witnesses concerning how many times they met, their testimony about what they discussed is similar.

In essence, Vitello said he would be interested if two conditions were met. He was not informed that those conditions could be satisfied until late August. Neither he nor Garavaglia testified that they had a meeting of the minds prior to the time the lease was signed. At best, both Vitello and Garavaglia testified that Vitello was conditionally interested.

There is nothing in Garavaglia's testimony nor in the testimony of Vitello that would indicate that in late July Transcontinental and Capitol had any kind of understanding that Capitol would use the services of Transcontinental. There is no indication in Garavaglia's testimony, or that of Vitello, that Vitello had made a decision then, even tentatively, to change his method of operations.

William Klann testified that he met with Vitello on 13 August and presented him with recognition agreement which Vitello stated he would submit to his lawyer. According to Klann's testimony, on cross-examination:

> Q. Did he [Vitello] ask you whether you had authorization cards?
>
> A. Yes.
>
> Q. What did you tell him?
>
> A. I said that that's in the process. I then—the people have been talking to each other and there is cards out yes.

Vitello testified about this meeting. He did not deny that he asked Klann about cards and Klann had stated that the Union was in the process of getting authorization cards signed.

Garavaglia and Vitello then met on 29 August and reached an agreement in which Capitol would use Transcontinental, and they signed a lease on 2 September to be effective 15 September.

Based on the generally undisputed and credible evidence of record, and crediting Garavaglia, I conclude that Vitello did not make a decision to change his method of operations until at least 29 August 1986.

There is nothing in Vitello's testimony, or other credible evidence, to suggest that he had made a decision prior to that date. While it appears to be the case that Vitello was contemplating a change in operations prior to 29 August, he had not yet made a decision.

It is also undisputed that by at least 13 August Vitello knew that his employees were engaged in an organizational campaign on behalf of the Union. Klann so testified Vitello did not refute this testimony.

Further, had Vitello in fact decided to change his method of operations before 13 August, it seems reasonable he would have told Klann. But at a minimum, he would probably not have engaged in the 8(a)(1) conduct.

Although the dates of Vitello's interrogation of employees are not precisely set, the credible evidence shows that there were interrogations and other acts violative of Section 8(a)(1), which began occurring in late August. I do not find it particularly unreasonable that the employees' memory of when particular acts of interrogation took place lack mathematic precision. The general timeframe of late August is sufficient and is corroborative of the undenied testimony of Klann that he had a meeting with Vitello on 13 August at which he stated that the employees were engaged in organizational activity. I therefore reaffirm my conclusion, based on all the credible evidence of record, that in fact Vitello knew of the organizational campaign among his employees prior to the time that he made the decision to change his method of operation by terminating the entire bargaining unit and executing an employee lease agreement with Transcontinental.

B. *The Credibility of Garavaglia*

On reviewing the record and my trial notes, I find no basis to discredit Garavaglia. His testimony appears internally consistent and not at material variance with others whom I do credit. While his demeanor was not particularly positive, neither did it show untrustworthiness. Absent a basis for discrediting one who has taken an oath, I conclude that his testimony should be credited, at least where unrefuted. I generally credit his factual version of the meetings to which he testified. However, his interpretation of those facts I consider argument by an interested representative of one of the parties. In short, his testimony of what was said at his meetings with Vitello and when they met is credited. His opinion that Vitello decided in July to use Transcontinental is not. Garavaglia's opinion is not supported by the facts to which he or Vitello testified.

Thus, though I credit Garavaglia's testimony, I nevertheless conclude that Vitello did not reach a decision to change his operation until after he learned of the organizational campaign. That he and Garavaglia may have had discussions along these lines prior to the time he learned of the organizational activity does not make lawful his otherwise unlawful activities.

The only testimony suggesting a contrary finding is in Garavaglia's version of the 25 July meeting. Present were Garavaglia, Vitello, Rogers, and Vitello's son. After discussion of how the personnel leasing process would work, its value and Roger's experience in the trucking industry, Garavaglia testified:

> And Mr. Rogers gave him [Vitello] the information. He accepted that information and said he would go with a program like that, subject to—I think it resolved [sic] around four issues. One was, there was an issue over his insurance. Something about he was a self-insured insurant, or something that he had to pay the total amount of the insurance. I don't know the exact details. And something about Mr. Rogers had a premium policy with Firemans Fund, and that they matched the benefits. They looked—Firemans Fund looked better and cheaper. He wanted to make sure, so he wanted some proof from either an actuary, or somebody from Firemans Fund, or something to say that the insurance is better. There was an issue over the people that he had presently employed with him. Would they be given protection to work, I think he said at Capitol Transit? There was an issue over if the insurance—if he went along with the program would it pick it up immediately? If his stopped today would theirs pick up immediately? Did he—in the final one did he have the ability to have enough extra people if he needed a surge of people? And that was the basis.

While this testimony of Garavaglia seems to indicate that Vitello was seriously considering changing the method of his operation, it is insufficient to conclude that in fact Vitello had made up his mind or had determined at that time to enter into an employee leasing arrangement.

I conclude rather that as of 25 July those talks were still in a preliminary stage subject to resolution of the issues Vitello raised and that agreement was not imminent. This is established by the fact that after the 25 July meeting, Transcontinental and Capitol had no further contact until 29 August. I credit Garavaglia over Vitello and conclude there was no early August meeting. It does not seem to have been in Garavaglia's interest to ignore such a meeting, had it in fact occurred. However, it would seem to be in Vitello's interest to have had yet one more meeting prior to any proved union activity. While the number of meetings is not so important as what was said, that these two principal actors have such different memories of how often they met, suggests that the meetings themselves were not considered too important. This in turn implies that nothing of great substance occurred—certainly not something so important as reaching an agreement.

Although it is possible to conclude from the words "he would go with a program like that" that Vitello had made up his mind, such words just as reasonably merely convey interest. Further, it is clear that these are Garavaglia's words and do not purport to be a quote from Vitello. Vitello did not testify that he had made up his mind or told Garavaglia that he had. To interpret Garavaglia's testimony in such a way as to conclude that Vitello had agreed about 25 July to enter into the employee lease arrangement would be to give determinative significance to Garavaglia's choice of words as a witness—words that do not even purport to be those he remembered Vitello having uttered at the time. I do not believe that the Section 7 rights of 45 employees can be set on such a questionable foundation.

Counsel for the General Counsel argues that Vitello and Garavaglia should be discredited and I should find there were no meetings between them until late August—after the organizational campaign became known. Though somewhat vague their testimony of a late July meeting tends to be corroborated by Lawrence McHenry, a representative for United Labor Associates International. McHenry testified to an early August discussion with the president of ULAI, the subject of which was their earlier meeting with Garavaglia about giving former Capitol employees preference to be hired by Transcontinental. Such supports Garavaglia's testimony that he met with them on 31 July. Other witnesses to this discussion between McHenry and Donald Deters fixed no date. Klann, who McHenry testified was present, denied the substance of McHenry's testimony. Though crediting Klann could serve to discredit McHenry and therefore Garavaglia, Klann's testimony is not sufficiently definitive for such a conclusion. I credit McHenry.

While I do not discredit Garavaglia, neither do I conclude that he even attempted to testify factually that Vitello had decided to enter into the leasing agreement as of 25 July.

From a totality of the record, I conclude that Vitello did not decide to enter into the employee leasing arrangement until after he had and learned of the employees' organizational campaign. Further, given the substantial S(a)(1) activity engaged in by Vitello after this, I conclude that his ultimate decision to change his operation was motivated by the employees' union activity; and the Respondent brought forth insufficient evidence that he would have changed even absent the union activity.

I therefore reaffirm my conclusion that by executing the lease agreement with Transcontinental and terminating all the bargaining unit employees, Capitol Transit violated Section 8(a)(3) of the Act.

I further reaffirm and adopt the other findings and conclusions and recommend entry of the Order set forth in my initial decision.

The North American Coal Corporation *and* International Union, United Mine Workers of America. Case 18–CA–10202

July 11, 1988

DECISION AND ORDER

BY CHAIRMAN STEPHENS AND MEMBERS BABSON AND CRACRAFT

On March 7, 1988, Administrative Law Judge Stephen J. Gross issued the attached decision. The Respondent filed exceptions and a supporting brief. The Union filed an answering brief in opposition to the Respondent's exceptions.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and briefs[1] and has decided to affirm the judge's rulings, findings, and conclusions as modified and to adopt the recommended Order.[2]

The judge concluded that the Respondent's refusal to provide information requested by the Union concerning the location of leases and coal-related assets of the Respondent and its subsidiaries and joint ventures within the State of North Dakota violated Section 8(a)(5) and (1) of the Act. No exceptions to this conclusion were filed. The judge also concluded that the Respondent's refusal to provide such information was a contributing cause of the November 1, 1987 strike by unit employees. Accordingly, the judge concluded that the strike was an unfair labor practice strike from its inception. The Respondent excepts to the judge's finding of an unfair labor practice strike.

We agree with the judge that the November 1, 1987 strike was an unfair labor practice strike. In reaching this conclusion, we find it unnecessary to rely on the judge's suggested rationale that any discussion of an unfair labor practice during an employee meeting called to discuss whether to strike automatically establishes a presumption that any subsequent strike is an unfair labor practice strike. Rather, we find in the circumstances of this case sufficient evidence that the Respondent's undisputed unlawful refusal to provide bargaining information was a contributing cause of the strike.

We emphasize that the requested information was relevant to the bargaining issue of employee job security, an issue of paramount concern to the Union in negotiations for a successor agreement. In fact, the Union linked these matters in its initial information request. Further, just 3 days prior to the strike, the Union informed the Respondent during bargaining that it could not make any more proposals on job security without the requested information, and it gave strike notice over this issue.[3] Shortly thereafter, at the November 1 strike meeting, employees were informed about the nature of the Union's information request, the Respondent's refusal to provide the information, the Union's specific need for the information in order to make job-security proposals, and the Union's opinion that any strike would be an unfair labor practice strike.[4] On these facts, we conclude that the General Counsel has affirmatively established the requisite causal connection between the Respondent's unlawful refusal to provide the information and the strike. Accordingly, we find that the November 1 strike was an unfair labor practice strike from its inception.

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge and orders that the Respondent, The North American Coal Corporation, Bismarck, North Dakota, its officers, agents, successors, and assigns, shall take the action set forth in the Order.

Everett Rotenberry, Esq., for the General Counsel.
David J. Laurent, Esq. and *Thomas Smock, Esq.*, of Pittsburgh, Pennsylvania, for the Respondent.
Karen L. Yablonski-Toll, Esq., of Denver, Colorado, for the Charging Party.

DECISION

STATEMENT OF THE CASE

STEPHEN J. GROSS, Administrative Law Judge. The Indian Head Mine is a surface coal mine near Zap, North Dakota. The Respondent, The North American Coal Corporation (North American), owns and operates the

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[1] The Respondent has requested oral argument. The request is denied as the record, exceptions, and briefs adequately present the issues and the positions of the parties.

[2] The Respondent alleges that it has fully remedied the unfair labor practice by forwarding the requested information to the Union on March 23, 1988, posting the required notice on March 25, 1988, and meeting with the Union to discuss the lease and asset information on March 30, 1988. Therefore, it maintains that the strike has reverted to an economic strike. We leave this issue to be litigated and resolved in compliance.

[3] Although not mentioned in the judge's decision, the uncontroverted testimony of Bruce Boyens, the Union's chief negotiator, was that:

> I believe on the 28th of October the last few things were said about our proposals was that it was unfortunate they wouldn't supply the information because we couldn't make any more proposals on job security than we already made or alter ours without it, and that we were going to have to strike over that.

[4] We agree with the judge that the Union here obviously recognized the strategic advantage of portraying the impending work stoppage as an unfair labor practice strike, but we disagree with his suggestion that this advantage and its exploitation should be viewed as a factor indicating the lack of any real causal connection between the unfair labor practice and the subsequent strike.

289 NLRB No. 102

mine. The Charging Party, the International Union, United Mine Workers of America (UMWA), represents the mine's 55 employees. During the course of bargaining over a new collective-bargaining contract covering the Indian Mine, the UMWA asked North American for information about North American's other coal-related assets in North Dakota. North American refused to provide the information. Subsequently the employees of the Indian Head Mine went out on strike.

I. INTRODUCTION

The General Counsel contends that North American violated Section 8(a)(1) and (5) of the National Labor Relations Act (the Act) when the Company failed to provide the UMWA with the information it sought, and that a cause of the strike by the employees of the Indian Head Mine was North American's refusal to provide the UMWA with such information.[1]

As claimed by the General Counsel, my conclusions are that (1) North American violated the Act when it refused to provide the information sought by the UMWA, and (2) the strike against North American is an unfair labor practice strike.

II. NORTH AMERICAN'S REFUSAL TO PROVIDE INFORMATION

The 1984 collective-bargaining agreement between North American and the UMWA covering the employees of the Indian Head Mine expired by its own terms on 1 September 1987 but prior to that date was extended through 30 October 1987. (All the events I subsequently refer to occurred in 1987 unless I specify otherwise.) Bargaining, looking toward a new agreement, began in July.

From the start of the bargaining the UMWA representatives expressed their concern about the job security of the mine's employees. Virtually all the plant, located about 15 miles from the mine, owned by the United Power Association (UPA). The contract between North American and the UPA covering coal from the Indian Head Mine expires in March 1992. The mine's employees knew that and had come to the conclusion that North American was going to shut down the Indian Head Mine in 1992 on the expiration of the contract. The mine's employees also knew that North American was discussing a follow-on contract with the UPA; but the employees assumed that even if North American did reach agreement with the UPA, the post-1992 coal would come from some place other than the Indian Head Mine. The employees expressed all these concerns to their UMWA representatives.

The employees arrived at these concerns about their future employment without any specific advice on the subject from North American. North American has not told the employees (or the UMWA) that it is going to shut down the Indian Head Mine on the expiration of the UPA contract in 1992. On the other hand North American has not said that the mine will remain open. And North American has said nothing about whether it plans to supply the UPA's powerplant from another mine if the Company does close the Indian Head Mine in 1992.

The lead negotiator for the UMWA in the bargaining with North American was Bruce Boyens, western administrator and counsel for the UMWA. His approach to the job-security issue was to propose two kinds of contract provisions. Under one approach, the "jurisdictional clause" of the North American-UMWA collective-bargaining agreement would be amended to cover additional coal lands in which North American had an interest "so that the mine life of the [Indian Head Mine] could be extended."[2] Under the second approach, Indian Head Mine employees would "have preferential hiring and transfer" rights to jobs at other North American Mines.[3]

But North American rejected the UMWA's proposals. North American's negotiating team was headed by James Rouse, director of employee relations for the western division of North American. From the start Rouse took the position that (1) "we [that is, North American's management] would indeed do what we could for the Indian Head Mine employees . . . [w]hen such a circumstance would arise that there would be a reduction in employment at that mine . . . in assisting these folks to find other employment";[4] but (2) North American would not agree to any proposed contract provision that gave the Indian Head Mine employees preferential rights to jobs at any other location. North American maintained that stance throughout the bargaining.

Boyens responded to Rouse's position by asking for information about North American's coal lands. In particular, Boyens asked for the locations of "those leases and coal related assets of North American which now exist in North Dakota." The UMWA needed that information, said Boyens

> in order to make or alter what job security provisions we had on the table an that time. The Union could not intelligently bargain without that information since it needed it in order to know what North American held and in order to make any changes in our job security proposal which could form the basis for settlement of the agreement.[5]

North American refused to provide the requested information. The only information that North American would provide about its leases and coal-related assets, said Rouse, was information about the various properties encompassed by the definition of the Indian Head Mine in the collective-bargaining agreement between North

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[1] The UMWA filed its unfair labor practice charge on 4 September 1987. The complaint issued on 30 October and was amended on 13 November. I heard the matter in Bismark, North Dakota, on 3 December. The General Counsel and North American submitted briefs on 6 January 1988.

North American admits that it is an employer engaged in commerce (see, in this connection, Tr. 5), that the UMAW is a labor organization, that the employees employed at the Indian Head Mine constitute an appropriate unit, and that the UMWA is the exclusive collective-bargaining representative of the employees in that unit.

[2] Boyens Tr. 35.

[3] Ibid.

[4] Rouse, Tr. 86-87

[5] Tr. 12-13.

American and the UMWA. Because the UMWA's objective was to provide job opportunities for the Indian Head Mine employees in the event that North American shut down the Indian Head Mine, information only about that mine was not helpful to the UMWA.

Neither party subsequently altered its position about either the information request or the appropriateness of a job security provision in the new contract.

III. NORTH AMERICAN'S FAILURE TO PROVIDE INFORMATION VIOLATED THE ACT

North Amercian argues that the Act does not require North American to provide the information requested by the UMWA since that information is relevant only to nonmandatory subjects of bargaining. It is true that employers do not have to supply information that is relevant only to nonmandatory subjects of bargaining. *Service Employees Local 535 (North Bay Regional Center)*, 287 NLRB 123 at fn. 1 (1988); *Otis Elevator Co.*, 269 NLRB 891, 894 (1984).

As noted earlier, however, one of the UMWA's bargaining goals is to have the new collective-bargaining agreement with North American provide for preferential hiring and trasnfer rights for the Indian Head Mine employees. In this regard, a unionized employer that is planning to shut down a jobsite must, of course, bargain about the effects of the action on its employees. E.g., *First National Maintenance Corp. v. NLRB*, 452 U.S. 666, 681 (1981). The Board has long held that where that action includes the shutdown of one location and the opening of another, the employer is obligated to bargain about "the placement of the [old location's] employees in positions" at the new location. *Brown Truck & Trailer Mfg. Co.*, 106 NLRB 999, 1000 (1953).

I know of no effects-bargaining case that deals with a shutdown years in the future. But "the words of [Section 8(d)] . . . plainly cover termination of employment which . . . necessarily results from closing an operation." *First National Maintenance Corp.*, above at 681, quoting *Fiberboard Corp. v. NLRB*, 379 U.S. 203, 210 (1964). That being so, it is far from clear that, even where employees have no basis for believing that their employer contemplates closing their jobsite, an employer has the right, during bargaining over a new contract, to refuse to discuss the effects of future closings or the transfer rights of employees affected by such closings.

For present purposes, assume that employers are not obliged to bargain about the effects of jobsite closings as long as no closing is on the horizon. That is not the situation here. There are objective circumstances specifically related to the Indian Head Mine that point to the real possibility of its shutdown. The UMWA is in fact concerned about the mine's employees losing their jobs in the event of such a shutdown.

North American argues that despite these circumstances, since there has been no "announced decision" by North American to close the mine, the Act does not require the Company to respond to requests by the UMWA to bargain about the effects on employees of a closing of the mine.[6] The central purpose of the Act is to promote industrial stability and peace.[7] Given the real, and reasonable, concerns of the UMWA about the Indian Head Mine employees losing their jobs, that purpose would plainly be disserved by the adoption by the Board of the position urged by North American.

I accordingly conclude that the Act requires North American, on request by the UMWA during bargaining over a new collective-bargaining contract, to bargain with the UMWA about the effects of the possible shutdown of the Indian Head Mine on the mine's employees.[8]

I also conclude that included within the scope of such bargaining is the question of the rights of those employees to jobs at other North American mines in North Dakota.[9]

That brings us to the information that the UMWA seeks from North American.

As discussed above, the UMWA asked North American for information about North American's "leases and coal-related assets" in North Dakota. That information is plainly relevant to what jobs the employees in the Indian Head Mine bargaining unit might transfer to if the Indian Head Mine does close in 1992. Indeed, as also discussed above, the UMWA advised North American that the Union "needed the information in order to make or alter what job security provisions we had on the table."

I am aware that North American might have reasons for not wanting to publicize the location of its coal-related interests in North Dakota. But North American could have expressed that concern here. See, e.g., *Kelly-Springfield Tire Co.*, 266 NLRB 587, 588 (1983). North American chose not to do so.

I am also aware that, from North American's point of view, nothing the UMWA can propose could convince the Company to grant contractually established transfer rights to its Indian Head Mine employees. However, for obvious reasons, that consideration does not excuse an employer from supplying information of a kind that the Act would otherwise require the employer to provide. See *Pertec Computer Corp.*, 284 NLRB 810 fn. 3 (1987).

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[6] North American Br. at 11.

[7] Sec. 1(b) of the Act; *NLRB v. Financial Institution Employees Local 1182 (Seattle-First)*, 471 U.S. 1098 (1986).

[8] North American contends that to the extent the requested information is relevant to the UMWA's interest in rededfining the jurisdictional clause of the collective-bargaining agreement, the information relates to a nonmandatory subject of bargaining. Where requested information is relevant to a mandatory subject of bargaining, the employer may not refrain from supplying it merely because the information is also relevant to nonmandatory subject. See *Oliver Corp.*, 162 NLRB 813 (1967). Thus I need not decide whether revision of the jurisdictional clause of the agreement would be a nonmandatory subject of bargaining. Similarly, I need not decide the effect on this theory that in 1974 North American demanded a change in the jurisdictional clause of its agreement with the UMWA, and then bargained to impasse and took (and won) a strike over the matter.

[9] The limitations expressed in that conclusion about the scope of North American's bargaining obligation (rights to jobs in mines in North Dakota) are intended only to reflect the nature of the information request that is the subject of this hearing.

The evidence suggests that the UMWA assumed that any transfer rights would apply only to mines that North American might open in the future, not to mines already in operation. Whether North American's bargaining obligation is broader than that need not to be decided here.

I accordingly conclude that by failing to provide the information requested by the UMWA, North American has violated Section 8(a)(1) and (5) of the Act.

One other question about the UMWA's information request remains. The complaint alleges that North American violated the Act by failing to provide information about the "location of leases and coal-related assets within the State of North Dakota of the North American Coal Corporation *and its subsidiaries and joint ventures.*" (Emphasis added.) However, North American urges that information about "leases or coal-related assets owned by entities other than North American are not relevant to the Union's performance of its duties."[10]

In passing on the appropriateness of an information request, the standard used to evaluate the relevance of the requested information "is akin to that adopted matters regarding discovery." Thus "potential relevance is sufficient." *Dahl Fish Co.*, 279 NLRB 1084 (1986); see *NLRB v. Acme Industrial Co.*, 385 U.S. 432, 437 (1967). Under a variety of circumstances, information on the location of the leases and coal-related assets of North American's subsidiaries and joint ventures could be relevant to the bargaining between the UMWA and North American about the impact of the possible closing of the Indian Head Mine on the mine's employees.[11]

III. IS THE STRIKE AN UNFAIR LABOR PRACTICE STRIKE

The employees of the Indian Head Mine who are members of the UMWA are organized into a local union of the UMWA, Local 8880. As touched on earlier, the collective-bargaining contract between the UMWA and North American expired on 30 October. On that date the UMWA's president, Richard Trumka, notified Local 8880 by telegram that he authorized a strike, effective 12:01 a.m. the following day, "upon the expiration of the agreement between the United Mine Workers and North American Coal Company."

Daniel Neurohr is the president of Local 8880. According to Neurohr: (1) the Local ordinarily receives such a telegram whenever a collective-bargaining agreement comes to an end, and (2) that kind of telegram always preceeds a strike by Local 8880.

The members of Local 8880 met during the evening of 1 November. Neurohr read Trumka's telegram. Neurohr then referred to, among other things, North American's refusal to provide information that the UMWA had requested, and said that the strike would be an unfair labor practice strike.

Dallas Wolf is a UMWA representative in North Dakota. Wolf spoke after Neurohr. Wolf testified that he told the employees—"basically . . . that we are authorized to go on strike by the president and he is the only one [who] can authorize a strike."[12]

Wolf, like Neurohr, while discussing whether to strike, referred to North American's failure to provide information, briefly described the kind of information the UMWA wanted, and mentioned why the Union wanted it. In the course of his talk, Wolk reiterated Neurohr's view that the strike would be an unfair labor practice strike.

The employees did not vote on whether to strike. Rather, in Wolf's words:

> The impression we got was that everybody wanted to go on strike . . . I got up and asked if there is any objection that I will go tell the press that we are on strike, and there was no objection.[13]

The strike did begin on 1 November and picket signs did use the term "unfair labor practice."

Neurohr was the only Indian Head Mine employee called to the witness stand by either the General Counsel or the UMWA. North American did not call any employees as witnesses.

The General Counsel contends that the foregoing facts show that the strike is an unfair labor practice strike. The question that raises is whether the strike was caused at least in part by North American's refusal to provide the information that the UMWA sought; was that refusal a "contributing cause" of the strike.[14]

Certainly there is evidence to support the contention of the General Counsel and the UMWA that the strike is an unfair labor practice strike. Namely, Neurohr (Local 8880's president) and Wolf (a UMWA representative) testified that they referred to North American's failure to provide information in the course of the meeting of the members of Local 8880 that led directly to the strike.

A number of factors point in the other direction. First, the basis of the UMWA's authorization of the strike was, clearly, the fact that the old contract had expired and no new one had been agreed to. The UMWA did not grant the authorization because North American had failed to provide information.

Second, it could prove greatly to the advantage of the Indian Head Mine employees and their union that the strike be considered an unfair labor practice strike. Thus at the meeting preceding the strike Neurohr and Wolf had considerable incentive to refer to North American's refusal to provide information (or, at least, to testify that they made such references), even if they did not care about North American's failure to provide information and even if they thought the employees felt the same way.

Third, the record tells us nothing about the thoughts of the employees (other than Neurohr) as they went out on strike.

Fourth, in the normal course of events one would expect that, from an employee's viewpoint, an employer's failure to provide information would be wholly overshadowed by other kinds of issues. In this case those other issues would be the expiration of the collective-bargaining contract and North American's adamant refusal to provide for job transfer rights.[15]

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[10] Reply dated 12 November 1987.

[11] The UMWA's last request for information did not refer to the holdings of North American's subsidiaries and joint ventures. However, earlier requests did and North American apparently understood that last request to encompass such entities. See North American's Br. p. 2.

[12] Tr. 73.

[13] Tr. 74.

[14] E.g., *American Gypsum Co.*, 285 NLRB 100 (1987); *Citizens National Bank*, 245 NLRB 389, 391 (1979).

Ultimately, it seems to me, the question is whether Neurohr's and Wolf's statements to the employees raise a presumption that the employees' states of mind reflected those statements when the employees opted to strike. If so, it was up to North American to prove that that was not the case. If not, the General Counsel did not present a prima facie case.[16]

Whatever the answer might be, if the slate was clean, it appears that the Board has resolved the question. Credible evidence that the employer's unfair labor practices were referred to in the course of the meeting of employees that led to the strike proves that the strike is an unfair labor practice strike, absent evidence to the contrary. *American Gypsum Co.*, above; see also *Buffalo Concrete*, above at 841–842 (1985); *Struthers Wells Corp. v. NLRB*, 721 F.2d 465 (3d Cir. 1983).[17]

I accordingly conclude that the strike by the employees of North American's Indian Head Mine was an unfair labor strike from its inception on 1 November 1987.[18]

THE REMEDY

The accompanying recommended Order requires North American to provide the information sought by the UMWA.[19] The recommended Order also requires North American to reinstate striking members of the bargaining unit in the event any such strikers unconditionally ask for reinstatement, dismissing, if necessary, employees hired on or after 1 November as replacements, and requires North American to pay backpay commencing 5 days after any such striker makes an unconditional offer to return to work. Such employees' loss of earnings shall be computed as prescribed in *F. W. Woolworth Co.*, 90 NLRB 289 (1980), with interest computed in accordance with *New Horizons for the Retarded*, 283 NLRB 1173 (1987).[20]

The General Counsel urges that the recommended Order include a visitatorial provision authorizing the Board to engage in discovery, if necessary, to monitor compliance with the Order. The facts of this case do not warrant the imposition of this kind of provision. See *Cherokee Marine Terminal*, 287 NLRB 1080 (1988).

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[21]

ORDER

The Respondent, The North American Coal Corporation, Bismarck, North Dakota, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Refusing to bargain collectively with the International Union, United Mine Workers of America (UMWA), as the exclusive bargaining representative of the members of the bargaining unit at the Respondent's Indian Head Mine, by refusing to furnish the UMWA with information relevant to the effects on the members of the bargaining unit of a possible closing of the Indian Head Mine.

(b) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Provide the UMWA with the information specifying the location of the leases and coal-related assets within the State of North Dakota of the Respondent and its subsidiaries and joint ventures.

(b) On their unconditional offer to return to work, offer to all unfair labor practice strikers immediate and full reinstatement to their former jobs or, if those jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority of any other rights and privileges, dismissing, if necessary, any persons hired by the Respondent on or after 1 November 1987, and make them whole for any loss of earnings they may have suffered as a result of the Respondent's refusal, if any, to reinstate them in the manner set forth in the remedy section of this decision.

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[15] On at least one occasion the Board had held that an employer's unlawful failure to provide information was a cause of a strike. *Buffalo Concrete*, 276 NLRB 839 (1985). But the information the union sought there at least arguably was more directly related to the employees' concerns than is the case here.

[16] The General Counsel has the burden of proving that a strike is an unfair labor practice. See *Tufts Bros.*, 235 NLRB 808, 810–811 (1978).

[17] There would have been no strike, of course, had the UMWA and North American been able to reach agreement. It is conceivable that had North American provided the requested information, the UMWA could have come up with a job security proposal satisfactory to North American and that North American and the UMWA would subsequently have entered into a collective-bargaining agreement. If it were probable that an agreement would have been reached but for North American's refusal to provide the information, that might alone be enough to prove that the strike was an unfair labor practice strike, whatever thoughts the employees might have had about why they were going out on strike. See *Brooks, Inc.*, 228 NLRB 1365, 1367 fn. 12 (1977). The likelihood that the UMWA and North American would have reached agreement had the Union gotten the information is too remote for the theory to apply.

[18] North American argues that it is premature to consider in this proceeding whether the strike is an unfair labor practice strike since the strike is ongoing and since (as of the end of the hearing, at least) no employees have made unconditional offers to return. And it is true that the General Counsel could properly have litigated in a subsequent proceeding the question of whether the strike is an unfair labor practice strike. E.g., *International Business Systems*, 258 NLRB 181, 193 (1981), enfd. mem. 701 F.2d 158 (3d Cir. 1983). But the Board long ago concluded that an appropriate alternative approach is to deal with that question in the proceeding that considers the actions alleged to constitute the underlying unfair labor practice, even though the strike is then still underway. *J. H. Rutter-Rex Mfg. Co.*, 115 NLRB 388, 414 (1956), enfd. 245 F.2d 594, 597–598 (5th Cir. 1957); *Louisville Chair Co.*, 161 NLRB 358, 376 (1966), enfd. 385 F.2d 922 (6th Cir. 1967). (For a recent example of a ruling by the Board that an ongoing strike was a unfair labor practice strike see *Port Plastics*, 279 NLRB 362 (1986).)

[19] North American urges that "the only entity that should be required to produce . . . information is North American"—not "North American's nonparty subsidiaries or affiliates." Br. at 12–13. North American's point is well taken and I do not understand the General Counsel to argue otherwise. That does not, however, excuse North American from producing information about the leases and coal-related assets of its subsidiaries and joint ventures, to the extent that such information is available to North American. See fns. 10 and 11, above, and the related text.

[20] Under *New Horizons*, interest is computed at the "short-term Federal rate" for the underpayment of taxes as set out in the 1986 amendment to 26 U.S.C. § 6621.

[21] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

(c) Preserve and, on request, make available to the Board or its agents for examination and copying, all payroll records, social security payment records, timecards, personnel records and reports, and all other records necessary to analyze the amount of backpay due under the terms of this Order.

(d) Post at its Indian Head Mine copies of the attached notice marked "Appendix."[22] Copies of the notice, on forms provided by the Regional Director for Region 18, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material.

(e) Notify the Regional Director in writing within 20 days from the date of this Order what steps the Respondent has taken to comply.

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[22] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

I. REGARDING OUR FAILURE TO PROVIDE INFORMATION TO THE UMWA

WE WILL NOT refuse to bargain collectively with the International Union, United Mine Workers of America, by refusing to furnish the UMWA with information relevant to the effects on employees of a possible closing of the Indian Head Mine.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL tell the UMWA where in North Dakota we and our subsidiaries and joint ventures have leases and coal-related assets.

II. REGARDING REINSTATEMENT AND OTHER RIGHTS OF STRIKING EMPLOYEES

On the unconditional offer to return to work of any Indian Head Mine employees who are on strike against us:

WE WILL offer to reinstate them to their former jobs without prejudice to their seniority or any other rights and privileges. If those jobs no longer exist when the employees unconditional offer to return to work, we will reinstate the employees in substantially equivalent positions.

WE WILL, if necessary in order to reinstate such employees, dismiss any persons we hired on or after 1 November 1987.

WE WILL make whole such employees for any loss of earnings they may have suffered as a result of our refusal, if any, to reinstate them.

THE NORTH AMERICAN COAL
CORPORATION

Atwood & Morrill Co., Inc. *and* **United Electrical, Radio & Machine Workers of America, Local 1204.** Cases 11-CA-9483 and 11-CA-9787

July 12, 1988

DECISION AND ORDER

BY CHAIRMAN STEPHENS AND MEMBERS JOHANSEN AND CRACRAFT

On February 23, 1983, Administrative Law Judge Joel A. Harmatz issued the attached decision. The Respondent and the General Counsel filed exceptions and supporting briefs, and the Respondent filed an answering brief.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings,[1] and conclusions only to the extent consistent with this Decision and Order.

1. As discussed below, we affirm the judge's finding that the Respondent lawfully withdrew recognition from the Union on February 23, 1981.

The record indicates that between February 19 and 21, 1981, during the pendency of a blocked decertification petition, the Respondent received written statements from 21 of the 35 unit employees indicating that they no longer desired union representation. Based on these statements, the Respondent notified the Union on February 23, 1981, that it was withdrawing recognition. The judge found that the Respondent withdrew recognition as a result of clear and unambiguous evidence that the Union had lost majority support. He found no evidence that the employees' statements lacked authenticity or that they were tainted by the Respondent's sponsorship or participation.[2] Nor did the judge find any nexus between the Respondent's wage increase to employee Perry,[3] which the judge found violative of Section 8(a)(5) of the Act, and the repudiation of the Union, 8 months later, by 60 percent of the unit. Based on this record evidence, the judge concluded that the Respondent lawfully withdrew recognition from the Union.

In excepting to the finding that the Respondent lawfully withdrew recognition, the General Counsel argues that the judge failed to consider employee expressions of union support and that the Respondent's withdrawal of recognition was prohibited while the decertification petition was pending. We disagree.

The evidence of employee support for the Union is ambiguous at best and is nullified by the majority's subsequent repudiation of the Union in late February 1981. Further, since the Respondent, in apparent good faith, withdrew recognition based on tangible evidence of loss of majority support, its withdrawal was lawful, notwithstanding the pending decertification petition. As the Board stated in *Dresser Industries*, 264 NLRB 1088, 1089 fn. 7 (1982): "[I]f an employer is presented with a valid decertification petition supported by a majority of the unit employees, it may be privileged to withdraw from bargaining." We similarly recognized in *RCA Del Caribe, Inc.*, 262 NLRB 963, 965 fn. 13 (1982), that, during the pendency of a question concerning representation, an employer in good faith may withdraw recognition based on objective considerations.[4] Accordingly, we agree that the Respondent lawfully withdrew recognition and dismissed the 8(a)(5) allegation.

2. We do not adopt, however, the judge's finding that the Respondent violated Section 8(a)(5) of the Act by unilaterally granting a 20-cent-per-hour wage increase to employee Perry on June 17, 1980. Thus, immediately after the increase, the Union filed a grievance under the extant collective-bargaining agreement claiming that the Respondent improperly reclassified Perry from labor grade 5-C to a labor grade 5-A position. The Respondent defended the reclassification, and the attendant 20-cent-per-hour wage increase, under article VI, the contract's management-rights clause,[5] and article

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[1] The Respondent has excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

[2] The parties stipulated to the authenticity of the employees' signatures. The General Counsel did not contend that the Respondent fostered or supported the employees' statements.

[3] We correct the judge's inadvertent error in sec. III,B,1,(a), par. 2, to reflect that Kay Perry received the wage increase in 1980. We also note that Don Baird, the Respondent's production manager, admitted that Union Steward Jefferson never agreed to an increase of Perry's wages.

[4] See also *Hemet Casting Co.*, 260 NLRB 437, 446 (1982); *GAF Corp.*, 195 NLRB 169, 170 (1972). To the extent *Turbodyne Corp.*, 226 NLRB 522, 525 (1976), and *Mervyn's*, 240 NLRB 54, 60 (1979), can be read to preclude an otherwise lawful withdrawal of recognition during the pendency of a question concerning representation, we expressly overrule them.

Member Cracraft did not participate in *Dresser Industries* or *RCA Del Caribe*. Although she agrees with the propositions for which they are cited above, she does not pass on any other aspects of those cases.

[5] Art. VI provides, inter alia, that:

> Without limiting the generality of the foregoing, the sole and exclusive rights of management which are not abridged by this Agreement include, but are not limited to, the full and exclusive control, direction and supervision of the work force; the hire, promotion, demotion, transfer . . . and the assignment of work to employees without restriction.

289 NLRB No. 100

XXXI that provided, in relevant part, that "Employees may be hired at rates above the minimum set forth in Schedule A [the contract wage scale] if the Company determines that their skills so warrant." Although the judge found that the Respondent had at least a colorable contract defense to the unfair labor practice charge, he, nonetheless, found a violation "rest[ing] simply upon the more appropriate interpretation" of the contract. We disagree. Where, as here, the dispute is solely one of contract interpretation, and there is no evidence of animus, bad faith, or an intent to undermine the Union, we will not seek to determine which of two equally plausible contract interpretations is correct. *NCR Corp.*, 271 NLRB 1212, 1213 (1984). Accordingly, we find no 8(a)(5) violation.

3. Nor do we adopt the judge's finding that the Respondent violated Section 8(a)(1) of the Act on March 10, 1981, by unilaterally granting employees a wage increase, floating holiday, and increased sickness and accident benefits. The judge found these increases unlawful on the theory that, during the pending question concerning representation, the Respondent's grant of benefits presumptively had the unlawful purpose of influencing employees in their selection of a bargaining representative. Because the Respondent did not rebut this presumption by establishing that the increases were justified by legitimate business considerations, instead of being made to impede Board decertification procedures, the judge found the increases violative of Section 8(a)(1). We disagree.

In the unusual circumstances of this case, where (1) as we find below, the increases were not discriminatorily motivated, (2) the Respondent had already, as we have now concluded, lawfully withdrawn recognition from the Union, and (3) for the reasons explained below, there was no cognizable election in prospect at the time the increases were made, we cannot conclude that the Respondent is properly chargeable with coercing the employees' choice in the election or otherwise impeding the Board's decertification procedures. Although the Regional Director did not in fact dismiss the decertification petition until August 23, 1982, the petition should have been dismissed on the issuance of the complaint on the 8(a)(5) charge alleging an unlawful withdrawal of recognition. See NLRB Casehandling Manual, Part I, Unfair Labor Practice Proceedings, Section 11730.3. Although there may be a theoretical basis for a finding that the Respondent's grant of benefits could interfere with employee free choice in a decertification election, where, as here, because of the prior lawful withdrawal of recognition and eventual dismissal of the petition, no election was ever held (and when the decertification petition should properly have been dismissed even earlier), we cannot conclude that it effectuates the purposes of the Act to find that the grant of benefits violated the Act in this respect.

4. Although we agree with the judge that the Respondent's March 10, 1981 unilateral increase in wages and benefits did not violate Section 8(a)(3) of the Act, we do so for the following reasons.[6] The General Counsel offered no evidence that the Respondent granted the floating holiday and increased sickness and accident benefits in order to undermine union support. Nor, under all of the record evidence, has the General Counsel established that the March 10, 1981 wage increase was discriminatorily motivated. The Respondent granted the increase more than 1 year after the previous employee wage increase. Although the amount of this increase exceeded that which the Respondent offered, or was willing to propose in negotiations, this alone does not render the increase unlawful. During negotiations, the Respondent was proposing figures based on a 3-year contract package rather than on a single increase. Moreover, following the withdrawal, the Respondent considered additional factors when setting the amount of its wage increase including local market conditions, comparable pay, and preservation of employee skills. The fact that, as a result of its withdrawal of recognition, more funds were available for it to address these additional concerns merely reflects a realistic assessment of the Respondent's new position following its withdrawal of recognition. It does not, standing alone, prove unlawful motivation. Nor has the General Counsel demonstrated discriminatory intent. Accordingly, we dismiss the 8(a)(3) allegations.

5. Finally, as we find that the Respondent has not violated the Act, we agree with the judge that a bargaining order is unwarranted in this case.

ORDER

The complaint is dismissed.

Howard M. Kastrinsky, Esq., for the General Counsel.

Stuart M. Vaughan, Esq. and *John Lynch, Esq. (Ogletree, Deakins, Nash, Smoak & Stewart)*, of Raleigh, North Carolina, for the Respondent.

Steven Hochman, of Winston-Salem, North Carolina, for the Charging Party.

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[6] We expressly disavow the judge's finding that Sec. 8(a)(3) is limited to discriminatorily motivated "detriments." Benefits, as well as detriments, imposed for a proscribed object, violate Sec. 8(a)(3). *Flite Chief, Inc.*, 220 NLRB 1112, 1120 (1975), enfd. 626 F.2d 866 (9th Cir. 1977). See generally *St. Elizabeth Community Hospital*, 240 NLRB 937, 941 (1979).

DECISION

STATEMENT OF THE CASE

JOEL A. HARMATZ, Administrative Law Judge. This proceeding was heard by me on September 29 and 30, 1982, in Washington, North Carolina, on an original unfair labor practice charge filed on October 23, 1980, and a consolidated complaint issued December 3, 1981, which, as amended, alleged that Respondent independently violated Section 8(a)(1) of the Act by inducing employees to withdraw union support by offering possible wage increases and by threatening employees with discharge for engaging in union activity, and violated Section 8(a)(3) and (1) of the Act, by increasing the wages and benefits of employees represented by the Union. The complaint further alleged that Respondent violated Section 8(a)(5) and (1) by refusing to recognize and bargain with the Union as the majority representative of employees in the appropriate unit, and by making various unilateral changes, without notifying the Union, in terms and conditions of work of employees in the appropriate collective-bargaining unit. In its duly filed answer, Respondent denied that any unfair labor practices were committed. Following close of the hearing, briefs were filed on behalf of the General Counsel, the Charging Party, and the Respondent.

On the entire record in this proceeding[1] including consideration of the posthearing briefs, and my opportunity directly to observe the witnesses while testifying as well as their demeanor, I find as follows

FINDINGS OF FACT

I. THE BUSINESS OF THE RESPONDENT

Respondent is a Massachusetts corporation with a plant located in Washington, North Carolina, the sole facility involved in this proceeding, from which it is engaged in the manufacture of special valves used by power plants and in marine turbines in the petro-chemical industry. In the course of the operation, during the calendar year preceding issuance of the complaint, a representative period, Respondent received goods and raw materials from points located directly outside the State of North Carolina, which exceeded $50,000 in value, and manufactured and shipped directly to points outside the State of North Carolina, products valued in excess of $50,000.

The complaint alleges, the answer admits, and I find that Respondent is now and has been at all times material an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

II. THE LABOR ORGANIZATIONS INVOLVED

The complaint alleges, the answer admits, and it is found that Local 1204, and its International, United Electrical, Radio and Machine Workers of America (collectively as the Union) are labor organizations within the meaning of Section 2(5) of the Act.

III. THE ALLEGED UNFAIR LABOR PRACTICE

A. *Preliminary Statement*

Basically at stake in this proceeding is the question of whether statutory remedies ought be invoked to enforce continued recognition of a previously certified representative, an issue that finds its origin in an initial organizational campaign waged in 1979. Thus, on July 26, 1979, the Union was designated in a Board-conducted election as representative of Respondent's production and maintenance employees at the Washington, North Carolina plant by a vote of 32 for union representation, 29 against, with 1 challenged ballot. Within a few days, on August 3, 1979, the Union was certified and shortly thereafter negotiations commenced on August 14, 1979, continuing until January 28, 1980, when 1-year agreement was executed.[2] However, the first year of this newly founded relationship was marked by controversy, including suggestions that employees were disenchanted with their statutory representative as well as charges by the Union as to foul play in the Employer's approach to employee organizational rights. The latter was memorialized in extensive unfair labor practice charges filed by the Union on October 23, 1980,[3] and the instant consolidated complaint, which, inter alia, includes allegations that between May 12 and June 16, 1980, the Respondent engaged in the conduct outlined below:

1. In June 1980, Respondent violated Section 8(a)(1), through Supervisor Robert Hines having offered "employees the possibility of increased wages and other benefits if they abandoned their support for the Union. . . ."

2. On June 18, 1980, Respondent violated Section 8(a)(1) through Supervisor Matthew Reddick's and on June 20, 1980, through Don Baird's having, "Threatened its employees with discharge for engaging in union activities."

3. On May 12, 1980, Respondent violated Section 8(a)(5) and (1) of the Act by reclassifying and granting a wage increase to employees "unilaterally, without notifying the Union. . . ."

4. On June 9 and 16, 1980, Respondent violated Section 8(a)(5) and (1) of the Act when it "unilaterally refused to allow stewards to file grievances."

Against the foreground of this alleged misconduct, a decertification petition was filed on behalf of employees on November 26, 1980. The petition was timely filed, and would have been processed to election but for the pending unfair labor practice charges. Well after issuance of the instant complaint, the petition was dismissed by the Regional Director on August 23, 1982, almost 20 months after filing.

In the interim, notwithstanding pendency of the petition, contract renewal negotiations opened on January 14, 1981.[4] Thereafter, on January 28, the expiration date of the agreement, negotiations were adjourned indefinitely, with the parties unable to achieve an accomodation.

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[1] Following close of the hearing, counsel for the General Counsel and Respondent both moved to correct the official transcript in certain particulars. Certain errors in the transcript are noted and corrected.

[2] See G.C. Exh. 2.

[3] See G.C. Exh. 1(a).

[4] Unless otherwise indicated all dates refer to 1981.

It is noted that the complaint does not in any respect challenge the propriety of Respondent's conduct in connection with or in the course of these negotiations.

Thereafter, a further bargaining session was scheduled through the Federal Mediation and Conciliation Service for February 23. However, an illness of the Company's chief spokesman led to postponement until February 28. In the interim, however, between February 19 and 23, 21 of the 35 employees in the appropriate unit at that time submitted statements to Respondent to the effect that they no longer wished to be represented by Local 1204.[5]

Based on the foregoing, by letter dated February 23, 1981, Respondent informed the Union, as follows:

> On Friday, a substantial majority of our employees informed us, in writing, that they no longer want the UE or Local 1204 of the UE to represent them. Because of this, we now have a good faith doubt that your union represents a majority of the employees in the unit certified by the NLRB.
>
> Accordingly, we cannot continue to recognize Local 1204 as the collective bargaining representative of these employees and will no longer deal with your union as their representative in matters pertaining to wages, hours and working conditions.[6]

As indicated, the issue of primary concern in this proceeding is whether, in the face of clear and undisputed repudiation by an employee majority, the bargaining relationship should be reestablished by a remedial order. Three distinct theories are advanced in quest of such relief. The first is found on a claim that repudiation of the Union was tainted by the Employer's unlawful conduct. Thus, it is contended that Respondent unlawfully inspired the erosion of the Union's majority by various unfair labor practices outlined above and hence, Respondent should be deemed obligated to continue to recognize and bargain with the Union until redress of the illegalities. See, e.g., *Chet Monez Ford*, 241 NLRB 349 (1972), enfd. sub nom. *NLRB v. Chet Monez Ford*, 624 F.2d 193 (9th Cir. 1980). In the alternative, it is argued on behalf of the complaint that even if no unfair labor practices were committed during the period prior to the employee defections, a bargaining order would nonetheless be justified on the basis of changes in working conditions unilaterally effected by the Employer after the withdrawal of recognition, but before the Board had an opportunity to resolve the question concerning representation raised by a then pending decertification petition. See *Turbodyne Corp.*, 226 NLRB 522 (1976). To support this alternative view, the complaint includes allegations that further unfair labor practices were committed by the Respondent between March and May 1981, particularized as follows:

1. On March 10, 1981, Respondent violated Section 8(a)(1), (3), and (5) of the Act by increasing the wages and benefits of its employees.

2. Respondent violated Section 8(a)(5) and (1) of the Act by on March 20, 1981, refusing to negotiate with the Union concerning health and safety matters.

3. On May 1, 1981, Respondent violated Section 8(a)(5) and (1) by unilaterally, and without notifying the Union, restoring the canteen rights of employees.

As its final alternative position, the General Counsel proposes that as per *Michigan Products*, 236 NLRB 1143 (1978), since the postwithdrawal unfair labor practices precluded the possibility of a fair election on the decertification petition remedial bargaining order is warranted under the auspices of *NLRB v. Gissel Mfg. Co.*, 393 U.S. 575 (1969).

Basically, by way of defense, Respondent urges that the consolidated complaint be dismissed in its entirety in that it engaged in no unlawful conduct either before or after it withdrew recognition from the Union on the basis of indisputable evidence that a majority of the employees had rejected union representation.

B. *Concluding Findings*

1. The prewithdrawal unfair labor practices

a. *The wage increase and alleged reclassification*

This allegation rests on a wage increase granted to a single employee, Kay Perry, during the term of the collective-bargaining agreement. At times material Perry was a documents clerk, a labor grade 5-C position. Prior to the events in issue here, she earned $4.44, the top rate for her classification under the contractual wage schedule. Documentary and parole evidence discloses that on June 17, 1980, while the collective-bargaining agreement was in effect, Perry's hourly rate was increased to $4.64. Respondent explained this action as triggered by termination of Perry's former supervisor on May 9, 1980, which promoted a review of her job classification. According to Don Baird, Respondent's production manager, he evaluated Perry's performance and based thereon determined that in view of her duties, at least since his arrival at the plant, particularly the responsibility she exercised independently, a 20-cent-hour increase was justified.

As indicated, the increase was not granted until June 17, 1981. The testimony is in conflict as to what transpired in the interim. According to Baird, about May 12, he contacted Ronnie Jefferson, the chief union steward, to inquire whether the Union had any objection to the increase. Jefferson indicated that he was unsure that it would be a problem, but wanted to talk to the union committee. Thereafter, Baird and Jefferson had several conversations in which, according to Baird, it was indicated that the Union had no problems with the increase in Perry's rate, but wanted other positions upgraded as well, particularly that held by Sharon Grice. Baird claims to have examined Grice's job classification, and to have informed Jefferson that she was appropriately placed in the 5-A labor grade. Baird also claims that conversations concerning the increase took place on at least a half dozen occasions and continued over a period of "some weeks." Finally, according to Baird, on June 16, he informed Allen that he was going to give Perry the increase.

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[5] See R. Exhs. 4(a) thru (u) and R. Exh. 12. The General Counsel does not contend that the Company in any way fostered or solicited the withdrawals, nor is it argued that these documents either lacked authenticity or constituted insubstantial proof of loss of majority.

[6] See G.C. Exh. 9.

b. *Alleged 8(a)(5) and (1) Violation*

Jefferson testified to the effect that his conversations with Baird concerning Perry's wage increase were confined to a single day. He related that Baird first informed him of the Company's intention in this respect on June 11, 1980, in the front office, requesting that Jefferson inform the "committee." Then, after Jefferson assertedly consulted with Union President Allen Roberson and Vice President William Roach, he avers that he again discussed the matter with Baird after lunch, indicating that the matter would have to be negotiated. Later that same day, according to Jefferson, Baird approached him in the weld shop, stating "he already gave Kay Perry a raise on May 12th" and he did not have to negotiate "under management rights."[7]

Baird also testified that he did not decide to effect the increase until after he discussed the matter with Allen Roberson, the Local's president. Baird claims that he went to Roberson's work station where he told him that he had reached an impasse with Jefferson and wanted to put the increase into effect if the Union had no objection. According to Baird, Roberson also expressed that he had no objection to the Perry raise, but wanted to upgrade Sharon Grice. This was denied by Roberson, who claimed that he received no notification from the Company concerning Perry's wage increase, but instead first learned of the matter when Jefferson reported that Baird told him that the raise had been already placed in effect.[8] Although I credit Baird's testimony in its essential particulars, I believe as a matter of hindsight he merely interpreted the Union's position as tantamount to assent to the Perry increase. I do not, however, accept that this was the case.[9] The absence of such assent is determinative. For, on analysis it is concluded that the rate ranges set forth in the governing collective-bargaining agreement could not be altered unilaterally under any circumstances. Thus, whether an impasse was reached on the Company's professed desire in this respect is immaterial, for as stated in *Fourco Glass Co.*, 250 NLRB 953 (1980), enfd. denied 646 F.2d 863 (4th Cir. 1981):

> Section 8(d) of the Act clearly provides that neither party to a collective-bargaining agreement is required "to discuss or agree to any modification of the terms and conditions contained in a contract for a fixed period, if such modification is to become effective before such terms and conditions can be reopened under the provisions of the contract." The fact that the Union was willing to listen to the proposal, and did not disagree that the proposal was not "fair and equitable," did not constitute a waiver of its rights under Section 8(d) of the Act.

Nor was the conduct excusable as affecting a subject matter that the Union had already bargained away. For neither the management rights clause set forth in article VI nor the reference to flexibility conferred in connection with rates of new hires in article XXXI, section C, constituted a clear and unequivocal waiver on the part of the Union with respect to any form of revision of the agreed-upon rate schedule be it upward or downward.[10] Thus, Respondent's action, in granting the increase, without first obtaining agreement of the Union, violated Section 8(a)(5) and (1) of the Act.[11]

There are a number of circumstances, however, that mitigate the scope and extent of this violation. First, only one employee was involved. Further, there is no evidence that the matter was subject to direct dealing between any official of Respondent and Perry, the employee affected.[12] Moreover, unlike cases involving a disparaging bypass, Respondent consulted the Union repeatedly seeking its assent, which in all probability, was withheld due to the Union's opportunistic effort to exert leverage for upward revision in the wage scale covering other jobs, which in the Union's view were underpaid. Finally, Respondent's defense that the contract did not prohibit merit increases over and above rates specified in the contract was at least colorable. Hence, the conclusion as to the unfair labor practice rests slimly upon the more appropriate interpretation that the Employer was so restrained, and that, having acted without union assent, the increase technically violated Section 8(a)(5) and (1) of the Act.

2. The alleged promise of benefits

The General Counsel looks to testimony of employees Billy Roberson and Ricky Woolard to substantiate the assertion that Supervisor Robert Hines unlawfully stated in June 1980 that it was possible that wages would have been higher had the Union not been in the plant. Thus, Woolard testified that in that time frame he and Hines were engaged in conversation in his work area when Woolard stated that he had heard that if the Union had not gotten in he would not have a job. Hines responded that Woolard was probably right. According to Woolard, as the conversation continued, he inquired of Hines whether employees would have gotten a larger raise if there were no union. To this, Hines allegedly responded "possibly . . . you would have probably got double." Woolard asserts that he then asked, "What, we would have got a bigger raise?" To this, Hines allegedly responded, "yeah," but then recanted, stating: "No, I didn't mean it that way." According to Woolard, Hines also stated that "the atmosphere would probably be better without a union . . . we'd probably have canteen rights."[13]

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[7] Jefferson in effect denied that the Union's sole objection to Kay Perry's pay increase was based on its claim that Sharon Grice should also receive an increase.

[8] In this respect Roberson's testimony seems to conflict with that of Jefferson who indicated that he consulted Roberson and Roach before he was informed by Baird that the increase had already been placed in effect. Roach was not examined about his involvement in the matter.

[9] Note that on June 17, 1980, the Union filed a grievance alleging that the "Company is knowly [sic] changed the contract in Schedule A. . . ." See R. Exh. 8. The Company's response omitted any claim that the Union had assented to this change, a response that would have been the most obvious, particularly since the answer was prepared at the third step by Baird himself.

[10] See, e.g., *Hilton Hotels Corp.*, 191 NLRB 283, 288 (1971); *Press Co.*, 121 NLRB 976, 977–978 (1958); *NLRB v. Perkins Machine Co.*, 326 F.2d 488, 489 (1st Cir. 1964).

[11] *Oak Cliff-Golman Baking Co.*, 207 NLRB 1063 (1973).

[12] Perry was reputed to be an antiunion employee, and she did in fact file the decertification petition in November 1980. However, evidence received failed to disclose just when she developed such a posture or whether Respondent was mindful of it at the time of the instant wage increase. In this latter connection, although the General Counsel attempted to examine Baird as to his knowledge in this respect, when objection was interposed and I sought to be educated as to relevance, the General Counsel elected to withdraw, rather than clarify the pertinence of his examination.

Billy Roberson was able to corroborate Woolard only to a limited extent. On direct examination, he afforded the following:

> I hear Robert Hines tell Ricky Woolard that if we didn't have a union, we would get more money. And then Ricky Woolard reply and said what he said, "If the union wasn't in, we would have got more money?" And Robert Hines reply, he said, "No, I didn't mean it like that." Then I had to go to the tool crib to get a tool and that's all I heard of that discussion.[14]

Hines denied making any statement to the effect that wage rates or benefits were influenced by the presence of the Union. I credit him. He impressed me as a straightforward witness, whom I regarded as credible. I also consider it unlikely that he would have ventured to express the views imputed to him by Union Steward Woolard. Beyond Roberson, and although three other employees were present, there was no further corroboration of Woolard, who was a particularly unpersuasive witness and who seemingly allowed a bias to influence his accounting of the facts in several additional areas. His testimony concerning this incident, to the extent that it transcended wages and related to other benefits, was uncorroborating and lacked a plausible ring. Also questionable was testimony of corroborating witness Roberson, who claimed to be 8 feet away, and who admittedly heard only a segment of the conversation. It was not my impression that Roberson was possessed of capacity for recall sufficient to allow attestation as to the substance of the exchange on the occasion in question. I sum, based on Hines' credited denial, the 8(a)(1) allegation in this respect shall be dismissed.

C. *Threats of Discharge*

The complaint imputes coercive threats to Supervisor Matthew Reddick on June 18, 1980, and to Plant Manager Baird, on June 20, 1980. As for Reddick, the allegation rests on the uncorroborated testimony of Ricky Woolard. By way of background, it is noted that on Saturday, June 14, a barbecue was held by employees to raise funds for the Union. Certain employees were scheduled to work overtime that day, including Carlton Gurley, who elected to attend the barbecue, rather than work. On the next working day, Monday, June 16, 1980, Supervisor Reddick met with Gurley in the presence of Woolard, who was present as Gurley's steward. Later that day, Gurley was called to the office of Plant Manager Baird and discharged.[15] According to Woolard, about 2:30 p.m., Reddick walked by and simply commented either "you're next" or "who's next." It is not clear that the alleged remarks were made before or after the Gurley discharge. In any event, Reddick denied making any such comment, and here again, I regarded the testimony of Woolard as unreliable. It was my impression that Woolard was incapable of recalling details with any degree of clarity and, indeed, the certainty he expressed when cross-examined about what he possibly could have heard at the time was highly suspect and convinced that his overall testimony was more a product of perspective reshaped by strong union alliances, than an accurate accounting of events as they had occurred. The allegation that Respondent violated Section 8(a)(1) through any threatening remark on the part of Reddick is dismissed.

As for Baird, it is noted that Respondent, in June 1980, filed an unfair labor practice charge alleging that Local 1204 had engaged in unlawful coercion of employees. In connection therewith, an agent of the National Labor Relations Board interviewed William Roach, a union vice president and shop steward, informing him that he had been charged with "threatening employees." According to Roach, the next day he had a conversation with coworker Tommy Hardison in which the latter inquired as to what the labor investigator wanted, whereupon Roach stated to Hardinson "he wanted to see me over some lies . . . told on me."[16]

According to Baird, Chandler, after he had been questioned by the Board agent, reported to Baird that Roach told Chandler, Hardinson, and Shelton Lilley that they "were playing games with their lives."[17] He claimed that he discussed the matter with Hardinson and Lilley who confirmed Chandler's report.[18] Baird relates that he then called Roach to his office and told him that he would not tolerate threats by one employee to another and that if Roach did that again he would be terminated.

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[13] At the time, the Company was interpreting the collective-bargaining agreement as confining employee access to the canteen to scheduled breaks.

[14] In his prehearing affidavit given to the General Counsel, Roberson described what he heard as follows:

> I hear Robert Hines say that if the Union wasn't in the plant, we would have probably got more money. Woolard said to him in a loud voice, what he said that if the union is voted out, we would get more money? Hines said, "I didn't mean that like that." Then I left my station to get something and I did not hear any more of this conversation.

[15] Woolard did not participate in the discharge interview as Gurley then was represented by Chief Steward Ronnie Jefferson.

[16] Hardinson testified that he had a conversation with Roach, in the presence of coworker Jermi Chandler. He claims that at the time they were "just screwing around," but that they discussed that " somebody filed a charge and Roach had threatened their life for doing that." In this context Hardison asserted that Roach said something about "some people like to play games with their life." Hardison went on to testify that Chandler informed him that he would file charges to the effect that Roach had threatened his life. Later, Hardison was called as a rebuttal witness for the General Counsel, it is difficult to comprehend the statement of the latter's posthearing brief to the effect that "no evidence was proffered of any alleged threats made by Roach."

[17] The testimony of Hardinson confirms that Roach used language to the effect that any employee who accused him of misconduct in the course of an investigation by the National Labor Relations Board would be "playing with their lives."

[18] Although Hardinson denied that he discussed the matter with Baird, this aspect of his testimony was probably incorrect.

Baird also indicated that he would again file charges with the National Labor Relations Board.[19]

The General Counsel maintains that "there is not one item of evidence to support Respondent's contention that Roach threatened any employee." In the light of Hardinson's testimony, an observation possessed of greater accuracy and pertinence would be to the effect that there is not one iota of evidence to support the General Counsel's contention that Baird's warning in any sense related to any protected activity on the part of Roach. Contrary to the position advanced in support of this allegation, the General Counsel's own evidence discloses that Roach's alleged misconduct was the focus of a Board investigation and that Roach plainly implied that those giving evidence in that connection "were playing with their lives." The General Counsel's evidence further discloses that another employee, Chandler, was sufficiently disturbed by this remark to call it to the attention of management.[20] When this information reached Baird, he called Roach in and warned him that such misconduct in the future would result in discharge.[21]

Accordingly, I find that the statements made by Baird to Roach on the occasion in question constituted a legitimate exercise of management's right to correct employee improprieties and to maintain plant discipline. Finally, under no circumstances could it be fairly concluded that the action was in any way prompted by Roach's having participated in activity protected by the Act. Hence, the 8(a)(1) allegation in this respect shall be dismissed.

1. Refusal to permit stewards to file grievances

The complaint alleges that Respondent violated Section 8(a)(5) and (1) of the Act because it, "on or about June 9, 1980 and June 16, 1980, unilaterally refused to allow stewards to file grievances." At the core of this allegation is Respondent's position taken in defense of certain grievances that, in its opinion, were not processed in accordance with the procedure defined in article II of the then subsisting collective-bargaining agreement and the condition set forth in section 4 thereof that "Failure on the Union's part to follow the steps of the grievance procedure shall be considered just cause for the grievance to be dropped."

Under the contract, step one requires that "the grievance be taken up by the effected employee with his immediate supervisor . . . the employee may have a shop steward from his area present if the employee so desires." In reliance on this language, Respondent denied two grievances at the third step. The first related to the discharge of Gurley and the second involved a warning issued to Al Roberson. Both grievances were denied by Respondent on grounds that a step one grievance had not been filed with respect to either.

The central focus of this allegation is on Machine Shop Supervisor Matthew Reddick. It is claimed that Reddick precluded the step one filing of the above grievances of Gurley and Roberson. It will be recalled that Gurley and Roberson declined to work mandatory overtime on Saturday, June 14, 1980. Gurley's failure to work the overtime generated several meetings the following Monday, June 16. At the second meeting, Gurley, Shop Steward Rickey Woolard, Matthew Reddick, and Lee Penrod, Respondent's operation manager, were present. Woolard and Gurley agree that during this session Woolard indicated that he wanted to file a grievance. At this juncture, according to Gurley, Penrod inquired of Woolard, "Why do you want to file a grievance since nothing's happened . . . there's no charge been charged against this man."[22] Both Woolard and Gurley agreed that at the time of this conference Gurley had received no warning, nor had Gurley been otherwise subject to discipline. It was also conceded that no one attempted to file a first step grievance at any time after Gurley's discharge, and there is no evidence whatever that a second grievance was ever processed in this respect.

Reddick, while denying that he ever precluded the filing of a grievance, acknowledge that, in the conference with Woolard and Gurley, Woolard indicated that he wished to file a grievance.[23] In response to this request, Reddick asked Woolard, "What was the grievance . . . all I was asking for was why he was not at work on Saturday."[24]

Contrary to the General Counsel and the Charging Party, the position of Reddick in connection with Gurley in no way impeded access to contractual remedies with respect to any matter within the jurisdiction of the contractually defined grievance machinery. Under the expressed terms of the subsisting collective-bargaining agreement, a grievance is defined as "a difference of opinion between the company and the union or any employee in the company as to the interpretation, application or compliance with the provisions of this agreement." At the time of Woolard's request, discipline had not even been threatened in the case of Gurley, no detrimental action had been taken, and, hence, there certainly was no foundation for grieving a discharge or other discipline. Also, there was no perceptible dispute subject to adjustment as between the parties. In such circumstances, the position taken by Reddick impressed me as perfectly rational and hardly inimical to the scope and intent of the dispute settlement machinery negotiated by the parties. Indeed, that this action in no way prejudiced the Union's access to the grievance procedure was evident from the testimony of Chief Steward Ronnie Jefferson, who accompanied Gurley to the front office when the latter was terminated. Jefferson acknowledged that in the course of that meeting he attempted to file a grievance with respect to the discharge, but Baird informed him that the Union was required to comply with the grievance procedure by initiating a grievance at step one. Nonetheless, for reasons unclear on the record, the Union elected to pursue the matter directly to the third step where the grievance was denied on grounds that it was not processed through the first two steps of the grievance procedure as required. See G.C. Exh. 15.[25]

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[19] Although the General Counsel in his brief states that Baird did not accuse Roach of threatening anybody, Roach's own testimony discloses that Baird accused him of "running around threatening people."

[20] The General Counsel urges that an adverse inference be drawn against Respondent by virtue of its failure to call Chandler or Lilley. Any inference supportive of the complaint that could be drawn in this respect was neutralized by the account of Hardinson, which confirms the basis for Baird's action, by pointing out the threatening remark as well as the fact that fellow employee Chandler was sufficiently disturbed to report the matter and declare his intention to file charges. Furthermore, Hardinson's own subjective reaction to Roach's statement is beside the point in evaluating the coercive nature thereof.

[21] The General Counsel's reliance on *NLRB v. Burnup & Sims*, 379 U.S. 21 (1964), is misplaced. The holding and rationale in that case pertains soley to discipline imposed, albeit in good faith, under mistaken belief that an employee engaged in misconduct in the course of acknowledged protected activity. Unless an employee's displeasure with the fact that a coworker elects to cooperate with a Board investigator is to be deemed protected, it taxes imagination as to just how this allegation relates to conduct protected by Sec. 7 of the Act.

[22] Lee Penrod, Respondent's operation manager, was responsible for handling grievances at the second step. He testified without contradiction that he had never been requested to process a step two grievance with respect to the Gurley discharge.

[23] Woolard admitted that Carlton Gurley did not request a grievance in the confrontation with Reddick, but that it was Woolard himself who indicated that he had a grievance. However, the step one, in terms, seemingly requires that the employee himself file. As stated, "the grievance shall be taken by the affected employee with his immediate supervisor, and the employee may have the shop steward from his area present if the employee so desires."

[24] Woolard testified that his indication that he wanted to file a grievance was met by Reddick's response that "he [Reddick] would decide when it was the first step of grievance." Woolard's testimony was uncorroborated, seemed unlikely, and is rejected. Note that this was identical to an assertion contained in a grievance filed by Woolard, a week earlier on June 9, 1980. See R. Exh. 9.

In further support of the complaint, it is also alleged that Reddick precluded the filing of a grievance protesting a warning issued to Al Roberson, the president of Local 1204. It appears that Roberson, like Gurley, did not work scheduled overtime on Saturday, June 14.[26] Reddick gave the warning to Roberson at his machine the following Monday, June 16, under conditions described by Roberson as follows:[27]

> [Reddick] came up to me on Monday morning, during the day of Monday and asked me or told me that I had a written warning for not working four or five hours, and he asked me if I was going to sign it and I told him "no" and he said, "Well, do you want the steward present?" I said, "Yes." And so he went to the assembler and got my steward, which was Rickey Woolard; and Rickey Woolard came over, and when he got there, he said, "Are you going to sign this?" I said, "No." He said, "That's all I want to hear." I said, "Well, this is a grievance." I said, "Are you going to talk to him?" And Rickey said, "Right, this is a grievance and I want to talk to him." Reddick pointed his fingers at my steward and said, "You go back to your work area" and Rickey went back to his work area and I went back to work.

Woolard's version was not entirely consistent with that of Roberson. He related as follows:

> Q. What was said and by whom?
>
> A. Well, Matthew Reddick was telling Allen he was giving him a warning, a written warning for not coming to work that Saturday. And Allen told him, "consider this a first step of grievance."
>
> Q. What, if anything, was said after that?
>
> A. And Matthew said that there was no need for a first step of grievance. He say, "Take it to the second step."

The testimony of Roberson and Woolard takes on significance when considered in light of the fact that this grievance was rejected by Respondent at the third step on grounds that, like the Gurley discharge, it was "not processed through step 1 of the grievance procedure as required by Article 2, Section 4."[28]

Reddick denied that he had ever precluded the filing of a first step grievance and denied indicating to anyone that it was he who "made that decision whether an employee had a grievance."[29] Reddick specifically testified that there was never a first step grievance requested or filed in connection with the warning issued Roberson on June 16.

As indicated above, neither Roberson nor Woolard were impressive witnesses. On the other hand, Reddick struck me as believable, and under the total circumstances, his denial to the effect that he ever precluded anyone from filing a first step grievance seemed the more probable. Based on the above, it is concluded that neither Roberson nor Woolard requested a grievance in connection with the warning issued on June 16. There being no other evidence that any representative of the Respondent refused to accept or process a properly tendered grievance, the General Counsel has failed to establish by a preponderance of the evidence that the Respondent violated Section 8(a)(5) by unilaterally refusing to allow stewards to file grievances.

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[25] The discharge was ultimately carried to arbitration. The arbitrator upheld the Company's position that pursuant to art. IV of the contract the Gurley grievance was not arbitrable as it was not processed in accordance with the requirements of art. II of the collective-bargaining agreement. In that view, I need not reach the question of whether deferral to the award is warranted under *Spielberg Mfg. Co.*, 112 NLRB 1080 (1955). Disturbing, however, is the claim made by the General Counsel that that doctrine is inapposite because "the arbitrator expressly found it unnecessary to decide whether Woolard had attempted to file a first step grievance and made no findings as to whether Jefferson attempted to file a first step, or a second step grievance with Penrod." See General Counsel's posthearing Br. at 18. This reference is misleading and totally inaccurate. The arbitrator made the very findings attested to through evidence parallel to that presented by the General Counsel's witnesses in this proceeding concerning the ineffectual nature of the first step grievance attempted to be filed by Woolard. Furthermore, the award specifically concludes with respect to Jefferson that "no step 1 or step 2 grievance was ever filed." See R. Exh. 1, p. 9. Indeed, contrary to the factual assertion by the General Counsel that "the arbitrator did not find whether Respondent had prohibited Woolard and Jefferson from filing these grievances," it is apparent on the face of the award that the arbitrator concluded that this was not the case.

[26] See G.C. Exh. 17.

[27] Both Roberson and Reddick manifested some confusion stemming from the fact that on successive Saturdays Roberson refused to work scheduled overtime. He received warnings for each incident. Roberson claims to have attempted to file a grievance with respect to both warnings and that Reddick only refused to accept as to one. Both Reddick and Roberson had considerable difficulty isolating their recollection to the particular warning in controversy.

[28] See R. Exh. 3. During the preceding week, Roberson was given a warning for failing to work all of his scheduled overtime on Saturday, June 9. Woolard and Roberson concede that Reddick was informed that a first step grievance was being submitted with respect to that, and that Reddick accepted the grievance and discussed it. See R. Exh. 2.

[29] Reddick at one point testified that at the end of the conversation in which he delivered the written warning concerning Roberson's offense of June 14, Roberson indicated that the matter was to be "considered as a first step grievance." This apparent admission, however, was obviously the product of the same confusion concerning the two warnings labored under by Roberson and Woolard. Reddick in this instance is taken to have been commenting on the aftermath of Roberson's June 9 refusal to work overtime.

2. The withdrawal of recognition

It will be recalled that on November 26, 1980, a decertification petition was filed in Case 11-RD-323 during the open period prior to expiration of the subsisting collective-bargaining agreement. Despite the pendency, in January 1981, the Union and Respondent participated in contract renewal negotiations on eight separate occasions. Later, between February 19 and 21, a majority of the employees formally declared that they no longer wished union representation. Respondent was presented with this evidence and on the strength that it informed the Union by letter dated February 23, 1981, that recognition would be withdrawn.

In examining the contention that Respondent's termination of the bargaining relationship violated Section 8(a)(5) and (1) of the Act, it is emphasized that there is no claim or evidence in this proceeding that the defection by a majority of employees was tainted directly by employer solicitation or participation in the deauthorization process, or that the evidence of employee defection lacked authenticity.[30] Beyond that, in such a context, the controlling legal principles have been articulated succinctly in *Terrell Machine Co.*, 173 NLRB 1480, 1480-1481 (1969):

> It is well settled that a certified union, upon expiration of the first year following its certification, enjoys a rebuttable presumption that its majority representative status continues. This presumption is designed to promote stability in collective-bargaining relationships, without impairing the free choice of employees. Accordingly, once the presumption is shown to be operative, *prima facie* case is established that an employer is obligated to bargain and that its refusal to do so would be unlawful. The *prima facie* case may be rebutted if the employer affirmatively establishes either (1) that at the time of the refusal the union in fact no longer enjoyed majority representative status; or (2) that the employer's refusal was predicated on a good-faith and reasonably grounded doubt of the union's continued majority status. As to the second of these, i.e., "good faith doubt," two prerequisities for sustaining the defense are that the asserted doubt must be based on objective considerations and it must not have been advanced for the purpose of gaining time which to undermine the union.

This second point means, in effect, the assertion of doubt must be raised "in a context free of unfair labor practices." With the foregoing in mind, it is noted that on the above findings made, the withdrawal of recognition followed a single solitary unfair labor practice founded on a wage increase granted by the Respondent, without union assent. The violation in question related to a 20-cent adjustment conferred on a single employee, which occurred 8 months before the loss of majority, and while limited to an isolated change in the contract, did in fact follow notification and consultation with the Union over an extended period. Respondent's offense in that regard was more technical than egregious in its unlawful elements. Thus, through my interpretation of the collective-bargaining agreement, the consultation that took place did not fulfill Respondent's statutory obligation in that a change in substantive contract limitations was involved and nothing short of union assent to the merit increase would satisfy the rigid requirements of Section 8(d) in such a context.

On balance, the question presented is whether a violation of such limited magnitude should override the unambiguous choice registered by employees in February 1981. In this connection, it is noted that, under the precedent, not every unfair labor practice, which precedes renunciation of a union, will result in statutory resurrection of a bargaining relationship. Thus, where there is no rational basis for assuming that a causal relationship exists between an illegal act and a union's demise, Board remedies will not be invoked to perpetuate an unwanted bargaining relationship.[31] The analysis is a sensitive one, for under established policy the circumstances under which employees might reject an established representative are narrowly circumscribed, and a faultry determination might well imperil the exercise of employee choice for some time to come. For under Board policy, repudiation by employees of a union is deemed lacking in legal effect for a reasonable period of time following the issuance of a bargaining order. Indeed, the restraining impact that might be experienced by an unwilling majority through combined interaction of such an order and contract bar policy was previously reviewed by me in *Deblin Mfg. Corp.*, 208 NLRB 392, 401 (1974), in which it was stated as follows:

> To . . . hold that Respondent was not free to assert a good faith doubt, would require an affirmative bargaining order, calculated to assure additional bargaining and ultimate agreement on a new contract which could bar an election for its duration. Recognizing the effect of such relief, and its impact

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[30] The General Counsel seeks to negate the plain import of the majority's action by certain evidence that on several occasions prior to February 19, 1981, employees in substantial numbers openly endorsed positions pressed by the Union. With a single possible exception, these expressions were ambiguous as more indicative of a shared concern in grievances promoted by the Union than an expression of continued desire for representation or preference for collective bargaining. Indeed, whether intended or not, the paraphernalia used to symbolize support of these causes downplayed the Union's own involvement and might well have been deliberately designed to reach the broadcast base possible by reflecting neutrality on the question of union representation. See G.C. Exhs. 12(a), 13(b), and 14. In any event, the earlier manifestations in no way impaired the unambiguous determination made by a majority of the employees beginning on February 19, 1981.

[31] See *Colonial Manor Nursing Center*, 188 NLRB 861 (1971); *GAF Corp.*, 195 NLRB 169 (1972); *Freeman Co.*, 194 NLRB 595, 598 (1971).

> upon employee choice, the Board has sought to avoid the issuance of such an order, if based strictly on technical grounds, and where such relief would result in continued imposition of a bargaining representative on an unwilling majority, whose defection in no sense related to the prior unfair labor practice. Therefore, the Board, over the years, has declined to regard the rule precluding employers from asserting a good-faith doubt in a context of unfair labor practices as "an absolute prohibition." This is so even where the prior unfair labor practice is unremedied at the time that recognition is withdrawn.

For reasons indicated above, I am convinced that the wage increase granted to Kay Perry in June 1980 neither caused nor influenced the repudiation fo the Union some 8 months later by 60 percent of the employees in the appropriate collective-bargaining unit.[32] Accordingly, it is concluded that Respondent's withdrawal of recognition cannot be faulted on the basis of any conduct on its part, which occurred prior to February 19, 1981.

In the alternative the General Counsel contends that even if loss of majority was not coerced, inasmuch as a decertification petition was pending, Respondent was not privileged to withdraw recognition prior to resolution of the question concerning representation. This theory is founded on the notion that in such circumstances the employer is under a strict duty of neutrality that would be violated on either a withdrawal of recognition or changes in working conditions, a view that defies longstanding Board policy to the effect that employers are free to withdraw recognition when confronted with clear evidence that the statutory representative has lost its majority. *Celanese Corp.*, 95 NLRB 664, 672–673 (1951). Nonetheless, unfortunate language gleaned by the General Counsel from *Turbodyne Corp.*, 226 NLRB 522, 525 (1976), appears to support just such an interpretation. That case involved an employer's obligation to "remain neutral" when an incumbent representative is rivaled by a competing labor organization. See *Shea Chemical Corp.*, 121 NLRB 1027 (1958); see also *Midwest Piping Co.*, 63 NLRB 1060 (1945). In *Turbodyne*, the incumbent representative was challenged by two rival unions, each of which had filed separate election petitions. Prior to expiration of the subsisting collective-bargaining agreement, an election was conducted. The incumbent representative obtained only 26 of the 204 votes cast in the election, but filed objections thereto, which became the subject of a stipulation by all parties calling for a rerun election. Before the rerun election could be held, the collective-bargaining agreement in question expired. Immediately thereafter, the employer withdrew recognition and effected certain unilateral changes in working conditions. The Board affirmed the administrative law judge's findings that the employer thereby violated Section 8(a)(5) and (1) of the Act. However, unlike the instant case, the employer's assertion of a doubt of majority was based on questionable evidence; namely, the incumbent's poor showing in the abortive first election. In connection therewith, the administrative law judge in *Turbodyne* stated: "I would have extreme difficulty in concluding that [the employer] had met its burden of overcoming the presumption of majority status possessed by the contracting union." 226 NLRB at 525. Although the result in *Turbodyne* would be reconcilable with *Celanese*, supra, on that ground the administrative law judge went further. Thus, the General Counsel points to the conclusion by the administrative law judge in *Turbodyne*, held that:

> . . . the question of good-faith doubt of majority status of the incumbent union by the respondent . . . is essentially beside the point [inasmuch as] [t]he legal obligation of an employer, irrespective of doubt of majority status, is to await resolution of the QCR by the National Labor Relations Board or other appropriate agency, before instituting any changes in the working conditions of the employees.[33]

This reference amounted to an outright nullification of the legal efficacy of good-faith doubt. Indeed deferral to the election procedures of the Board is envisioned as actually cementing an unwanted relationship, beyond what would have been the case had those challenging the incumbent representative simply resorted to self-help. Yet, it is a view that was not supported by a citation of authority, accompanied by rationale, nor supportable under any line of reasoning familiar to me. Most significant, however, it paved the way for a remedy that heightened the opportunity of a minority union to perpetuate its exclusive statutory status. Thus, although the presumption of continuing majority was previously viewed as irrebuttable during the certification year, and during the term of a subsisting collective-bargaining agreement, *Turbodyne*, without explication or reference to the *Celanese* doctrine, would also insulate the incumbent's representative base from challenge during periods when a question concerning representation was pending. The anomaly in this view is highlighted by the General Counsel's concession that the employer would have been free to withdraw recognition had there been no decertification petition. Just how this factor ought freeze an incumbent's status as against clear evidence of a loss of majority defies explanation. Indeed, to uphold the General Counsel's view is to penalize the unwilling majority because some within their ranks have exercised the only option available to them independently under this Act to eliminate an unwanted representative, a result that would tend to discourage employees from invoking the election procedures of the National Labor Relations Board.[34] This view stands starkly in contrast with the caution that should be exercised before any new policies are adopted that further impede employees from taking steps to eliminate an unwanted representative. Their rights in this respect have already been curtailed significantly by desirable Board policies designed to foster stability in existing bargaining relationships, including certification year, contract bar, and policies precluding an election in the face of unremedied unfair labor practices.[35] The opportunity for employee choice, having been so narrowed, ought be honored with immediacy and reason where these restraints do not obtain. Here, the decertification petition was dismissed by the Regional Director soley on the ground that "[as] there is an outstanding complaint . . . which allege[s] that the employer has violated Section 8(a)(5) . . . there can be no QCR." It surely would be a paradox of circuitry, if, as the General Counsel urges, an unlawful refusal to bargain were to be founded soley on a QCR, that was ultimately negated by that very unfair labor practice.

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[32] The General Counsel correctly observes that in *NLRB v. Nu-Southern Dyeing & Finishing*, 444 F.2d 11, 15–16 (4th Cir. 1971), it was similar context that "an employer may avoid a bargaining order by showing that the unfair labor practices did not significantly contribute to such a loss of majority or to the factors upon which a doubt of such majority is based." Although such a burden is properly reposed in the Employer, I cannot agree with the General Counsel that the duty may only be met by subjective evidence. On the contrary, consistent with the traditional approach to factfinding, the absence of nexus might be inferred on the inherent tendency of the proven facts in the light of all the surrounding circumstances. Indeed, practical limitations on the parties in litigation make it imperative that, in a case such as this, if a respondent has denied any and all unlawful conduct prior to the withdrawal of recognition, that the latter not be put to the impossible task of presenting subjective evidence that the specifically denied illegalities did not influence employee defections.

[33] This language reappeared as obiter dictum in *Mervyn's*, 240 NLRB 54 (1979), in a single union situation, and in the context of disputed election on a decertification petition, the administrative law judge stated 240 NLRB at 60:

> The legal obligation of an employer, in these circumstances, is to await resolution by the Board of the question concerning representation before instituting any changes in the working conditions of unit employees. Any doubt as to the Union's majority status is irrelevant, and the presumption of majority flowing from the recently expired contract continues until such resolution. *Turbodyne Corporation, Gas Turbine Division*, 226 NLRB 522 (1976).

Fortunately, however, *Turbodyne* appears to have been corrected by two recent decisions reaffirming Board policy that an employer is free to withdraw recognition if he has actual proof or a reasonable doubt that a labor organization continues to represent a majority. Those cases confirm that it is the question concerning representation, rather than the loss of majority, that is "beside the point."

Thus, *RCA Del Caribe*, 262 NLRB 963 (1982), as was true of *Turbodyne*, supra, involved an application of *Shea Chemical*, supra, and the employer's strict duty of neutrality in circumstances where a rival labor organization files a representation petition seeking to replace an incumbent representative. There, in a major reversal of policy, a Board majority held that in such circumstances an employer may not rely on the pendency of an election petition as a defense to a withdrawal of recognition but reains an obligation to bargain, even to the point of negotiating a new contract, pending resolution of the question concerning representation. The majority, in diminishing the impact of a QCR on the existing bargaining relationship was careful to point out that the incumbent's representative status will *not* be preserved in the eyes of the law where, as here, clear evidence exists as to its loss of majority. In this respect, 262 NLRB 963, fn. 13, it was stated:

> Of course this rule will not preclude an employer from withdrawing recognition in good faith based on other objective considerations. See, e.g., *United States Gypsum Company*, 157 NLRB 652 (1966), *Laystrom Manufacturing Co.*, 151 NLRB 1482 (1965): *Celanese Corporation of America*, 95 NLRB 664 (1951).

This sentiment was carried forth by *Dresser Industries*, 264 NLRB 1088 (1982), in which it was held that "the filing of a decertification petition, standing alone, does not provide a reasonable ground for an employer to doubt the majority status of a union." But once more, in holding that an employer could not act on so limited a basis, the Board specifically preserved employee choice by stating, 264 NLRB 1088 fn. 7, the following:

> The rule we announce today in no way erodes the principle that an employer is privileged to withdraw from bargaining if, on the basis of objective evidence, it has good-faith doubt as to the union's continued majority status. Thus, for example, if an employer is presented with a valid decertification petition supported by a majority of the unit employees, it may be privileged to withdraw from bargaining.

It is concluded in the face of these more recent declarations that the Board has in effect repudiated the statement in *Turbodyne* to the effect that a good-faith doubt of majority is "beside the point." Accordingly, the view expoused by the General Counsel in reliance thereon is deemed lacking in merit. Valid and substantial evidence having presented between February 19 and 21 that the Union no longer represented a majority of the employees, Respondent was free in reliance thereon to withdraw recognition from the Union.

3. The March 10 grant of wage increases and other benefits

Consistent with the complaint, the General Counsel contends that on March 10, 1981, Respondent violated Section 8(a)(3) and (1) of the Act by granting a 10.5-percent-wage increase, an extra "floating" holiday, and a $10 increase in compensation under the sickness and accident policy.[36] Under established Board policy, benefits conferred by an employer during the pendency of a question concerning representation are presumed unlawful as calculated to influence employees in the exercise of their choice of a bargaining representative. Thus, the burden of disassociating any conferral of benefits from the preelection campaign is on the employer.[37] With this in mind, it is noted first that no proof was offered by Respondent to divorce from union considerations, the additional holiday and enhanced sickness coverage. On the other hand, such an effort was made in connection with the wage increase and a close question is presented in that regard. However, as this was the first general wage increase received by the employees since January 28, 1980, when the recently expired contract became effective, its timing would not, standing alone, support illegality. Yet the increase was not shown to be proportionate to but seemed excessive when considered in the light of past practice. Here too, the onus is on the employer to demonstrate either that the pattern of increases given in the past, or that any such increment was arrived at on considerations other than a desire to influence the outcome of an election.

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[34] Practical unsoundness in the General Counsel's theory is evident in the fact that action on the QCR raised by the RD petition filed on November 26, 1980, did not materialize until dismissed by the Regional Director on August 23, 1982. Apparently it is the General Counsel's view that during this entire period Respondent was obligated to continue recognition of the Union, and could not, without bargaining, alter conditions of work that had been set more than 2-1/2 years earlier when the initial collective-bargaining agreement became effective.

[35] Another impediment frequently encountered is the rule requiring elections to be conducted in a voting group coextensive with the historic bargaining unit, a policy requiring disenchanted employees in multiplant and multiemployer units to obtain the required showing of interest from diverse and often unfamiliar worksites.

[36] Despite extensive amendments to the complaint made at the hearing, no effort was made by the General Counsel to place in issue appropriately grants of benefit that occurred substantially after March 10, 1981, including a second general wage increase on February 1, 1982, the institution of a summer hours policy in 1982, and a change in the payday during the summer of 1982. These matters are deemed outside the purview of this proceeding.

Respondent claims that its decision to grant the 10.5-percent increase was justified by legitimate business considerations.[38] To evaluate the claim of illegality, it is important to note that the highest wage offer made by the Respondent to the Union in contract renewal negotiations was 6.5 percent. Respondent sought to explain this differential through Tyree Derrick, corporate director of labor relations for Emerson Electric Company, and Russ Adams, director of administration for Xomox Corporation.[39] According to their testimony, responsibility for defining terms and conditions of employees of organized and unorganized plants is separately allocated within the enterprise. Thus, Derrick is responsible for organized facilities, and Adams handles nonunion operations.

On analysis, the testimony of Derrick and Adams seems to suggest an overarching corporate policy in which the amount of increases to be conferred at various plants depended on organization, and as implemented, in effect amounted to an unlawful reward to employees for rejection of the Union.

Thus, Tyree Derrick described himself as the principal spokesman for Respondent during the 1981 negotiations. According to his credible testimony, when the Company made its final offer, several economic and noneconomic areas stood unresolved with the parties far apart on wages and certain other benefits. According to his estimation, the so-called last offer made by the Union included demands calling for 45- to 50-percent increases over the 3-year duration sought by the Union, with the increases in wages amounting to 19 percent in the first year, 15 percent in the second, and 13 percent in the third. This contrasted sharply with the "best and final" offer presented to the Union by the Company, which included a wage offer at 6.5 percent the first year, in excess of 6 percent in the second year, and in excess 5.5 percent in the third year. It was in this posture that negotiations were adjourned indefinitely on January 28.

By way of further clarification, it was the sense of Derrick's testimony that the 6.5 percent was not the limit as to how far the Company would go in negotiations. Instead, this position was taken in response to the bargaining posture of the Union, which Derrick viewed as "unreasonable." He asserted that though there was additional room for movement on the part of the Company at that time, its own position would depend on several factors, central to which would be the flexibility that the Union was able to manifest. Other factors, according to Derrick, which influenced the 6.5-percent proposal, including business conditions[40] and the weak bargaining posture of the Union. Most significant, however, was the observation by Derrick that the corporation had been settling contracts in that year in the range of 8 percent and 7 percent, and that in his own estimation he could not be certain that any settlement with the Union at the Washington plant would be in the 8-percent range. Derrick's testimony plainly suggests that 8 percent would be the ceiling on any wage settlement, a conclusion that derives collateral support from his own expressed goal that "a modest contract should be achieved."

Derrick related that he did not participate in the decision to grant the employees a 10.5-wage increase some 2 weeks after recognition was withdrawn, as a different "channel of approval" controlled working conditions in unorganized plants. Russell Adams confirmed that once he was informed that the Union no longer represented employees at the Washington plant, determination of their compensation fell within the jurisdiction of his office. Adams was mindful of the 6.5-percent offer made to the Union on January 28, but he denied involvement in the formulation of that offer. As for the 10.5-percent increase, Adams claims that it was founded on a survey of wages paid by several manufacturing facilities in the area and economic conditions in the "market" in which the plant is located. Like Derrick, he acknowledged that 1980-1981 had been a particularly difficult year for the Atwood & Morrill plants in Washington, North Carolina, and Salem, Massachusetts, and that an 8-percent increase was viewed as appropriate with respect to both.[41] However, based on the survey, it was indicated that at the Washington plant, the scale was about $1 behind comparable jobs in the area. Adams therefore adopted the view that to maintain skill levels, a higher increase than 8 percent was necessary. According to Adams, initially his superiors at Xomox and Emerson did not agree, but ultimately they were persuaded based on savings to be realized from the elimination of grievance fees, legal fees, and arbitration that could be added to the 8-percent figure to achieve parity in Washington with what others in the labor market were paying for comparable work.

In the circumstances, I cannot agree with the General Counsel and Charging Party that the increase afforded in

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[37] See *Arrow Elastic Corp.*, 230 NLRB 111-113 (1977).

[38] Contrary to an assertion by Respondent, it is noted that the fact that recognition was lawfully withdrawn on February 23, did not afford it "an absolute right" thereafter to impede the election process by conferring benefits.

[39] Atwood & Morrill Co., Inc. is a division of Xomox Corporation, which in turn is a wholly owned subsidiary of Emerson Electric Co.

[40] Derrick claims to have "consulted" with management at the plant, divisional, and corporate levels concerning "the condition of the business at that time."

[41] Adams testified that in 1982 the increase received at both Washington and Salem plants of Atwood & Morrill amounted to 7.4 percent.

March 1981 is to be deemed unlawful because it exceeded that incorporated in the last company offer in the aborted January negotiations. There was no allegation that the breakdown in those negotiations was attributed to bad faith or other improper motivations that could be imputed to management. Furthermore, I credit the testimony of Derrick that at the time the negotiations were suspended there was room for movement on the Company's part and that from its point of view further exchanges were to be made, with the onus on the Union to show some movement.[42] Such a bargaining strategem is not unique and to assume that it placed a ceiling on what the Company could later provide would rest on faulty assumption that management had exhausted its concessions with respect to wages as of January 28 and should be penalized because it held back, waiting for the Union to manifest flexibility. Equally lacking in merit is the General Counsel's proposal that because the Union was not apprised that the Employer was willing to make substantial further concessions, one should assume that the Employer was not willing to do so. This assumption ignores the fact that as of January 28 negotiations were not viewed by Derrick as having concluded, but had reached a point where the parties were so far apart that sound negotiating tactic was taken as demanding that management not reveal its hand until concession was made by the other side.

This does not mean, however, that I am willing to accept the balance of Respondent's evidence as furnishing a credible explanation for this increase granted on March 10, 1981, only 2 weeks after the Company had withdrawn recognition. First, I find it difficult to believe that in the interim a new wage policy was devised by separate labor relations functionaries within the Emerson Enterprise and that there was no serious consultation as to what wage strategem the Company would adopt at Washington between Adams, who ostensibly was to fashion a new wage policy, and Derrick, who had just been released from collective bargaining covering that very plant. In any event, that union activity was the decisive factor in defining the amount of the increase is admitted in Respondent's own evidence. Management's concern for competitive rates, a factor that combined humane and practical elements, while of empirical concern to Respondent on March 10, following the recent repudiation of the Union, went unmentioned by Derrick in his description of the considerations entering his formulation of wage offers to be and actually made to the Union. For Respondent, there is no escaping the disparate considerations relied on by Adams and Derrick. Evident from these differences was the fact that the focus at Washington was one of greater generosity once that plant had gone nonunion. The net result was a reward founded on that very fact. Thus, the March increase, being of unprecedented size, coming as it did only 2 weeks after recognition was withdrawn, and having been granted to a bargaining unit still bearing the wounds of substantial layoffs, conveyed graphically to employees that their "lot" would be better cast without union representation. During the pendency of a question concerning representation, employers are free to campaign on the basis of existing benefits, but management may not on a discretionary basis make upward revisions in established patterns in conferring additional benefits. The latter is precisely what occurred here, and the identity of those who might have wielded corporate power to that end is entirely irrelevant.[43]

Based on the foregoing, it is concluded that the 10.5-percent increase conferred on employees on March 10 was not shown by Respondent to be justified by considerations other than union activity and, accordingly, Respondent thereby violated Section 8(a)(1) of the Act. Furthermore, as Respondent has failed to adduce proof concerning the propriety of its March 10 grant of an additional holiday and broadened sickness and accident benefits,[44] I find that these changes, effected during the pendency of the question concerning representation, also were calculated to influence employee choice in violation of Section 8(a)(1) of the Act.[45]

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[42] There is no allegation that Respondent's failure to offer an increase in excess of 6.5 percent during the January negotiation was violative of Sec. 8(a)(3) and (1) of the Act.

[43] Serious question exists whether savings realized by an employer through elimination of a union represents a suitable justification for a preelection wage increase. In this regard, the Board has held that an employer may not legitimately campaign against representation by propagandizing that without a union more money would be available to spend on employees. See *Dow Chemical Co.*, 250 NLRB 748, 750 (1980), enfd. denied 660 F.2d 637, 646–647 (5th Cir. 1981).

[44] The wage increase and other benefits conferred on March 10, 1981, on August 13, 1982, by amendment to the consolidated complaint, were added to par. 9 as an alleged violation of Sec. 8(a)(3) and (1) of the Act. At the same time, Respondent's action with respect to canteen privileges remained confined to par. 16 of the complaint and for purposes of this proceeding was alleged soley as unilateral action violative of Sec. 8(a)(5) and (1) of the Act. Accordingly, as no notice was afforded to Respondent that its motive was in any way placed in issue in connection with the canteen issue, it understandably furnished no justification for that change. Accordingly, any such charge was neither alleged nor fully litigated, and hence is not the subject of a finding here.

[45] The complaint alleges, and the General Counsel and Charging Party insist, that the wage increases in question violated Sec. 8(a)(3) of the Act. As indicated at the hearing by me, that section of the Act regulates conduct detrimental, rather than beneficial to employee interests. In this respect, cases such as *Service Garage*, 247 NLRB 943 (1980), and *Associated Milk Producers*, 255 NLRB 750 (1981), are distinguishable, as the conduct complained of in each related to the withholding of a schedule increase, action clearly detrimental in nature. Also off base is the notion advanced by the General Counsel that an 8(a)(3) violation could influence the scope or appropriateness of a remedial order, or the validity of a possible election. This remedy is controlled by the nature of the unlawful conduct and its impact on protected rights, rather than technical compartmentalization or a process in which conduct is labeled as a violation of one section of the Act or another. See *Drawo Line Co.*, 234 NLRB 213, 214 fn. 1 (1978). Also noteworthy in this connection is the assertion in the Charging Party's posthearing brief that the grant of benefits on March 10, 1981, did constitute "adverse action" and hence violated Sec. 8(a)(3) as charged in the complaint. It is argued in this respect that Respondent maintained "a carrot and stick" approach, offering the Union less in the contract renewal negotiations, and then after repudiation of the Union rewarding employees with the "carrot" a greater increase. The Charging Party submitted that this is "more than [an] 8(a)(1) violation." However, even under this view, it was in January 1981, not March 1981, that the "stick" was ministered. Furthermore, although the former might well have been challenged in an amendment to the charge in Case 11–CA–9787 filed on February 3, 1982, the complaint, though subsequently amended, made no such reference, but was limited to a challenge to the "carrot" conferred on March 10, 1981. In short, control over the scope of the complaint is the exclusive prerogative of the General Counsel under well-established Board authority. See *Winn-Dixie Stores*, 224 NLRB 1418, 1420–1421 (1976).

IV. THE REMEDY

Having found that Respondent has engaged in certain unfair labor practices within the meaning of Section 8(a)(1) and (5) of the Act, it shall be recommended that it cease and desist therefrom and take certain affirmative action designed to effectuate the policies of the Act.

I have found above that as of February 23, 1981, the Union no longer represented a majority of the employees, and on that date Respondent withdrew recognition, lawfully, on considerations furnishing a reasonable basis not only for belief that the Union had lost its majority, but establishing that fact. I have also found that Respondent thereafter violated Section 8(a)(1) of the Act by on March 10, 1981, granting a wage increases of unprecedented size. It is in this light that I consider the General Counsel's further contention that the bargaining relationship be resurrected on the basis of a remedial bargaining order consistent with the dictates of *NLRB v. Gissel Mfg. Co.*, supra. In this respect, the General Counsel relies on cases such as *Michigan Products*, 236 NLRB 1143 (1978), to the effect showing that the Union continued to represent a majority. In *Michigan Products*, supra, the incumbent union was rejected in a Board-conducted election, but the loss of majority was viewed as a byproduct of the employer's unfair labor practices that "had as its objective the elimination of the Union as the collective-bargaining representative." Hence, the election was a nullity and the incumbent union "enjoyed the presumption of continued majority status." No such conclusion is warranted on the instant record. The key element distinguishing the instant case from *Michigan Products*, supra, and other authority cited by the General Counsel[46] is the fact that here the proof demonstrates an actual loss of majority,[47] which, while not induced by unlawful conduct, occurred prior to any serious unfair labor practice. The presumption of continuing majority was rebutted with finality, and having taken full account of the unlawful grant of benefits on March 10, 1981, the conduct is viewed as lacking the quality that would render dispensable reestablishment of the Union's majority, either factually or by operation of law, as a predicate to a remedial bargaining order. Accordingly, as the Union had not reestablished its majority status at the time of the independent 8(a)(1) violation founded on the wage increase of March 10, 1981, and as that violation, though serious, would not be considered as the sufficiently "pervasive" or "egregious" as to warrant a minority bargaining order,[48] no basis exists for an affirmative order for reestablishing the relationship repudiated by employees between February 19 and 21, 1981.

In the total circumstances, not only do I dismiss the 8(a)(5) allegation predicated on the withdrawal of recognition, but like action is taken with respect to allegations in the complaint that Respondent violated Section 8(a)(5) and (1) of the Act after February 23, 1981, by unilaterally increasing wages and benefits of employees about March 10, 1981, by, on March 20, 1981, refusing to negotiate with the Union concerning health and safety matters, and by, on May 1, 1981, unilaterally restoring the canteen rights of its employees.

CONCLUSIONS OF LAW

1. Respondent is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

2. The Unions are labor organizations within the meaning of Section 2(5) of the Act.

3. Respondent violated Section 8(a)(5) and (1) of the Act by, on June 17, 1980, during the term of a collective-bargaining agreement, granting a 20-cent-wage increase to an employer without the assent of the Union.

4. Respondent independently violated Section 8(a)(1) of the Act by, on March 10, 1981, granting a wage increase to employees under conditions calculated to induce them to refrain from designating the Union as their representative for collective bargaining.

5. The unfair labor practices found in paragraphs 3 and 4 above constitute unfair labor practices having an effect on commerce within the meaning of Section 2(6) and (7) of the Act.

[Recommended Order omitted from publication.]

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[46] Cf. *Dow Chemical Co.*, supra. *Grede Foundries*, 224 NLRB 1312, 1316 (1976); *Litton Business Systems*, 205 NLRB 532 (1973), enfd. denied 497 F.2d 262 (6th Cir. 1974). In the above cases, the presumption of continuing majority remained viable either because unrebutted or because loss of majority was attributable to the employer's unfair labor practices.

[47] Cf. *Litton Business Systems*, supra.

[48] Cf. *United Dairy Farmers Cooperative Assn.*, 257 NLRB 772 (1981), on remand from 663 F.2d 1054 (3d Cir. 1980).

Omnix International Corporation d/b/a Waterbed World *and* Union Independiente de Supermercados y Tiendas Por Departamentos. Cases 24–CA–5160 and 24–RC–6985

July 13, 1988

ORDER GRANTING MOTION TO REOPEN RECORD AND FOR FURTHER HEARING

BY CHAIRMAN STEPHENS AND MEMBERS JOHANSEN AND BABSON

On September 30, 1987, the National Labor Relations Board issued a Decision, Order, and Certification of Representative in the above-entitled proceeding, finding that the Respondent had violated Section 8(a)(1) of the Act by threatening employees with unspecified reprisals for union activities and by creating the impression of surveillance of employees' union activities and had violated Section 8(a)(3) of the Act by refusing to permit employee Marilu Marquez to rescind her resignation and by discharging employee Gloria Garcia in retaliation for Marquez' union activities.[1] Thereafter, on January 22, 1988, the Respondent filed a motion to reopen the record and a separate motion for a protective order. The General Counsel then filed an opposition to the motion for a protective order, but stated therein that she did not oppose the motion to reopen the record.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

In its motion to reopen the record, the Respondent contends that it has obtained newly discovered evidence that should cause the Board to reverse its findings of fact and conclusions of law and find that the Respondent has not violated the Act. In support of its motion, the Respondent has attached an affidavit from witness Raisa Musa Quinones (Musa), in which she appears to recant certain testimony that she gave at the unfair labor practice hearing in this proceeding. At the hearing Musa testified that on May 3, 1985, Jaime Rico, the Respondent's treasurer and a supervisor of the Respondent within the meaning of Section 2(11) of the Act, told her that he had discovered that employees wanted to bring a union into the Company, that Marilu Marquez was in charge of everything, that he regarded Musa as a good employee, and that she should not get involved in the union activity. In our decision, we used Musa's credited testimony to find that the Respondent had violated Section 8(a)(1) as detailed above and that it had knowledge of and animus toward Marquez' union activities. The Respondent has appended a translation of Musa's affidavit to its motion to reopen the record. The relevant parts of this translation, set out verbatim, follow:

> I testified in the administrative case # 24–CA–5160 held on December 16, 17, and 18, 1985 because my personal well-being and security were threatened by Marilu Marquez and Gloria Garcia and I now wish to correct my testimony declaring the following:
>
> On May 1, 3, 1985 nor at any other time, did Jaime Rico threaten me with retaliation or with rewards in relation to my employment or union activities.
>
> Jaime Rico did not tell me that it was not for my benefit to participate in union activities.
>
> Jaime Rico did not tell me that Gloria Garcia or Marilu Marquez were involved in the union.
>
> Jaime Rico nor any officer of Waterbed World has pressured me nor has promised me anything of value so that I would now make these declarations nor have I been offered employment.
>
> Jaime Rico did not tell me not to get involved with the union.

The Respondent contends that reopening the record is necessary because it argues that Musa's testimony formed the Board's only basis for finding that the Respondent had violated Section 8(a)(1) of the Act. Regarding the 8(a)(3) finding, the Respondent further contends that in the absence of Musa's testimony, the Board could not have inferred that the Respondent either knew of Marquez' union activities or harbored animus toward her for these activities at the time of the decision to discharge Garcia and to refuse to permit Marquez to rescind her resignation.

The evidence the Respondent now seeks to introduce may tend to show, among other things, that Marquez and Garcia threatened Musa's well-being and security to induce her to testify falsely at the unfair labor practice hearing; that Musa testified falsely at that hearing; that Jaime Rico did not threaten Musa with retaliation or rewards with regard to her employment; that Jaime Rico did not tell Musa that it was not to her benefit to be involved in union activities; and that Jaime Rico did not tell Musa that Garcia or Marquez was involved with the Union.

After carefully reviewing the record, the judge's decision, the Board's decision, and the motion, we find that Musa's affidavit raises substantial questions of whether an important witness testified

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[1] 286 NLRB 425.

289 NLRB No. 101

falsely about material issues in this case. Accordingly, we shall grant the Respondent's motion to reopen the record and we shall remand the proceeding to the judge to reopen the record, to take additional testimony to resolve the issues of credibility raised by Musa's affidavit, and to issue new findings of fact and conclusions of law in a supplemental decision consistent with his resolution of the issues.

As noted above, the Respondent also seeks a protective order from the Board in which the Board would order the parties not to disclose the information in the motion to reopen to Marilu Marquez or Gloria Garcia. In support of this motion, the Respondent cites portions of Musa's affidavit, quoted above, contending that Garcia and Marquez threatened her well-being and security to support its contention that confidentiality is required to protect Musa from "annoyance and oppression." The General Counsel has opposed the motion, contending that the Board is not empowered to grant such a protective order and that the Board is empowered only under appropriate circumstances, and for good cause shown, to petition the United States district court for such an order. The General Counsel also contends that the Respondent has not shown "good cause" to warrant petitioning the court for a protective order. Without passing on the General Counsel's arguments, we deny the Respondent's motion, without prejudice to a subsequent motion for appropriate relief. Our reasons for denying the motion follow.

First, we do not believe that holding the contents of the motion to reopen confidential would be proper—or even possible—under the circumstances of this case. Musa's affidavit appended to the motion has raised serious questions regarding not only the factual bases of the Board's decision in this case, but also the credibility of testimony taken at the hearing. Such questions can only be resolved through the hearing process. Second, we note that Garcia and Marquez are not charging parties. However, "[a] discriminatee who has not filed his own charge is not a party within the Board's definition but . . . in a real sense has been regarded as a party in a long line of Board decisions." *Unga Painting Co.*, 237 NLRB 1306, 1307 (1978). In recognition of the strong interest of discriminatees in Board proceedings, the Board recognizes only limited circumstances under which they can be prevented from hearing the testimony of other witnesses:

> Specifically, alleged discriminatees should be excluded only during that portion of the hearing when another of the General Counsel's or charging party's witnesses is testifying about events to which the discriminatees have testified, or will or may testify, either in the case-in-chief or on rebuttal, unless, in the judgment of the Administrative Law Judge, there are special circumstances warranting the unrestricted presence of discriminatees or total exclusion when not testifying.

Ibid. (fn. omitted).

Therefore, in view of the Board's policy affording a discriminatee the right to hear testimony except under certain circumstances, and in light of the scanty and conclusory nature of the averments in the Respondent's memorandum and supporting affidavit on which the request for a protective order is based, we view any relief in the nature of a protective order foreclosing Garcia and Marquez from knowing of the contents of the motion to reopen as unwarranted at this time.[2]

Last, although we share our colleague's concern for the seriousness of the allegations now before us, we think it premature at this stage of the proceedings to send the record to the Department of Justice. In our view, the better course is to await the judge's supplemental decision with its further findings of fact and credibility resolutions, and our own disposition of that decision, before we consider what possible future course, including the referral of this case to the Justice Department, to pursue.

IT IS ORDERED that the proceeding is remanded to Administrative Law Judge Elbert D. Gadsden for the purpose of holding a hearing to receive additional testimony from Raisa Musa Quinones and other appropriate evidence relating to the credibility issues and other issues raised by Raisa Musa Quinones' December 15, 1987 affidavit.[3]

IT IS FURTHER ORDERED that, at the conclusion of the hearing, Judge Gadsden issue a supplemental decision containing findings of fact, credibility resolutions, and conclusions of law. The supplemental decision shall be served on the parties, after which the provisions of Section 102.46 of the Board's Rules and Regulations shall be applicable.

IT IS FURTHER ORDERED that Respondent's motion for a protective order is denied without prejudice for the reasons stated above.

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[2] Our Order here, however, should not be construed as precluding the judge upon a motion at the hearing for deciding in his discretion to sequester witnesses based on a showing that special circumstances exist warranting sequestration under *Unga Painting*, supra.

[3] Member Johansen views as most serious any allegation that witnesses in Board proceedings are threatened in order to affect their testimony and/or that witnesses have lied under oath either in Board hearings or in affidavits presented to the Board. Accordingly, he would send the entire record in this proceeding to the Department of Justice for whatever action that agency may deem to be appropriate in light of all the circumstances in this case.

Correctional Medical Systems, Inc. ***and*** **Communications Workers of America, AFL–CIO, Petitioner.** Case 33–RC–3099

July 13, 1988

DECISION ON REVIEW AND ORDER TO DISMISS

By Chairman Stephens and Members Johansen and Babson

On December 30, 1985, the Regional Director for Region 33 issued a Decision and Direction of Election in this proceeding in which he found, inter alia, that the Board had jurisdiction over the Employer under *National Transportation Service*, 240 NLRB 565 (1979), because the Employer retained sufficient control over its operations and labor relations to engage in meaningful bargaining with the Union.

Thereafter, in accordance with Section 102.67 of the National Labor Relations Board Rules and Regulations, the Employer filed a request for review of the Regional Director's Decision and Direction of Election. The Employer contended, inter alia, that the Regional Director erred (1) in finding that the Employer retained sufficient authority and control over its operations and labor relations policy to engage in meaningful negotiations with the Union and (2) in finding that the public officials for the State of Iowa are not responsible for directing and overseeing the Employer's contract at the Iowa State Penitentiary, which would preclude the Board from asserting jurisdiction over the Employer.

By order dated January 28, 1986, the Board granted the Employer's request for review pending the Board's decisions in *Res-Care, Inc.*, 280 NLRB 670 (1986), and *Long Stretch Youth Home*, 280 NLRB 678 (1986). The election scheduled for January 28, 1986, was held, and the ballots cast in the election were impounded.

By order dated June 30, 1986, the case was remanded to the Regional Director for further consideration consistent with the Board's decisions in *Res-Care, Inc.* and *Long Stretch Youth Home*. The record was reopened and the parties were permitted to submit supplemental briefs in support of their respective positions. The Employer relied on the record as it existed and filed a supplemental brief reasserting its position that the Board does not have jurisdiction. The Union asserted no position regarding the reopening of the record and did not file a supplemental brief.

The Regional Director issued a supplemental decision on August 4, 1986, reaffirming his prior conclusion that the Employer retains sufficient control over its labor relations to engage in meaningful collective bargaining with the Union and directed that the impounded ballots be counted. The Employer filed a request for review of the Regional Director's Supplemental Decision and Order directing the counting of impounded ballots. By Order dated December 9, 1986, the Board granted the Employer's request for review.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the entire record in this case with respect to the issues under review and has decided to dismiss the petition.

The essential facts are as follows. The Employer, Correctional Medical Systems (CMS), provides onsite medical and health care services to inmates and preemployment exams to employees at the Iowa State Penitentiary (ISP). ISP is a maximum security prison, which houses approximately 800 inmates.

In 1973 the inmates at ISP instituted a civil rights action against the prison officials. As a result of this action, a consent order was entered mandating changes in the delivery of health care services to ISP inmates. *McBride v. Farrier*, No. 73-242-2 (S.D. Iowa 1981, amended consent order). The order required the Iowa State Department of Corrections to procure an independent contractor to provide quality health care services at the Penitentiary to begin on or before October 30, 1981. The order directed the State to solicit bids from potential contract health care providers and submit those bids to the court-appointed monitors for review and approval. The consent order also required ISP to continue to employ an independent health care provider until the State is able to demonstrate to the court's satisfaction that the same level and quality of health care can be provided to the inmates by ISP health care professionals. The consent order specifically set the initial parameters for staffing the infirmary facility, including job descriptions and classifications, the number of employees within each classification, the full-time or part-time status of employees, and the licensing and educational requirements for each of the individuals employed.

The consent order required the establishment of a medical audit committee responsible for managing and evaluating the delivery of health care services. This committee is composed of the ISP warden, the health care unit administrator, the director of nurses, the chief of dental services, the pharmacist, and the medical records administrator. The consent order prescribed that formal policy and procedures be developed internally for the communication and resolution of inmate and staff

289 NLRB No. 103

complaints. It also details the types of duties to be performed by the health care unit employees and which employees should perform which duties.

Pursuant to the *McBride v. Farrier* consent order, the State of Iowa issued a Request for Proposals (RFP) on July 1, 1981, to solicit bids for the provision of comprehensive health care services by an independent contractor for the inmates at the penitentiary. The RFP specified the job classifications, the hours of work per week for each classification, and the number of employees in each classification. The State reserved the right, in the RFP, to interview and approve the hiring of the medical director, nursing director, the pharmacist, and health care unit administrator. The RFP also required the successful contractor to retain and continue to employ all health care personnel that were currently employed by ISP for at least 1 month after receiving the contract and thereafter to treat those employees in accordance with the Iowa Merit Employment Department rules on employee transfer and/or reduction of work force.

On July 1, 1981, CMS submitted a bid, which was accepted, and a 1-year renewable contract was executed on October 30, 1981. The contract was thereafter renewed at 1-year intervals until June 30, 1985.

The State of Iowa issued a second RFP in February 1985 soliciting new bids for the provision of health care services at the institution. On March 18, 1985, the State issued an addendum modifying the second RFP. The modification required all prospective bidders to submit a proposal consisting of technical and financial components and containing organizational charts, job descriptions, salary ranges for all staff positions, and a staff manning table including the required number of employees in each required position for certain specified hours per week. The addendum further required the submission of a line-item budget showing the hourly pay rate and fringe benefit costs per hour for each job classification and the number of man-hours to be worked in each classification. The line-item budget is required to reveal all overhead, general, and administrative services, and all other direct costs. The budget must also show as separate line-items all other ancillary costs such as maintenance and repairs, office supplies, postage, uniform allowance, insurance, data processing, accounting, legal services, state and Federal taxes, and a set management fee.

The RFP designates the warden as project manager to be responsible for the day-to-day administration of the contract and directs that the consultants for the Department of Corrections will provide professional review and assessment of the provider's operations within their area of expertise. The Department of Corrections consultants are employed by the State of Iowa and are responsible for providing guidance and management oversight to the CMS staff.

The RFP requires the contractor to prepare and submit to the Department of Corrections monthly reports that specify any deviation by position, title, or hours worked from the staffing requirements of the contract. If at any time the contractor fails to maintain qualified personnel in each of the 22 positions as required by the consent decree for 30 consecutive calendar days, the scheduled installment payment for that period will be reduced by one-twelfth of the annual salary and benefits of the previous incumbent in the vacant position. The Department of Corrections and the warden exercise reviewing authority over the employment of the medical director, director of nursing, pharmacist, and administrator. The resumes of these individuals are forwarded to the warden for his approval, and he must interview them prior to their staff appointment. The RFP requires that a list of all personnel assigned to the facility be submitted to the State for approval. In addition, the State has reserved the right to request the replacement of any CMS personnel believed unable to carry out the responsibilites of the contract, or believed to present an unacceptable breach of the legitimate security requirements at the institution. All contractor employees must pass a background investigation conducted by ISP prior to their employment at the facility. The RFP requires the contractor to submit to the warden for his approval a personnel manual applicable to all health care contract employees. The manual specifies the terms and conditions of employment, the employee probationary period, definition of seniority, rules of conduct, provision for progressive discipline and discharge, vacation and holiday benefits, and sick leave. CMS is not permitted to make any changes in these conditions of employment without the express written approval of the warden.

The Employer submitted a bid and proposal in response to the State's second RFP and on June 3, 1985, a new 1-year contract was executed and made effective through June 30, 1986. The new contract incorporates the State's RFP and addendum, the Employer's proposal, and the *McBride v. Farrier* consent order. The contract specifically prohibits the Employer from making any changes in the agreement without the State's consent. As mandated by the consent order, a medical audit committee monitors the day-to-day operations of the health care unit. The medical audit committee now comprises the warden, the court-appointed monitors, and several other employees and supervisors of the Employer, all of whom must approve of any policy and/or operational changes at the institution.

The Regional Director in his original Decision and Direction of Election concluded that the Board should assert jurisdiction because the Employer retained the necessary degree of independence from the State of Iowa in setting its overall labor-relations policy, which enables the Employer to effectively bargain with the Union within the meaning of the "right of control" test as set forth in *National Transportation*, supra.[1] The Regional Director reconsidered his original conclusion in light of the Board's recent decisions in *Res-Care, Inc.*, supra, and *Long Stretch Youth Home*, supra, and reaffirmed his decision that the Employer retains sufficient control over the essential terms and conditions of employment to enable it to engage in meaningful collective bargaining with a labor organization. We disagree.

In *Res-Care, Inc.*, supra, and *Long Stretch Youth Home*, supra, 678 the Board reaffirmed the basic "right of control" test enunciated in *National Transportation Service*, 240 NLRB 565 (1979), for determining when it is appropriate to assert jurisdiction over an employer providing services to or for an exempt entity. In applying the test, the Board stated in *Res-Care* that the examination would not be limited to the control over the essential terms and conditions of employment retained by the employer, but would also extend to an examination of the "scope and degree of control exercised by the exempt entity over the employer's labor relations, to determine whether the employer in issue is capable of engaging in meaningful collective bargaining." 280 NLRB at 672. The Board held that "meaningful bargaining" cannot be accomplished unless the employer has "the final, practical say regarding wages and benefits" afforded its employees. Id. at 674. Applying these principles, the Board reached different results in *Res-Care* and *Long Stretch Youth Home.*

In *Long Stretch Youth Home*, supra, the Board concluded that it was proper to assert jurisdiction because the control retained by the employer over the essential terms and conditions of employment of its employees was sufficient to enable it to engage in meaningful collective bargaining with a labor organization. The exempt entity in *Long Stretch* reviewed the annual proposed budget for the youth home's functions and services. The agency did not issue any minimum-maximum salary ranges, but suggested some cost guidelines for each job classification, and also suggested that no more than 65 percent of its gross operating budget be allocated for salaries. The employer was responsible, however, for setting its own minimum standards and qualifications for employees, and the exempt entity had little or no control over the determination of employees' wages, vacation, sick leave, or other benefits.

In *Res-Care*, the Board reached the contrary conclusion and refused to assert jurisdiction. In that case, the employer operated a job corps center pursuant to a contract with the United States Department of Labor (DOL). The contract mandated that DOL review and approve the minimum/maximum wage ranges, as well as the specific levels of various employee benefit packages. The contract prevented the employer from independently setting initial wages, granting a wage increase higher than the approved maximum, or providing benefits greater than those contained in the approved benefit package. The exempt entity, DOL, exercised ultimate discretion over the basic economic terms and conditions of employment. Res-Care was compensated by DOL on a cost-plus-fixed-fee basis, i.e., the total of all line items as listed in the operating budget including wage and benefit levels proposed by the employer and approved by the exempt entity, plus the employer's proposed fixed fee and other "allowable costs" as defined by DOL. Upon DOL's acceptance and approval of Res-Care's bid, the proposed figures became the contract price and were set forth in the final contract. Res-Care was not permitted to pay wages or benefits to employees above the approved maximums and to do so would result in a determination by DOL that the increase was a "disallowable cost" that would reduce Res-Care's installment payment under the contract. On these facts, the Board concluded that the employer was precluded from engaging in meaningful bargaining because it did not have sufficient discretion to set wages and benefits for its employees.

In asserting jurisdiction over CMS, the Regional Director drew upon comparisons with the facts of *Long Stretch Youth Home* and sought to distinguish *Res-Care* from the case before us. We find, however, that the Employer's situation here more closely parallels that of the employer in *Res-Care*. Thus, the contract between ISP and CMS incorporates the *McBride v. Farrier* consent decree, the State's Request for Proposals, the addendum requiring a line-item budget, and the Employer's proposal, with the provision that no contractual changes can be made without written approval and permission of the State. As described earlier, these documents leave very little to CMS's discretion. The wage and benefit levels for CMS employees are specifically identified in the contract for each job classification. The cost for each position is dictated by the wage ranges, the wage rates, the hours of work per week for each position, the hourly costs for fringe benefits, and the resulting total for all compensation costs. Final approval for the proposed levels of employee compensation rests with the State and ISP has the authority not only to limit the total budget, but also to limit the maximum amount which is paid to CMS for employee compensation. CMS cannot change the fringe benefit package for employees, nor can it implement new benefits. While CMS can increase the wages, its increases cannot exceed the total amounts prescribed for wages in the contract. Any moneys not expended on wages and benefits as allocated must be returned to the State.

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[1] In *National Transportation*, the Board rejected the "intimate connection" test and adopted a twofold approach to determining when assertion of jurisdiction over an employer providing services to or for an exempt entity is appropriate. The approach set forth in *National Transportation* examines whether (1) the employer itself meets the definition of "employer" within the meaning of Sec. 2(2) of the Act and, if so, (2) the employer has sufficient control over the employment conditions of its employees to enable it to bargain with a labor organization as their representative.

The Regional Director, while noting the existence of a line-item budget, concluded that the State, by limiting the total budget, does not exert control over labor relations. In so doing, the Regional Director failed to make the distinction drawn by the Board between placing an "effective ceiling on [employee compensation] expenditures by limiting the private employer's total budget" as in *Long Stretch Youth Home*, supra, 280 NLRB at 682 fn. 14, and "direct limits on employee compensation" by means of a budget that specifies maximum amounts for employee compensation," as in *Res-Care*, supra, 280 NLRB 670 at 674 fn. 22. The Regional Director's conclusion that employee compensation here is not tied to the budget is, therefore, incorrect, as is his conclusion that the Employer has control over its employees' wages.

Further, the consent decree specifies the minimum standard operating procedures and staff requirements for the ISP health care unit. The State's RFP sets forth the necessary staffing requirements and descriptions of the job classifications along with what would constitute certain full-time equivalent positions. The job classifications, the number of employees in each classification, and the hours of work for each employee are effectively controlled and limited by ISP through its control of the budget. Unlike in *Long Stretch Youth Home*, in which the level of control exercised by the exempt entity over the staffing component did not require that the employer fill certain positions, and the contract price had no direct relation to salaries, CMS must adhere strictly to the staffing requirements of the contract.

The Regional Director concluded that the control ISP exerts over the terms and conditions of the CMS employees is limited primarily to its concerns about security, and ISP is not directly involved in the hiring, management, or discipline of the health care unit employees. The Regional Director found that ISP would become involved only in the discharge of an employee who presented a security risk to the institution. The record reveals, however, that on two occasions the warden requested that certain CMS personnel be discharged and his mere request was honored without question or reference to a legitimate breach of prison security.

With regard to benefits, the Regional Director stated that as with wages, "total compensation costs" are identified in the bid. However, the Regional Director concluded that the exempt entity does not possess the "final, practical say" regarding benefits because there was no evidence that the warden exercised his authority to veto changes in the Employer's personnel manual. This finding is in error. The Board stated in *Long Stretch Youth Home*, that its decision to assert jurisdiction was not based on the failure of the exempt entity to exercise its authority to disapprove the employer's wage/benefit proposals, but on the absence of any such authority. *Long Stretch Youth Home*, supra, 280 NLRB at 681 fn. 12. In that case, the exempt entity required only that the employer have personnel policies and that certain benefits be provided; it did not specify their content, and thus did not retain authority to disapprove benefit proposals. Here, by contrast, the costs of benefits is included as a line item in the budget, and the personnel manual, which includes provisions for vacation and holiday benefits, leaves of absence, sick days, and tuition reimbursement, must be approved by the warden. Accordingly, we find, contrary to the Regional Director, that there are significant limitations imposed by ISP on the Employer's control over its labor relations.

Considering all the foregoing factors, we conclude that the Employer does not possess sufficient control over the employment terms and conditions of its employees to enable it to engage in meaningful collective bargaining with a labor organization. Accordingly, we conclude that it would not effectuate the purposes and policies of the Act to assert jurisdiction over the Employer, and we shall dismiss the petition.[2]

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[2] The Employer attempted to establish that CMS is a political subdivision of the State and shares ISP's Sec. 2(2) statutory exemption. The Regional Director did not consider this issue nor the cases cited in support

Continued

ORDER

The petition is dismissed.

CHAIRMAN STEPHENS, concurring.

Because of the unique circumstances brought about by the inmates' civil rights action against Iowa State Penitentiary (ISP) officials, I agree with my colleagues that jurisdiction should not be asserted over the Employer and that the petition in this case should be dismissed. In contrast to the situation presented in *Res-Care, Inc.*, 280 NLRB 670 (1986), the government authority involved here is not purely theoretical and unlikely to be exercised. To the contrary, the consent order in *McBride v. Farrier*, No. 73-242-2 (S.D. Iowa 1981, amended consent order), sets specific requirements for all aspects of the delivery of health care services to prison inmates. The consent order further requires, among other things, that a medical audit committee comprised of the warden of ISP, court-appointed monitors, and several employees and supervisors of the Employer oversee the day-to-day operations of the health care unit. Any change in policy or operations must be approved by the committee. It is clear that, at the present time, the delivery of health care to the inmates of ISP by any Employer is subject to strict supervision by the court and, pursuant to the court's order, ISP officials. Given this close and comprehensive involvement of exempt entities in labor relations matters I agree that we should not assert jurisdiction over the Employer.

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of this position. We find that the Employer is not a political subdivision of the State.

The Board has long extended the exemption for political subdivisions to entities that are, inter alia, administered by individuals who are responsible to public officials or to the general electorate. *NLRB v. Natural Gas Utility District*, 402 U.S. 600 (1971). "Administration" in this context is construed as responsibility for day-to-day operations. *Resident Home for the Mentally Retarded*, 239 NLRB 3 (1978). The Employer argues that it meets this test because its operations are controlled by the warden, who is appointed by the commissioner for the Iowa State Department of Corrections, who is appointed by the Governor.

We find no merit in the Employer's argument. The record shows that the health care unit administrator who is employed by CMS has responsibility for the day-to-day operations. While the warden's involvement with CMS is such as to constitute one of the factors supporting our conclusion that the Employer lacks sufficient control to engage in meaningful bargaining, there is no indication that the health care unit administrator is directly appointed by the warden or fully responsible to the warden for day-to-day administrative matters. Finally, the record does not support a conclusion that the warden administers the health care unit. Accordingly, we conclude that the Employer is not entitled to the exemption for political subdivisions.

Francis J. Fisher, Inc. *and* **Local 13, International Brotherhood of Teamsters, Chauffeurs, Warehousemen & Helpers of America, AFL-CIO.** Case 27-CA-10021

July 13, 1987

DECISION AND ORDER

BY CHAIRMAN STEPHENS AND MEMBERS JOHANSEN AND BABSON

On February 3, 1988, Administrative Law Judge William L. Schmidt issued the attached decision. The Respondent filed exceptions and a supporting brief. The General Counsel filed an answering brief.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings, and conclusions, as modified,[1] and to adopt the recommended Order.

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge and orders that the Respondent, Francis J. Fisher, Inc., Denver, Colorado, its officers, agents, successors, and assigns, shall take the action set forth in the Order.

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[1] We agree with the judge that the Respondent violated Sec. 8(a)(1) of the Act when, at an employee meeting in November 1986, its owner and president told employees that there would be no union after March 1987 and its vice president concluded the meeting by telling employees to decide what they wanted and come to him. In agreeing with the judge's conclusion, however, we do not rely on his finding that such remarks by the Respondent tend to cause employees to be "apprehensive and fearful" in exercising their Sec. 7 rights; rather, we find that such remarks reasonably tended to interfere with, restrain, or coerce employees in the exercise of their Sec. 7 rights.

The judge relied on the court's opinion in *Teamsters Local 175 v. NLRB*, 788 F.2d 27 (D.C. Cir. 1986), denying enf. of *Bell Transit Co.*, 271 NLRB 1272 (1984), for the general proposition that an employer is required to maintain the status quo established by an expired collective-bargaining agreement until the parties reach a new agreement or bargain to impasse. The General Counsel, in her answering brief, contends that *Bell Transit*, in which a valid impasse was found after only three bargaining exchanges, is distinguishable on its facts. Whether or not *Bell Transit* is distinguishable from the instant case, we overrule it to the extent it holds that impasse can be found on the basis of subsequent events—e.g., a failure to ratify a contract proposal or an ultimate failure to reach an agreement—rather than on the state of negotiations at the time of the unilateral action. We additionally overrule the Board's analysis in that case to the effect that an impasse and tentative agreement may exist simultaneously.

Michael J. Belo, Esq., for the General Counsel.
Gus Achey, Esq., of Denver, Colorado, for the Respondent.

289 NLRB No. 104

DECISION

STATEMENT OF THE CASE

WILLIAM L. SCHMIDT, Administrative Law Judge. I heard this matter on 9 July 1987[1] at Denver, Colorado. The proceeding is based on a charge filed 10 March by International Brotherhood of Teamsters, Chauffeurs, Warehousemen & Helpers of America, AFL-CIO[2] Local 13 (Charging Party or Union) alleging that Francis J. Fisher, Inc. (Respondent or Employer) violated Section 8(a)(1) and (5) of the National Labor Relations Act (the Act). Pursuant to that charge the Regional Director for Region 27 of the National Labor Relations Board (NLRB or Board) Region 27 issued a complaint on 23 April alleging that Respondent violated Section 8(a)(5) of the Act when it: (1) bypassed the Union and dealt directly with employees the Union represents on 24 November 1986; (2) refused to bargain in good faith with the Union since 15 January; and (3) unilaterally altered wages and working conditions on 9 March. The complaint also alleges Respondent independently violated Section 8(a)(1) of the Act when its owner and president Jean Sharkey told employees on 24 November 1986 that as of March there would be no more union and its vice president Don Klaversma solicited employees for information concerning the working conditions they desired in March.

On 30 April Respondent filed a timely answer wherein it admitted certain allegations of the complaint and denied others, including the unfair labor practices alleged.

Having carefully considered the record, the demeanor of the witnesses as they testified and the parties' posthearing briefs, I now make the following

FINDINGS OF FACT

I. THE EVIDENCE

A. *Relevant Background*

Respondent is an old Denver firm established in 1889 that sells construction materials.[3] In 1935 ownership of Respondent passed from the heirs of its founders to the Goody family and the Union, a labor organization within the meaning of Section 2(5) of the Act, and became the representative of Respondent's drivers and warehousemen. The collective-bargaining relationship between Respondent and Union proceeded peacefully for the next 50 years. The most recent agreement, having a term from 1 March 1984 to 1 March 1987, was concluded following five bargaining sessions in 1984.[4]

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[1] If not specified all further dates refer to the 1987 calendar year.

[2] On 1 November 1987 the Teamsters International Union was readmitted to the AFL-CIO. Accordingly, the name of the Union has been amended to reflect that change.

[3] Respondent sells to the retail and nonretail trade. Annually its sales have exceeded $500,000 and its direct inflow exceeded $50,000. Accordingly, Respondent meets the Board's announced standard for exercising jurisdiction over the labor dispute involved here.

[4] Throughout this decision are references to an agreement expiring 8 March. It is the same agreement. As found below, the parties orally extended the agreement from its 1 March expiration through 8 March.

For about 20 years prior to 1982 Jean Sharkey and her husband, Walter M. Goody, Jr., successfully operated the business. In large measure this success was due to a personal arrangement permitting Goody the exclusive right to distribute a waterproofing product manufactured by Thoro Systems, a firm ultimately consumed in a merger with the Beatrice Company. With the resultant boom this arrangement produced, Respondent expanded beyond its historical roots in Denver by adding a branch outlet in Casper, Wyoming.

Good times and humans are not eternal. In 1982 Goody died. The exclusive arrangement for the lucrative waterproofing product ended with his life. In addition to her personal loss, Sharkey was left to deal with the business ramifications of Goody's death.

The effects were not immediate but in 1984, Respondent was confronted with competitors for its principal product. By 1985 Respondent's income statement reflected a loss exceeding $81,000.[5] The following year's income statement reflected a $36,000 loss on net sales, which were $258,000 lower than those of 1985.[6] The January 1987 statement reflected a $6100 loss. According to Sharkey the loss had risen to approximately $30,000 by May 1987.

Certain efforts to retrench Respondent's operations were taken in response to these losses. They included:

1. The Casper branch was closed and its capital equipment was relocated to Denver or sold.

2. The number of bargaining unit employees in Denver was reduced from five to three between 1984 and the end of 1986. In January 1987 one additional bargaining unit employee was laid off.

3. By April 1987 Respondent relocated its Denver operation from quarters requiring a lease payment in excess of $9000 per month to a location where the lease payment is $1600 per month.[7]

4. In mid-January 1987 the pay of the five salaried office employees, including Klaversma and Sales Manager Clarence Robert, was reduced.[8] This was accomplished by a variety of methods. The elimination of Robert's commission earnings resulted in a $600 per month pay reduction. Bookkeeper Marcie Bishop's salary was reduced by $400 per month. Klaversma's and Tenice Goodman's pay were not reduced but their hours of work were extended. Sharkey relinquished her salary altogether in favor of her son who was hired for sales work. Finally, Respondent's profit-sharing plan for nonunit employees was eliminated. Following these salary actions, the two remaining unit employees were Respondent's highest paid employees by a significant margin.

5. Several vehicles were sold in 1986 and early 1987. Those sold in January 1987 produced income in the amount of $4800 and thereby reduced the loss for that month from $10,900 to $6100.

During this retrenchment period, Sharkey made no moves that affected the unit employees' contractual benefits. After participating in the 1984 labor negotiations, Sharkey's perception was that on the conclusion of the 1984–1987 agreement she would be free to legally adjust the unit labor costs promptly as she was of the view even as late as the hearing that she would not be obliged to adhere to the agreement in any manner once it expired.

In the meantime, Sharkey remarried and relocated her personal residence to Indiana. However, she returns to Denver for approximately 1 week per month to oversee Respondent's operations. In her absence, Klaversma is the principal executive in charge of the operation. There is little or no evidence that he is authorized to conduct Respondent's business with the Union.

B. *The Alleged Unfair Labor Practices*

1. The 8(a)(1) allegations

On 11 November 1986 Sharkey met with the unit employees primarily to reassure them that Respondent was not going to close its doors or declare bankruptcy as widely rumored. In addition to Sharkey, Klaversma and the three unit employees, Richard Einertson, Paul LeGault, and Paul Vestal, were present.

According to LeGault, Sharkey reassured the employees that "the company was not for sale and stuff like that." However, Sharkey did inform the employees that the company was "hurting financially" and that the nonunit employees "hadn't had raises in a certain period of time." Sharkey appealed to the employees to pull together so they could "make a go out of the company."[9]

LeGault testified that after Sharkey spoke, Einertson asked her if "we were going to go without the union." Sharkey responded to Einertson saying "for us to get together and figure out what we wanted . . . and let [Klaversma] know . . . that we'd work something out to go without the union." Einertson then asked if the unit employees "would get a chance to vote on this or anything." In response, Sharkey said the employees would not have a chance to vote as, apparently, "there would be no union contract after March lst."

Because the pension plan was of concern to LeGault, he asked Sharkey about that matter. Sharkey responded that "something would be done about a profit-sharing plan."

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[5] More precisely the loss was $81,487.24. Nearly 43 percent of this loss could be attributed to a bad debt writeoff in the amount of $35,016.85 for the month of December 1985, the final month of Respondent's fiscal year. By contrast, the bad debt writeoff for December 1986 was $2913.05. The total bad debt writeoff for 1985 was $46,413.83. The 1986 income statement does not indicate the total of that writeoff for that year.

[6] Respondent's net sales (gross sales plus returns and allowances minus trade discounts) in 1985 were $1,371,250.77. The net sales in 1986 were $1,112,674.33.

[7] This finding is based on Mrs. Sharkey's testimony. However, the 1985 and 1986 income statements reflect rent payments of $62,716.72 and $68,988.40, respectively, or considerably less per month than Sharkey stated at the hearing.

[8] The General Counsel attempted to establish—without success—that Robert was a supervisor. Robert, who is essentially an outside salesman, possesses and exercises only routine authority. Although Sharkey would expect Robert to exercise common sense in Klaversma's absence by sending an intoxicated driver home, such situations have never arisen.

[9] All five individuals who testified concerning this meeting are in substantial accord concerning this aspect of the meeting.

LeGault also recalled Klaversma requested that the unit employees let him know what the drivers wanted after they had an opportunity to get together.

Like LeGault, Einertson testified that Sharkey spent the first part of the meeting reassuring employees that she intended to keep the business going. Following a discussion concerning holidays, Einertson asked "about negotiations come March lst . . . ." Sharkey replied "that come March lst . . . we would be going non-union—there would be no union as of March lst." None of the employees responded but Klaversma said that the employees should "come to me and tell me what you want."

As for the pertinent part of the meeting concerning the Union, Vestal testified that Einertson asked "What about the union?" Purportedly Sharkey replied that "come March there will be no union." Later, at the end of the meeting, Klaversma told the employees "to let . . . the Company know what [the unit employees] wanted."

Sharkey testified that she was "not real sure" if there was any discussion about the Union at this meeting. She said she "just [did not] really know."

Klaversma recalled that following Sharkey's introductory remarks one (unspecified) driver asked: "What about the union?" Klaversma testified that he "really did not remember what [Sharkey's] reply was at the time" but "[t]hey went on discussing that, and I really didn't get that much involved in that one." When asked directly if Sharkey had said that when the contract ended in March there would be no union, Klaversma responded: "I don't recall her saying that, specifically, no." As for remarks the drivers attributed to Klaversma suggesting that he solicited proposals about working conditions after the contract ended, Klaversma testified that he only asked the employees to tell him about their complaints so he would not have any morale problems.

2. The 8(a)(5) allegations

For a number of years Respondent has retained the Mountain States Employers' Council (MSEC) to conduct its labor negotiations. In mid-December 1986 Gus Achey—an MSEC representative who normally handled Respondent's labor negotiations—sent a written notice to the Union's president terminating the existing agreement effective 1 March, its expiration date. The document is a typical "opening letter" in which Achey also invited the Union to arrange "a meeting to discuss a new Agreement."

By mid-January 1987 the Union met with Respondent's employees and drafted a list of proposals for a new agreement which were hand-delivered to Achey at MESC. In late January 1987 Union Representative George Del Monte wrote to inform Achey that the Union "is prepared to meet for the purpose of negotiating an agreement with [Respondent]." About the same time Del Monte reached Achey on the telephone and was informed Respondent would be unable to meet until 27 February, the date of Sharkey's next scheduled return to Denver. Because Sharkey was unavailable until that late date, Achey agreed to extend the agreement to 6 March and tentatively agreed to meet with the Union on 2 and 5 March.[10]

In late February, Sharkey arrived back in Denver as planned. On 1 March she met with MSEC representative Joe Downing to review Respondent's financial predicament and formulate its proposals.[11] By the conclusion of this meeting, Respondent planned to propose the following:

1. Reduce the hourly pay of unit employees from $9.30 to $6.50 per hour.
2. Delete pension contributions by Respondent.
3. Delete the maintenance-of-standards clause (contract article 5).
4. Change the time and one-half premium pay for overtime work from all hours after 8 per day to 40 per week.
5. Switch unit employees from the Union's health and welfare plan to the Respondent's plan established for non-unit employees.
6. Establish a vacation moritorium until the end of the year, Respondent's slow season.
7. Limit the contract term to 7 months (or 1 October).

The Union's proposals delivered to Respondent in mid-January were dramatically different. They provided

1. Increase hourly pay by 40 cents in each year of a three-year agreement.
2. Increase the Respondent's pension contribution by 14 cents per hour each year of the agreement.
3. Require Respondent to maintain health and welfare coverage at no less than the current level.
4. Maintain all other contract provisions.

The following day, 2 March, the Respondent and union negotiators met for the first bargaining session. Downing was Respondent's primary spokesman, aided by Sharkey and Marcie Bishop, the Respondent's bookkeeper. Del Monte spoke for the Union. He was assisted by fellow business agent Ray Tefrey.

During the first portion of the meeting Downing explained the Respondent's financial position at some length, providing the union agents with copies of its income statements for the 1985 and 1986 calendar years as well as its January 1987 income statement, the last available. Although Del Monte could not specifically recall the extent of the losses suffered by Respondent for that period, he clearly remembered Respondent's claim that it was losing money and that the office employees' salaries had been reduced by one means or another. After stressing that any increases in wages and benefits were out of the question and the need for immediate financial relief,[12] Downing slowly set forth Respondent's proposals, enabling the union agents to write them down. Discussions of the Respondent's proposals focused primarily on the relative merits of the health and welfare plans for unit and nonunit employees. During this exchange the union agents were informed that the purpose of this proposal was to realize savings that might accrue under the company plan by enlarging its group coverage. After approximately an hour and a half, the session was adjourned until 5 March.

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[10] There is evidence that Sharkey was somewhat upset at Achey's action of extending the agreement.

[11] Achey enlisted his colleague Downing as a substitute because of the press of other business.

[12] Del Monte recalled that Downing said something had to be done by Monday, 9 March.

Between the two bargaining sessions, the union representatives met with the unit employees to review the Respondent's proposals with them.[13] As explained by Del Monte, the union agents "wanted to know from [the employees], and get some direction from them, on what was the bottom line, what was the least they felt that they could work for and what conditions they wanted us to insist would be maintained. As a result of this meeting, the union agents were instructed to first seek a wage freeze and if that was not possible then they could work for a "little less than they were making at the time." However, the employees "didn't feel that they could . . . survive on what the company had offered." In addition, the employees indicated that they could "reluctantly agree to the overtime-after-forty proposal."

The second bargaining session was held on 5 March at the Union's offices. At the outset of this session the Union proposed a wage freeze, which was promptly rejected. The Union then proposed to reduce the wage rate to $8.90 per hour and agreed with the overtime-after-forty proposal. Downing responded that substantially more relief was required. A discussion ensued concerning the Union's willingness to assist Sharkey in filing applications with the city of Denver and the State of Colorado for certification as a minority contractor, a status that presumably would accord Respondent some type of preferential treatment in doing business with those governmental entities. Sharkey, however, had already sought such certification in the past 2 years. The union agents then questioned Respondent's agents closely about the nonunit health plan. That discussion disclosed that Respondent was uncertain of the savings that would be realized from adding the unit employees to the nonunit group coverage. For this reason the union negotiator[14] asked Respondent to extend the agreement while this information was obtained from Respondent's insurance carrier.

At some point in this 1-1/2- to 2-hour meeting Respondent asked for a caucus from which they emerged with a counterproposal. This counterproposal differed from the Respondent's earlier proposal in that (1) the demand to include unit employees in the nonunit health plan was dropped; (2) the vacation moratorium was dropped; and (3) the contract term was shortened from 1 October to 15 September. Downing stressed that the reason for the switch in the health plan proposal was that time was of the essence in obtaining relief. Downing further stated that the Respondent's audit reports showing business conditions for the busier summer months would probably be available by 12 September in time for review by the Union for negotiation of a new agreement. Downing stated that this proposal was the Respondent's final proposal which it intended to implement on 9 March.

The Union responded by suggesting that the unit employees could probably earn more on unemployment compensation than by working at the Respondent's proposed wage rate. Downing told the Union that if the employees chose to leave, the Respondent would not contest their claim for unemployment compensation and that this offer would remain open while the employees were given an opportunity to see how well they could survive on the lower wage rate. Del Monte also recalled that the Union asked if Respondent would consider making the employee pension contributions. Downing responded that employees would have to pay that cost themselves.[15]

The Union also proposed extending the existing agreement until there was an opportunity to have its accountants audit the Respondent's books. Although Respondent agreed to make its books available for audit at any time, Downing told the Union that the Respondent was not in a position to await an audit before it made changes in its wage rates. The Respondent also agreed to make its books available for an audit in September but declined to commit itself to increase wages in September if it was making money because of its tax deficiencies and debt situation.[16]

Del Monte recalled that the union agents (he did not specify which ones) expressed the view that further negotiations were needed—that there had not been sufficient time to consider Respondent's proposals—and that they did not believe an impasse existed. Nevertheless, the 5 March meeeting concluded with the Respondent's request that the Union seek ratification of the Respondent's final proposal. The union agents told Respondent's negotiators that they would take Respondent's proposals to the employees to be voted on but that they could not recommend such an agreement. Nevertheless, Downing provided them with his home number and asked the Union to notify him if the Respondent's proposal was ratified. Downing told the Union agents that if the Respondent's proposals were not ratified, they would be implemented the following Monday anyway. Downing extended the existing agreement through 8 March.

Downing recalled that after the 5 March meeting there were two relatively brief telephone exchanges between Del Monte and himself, one on 5 March and one on 6 March. During one of these exchanges, he agreed that the Respondent would pay prorated vacation pay to the unit employees if they chose to leave and draw unemployment insurance against the Respondent's account. He also recalled that Del Monte again expressed the view that the negotiators were not at an impasse. In effect, Downing felt that in light of the Union's reluctance to agree to its proposals and the limited wage reduction ratified by the employees at the Threewit-Cooper Company,[17] one of Respondent's principal competitors, the Union would not agree to a contract that put Respondent in a significantly better position than this competitor.

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[13] Presumably this session was attended by at least Vestal and Einertson. Whether LeGault—who had been laid off approximately 45 days earlier—attended is unknown.

[14] The Union's principal spokesperson at this portion of the meeting appears to have been Ray Tefrey who did not testify.

[15] Del Monte said Respondent's stand on the pension contributions was a major matter with the two employees involved as neither had worked the 10 years necessary in covered employment to have a vested interest in the Union's pension plan. At the time of the hearing Vestal and Einertson had worked for Respondent over 7 years.

[16] While the income statements in evidence reflect a variety of tax payments as operating expenses, they do not indicate if such payments were sufficient to meet Respondent's tax liabilities. The statements reflect no obvious loan or interest payments.

Del Monte recalled that the first telephone conversation occurred during the afternoon of 5 March. He said that he told Downing that the Union had a counterproposal and that further negotiations were needed as the parties were not at impasse.[18] Downing apparently disagreed as he told Del Monte that Respondent had made its final proposal.

On the morning of 6 March, Del Monte again telephoned Downing to request that negotiations continue. Del Monte proposed a meeting for 19 March but apart from the fact that no such meeting was ever agreed on, Downing's response is unknown. Del Monte reported that Downing again stressed that Respondent had made its final proposal.

Del Monte wrote to Downing on 6 March (with a copy to Sharkey and the unit employees.) In the letter, Del Monte repeated his belief that negotiations were not at an impasse. The letter continues: "Due to the limited time allowed by the company for negotiations this Local Union requests further meetings as soon as possible as there are still many issues to discuss and contract articles to address." Del Monte's letter also states that the Union has a counterproposal that it desired to present, suggests a 19 March meeting and requests a response to arrange a time and date for a meeting.

Del Monte received no response to his 6 March letter until approximately 17 or 18 March when Downing called his office and requested to meet at 8:30 a.m. on 19 March. When Del Monte learned of this call he telephoned Downing's office and spoke with a secretary in an effort to arrange a 9:30 or 10 a.m. alternative meeting time on 19 March as he had, in the meantime, made another commitment at 8:30. The alternative times proved unsatisfactory for Downing's schedule so a further meeting between the parties never occurred.

Meanwhile, on 9 March Respondent reduced the unit employees' hourly rate from $9.30 to $6.50, discontinued pension contributions, and began paying overtime premium pay after 40 hours of work per week instead of 8 hours per day. On 10 March, the Union filed the instant charge.

C. *Further Findings and Conclusions*

1. The independent 8(a)(1) allegations

Section 8(a)(1) of the Act provides that it is an unfair labor practice for an employer to "interfere with, restrain, or coerce employees" in the exercise of their Section 7 rights. 29 U.S.C. § 158(a)(1). In essence, Section 7 provides that employees have the right to engage in union or concerted activity for the purpose of collective bargaining or other mutual aid or protection, or to refrain from such activities.

I find that the account of the employee-witnesses about Sharkey's remark at the November 1986 meeting that there would be no more union after March and Klaversma's followup remarks that the employees should decide what they wanted and come to him are credible. Neither Sharkey nor Klaversma provided a clear-cut denial concerning the reported remarks. Read together, the two remarks convey the message that the Respondent was proceeding to unilaterally dismantle the collective-bargaining system by which employee wages, hours, and working conditions were determined. Announcements of this nature reasonably tend to cause employees to be apprehensive and fearful of persisting against their employer's will in exercising the right they have under Section 7 to bargain collectively. Accordingly, I find the remarks by Sharkey and Klaversma on this occasion to be coercive within the meaning of Section 8(a)(1) of the Act, as alleged in the complaint.

2. The 8(a)(5) allegations

Section 8(a)(5) of the Act provides that it is an unfair labor practice for an employer "to refuse to bargain collectively with the representative of his employees." (29 U.S.C. § 1158(a)(5).) Section 8(d) of the Act defines the duty to bargain collectively as "the performance of the mutual obligation of the employer and the representative of the employees to meet at reasonable times and confer in good faith with respect to wages, hours, and other terms and conditions of employment, or the negotiation of an agreement or any question arising thereunder." (29 U.S.C. § 158(d).)

Justice Felix Frankfurter, dissenting in *NLRB v. Truitt Mfg. Co.*, 351 U.S. 149, 154–155 (1956), observed that:

> These sections 8(a)(5) and 8(d) obligate the parties to make an honest effort to come to terms; they are required to try to reach an agreement in good faith. "Good faith" means more than merely going through the motions of negotiating; it is inconsistent with the predetermined resolve not to budge from an initial position. But it is not necessarily incompatible with stubbornness or even with what to an outsider may seem unreasonableness. A determination of good faith or of want of good faith normally can rest only on an inference based upon more or less persuasive manifestations of another's state of mind. The previous relations of the parties, antecedent events explaining behavior at the bargaining table, and the course of negotiations constitute the raw facts for reaching such a determination.

Over the years certain more specific principles have evolved that provide flesh for the statutory skeleton set forth above. Among other things, an employer is required to maintain the status quo established by an expired collective-bargaining agreement until the parties reach a new agreement or bargain to an impasse. *Teamsters Local 175 (Bell Transit) v. NLRB*, 788 F.2d 27 (D.C. Cir. 1986). If an employer unilaterally institutes changes in wages, hours, or working conditions absent an impasse in the negotiations for a new agreement, the duty to bargain in good faith is violated. *NLRB v. Katz*, 369 U.S. 736 (1962); *Stone Boat Yard v. NLRB*, 715 F.2d 441, 444 (9th Cir. 1983).

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[17] According to Downing, the Threewit-Cooper employees ratified an agreement providing for a 30-cent-per hour wage reduction and overtime premium pay after 40 hours on 5 March.

[18] The terms of the counterproposal are not known. Nor does it appear that Del Monte attempted to report the counterproposal terms to Downing during this conversation or at any later time.

In addition to foregoing basic ground rules establishing the starting point for negotiations, it has been observed that the duty to bargain in good faith contemplates "cooperation in the give and take of personal conferences with willingness to let [the] ultimate decision follow a fair opportunity for the presentation of pertinent facts and arguments." *NLRB v. Jacobs Mfg. Co.*, 19 F.2d 680, 683 (2d Cir. 1952). Good-faith bargaining precludes laying plans for comprehensive changes and timing their announcement or implementation so as to preclude any meaningful negotiation. *J. P. Stevens*, 240 NLRB 579 (1979). To these ends the courts long ago established the requirement that an employer pleading an inability to pay furnish the bargaining representative with information sufficient to substantiate such claims. *NLRB v. Truitt Mfg. Co.*, supra; *NLRB v. Jacobs Mfg. Co.*, supra.

Here the 9 March unilateral changes in wages and benefits are undisputed. The sole question concerns the presence or absence of a bargaining impasse when these changes occurred. The existence of an impasse is a fact question. In *Hi-Way Billboards*, 206 NLRB 22, 23 (1973), the Board stated:

> A genuine impasse in negotiations is synonymous with a deadlock; the parties have discussed a subject or subjects in good faith, and despite their best efforts to achieve agreement with respect to such, neither party is willing to move from its respective position. [footnotes omitted].

In *Taft Broadcasting*, 163 NLRB 475, 478 (1967), the Board identified numerous factors that serve to aid in determining the existence of an impasse:

> Whether a bargaining impasse exists is a matter of judgment. The bargaining history, the good faith of the parties in negotiations, the length of the negotiations, the importance of the issue or issues as to which there is disagreement, [and] the contemporaneous understanding of the parties as to the state of negotiations are all relevant factors to be considered in deciding whether an impasse in bargaining existed.

Regardless, an employer may not "parlay an impasse resulting from its own misconduct into a license to make unilateral changes." *Wayne's Olive Knoll Farms*, 223 NLRB 260, 265 (1976).

Overall, certain circumstances here suggest the negotiations may have been practically doomed before they began. First, there were several signals that a significant upheaval was likely especially where, as here, the unit employees enjoyed the highest pay rates. Over the period of the recently expired agreement, the size and scope of Respondent's business operation was steadily shrinking. The Casper branch was closed, capital equipment was sold, the unit employment was shrinking, and rumors were afloat that the enterprise was going under. In January as the Union and the unit employees were formulating proposals for wage and benefit increases, one additional unit employee was laid off, salary cuts ranging from $400 to $600 per month were imposed on two of the four unrepresented employees, the hours of the other two were extended without added compensation, and the owner relinquished her own salary in favor of another full-time salesperson albeit that person was her son. Added capital equipment was sold to reduce January losses and Respondent was in search of other lower cost quarters. These factors signaled the probability of concession bargaining.

Second, when negotiations did commence, the Respondent's dire financial circumstances were detailed for the Union's negotiators and the urgency of Respondent's need for immediate relief was emphasized. The salient feature of Respondent's proposal, which lends credence to the urgency of the situation, is, the fact that Respondent was proposing a short-term agreement of 6 or 7 months' duration rather than a long-term commitment.

Third, although some modifications in position were made by both Respondent and the Union at the second session, progress toward a wage and benefit adjustment of the magnitude sought by the Respondent was much slower. Del Monte conceded in his testimony the Union's unwillingness to consider a cut in wages of the magnitude sought by the Respondent. Del Monte's report of the unit employee attitude as reflected in the direction given the Union agents between the two bargaining sessions to seek a pay freeze or a concession in the range of 20 or 30 cents per hour strongly indicates that they too were unwilling to readily accept Respondent's proposed pay. The General Counsel attempts to deflect attention away from this central fact by arguing that Respondent's wage proposal was arbitrary and capricious based on Sharkey's testimony that it was within the range of wage rates at nonunion firms in the area. That argument misses one central point, to wit, the wage reduction Respondent sought to impose on the unit employees was also within the range of cuts already imposed on nonunit employees about 2 months earlier.

Fourth, at the conclusion of the second bargaining session the Union specifically stated its unwillingness to recommend the Respondent's final proposal. This fact, coupled with the concession made that employees could quit to draw unemployment without a contest from Respondent and the limited nature of concessions in the about-to-be-ratified agreement with one of Respondent's competitors, lends some credence to Downing's assessment that the parties were at an impasse.

Despite the high probability that attempts to negotiate a new agreement here would produce an impasse, I am unable to conclude that an impasse—as the term has previously been used by the Board and the courts—occurred so quickly. The question for me to decide is not whether an impasse would occur but rather whether an impasse did occur and, if so, when. Although the number and extent of the bargaining sessions are not controlling considerations,[19] they are factors which, as the *Taft Broadcasting* case suggests, are significant. When those factors are coupled with the magnitude of the concessions sought by Respondent, the bargaining here simply does not reflect the type of fixed resolve on both sides normally found in impasse situations.

Instead, the facts here show that the Union approached negotiations with a compromising attitude. In the 3 or 4 hours of face-to-face negotiations, the Union abandoned nearly all of its original proposals, accepted the Respondent's position on overtime premium pay, discussed a potential pay reduction albeit not of the magnitude Respondent sought, achieved agreement for an alternate course of action if employees were unable to "live" on the pay scale Respondent proposed, and achieved concessions from Respondent concerning the health and welfare plan and the vacation moritorium. In addition the Union sought an additional meeting to present another proposal. Objectively viewed, these circumstances strongly suggest that the parties were not yet completely deadlocked. Rather, they suggest that at least the Union's position remained fluid while the parties engaged in face-to-face negotiations.

Other atmospheric factors also detract from a conclusion that the parties arrived at a deadlock after "exhaustive" negotiations. Thus, because of Sharkey's unavailability, the parties did not commence negotiations until 2-1/2 months after Respondent sent its termination notice and 1-1/2 months after the Union made its initial proposal. When negotiations did commence, Respondent artifically compressed the time available for negotiations into a 1-week period. Moreover, Respondent insisted on the Union's acceptance of huge concessions without providing the Union with an opportunity to have Respondent's financial records evaluated by independent experts. This was at the very time when the Union was in the process of concluding an agreement with one of Respondent's competitors which involved concessions of a much smaller magnitude.[20] Although Respondent did provide the union agents with the financial statements for the previous 2 years plus the month of January, it is reasonable to infer in light of the Union's request for a broader independent analysis that its negotiators were not competent business analysts. In this circumstance, it would be unreasonable to conclude that the Union requested further substantiation of Respondent's financial position merely to prolong negotiations. Rather, an expert analysis could have provided the union agents with a more persuasive basis to educate unit employees for the need to be more realistic about their expectations concerning an agreement or to provide them with more convincing arguments in further negotiations with Respondent. Moreover, certain aspects of Respondent's financial records in evidence indicate that an expert analysis would be appropriate on the Union's part. Finally, Sharkey's misapprehension that the terms of a collective-bargaining agreement could be abrogated at the end of its term like any ordinary contract suggests that the Respondent's limitation on the bargaining process resulted from a predetermined plan and not from an objective assessment of the Union's bargaining flexibility.

For the foregoing reasons, I find that although obtaining an agreement as circumstances existed here would have been quite difficult, the parties had not yet reached a complete deadlock when Respondent implemented the new wage rates and abolished the pension contributions of 9 March. Accordingly, by doing so, Respondent violated its duty to bargain in good faith as defined in Section 8(a)(5) and (d) of the Act.

II. THE EFFECT OF THE UNFAIR LABOR PRACTICES ON COMMERCE

The activities of the Respondent set forth above, occurring in connection with the Respondent's business operations, have a close, intimate, and substantial relationship to trade, traffic, and commerce among the several states and tend to lend to labor disputes burdening and obstructing commerce and the free flow of commerce.

CONCLUSIONS OF LAW

1. Respondent is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

2. The Union is a labor organization within the meaning of Section 2(5) of the Act.

3. The following employees of Respondent constitute a unit appropriate for purposes of collective bargaining within the meaning of Section 9(b) of the Act:

> All truck drivers and warehousemen, excluding office and clerical employees, salesmen, executives, foremen, and all supervisory employees with the authority to hire, discharge, promote, discipline, or otherwise effect changes in the status of employees.

4. By telling employees that there would be no union after March 1987 and requesting that they inform Respondent of the working conditions they desired after March 1987, Respondent engaged in an unfair labor practice within the meaning of Section 8(a)(1) of the Act.

5. By unilaterally changing the wages and benefits of employees on 9 March without agreement of the Union or without reaching an impasse in negotiations concerning such changes, Respondent engaged in an unfair labor

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[19] For example, in *Betlem Service Corp.*, 268 NLRB 354 (1983), the Board adopted Judge Ricci's conclusion that the parties there were at impasse following two formal negotiating sessions. However, in that case, the union adamantly refused to consider any agreement other than a new agreement negotiated with another employer. There the Board stated:

> Generally, [we] will not find that an impasse has occurred unless the negotiations between the parties have been exhaustive. Here, the parties had engaged in only two formal bargaining sessions with subsequent contact through two telephone conversations. We agree with the judge, however, that the Union's refusal to consider any agreement other than the new local agreement caused impasse early in the negotiations.

But cf. *NLRB v. Jacobs Mfg.* supra; *Servis Equipment Co.*, 198 NLRB 266, 269 (1972).

[20] The Respondent's most recent agreement with the Union contains no "most favored nations" clause. Whether the Threewit-Cooper agreement contained such a clause is not known. Regardless, the Union could not have been expected realistically to agree on a $2.80 per hour wage reduction on the very day it sought employee ratification to an agreement with Respondent's competitor calling for only a 40-cent-per-hour wage reduction.

practice within the meaning of Section 8(a)(1) and (5) of the Act.

6. The unfair labor practices specified in paragraphs 4 and 5, above, affect commerce within the meaning of Section 2(7) of the Act.

REMEDY

To remedy the unfair labor practices found above, Respondent must cease and desist its unlawful conduct and take the affirmative action specified below to effectuate the purposes of the Act.

Affirmatively, Respondent must bargain in good faith with the Union if requested to do so. Additionally, Respondent must restore and maintain the terms and conditions of employment of the unit employees to those specified in the collective-bargaining agreement, which expired 8 March 1987 until a new agreement is concluded or a valid impasse in bargaining occurs.

The Respondent must also make unit employees whole for the loss of pay they incurred as a consequence of the unlawful change in their wage rate on 9 March 1987, with interest. The amount of backpay due each employee shall equal the difference between their pay as calculated using the wage rate in the expired agreement and the amount they actually received for the period beginning on 9 March 1987 and ending on the date Respondent restores the appropriate wage rate. The appropriate method of determining backpay is specified in *Ogle Protection Services*, 189 NLRB 682, 683 (1970). The appropriate method of determining the interest on the backpay due is specified in *New Horizons for the Retarded*, 283 NLRB 1173 (1987). Respondent must also make pension plan contributions on behalf of the unit employees retroactively to 9 March 1987. The method of determining the amount of those contributions and any interest thereon is specified in *Merryweather Optical Co.*, 240 NLRB 1213 (1979).

Finally, Respondent must post the attached notice to inform employees of their rights and the outcome of this matter.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[21]

ORDER

The Respondent, Francis J. Fisher, Inc., Denver, Colorado, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Refusing, on request, to bargain in good faith with Local 13, International Brotherhood of Teamsters, Chauffeurs, Warehousemen & Helpers of America, AFL-CIO as the exclusive collective-bargaining representative of its employees in the following appropriate unit:

> All truck drivers and warehousemen, excluding office and clerical employees, salesmen, executives, foremen and all supervisory employees with the authority to hire, discharge, promote, discipline, or otherwise effect changes in the status of employees.

(b) Changing the terms and conditions of employment of the unit employees from those specified in the collective-bargaining agreement with Teamsters Local 13, which expired on 8 March 1987 without reaching an agreement with Teamsters Local 13 concerning such changes or a valid impasse in bargaining.

(c) Telling employees there would be no union when its collective-bargaining agreement expires and requesting that they formulate their own terms and conditions of employment for submission directly to Respondent.

(d) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action designed to effectuate the policies of the Act

(a) On request, bargain with the Union as the exclusive representative of the employees in the following appropriate unit concerning terms and conditions of employment and, if an understanding is reached, embody the understanding in a signed agreement:

(b) Restore and maintain the wages, benefits, and other terms and conditions of employment of the unit employees to those specified in the collective-bargaining agreement, which expired on 8 March 1987, until a new agreement is bargained or a valid impasse in bargaining occurs.

(c) Make employees whole, with interest, for the difference in pay that they would have received under the collective-bargaining agreement that expired on 8 March 1987 and the amount of pay they actually received for the period following 9 March 1987 in the manner specified in the remedy section of the decision.

(d) Make all contributions required under the pension plan established in the collective-bargaining agreement that expired on 8 March 1987, with interest if any is required, in the manner specified in the remedy section of the decision.

(e) Preserve and, on request, make available to the Board or its agents for examination and copying, all payroll records, social security payment records, timecards, personnel records and reports, and all other records necessary to analyze the amount of backpay due under the terms of this Order.

(f) Post at its Denver, Colorado, facility copies of the attached notice marked "Appendix."[22] Copies of the notice, on forms provided by the Regional Director for Region 27, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material.

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[21] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

[22] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

(g) Notify the Regional Director in writing within 20 days from the date of this Order what steps the Respondent has taken to comply.

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

After a hearing before an administrative law judge at which we were provided with the opportunity to present evidence and argument, the National Labor Relations Board concluded that we violated the National Labor Relations Act. To remedy this matter the National Labor Relations Board has ordered us to post this notice and comply with its terms.

The National Labor Relations Act gives employees the right to organize themselves, to join or assist unions, to engage in collective bargaining with their employers through representatives freely chosen by a majority of employees in an appropriate bargaining unit, to engage in other group activities for the mutual aid and protection on the job, and to refrain from any or all of the above activities.

WE WILL NOT refuse to bargain in good faith with Local 13, International Brotherhood of Teamsters, Chauffeurs, Warehousemen & Helpers of America, AFL-CIO as the exclusive bargaining representative of our employees in the following appropriate unit:

> All truck drivers and warehousemen, excluding office and clerical employees, salesmen, executives, foremen and all supervisory employees with the authority to hire, discharge, promote, discipline, or otherwise effect changes in the status of employees.

WE WILL NOT change the terms and conditions of employment established in our agreement with Teamsters Local 13 which expired on 8 March 1987 until a new agreement or a valid impasse in bargaining is reached.

WE WILL NOT tell employees there would be no union when our collective-bargaining agreement with Teamsters Local 13 expires and request that employees tell us directly about the terms and conditions of employment they want.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL, on request by Teamsters Local 13, bargain in good faith concerning rates of pay, wages, hours, and other terms and conditions of employment for our employees represented by that union and, if an understanding is reached, embody such understanding in a signed agreement.

WE WILL restore and maintain the terms and conditions of employment contained in our expired agreement with Teamsters Local 13, including the wage rates and pension benefits, until a new agreement or a valid impasse in bargaining is reached.

WE WILL make unit employees whole, with interest, for the loss of pay they incurred because we unilaterally established new wage rates on 9 March 1987 before an agreement or impasse in bargaining with Teamsters Local 13 was reached.

WE WILL make appropriate pension plan contributions on behalf of the unit employees retroactively to 9 March 1987, with interest if required, because we unilaterally discontinued pension contributions on that date before an agreement or impasse in bargaining with Teamsters Local 13 was reached.

FRANCIS J. FISHER, INC.

Kent Products, Inc., White Cloud Division *and* **Thomas C. Stout.** Case 7–CA–26649

July 13, 1988

DECISION AND ORDER

BY CHAIRMAN STEPHENS AND MEMBERS JOHANSEN AND BABSON

On October 21, 1987, Administrative Law Judge Walter H. Maloney Jr. issued the attached decision. The Respondent filed exceptions and a supporting brief.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and brief and has decided to affirm the judge's rulings, findings,[1] and conclusions only to the extent consistent with this Decision and Order.

The judge concluded that the Respondent violated Section 8(a)(1) of the Act in November 1986 when Jackie Bulson spoke to Charging Party Thomas C. Stout. During their conversation Bulson asked Stout, inter alia, about the identity of employees involved in an organizational effort, and Stout's opinion of the union activity. Bulson further told Stout that she would relay the information Stout gave concerning the identity of the employees who were organizing to the plant manager but would leave Stout's name out of the report. The Respondent excepts to the judge's finding of violations based on Bulson's remarks, contending that Bulson was not a statutory supervisor at the time of this conversation. We find merit in the Respondent's exception.

The Respondent is a manufacturer of shifters for Ford automobiles. During November 1986, Bulson, the welding department leadperson on the first shift, was also assigned to work 2 additional hours on the second shift in order to train Stout in his duties as a robotics technician. Although the judge found that Bulson was a supervisor during her normal shift, as well as during her overtime work with Stout when the alleged unlawful conversation took place, we find that her duties and responsibilities were insufficient at that time to establish her as a supervisor under the Act.[2]

As the work leader of 12 employees on the first shift, Bulson turned on the machines in the department, provided supplies, charted and gauged parts, answered questions, and submitted production cards and production sheets for her shift. The record does not show that Bulson's responsibility for assigning work entailed the exercise of independent judgment, since assignments were made by first seeing what jobs were ready to be done and which employees had reported to work, and then directing the workers to operate the machines necessary for the jobs at hand. There was no evidence demonstrating that Bulson exercised discretion in assigning work to employees or determining the priority of work. Bulson did have authority to allow employees to leave work early due to illness or medical appointments, although she could not authorize days off. She had no power to hire or fire, but did participate in oral warnings for excessive absences. However, while she identified cases when a warning might be appropriate, no warning was given unless her supervisor and the plant manager concurred, and even then Bulson and her supervisor together discussed the problem with the employee and signed the forms documenting the warning. Bulson testified that such oral warnings were rare and that her recommendations were not always adopted by her superiors. Finally, Bulson indicated that she did not handle problems with employees who would not perform their duties, but rather would inform her supervisor of the matter.

The foregoing evidence indicates that Bulson's assignment of work to employees was routine and that her role in giving oral warnings did not demonstrate the exercise of discretion or independent judgment. Further, her allowing employees to leave work early if they were ill or had medical appointments is insufficient to establish supervisory status. We therefore conclude that Bulson was not a supervisor in November 1986 and that the Respondent did not coercively interrogate Stout and place employee union activities under company surveillance in violation of Section 8(a)(1).

AMENDED CONCLUSIONS OF LAW

Delete Conclusions of Law 2 and substitute the following:

"2. By threatening an employee with plant closure and discharge if employees engaged in strikes

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[1] The Respondent has excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

We note that in the last sentence of sec. I,B, par. 6, of his decision, the judge inadvertently named Joann Nelson rather than Jackie Bulson as the person to whom Debbie Griffis Vincent and Kenny Miller complained about the lack of premium pay for their shift.

[2] We note that from early January 1987 Bulson served in positions which the Respondent admits were supervisory positions. This fact, however, is insufficient to affect our finding that at the time of her conversation with Stout in November 1986 Bulson was not a statutory supervisor.

289 NLRB No. 105

or voted to support a union, the Respondent violated Section 8(a)(1) of the Act."

ORDER[3]

The Respondent, Kent Products, Inc., White Cloud Division, White Cloud, Michigan, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Threatening employees with plant closure and discharge if they engage in a strike or vote to support a union.

(b) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Post at the Respondent's White Cloud, Michigan plant copies of the attached notice marked "Appendix."[4] Copies of the notice, on forms provided by the Regional Director for Region 7, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material.

(b) Notify the Regional Director in writing within 20 days from the date of this Order what steps the Respondent has taken to comply.

IT IS FURTHER ORDERED that the complaint is dismissed insofar as it alleges violations of the Act not specifically found.

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

WE WILL NOT threaten employees with discharge or plant closure if they engage in a strike or vote to be represented by a union.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

KENT PRODUCTS, INC., WHITE CLOUD DIVISION

Mark D. Rubin, Esq., for the General Counsel.

Gregory M. Palmer, Esq., of Grand Rapids, Michigan, for the Respondent.

DECISION

STATEMENT OF THE CASE

WALTER H. MALONEY JR., Administrative Law Judge. This case came on for hearing before me at Grand Rapids, Michigan, on June 25, 1987, on an unfair labor practice complaint,[1] issued by the Regional Director for Region 7 and amended at the hearing, which alleges that Respondent Kent Products, Inc., White Cloud Division,[2] violated Section 8(a)(1) of the Act. More particularly, the amended complaint alleges that the Respondent instructed employees not to engage in concerted protected activities, threatened to close the plant if a union were voted in, interrogated employees concerning their union activities, and discharged Charging Party Thomas C. Stout because he engaged in concerted, protected activities. The Respondent denies each of these allegations and asserts that it discharged Stout because Stout engaged in a fight on company property that was provoked, at least in part, by disparaging statements and scandalous accusations that he had made about a fellow employee. On these contentions the issues were drawn.[3]

FINDINGS OF FACT

I. THE UNFAIR LABOR PRACTICES ALLEGED

Respondent operates a manufacturing facility in White Cloud, Michigan, where it produces auto parts for the Ford Motor Company. Recently Respondent was purchased by the Sparton Corporation. At White Cloud it

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[3] The judge's recommended Order includes a visitatorial clause allowing the Board to obtain discovery under the Federal Rules of Civil Procedure in the event that the Order must be enforced through contempt proceedings. Under the circumstances of this case, we find it unnecessary to include such a clause. See *Cherokee Marine Terminal*, 287 NLRB 1080 (1988).

[4] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

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[1] The principal docket entries in this case are as follows:

Charge filed by Thomas C. Stout, an individual, against the Respondent on February 17, 1987; complaint issued by the Regional Director for Region 7, against the Respondent on March 26, 1987; Respondent's answer filed on April 4, 1987; hearing held in Grand Rapids, Michigan, on June 25, 1987; briefs filed by the General Counsel and the Respondent on August 17, 1987.

[2] I find that the Respondent is a Michigan corporation that maintains its principal place of business in White Cloud, Michigan, where it is engaged in the manufacture and sale of automotive parts. During the fiscal year ending July 1, 1986, in the course and conduct of this operation Respondent purchased at its White Cloud, Michigan plant directly from points and places located outside the State of Michigan goods and materials valued in excess of $50,000. Accordingly, the Respondent is an employer engaged in commerce within the meaning of Sec. 2(2), (6), and (7) of the Act.

[3] Transcript correction is noted and corrected.

employs approximately 125 production and maintenance employees. They were formerly represented by a labor organization, but, at some point in time not disclosed in the record, the Union was decertified.

Until January 1987, the Respondent maintained a two-shift operation. The first shift reported at 7 a.m. and left at 3:30 p.m. The second shift reported at 3:30 p.m. and stayed until midnight. The second shift received a 10-cent-per-hour shift premium. Because production was backlogged and the Respondent's robotic machines were not utilized 8 hours each day, Plant Manager Vince Sweezey, in consultation with certain supervisors, decided to put the plant on a three-shift basis and posted a notice to that effect. The notice, dated January 9, 1987, read:

> Please be advised effective January 12, 1987, the robots will have an added third shift. Please note the following schedules.
>
> 3:00 a.m. to 11:00 a.m. 1st shift no premium
> 11:00 a.m. to 7:00 p.m. 2nd shift 10 cent premium
> 7:00 p.m. to 3:00 a.m. 3rd shift 15 cent premium

Charging Party Thomas C. Stout was transferred to the new first shift from the former second shift. By virtue of this transfer he stood to lose his shift premium.[4] His reaction to the shift change constitutes a significant portion of this case.

Stout was hired by the Respondent in July 1986, as a robotics technician and was placed under the supervision of Maintenance Supervisor Frank Gavinski. He also came into frequent contact with Supervisors Jackie Bulson and Joann Nelson.[5] During the fall of 1986, Bulson was assigned to give Stout special training as a robot maintenance man because he was having difficulty learning the job. After finishing her regular tour of duty as a first-shift leadlady in the welding department, she would return to the plant in the evening during Stout's shift and give him 2 hours of assistance and training in robotics maintenance and repair.[6]

I credit Stout's testimony[7] that, during one of these evening training sessions in November, Bulson asked Stout if he had heard anything in the shop concerning a union. She said she wanted to know who was spreading unionization "rumors" and who was organizing. Stout asked if he would get into trouble if he told her. She assured him that he would not. Stout then mentioned the names of Nick McGraw, Simon Quintanilla, and Bill Seply as union sympathizers, saying that he had discussed unionization with them. She then asked Stout about his own feelings but he declined to reply. She told Stout that she would relay the information that he had given her to plant management but would leave Stout's name out of her report. Bulson reported her conversation with Stout to Nelson, and both of them took the information to Sweezey. When Sweezey learned of the rumor, he phoned his supervisor, Gary White, the manufacturing manager for Kent Products, and relayed the information to him. White asked Sweezey how plant morale was faring. When Sweezey said he thought that morale was good, White told him simply to "sit tight" and not react.

About the time that the shift change notice was posted,[8] a number of employees objected to the new 3 a.m. starting time and the fact that this shift carried with it no shift premium. They began to criticize the change among themselves. Among those who were opposed to the change were Debbie Griffis Vincent, Laurie Pace, Scott Carpenter, and Stout. Vincent and fellow employee Kenny Miller went to see Bulson about the change. They told her that they thought it was unfair that they should be asked to report to work at 3 a.m. and not receive any shift premium for their trouble. Bulson replied that the 3 a.m. shift was considered the first shift so employees assigned to it were not eligible for a premium. After returning to their duty stations, they were criticized by Supervisor Gary Clark for taking their complaint to Nelson rather than to him.

Stout asked Vincent and Miller what had happened. They related that they had made a complaint about the shift change and were chewed out for doing so by Clark because he felt they should have come to him rather than to Bulson. Stout said that he would take the complaint to Nelson and he did so. After voicing to Nelson and Clark the complaint that the shift change was unfair because it deprived 3 a.m. shift employees of a shift premium, Nelson told him that Sweezey had designated the 3 a.m. shift as the first shift and that it would have no premium connected with it. Stout said that he thought it was unfair because the new shift, which began at 3 a.m., was actually part of an old shift that paid a shift premium. He suggested that they ask Sweezey how he would like to get up at 3 a.m. in order to be at work when he was used to getting up at 10 a.m. The two supervisors told Stout that they would relay his complaint to Sweezey and in fact they did so.

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[4] In fact, because of a clerical error, Stout was not actually deprived of his shift premium during the week in which the three-shift operation was in effect.

[5] Gavinski exercised general oversight of maintenance personnel. He could and did evaluate and reprimand employees for shortcomings in their job performance. The record reflects that he was empowered to suspend employees and did in fact suspend Stout. I conclude that Gavinski is a supervisor within the meaning of the Act. Joann Nelson carried the title of supervisor of the pressroom and welding department, which consists of about 35 employees. She can discipline and discharge employees. I conclude that she is a supervisor within the meaning of the Act. From January 6, 1987, until June 1, Jackie Bulson was an acting supervisor on the second shift. After June 1 she was given the title of supervisor. At some period of time in 1986, she was also an acting supervisor. During the months of October, November, and December 1986, she was a leadperson on the first shift. As lead welder, she performed quality-control work, set up work in her department each day, made sure that the 12 employees in that department had supplies, and that they properly filled out production cards and production sheets. She earned 5 percent more in this position than other employees. Although claiming that she did not administer discipline, she could give oral warnings, the first step in the Respondent's five-step progressive discipline system, with the consent of her own supervisor. She regularly assigned work each day to the employees under her supervision. Based on these factors, I conclude that Jackie Bulson was a supervisor both when she was a leadperson and when she was given titles indicating higher supervisory authority.

[6] Bulson did not cease to be a supervisor because she worked overtime in the evening instructing Stout. She was paid her regular wage for this extra service, and there is no reason to believe that she had less authority during evening hours than she exercised during the day.

[7] Bulson was not an impressive witness. She was biased, not only in an institutional sense but in a personal one. She was intimately involved in the events that led up to Stout's discharge. She repeated Stout's questionable remarks to Simon Quintanilla, Stout's antagonist in the fight which led to the discharge of both men. But for her act the fight would never have taken place. Moreover, the propriety of her relationship with Quintanilla was seriously challenged by Stout, who made remarks to her that reflected badly on her character. Accordingly, I would discredit any controverted testimony that she gave.

[8] There is some conflict in the testimony as to whether Stout's complaint about the shift change took place immediately before or immediately after the Monday on which the change took place. It is immaterial to this case whether he complained just before or just after the event.

An hour or so later Stout had a lengthy discussion with Gavinski. He had previously asked Gavinski for a raise and, in response to that request, Gavinski went to Stout's personnel records and looked at Stout's resume. The resume was a lengthy one. Instead of merely reciting Stout's previous jobs, the resume went into great detail concerning the job content of the position that Stout had vacated in order to come to work for the Respondent, itemizing 11 different elements or components in his former position. Gavinski told Stout that he did not think that his performance to date for the Respondent had measured up to the expectations that the Company had when it first saw his resume.[9] Stout told Gavinski that he thought that all employees, including himself, who worked on the newly constituted first shift should receive a shift premium and mentioned that he had brought the same complaint to the attention of other supervisors. Gavinski replied that, if Stout had talked about it with other supervisors, the matter was surely being taken care of. I credit Gavinski that he did not tell Stout that he should just watch out for himself and further find that he did not tell Stout on this occasion that he could fire him if he wished. I discredit Stout and credit Nelson with respect to a statement, assertedly made by Nelson to Stout after his conversation with Gavinski, to the effect that Nelson told Stout that he would have been better off to have kept his mouth shut. Nelson denied even having made this statement.

On January 19, the Respondent discontinued the three-shift operation, which had been in effect the previous week, and returned to the two-shift operation it previously utilized. Various reasons for the discontinuance of the new shift arrangement were given in the record, but it appears clear that Stout's protest and the unhappiness of first-shift workers played a large role in the Company's decision to go back to its former practice.

Sometime in mid or late January, Stout told Vincent, Pace, and Carpenter that he would bring up the dispute over the pay premium at the next company meeting. About this same point in time, Stout spoke with Bulson concerning the shift premium dispute. I credit his testimony to the effect that he complained to her that the failure of the Company to pay a shift premium on first shift was a raw deal and both he and others were upset about it. In the course of his protest he stated, "Now you can understand why some people had union sympathies." Bulson replied that, if employees voted to unionize, the Company would close the plant, any people who went on strike would lose their jobs, and the Company would just reopen under another name.

About midnight on January 20-21, just before Bulson was leaving the plant for the evening, she had a brief conversation with Stout. In the course of that conversation, Stout referred to employee Quintanilla by an obscene variation of his name and suggested to Bulson that she and Quintanilla were a "hot little number."[10] She denied the accusation, saying that Stout must be "on drugs." She asked Stout where he obtained this information. He replied that he had heard it in the shop, both from Quintanilla himself and from another employee, John Winks. Stout suggested that, if she did not want this matter to get back to her husband, she should stop seeing Quintanilla. According to Stout's version of the conversation, she said she was going to do so. According to Bulson, she denied to Stout any such relationship ever existed. In any event, on her way home from work she stopped at Charlie's Bar, where Quintanilla was drinking beer with two or three individuals, and recounted to Quintanilla the conversation between Stout and her.

Quintanilla went to the plant about 4 a.m. and sought out Stout. There is no factual dispute that Quintanilla had been drinking or that he was not authorized to be on company property at that time since he was off duty.[11] Quintanilla accused Stout of having a "big mouth" and stated that he was always causing trouble. As he made this accusation, he began poking Stout in the chest. Stout pushed his hand away and Quintanilla hit Stout in the mouth, causing him to fall into a bandsaw. Stout was dazed but got up and saw Quintanilla come toward him threatening to "beat the living shit" out of Stout. Stout warned Quintanilla to get out of the shop before both of them were fired. Quintanilla replied that it was just one person's word against the other as to who threw the first punch, but eventually he left the plant through the back door.

Stout noticed that he was bleeding and decided to go to the hospital for treatment. He called Bulson at her home, reported what had happened, and told her that he was in the emergency room. She said that he could not leave the others on his shift unsupervised. Stout suggested that she put Phil Vincent in charge and she agreed. He also said he knew that a fight would occur if she repeated to Quintanilla what he had said to her earlier in the evening.

About 10 a.m. Stout received a call at his home from Gavinski, who told him that he was being put on suspension pending an investigation. Stout insisted that the fight with Quintanilla was not his fault and told Gavinski that he was retaining counsel. He also told Gavinski that he did not think that he would be able to work the balance of the week because of the injuries he had sustained. According to Gavinski, the purpose of the call was to get Stout's version of the incident. Gavinski observed in the course of his testimony that various reports that he had received concerning the fight basically jibed. Stout told Gavinski that he was going to file a complaint against Quintanilla with the Newaygo County sheriff's department. In fact he did so and Quintanilla was brought to trial for assault. No criminal action was taken against Stout.

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[9] I credit Gavinski that, during this interview, he did not accuse Stout of falsifying his resume.

[10] Stout admits most of the conversation, as reported by Bulson, but denies he used the word "hot."

[11] Quintanilla did not testify so Stout's version of this incident is uncontradicted in the record.

On January 27, Sweezey sent identical letters to Stout and Quintanilla that read:

> After review of the situation that occurred on January 21, 1987, White Cloud Products has no other alternative than to follow the Employee Handbook, page 6, paragraph 2 and item #4 and item #10.
>
> As of today January 27, 1987 your name has been removed from the Seniority List at White Cloud and your employment has been terminated.

The paragraph in question covers grounds for discipline. Item 4 is "disorderly conduct" and Item 10 is "unprovoked assault."

II. ANALYSIS AND CONCLUSIONS

A. *Violations of Section 8(a)(1) by Threats and Interrogation*

I have found that early in November 1986, Supervisor Bulson asked Stout if he had heard anything in the shop concerning unionization and asked him specifically who was spreading unionization "rumors." She also asked Stout what his own feelings were on the subject. Stout expressed apprehension that he might get into trouble by answering her questions. She assured him that he would not but did tell him that she would be passing the information along to higher management without using his name. In fact, she did relay the information she received from Stout to higher management, including the name of one or more individuals mentioned by Stout as union activists. By these statements and actions, the Respondent engaged in coercive interrogation and in placing the union activities of employees under company surveillance in violation of Section 8(a)(1) of the Act.

Having discredited Stout's assertion that Nelson told him that he would have been better off keeping his mouth shut instead of protesting the failure of the Respondent to pay a shift premium, I would dismiss so much of the amended complaint, which alleges a violation of the Act in this regard.

In response to a complaint from Stout about why employees might want to unionize, Bulson told him that, if the employees voted to unionize, the Company would close the plant, strikers would lose their jobs, and the Company would reopen under another name. These statements constitute threats to take reprisal for union and protected activities that violate Section 8(a)(1) of the Act. I so find and conclude.

B. *Stout's Concerted Protected Activities*

There is no question that the shift change and the failure of the Respondent to pay shift premiums to employees scheduled to report for work at 3 a.m. caused considerable consternation among those who were adversely affected. Vincent and fellow employee Kenneth Miller protested the matter to Bulson. When they got nowhere, they discussed the problem and their unsuccessful efforts with Stout and he also protested the matter to Nelson. In turn she carried the protest to the plant manager and the grievance was ultimately resolved in the employees' favor. Stout also raised the question with Gavinski. The Respondent admits that Stout's complaint was, at least in part, responsible for the elimination of the three-shift schedule and its return to a two-shift schedule. It is clear from these facts that Stout engaged in concerted protected activities with his fellow employees and the Respondent was well aware of this fact. It is also undeniable that Stout's protests took place not long before he was discharged.

C. *Stout's Discharge*

Despite the fact that Stout engaged in concerted protected activities and made prounion remarks not long before his discharge, it remains incumbent on the General Counsel to establish by a preponderance of the evidence that Stout's sentiments and activities were responsible, at least in part, for his termination. Although the General Counsel has presented an arguable position, I am forced to conclude that the Respondent was not asserting a pretext when it fired Stout, that its stated reason for terminating him was also its real reason, and that the portion of the amended complaint alleging a discriminatory or illegal discharge of Stout should be dismissed.

Admittedly there is a certain lack of abstract logic in asserting that each of two participants in a fight has engaged in an unprovoked assault on the other. The facts appearing in this record and the facts ascertained by the Respondent in the course of its own investigation of the incident demonstrate that Quintanilla, not Stout, was the aggressor in the fight that occurred on the morning of Stout's suspension. At the time of the fight Stout was working at his assigned duties, whereas Quintanilla, who was under the influence of alcohol, came on company property without authority, sought out the Charging Party, and started accusing him and poking him in the chest. That these facts make out an assault by Quintanilla on Stout under the criminal statutes of the State of Michigan is a matter of concern for the prosecuting attorney for Newaygo County. It is the Board's province to examine the links in the chain of causality that lead to Stout's discharge and to see if protected concerted activities or union activities were among those links. In the absence of such causality, the Respondent may discharge Stout for good reason, bad reason, or no reason at all, even if it appears that he was the victim and not the perpetrator of an assault.

Had the Respondent discharged Stout and retained Quintanilla, a good argument for pretext could be made out, but such was not the case. If Stout bore no responsibility at all for the events immediately preceding his discharge, it could be argued that the Respondent was merely lying in wait for an irritating employee on its list of undesirables to make a mistake. Having been presented with an occasion to act by virtue of a fight, which occurred in its plant, the Company then took advantage of the incident to rid itself of an employee whom it wished to fire for totally unrelated reasons. However, Stout himself set in motion the chain of events that led to the fight. He had, on more than one occasion, referred to Quintanilla in a vulgar manner. Within a few hours before this fight Stout confronted his immediate supervisor with the accusation that she was seriously misbehaving with a fellow employee and warned her of the consequences of her alleged actions. Even the slightest reflection should have made Stout realize that such remarks could have explosive consequences. The Respondent was well within the bounds of prudence in believing that such accusations and talebearing could have and would have serious adverse consequences on the morale in its shop. The fact that Quintanilla was guilty of a criminal assault and that Stout was his victim does not bar the Respondent from concluding that it did not want scandalous accusations being circulated in its plant and wished to prevent such talk from generating similar incidents in the future. In the chain of causality that led up to the January 21 incident, union activities and concerted protected activities played no part, but Stout's inflammatory comments played a large part. In light of these considerations, I conclude that concerted protected activities on the part of Stout did not bring about his termination. Accordingly, I would dismiss so much of the amended complaint that alleges that it did.

CONCLUSIONS OF LAW

1. Respondent Kent Products, Inc., White Cloud Division, is now and at all times material has been an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

2. By coercively interrogating employees concerning their union and concerted protected activities and the union and concerted protected activities of other employees; by threatening employees with plant closure and discharge if they engaged in strikes or voted to support a union; and by placing the union and concerted protected activities of employees under company surveillance, the Respondent violated Section 8(a)(1) of the Act.

3. The aforesaid unfair labor practices have a close, intimate, and adverse effect on the free flow of commerce within the meaning of Section 2(2), (6), and (7) of the Act.

REMEDY

Having found that the Respondent has engaged in certain unfair labor practices, I will recommend that it be required to cease and desist and to take other affirmative actions that are designed to effectuate the policies of the Act. The General Counsel has requested that the Board's Order include a visitatorial clause permitting the Board to obtain discovery in accordance with the Federal Rules of Civil Procedure in the event that the order in this case has to be enforced through contempt proceedings. I will recommend such an order. I will also recommend that the Respondent be required to post the usual notice, advising its employees of their rights and of the results in this case.

[Recommended Order omitted from publication.]

Delta-Macon Brick & Tile Company, Inc. ***and*** **United Brotherhood of Carpenters and Joiners of America, AFL–CIO, Southern Council of Industrial Workers, Local Union 2272.** Case 26–CA–9030

July 13, 1988

ORDER REMANDING PROCEEDING

BY CHAIRMAN STEPHENS AND MEMBERS JOHANSEN AND BABSON

On June 9, 1982, Administrative Law Judge James L. Rose issued the attached decision finding that the layoff of certain permanent striker replacements did not create any vacancies to which unreinstated economic strikers would be entitled under *Laidlaw Corp.*, 171 NLRB 1366 (1968), and dismissing the complaint which alleges that the Respondent's failure to recall unreinstated strikers ahead of the laid-off striker replacements violated Section 8(a)(3) and (1) of the Act. The General Counsel filed exceptions to the judge's decision and a supporting brief, and the Respondent filed a brief in answer to the General Counsel's exceptions.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

On May 26, 1988, the Board issued a Decision and Order in *Aqua-Chem*, 288 NLRB 1108, setting forth the criteria to be used in determining whether a layoff has resulted in the departure of a striker replacement under *Laidlaw*, and allocating to parties their respective burdens of proof on this issue.

The Board has decided to remand this proceeding to the judge for the purpose of allowing the parties an opportunity to present evidence on this issue in accordance with the Board's holding in *Aqua-Chem*, and for his further consideration consistent with that decision.[1] Subsequently, the judge is instructed to issue a supplemental decision, including findings of fact with credibility resolutions, conclusions of law, and a recommended Order, consistent with this remand Order. Copies of such supplemental decision shall be served on all parties, after which the provision of Section 102.46 of the Board's Rules and Regulations shall apply.

MEMBER JOHANSEN, dissenting.

I disagree with my colleagues' conclusion that a remand is warranted in this case. The Respondent recalled, ahead of unreinstated economic strikers, five striker replacements who had been laid off for periods of 14 to 16 months. In accordance with my concurring opinion in *Aqua-Chem*, 288 NLRB 1108 (1988), and contrary to my colleagues, I would not place the burden on the General Counsel to prove that the layoff of these striker replacements created "vacancies" to which the unreinstated strikers were entitled to be recalled. Instead, I find that the Respondent had the burden of establishing that there was a substantial business justification for failing to recall the unreinstated strikers after a layoff of such a long duration resulting solely from a prolonged shortage of work. Further, I find that the Respondent had ample opportunity during the hearing to make such a showing, but that the evidence demonstrates that it failed to do so. I see no purpose to be served by giving Respondent—more than 6 years after the judge's decision in this case—a second chance to prove that these layoffs did not create vacancies within the meaning of *Laidlaw Corp.*, 171 NLRB 1366 (1968), enfd. 414 F.2d 99 (7th Cir. 1969). In my view, the long, indefinite layoffs here constituted a sufficient interruption of the employment relationship so as to warrant the recall of the unreinstated strikers.

Accordingly, I would reverse the judge and find that the Respondent violated Section 8(a)(3) and (1) by failing to recall the unreinstated strikers.

W. Gene Heard, Esq. and *Coleman Garrett, Esq.*, for the General Counsel.

Louis A. Fuselier, Esq. and *Jeffrey A. Walker, Esq. (Fuselier, Ott, McKee & Moeller, P.A.)*, of Jackson, Mississippi, for the Respondent.

Steve Herring, Assistant to the Executive Secretary, Southern Council of Industrial Workers, Local Union 2272, of Tuscaloosa, Alabama, for the Charging Party.

DECISION

STATEMENT OF THE CASE

JAMES L. ROSE, Administrative Law Judge. This matter was tried before me on March 17, 18, and 19, 1982, at Macon, Mississippi, on the General Counsel's complaint, which alleged that the Respondent violated Section 8(a)(1) and (3) of the National Labor Relations Act, 29 U.S.C. § 151 et seq., by failing to reinstate certain economic strikers.

The Respondent generally denied that it engaged in any unfair labor practices and specifically contends that its treatment of the strikers was in accordance with established principles set by the Board and courts.

On the record as a whole,[1] including my observation of the witnesses, briefs and arguments of counsel, I make the following

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[1] Given the rule in *Aqua-Chem* placing the burden on the General Counsel to show that permanent replacements who were subsequently laid off had no reasonable expectation of recall, we believe that, notwithstanding the passage of time, it is appropriate to give the General Counsel the opportunity to meet that burden here.

289 NLRB No. 111

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[1] The General Counsel's motion to correct the transcript is, without objection, granted and is included in the formal papers as G.C. Exh. 1(p). The Respondent's motion to receive into evidence its Exh. 5 is granted and is included with the exhibits.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

I. JURISDICTION

The Respondent is engaged in the manufacture, sale, and distribution primarily of architectural bricks for use in commercial construction at its Macon, Mississippi facility. In its conduct of this business, the Respondent annually ships from its Macon facility goods, products, and materials valued in excess of $50,000 directly to points outside the State of Mississippi and annually receives directly from points outside the State of Mississippi goods, products, and materials valued in excess of $50,000. From these facts, I conclude that the Respondent is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

II. THE LABOR ORGANIZATION INVOLVED

United Brotherhood of Carpenters & Joiners of America, AFL-CIO, Southern Council of Industrial Workers, Local Union 2272 (the Union) has for a number of years represented employees of the Respondent in a basic production and maintenance unit. It has negotiated on behalf of these employees with the Respondent concerning wages, hours, and other terms and conditions of employment and has been a party with the Respondent to a series of collective-bargaining agreements, the most recent of which is effective from September 24, 1979, to September 23, 1982.

On these facts, I conclude that the Union is a labor organization within the meaning of Section 2(5) of the Act.

III. THE ALLEGED UNFAIR LABOR PRACTICES

A. *The Facts*

With minor and largely immaterial exceptions, the facts giving rise to this dispute are uncontested. In the summer of 1979, representatives of the Union and the Respondent began negotiations for a collective-bargaining agreement to succeed the one then in existence. After several meetings the employees determined to press their additional bargaining demands, which had been rejected by the Company, by engaging in an economic strike. The strike began at midnight September 11 and ended on Friday, September 21 (according to the General Counsel's witnesses), or Sunday, September 23 (according to the Respondent's witnesses). In any event, the parties did meet on September 23, entered into a stipulation settling the strike, and agreed to a new contract. And on September 24 the Respondent began to reinstate the strikers.

However, during the strike the Respondent had hired some permanent replacements; thus when the Respondent had reached a full complement of employees, there remained without jobs 37 strikers who had been permanently replaced. These individuals were advised to sign a form indicating whether they wished to be recalled in the event of a job vacancy and those who did so were placed on a preferential hiring list. To the date of the hearing only one had been called back to work, inasmuch as during the intervening period, due to the downturn in the economy, the Company has not been operating even at its prestrike capacity.

On January 30, 1980, five individuals, all of whom had been hired during the strike, were laid off. In March and May 1981 these individuals were recalled to the jobs from which they had been laid off.[2]

In recalling these individuals, the Company did not consider any of the strikers who had not yet been reinstated although in every case the nonreinstated strikers had company seniority superior to that of any of the five laid-off replacements. Further, some of the nonreinstated strikers had in fact worked in the departments to which the replacements were recalled. Though there is no evidence that any nonreinstated striker was specifically qualified to do the particular job from which the replacement had been laid off and recalled, there is also no evidence they were all unqualified. By and large the nonreinstated strikers had worked for the Company many years. In any event, the Respondent concedes that it did not consider recallings, even if qualified, nonreinstated strikers to these jobs. The laid-off replacements were given preference over nonreinstated strikers.

B. *Issues*

The General Counsel contends that because these five replacements had been laid off in excess of 15 months, the positions to which they were recalled were really job vacancies. Thus to give them preference over any nonreinstated striker was tantamout to granting the striker replacements superseniority, which necessarily discriminated against the strikers and was violative of Section 8(a)(1) and (3) of the Act. *NLRB v. Erie Resistor Corp.*, 373 U.S. 221 (1963).

The Respondent contends that it had the right to replace permanently individuals who engaged in an economic strike, *NLRB v. Mackay Radio & Telegraph Co.*, 304 U.S. 333 (1938), and that as long as it does not discriminate against the strikers in its recall of them, it has not violated the Act, *NLRB v. Fleetwood Trailer Co.*, 389 U.S. 375 (1967). Further, the Respondent contends that it did in fact recall the strikers in accordance with the procedures set forth by the Board in *Laidlaw Corp.*, 171 NLRB 1366 (1968), enfd. 414 F.2d 99 (7th Cir. 1969), cert. denied 397 U.S. 920 (1970).

C. *Analysis and Concluding Findings*

The relative rights of economic strikers to their jobs and of employers to continue business during a strike is well settled in *Mackay*, *Fleetwood*, *Laidlaw*, and numerous subsequent cases. Generally, an employee may not be discharged or otherwise discriminated against for having engaged in a strike. However, an employer may operate its business, and may do so by offering permanent jobs to individuals who are willing to work during a strike. When a strike ends, an employer need not discharge the replacements to make room for the strikers. Thus a striker may not be discharged but may be permanently replaced. When a striker is permanently replaced, he is entitled to reinstatement on departure of the replacement only until he becomes a permanent employee elsewhere. Of course, as the Board and Supreme Court noted in *Erie Resistor*, the employer may not discriminate against strikers by giving replacements or those who abandon the strike, for instance, an additional 20 years' seniority. Nor may strikers otherwise be treated disparately from replacements, nonstrikers, or those who abandon the strike. *Transport Co. of Texas*, 177 NLRB 180 (1969); *Wisconsin Packing Co.*, 231 NLRB 546 (1977). Nevertheless, absent disparity of treatment, a striker who has been permanently replaced only has the right to be reinstated if there is a job opening and then only until he has become permanently employed elsewhere.

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[2] This finding is based on the unequivocal, generally credible, and uncontroverted testimony of Charles S. Barrett, the Respondent's administrator, even though documentary evidence seems to indicate that two of them were recalled to different jobs. That is, Eddie Tutt and Fred Ivy replaced strikers in the finished products department yet the recall notice for each was to a job in the production department. As indicated, I resolve this apparent discrepancy in favor of the specific testimony of Barrett. I note that this matter was apparently not considered of particular significance by the parties, which enhances Barrett's reliability. His demeanor was positive, and on this, his testimony was specific. The recall notices are ambiguous and are not really dispositive of which job the individual was recalled to. Finally, on brief the General Counsel does not contest this fact.

These cases deal with two similar, but distinct, concepts—the conditions under which strikers are entitled to reinstatement and, the right of strikers not to be discriminated against (either before or after reinstatement).

The matter deals basically with the former. It is argued that by recalling replacements who had been laid off about 15 months instead of nonreinstated strikers, in effect the Respondent granted the replacements superseniority. The General Counsel contends that the senior qualified nonreinstated striker should, in each case, have been offered the job. There is no contention that the striker who was specifically replaced on one of these jobs is entitled to it.

The General Counsel contends that a job vacancy is created when a company determines to end a layoff caused by economic considerations. Either the layoff and subsequent reactivation of the job amounts to departure of the replacement (as in *Laidlaw*) or implies a vacancy resulting from expansion of the work force (as in *Fleetwood*). In either case strikers were entitled to consideration.

The General Counsel does not suggest that a layoff of short duration would create a vacancy but only a "layoff of several month's duration caused by a prolonged shortage of work, constitutes a sufficient interruption of the employment relationship which would warrant recall of both unreinstated strikers and strike replacements on a nondiscriminatory basis."

It should be noted at this point that the issue litigated in this proceeding is quite narrow and concerns whether when a striker replacement is laid off and then recalled to his job there is a "vacancy." This case does not involve the rights of strikers generally—nonreinstated or otherwise. For instance, the manner in which the Respondent has handled the filling of job openings caused by resignation or discharge or the creation of a new job is not in dispute. With such openings the Respondent first posts the job for bid among employees currently working. If no currently working employee bids on the job or none is qualified, then a notice is sent to all employees on layoff. If that produces no qualified bidder, then the Respondent sends a notice of the job opening to the nonreinstated strikers. Thus the Respondent admits that with regard to job openings, it has treated nonreinstated strikers differently from current employees or employees on layoff. The General Counsel, however, specifically stated at the hearing that this policy is not alleged to be violative of the Act.

On the essentially undisputed facts before me, I conclude that the five individuals involved in this matter were laid off from a specific job and each was recalled to his/her respective job. There were no job vacancies for which the nonreinstated strikers need have been considered.

When an employee is laid off he is not deemed terminated if he had "a reasonable expectation of recall." Thus his recall is not to a job vacancy. Such was the Board's holding in *Bancroft Cap Co.*, 245 NLRB 547 (1979), in which it was specifically held that the length of the layoff is relevant in determining whether a vacancy existed. In *Bancroft* the layoffs were from 2 to 7 days and caused by a shortage of materials.

Here the five striker replacements were on layoff for 15 months. Such is clearly relevant to the question of whether they had a reasonable expectation of recall and whether they were recalled to a job vacancy. The longer the hiatus the more indication that they had no reasonable expectation of recall and when recalled, it was to a vacancy and not to their respective jobs.

However, length of time is not dispositive, particularly given the current state of the national economy. Other factors are also relevant. First, the fact that one is laid off rather than terminated implies some expectation of recall. The cause of the layoff would also tend to prove whether the employee might expect to be recalled—whether, for instance, the lack of work causing a layoff appears permanent (as with buggy whips) or temporary (as with automobiles). Here the layoff resulted from a general downturn in the construction industry—not obsolescence.

That these laid-off employees waited 15 months for recall does not end their expectation for recall. To the date of the hearing the nonreinstated strikers had waited 2-1/2 years, yet expect to be rehired. The collective-bargaining agreement provides that seniority will be lost after 9 months on layoff (a provision that the Respondent does not apply). Though such would tend to diminish one's expectation of recall, it would not necessarily end that expectation.

It is also relevant whether the employee on layoff is recalled to the job he had, or to another one. Here the uncontested and generally credible evidence is that striker replacements were recalled to the specific jobs from which they were laid off.

It would seem not to matter whether an employee's absence from work was a day, a month, or a year if during that period his job was not performed by anybody else and he was specifically recalled to that job. If those are the facts, and I must conclude they are in this case, then the layoff did not create a job vacancy nor did the Company's determination to recall the individual laid off. Again, this matter does not involve competing for jobs either newly created or occasioned by discharge or resignation.

As to the specific facts here, nonreinstated strikers were not treated differently than any other group of nonworking employees. Laid-off replacements were not considered a class and given preference. Rather an individual was given the first opportunity to return to the job from which he was laid off and in each case accepted. Although it happens that each of the laid-off employees here were striker replacements, that was not, apparently, a factor. They could have been laid-off reinstated strikers with the same result.

Thus *Giddings & Lewis*, 255 NLRB 742 (1981), enf. denied 675 F.2d 926 (7th Cir. 1982), cited by the General Counsel, is distinguishable from this matter. In *Giddings & Lewis*, the Board was concerned with the promulgation of a comprehensive seniority policy and not with the specific situation of given individuals laid off from and recalled to particular jobs. Under the seniority policy announced in *Giddings & Lewis*, regardless of how the job vacancies came about, striker replacements on layoff would be given preference to nonreinstated strikers. The Board concluded the policy was violative of the Act. The Seventh Circuit disagreed, holding that a layoff does not terminate the employment relationship and a layoff does not create "a 'vacancy' in the work force which would entitle a striker to reinstatement."

Although I am, of course, bound by the Board's decision I do not believe it is controlling here. The Respondent's general treatment of striker replacements vis-a-vis nonreinstated strikers was not litigated. Rather, this case concerns only whether specific employees who had been laid off could be recalled to their particular jobs without the opportunity to compete being given nonreinstated strikers.

Without regard to the question of whether there were "job vacancies," the issue is whether the last incumbent is entitled to paramount consideration when the Respondent determines to reactivate a job. To conclude, as I do, that such is permissible does not put strikers in a subordinate class. Indeed, another time the laid-off employees might be reinstated strikers.

When strikers are put in a separate and subordinate class from nonstrikers, such inherently discriminates against one for having engaged in protected activity. *Great Dane Trailers*, 388 U.S. 26 (1967). Here, as to the matter litigated, strikers were not considered separately. Classes were not established based on one's participation in protected activity.

Establishing classes based on participation in protected activity was the basis of the Board's holding in *Giddings & Lewis*. There the company promulgated a policy whereby nonreinstated strikers were placed in a subordinate class to laid-off employees (presumably replacements as well as others) for purposes of bidding on job openings. That case did not deal with the situation of individuals on layoff being recalled to the specific jobs they had. In fact the Board held that the company was free to set criteria for job bidding so long as such did not relate to having engaged in protected activity.

Here the only criterion used for selecting the individuals for recall was their incumbency in the particular job. Such does not relate to having engaged in or refraining from protected activity nor does such inherently discriminate against strikers.

Thus I conclude that the recall of one on layoff to the job he had does not imply there was a vacancy, nor is such inherently discriminatory against strikers in violation of Section 8(a)(1) and (3) of the Act. Accordingly, I will recommend that the complaint be dismissed.

In view of this, I need not consider the Respondent's additional defenses: that its conduct was not inherently destructive of employee rights; that the Union waived the nonreinstated strikers right to be recalled ahead of laid-off replacements; that somehow the strike was unprotected because the employees had changed their collective mind about what it was they wanted; that the matter should be deferred to arbitration; that the nonreinstated strikers for whom the General Counsel seeks relief have been offered and have refused substantially equivalent jobs; and that there was no showing of a casual connection between the recall procedure and the fact that five nonreinstated strikers were not offered the specific jobs.

[Recommended Order for dismissal omitted from publication.]

Superior Industries International, Inc. *and* International Union, United Automobile, Aerospace and Agricultural Implement Workers of America, UAW Amalgamated Local No. 645. Case 31–CA–16587

July 14, 1988

DECISION AND ORDER

BY CHAIRMAN STEPHENS AND MEMBER JOHANSEN AND BABSON

Upon a charge filed by the Union June 11, 1987,[1] the General Counsel of the National Labor Relations Board issued a complaint on July 16 against Superior Industries, the Respondent, alleging that it has violated Section 8(a)(5) and (1) of the National Labor Relations Act. Although properly served copies of the charge and complaint,[2] the Respondent has failed to file a timely answer.[3]

As no timely answer was filed and no extension of time to answer was requested or granted before the due date, the General Counsel on September 21, 1987, filed a Motion for Summary Judgment with attached exhibits.[4] On September 25 the Board issued an order transferring the proceeding to the Board and a Notice to Show Cause why the motion should not be granted.

The Respondent filed a response on September 30, 1987.[5] On October 23, 1987, the Charging Party filed a brief in support of the Motion for Summary Judgment. Also, on October 23 the Respondent filed a second response.[6] On October 26 the General Counsel filed a motion[7] to reject the Respondent's first response. On November 20 the Respondent filed an errata/response with respect to its October 23 response.[8] On December 7 the General Counsel filed a response[9] to the Respondent's second response and errata/response. On December 9 the Charging Party filed a brief in support of the General Counsel's Motion for Summary Judgment. On December 14 the Respondent filed a motion.[10] On December 21 the Charging Party filed a response to the Respondent's December 14 motion. On January 4, 1988, the Respondent filed a

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[1] All dates refer to 1987, unless otherwise indicated.

[2] G.C. Exh. 55(B), "Affidavit of Service of Complaint and Notice of Hearing," states that the complaint was served by certified mail on July 16, 1987, on the Respondent (postal receipt No. 375,938), the Respondent's attorney (postal receipt No. 375,939), the Charging Party (postal receipt No. 375,940), and the Charging Party's attorney (postal receipt No. 375,941).

Exh. 4 of the General Counsel's "motion to reject" (infra fn. 7) shows photocopies of signed postal receipts, Nos. 375,938 and 375,939, for both the Respondent and the Respondent's attorney. Both receipts show a date of delivery of July 17, 1987.

[3] On August 24, 1987, Superior Industries sent a letter to the Regional Office in answer to the complaint. The letter stated that the Respondent was "without knowledge" with respect to pars. 1, 3, 4, and 5 of the complaint; denied pars. 2 and 6 through 14; opposed the remedy sought; and "affirmatively challenged, opposed, denied, and appealed" the Board's May 21, 1987 Decision and Certification of Representative.

[4] The Motion for Summary Judgment's certificate of service form, dated September 16, 1987, indicates that the motion was served by certified mail on the Respondent's attorney (postal receipt No. 375,821) and on the Charging Party's attorney (postal receipt No. 375,822). Service of the motion, by ordinary mail, was made on the Respondent, on the Charging Party, and on the Respondent's attorney (at a second address).

Exh. 3(B) of the General Counsel's "motion to reject," infra, shows a photocopy of the signed postal receipt (No. 375,821) for the Motion for Summary Judgment, sent to the Respondent's attorney, with a date of delivery of September 17, 1987.

[5] The Respondent's response is entitled "preliminary opposition to General Counsel's motion to transfer case to and continue proceedings before the Board [and motion to reconsider grant of same] and for summary judgment, petition to revoke notice to show cause and/or motion to postpone due date to show cause." Refer to fn. 7, infra.

[6] The Respondent's second response is entitled "Motion to Show Cause Why Summary Judgment Summary Judgment [sic] Should Not Be Granted." The response was served by ordinary mail on the Board, the Charging Party, and the Charging Party's attorney, but not on the Regional Office.

[7] The General Counsel's motion is entitled "Motion To Reject Respondent's Preliminary Opposition to General Counsel's Motion for Summary Judgment."

In its "preliminary opposition," the Respondent made three allegations why the Motion for Summary Judgment was defective. Allegation 1 maintained that the General Counsel failed to served the Motion for Summary Judgment (with exhibits) on the Respondent. In its motion to reject, the General Counsel states that the Motion for Summary Judgment and the exhibits were packaged together. Postal receipt No. 375,821 evidences service of the motion and its exhibits. Thus, they were served by certified mail on the Respondent's attorney. Allegation 2 maintained that the complaint was not served on the Respondent's attorney. As stated in fn. 4, supra, the complaint was served by certified mail on the Respondent's attorney and was delivered on September 17, 1987. Allegation 3 maintained that the General Counsel omitted documents from its exhibits to the Motion for Summary Judgment. The General Counsel provided 59 exhibits (most multipart). The Respondent has made a bare assertion and has failed to indicate which documents were omitted.

Accordingly, we find that the Respondent's preliminary opposition is lacking in merit and we grant the General Counsel's motion to reject.

[8] The Respondent's errata/response corrects the title of its October 23 second response. The corrected title reads: "Cause Why Summary Judgment Should Not Be Granted." This document contains 1-1/4 pages of text, a proof of service sheet (unsigned), and a corrected title page.

The errata also contains the assertion that the photocopy of the postal receipt card showing receipt of the complaint by the Respondent's attorney "appears to be falsified." The Respondent offers no evidence to support its allegation of falsification.

[9] The General Counsel's response is entitled "Motion To Strike Respondent's 'Cause Why Summary Judgment Should Not Be Granted And Corresponding Errata/Response,' or Alternately, Motion To Consider General Counsel's Within Response And Opposition Thereto."

The General Counsel moves the Board to strike the Respondent's response to the Notice to Show Cause because it was defective under Sec. 102.114 of the Board's Rules and Regulations. The Respondent failed to serve the Regional Office with its response to the Notice to Show Cause until November 16 and the Respondent's proof of service sheet, attached to the combined "cause why" and "errata/response" documents are unsigned.

The General Counsel is a party in this case and should have been timely served. However, in light of the fact that the General Counsel was ultimately served and has responded to the Respondent's allegations we find that no prejudice exists. See Sec. 102.114(a)(2), as amended. Accordingly, we deny the General Counsel's motion to strike.

[10] The motion was entitled "motion to set time for responses to General Counsel's motion to strike Respondent's cause why summary judgment should not be granted." On December 16 the Executive Secretary extended the filing deadline to January 4, 1988.

289 NLRB No. 106

response.[11] On February 9, 1988, the Charging Party requested that the Board expedite the case.[12]

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

Ruling on Motion for Summary Judgment

Section 102.20 of the Board's Rules and Regulations provides that the allegations in the complaint shall be deemed admitted if an answer is not filed within 14 days from the service of the complaint, unless good cause is shown. The complaint states that unless an answer is filed within 14 days of service, "all of the allegations in the Complaint shall be deemed to be admitted to be true and shall be so found by the Board."

The Respondent contends that its failure to file a timely answer was excusable. The Respondent alleges that "good cause" exists for excusing the lateness of its answer. The alleged grounds are that the Respondent relied on the General Counsel's service sheet, which showed service of the complaint on the Respondent's attorney, and expected that its attorney would file an answer. According to the Respondent, its employment supervisor was on vacation during a portion of this time and on his return from vacation he allegedly was told by the Respondent's attorney's office that the office never received the complaint and notice of hearing and that the Respondent's attorney was on vacation.

In its October 23/November 20 response to the General Counsel's Notice to Show Cause, the Respondent argued that the Motion for Summary Judgment should not be granted for several reasons: (1) the complaint was not served on the Respondent's attorney; (2) the Motion for Summary Judgment was not properly served on the parties; (3) good cause existed for the delayed filing of the answer; (4) the Respondent was not "specially reminded" of the requirement to file an answer to the complaint;[13] (5) the Respondent's late answer raised factual issues requiring a hearing;[14] (6) the Board's August 6 denial of the Respondent's "motions to reconsider and reopen the record" did not address "newly discovered evidence" contained within certain motions to the General Counsel.

We find that "good cause" does not exist for excusing the late filing of the answer. We find that the Respondent's submissions do not constitute good cause within the meaning of Section 102.20 of the Board's Rules and Regulations.[15] Both the Respondent and the Respondent's attorney were served with the complaint by certified mail, the signed postal receipts were returned to the Regional Office, photocopies of the signed postal receipts are in the record, the Respondent has failed to offer evidence of its allegation of a falsified postal receipt, the parties, at the least, had notice of the Motion for Summary Judgment, and the Board cannot consider motions made to the General Counsel.

In the absence of good cause being shown for the failure to file a timely answer, we grant the General Counsel's Motion for Summary Judgment.

On the entire record, the Board makes the following

FINDINGS OF FACT

I. JURISDICTION

The Respondent, a California corporation, manufactures cast aluminum wheels and automobile accessories at its principal place of business in Van Nuys, California, where it annually sells and ships goods valued in excess of $50,000 directly to customers located outside the State of California. We find that the Respondent is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act and that the Union is a labor organization within the meaning of Section 2(5) of the Act.

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[11] The document is entitled "Response To Motion To Strike Respondent's 'Cause Why Summary Should Not Be Granted' And Corresponding 'Errata/Response,' Or, Alternately, Motion To Consider General Counsel's Within Response and Opposition Thereto."

[12] The Charging Party stated that it was willing to waive any question of timeliness regarding the Respondent's October 23 submission. Timeliness is a procedural question and cannot be waived by a party.

The Respondent filed a response to the Charging Party's motion on February 25, 1988; the response was rejected by the Executive Secretary on February 29, 1988.

[13] The Respondent argues that Sec. 10280.3 of the Casehandling Manual *requires* the General Counsel to "specially remind" a respondent when an answer is late. Contrary to the Respondent, the Casehandling Manual contains guidance, not rules. The "Purpose of Manual" section states:

> This manual has been prepared by the General Counsel of the National Labor Relations Board pursuant to his authority under Section 3(d) of the Act. It is designed only to provide procedural and operational guidance for the Agency's staff in administering the National Labor Relations Act, and it is not intended to be a compendium of substantive or procedural law, nor a substitute for a knowledge of the law. The guides are not General Counsel or Board rulings or directives and are not a form of authority binding upon the General Counsel or upon the Board.

We note that in *Sherwood Coal Co.*, 252 NLRB 497 (1980), a case in which summary judgment was granted in circumstances similar to this case, there is no indication the General Counsel specially reminded the respondent to file an answer to the complaint.

[14] The Respondent's late answer, which is not before us, cannot raise issues warranting a hearing.

[15] See *Sherwood Coal Co.*, supra; *Jones Engineering Co.*, 267 NLRB 906 (1983); *Hillcrest Packing Co.*, 247 NLRB 1389 (1980); *Klein's Park Manor*, 235 NLRB 64 (1978); *Sullivan Magee & Sullivan, Inc.*, 229 NLRB 543 (1977). See also *Lee & Sons Tree Service*, 282 NLRB 905 (1987); *Hoffschneider & Son*, 250 NLRB 810 (1980); and *Urban Laboratories*, 249 NLRB 867 (1980).

We have considered the present case in light of the "good cause" standard articulated in Sec. 102.20 of the Board's Rules and Regulations. See *NLRB v. Zeno Table Co.*, 610 F.2d 567 (9th Cir. 1979).

II. ALLEGED UNFAIR LABOR PRACTICES

A. *The Certification*

Following the election held on August 30, 1984, the Union was certified on May 21, 1987, as the collective-bargaining representative of the employees in the following appropriate unit:

> All production and maintenance employees, including leaderpersons, inspection employees, quality assurance technicians, shipping and receiving employees, warehouse employees, bobtail drivers, and tool and die makers, employed by the Employer at its facilities located at 7800 Woodley Avenue, 14617 Keswick Street, 14721 Keswick Street, and 14728 Raymer, Van Nuys, California 91406; excluding all other employees, electronics technicians, radiologists, chemists, draftsmen, tractor trailer drivers (long haul), office clerical employees, professional employees, guards, and supervisors as defined in the Act.

The Union continues to be the exclusive representative under Section 9(a) of the Act.

B. *Refusal to Bargain*

Since June 3, 1987, and continuing to date, and more particularly by letters dated June 3, 19, and 23 and by phone calls on June 12, 16, 17, 22, and 26, the Union has requested, and is requesting, the Respondent to bargain collectively with respect to the terms and conditions of employment of the unit employees. Since June 3 the Respondent has refused to bargain collectively with the Union.

Since June 19, 1987, the Union has requested the Respondent to furnish it with information; such information is necessary and relevant to the Union's performance of its function as the exclusive collective-bargaining representative of the unit employees. Since June 19 the Respondent has failed and refused to provide the information requested by the Union.

CONCLUSIONS OF LAW

By refusing since June 3, 1987, to bargain with the Union as the exclusive representative of employees in the appropriate unit and by refusing since June 19, 1987, to provide the Union with the requested information, the Respondent has engaged in unfair labor practices affecting commerce within the meaning of Section 8(a)(5) and (1) of the Act.

REMEDY[16]

Having found that the Respondent has violated Section 8(a)(5) and (1) of the Act, we shall order it to cease and desist, to bargain on request with the Union, and, if an understanding is reached, to embody the understanding in a signed agreement; and to provide the Union with the requested information.[17]

To ensure that the employees are accorded the services of their selected bargaining agent for the period provided by law, we shall construe the initial period of the certification as beginning the date the Respondent begins to bargain in good faith with the Union. *Mar-Jac Poultry Co.*, 136 NLRB 785 (1962); *Lamar Hotel*, 140 NLRB 226, 229 (1962), enfd. 328 F.2d 600 (5th Cir. 1964), cert. denied 379 U.S. 817 (1964); *Burnett Construction Co.*, 149 NLRB 1419, 1421 (1964), enfd. 350 F.2d 57 (10th Cir. 1965).

ORDER

The National Labor Relations Board orders that the Respondent, Superior Industries International, Inc., Van Nuys, California, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Refusing to bargain with International Union, United Automobile, Aerospace and Agricultural Implement Workers of America, UAW Amalgamated Local No. 645 as the exclusive bargaining representative of the employees in the bargaining unit.

(b) Refusing to provide the Union with requested information that is necessary and relevant to the Union's performance of its function as the exclusive bargaining representative of the employees in the bargaining unit.

(c) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) On request, bargain with the Union as the exclusive representative of the employees in the following appropriate unit concerning terms and conditions of employment and, if an understanding is reached, embody the understanding in a signed agreement:

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[16] The General Counsel's request for a visitatorial provision is denied as unnecessary. See *Cherokee Marine Terminal*, 287 NLRB 1080 (1988).

[17] In its October 23, 1987 brief, the Charging Party requested litigation costs pursuant to *Heck's Inc.*, 215 NLRB 765 (1974). The Charging Party also requested the Board to reconsider its decision in *Ex-Cell-O Corp.*, 185 NLRB 107 (1970). The Charging Party argues that the Respondent's defenses are frivolous.

The Charging Party's request for extraordinary remedies is denied. The Board has held that it will not award litigation expenses even where the respondent may be found to have engaged in "clearly aggravated and pervasive conduct," except in extraordinary circumstances involving frivolous defenses. *Garland Coal & Mining Co.*, 276 NLRB 963 fn. 4 (1985); *Tiidee Products*, 194 NLRB 1234 (1972).

> All production and maintenance employees, including leaderpersons, inspection employees, quality assurance technicians, shipping and receiving employees, warehouse employees, bobtail drivers, and tool and die makers, employed by the Employer at its facilities located at 7800 Woodley Avenue, 14617 Keswick Street, 14721 Keswick Street, and 14728 Raymer, Van Nuys, California 91406; excluding all other employees, electronics technicians, radiologists, chemists, draftsmen, tractor trailer drivers (long haul), office clerical employees, professional employees, guards, and supervisors as defined in the Act.

(b) Provide the Union with requested information that is necessary and relevant to the Union's performance of its function as the exclusive bargaining representative of the employees in the bargaining unit.

(c) Post at its facilities in Van Nuys, California, copies of the attached notice marked "Appendix."[18] Copies of the notice, on forms provided by the Regional Director for Region 31, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material.

(d) Notify the Regional Director in writing within 20 days from the date of this Order what steps the Respondent has taken to comply.

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

WE WILL NOT refuse to bargain with the International Union, United Automobile, Aerospace and Agricultural Implement Workers of America, UAW Amalgamated Local No. 645 as the exclusive representative of the employees in the bargaining unit.

WE WILL NOT refuse to provide the Union with requested information that is necessary and relevant to the Union's performance of its function as the exclusive bargaining representative of the employees in the bargaining unit.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL, on request, bargain with the Union and put in writing and sign any agreement reached on terms and conditions of employment for our employees in the bargaining unit:

> All production and maintenance employees, including leaderpersons, inspection employees, quality assurance technicians, shipping and receiving employees, warehouse employees, bobtail drivers, and tool and die makers, employed by the Employer at its facilities located at 7800 Woodley Avenue, 14617 Keswick Street, 14721 Keswick Street, and 14728 Raymer, Van Nuys, California 91406; excluding all other employees, electronics technicians, radiologists, chemists, draftsmen, tractor trailer drivers (long haul), office clerical employees, professional employees, guards, and supervisors as defined in the Act.

WE WILL provide the Union with the requested information that is necessary and relevant to the Union's performance of its function as the exclusive bargaining representative of the employees in the bargaining unit.

SUPERIOR INDUSTRIES INTERNATIONAL, INC.

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[18] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

H. B. Zachry Company ***and*** **International Brotherhood of Boilermakers, Local 30, affiliated with International Brotherhood of Boilermakers, Iron Shipbuilders, Blacksmiths, Forgers and Helpers, AFL–CIO.** Case 5–CA–17605

July 14, 1988

DECISION AND ORDER

BY CHAIRMAN STEPHENS AND MEMBERS JOHANSEN AND BABSON

On December 1, 1987, Administrative Law Judge Benjamin Schlesinger issued the attached decision. The Respondent filed exceptions and a supporting brief.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and brief and has decided to affirm the judge's rulings, findings,[1] and conclusions and to adopt the recommended Order.[2]

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge and orders that the Respondent, H. B. Zachry Company, Chesapeake, Virginia, its officers, agents, successors, and assigns, shall take the action set forth in the Order.

Paula S. Schaeffer, Esq., for the General Counsel.

William E. Twomey, Jr., Esq. (McGuire, Woods, Battle & Boothe; David R. Simonsen, Esq., Maris M. Wicker, Esq. and *Thomas P. Murphy, Esq.*, on the brief), of Richmond, Virginia, for the Respondent.

Robert L. Dameron, Esq. (Blake & Uhlig, P.A.), of Kansas City, Kansas, for the Charging Party.

DECISION

STATEMENT OF THE CASE

BENJAMIN SCHLESINGER, Administrative Law Judge. Respondent H. B. Zachry Company stipulated that about 20 August 1985, it did not hire Barry D. Edwards, a qualified boilermaker welder, who had applied for that position, "because Respondent believed it could lawfully refuse to hire a paid, full-time professional union organizer such as" Edwards. The complaint alleges that Respondent violated Section 8(a)(1), (3), and (4) of the National Labor Relations Act, 29 U.S.C. § 151 et. seq.[1] Respondent denied that it violated the Act in any manner.

Respondent admits, and I find, that it is a Delaware corporation with an office and place of business in Chesapeake, Virginia, where it has been engaged in construction work and is the general contractor for constructing and repairing boilers for Virginia Electric and Power Company on its property in Chesapeake. During the year preceding 3 June 1986, Repsondent has purchased and received at its Chesapeake facility construction site products, goods, and materials valued in excess of $50,000 directly from points outside Virginia. I conclude, as Respondent admits, that it is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act. I also conclude, as Respondent admits, that the Union is a labor organization within the meaning of Section 2(5) of the Act.

In an earlier unfair labor practice proceeding, *H. B. Zachry Co.*, 261 NLRB 681 (1982), the Board found that Respondent had violated the Act in numerous respects, including the discharge of Edwards in violation of Section 8(a)(3) and (1), and ordered Respondent, among other things, to reinstate Edwards to his former job at the Mayo project near Roxboro, North Carolina, with full backpay. The administrative law judge wrote, at 685:

> Edwards began work at the site on March 28, 1980, as a journeyman boilermaker welder after successfully completing welding tests for heavy and light wall construction with results termed "one of the prettiest test he'd [the company official] ever seen of many he'd administered—and done expediently, faster than most." Respondent stipulated that Edwards was a competent welder, and Edwards testified that Welding Foreman Dick Johnson complimented him on his work and the pains he took with it, as well as the help Edwards extended to coworkers about 2 weeks after Edwards started on B-boiler. General Foreman Pack also complimented Edwards on his work, a week or two later telling Edwards he "showed a lot of craftsmanship." Edwards, moreover, was never reprimanded in the course of his employment by Respondent.

At the time when Respondent was obligated to reinstate Edwards, its work at the Roxboro facility had finished, and so Edwards never obtained employment there; he applied for employment at Respondent's Chesapeake job in December 1984, and January, February, and July

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[1] The Respondent has excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

[2] We agree with the judge's finding that the appropriate remedy for the Respondent's unlawful refusal to hire employee Edwards should include an offer of employment and backpay. In so doing, we note that the Respondent in excepting to this portion of the remedy relies on the same asserted justifications for its refusal to hire Edwards which the judge rejected. We further noted that the Respondent has not established that it has a policy or past practice of not hiring employees based on such reasons.

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[1] The relevant docket entries are as follows: International Brotherhood of Boilermarkers, Local 30, affiliated with International Brotherhood of Boilermakers, Iron Shipbuilders, Blacksmiths, Forges and Helpers, AFL-CIO (Union) filed an unfair labor practice charge on 4 November 1985; and a complaint issued on 12 December 1985, which was amended on 3 June 1986 and at the hearing, which was held in Norfolk, Virginia on 30 July 1987.

1985, without success. The final refusal of Respondent to hire him occurred on 20 August 1985. Edwards' uncontradicted testimony was as follows:

> . . . I applied for work early in the morning because I knew they were hiring employees. And I addressed the personnel lady at the personnel trailer in the parking lot. And she told me that the boilermaker superintendent, [Jerrell] Barnes, would be coming out in a little while to interview applicants and he was needing tube welders, and if I was interested in going to work I should talk to him.
>
> A few minutes later, approximately within an hour [Jerrell] Barnes came out, told me he was needing tube welders, he was having a hard time obtaining people that could pass a welding test, wanted to know if I'd ever been certified on tubes before, and I told him yes. I showed him some certification papers that I had from various companies. And he told me that he needed to take my name and Social Security Number and he'd get me cleared through security and he would check with the welding technician to see that the test booth was open and when it came open he would give me a welding test. He told me to hang around, it would be about 45 minutes to an hour.
>
> He came back out about an hour later and he had another gentlemen with him by the name of Clarence Wade, who was the general foreman on the boilermaker craft, and he asked me had I ever worker for Zachry, and I told him yes. And he told me, he says, "When?"
>
> I said 1980 or '81, the best of my memory.
>
> And he said, "Well, I put your name in to the gate and Vepco, Virginia Power Company, okayed it through their security, but when we put it into the computer it came up with a star beside it, says not eligible for rehire," indicating I'd had some trouble in Roxboro in 1980.
>
> He asked me about this incidence [sic] and I told him at that time I had been discharged unlawfully, it went to an NLRB hearing, the Administrative Law Judge ruled on it in my behalf, it had been appealed and the appeal had been upheld, and I had been ordered to be reinstated to the job and I was there willing to go to work and wanting a job.
>
> He told me as long as my name was on that list not for rehire that he didn't have any authority to hire me and the only one that could take my name off that list was George Fewox.
>
> Q. And who is George Fewox.?
>
> A. He was the project manager at the Mayo job site back in 1980, but my understanding now he's a district representative for Zachry.
>
> . . . .
>
> Q. So were you ever hired at H. B. Zachry?
>
> A. No, ma'am, I was never hired.
>
> Have you continued to apply for jobs at H. B. Zachry?
>
> A. Yes, ma'am.

Edwards' application for employment graphically corroborates his testimony. Across its front is a thick dark slash, and in equally dark letters "DO NOT HIRE," followed by "ANYTIME per Jerrell Barnes."

Section 2(3) of the Act makes no distinction between employees, employees who are opposed to labor unions, employees who favor labor unions, and employees who are full-time paid union organizers. The Act merely states: "The term 'employee' shall include any employee, and shall not be limited to the employees of a particular employer, unless the Act explicitly states otherwise. The Board views the word "employee" as a member of the working class generally. *Giant Food Markets*, 241 NLRB 727, 728 fn. 3 (1979); *Little Rock Crate & Basket Co.*, 227 NLRB 1406 (1977); *Oak Apparel*, 218 NLRB 701 (1975). A job applicant is entitled to the protections of the Act, and the decision to hire that applicant must be made without consideration of the applicant's concerted and protected union activities. *Copes-Vulcan, Inc.*, 237 NLRB 1253, 1257 (1978), enfd. in relevant part 611 F.2d 440 (3d Cir. 1979).

This principle has been specifically applied to full-time paid union organizers who, although their ulterior purpose may be to organize the unorganized, are merely applying for a job, just like any other employees, are to be judged on their abilities as employees, and are forbidden by the Act to be judged on their union sympathies. *Pilliod of Mississippi, Inc.*, 275 NLRB 799, 811 (1985); *Palby Lingerie*, 252 NLRB 176, 182 (1980); *Margaret Anzalone, Inc.*, 242 NLRB 879, 888 (1979); *Henlopen Mfg. Co.*, 235 NLRB 183 fn. 1 (1978), enfd. 599 F.2d 26 (2d Cir. 1979); *Anthony Forest Products Co.*, 231 NLRB 976 (1977); *Oak Apparel*, supra.[2] Respondent raises no question about Edwards' physical capabilities to perform safely to job of boilermaker welder; and Edwards met Respondent's other criteria for employment, to wit, experience and past employment by Respondent. The only reason for not hiring him was because of Edwards' status with the Union. Since 1 January 1987, Edwards was a representative of the International Brotherhood of Boilermakers, but before, since 1983, he was a full-time paid organizer for Local 30. Respondent knew it. Eugene Hammond, Respondent's vice president, industrial relations, admitted knowing that Edwards was a union organizer because that is what he was doing at Roxboro and "he's been ineligible for rehire by H. B. Zachry since that time." It is, therefore, clear that counsel for the General Counsel has, at the very minimum, established a prima facie case that Respondent violated Section 8(a)(3) and (1) of the Act.

I note the establishment of a prima facie case because under the Board's test enunciated in *Wright Line*, 251 NLRB 1083 (1980), enfd. 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982); approved in *NLRB v. Transportation Management Corp.*, 462 U.S. 393 (1983), where a dual motive, and a prima facie violation of the Act has been established, the burden then shifts to Respondent "to demonstrate that the same action would have been taken even in the absence of the protected conduct." *Wright Line*, supra, 251 NLRB at 1089. Here, however, the only evidence of what caused Respondent not to hire Edwards is contained in his testimony, and that is that Barnes put Edwards' name "into the computer [and] it came up with a star beside it, says not eligible for rehire." Barnes, the person who refused to hire Edwards, did not testify, and the record is barren of any explanation of why Respondent, which needed qualified boilermakers and which conceded that Edwards was a qualified boilermaker, should have blacklisted Edwards, other than (1) Respondent's admission of its belief that "it could lawfully refuse to hire a paid, full-time, professional Union organizer"; (2) its maintenance of a list of the alleged discriminatees involved in the unfair labor practice proceeding, which culminated in the Board's decision at 261 NLRB 681, which list included Edwards separately as both an employee and organizer and was accompanied by instructions that the individuals on that list were not to be rehired;[3] and (3) the fact that Edwards had previously testified in that Board proceeding.

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[2] Respondent's reliance on the dissent of Member Kennedy in *Oak Apparel* has no merit. Obviously, his views were rejected, and they have never been adopted by the Board. Similarly, *NLRB v. Elias Bros. Big Boy*, 327 F.2d 421, 427 (6th Cir. 1964), to the extent that it finds paid union organizers are not employees, does not represent Board law. The Second Circuit in *Henlopen Mfg. Co.*, supra, 599 F.2d at 30, agreed with the Board.

Accordingly, on the basis of what happened on 20 August 1985, and the information that was available to Barnes, this is not a dual-motivation case in the classic sense, one motive illegal, and the other legitimate. If there are two motives, they are both illegal, one under Section 8(a)(3), because Edwards engaged in union activities, and the other under Section 8(a)(4), because Edwards was involved in the prior Board proceeding and was still being punished for his testimony, participation, and success in that proceeding. I find, in these circumstances, that Respondent violated the Act in both respects, as alleged in the complaint.

Furthermore, assuming that there is actually a dual motivation[4] and that I ought to consider Respondent's claims of other legal justifications for its action, I find them without merit because I found Hammond, Respondent's sole witness, unreliable. Respondent's primary contention in its brief is that it will not hire anyone who had other full-time employment. Actually, what Hammond testified to was that Respondent's policy was to "prohibit persons who [are] employed full-time elsewhere during the daytime to be employed by" Respondent. Because Respondent's normal workdays are from Monday to Friday, "during the daytime," I find it difficult to imagine how and when the alleged policy would be applied because an employee could not work full-time for two employers during the same working hours. So really, what Hammond testified to was nonsensical and was simply a method of attempting to avoid Respondent's stipulation of the reasons it did not hire Edwards, quoted at page 1, above.[5] The entire record persuades me that "full-time" was not the salient part of the stipulation; rather, it was because Edwards was a union organizer (who also happened to be on the union's payroll as a full-time employee), who would, in Hammond's words, be disruptive on the jobsite, that Respondent did not hire him. Respondent produced no document that supported Hammond's alleged policy against hiring persons employed full time by others, and Respondent's own hiring policies omit this policy. In addition, Hammond's testimony supporting the existence of this policy (pp. 142-143 of the official transcript) was vague, hesistant, and, I find, unbelievable. Furthermore, other than the repetition of the adjective "disruptive"—which is synonymous for union activity—Hammond's rationale makes no sense because he conceded that one of Respondent's employees could work a second job on weekends because that did not interfere with his work for Respondent. Edwards' earlier employment by Respondent indicates that his Section 7 activities did not interfere with his work for Respondent, and there is no reason to anticipate that it would have interfered at the Chesapeake project.

Obviously, I am not at all persuaded with Respondent's newly found defense that it will not hire persons who are employed full time elsewhere. So many times, and in so many different ways, did Hammond repeat Respondent's motivation that it would not hire a paid union organizer. Indeed, he admitted that Respondent had an unwritten policy against hiring union organizers as early as 1980; and if Respondent had known then that Edwards was a paid union organizer and union president, Respondent would not have hired him in 1980. When Hammond referred to those whom Respondent would not hire, he did not refer to their "full-time" status; he talked about "professional union organizer" or "paid professional union organizer." His fears were directed not to the fact that such employees would report to work exhausted, or would not report at all, but what they would do when they were supposed to be working for Respondent, to wit, "we would find it most disruptive to co-employees working on the site"; and "[w]e did not need [Edwards] on the job since we know that he's a paid employee of the Boilermakers and would cause nothing but problems upon our job site." Edwards, as a paid union organizer, Hammond explained, would be more disruptive on the jobsite than an unpaid union organizer because he would leave his work area, would talk to people during working hours, and would slow down employees' work performance. These reasons having nothing to do with whether Edwards is employed full time or part time or no time elsewhere. They have only to do with Edwards' protected Section 7 rights to organize employees. Those rights, as noted above, are protected for all employees; and Respondent may not simply ignore them because it believes that the Act is not in Respondent's best interest.

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[3] Two other employees whom the Board had ordered reinstated in its prior decision, Frank and Garland Keatts, applied for boilermaker welder position about 19 August 1985 (the day before Edwards applied) at Respondent's Chesapeake jobsite and successfully completed preemployment welding tests on that date, but Respondent did not hire them, although it hired other applicants. The names of both employees were on the same list referred to above, and the parties stipulated that "Respondent's failure to erase that list directly resulted in Respondent's refusal to hire Frank and Garland Keatts." Respondent's refusal to hire them and Edwards were incorporated in the same unfair labor practice charge filed 4 November 1985, and the refusal to hire them was was originally alleged as a unfair labor practice in the complaint herein. However, by letter dated 5 December 1985, Respondent offered employment to both Keatts, who started working for Respondent in Chesapeake about 11 December 1985. All allegations of the complaint, except those that referred to Edwards, were withdrawn at the opening of the hearing.

[4] Hammond testified that the reason Respondent would not hire Edwards "today" (the day of the hearing) is that Edwards is a paid union organizer "today." If he were not, Respondent "might possibly" hire him. Although Hammond's statement was less than completely definite, nonetheless nothing was said about all the other alleged reasons, now urged by Respondent, why Edwards should not have been hired. Only his position as a paid union organizer was the asserted obstacle to his employment. In addition, in answer to my hypothetical question about an applicant for employment, who was a most capable employee, but a rabid union adherent, not a paid organizer, who openly admitted a desire to organize Respondent's employees, Hammond could not answer whether Respondent would hire him because: "When a person comes on board and makes those kind of statements, it makes one think." It appears that Respondent had such union animus that no union adherent, no less organizer, was eligible for employment.

[5] I recognize that Respondent, by entering into the stipulation, did not waive any other arguments that it sought to litigate. However, it would have been simple enough for Respondent to have stipulated that it refused to hire Edwards only because it believed that he had a full-time job elsewhere, omitting any emphasis on the fact that the full-time job was with the Union. It did not, and Hammond's emphasis on Edwards' full-time employment as a union organizer was the only issue that motivated Respondent not to hire him.

The gist of Respondent's argument is that Edwards owes Respondent a duty or loyalty, which he cannot have if he is a union organizer. That is simply unfounded, in fact and in law. Respondent's cited decisions hold only that merely because an employee favors union organization, an employee is not insulated from discipline for not doing his or her job. They do not hold that an employer is free to hire only those employees who are opposed to union organization or to discipline employees solely because of their Section 7 activities.

Respondent's additional defenses require little comment. First, Respondent contends that it has a no-solicitation rule and that Edwards was engaging in "a ruse to enter [Respondent's] private property with the sole purpose of attempting to defeat its property rights," because it was entitled to exclude nonemployee union organizers from its private property, citing *NLRB v. Babcock Wilcox Co.*, 351 U.S. 105 (1956). The simple answer is that Edwards was not attempting as a nonemployee to gain access to Respondent's premises. He was attempting to obtain employment; and, he had been hired, he would have the same Section 7 rights as any other employee. Respondent's argument would permit it and all other employers to utilize no-solicitation rules to discriminate in their hiring policies against any union sympathizer in order to keep that sympathizer off their property. I know of no support for this argument, which flies in the face of Section 8(a)(3) of the Act.

Second, Respondent contends that it refused to hire Edwards to avoid the creation of an inference that it supported the Union and to avoid financial assistance to the Union, in violation of Section 8(a)(2) of the Act. The first point may have been more persuasive urged had Respondent not already been found in violation of the Act. It is rather brazen for it to so urge when the Board has previously found that, among other things, it had engaged in surveillance and created the impression of surveillance of its employees' union activities, it has threatened employees with discharge and discharged them for engaging in union activities, it had refused to employ a prospective employee because he was related to employees who supported the Union, and it had more strictly enforced its work rules because the employees engaged in union activities. Respondent's second point, that had it hired Edwards, it would be paying him for his union organizing duties, is simply not so. It would be paying Edwards solely for his work performed for Respondent. Finally, there is absolutely no support in the record that these reasons motivated Respondent to refuse to hire Edwards. Rather, the record amply supports my finding that Respondent did not hire Edwards not because it wanted to avoid favoring the Union but because it sought to ensure that it would do nothing to help any union organizational attempt.[6]

Third, Respondent contends that it would not have hired Edwards because he did not report his present and prior employment by the Union on his application form and because Respondent had in its files a 1983 psychological evaluation, prepared for another employer, which recommended against hiring Edwards on a nuclear power plant project because of his alleged unstable mental condition. Like so much else in this proceeding, I find no evidence that these contentions played any role in Respondent's decision. Hammond testified that about a week after Edwards was refused employment, he spoke to Fewox and told him that he did not have to hire paid union organizers. He never asked him what Edwards had put on his application; and Hammond, in relating the conversation, seems never to have discussed the application. Rather, the sole reason for affirming Barnes' decision (if Hammond ever had the conversation) was that Edwards, as a union organizer, "would cause nothing but problems upon our jobsite." Equally important, the Chesapeake job was not a nuclear power project and, if the evaluation had any substance, it applied solely to a nuclear site and nothing more. Furthermore, Hammond seems to have thought that the evaluation was insubstantial because he buried it in Respondent's Roxboro file and not in Edwards' personnel file. He had not looked at it from 1983 until the day before the hearing in this proceeding when he also saw for the first time Edwards' application for employment.

Fourth, as to that application, Respondent contends, in conformity with the rejected dissent in *Oak Apparel*, supra, 218 NLRB at 701: "It is logical to infer . . . that the duration of Edwards' employment with each nonunion employer will be determined by the course of the organizational process, rather than by the duration of the contract's project." But, because Hammond had not seen Edwards' job application until immediately before the hearing, I am unpersuaded that he relied on Edwards' past work record, which shows, in any event, that Edwards left most of his jobs because they had been completed, thus belying any inference to the contrary.

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[6] *NLRB v. Vernitron Electrical Components*, 548 F.2d 24 (1st Cir. 1977), cited by Respondent, is inapposite. There, the employer assisted the union by shepherding employees by department to meeting with the union organizers, by paying the employees their wages during the meetings, by monitoring the employees' execution of authorization cards, and by speedily recognizing the union in order to ensure that recognition would continue, in the face of erosion after the employer-assisted organizing ceased. The "confluence" of these actions, which supported the Board's findings of violations of Sec. 8(a)(1) and (2), is clearly different from a single acceptance of an employment application from one known union organizer.

In sum, I find no motive other than the illegal motives found above that caused Respondent to refuse to hire Edwards and conclude that Respondent violated Section 8(a)(1), (3), and (4) of the Act.[7] These unfair labor practices, occurring in connection with Respondent's operations described above, have a close, intimate, and substantial relationship to trade, traffic, and commerce among the several States and tend to lead to labor disputes burdening and obstructing commerce and the free flow thereof.

THE REMEDY

Having found that Respondent has engaged in and is engaging in unfair labor practices within the meaning of Section (1), (3), and (4) of the Act, I shall recommend that it cease and desist therefrom and take certain affirmative action designed to effectuate the purposes and policies of the Act. Respondent has finished its work at Chesapeake location and so I cannot order employment of Edwards on that project. However, Respondent gives its employees the opportunity, when one project is finished, to obtain employment at another of its projects, provided that jobs are available. Furthermore, the Board has recently directed that, as standard relief in construction industry cases, discriminatees should be ordered to be reinstated and, if an issue should arise with respect to that relief, the issue should be resolved in compliance proceedings. *Dean General Contractors*, 285 NLRB 573 (1987). Accordingly, I shall recommend that Respondent be ordered to offer Edwards full and immediate employment in the position of boilermaker welder or a substantially equivalent position and to make him whole for any loss of earnings he may have suffered by reason of Respondent's failure to hire him on 20 August 1985, by paying him a sum of money equal to that which he normally would have earned absent Respondent's unfair labor practices, less earnings during such period,[8] to be computed in the manner prescribed in *F. W. Woolworth Co.*, 90 NLRB 289 (1950), plus interest in accordance with *New Horizons of the Retarded*.[9] Because the Chesapeake job has been completed, I shall order Respondent to mail the usual notice to the employees who were employed by Respondent at the jobsite at any time. In addition, because Respondent appears to have learned little from its earlier experiences before the Board and continues to violate the Act, I shall recommend a broad order, pursuant to *Hickmott Foods*, 242 NLRB 1357 (1979).

The General Counsel also requests a visitatorial clause, authorizing the Board to engage in discovery under the Federal Rules of Civil Procedure so that it will be able to monitor compliance with the Order recommended herein, if adopted by the Board and enforced by a court of appeals. The Board heard oral argument on this issue in September 1986 but has not yet ruled. In the meantime, it has uniformly denied the relief in individual cases, without explanation; and I will not recommend that the visitatorial clause be included in the relief, until the Board instructs otherwise.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[10]

ORDER

Respondent, H. B. Zachry Company, Chesapeake, Virginia, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Refusing to hire employees because of their membership in or activity on behalf of International Brotherhood of Boilermakers, Local 30, affiliated with International Brotherhood of Boilermakers, Iron Shipbuilders, Blacksmiths, Forgers and Helpers, AFL–CIO or any other labor organization.

(b) Refusing to hire employees because they have filed charges or given testimony under the National Labor Relations Act.

(c) In any other manner interfering with, restraining, or coercing its employees in the exercise of their rights guaranteed under Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Offer Barry Edwards full and immediate employment in the position, or its substantial equivalent, in which he would have been employed on 20 August 1985, without prejudice to any seniority or other rights or privileges he would have acquired and make him whole for any loss of earnings he may have suffered by reason of the discrimination against him, in the manner set forth in the remedy section of this decision.

(b) Preserve and, on request, make available to the Board or its agents for examination and copying, all payroll records, social security payment records, timecards, personnel records and reports, and all other records necessary to analyze the amount of backpay due under the terms of this Order.

(c) Mail to all employees employed on 20 August 1985 by Respondent at its Chesapeake, Virginia jobsite copies of the attached notice marked "Appendix,"[11] copies of which will be provided by the Regional Director for Region 5.

(d) Notify the Regional Director in writing within 20 days from the date of this Order what steps the Respondent has taken to comply.

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[7] Even if I found the existence of a different motive, I am persuaded that such a motive would be a mere pretext seized on by Respondent to avoid hiring Edwards.

[8] Concededly, the amount involved may be minimal because Edwards probably continued to receive pay from the Union or the International throughout the period. However, Edwards would have been entitled to retain any amount paid by a construction firm as overtime or a bonus.

[9] 283 NLRB 1173 (1987). Interest will be computed at the "short-term Federal rate" for the underpayment of taxes as set out in the 1986 amendment to 26 U.S.C. § 6621.

[10] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

[11] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

WE WILL NOT refuse to hire employees because of their membership in or activity on behalf of the International Brotherhood of Boilermakers, Local 30, affiliated with International Brotherhood of Boilermakers, Iron Shipbuilders, Blacksmiths, Forgers and Helpers, AFL-CIO or any other labor organization.

WE WILL NOT refuse to hire employees because they have filed charges or given testimony under the National Labor Relations Act.

WE WILL NOT in any other manner interfere with, restrain, or coerce our employees in the exercise of their rights guaranteed under Section 7 of the Act.

WE WILL offer Barry Edwards full and immediate employment in the position, or its substantial equivalent, in which he would have been employed on 20 August 1985, without prejudice to any seniority or other rights or privileges he would have acquired and WE WILL make him whole for any loss of earnings he may have suffered by reason of the discrimination against him, with interest.

H. B. ZACHRY COMPANY

Shaw's Supermarkets, Inc. ***and*** **Teamsters Union Local 340 a/w International Brotherhood of Teamsters, Chauffeurs, Warehousemen & Helpers of America, AFL-CIO.**[1] Cases 1-CA-24543 and 1-RC-18882

July 14, 1988

DECISION AND ORDER

BY CHAIRMAN STEPHENS AND MEMBERS BABSON AND CRACRAFT

On November 23, 1987, Administrative Law Judge Michael O. Miller issued the attached decision. The Respondent filed exceptions and a supporting brief. The General Counsel also filed exceptions and a supporting brief, to which the Respondent filed a reply.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings,[2] findings,[3] and conclusions[4] and to adopt the recommended Order.

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge and orders that the Respondent, Shaw's Supermarket, Inc., Portland, Maine, its officers, agents, successors, and assigns, shall take the action set forth in the Order.

IT IS FURTHER ORDERED that the election conducted on January 20, 1987, in Case 1-RC-18882 is set aside and this case is severed and remanded to the Regional Director for Region 1 for the purpose of scheduling and conducting a second election at such time as he deems the circumstances permit a free choice on the issue of representation.

[Direction of Second Election omitted from publication.]

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[1] On November 2, 1987, the Teamsters International Union was readmitted to the AFL-CIO. Accordingly, the caption has been amended to reflect that change.

[2] The Respondent has excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

[3] We agree with the judge's finding that Vice President of Distribution Wyatt's statement at the January 15, 1987 employee meetings that "employees would be guaranteed minimum wages and workmen's comp[ensation] and that's where our collective-bargaining process would begin," amounted to an unlawful threat of regressive bargaining with a resulting loss of benefits. In so doing, we conclude that Wyatt's several references to collective bargaining as a "give-and-take" process, his example of how a union in another warehouse bargained away a profit-sharing plan in exchange for a pension plan, and his statement that the Respondent would start with minimum wages and workmen's compensation and "build from that point," do not constitute assurances that the Respondent would not require the Union to give up existing benefits or dispel the impression that what employees ultimately receive through collective bargaining is dependent on what the Union can induce the Respondent to restore. Thus, in contrast to the Employer's statement in *La-Z-Boy*, 281 NLRB 338, 340 (1986), that it was "ridiculous" to think the company would pay minimum wages regardless of the outcome of negotiations, Wyatt's statements do not give employees the unambiguous message that they will not initially be stripped of all existing benefits through collective bargaining. Indeed, Wyatt's statement that the employees would be "guaranteed" minimum wages and workmen's compensation and that the parties would have to "build" from that point conveys the opposite message, i.e., that collective bargaining *begins* with the loss of existing benefits and proceeds with a struggle by the Union to get those benefits restored.

[4] We correct two misstatements made by the judge. Objections and an unfair labor practice charge had been filed concerning an election conducted October 23, 1982, but were later withdrawn. No reliance was placed on these events. Further, the evidence shows the second letter from the Respondent about the election that mentioned the Respondent's expansion plans was sent to the employees at some point before the election, but not that it was sent 1 week before the election as the judge stated. The judge's error does not affect the decision inasmuch as the evidence shows that in any event the employees had access to the content of both letters before the election.

Finally, in the absence of exceptions we adopt pro forma the judge's recommendation that Objection 3, parts 2, 4, 5, and 6, be overruled.

289 NLRB No. 119

Kathleen F. McCarthy, Esq. and *Beryl Rothman, Esq.*, for the General Counsel.

Murray S. Freeman, Esq. (Nutter McClennen & Fish), of Boston, Massachusetts, for the Respondent.

James E. Carson of Portland, Maine, for the Charging Party.

DECISION

STATEMENT OF THE CASE

MICHAEL O. MILLER, Administrative Law Judge. This case was heard in Portland, Maine, on 30 June 1987 based on an unfair labor practice charge filed on 23 February 1987 by Teamsters Union Local 340, a/w International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America (the Union or Local 340), and a complaint issued by the Acting Regional Director for Region 1 of the National Labor Relations Board (the Board) on 9 April 1987. The complaint alleges that Shaw's Supermarkets, Inc. (Respondent or the Company), violated Section 8(a)(1) of the National Labor Relations Act (the Act) by threatening employees with various reprisals in the event that they selected a collective-bargaining representative. Respondent's timely filed answer denies the commission of any unfair labor practices. The allegations of the complaint were consolidated for hearing with the Union's objections to conduct affecting the results of an election in Case 1-RC-18882, which had been conducted on 20 January 1987, as set forth in a Report on Objections and Challenges, which issued on 4 April 1987.[1]

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[1] By stipulation, the challenges were withdrawn and a revised tally of ballots issued. The revised tally showed that there were 46 ballots cast for representation by the Union, 1 ballot cast for the Independent Foodhandlers and Warehouse Employees, an intervenor, and 71 ballots, a majority of the valid votes cast, for neither Union.

All parties were afforded full opportunity to examine and cross-examine witnesses, argue orally, and submit briefs. Briefs, which have been carefully considered, were submitted by the General Counsel and the Respondent.

Based on the entire record, including my observations of the demeanor of the witnesses, I make the following

Findings of Fact

I. THE RESPONDENT'S BUSINESS AND THE UNION'S LABOR ORGANIZATION STATUS— PRELIMINARY CONCLUSIONS OF LAW

The Respondent is a corporation engaged in the retail sale and distribution of groceries, frozen food, and related items with a warehouse facility in Wells, Maine. Jurisdiction is not in issue. The complaint alleges, Respondent admits, and I find and conclude that Respondent is, and has been at all times material, an employer engaged in commerce and in operations affecting commerce within the meaning of Section 2(2), (6), and (7) of the Act.

The complaint alleges, Respondent admits, and I find and conclude that Teamsters Union Local 340, a/w International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America is, and has been at all times material, a labor organization within the meaning of Section 2(5) of the Act.

II. THE ALLEGED UNFAIR LABOR PRACTICES

A. *Background*

The Respondent operates a chain of 48 retail grocery stores in Maine, New Hampshire, and Massachusetts, with warehouse facilities in East Bridgewater, Massachusetts (where its corporate headquarters are located), and Wells, Maine. The Wells warehouse, the only one involved in these proceedings, was opened in about 1985, replacing a warehouse in Portland, Maine. It consists of approximately 250,000 square feet of space, predominantly devoted to frozen foods. Respondent has approximately 2000 employees, about 130 of whom work in the Wells unit. Of these, about 90 are full-time employees; the remainder work part time. The Wells warehouse operates on a three-shift basis with the hours staggered between the frozen food and dry grocery sides. The warehouse manager is Stephen Kumka; Charles Wyatt is the vice president of distribution. Respondent admits the supervising status of Wyatt and Kumka. Wyatt is based in East Bridgewater and visits the Wells warehouse about once a week.

The Wells employees are not currently represented by any labor organization. The election involved here was the third conducted among the employees since this warehouse, and its predecessor in Portland, opened in 1982. No unfair labor practice charges or objections were filed concerning the prior campaigns or elections, both of which resulted in votes against union representation. The employees at East Bridgewater have been represented for about 35 years by the Independent Food Handlers and Warehouse Employees Union, (IFWE). IFWE intervened in Local 340's most recent petition.

B. *The 23 December 1986 Letter—Alleged Threat to Cancel Expansion Plans*

The Respondent has plans to expand the Wells warehouse by about 230,000 square feet and its employees have been aware of those plans since at least late summer or early fall of 1986. By December 1986, some preliminary planning had been done with an engineering group and a consulting firm.

Sometime around early December 1986, Local 340 filed a representation petition; IFWE intervened. On 23 December 1986, Respondent posted a letter addressed to all of its Wells employees pointing out that, "for the third time in four years, [we are] going to be subjected to another organization drive by both Teamsters Local 340 and . . . IFWE." It went on to state:

> We want to get this election behind us as soon as is reasonably possible. As you are aware, we have plans for expansion here at Wells. In part, those plans are based upon our confidence in our employees here at Wells; we are similarly confident that our employees will reject the sales pitch of both these Unions and that we can then turn our mutual efforts to make this the best of its kind of operation from the point of view of both our employees and the company.

The letter concluded with information about when the election would be held.

In a second letter, undated but identified by Wyatt as having been sent to the employees about a week before the election, Wyatt stated:

> In the relatively short time we have been here at Wells, we've accomplished a lot together. The Company is growing and we all hope to grow along with it. We are firmly committed to expansion here at Wells and working together we are going to be able to provide more jobs and more promotional opportunity. We do not want to be distracted from that goal by endless negotiations and possible strikes, etc.

C. *Wyatt-Swanson Conversation*

In early January, day-shift employee Dean Swanson raised some questions concerning the upcoming election that Kumka could not answer. Kumka referred them to Wyatt and, when Wyatt came to the warehouse around 9 January 1987,[2] he spoke with Swanson, an employee he had known for 6 years. The conversation took place in the aisle where Wyatt met Swanson. They spoke for about 2 hours, covering such topics as overtime, insurance benefits, and the Company's allotment for work shoes. In the course of discussing collective bargaining, Wyatt told Swanson that Respondent's employees enjoyed the best benefits in the industry for that area. He suggested that the wages and benefits were so good that the employees would not be able to get anything better through collective bargaining. According to Swanson, when Swanson suggested that the two prior union campaigns had a lot to do with the present level of benefits, Wyatt got upset and stated that he could guarantee that the employees would get no greater benefits through union representation because the Union would have to bargain with him and he was not willing to give any better benefits than they had at that time.

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[2] All subsequent dates are 1987 unless otherwise specified.

Wyatt denied telling Swanson that he would guarantee that a union would get them no greater benefits; he claimed (and Swanson confirmed) that he asked Swanson whether Swanson really believed that he could do better by turning his affairs over to a "third party." Kumka, who had been present during parts of the conversation, was not present during this portion.

In his pretrial affidavit, Swanson made no mention of having upset Wyatt with the contention that Respondent had granted its present level of benefits because of the earlier union campaigns. This, however, was a significant aspect of Swanson's testimony before me. It would tend to explain why an otherwise careful campaigner (as I find Wyatt to be) might threaten to be adamant in bargaining to the point of having a closed mind. Noting that omission, the possibility that Swanson interpolated such a threat from Wyatt's question, and my impressions as to the credibility and recollective abilities of the witnesses, I find that the General Counsel has not sustained her burden of proving that Wyatt made the threat Swanson attributed to him. Accordingly, I shall recommend that the allegation of paragraph 7(c) of the complaint be dismissed.

D. *The Meetings*

On January 15, Wyatt held meetings with the employees of each shift, as he had done during each of the prior campaigns. Respondent does not dispute that the purpose of these meetings was to persuade the employees to vote against union representation. Each of the meetings was "on-the-clock" and the employees were instructed to attend by their supervisors.

The meeting with the first-shift employees took place between 1 and 3 p.m. with about 35 employees, Wyatt, Kumka, and about 4 other supervisors present. Wyatt began this meeting, as he began each of them, by introducing himself, explaining that he had come to answer their questions and address their concerns about the election, which was scheduled for the following Tuesday, and stating that he hoped that they had or would decide to vote for neither Union in the election.

Wyatt then took questions from the employees. An employee asked what collective bargaining was or what it meant to the employees at Wells. According to Wyatt, he told them that collective bargaining was a system of give and take, that demands would be put on the table by a "third party,"[3] and it would be up to the employer to negotiate back and forth concerning the demands and work restrictions that were being discussed. As he testified:

> I told the group, as I told all groups, that if they were to turn their affairs over to a third party that the employees would be guaranteed minimum wages and workmen's comp[ensation] and that's where our collective-bargaining process would be.[4]

At the time he made this statement, Respondent was paying up to $11.70 per hour plus differentials to the full-time employees and about $5 per hour to the part-timers.

Several questions were asked about profit sharing, particularly whether the profit sharing that they presently enjoyed would be in jeopardy as a result of collective bargaining. Wyatt explained that profit sharing could be a negotiable item and described how IFWE had negotiated away profit sharing in favor of a pension plan at East Bridgewater, funding that plan from accumulated profit-sharing funds. He denied threatening the employees with the loss of profit sharing.[5]

Someone questioned whether the Teamsters could guarantee job security; Wyatt answered that neither the Teamsters nor any other union could guarantee job security. He pointed out several Maine firms with Teamsters contracts that had gone out of business, stating, however, that he was not claiming that they had done so because of the Union. He said that it had happened as a possible result of deregulation or the economy; he only cited them as examples to show that union representation did not prevent plant closings.

In response to a question about Respondent's expansion plans, Wyatt stated that those plans were proceeding along, that he expected some sitework to be done in early spring and that the expansion would be completed, or at least enclosed, by late fall and operational by the spring of 1988.[6]

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[3] Wyatt repeatedly referred to selection of a union as bringing in a "third party," a disparaging and less than fully accurate description of the role of a collective-bargaining representative. Wyatt, having served on the IFWE's negotiating committee when he was a unit employee in East Bridgewater, knew that unions act in a representative capacity and are no more "third parties" than employer's counsel or consultants.

[4] Although some employees described his statement with slightly different terms, I am satisfied that this is essentially what he said.

[5] Swanson claimed that he asked Wyatt the foregoing questions; Wyatt named other employees as having done so. As Swanson recalled it, he asked Wyatt if Wyatt meant that "if the employees . . . went into a union that the employees could lose their profit sharing and all the other employees in the program would keep it, and all of our money would be put into the account?" Wyatt allegedly replied, "Yes, we wouldn't, but we could." Assuming, arguendo, that such a statement would constitute a threat of loss of the profit-sharing plan, thus necessitating a resolution of credibility, I find that I cannot credit Swanson. Swanson acknowledged that he was seated in the back of the room, between two noisy vending machines, and could not hear everything that was being said. Moreover, the General Counsel offered no corroboration of Swanson's testimony from among the 35 employees who were present and Kumka credibly corroborated Wyatt. Similarly, I cannot credit Swanson's assertion that, in response to a further question about the effects of voting a union in, Wyatt stated, "[I]f a union came in we could just close the place up." Such a patent threat is totally out of character with Wyatt's carefully phrased answers and no employee corroborated Swanson or contended that Wyatt made any such remarks in the three other meetings held that day.

[6] As of the hearing date, construction had not begun. According to Wyatt, Respondent had not received the necessary approvals from the Department of Environmental Protection and was awaiting its permits.

The meeting continued with some discussion of the insurance benefits enjoyed at Wells as compared to East Bridgewater and Wyatt's role in IFWE when he had been a unit employee. He was asked how he could now urge employees to reject unionization when he had once been a union officer. He replied that Respondent paid the best wages and benefits of, or at least paid wage and benefits comparable to, anyone in the industry and, because of that, he believed that they had earned the right to maintain a union-free environment and not be subjected to such work restrictions as they had at East Bridgewater. He told the employees that the first contract would be the hardest to negotiate and concluded the meeting by stating his hope that they would make the right decision.

According to Wyatt and Kumka, the meeting with the frozen food department employees of the second shift was essentially a repetition of the first-shift meeting described above. Rather than take as many questions, Wyatt told the employees what had been asked at the first meeting and repeated his answers. According to employee Kenneth Sylvester, however, Wyatt answered a question from Thea Jongerden about the effect of collective bargaining on their profit sharing by stating that "it could be lost, a good possibility that it would be lost." Sylvester recalled no discussion about negotiations at East Bridgewater with IFWE affecting the profit-sharing plan there and testified, contrary to his affidavit, that he recalled no statements about profit sharing being on the table or subject to collective bargaining. He also recalled Wyatt stating that there was no movement on the expansion program because of the upcoming election, that the Teamsters were not partial to part-timers, who could lose their jobs, and that a layoff was not likely because business was picking up "but there could possibly be one." He also recalled a part-time employee, Ralph DuChamb, asking about work standards, called reasonable expectations or REs. Kumka allegedly answered that REs were a nonnegotiable item in the contract. He recalled no discussion of management's right to measure productivity.

Wyatt and Kumka denied making the statements attributed to them by Sylvester and, as noted above, assert that Wyatt only repeated the remarks he made in the first meeting. Kumka could recall no discussion of REs in any meeting other than the last.

No testimony was offered concerning Wyatt's meeting with the dry grocery employees of the second shift.

Wyatt met with all the third-shift employees about 11 p.m. He and Kumka testified that it followed essentially the same pattern as the second-shift frozen food department meeting. In this meeting, however, a question was raised about the work standards; Kumka answered, telling employees that the REs were negotiable but that he believed that management had a right to have a performance measurement system in place in order to fairly measure the performance of its employees. He credibly denied ever telling employees that the work standards were not negotiable. An employee asked whether part-time employees would lose their jobs if either the Teamsters or IFWE got in. In reply, Wyatt told the employees of his experience with one of Respondent's subcontractors whose employees were represented by the Teamsters. Under that contract, there were no part-timers; employees not called in to work were treated as if they were casuals, on layoff when not working.[7]

Analysis and Conclusions

As set forth above, I have found insufficient credible evidence to support the General Counsel's contentions that Wyatt or Kumka threatened employees with plant closure (complaint pars. 7(a)(i), loss of profit sharing par. 7(a)(iii); the taking of bad-faith bargaining positions pars. 7(a)(v), (vii), and 7(c); or layoffs of either full or part-time employees pars. 7(a)(vi) and (viii)). Accordingly, I shall recommend that these allegations be dismissed.

The General Counsel asserts that Respondent's 23 December letter, by creating a nexus between the Employer's expansion plans and the employees' rejection of the unions, constituted a subtle threat to cancel or reconsider those plans if the employees selected a collective-bargaining representative.[8] In agreement with Respondent, I cannot find the message of this letter to be coercive. The letter expresses confidence in, or satisfaction with, the employees in the Wells work force. It states that because of that confidence, the Employer is planning to expand the facility and goes on to state, "we are similarly confident that our employees will reject the sales pitches of both these unions and that we can turn our mutual efforts to make this the best of its kind of operation from the point of view of both our employees and the company."

The General Counsel argues that there would be no reason for Respondent to connect a discussion of the expansion plans with a statement about voting against unionization unless those plans were contingent on the employees' negative vote. This, I believe, is a strained interpretation of the letter, one which might be warranted in a context heavy with animus and other coercive conduct, but not in this case. A lawful interpretation, at least as plausible as that offered by the General Counsel, is that Respondent, in its effort to persuade employees that they did not need union representation, was merely endeavoring to show that they were appreciated and that the future was already bright. This becomes the more logical interpretation of the letter when it is read in conjunction with the subsequent letter, issued about a week before the election. In that letter, Respondent stated that it was "firmly committed to expansion," words hardly suggestive of threatening contingencies.[9] Further, this second letter pointed out what expansion meant to the employees, more jobs and greater promotional opportunity, emphasizing Respondent's position that the employees did not need a union.

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[7] Mark Dubois, an employee who had been discharged in February (unfairly to his way of thinking), testified that Wyatt said that "there probably could not be any [profit sharing] or it could be less . . . that [the expansion] definitely would come to a halt," that the Company would just have to "wait and see" what would become of part-timers if a union got in, and that Kumka said that he would set the work standards and they would not be "privy to negotiations." Noting the demeanor of the witnesses, the contradictions between the testimony and the affidavits of Sylvester and Dubois, the contradiction of Dubois' contention concerning the halting of the expansion plans (which is contained in Respondents' second letter), asserting a firm commitment to expansion, evidence establishing a basis for bias by Dubois against Respondent arising from the circumstances of his termination, the lack of corroboration of their testimony by anyone else present at the same meetings, and the probability that both employees read more into Wyatt and Kumka's words than they really contained, I credit Wyatt and Kumka's versions of the second- and third-shift meetings.

[8] I have found the evidence that Wyatt threatened employees with delay or cessation of the expansion plans in the course of the January 15 meetings insufficiently probative or credible to sustain the General Counsel's burden of proof. Accordingly, I shall recommend dismissal of complaint par. 7(a)(iv).

Accordingly, because I find no threat to be implicit in the 23 December letter, I shall recommend dismissal of complaint paragraph 7(d).

Finally, the General Counsel asserts that Wyatt's purported explanation of the collective-bargaining process, as a system of give-and-take where the Employer would begin bargaining at minimum wage and workmen's compensation (the bare legal requirements) and that would be all that the employees would be assured of receiving, threatened the employees with regressive bargaining, and the likely loss of benefits and violated Section 8(a)(1). I agree.

Wyatt's statement, viewed in its most favorable light, is a variation on the "bargaining from scratch" statements with which the Board has been dealing for at least two decades. Of such statements, the Board has held:

> As the Board and the courts have recognized in other cases, in the course of organizational campaigns, statements are sometimes made of a kind that may or may not be coercive, depending on the context in which they are uttered [fn. omitted.] "Bargaining from scratch" is such a statement. In order to derive the true import of these remarks, it is necessary to view the context in which they are made.

Wagner Industrial Products Co., 170 NLRB 1413 (1968). See also *Campbell Soup Co.*, 225 NLRB 222, 229 (1976), and cases cited therein. Statements that "accurately reflect the obligations and possibilities of the bargaining process . . . which do not contain any threats that Respondent will not bargain in good faith or that *only* regressive proposals will result" will not be found violative. *Clark Equipment Co.*, 278 NLRB 498 (1986). Statements that "effectively threaten employees with the loss of existing benefits and leave them with the impression that what they may ultimately receive depends in large measure upon what the Union can induce the Employer to restore" are objectionable (and violative of Sec. 8(a)(1)). *Plastronics*, 233 NLRB 155, 156 (1977), and cases cited therein; *Belcher Towing Co.*, 265 NLRB 1258, 1268 (1982).

Two recent cases, almost squarely on point, establish that Wyatt's admitted statements to all the employees were coercive and not merely descriptive of the collective-bargaining process. In *Mississippi Chemical Corp.*, 280 NLRB 413, 417 (1986), a supervisor told employees "that he could not possibly see where a union would benefit employees or see how they could get anything out of it." He "added that all 'they' would do is knock employees down to the minimum wage, take all their benefits and then they would have to bargain from scratch." The Board stated:

> It is clear that Jackson's remark carried with it the express threat that the bargaining from "scratch" would start only after employees had been reduced to "minimum wage" and all their benefits taken away. In this context, Jackson's remark was coercive for it threatened the loss of existing benefits not necessarily the result of good faith bargaining.[10]

Similarly, in *Fountainview Place*, 281 NLRB 26, 29 (1986), the personnel director stated that if the union was voted in, bargaining "starts out fresh"—"you don't start out with what's in the handbook." As he did this, he held up and waved a copy of the employer's handbook, which set forth all the existing benefits. The Board held that the employer's statement, made in the context of emphasizing the existing benefits by waving the handbook (and in the context of other coercive conduct), conveyed the reasonable impression that the employer would require the union to give up existing employee benefits. That employer's conduct was thus found to constitute an unlawful implied threat. Although the instant case lacks the context of other coercive conduct, Wyatt's statement is similar to that of Fountainview's personnel director; he did not wave a handbook but he told employees how good their present benefits were and stated that if Respondent had to negotiate with the Union, it would begin its negotiations at the bare minimum required by law, minimum wage and workmen's compensation.

Accordingly, I find that by threatening employees that it would bargain regressively, resulting in lost benefits, if they selected a bargaining representative, Respondent has violated Section 8(a)(1).

The Objections

As noted, the Local 340 filed objections to the conduct of the 20 January election. Its Objection 3, subparts 1 through 6, which were identical with the allegations of the complaint, were consolidated for hearing with the complaint. I have rejected the contentions contained in Objection 3, parts 2 through 6, and recommend that they be overruled.

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[9] The following sentence of that letter, "We do not want to be distracted from that goal by endless negotiations and possible strikes," does not necessarily negate Respondent's commitment to expansion or threaten cessation of the plans in the event of unionization. Arguably, it merely offers management's view that negotiations and strikes divert energies from other management functions.

[10] Compare *La-Z-Boy*, 281 NLRB 338 (1986), in which an employer's statement that "everything was up for negotiations and that minimum wage was the bottom line" was found not to be a coercive threat to bargain regressively inasmuch as the employer told the employees that "it was 'ridiculous' to think the company would pay minimum wage regardless of the outcome of negotiations." No such assurances were given in *Mississippi Chemical* and none were given here. Even assuming that the employees might, on their own, conclude that it would be ridiculous to think that the employer would reduce full-time wages of $11.70 per hour to $3.35, it would not have seemed ridiculous for them to believe that the Employer might reduce the $5 per hour wage of the part-time employees to that level.

I have found that Respondent threatened employees with a loss of wages and benefits through regressive bargaining in violation of Section 8(a)(1). Pursuant to the Board's usual policy, a new election is to be directed "whenever an unfair labor practice occurs during the critical period since '[c]onduct violative of Section 8(a)(1) is, *a fortiori*, conduct which interferes with the exercise of a free and untrammeled choice in an election.'" *Dal-Tex Optical Co.*, 137 NLRB 1782, 1786 (1962), quoted with approval in *Clark Equipment*, supra. It cannot be contended that the conduct here was de minimus and should not result in the election being set aside. These threats, violative of Section 8(a)(1), reached all of the unit employees and were uttered only 5 days before the election. Accordingly, I recommend that the election conducted on 20 January be set aside on the basis of Local 340's Objection 3(1) and a rerun election be conducted.

THE REMEDY

Having found that Respondent has engaged in unfair labor practices in violation of Section 8(a)(1) of the Act, I shall recommend that it be ordered to cease and desist and take certain affirmative action designed to effectuate the policies of the Act.

The General Counsel seeks the inclusion of a visitatorial clause in the recommended Order, authorizing the Board, for compliance purposes, to obtain discovery from the Respondent under the Federal Rules of Civil Procedure under the supervision of the United States court of appeals enforcing the Order. The circumstances of this case do not warrant inclusion of such a clause. *Fountainview Place*, supra.

FURTHER CONCLUSIONS OF LAW

1. By threatening employees that it would bargain from scratch starting from a substantially reduced level of benefits, Respondent has threatened its employees with regressive bargaining and a loss of benefits and has interfered with, restrained, and coerced its employees in the exercise of their Section 7 rights and has violated Section 8(a)(1) of the Act.

2. The unfair labor practice enumerated in paragraph 1, above, is an unfair labor practice affecting commerce within the meaning of Section 2(6) and (7) of the Act.

3. The Respondent's conduct described in paragraph 1, above, interfered with the employees' rights to a free and untrammeled choice in the election conducted on 20 January 1987 in Case 1-RC-18882 and warrants that that election be set aside and a rerun election conducted.

4. The Respondent has not engaged in any unfair labor practices or objectionable conduct not specifically found.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[11]

ORDER

The Respondent, Shaw's Supermarkets, Inc., Portland, Maine, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Threatening employees that it would "bargain from scratch" starting from substantially reduced levels of wages and benefits if they selected a union to represent them.

(b) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action deemed necessary to effectuate the policies of the Act.

(a) Post at its Wells, Maine warehouse facility copies of the attached notice marked "Appendix."[12] Copies of the notice, on forms provided by the Regional Director for Region 1, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material.

(b) Notify the Regional Director in writing within 20 days from the date of this Order what steps the Respondent has taken to comply.

IT IS FURTHER RECOMMENDED that the complaint be dismissed in all other respects, and,

IT IS FURTHER RECOMMENDED that Case 1-RC-18882 be severed from Case 1-CA-24543 and be remanded to the Regional Director who shall conduct a rerun election at such time as he deems the circumstances permit a free choice on the issue of representation.

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

Section 7 of the Act gives employees these rights.

To organize

To form, join, or assist any union

To bargain collectively through representatives of their own choice

To act together for other mutual aid or protection

To choose not to engage in any of these protected concerted activities.

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[11] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

[12] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

WE WILL NOT threaten our employees that we would "bargain from scratch" starting from a level of substantially reduced wages and benefits if they select a union to represent them.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce our employees in the exercise of the rights guaranteed them under Section 7 of the Act.

SHAW'S SUPERMARKETS, INC.

Island Creek Coal Company ***and*** **United Mine Workers of America District 31.** Cases 9–CA–23181 and 9–CA–23663

July 14, 1988

DECISION AND ORDER

BY CHAIRMAN STEPHENS AND MEMBERS JOHANSEN AND CRACRAFT

On June 30, 1987, Administrative Law Judge William F. Jacobs issued the attached decision. The Respondent filed exceptions and a supporting brief.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and brief and has decided to affirm the judge's rulings, findings,[1] and conclusions only to the extent consistent with this Decision and Order.

The judge found that the Respondent unlawfully refused to bargain with the Union over its decision to subcontract work at its Tioga Surface Mine to another company. We disagree with that finding. In our view, the Respondent fully complied with its statutory duty to bargain over subcontracting.

The collective-bargaining agreement in effect at the time the Respondent subcontracted the work in question contained detailed provisions concerning the subcontracting of mining operations, referred to in the contract as "leasing, subleasing and licensing out of coal lands." The contract provides for the circumstances and conditions under which subcontracting will be permitted and, as is the case with most of the contract's substantive provisions, provides that disputes are to be settled by agreement or by use of a "Settlement of Disputes" procedure culminating, where necessary, in arbitration.

In bare outline, the contract prohibits subcontracting that is for the purpose of avoiding other provisions of the contract or that results in laying off the Employer's employees. Otherwise, subcontracting is permitted, provided that the subcontractor agrees to offer employment first to the Employer's qualified employees who are on layoff status.[2]

When the subcontracting that gave rise to the instant charge occurred, a unit employee filed a grievance that closely paraphrased the language of the first paragraph of the applicable contract provision. The grievance alleged that the Respondent "conveyed, leased, transferred or assigned its Tioga Strip [mine] . . . in an attempt to avoid the application" of the contract. The charge filed shortly thereafter by the Union alleged, inter alia, that the Respondent assigned, transferred, or conveyed "its Tioga Surface Mine to another employer in order to . . . escape its obligations pursuant to the collective bargaining agreement." The complaint that subsequently issued and is before us, however, alleges only an unlawful failure to give the Union prior notice and an opportunity to bargain about the Respondent's subcontracting the work at its Tioga Surface Mine. And it is that subcontracting issue alone that was litigated here. Our analysis of the entire course of events convinces us that when the parties reached agreement over the subject of subcontracting in their 1984 contract the Respondent fulfilled its affirmative obligation to bargain over that subject for as long as the agreement remained in effect.[3] Thus, the parties have agreed specifically on their respective rights and duties concerning subcontracting. By operation of Section 8(d), the parties' substantive agreement relieved the Respondent of the duty to bargain further over the terms on which and the manner in which subcontracting could be done. Consequently, the General Counsel's case is fully rebutted by the established fact that the Respondent bargained to agreement over this subject. The only extent to which we find it necessary to interpret the contract is to determine, as we have, that it is intended to cover the situation that developed when the Respondent chose to exercise its asserted right to subcontract.[4]

Accordingly, we dismiss the allegation that the Respondent failed and refused to bargain over subcontracting in violation of Section 8(a)(5) of the Act.[5]

289 NLRB No. 121

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[1] In finding that the judge properly rejected the Respondent's confidentiality defense to the allegation of refusal to provide the Union with information it had requested, we note that the Respondent did not assert its claim of confidentiality until shortly before the hearing in this proceeding, and did nothing to test the Union's willingness to treat the information in a confidential manner. The Union's representative, on the record of this proceeding, explicitly pledged to honor the confidentiality of the information. Absent proof that the Union was unreliable in respecting confidentiality agreements, the Respondent's failure to test its willingness to treat the information confidentially weighs heavily against its defense. *Pertec Computer Corp.*, 284 NLRB 810 (1987).

In addition to the judge's reasons for finding the Respondent's offer of alternatives to the form of information requested by the Union to be inadequate, we find that, in any event, the Respondent's delay in offering the information in *any* form until the eve of the trial, constituted an unlawful refusal to bargain. *Interstate Food Processing Corp.*, 283 NLRB 303 (1987); *EPE, Inc.*, 284 NLRB 191 (1987).

[2] Sec. 1A(h) of the contract, covering this subject, is reproduced in its entirety as "Appendix B" to this Decision and Order.

[3] We contrast this "affirmative" duty with the negative duty, described in Sec. 8(d) of the Act, not to terminate or modify the contract without meeting the conditions specified in that subsection. No violation of that negative duty is alleged in the complaint, nor was such issue litigated.

[4] The Union's representative testified at the hearing that the contract permitted subcontracting under certain circumstances but required the Employer to *notify* the Union. This accords with our reading of the applicable contract language.

[5] The Respondent argues that we should defer this refusal-to-bargain allegation to the grievance-arbitration procedure. However, the Respondent first raised this contention in its brief to the judge. This was not a timely assertion of the issue. See *United Technologies Corp.*, 274 NLRB 504 (1985), and cases cited there.

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ORDER

The National Labor Relations Board orders that the Respondent, Island Creek Coal Company, Craigsville, West Virginia, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Failing and refusing to provide a complete copy of the contract between Island Creek Coal Company and Magnum Mining Company and cost sheets for the Tioga Surface Mine operation for the 18-month period immediately preceding the Tioga Surface Mine's closure in 1979.

(b) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Furnish to the Union a complete copy of the contract between Island Creek Coal Company and Magnum Mining Company and cost sheets for the Tioga Surface Mine operation for the 18-month period immediately preceding the Tioga Surface Mine's closure in 1979.

(b) Post at its facilities in Craigsville, West Virginia, copies of the attached notice marked "Appendix A."[6] Copies of the notice, on forms provided by the Regional Director for Region 9, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately on receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material.

(c) Notify the Regional Director in writing within 20 days from the date of this Order what steps the Respondent has taken to comply.

APPENDIX A

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

WE WILL NOT refuse to furnish United Mine Workers of America District 31 with information relevant and necessary for the proper prosecution of grievances.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL furnish United Mine Workers of America District 31 with complete copies of our Tioga Surface Mine contract with Magnum Mining Company and cost sheets for the Tioga Surface Mine operation for the 18-month period immediately preceding its closure in 1979.

ISLAND CREEK COAL COMPANY

APPENDIX B

Section (h) Leasing, Subleasing and Licensing Out of Coal Lands

(1) The Employers agree that they will not lease, sublease or license out any coal lands, coal producing or coal preparation facilities where the purpose thereof is to avoid the application of this Agreement or any section, paragraph or clause thereof.

Licensing out of coal mining operations on coal lands owned or held under lease or sublease by any signatory operator hereto shall not be permitted unless the licensing out does not cause or result in the layoff of employees of the Employer.

(2) For purposes of lawfully preserving and protecting job opportunities for the Employees working or laid off from a particular operation covered by this Agreement, and to assure that work opportunities are not eliminated by lease or license arrangements, the Employer agrees that it will not lease, sublease, or license out coal mining operations which at any time were in operation by that Employer and covered by this Agreement, unless the conditions set forth in the following paragraph are satisfied:

Leasing, subleasing or licensing out of coal mining operations covered by this Agreement shall be permitted where the lessee-licensee agrees that all offers of employment by such lessee-licensee shall first be made (on the basis of mine seniority) to the Employer's classified and laid-off employees at the mine who have not secured regular employment at any other operation of the Employer covered by this agreement, if such employment at the leased, subleased or licensed out operations is for jobs of the nature covered by this agreement, and if such employees are qualified for such jobs. The lessee-licensee shall not be required to make more than one such offer of employment to each such employee.

(3) Acceptance or rejection of such an offer of employment made by a lessee-licensee or any personnel action between the employee and lessee-licensee shall not affect such employee's panel rights with the Employer as established by this agreement.

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[6] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

(4) Any dispute regarding the rights of employees secured by subsection (2) above shall be resolved between the prior employer and the Employee under Article XXIII of this agreement. The Employer agrees that it will reserve in any lease, sublease or license subject to this section the ability of the Employer to remedy any finding as to noncompliance of an employee's right to be considered for employment opportunity as provided herein.

(5) The prior Employer shall not be a guarantor or be held liable for any breach of the lessee-licensee or its hiring or bargaining obligations or the terms of any agreement between the Union and the lessee-licensee.

(6) Within ten (10) days after the lease, sublease, or licensing out of any coal producing or coal preparation facilities, but in any event prior to the time that any classified work commences, the Employer shall provide notice thereof to the appropriate district president. Such notice shall disclose the identity of all parties to the transaction, the location of the facilities affected thereby, and the identity of the coal producing or coal preparation facilities affected thereby.

(7) These provisions (Article IA(h)(2) through (6)) shall not be construed to diminish any rights of employees or the Union established in any other provision of this Agreement, including but not limited to the successorship clause or Article IA(h)(1).

Janette Johnson, Esq., for the General Counsel.

J. Steve Warren, Esq. (Jackson, Lewis, Schnitzler, and Krupman), of Greenville, South Carolina, and *Paul B. Lindermann, Esq. (Jackson, Lewis, Schnitzler and Krupman)*, of Atlanta, Georgia, for the Respondent.

Jerry Miller, of Fairmont, West Virginia, for the Charging Party.

DECISION

STATEMENT OF THE CASE

WILLIAM F. JACOBS, Administrative Law Judge. This case was tried before me on 15 and 16 October 1986 at Charleston, West Virginia. The charge in Case 9-CA-23181 was filed on 5 June 1986[1] by United Mine Workers of America, District 31 (the Union). The charge in Case 9-CA-23263 was filed by the Union on 26 June. The consolidated complaint issued 28 July alleging that Island Creek Coal Company (Respondent or the Company) violated Section 8(a)(1) and (5) of the National Labor Relations Act by entering into a contract with another company for the mining of coal at a site that had previously been mined by employees of Respondent in a unit represented by the Union without giving prior notice to the Union or affording the Union an opportunity to negotiate and bargain concerning such acts or the effects; and by refusing to furnish certain information to the Union concerning the contracting out of unit work. Respondent, in its answer to the consolidated complaint, denied the commission of any unfair labor practices.

All parties were represented at the hearing and were afforded full opportunity to be heard and present evidence and argument. The General Counsel and Respondent filed briefs. On the entire record, my observation of the demeanor of the witness, and after giving due consideration to the briefs, I make the following

FINDINGS OF FACT[2]

The Respondent is a coal mining company with underground and surface mines and other facilities located in various States including West Virginia. Respondent sometimes employs its own employees to work its mines, but also subcontractors with other employers to work its mines using the subcontractors' own employees to mine the coal. One location where Respondent has mining rights is at the Tioga surface mine located near Craigsville, West Virginia.

Respondent first mined at Tioga in late 1971. At that time it employed its own employees, all of whom were represented by the Union. These employees not only mined coal but also did whatever reclamation work was necessary and repaired and maintained equipment. Respondent continued to operate the Tioga surface mine in this fashion until 1979.

During the 1970s Respondent worked the Tioga Mine full time, stripping during two shifts and loading on the third shift. Equipment used included endloaders, bulldozers, and a shovel. Employees included equipment operators, a drill crew, powdermen, mechanics, welders, electricians, and maintenance personnel. Coal mined at Tioga was sent to a preparation plant to be washed. Respondent closed down the Tioga surface mine in March 1979.

After closing down the Tioga surface mine, Respondent kept four or five unit employees at the minesite to do reclamation work. Their task was to fill in the pit, plant grass seed, and put the land back into a contour similar to that which it had been before being mine. The reclamation work was completed, for the time being, in June 1979 after which Respondent transferred the remaining employees to one of its other facilities.

In April 1984 Respondent brought 10 or 11 bargaining unit employees back to the Tioga site to do additional reclamation work. They removed topsoil, mined some coal, then covered the pit and seeded. The removal of coal during this period was merely incidental to the reclamation work and not a standard coal mining operation.

In 1985 Respondent obtained a new permit to mine coal in a 170-acre area at Tioga immediately adjacent to the area where its bargaining unit employees had mined during the 1970s. The permit was obtained because Respondent had received a small order for 30,000 to 40,000 tons of coal and because the Department of Natural Resources had brought to Respondent's attention the fact that there was a necessity for further reclamation, at the old Tioga mining site. With these factors in mind, it was Respondent's plan to mine coal on the newly acquired 170-acre site and use the overburden from the site to reclaim the adjacent, previously mined Tioga surface site thus cutting the cost of reclamation by partially paying for it through the mining and selling of coal from the new site.

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[1] All subsequent dates are 1986 unless otherwise noted.

[2] The complaint alleges and the answer admits that the Board has jurisdiction and that the Union is a labor organization within the meaning of the Act.

To put its plan into operation Respondent brought back to Tioga 10 or 11 bargaining unit employees to mine coal and to reclaim land. Respondent pursued its course of reclaiming and mining for about 6 or 7 weeks but then determined that it was not economically feasible to continue mining. When it lost the coal order on which it was relying to help reduce the cost of reclamation, it shut down the mine and laid off or transferred the bargaining unit employees to other locations.

In late 1985 Respondent began to give considerations to awarding a contract to an outside company to mine coal at the Tioga site on the 170 acres that it had itself been mining in 1985. This consideration was based on the fact that certain of Respondent's officials became aware of the availability of a short-term spot market contract for coal at a production level of 700 to 800 tons per day, a level far smaller than Respondent ordinarily produced.[3] By February 1986 it was determined that the coal at Tioga could serve the requirements of the spot market contract and several coal companies were contacted for the purpose of contracting out the coal mining operation to one of them. Shortly thereafter, an official of Magnum Mining Company, Russell Coleman, visited the site, inspected the grounds and available equipment, and advised Respondent that it would be willing to undertake the project. Roy Dotson, Respondent's manager of contract coal, northern division, testified that he had considered several contractors but finally chose Magnum after talking to Coleman. The decision as to which contractor to use, according to Dotson, was based on the relative financial condition of each, the kind of equipment they intended to use, and the price they were asking. The price paid to any potential contractor depended on how much Respondent could obtain for the coal when it sold the coal to a customer. The sale price would have to cover the contractor's price.

In April Respondent and Magnum signed a contract that required Magnum to mine Tioga coal and to sell and deliver it to Respondent's Gully Eagle preparation plant where it was commingled with coal produced by other mining contractors and sold to Respondent's customers, sometimes in the raw state, sometimes after being washed. Under the contract Respondent provided Magnum certain engineering services, surveys, the use of equipment, repair services if desired, and supplies if needed. If Magnum required repair or supplies from Respondent, it was understood that Magnum would be billed for such.

After the signing of the contract Magnum began mining coal at Tioga. Respondent's 170-acre permit to do so was transferred to Magnum.[4] Magnum used Respondent's equipment to mine the coal, the same equipment that had been used by Respondent's employees during previous excavations. Magnum paid a fee in order to use this equipment. Although Magnum could, under the contract, have Respondent repair this equipment, also for a fee, Magnum never chose to do so. Similarly, Magnum never purchased supplies from Respondent for its Tioga mining project although it could have done so.

Also, after the signing of the contract between Respondent and Magnum, Respondent's management reviewed the names of employees who had formerly worked at the Tioga surface mine, in anticipation of Magnum's having to recall these employees, in accordance with the labor agreement in effect at the time, and found 14 names of bargaining unit employees on the layoff panel list. Of these 14 employees, 10 were working at the time for Respondent at its other facilities including William Hayes who would eventually file the grievance that would, in turn give rise to the filing of the charge in the instant proceeding. The other four bargaining unit employees laid off from the Tioga surface mine were sent letters prepared in the office of Donald S. Basset, Respondent's manager of industrial/employee relations for the northern division, and signed by Coleman on behalf of Magnum after Coleman had been advised by Simmons that there was a contractual obligation to recall these employees to Tioga. Coleman reviewed the letters before they were mailed.

When actual work began at the Tioga surface mine, Magnum immediately ran into trouble. At the start Magnum had no new equipment. In fact it had virtually no equipment at all. Rather, it used the exact same equipment, the same bulldozers and endloaders, Respondent's equipment, that had been used by bargaining unit employees working at the Tioga surface mine back in 1985. Exceptions were two augers, which Magnum later brought on site, started up, but may never have used.[5] The Island Creek equipment used by Magnum at Tioga was old and in need of repair. Some of the repair work on this equipment was performed by the four to six employees hired by Magnum to work at Tioga. Other repairs were performed by independent outside contractors. Though the equipment belonged to Respondent, none of the repairs were performed by Respondent's employees. It is conceded that the repair work performed at Tioga by Magnum and independent contractors would have been performed by bargaining unit employees under the contract.

The frequent breakdown of the equipment at Tioga resulted in substantial downtime for Magnum. The repair work was paid for by Magnum, and Respondent was not billed although it was Respondent's equipment that was undergoing repairs. The frequency of repairs and resultant downtime caused Magnum to fall far below the 700 tons of daily production required under the contract. In some months Magnum averaged only 75 tons per day. Magnum's failure to meet its quota and the reasons therefor were closely monitored and reported to Respondent by Claude Simmons, its overseer on the project.

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[3] According to Claude Simmons, Respondent's mine foreman, when Respondent decides to contract out rather than mine with its own employees, the decision is based on an internal cost analysis. In the instant case the decision to contract out the Tioga surface mine operation was based on the short term, small production nature of the contract. It was decided that rather than invest all the necessary moneys into the equipment that would be required to start up the operation, it would be better to contract the work to another mining company.

[4] The permit was, at some time, modified to allow the use of augers. No such allowance was permitted under the old permit but there was a stipulation on the Island Creek/Magnum contract that permitted the use of augers.

[5] Respondent also owned an auger, which was an old model and had never been put into use.

Before actually beginning work at the Tioga surface mine, Coleman visited the union office in Craigsville, West Virginia, and advised the Union's representative there that Magnum was going to take over the Tioga surface mine operation. A meeting was scheduled for 9 May between Coleman and the Union's vice president, Jerry Miller. At the meeting, attended by Miller, Coleman, and another union representative, Coleman advised Miller that he had entered into an oral agreement with Respondent that permitted Magnum to operate at the Tioga surface mine; that the oral agreement was being reduced to written form; that Magnum would have a million tons of recoverable coal to mine under the contract; that Respondent would require Magnum to furnish it with 700 tons of coal per day; that Respondent would pay Magnum $12.50 per ton for the coal it mined at Tioga; and that Magnum would have to pay the hauling bill for transporting the coal from the minesite to where Respondent wanted the coal dumped out of the $12.50 per ton agreed on. Coleman informed Miller that he had 4 employees working for the past 2 weeks repairing the equipment; that the equipment was in such a state of disrepair that it was going to cost him $30,000 to $40,000 to put it in operable condition; that he had hired Lewis Machinery Company to help him overhaul Respondent's equipment; that he planned to call 2 more employees to work the following week; that at the peak of production Magnum would employ 20 employees; that he would not object to signing an agreement but wanted some exceptions to the NBCWA;[6] that his agreement with Respondent required that if he became signatory to a union contract, Magnum, itself, would have to pay its own contribution into the pension and trust funds; that as a small operator, he could not afford to pay into the pension and trust funds out of his $12.50 per ton as required by the NBCWA;[7] and that he would have to be selective about employees he would be hiring. Regarding this last matter, Miller told Coleman that there were a lot of Respondent's employees who had panel rights at the Tioga operation. Coleman disagreed stating that he did not think that he was obligated to hire any of those people and that he had been told by Respondent that Magnum was required to hire just one employee previously employed by Respondent.[8]

Prior to the 9 May meeting between Coleman and Miller, no one from Respondent ever advised the Union of its intention to subcontract out the Tioga surface mine operation. Similarly, Respondent never offered to bargain with the Union concerning its decision to subcontract the Tioga operation to a third party.

When Magnum first began working the Tioga surface mine, its operation was discovered by William Hayes, a bargaining unit employee of Respondent who had worked at Tioga on previous occasions and was again working there temporarily on reclamation work when Magnum was present. On 9 May Hayes sought to bring Magnum's presence at Tioga to the attention of Jerry Miller who by that time was already aware of the situation. Hayes felt that he should have been offered employment by Magnum because of his seniority at Tioga. Hayes and Miller discussed application of the contract to the situation, and it was decided that Hayes should file a grievance.

On 19 May a grievance was filed by Hayes:[9]

> The employer has conveyed, leased transferred or assigned its Tioga Strip to Magnum Mining in contradiction to the NBCWA of 1984 and in an attempt to avoid the application of said agreement. We are demanding that the employer immediately cease its improper actions and make whole any damaged employees, the Union and the Health and Retirement Funds.

The grievance was filed with Simmons who took the position that Respondent had not violated the contract, thus denying the grievance.

On 21 May, Miller sent a letter to Respondent's division manager, Donald G. Bassett, industrial and employee relations, requesting a copy of the contract between Respondent and Magnum Mining Corporation covering the Tioga surface mine. Miller advised Bassett that the contract was necessary to enable the Union to effectively process the grievance, which Hayes had filed on 19 May. Respondent did not immediately furnish the Union with a copy of the requested document.

On 30 May the Union and Respondent met in order to consider the grievance at its third step.[10] At this meeting Miller accused Respondent of violating article 1(A)(h)(1) of the contract by contracting out to Magnum Mining Corporation work that should have been done by its own employees in order to avoid application of the contract. Further, Miller accused Respondent of violating article 1(A)(h)(6), of the contract by failing to furnish the Union with a copy of Respondent's contract with Magnum and by failing to give the Union notice of the agreement. Finally, Miller charged that Respondent had violated the contract when it failed to require Magnum to assume Respondent's obligations under the successorship provision of the contract. Miller explained to Respondent's representatives his understanding of the arrangements between Respondent and Magnum as explained to him by Coleman at the earlier meeting. He argued that the $12.50 per ton that Respondent had agreed to pay Magnum was far less than the cost per ton to Respondent mined at Tioga in 1979, and that this fact proved that Respondent had contracted with Magnum to avoid application of the contract agreed to between the Union and Respondent.

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[6] National Bituminous Coal Wage Agreement.

[7] Miller testified that in the past he had agreed to grant relief to other employees who were unable to meet the pension fund requirements.

[8] Magnum subsequently sent a letter to that one person but he never went to work for Magnum.

[9] The language was Miller's.

[10] The parties scheduled the meeting to take place at the Union's offices. Hayes, Miller, and Chapman represented the Union while Bassett and Simmons represented the Respondent.

Miller advised Bassett that the Union intended to go forward with the grievance and gave him a handwritten request for certain information which he claimed would enable the Union to proceed. Bassett in turn asked Miller to have his request typed up and mailed to him. Miller agreed. The information requested was

> 1. A complete accounting of the repairs to the equipment on the Tioga Strip which were performed at the direction of Magnum Mining. This accounting should include an explanation of the repair work, the number of people used, the total hours worked by each person, the dates on which the work was performed, and the total cost of the work.
>
> 2. A copy of the cost sheet for the Tioga Surface Mine for the last month during which coal was produced at Tioga and for the seventeen (17) months preceding the last month of production. Please do not count the months during which coal was produced incidental to reclamation work required by state or federal regulations.

During the meeting of 30 May, Miller explained to Bassett why he needed the information. He told Basset that the Tioga unit work force had acquired jurisdiction over repair and maintenance of the Tioga surface mine equipment. He advised Bassett that in order to determine whether the repair and maintenance on this equipment had been contracted out improperly, it would be necessary for the Union to know exactly what had been done. The Union had to know what work subcontractors had done at Tioga in order to decide if the Union's jurisdiction over repair and maintenance work had been breached. The extent of repair and maintenance work performed had to be known in order to show the arbitrator the extent of damage to the Union and its membership. Miller testified that, at the time, he had reason to believe that Magnum was doing unit repair work.

Regarding the cost sheets, Miller told Bassett that the Union needed these to show that Respondent's production costs per ton in 1979 far exceeded the amount of money it was paying Magnum to mine coal under the contract it signed with Magnum in 1986 and that this would prove its charge that Respondent was violating section 1(A)(h)(1) of the NBCWA of 1984.

Bassett told Miller that he would call him once Respondent's attorneys had made a decision concerning the Union's 21 May request for a copy of the Island Creek/Magnum Mining Corporation contract. Bassett did not, at this time, advise Miller that the information he was seeking was considered confidential although he testified that this was one of the reasons he decided to deny the Union the requested information.

Regarding the Union's request for a complete accounting of the repairs to the equipment on the Tioga strip, which were performed at the direction of Magnum, Bassett testified that Respondent had no information concerning any such repairs and did no repairs, itself, on that equipment.

Regarding the cost sheets requested by the Union, Bassett testified that Respondent refused to provide the Union with this information because a great deal of time had passed since the 1977–1979 period and conditions had changed since them so that the data requested was no longer applicable to the problem at hand. In explanation of how conditions had changed, Bassett testified that the provisions of the applicable wage agreement had changed; the conditions affecting the surface mining of coal had changed; and the price obtained for mined coal had changed. These changes, in turn, affected the cost per ton that it would take to mine coal.

On 3 June Bassett replied by letter to Miller's 21 May request for a copy of Respondent's contract with Magnum. Bassett stated that he would be willing to review the contract with Miller in Bassett's office on a mutally agreeable date. At that time, according to the letter, Miller would be permitted to "examine all pertinent information contained in the contract" but would not be provided with copies of the contract. On the same date Miller mailed to Bassett a typewritten request for the information he had asked for at the 30 May grievance meeting. He also mailed to the Board, on the same date, a copy of the charge in Case 9–CA–23181. The Region docketed the charge on 5 June.[11]

On 13 June Miller met with Bassett in the latter's office. Bassett permitted Miller to review the entire contract and to take notes therefrom. The contract, however, was incomplete in that it disclosed none of the monetary figures. Missing were the dollar amounts that Respondent had agreed to pay Magnum per ton of coal mined; the dollar amounts that Magnum had agreed to place in a performance escrow account; the dollar amounts that Magnum had agreed to pay Respondent for the lease of its equipment; and the amount of money that Respondent was charging Magnum for electricity. Miller advised Bassett that he was not satisfied with the information proffered by the Respondent. He informed Bassett that he felt that Respondent had committed a breach of contract and that Union was entitled to a complete copy of the contract in order to present its case at arbitration. Bassett replied that he would relay Miller's message to Respondent's attorneys.

About the time of, or shortly after, Miller's meeting with Bassett, the Union sought from Coleman a copy of Magnum's contract with Respondent. Coleman advised the Union's representative that if he had a copy of the contract he would forward it to Miller. On 19 June the Union received from Coleman, not a copy of the contract, but a copy of an invoice covering the period June 1 through 15 showing how many tons of coal had been mined by Magnum for Respondent, the type of coal, the price paid per ton, the charges for power, deductions from the escrow account, and the amount of UMWA royalties paid per ton. A similar invoice was later received from Coleman covering June 16–30.

On 26 June the Union filed the charge in Case 9–CA–23263 alleging additional violations of Section 8(a)(1) and

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[11] The charge alleged violations of Sec. 8(a)(1), (3), and (5). The Union charged Respondent with assigning, transferring, or conveying its Tioga surface mine operation to another employer in order to escape its obligations under the collective-bargaining agreement.

(5) basing its charge on Respondent's refusal to supply it with the information requested on 21 and 30 May.

In late June Respondent, filed an application to change the permit covering the Tioga surface mine operation to enable the use of augers on the minesite. The decision to bring augers to the site may have been based on legitimate business considerations. However, in light of the outstanding charges against it, Respondent may have decided to bring the augers to the site in order to give the operation a superficial cosmetic change in appearance and to rely on such change in its defense to the outstanding charges filed against it. At any rate the augers were not brought to the Tioga surface mine until some time following August.

On 7 July Bassett sent to Miller a copy of the Magnum/Island Creek contract which Miller had examined at their 13 June meeting. Like the copy of the contract reviewed by Miller earlier, the one sent to him on 7 July was incomplete in the same respects as the earlier one. Although Miller subsequently renewed his request for the information asked for earlier, including a complete contract with financial data, Respondent has refused to supply information.

On 13 October, the day before the hearing in the instant proceeding, Bassett sent to Miller a position statement and an alternative offer to the information requested. As to the accounting of repairs to the equipment on the Tioga strip, Bassett stated that Respondent was not in possession of such information; as to cost sheets for the 1977–1979 period Bassett reiterated his position that the information was irrelevant; as to the Union's request for a complete copy of the contract Bassett reiterated his position that the financial figures were confidential. In the alternative, however, Bassett offered to compare the cost sheets for the 18-month 1977–1979 period with the price per ton that Respondent agreed to pay Magnum and to provide the Union with the difference between the figures. Bassett further offered to provide the Union with the items included in the cost sheets and agreed to have a mutually acceptable third party confirm the accuracy of the figures. The record does not reflect what reply, if any, the Union made to Respondent's 13 October communication.

The Issues

The following issues are:

I. Whether Respondent violated Section 8(a)(1) and (5) of the Act by its failure to notify and bargain with the Union prior to its decision to subcontract its Tioga surface mine Operation to Magnum.

II. Whether the Respondent violated Section 8(a)(1) and (5) of the Act by its failure to provide the Union with information necessary and relevant to the Union's processing of its grievance:

A. A complete copy of the Island Creek/-Magnum contract.

B. A copy of the sheets for the Tioga Surface Mine for the last 18 months of production, 1977 to 1979.

C. A complete accounting of the repairs to the equipment at the Tioga Surface Mine which were performed at the direction of Magnum Mining Company.

Analysis and Conclusions

I. FAILURE TO NOTIFY AND BARGAIN

The above facts, digested, indicate that Respondent first mined at Tioga in 1971, utilizing its own employees, all represented by the Union. These employees, besides mining coal, did reclamation work as well as repair and maintenance work on the equipment. They performed these duties in accordance with the existing collective-bargaining agreement until 1979.

During the 1970s the Respondent worked the Tioga surface mine full time, stripping during two shifts and loading on the third shift. Equipment used included endloaders, bulldozers, and a shovel. Respondent's employees included equipment operators, a drill crew, powdermen, mechanics, welders, electricians, and maintenance personnel. Coal mined at Tioga was sent to a preparation plant to be washed. After closing the mine in June 1979, Respondent did not do any mining at Tioga except for a small amount incidental to some reclamation work, work which is not here in issue.

In late 1985 Respondent became aware of the availability of a short-term spot market contract for coal at a production level of 700 to 800 tons per day. An internal cost analysis was undertaken to determine whether it would be more beneficial for the Company to undertake the mining at Tioga with its own unit employees or to contract out the mining to another mining company. It was determined that because the contract would be short term and the production small, it would be better to contract out the operation to another company rather than invest all the necessary moneys into equipment required to startup the operation. Several mining companies were henceforth contacted to see if any of them would be interested in mining the Tioga coal. The decision concerning whether to subcontract at all was strictly a financial consideration as was the choice of which company to subcontract the operation to. Finally, as noted, Magnum was chosen as the subcontractor and the contract was signed in April 1986. Subsequently, Magnum mined coal for Respondent, the coal being hauled to Respondent's preparation plant where it was commingled with the coal of other subcontractors, then washed or sold raw by Respondent to its customers. Under its contract with Magnum, Respondent made available to that subcontractor the same equipment and services that it had made available to its own employees in the 1970s. The work performed by Magnum's employees was the same type of work performed at the same site in the 1970s by Respondent's own unit employees.[12] This included both the actual mining of coal and the repair and maintenance of the equipment by Magnum's employees and the sub-subcontracting by Magnum of some repair work. Magnum's production and its failure to meet its assigned quota was closely monitored by Respodent's managerial personnel just as it had monitored its own production at Tioga in the 1970s.

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[12] The augers brought to the site by Magnum are of little or no significance. Since work began in April and was scheduled, at the time of the hearing, to be completed in October, and since the augers were not delivered to the site until August, they were either never used or were used very little.

The record clearly reflects, as alleged in the complaint, that Respondent entered into its contract with Magnum Mining Company for the mining of coal at the Tioga surface mine, which had been previously mined by employees of Respondent in the unit, and that it did so without prior notice to the Union and without having afforded the Union an opportunity to negotiate and bargain as the exclusive representative of Respondent's employees regarding such acts and conduct and the effects of such acts and conducts in violation of Section 8(a)(1) and (5) of the Act. As found in *Fiberboard Corp.*,[13] the replacement of employees in an existing bargaining unit with those of an independent contractor to do the same work under similar conditions of employment is a statutory subject of bargaining under Section 8(d) of the Act. Respondent's decision, in the instant case, to subcontract instead of recalling laid-off workers was based on labor costs. There was no change in the nature or direction of the business since Magnum continued to operate the Tioga surface mine in the same manner as Respondent had done previously, with the same equipment. Respondent's decision regarding subcontracting was clearly amenable to possible resoultion through the collective-bargaining process. Indeed, the Union on other occasions had granted concessions to employees in order to reach a satisfactory agreement, and there is no showing in the instant case that negotiations could have resulted in agreement.

Under the circumstance of this case Respondent's failure to afford the Union an opportunity to bargain over its decision to subcontract and the effects thereof deprived the Union of its rights guaranteed under the Act. *Pennsylvania Energy Corp.*[14] Respondent thus violated the Act.

II. RESPONDENT'S FAILURE TO PROVIDE A COMPLETE COPY OF THE ISLAND CREEK/MAGNUM CONTRACT

Regarding the allegation that Respondent violated Section 8(a)(1) and (5) by refusing to furnish the Union with a complete copy of the Magnum/Island Creek contract the record reveals that Miller, on 21 May, sent a letter to Bassett requesting a copy of the contract, advising him that the Union needed the document in order to enable it to effectively process the grievance filed by Hayes on 19 May. As noted, Respondent did not immediately furnish the Union with a copy of the contract.

On 30 May, at the third-step grievance meeting Miller accused Respondent of violating article 1(A)(h)(6) of the contract by failing to furnish the Union with a copy of its contract with Magnum. Although the cited article does not, in fact, require Repondent to supply the Union with a copy of the contract in question, it is clear that Miller was, in effect, renewing his request for a copy. Bassett, on this occasion, advised Miller that he would call him once Respondent's attorneys had made a decision on whether to furnish the Union with a copy of the requested document.

On 13 June, Miller met with Bassett in the latter's office. On this occasion Bassett permitted Miller to review a copy of the Magnum contract and take notes from it. The document shown to Miller, however, was incomplete in that all monetary figures had been deleted. Miller objected to the fact that the document was incomplete and insisted that the Union had to have the missing information in order to present its case at arbitration. Bassett again told Miller that he would relay Miller's message to Respondent's attorneys.

After the Union filed its charge on 26 June based on Respondent's failure to provide it with the requested information, Respondent on 7 July sent to Miller the same abridged version of the Magnum contract that he had been permitted to examine in Bassett's office. Although Miller subsequently renewed his request for a complete copy of the document including the monetary figures, Respondent has continued to refuse to supply the requested information.

On the day before the hearing in the instant proceeding Respondent again refused to provide the financial figures contained in the Magnum contract because those figures were considered confidential in that "releasing that information could have significant adverse impact on our operations and our sales, particularly in this highly competitive market for coal." Rather than furnish the requested figures, Respondent offered, in the alternative, to compare the cost sheets for the 18-month period requested by the Union with price per ton, the Company agreed to pay Magnum Mining Corporation and provide the difference between the figures to the Union. Respondent also offered to have a mutually acceptable third party confirm the accuracy of its figures. The Union has rejected Respondent's alternative offer.

The General Counsel takes the position that the monetary figures contained in the Magnum contract represent the hardcore evidence necessary to convince the arbitrator that the grievance is meritorious. The Union plans to show that the figures contained in the contract, when compared with the 1977-1979 cost sheets, prove that Respondent subcontracted out the Tioga operation for purely financial reasons. This, in turn will prove, according to the Union's theory, that Respondent subcontracted out the Tioga operation solely to avoid the application of the 1984 NBCWA in violation of section IA(h)(1) of that collective-bargaining agreement.

Respondent takes the position that the financial information contained in the Magnum contract is confidential and privileged because this information reflects Respondent's mining costs which in turn permits it to determine what it can bid on the spot and long-term contract market. Respondent posits that if competitors were to come into possession of this information they could determine what Respondent's bids might be and thereby underbid Respondent for other jobs. Further, Respondent argues that having one contractor know that another contractor has been offered more or less than itself, creates havoc in the coal mining contractor business community.

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[13] 379 U.S. 203 (1964).

[14] 274 NLRB 1153 (1985).

In *NLRB v. Acme Industiral Co.*,[15] the Supreme Court dealt with a situation similar to the one here extant. There, a collective-bargaining agreement, which contained procedures for processing grievances culminating in compulsory, binding arbitration provided that it was respondent employer's policy not to subcontract work that was normally performed by employees in the bargaining unit. During the contract term certain machinery was removed from the plant, and in response to the Union's query respondent stated that there was no violation of the agreement and barring exceptional or special circumstances should be furnished to the Union.

The Respondent argues that the monetary figures contained in the requested contract are confidential and if made public would place it at a disadvantage in the very competitive coal contracting business. The record, however, reflects that the Magnum/Island Creek contract was singularly unsuccessful and plagued with problems. The outmoded equipment used continuously broke down and Magnum was able to mine little more than 10 percent of the coal that had been contracted. Indeed, the project was in the process of being abandoned at the time the hearing was being concluded. I cannot believe that Respondent plans any similar operation in the future so that the monetary figures contained in the contract would be totally valueless to any competitor relying on them to outbid the Respondent. Ordinarily, where an employer transfers unit work to another company, the union is entitled to the information necessary for it to determine whether the transfer was in violation of the contract and to decide whether it should file a grievance and proceed to arbitration.[16] If an employer refuses to make the requested information available because the information is confidential, the burden of proving confidentiality is on the employer.[17] I do not believe the Respondent has done so in the instant case. Granting, arguendo, that the information requested was, in fact, confidential and Respondent did meet its burden of proving the confidential nature of the information requested, still it is violative of the Act for an employer to refuse to make the information available where there is no evidence that would show that if the information were made available, its confidentiality would, in some way, be abused.[18] In the instant case, Miller made it clear on the record that if Respondent made the requested information available to him, he would use it for purposes of enforcing the contract through the grievance and arbitration proceedings and would not divulge the information to unauthorized third parties. With these considerations in mind, I find that Respondent violated Section 8(a)(1) and (5) by failing to provide the Union with a complete copy of the Island Creek/Magnum contract.

III. RESPONDENT'S FAILURE TO PROVIDE COST SHEETS FOR THE TIOGA SURFACE MINE FOR THE LAST 18 MONTHS OF PRODUCTION, 1977–1979

Regarding allegation that Respondent violated Section 8(a)(1) and (5) by refusing to furnish the Union with cost sheets for the Tioga surface mine for the last 18 months production, 1977–1979, the record reveals that Miller, at the meeting of 30 May, asked Bassett for a copy of the cost sheets in question and fully explained the Union's legitimate need for the information to adequately pursue its contractual rights through arbitration. Bassett refused to supply Miller with the requested cost sheets because the passage of time since 1977–1979 and the changes in working and economic conditions made the requested information irrelevant.

Miller, by letter dated 3 June, renewed his request for the 1977–1979 cost sheets. When the information was not forthcoming Miller, on 26 June, filed a charge with the Board based on Respondent's failure to produce this and the other information requested earlier.

On 13 October, in a position paper furnished to Miller by Bassett, the latter reiterated Respondent's position regarding furnishing the 1977–1979 cost sheets. In the alternative, however, Bassett offered to have Respondent compare the 1977–1979 cost sheets with the price per ton that the company had agreed to pay Magnum Mining Corporation and to provide the Union with the difference. Bassett noted that although Respondent still felt that the information requested was irrelevant, the alternative offer made sufficient information available to the Union for its purpose while still maintaining the confidentiality which had to be protected. Although Respondent had maintained all along that the cost sheet information was irrelevant, this position paper contained the first indication that it also considered the 1977–1979 cost sheets confidential.

The General Counsel takes the position that the 1977–1979 cost sheets, like the monetary figures contained in the Magnum contract, represent the hardcore evidence necessary to convince the arbitrator that the grievance is meritorious; that when the two are compared, it will prove that Respondent subcontracted out the Tioga operation for purely financial reasons, in turn proving that Respondent did so in order to avoid the application of the 1984 NBCWA in violation of section IA(h)(1) of that collective-bargaining agreement. Respondent, as more fully described above, takes the position that the requested information is irrelevant.

In support of the position taken by the Union, the General Counsel cites *Kris-Beth*,[19] in which the United States Court of Appeals for the Fourth Circuit found in favor of the union involved there, affirming the earlier arbitrator's decision. In that case, as here, the company contracted out certain mining operations. The union grieved the contracting, contending that the employer was motivated by a desire to avoid its collective-bargaining obligations under the National Bituminous Coal Wage Agreement. To prove its allegations the union in the *Kris-Beth* arbitration presented evidence of economic motivation which included a copy of the contract between the employer and the contractor, which contained monetary figures and cost of production figures at mines operated by the employer. The court, in affirming the arbitrator's decision on behalf of the union, took special note that the arbitrator relied on the evidence adduced at the hearing to find economic motivation and a desire on the part of the company to avoid its obligations under the existing collective-bargaining agreement. The General Counsel argues convincingly that the information relied on by the union in *Kris-Beth* was relevant to that arbitration hearing and is therefore relevant to the planned arbitration of the issues involved in the current dispute between the parties herein since the issues in *Kris-Beth* and the issues sought to be arbitrated by the parties herein are virtually identical. I am persuaded that the requested cost sheets are relevant and necessary for the Union to pursue its right to arbitrate the issue of contract violation.

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[15] 385 U.S. 432 (1967).

[16] *Soule Glass & Glazing Co. v. NLRB*, 652 F.2d 1055 (1st Cir. 1981); *Boston University*, 210 NLRB 330 (1974).

[17] *Boston University*, supra; *E. W. Buschman Co.*, 277 NLRB (1985); *Washington Gas Light Co.*, 273 NLRB 116 (1984). *East Texas Fire Protection Co.*, 265 NLRB 173 (1982).

[18] *Designcraft Jewel Industries*, 254 NLRB 791 (1981).

[19] 4th Cir., February 27, 1986, unpublished.

Moreover, it is quite clear that the cost sheets that the Union intends to use as evidence in the forthcoming arbitration hearing are not accessible to it except through the Respondent. If Respondent is permitted to withhold this information, the Union's case before the arbitrator would seriously be undermined and Respondent will have succeeded in preventing the Union from pursuing its rights under the collective-bargaining agreement to which both parties have agreed.

As to Respondent's argument that the 1977–1979 cost sheets are no longer relevant because of the passage of time and the changes both in working and economic conditions, the General Counsel is correct in pointing out that this information, nevertheless, contains the most recent usable figures and therefore the most relevant figures available. Regarding the changes in working conditions and in the economic situation in the coal mining industry since 1977, these matters are more appropriate for the arbitrator to consider and weigh in rendering his decision on the ultimate issue. To determine, in advance, that these considerations preclude the use of the 1977–1979 cost sheets at the arbitration hearing would decisively foreclose the Union from presenting its case to the arbitrator. I am not prepared to do this.

Finally, Respondent argues that it has made an alternative offer which should suffice for the Union's purposes. But what Respondent offers to do is to act as agent for the Union in presenting evidence in an arbitration hearing against itself. I see no reason why the Union should be forced to accept such an offer. The Union should be able to pursue its rights in a manner it deems most appropriate. Although Respondent has cited a number of cases where the Board or the courts have decided that the alternative information offered by the company would suffice, all cases cited are easily distinguishable on the facts.[20] On the other hand the Board has frequently required an employer to provide financial information to a union where such information has proven relevant and necessary for the union to pursue its contractual obligations and/or to determine whether to take a contractual issue to arbitration.[21] I shall recommend that Respondent be ordered to provide the Union with the requested cost sheets for the Tioga surface mine for the last 18 months of production, 1977–1979.

IV. RESPONDENT'S FAILURE TO PROVIDE A COMPLETE ACCOUNTING OF THE REPAIRS TO THE EQUIPMENT AT THE TIOGA SURFACE MINE WHICH WERE PERFORMED AT THE DIRECTION OF MAGNUM MINING COMPANY

Regarding this allegation the record reveals that Miller, at the meeting of 30 May, asked Bassett for a complete accounting of the repairs to the equipment at the Tioga surface mine, which were performed at the direction of Magnum Mining. Miller gave Bassett a complete and cogent explanation as to the reasons why the information was required. On 3 June Miller reiterated his request in writing. When the information was not forthcoming, Miller, on 26 June, filed a charge based on Respondent's failure to provide the requested equipment repair information. In its 13 October position statement Bassett stated that Respondent had no records or information concerning equipment repairs made at Tioga by Magnum.

According to testimony provided by Respondent's witnesses, inquiries were made of knowledgeable members of its management concerning the existence of records that might shed light on the nature and costs of equipment repair at the Tioga surface mine. The uncontroverted testimony was that members of Respondent's management had neither knowledge nor record information concerning repairs made by Magnum to equipment at the Tioga surface mine operation. Respondent denied that it had made any repairs itself and supplied an affidavit to this effect as required.[22] Under the circumstances I conclude that Respondent was not in possession of the requested information. I cannot therefore recommend that it be found in violation of the Act by refusing to provide information that it does not possess.[23] I shall therefore recommend dismissal of this allegation.

V. THE EFFECT OF THE UNFAIR LABOR PRACTICES ON COMMERCE

The activities of Respondent set forth above, occurring in connection with its operations described above, have a close, intimate, and substantial relationship to trade, traffic, and commerce among the several States and tend to lead to labor disputes burdening and obstructing commerce and the free flow of commerce.

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[20] *Plough, Inc.*, 262 NLRB 1095 (1982); *Emeryville Research Center v. NLRB*, 441 F.2d 880 (9th Cir. 1985); *Minnesota Mining & Mfg. Co.*, 261 NLRB 27 (1982), affd. sub nom. *Oil Workers Local 6-418 v. NLRB*, 711 F.2d 348 (D.C. Cir. 1982).

[21] *NLRB v. Acme Industrial Co.*, 385 U.S. 432 (1967); *Realty Maintenance*, 265 NLRB 1352 (1982); *Designcraft Jewel Industries*, supra; *Washington Star Co.*, 273 NLRB 391 (1984); *East Texas Fire Protection Co.*, supra; *E. I. duPont & Co.*, 276 NLRB 335 (1985).

[22] *Doubarn Sheet Metal*, 243 NLRB 821 (1979).

[23] *NLRB v. United Brass Works*, 287 F.2d 689 (4th Cir. 1961); *Korn Industries v. NLRB*, 389 F.2d 117 (4th Cir. 1967).

REMEDY

Having found that Respondent has engaged in unfair labor practices warranting a remedial order, I shall recommend that it be ordered to cease and desist therefrom and that it take certain affirmative action designed to effectuate the policies of the Act.

Respondent having unlawfully failed to bargain with the Union over its decision to subcontract, I shall recommend that it be ordered to bargain collectively with respect to wages, hours, and other terms and conditions of employment, including the decision to subcontract bargaining unit work. I shall further recommend that it be ordered to recall from layoff, assuming work is available, those employees who would have been recalled absent Respondent's unlawful conduct and make them whole for any loss of earnings and other benefits. Earnings and benefits are to be computed in accordance with *F. W. Woolworth Co.*, 90 NLRB 289 (1950), with interest as set forth in *New Horizons for the Retarded*, 283 NLRB 1173 (1987). Finally, as I have found that Respondent refused to give to the Union relevant information which it requested for the purpose of enabling it to evaluate and pursue its grievance, I shall recommend it be ordered to furnish the Union with a complete copy of the contract between Island Creek Coal Company and Magnum Mining Comapny and cost sheets for the Tioga surface mine operation for the 18-month period immediately preceding its closure in 1979.

CONCLUSIONS OF LAW

1. Respondent is an employer engaged in commerce and in an industry affecting commerce within the meaning of Section 2(6) and (7) of the Act.

2. The Union is a labor organization within the meaning of Section 2(5) of the Act.

3. All employees employed at Respondent's Tioga Mine, in the unit described in the National Bituminous Coal Wage Agreement of 1984 constitute a unit appropriate for the purposes of collective bargaining within the meaning of Section 9(b) of the Act.

4. The Union has been the exclusive collective-bargaining representative of Respondent's Tioga Mine employees in the unit for at least 10 years during which period the Union has been recognized as such by Respondent. Such recognition has been embodied in successive collective-bargaining agreements the most recent of which is effective by its term through 31 January 1988.

5. By failing and refusing to bargain about subcontracting decisions, Respondent violated Section 8(a)(5) and (1) of the Act.

6. By failing and refusing to provide a complete copy of the contract between Island Creek Coal Company and Magnum Mining Company and cost sheets for the Tioga surface mine operation for the 18-month period immediately preceding the Tioga surface mine's closure in 1979, Respondent violated Section 8(a)(5) and (1) of the Act.

7. By failing to provide a complete accounting of the repairs to the equipment at the Tioga surface mine that were performed at the direction of Magnum Mining Company, Respondent did not violate the National Labor Relations Act.

8. The aforesaid unfair labor practices are unfair labor practices affecting commerce within the meaning of Section 2(6) and (7) of the Act.

[Recommended Order omitted from publication.]

Tube Craft, Inc. *and* United Steel Workers of America, AFL-CIO, Local 8703. Case 8-CA-18371

July 14, 1988

DECISION AND ORDER

By Chairman Stephens and Members Johansen and Babson

On January 23, 1986, Administrative Law Judge Robert W. Leiner issued the attached decision. The Respondent filed exceptions and a supporting brief and the General Counsel filed an answering brief.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings,[1] and conclusions[2] and to adopt the recommended Order as modified and set forth in full below.[3]

ORDER

The National Labor Relations Board orders that the Respondent, Tube Craft, Inc., Cleveland, Ohio, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Refusing to recognize and bargain in good faith collectively with United Steelworkers of America, Local 8703 and District 28 (the Union), as the exclusive bargaining representative of its employees in the following appropriate unit:

> All clerical employees of Tube Craft, Inc., employed at its Cleveland plant, excluding confidential employees and professional employees, guards and supervisors as defined in the Act and all other employees.

(b) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Recognize and, on request, bargain in good faith with the Union as the exclusive representative of the employees in the above-described appropriate unit regarding wages, hours, and other terms and conditions of employment and, if an understanding is reached, embody the understanding in a signed agreement.

(b) Post at its facility in Cleveland, Ohio, copies of the attached notice marked "Appendix."[4] Copies of the notice, on forms provided by the Regional Director for Region 8, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material.

(c) Notify the Regional Director in writing within 20 days from the date of this Order what steps the Respondent has taken to comply.

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[1] The judge's discussion and conclusions regarding the Respondent's failure to rebut the presumption of the Union's continuing majority status make it apparent that he erred inadvertently in stating, in part III,C, par. 6 of his decision, that the Respondent's evidence demonstrates the antiunion attitudes of "all" employees. The context indicates that the judge intended the word "some," and we adopt this finding as so corrected.

[2] In adopting the judge's conclusion that the Respondent did not rebut the presumption of continuing majority status or establish a reasonably based doubt of that status, we do not rely on *Pennco, Inc.*, 250 NLRB 716 (1980), which was overruled in *Buckley Broadcasting Corp.*, 284 NLRB 1339 (1987). In *Buckley Broadcasting*, we held that we will not entertain any specific presumption concerning the union sentiments of strike replacements but will simply consider whether the employer has proffered sufficient evidence of employees' expressed desires to repudiate the union as collective-bargaining representative to overcome the overall presumption of continuing majority status. Although the judge considered the *Pennco* presumption, his ultimate analysis was consistent with the principles of *Buckley Broadcasting*.

[3] As part of his recommended remedy for the violations that converted the employees' economic strike into an unfair labor practice strike, the judge provided that certain employees be accorded the reinstatement rights to which unfair labor practice strikers usually are entitled. Here, their rights would have been operative only after their positions were no longer filled by the permanent replacements hired while the strike was still an economic strike. We have decided however, in a separate proceeding involving the same parties, *Tube Craft, Inc.*, 287 NLRB 491 (1987) (*Tube Craft I*), that the Respondent lawfully discharged all the strikers who otherwise might have been eligible for reinstatement. Therefore, we shall delete the remedial provisions that provide for reinstatement rights.

Member Babson did not participate in *Tube Craft I*, supra. Member Babson agrees, based on the facts of that case, that the strikers engaged in picket line misconduct that justified their discharge by the Respondent. He, however, finds it unnecessary to pass on the standards applied by the Board in that case in assessing whether the picket line misconduct was sufficient to justify the discharge of the strikers.

We also recognize that eliminating the unfair labor practice strikers' reinstatement rights means that, in adopting the judge's recommended bargaining order, we will be directing the Respondent to bargain at a time when the Union has lost all its previously known supporters and the unit consists exclusively of permanent strike replacements or other newly hired employees. Nevertheless, the Respondent is not in a position to question the Union's status for, as found by the judge, it abruptly and unlawfully withdrew recognition at a time when the Union continued to be entitled to the presumption of majority status because at that time the striking employees were still employed. In these circumstances, a reasonable period of time for renewed bargaining must be provided without regard for subsequent fluctuations concerning majority status. *VIP Limousine*, 276 NLRB 871 fn. 1, 877 (1985); *Poole Foundry & Machine Co.*, 95 NLRB 34 (1951), enfd. 192 F.2d 740 (4th Cir. 1951), cert. denied 342 U.S. 954. Therefore, the bargaining order is still warranted.

Finally, we will delete the visitatorial provision granted by the judge in par. 2(c) of his recommended Order. See *Cherokee Marine Terminal*, 287 NLRB 1080 (1988).

[4] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

289 NLRB No. 122

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

WE WILL NOT refuse to recognize and bargain in good faith collectively with Local 8703 and District 28, United Steelworkers of America (the Union), as the exclusive bargaining representative of our employees in the following appropriate unit:

> All clerical employees, excluding confidential employees and professional employees, guards and supervisors as defined in the Act and all other employees employed by us in Cleveland, Ohio.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL recognize and, on request, bargain collectively in good faith with the above-named Union as the exclusive representative of our employees in the above appropriate unit regarding rates of pay, hours of employment, and other terms and conditions of employment and, if an understanding is reached, embody such understanding in a signed agreement.

TUBE CRAFT, INC.

Steven D. Wilson, Esq., for the General Counsel

David E. Bishop, Esq. and *Jeffrey M. Carey, Esq. (Calfee, Halter & Griswold)*, of Cleveland, Ohio, for the Respondent.

Mark A. Kock, Esq. (Schwarzwald, Robiner, Wolf & Rock), of Cleveland, Ohio, for the Charging Party.

DECISION

STATEMENT OF THE CASE

ROBERT W. LEINER, Administrative Law Judge. This matter was heard on 2 and 3 December 1985 in Cleveland, Ohio, on the General Counsel's complaint[1] alleging, in the substance, that Respondent, Tube Craft, Inc., in violation of Section 8(a)(1) and (5) of the National Labor Relations Act (the Act) unlawfully withdrew recognition from the Union as the exclusive collective-bargaining representative of a unit of Respondent's employees, thereby prolonging a strike[2] in which the unit employees were engaged. Respondent's timely filed answer admits certain allegations of the complaint, denied others, and denies the commission of any unfair labor practices.

At the hearing, all parties were represented by counsel, were given full opportunity to call and examine witnesses, submit oral and written evidence, and to argue orally on the record. At the close of the hearing, counsel waived final argument and reserved the right to submit posthearing briefs. Thereafter, all parties filed timely posthearing briefs, which have been carefully considered.

On the entire record, including the briefs, and from my observation of the demeanor of the witnesses as they testified, I make the following

FINDINGS OF FACT

I. RESPONDENT AS STATUTORY EMPLOYER

Respondent admits that it is an Ohio corporation with an office and place of business in Cleveland, Ohio, where it engaged in the fabrication of metal tubing for use in the transportation and other industries. Respondent further admits that, in the course and conduct of its business operations on an annual basis, it sold and shipped from its Cleveland, Ohio facility products, goods, and materials valued in excess of $50,000 directly to points outside the State of Ohio and that at all material times it has been and is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act. I so find.

II. THE UNION AS A STATUTORY LABOR ORGANIZATION

The complaint alleges, Respondent admits, and I find that United Steelworkers of America, District 28, and Local 8703, United Steelworkers of America, collectively called the Union, are now, and each have been at all material times, labor organizations within the meaning of Section 2(5) of the Act.

III. THE ALLEGED UNFAIR LABOR PRACTICES

A. *Background*

Respondent employs a total of 46 employees at its Baker Avenue, Cleveland, Ohio plant, 6 of whom, clerical employees, are called "office and technical" employees (O & T employees). The complaint alleges and Respondent admits, inter alia, that a unit of all of Respondent's clerical employees, excluding confidential employees and professional employees, guards and supervisors, as defined in the Act, and all other employees, constitutes a unit appropriate for the purpose of collective-bargaining within the meaning of Section 9(b) of the Act. Moreover, the complaint alleges and Respondent admits that on 15 August 1978, the Union was certified as the exclusive collective-bargaining representative in the above unit (G.C. Exh. 2).

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[1] The Union's underlying unfair labor practice charge against Respondent was filed and served on 28 June 1985. The General Counsel's complaint issued on 12 August 1985.

[2] At the hearing, I precluded the Charging Party from adducing proof or arguing that the strike from its 2 January 1985 inception, was an unfair labor practice strike. The General Counsel stated that the Charging Party's position was contrary to the complaint (Tr. 9) which, in substance, alleged that the strike first became an unfair labor practice strike on 9 January 1985. On the General Counsel's and Respondent's objection (Tr. 74-77), I also denied Charging Party's motion to amend the complaint to conform to the proof or to the offer of proof. I reaffirm those rulings. Compare *Pennatech Papers*, 263 NLRB 264, 265 (1982), with *Signal Transformer Co.*, 265 NLRB 272, 279 (1982).

Thereafter, Respondent and the Union entered into collective-bargaining agreements covering employees in the above unit, the last of which, of 3 years' duration, expired on or about 31 December 1984. Commencing 13 December 1984, the parties engaged in negotiations for a further collective-bargaining agreement, and in the period 13–19 December 1984, bargained four to five times toward that end. Essentially economic differences prevented agreement. On Wednesday, 2 January 1985, as admitted in the pleadings and as supported in the record, all six clerical unit employees commenced a lawful economic strike and commenced picketing Respondent's premises. The Union's picketing, commencing on 2 January, was ordinarily from 6 a.m. through midnight, with several unit employees on the picket line at any one time. Commencing midnight to 6 a.m., ordinarily strikers Lucia, Wallace, and Steele were regularly the pickets (Tr. 236). One picket, Alice Emmert, testified without contradiction that she was on the picket line 15 hours per day during the first 2 weeks of January (Tr. 242).

Commencing on or about 3 January, Respondent began contacting persons to replace the strikers. These persons had never filed employment applications with Respondent nor otherwise previously contacted Respondent for employment. Some of the prospective employees were friends of Respondent officers' children. Between 3 January and the early afternoon of 9 January, Respondent hired six employees to replace the six striking union members.[3] As of the time of the hearing, the strike continued.

1. The hiring of the replacement employees

Respondent's president (Thomas La Boda) and executive vice president (Bud Callahan) interviewed and hired the replacement employees immediately after the commencement of the 2 January economic strike. Thus, while Callahan did most of the interviewing and hiring, La Boda was present when Supervisor Walt Lindenberg interviewed and hired replacement *Deborah Curp* and he, himself, interviewed replacement employee *Tim Mellino*. Both replacements were told during the interviews that they were being hired as permanent employees to replace the striking employees. La Boda testified and Callahan corroborated that Timothy Mellino determined that Mellino had an engineering background, placed him in the production scheduling clerical position on the shop floor, which had previously been the job of striker Ed Steele. Callahan credibly testified that since all the employees, when interviewed, wanted to know their status, he told each of them that they were permanently replacing the strikers.

Callahan also interviewed Deborah Curp on 3 January 1985 and she started work on the same day. He initially made her a receptionist because she was the first replacement employee hired and there was nobody in the office to answer the telephones. She was transferred to the "traffic department" where she had the responsibility of contacting trucking companies to coordinate delivery of Respondent's product to customers. She replaced striker Sylvia Lucia, who had formerly been the billing and traffic clerk.

On the next day, Friday, 4 January, Callahan interviewed *Sandra Hall*, a friend of the Callahan family. She started work on Monday, 7 January. He told her in the interview that, with her background, she would perform best as an "order entry clerk." She replaced striking employee Betty Jean Schumaker. On the day before her interview (i.e., on 3 January), Callahan had informed Hall that Respondent was on strike and, if she were interested, she could come down for an interview. Callahan told Hall, both on the phone and at the actual interview on the next day, that she would be a permanent replacement for a striking employee.

On the same day that Callahan interviewed Sandra Hall, he also interviewed *John Roberson* who started work on the same day of the interview, 4 January 1985. Callahan noted that Roberson had no typing skills and told him he would be assigned as the "inventory control clerk" and a permanent replacement for Alice Emmert, who was on strike.

On Monday, 7 January 1985, Callahan interviewd *Amy Merrick* who was a part-time employee at a nearby bookstore, and a friend of Callahan's daughter, and who was taking courses at a nearby college. After the commencement of the 2 January strike, he spoke to her on a couple of occasions, told her of the strike, and told her that if she were employed, she would be a permanent replacement. He recalled telling her of the permanent nature of her job because it would require her to quit her part-time job at the bookstore and drop out of college in order to take a full-time, permanent job with Respondent. Callahan testified that he assigned *Amy Merrick* as the accounts receivable and payroll clerk, replacing striker Ruth Kelly.

Last, Callahan testified that *Mari Rasmussen*, interviewed at 10 a.m., was hired and started work on 9 January 1985. He testified and Respondent's records showed that she started work at 1 p.m. and was paid for 3-1/2 hours between 1 and 4:30 p.m. He told her at the time of hire that she was a permanent replacement. She was made a receptionist and payroll clerk, working in close proximity with Callahan.

All the above replacement employees were apparently working continuously for Respondent through the time of the instant unfair labor practice hearing. On the basis of the above uncontradicted testimony, I conclude that each was hired as a "permanent replacement" for each of the six striking employees and that Respondent replaced the six striking employees with six permanent employees. I further find that no fewer than five of the six permanent replacements commenced work on or before (Tuesday), 8 January 1985.

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[3] The sixth replacement, Mari Ann Rasmussen, although interviewed at 10 a.m., as noted, was hired on 9 January, apparently at or about 1 p.m., and appears to have been paid for the time between 1 p.m. and 4:30 p.m. (quitting time) on 9 January. Although there is certain documentary evidence arguably showing that her employment was effective only on the next day, 10 January 1985, there is other evidence to show that she entered on duty no later than 1 p.m. on 9 January (R. Exh. 8). Absent any other contrary evidence, I conclude that, as Respondent's supervisors testified, Rasmussen was hired no later than, and commenced work at, 1 p.m. of Wednesday, 9 January 1985.

I particularly conclude, consistent with Respondent's testimony and notwithstanding that Rasmussen did not appear as a witness (nor was her absence explained), that Rasmussen was a permanent employee at 1 p.m. on 9 January 1985. I further conclude, therefore, that all six of the replacement employees were hired on and between 3 January and 1 p.m. on 9 January 1985.

The Union admitted that since the commencement of the 2 January strike, the Union has not attempted in anyway to contact the replacement employees for purposes of soliciting their membership in the Union nor has it attempted to distribute union literature to them. I conclude that, on this record, the Union had no knowledge of the union attitudes of the replacements. The Union also stated that sometime before the summer of 1985, striker Ed Steele had sought temporary employment elsewhere, and that on 8 February 1985, striker Sylvia Lucia gave notice of an intent to resign, effective 22 February 1985. I conclude that Lucia resigned on 22 February 1985.

2. Bargaining subsequent to the strike; Respondent's withdrawal of recognition

On the first day of the strike, Wednesday, 2 January, on the picket line, the Union's agent, Staff Representative John J. Gromofsky, approached Respondent's manufacturing manager, Walter Lindenberg, and asked for a further collective-bargaining session. The parties met on the next day, 3 January, but could not reach agreement. At the meeting, Respondent's attorney (Bishop) started to reprimand the Union for alleged picket line misconduct, but Gromofsky cut him short and said that they were there to negotiate rather than to discuss the Union's conduct. Respondent said nothing, at this 3 January meeting, of withdrawing recognition.

On the next day, Friday, 4 January, Gromofsky asked President La Boda for a further meeting, but La Boda told him he would first have to contact Respondent's lawyer, Bishop, who was out of town. On 7 January, La Boda telephoned Gromofsky and set up a meeting for Wednesday, 9 January 1985. A meeting did take place in the afternoon on 9 January 1985, but Gromofsky said he was unclear when in the afternoon the meeting occurred. Because of Alice Emmert's testimony that striker Ed Steele came to the picket line on 9 January 1985 before the collective-bargaining session of that date, and arrived at about 1:30 p.m., I conclude that the collective-bargaining session of 9 January 1985 did not occur before 1:30 p.m. President La Boda said the meeting occurred in the early afternoon about 2:30. It is my conclusion that the 9 January collective-bargaining session occurred about 2:30 p.m. and lasted for no more than a short time in the afternoon (Tr. 339).[4]

The significance of the time when the 9 January collective-bargaining session first began relates in part to my conclusion, above, that Mari Ann Rasmussen was already a permanent employee of Respondent at the time of the commencement of the collective-bargaining session.

3. The collective-bargaining session of 9 Janaury 1985

Pursuant to the 7 January phone call from President La Boda, the parties met about 2:30 p.m. of 9 January 1985, the Union represented by Staff Representative Gromofsky and striker Ed Steele; Respondent represented by Attorneys Bishop and Carey, along with President La Boda. Gromofsky testified (Tr. 64) that the meeting consisted only of Attorney Bishop stating that he had a statement to read and that the substance of the statement was that the Respondent felt that the Union did not represent a majority of Respondent's unit employees and, until that question was resolved, the Respondent would not negotiate with the Union. Gromofsky was clear in that Bishop did not say why Respondent felt that the Union did not represent a majority. When Gromofsky asked for a copy of the statement read by Bishop, Bishop refused. Gromofsky cut short Bishop's attempt to bring up picket line misconduct relating to the pickets' blocking entrances.

After Bishop read his statement, the meeting concluded. Before 5 p.m., Gromofsky met with five of the strikers and told them what had happened at the meeting (Tr. 34). He asked them whether they desired to continue the strike and they told him that their cause was just and they would continue to picket.

President La Boda testified that prior to the opening of the meeting, Respondent, in conjunction of its attorneys, decided that it would no longer recognize or bargain with the Union and reached that decision because of (1) the misconduct of the six, employees whom it decided to discharge; and (2) the existence of the six permanent replacements, which caused counsel and Respondent to doubt whether the Union represented a majority. There was no evidence, however, to suggest that any decision to discharge the striking employees, for picket line or other misconduct or for any other reason, was ever communicated to them or to any other person. Nor is there evidence that they were discharged. Regarding picket line misconduct, it was conceded that neither Respondent nor any other person filed charges against the Union, whether 8(b)(1)(A) violations or otherwise. On the other hand, the record shows that Respondent unsuccessfully applied for a temporary restraining order against the Union's picketing in the court of common pleas in Ohio.

Respondent submitted in evidence (R. Exh. 7) the text of the Bishop statement which, on this record, was read to Gromofsky and Steele at the meeting on 9 January 1985.

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[4] About 6 February 1985, the Union wrote to the Respondent requesting further negotiations, and on 11 February 1985 the Respondent declined to bargain with the Union alleging a good-faith doubt originating on 9 January 1985 regarding the Union's majority status.

STATEMENT

> Mr. Gromofsky, Members of the Committee: The device that I just set in front of me is a little tape recorder. It is recording what I am saying. I am going to make a statement today and I want my statement recorded. Management's representatives at this meeting have a copy of the statement that I am reading that they are going to follow along to make sure that I say only what is contained in the statement.
>
> Prior to the strike, the O & T bargaining unit at Tube Craft consisted of seven persons. One of the employees was a temporary employee. That employee has submitted a letter of resignation to us. That person's position no longer exists at Tube Craft.
>
> Six members of the O & T unit began a strike on January 2, 1985. The strike continues as of today. Tube Craft has permanently replaced each of the six O & T employees. The replacements are working. With regard to permanent replacements, as you know the replaced employees have job rights should the replacement leave in the unforseeable future.
>
> You know as well as I do, Mr. Gromofsky, that the striking O & T employees engaged in misconduct during the strike. The fact Tube Craft is treating the striking O & T members as permanently replaced does not constitute a waiver of any of Tube Craft's legal rights with regard to picket line misconduct.

There are presently six striking O & T unit members and six permanent replacements working at Tube Craft. Because of this six and six situation, Tube Craft has good faith doubt that Local 8703 of the United Steel Workers of America represents a majority of employees in the O & T unit. For that reason Tube Craft, Inc., declines to engage in any further bargaining with Local 8703 with regard to the O & T unit until the question is resolved. It is, of course, an unfair labor practice for an employer to bargain with a union that does not represent a majority of its employees in a unit.

4. Replacement employees sentiments regarding the Union

a. *Respondent's witnesses*

La Boda testified that, while all employees voiced antiunion sentiments, two employees in particular made statements indicating their sentiments regarding the Union. He said that during the 2 January interview of Deborah Curp, she said that she did not understand why there was a union representing the clerical workers and that she would not join such a union; indeed, she had never heard of such a union representing such employees. She also allegedly told him that she would not want to work where there was a union representing these employees.

Although Curp testified for Respondent at the hearing, her testimony omits any corroboration of La Boda's testimony concerning her particularized anti union sentiments expressed during the 2 January interview.

La Boda testified that Sandra Hall made similar statements to him prior to the 9 January collective-bargaining session, at which time Respondent withdrew recognition from the Union. La Boda also testified, generally, that from the beginning of their employment, the replacements all asked how they could get rid of the Union and get rid of the pickets. It was Curp and Hall, however, whom he identified with forcefully expressing these sentiments. Yet Hall's testimony shows no conversation in which she made antiunion statements.

La Boda also testified that he could tell that John Roberson did not harbor any prounion sentiments because Roberson offered to obtain video equipment from his girlfriend in order to photograph the pickets and their alleged blocking of entrances and exits. It was this volunteering by Roberson that led La Boda to believe that Roberson was antiunion.

Roberson, corroborating La Boda, testified that on 8 January he filmed the pickets on the picket line and his picture was taken by one of the female pickets while he was videotaping them.

Bud Callahan

Callahan testified that the strikers called the replacements "scabs" and said they were going to take their jobs away. These striker statements occurred before 9 Janaury (Tr. 205). He testified, generally, that both before and after 9 Janaury, the replacement employees said they wanted the Union to "go away" and they wanted nothing to do with the Union (Tr. 206-207).

John Roberson

Roberson was hired and commenced employment on Friday, 4 January 1985, as inventory control clerk. He was interviewed on 3 January 1985 and testified that he saw and crossed the picket line on 4 and 7 January in his car in which Callahan and Debbie Curp, picked up at a prearranged point, were also passengers. He also testified that on 8 and 9 January, he drove separately to work in his car while all the other employees carpooled with Vice President Callahan in crossing the picket line. Commencing with his second day of work, 7 January, while at work, he heard the picketing strikers out in the street from his office. They said, inter alia, "Don't mess with the desks; we're going to be back." When he and other pickets told Callahan and La Boda of these remarks, they were instructed to close the office curtains and disregard the remarks, but the curtains, at least from time to time, remained open in order to see trucks arriving to make pickups of Respondent's material for delivery to customers. Roberson and other Respondent's witnesses were unclear about which pickets made statements, but he said that the remarks principally came from pickets Alice Emmert, Ruth Kelly, and Betty J. Schumaker. He was confident that he heard and reported the above remarks (about "messing with the desks" and that the pickets were "going to be back") on Monday and Tuesday, 7 and 8 January. Roberson, however, particularly identified four to five pickets on 7 January, including Alice

Emmert, Schumaker, Kelly, and Ed Steele. He also testified that on 8 and 9 January, he saw Emmert, Schumaker, Kelly, and other pickets.

On cross-examination, Roberson testified that at the time of hiring, Callahan told him that he was a permanent employee, and that Callahan repeated the same thing to the employees on 7 and 8 January after the replacement employees reported the pickets' statements about not "messing up the desks" and "taking" their jobs. In placing the time that Callahan repeated this assurance, however, Roberson specified that Rasmussen was among the employees. Since Rasmussen was not employed until 9 January 1985 at 1 p.m., at least some of Callahan's statements may have been made after Respondent withdrew recognition from the Union. This does not automatically follow because Callahan's statements, in the presence of Rasmussen, might have occurred on or after 1 p.m. (when Rasmussen entered on duty) and before the commencement of the collective-bargaining meeting about 2:30 p.m., when Respondent withdrew recognition. I am satisfied, however, on the basis of Roberson's testimony and the testimony of other Respondent's witnesses, and notwithstanding contradictory testimony interposed by the Union's witnesses, that in the period 4 January through 8 January, the replacement employees were told by Callahan and La Boda that they were permanent employees and that the Union's pickets did make the above statements to the replacements (concerning the replacement employees not messing up the desks and that the pickets would take their jobs) before 9 January 1985.

Deborah Curp

Curp entered on duty on 3 January after her 2 January interview. She testified that she heard nothing from the pickets on 3 or 4 January (Thursday and Friday), but commencing on Monday, 7 January, and through 9 January at least, she heard the pickets through the windows call the replacements "scabs"; told the replacements not to "get comfortable"; don't mess up the filing cabinets or the desks"; and that the pickets "were going to get [their] jobs back." She testified that she and the other replacements heard and reported the comments through the closed windows. Callahan told them to close the shades and curtains and to ignore what the pickets said. She testified that she could not tell which of the pickets said these things or what time of the day the statements were made, but that on 7 January, pickets Alice Emmert, Sylvia Lucia, and Ruth Kelly made the statements, although she was not looking at them when the statements were made.

Curp also testified that on 8 and 9 January (Tuesday and Wednesday), the pickets said the same things that were directed to all the replacements (the pickets did not know the replacements' names); and that the replacements, in general, and she, in particular, were afraid of losing their jobs and afraid of possible physical assault from the replacements. She and the other replacements told this, she testified, to Supervisors Lindenberg, Callahan, and La Boda. Last, Curp testified that almost on a daily basis, because of the pickets' statements, the replacement employees, including her, asked Callahan about their job tenure and were told that they were permanent employees. She testified that although she drove herself to the interview on 2 January, commencing with 3 January and thereafter, she drove to work escorted either by La Boda or Callahan.

Sandra Hall

Sandra Hall testified that on Friday, 4 January, at her interview, Ruth Kelly, a picket, took her picture as she entered Respondent's building in the early afternoon and that she told Plant Manager Lindenberg of the occurrence. She started work on 7 January (Monday) and in the period 7 January through 9 January, like replacement Deborah Curp, she heard the pickets call the replacements "scab,"[5] talk about getting their jobs back, and not messing up the desks in the office. She recalls that the replacement employees spoke of these things to Supervisors La Boda and Callahan and asked them whether they had permanent jobs and how long the picketing would go on. She testified that Callahan told them that they were permanent replacements and that they had nothing to worry about since the Respondent was taking care of the matter through its lawyers. Like Curp, Sandra Hall was driven through the picket line by carpooling with Callahan in the period 7 through 9 January 1985.

Last, Hall testified that she saw Ruth Kelly, Alice Emmert, and Ed Steele, all pickets, during daylight hours when she was working in the period 7 through 9 January, between the hours of 8 to 4:30 p.m. She particularly recalled that on 7 January, Emmert, Kelly, Schumaker, Lucia, and Ed Steele were on the picket line during these daylight hours and were also there on 8 and 9 January.

b. The Union's witnesses

Ruth Kelly testified that, contrary to the testimony of Sandra Hall, in particular, she was not on the picket line on 7 or 8 January because she was sick at home. Kelly testified that she returned to the picket line on 9 January, but said nothing to the replacement employees.

Although *Betty J. Schumaker* testified that she was on the picket line in the period 7 through 9 January 1985, she corroborated Ruth Kelly's testimony that Kelly was not on the picket line on 7 or 8 January; that Ed Steele was not there on 7 or 8 January, but was on the picket line on 9 January only for 15 minutes before the collective-bargaining meeting. She, like Kelly, denied saying anything about "scabs" or "getting the jobs back." Because of Kelly's and Schumaker's testimony, to the extent that Roberson, Curp, and Hall identified Kelly on the picket line on 7 and 8 January, I conclude that they were in error. This does not materially affect my generally crediting the replacements' testimony that on 7 and 8 January the strikers called them "scabs" and said they would get their jobs back.

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[5] The Union introduced into evidence (C.P. Exh. 2) Hall's statement, given in conjunction with Respondent's court of common pleas proceeding for a temporary restraining order in which Hall said that she and other replacement employees had been called scabs on 18 January by strikers who also said they would get their jobs back. No prior date appears in the Hall statement. Particularly since Hall's statement, given to support the TRO application, necessarily would suggest proximity of alleged union misconduct to the time of the TRO application, I do not believe that the failure of the document to mention more remote union conduct implies that such more remote conduct did not occur. On this record, therefore, I cannot conclude the statement to have serious impeaching effect, i.e., that no name-calling occurred in the period 7-9 January.

Kelly testified that *after* 9 January she called one female replacement a "scab," but said nothing else. Thereafter, she said she might have said this on more than one occasion. Schumaker testified that in the period 2 through 9 January she said nothing to the replacements; but after 9 January, heard the word "scab" used and heard Roberson called "pony-boy."

Alice Emmert, whose demeanor on the witness stand demonstrated hostility against the replacements, testified that she said nothing to the replacements in the period 2 through 9 January, although she was on the line for at least 12 hours per day in that period. After 9 January, she admitted calling them scabs and admitted saying that she would "have her job back." She observed that the replacements were driven to and from their jobs by La Boda and Callahan. Emmert's testimony appears to indicate that strikers Schumaker, Kelly, Lucia, and Emmert were often on the picket line from 6 a.m. to 8 or 9 p.m.

B. *Discussion and Conclusions*[6]

In the instant case, as discussed, we are concerned with the Board rules concerning two rebuttable presumptions often relevant in cases of withdrawal of recognition following an economic strike: the rebuttable presumption of continued majority status flowing from certification after the expiration of the certification year; and the rebuttable presumption that new employees, here the strike replacements, are presumed to support the Union in the same ratio as those they replace.[7]

In *Bartenders Assn. Pocatello*, 213 NLRB 651 (1974), the Board, restating the underlying principles in which the employer seeks to withdraw recognition from an established bargaining representative, referred to *Terrell Machine Co.*, 173 NLRB 1480–1481 (1969), enfd. 427 F.2d 1088 (4th Cir. 1970), in which the Board stated:

> It is well settled that a certified union, upon expiration of the first year following its certification, enjoys a rebuttable presumption that its majority representative status continues. This presumption is designed to promote stability in collective-bargaining relationships, without impairing the free choice of employees. Accordingly, once the presumption is shown to be operative, a prima facie case is established that an employer is obligated to bargain and that its refusal to do so would be unlawful. The prima facie case may be rebutted if the employer affirmatively establishes either (1) that at the time of the refusal the Union in fact no longer enjoyed majority representative status; or (2) that the employer's refusal was predicated on a good-faith and reasonably grounded doubt of the union's continued majority status. As to the second of these, i.e., "good-faith doubt," two prerequisites for sustaining the defense are that the asserted doubt must be based on objective considerations and it must not have been advanced for the purpose of gaining time in which to undermine the union.

Although some courts have held that subjective evidence may be used to bolster the argument that such doubt existed at the relevant time, *Pioneer Inn Associates v. NLRB*, 578 F.2d 835 (9th Cir. 1978), other courts have noted that "any doubt as to the continuing majority status must rest on a reasonable basis and may not depend solely on unfounded speculation or a subjective state of mind." *NLRB v. Gulfmont Hotel Co.*, 362 F.2d 588, 589 (5th Cir. 1966). See Member Jenkins dissenting in *Arkay Packaging Corp.*, 227 NLRB 397, 399 fn. 7 (1976). The Board and at least three circuit courts of appeals have observed that the quality of proof supporting the employer's good-faith doubt must be either "reliable objective evidence," cf. *Landmark Trucks*, 272 NLRB 675 (1984), which is "clear and convincing," *NRTA-AARP Pharmacy v. NLRB*, 519 F.2d 486 (2d Cir. 1975); or objective evidence that is "clear, cogent and convincing," *NLRB v. Gentzler Tool & Die Corp.*, 778 F.2d 1211 (6th Cir. 1985), enfg. 268 NLRB 330 (1983); *Pioneer Inn Associates v. NLRB*, above. *NLRB v. Tragniew, Inc.*, 470 F.2d 669 (9th Cir. 1972); *Ref-Chem Co. v. NLRB*, 418 F.2d 127, 130 (5th Cir. 1969); and *Whisper Soft Mills v. NLRB*, 754 F.2d 1381 (9th Cir. 1984). Employee expressions of dissatisfaction with or antipathy for a union may prompt a reasonable doubt of majority status. Compare *Pioneer Inn Associates v. NLRB*, with *NRTA-AARP Pharmacy v. NLRB*, above.

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[6] At the hearing, and in its brief, Respondent specified three defenses: (a) it had lawfully discharged the six strikers on the morning of 9 January, before withdrawing recognition, resulting in a unit composed only of the six replacements. Therefore, the presumption of the Union's continuing majority was rebutted since at least three of the six replacements were antiunion and Respondent's objectively based good-faith doubt was established. See *Beacon Upholstery Co.*, 226 NLRB 1360 (1976). This defense is rejected because Respondent's evidence, at most, showed that it made an uncommunicated decision to discharge the six strikers, but failed to prove that it actually discharged any of the six strikers—at any time—and therefore failed to factually support the defense. (b) The permanent replacement of the six strikers by 1 p.m. on 9 January resulted in "six against six" in the 12-employee unit. The Union thus either had no majority, in fact, or, alternatively, Respondent had at least a good-faith doubt of the Union's majority when it withdrew recognition. Since the Board rule in *Pennco, Inc.*, 250 NLRB 716 (1980), rebuttably presumes that permanent replacements support the incumbent Union in the same ratio as those replaced; and since all those replaced were prounion strikers, Respondent's defense, based solely on the total replacement of strikers, would ordinarily run afoul of the *Pennco* hiring-ratio presumption to which I am bound, notwithstanding that some courts of appeal may have refused to adopt the Board rule or may have even adopted a contrary presumption, e.g., *NLRB v. Randle-Eastern Ambulance Service*, 584 F.2d 720 (5th Cir. 1978), regarding the union sympathies of striker replacements. A contrary presumption based solely on the number of replacements, as the General Counsel observes (Br. at 9) apparently based on the Board's explicit statement in *Pennco, Inc.*, above at 717, would tend to validate a withdrawal of recognition, not on objective evidence of disaffection, but immediately on hiring permanent replacements equal to a majority of striking employees if the strikers constitute a unit majority. Such an automatic result would undermine the right to strike and would be contrary to the Act. Nowhere in Respondent's withdrawal of recognition (R. Exh. 7) is there mention of the union attitudes of the six replacements. Respondent alluded only to the fact of replacement. In the instant case, however, as the above text shows, Respondent presented evidence that, in my opinion, effectively rebutted this *Pennco* presumption. This evidence, comprised of the credited testimony of its supervisors and three replacements, eliminates the *Pennco* ratio presumption and makes consideration of it academic. For here, it appears to me, when Respondent interposed evidence supporting its third defense (c), objective evidence of good-faith doubt (five of the six replacement employees, in fact, were antiunion), such evidence rebutted and eliminated from consideration the *Pennco* hiring ratio presumption. In short, Respondent, having effectively rebutted this *Pennco* presumption by the introduction of actual evidence concerning the replacements' union attitudes, it may not, in this case, raise the issue of the *Pennco* presumption or, perhaps, a contrary presumption. The parties' actually came to grips on Respondent's above third defense, as the above text demonstrates. The presumption remains intact absent objective evidence that new employees are dissatisfied with the Union. *Pioneer Inn Associates v. NLRB*, 578 F.2d 835 (9th Cir. 1978). When, as here, convincing objective evidence rebuts the presumption, the presumption drops out.

[7] Thus, a word might be said about the rule of evidence concerning presumptions. In *NLRB v. Tragniew, Inc.*, 470 F.2d 669, 674–675 (9th Cir. 1972), a case involving the presumption of continued majority status and the rebuttal of such presumption, the court stated:

> Presumptions in the law are a procedural substitute for evidence. They recognize the probability of a fact and impose the proof of the non-existence of that fact upon the party against whom the presumption is asserted. The presumption of majority represenatation here involved is rebuttable by clear, cogent and convincing evidence.

Where, as here, objective evidence shows that at least 50 percent of the six replacement employees are antiunion, the *Pennco* presumption regarding the union sympathies of replacements no longer "remains intact." *Pioneer Inn Associates v. NLRB*, above.

When the employer's withdrawal of recognition is based on a good-faith doubt created by the permanent replacement of striking employees, the Board has created a corollary rule to the above rebuttable presumption of continuing majority status flowing from certification:[8] "[A]gain absent evidence to the contrary, new employees are presumed to support the incumbent union in the same ratio as those they replaced." *Pennco, Inc.*, above. In *Pennco, Inc.*, the Board expressly held that the rebuttable presumption of majority status continues in the face of an economic strike and is not rebutted by replacement employees passing through a hostile picket line. *Pennco, Inc.*, above at 718. It should be noted, however, that thereafter Chairman Dotson and three members of the Board have recently and repeatedly seen fit not to pass on this presumption concerning strike replacements set out in *Pennco, Inc.*; see *Stormor, Inc.*, 268 NLRB 860 (1984); *Blu-Fountain Manor*, 270 NLRB 199 fn. 3 (1984); and the recent *Cascade Painting Co.*, 277 NLRB 926 (1985). Several courts of appeals, however, have refused to accept the Board's *Pennco* presumption concerning the sympathies of striker replacements, *Whisper Soft Mills v. NLRB*, above,[9] while others appear to have supported the rule. As noted, the *Pennco* ratio rule presumption, having been rebutted by Respondent, is no longer legally before us. We are left, therefore, with the presumption of the Union's continued majority status flowing from certification and the recently expired contract and the reasonableness of the Respondent's doubt of the Union's majority status. That is an issue of fact. *NLRB v. Pennco, Inc.*, 684 F.2d 340 (6th Cir. 1982).

To determine majority status when there is a withdrawal of recognition in a unit where there are strikers and permanent striker replacements, the Board rule is that the numerical size of unit is measured at the time of withdrawal and includes both the permanent replacements and all the striking employees. *Pennco, Inc.*, above at fn. 17; *NLRB v. Windham Memorial Hospital*, 577 F.2d 805 (2d. Cir. 1978); *NLRB v. Crimptex, Inc.*, 517 F.2d 501, 503–504 (1st Cir. 1975). Of course, had the striking employees been lawfully discharged, as Respondent contends, the number of employees in the unit would not include the discharged employees. Similarly, when the passage of time and other facts demonstrate that permanently replaced strikers have abandoned their employment, such strikers are not counted for determining unit majority. *Arkay Packaging Corp.*, above. Here, of course, neither passage of time nor other evidence show that the strikers, when recognition was withdrawn, abandoned interest in their jobs. *Beacon Upholstery Co.*, 226 NLRB at 1368. To the contrary, it is clear that they wanted their jobs at all material times.

C. *The Striker Replacements as Permanent Employees*

Before reaching the questions of the rebuttal of presumptions and the evidence regarding the Union's continuing majority status, the first question is whether the six replacement employees are all permanent employees. If not, they may not be counted for unit majority purposes. Callahan, La Boda, Roberson, Curp, and Hall all testified that both at the interviews and thereafter (especially because of picket line taunts from the strikers concerning the permanency of the replacements' jobs), the replacements were repeatedly told that they were in permanent jobs. Indeed, in some instances, the names of the strikers whom they were replacing were given. Respondent was intent on hiring permanent employees. I, therefore, find that the six replacements were hired as permanent employees and lawfully permanently replaced the six strikers on or before 1 p.m., 9 January 1985. Permanently replaced economic strikers are not entitled to reinstatement on demand. *Auto Workers Local 259 v. NLRB*, 120 LRRM 3102, 3106 (2d Cir. 1985), citing *NLRB v. Fleetwood Trailer Co.*, 389 U.S. 375, 379 (1967).

Although Respondent contends that immediately prior to its 9 January withdrawal of recognition it had decided to discharge the six strikers for strike misconduct, Respondent admitted that there had been no communication, even of the alleged discharge decision, to the strikers or to anyone else. I conclude that there had been no discharges of the strikers within the meaning of the National Labor Relations Act. Similarly, neither the passage of time nor other circumstances indicate that the strikers abandoned their jobs prior to the withdrawal of recognition. Therefore, Respondent may not place itself within the holding in *Beacon Upholstery Co.*, above, in which the good-faith doubt was to be measured was reduced by the number of employees who had been lawfully discharged; or within *Arkay Packaging Corp.*, above, where the strikers abandoned their jobs; or within any reasonable position whereby its uncommunicated desire would affect the number of unit employees for purposes of proving its "good-faith doubt."[10] In short, therefore, I conclude that the numerical *size* of the unit against which Respondent's alleged good-faith doubt of majority status must be measured, is 12 employees: the 6 striking employees and the 6 striker replacements. *NLRB v. Crimptex, Inc.*, above at 503-504; *NLRB v. Windham Memorial Hospital*, above. It goes without saying that the critical *date* on which the size of this unit is to be measured, in assessing Respondent's good-faith doubt defense, is the date on which Respondent withdrew recognition of the Union, 9 January 1985, *NLRB v. Pennco, Inc.*, above at 342 and cases cited; and subsequent resignations or other matters affecting the employment of the strikers, or indeed the striker replacements, are irrelevant. *NRTA-AARP Pharmacy*, above; *NLRB v. Windham Memorial Hospital*, above.

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[8] A similar presumption exists following expiration of a collective-bargaining agreement. *Rosa Watch Corp.*, 249 NLRB 284, 286 (1980), citing *Triplett Corp.*, 234 NLRB 985 (1978)

[9] The Ninth Circuit, in *Whisper Soft Mills*, above, states that the *Pennco* doctrine has "never been embraced by any circuit court and has been rejected by the four circuits that have considered it," citing *NLRB v. Pennco, Inc.*, above, cert. denied 459 U.S. 994 (1982); *Soule Glass & Glazing Co. v. NLRB*, 652 F.2d 1055 (1st Cir 1981); *National Car Rental System v. NLRB*, 594 F.2d 1203 (8th Cir. 1979); and *NLRB v. Randle-Eastern Ambulance Service*, 584 F.2d 720 (9th Cir. 1978). This broad statement by the Ninth Circuit appears to be inconsistent with the holding of the Ninth Circuit's own decision in *Pioneer Inn Associates v. NLRB*, above, and the holding of the Second Circuit in *NLRB v. Windham Memorial Hospital*, above.

D. *Respondent's Rebuttal of the Pennco, Inc. Presumption of the Union Sympathies of the Replacement Employees*

As Noted above, the *Pennco, Inc.* presumption concerning union sympathies of replacement employees is a rebuttable presumption,[11] *Arkay Packaging Corp.*, above; and the presumption is not applicable in exceptional situations such as when strike replacements, over a period of months preceding the withdrawal of recognition, are not contacted by the Union and the Union makes no effort to police the terms of existing contracts, *Arkay Packaging Corp.*, above. *NLRB v. Windham Memorial Hospital*, above, fn. 11.

I credit the testimony of Respondent's president, La Boda, insofar as he testified that all the replacements, and particularly through Curp and Hall, asked Respondent, from the beginning of their employment, how to get rid of the Union and how to get rid of the strikers. I further credit his testimony that he told the replacements he was working with Respondent's counsel to "finalize" a method of getting rid of the pickets. In support of La Boda's testimony, I credit the testimony of Deborah Curp insofar as she testified that the striker replacements were afraid of losing their jobs, were afraid of physical contact occurring between the replacements and the strikers, and, commencing with Monday, 7 January 1985, told this to Respondent's supervisors on a daily basis. As Sandra Hall testified, the replacements spoke to the supervisors concerning the strikers returning to their jobs and the strikers' warnings not to mess up the strikers' desks. Hall and others, commencing 7 January, asked La Boda and Callahan whether the jobs were permanent and how long was this going on. I also find that on 7 and 8 January 1985, the pickets called the replacements "scabs" and warned them concerning the permanency of their jobs.

This striker hostility, commencing no later than 7 and 8 January, the replacements being fearful of hostile pickets, the permanency of their jobs and their physical well-being, communicating these problems to the Respondent's management, inquiring how long it was going on and how they might get rid of the pickets and the Union, all demonstrate convincing, objective evidence sufficient to rebut the *Pennco* presumption that the replacement employees favored the Union in the same ratio as the strikers. It is not necessary, it seems to me, to have each and every one of the replacements testify concerning their participation in individual conversations. Rather, it is sufficient if the credible evidence, as here, relates to at least a majority of the replacements and their union attitudes. See *Roza Watch Corp.*, above.

The presumption having been rebutted, I further find that the evidence, including Callahan's emphatic testimony (Tr. 205-206), shows that the five striker replacements hired before 9 January were antiunion. Regarding the sixth, Mari Ann Rasmussen, there is no evidence concerning her union attitude or sympathy in the crucial period between the time she became a unit employee (1 p.m.) and the time Respondent withdrew recognition (2:30 p.m.) both on 9 January 1985. *Odd Fellows Rebekah Home*, 233 NLRB 143, 145 (1977). Thus, while the *Pennco* presumption affecting Rasmussen (i.e., that, in substance, Rasmussen is *presumed* to be prounion) has been rebutted, I cannot find, on this record, that Rasmussen held any particular attitude concerning the Union, much less that, in the above crucial period before Respondent withdrew recognition, she communicated to anyone, or Respondent knew of, her union attitude in any way. Her union attitude or sympathy, if any, expressed *after* Respondent withdrew recognition, may well have been affected and, of course, is irrelevant. See *NLRB v. Gentzler Tool & Die Co.*, above, and cases cited; *Odd Fellows Rebekah Home*, above; *Thomas Industries*, 255 NLRB 646, 647 (1981), enf. denied on other grounds 687 F.2d 863 (6th Cir. 1982).

E. *Respondent Fails to Rebut the Presumption of the Union's Continuing Majority Status*

In the first instance, the burden rests with the General Counsel to establish the Union's status as majority representative, through rebuttable presumption or otherwise. *NLRB v. Tragniew, Inc.*, above at 672; *Pennco, Inc.*, 250 NLRB at 717. Here, the General Counsel's prima facie case of the presumption of the Union's majority status on 9 January is established both by virtue of the 1978 certification, *Pennco, Inc.*, 250 NLRB at 716 and cases cited in fn. 3, and the collective-bargaining agreement that expired on 31 December 1984, *Roza Watch Corp.*, above at 286 (1980). The burden of proof then shifts to the employer, who may rebut the presumption of majority status with less than proof that a union lacks actual majority support by establishing objective evidence forming a reasonable basis for a good-faith doubt of that status.

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[10] Respondent argues (Br. at 44) that *Randle-Eastern Ambulance Service*, 230 NLRB 542 (1977), supports, in some way, the position that its good-faith doubt is supported by its uncommunicated decision to discharge the strikers made before 9 January withdrawal of recognition. I do not agree. Such a conclusion would encourage the basest "bootstrapping" and is untenable.

[11] This presumption long antedates the *Pennco* case. See *Laystrom Mfg. Co.*, 151 NLRB 1482, 1484-1485 (1965).

However, in light of the policies underlying the presumption of continuing majority status, the employer's burden is a heavy one. *Pennco, Inc.*, 250 NLRB 716–717.[12] As above noted, the courts require that evidence in support of the employer's good-faith doubt of continued majority status be not only "objective" but "clear, cogent and convincing," *NLRB v. Tragniew, Inc.*, above; *Pioneer Inn Associates v. NLRB*, above, and *NRTA-AARP Pharmacy v. NLRB*, 519 F.2d 486 (2d Cir. 1975).

In the instant case, for purposes of determining the lawfulness of the 9 January withdrawal of recognition, the unit comprises 12 employees: 6 permanent replacements and 6 strikers. There is no dispute, on this record, and I find that on that date, and at all times, the strikers maintained their full allegiance to the Union. Indeed, on the very afternoon following withdrawal of recognition, when Union Representative Gromofsky polled the strikers, they told him that the strike was just and that the strike would continue. Likewise, as above noted, I am satisfied that, based on the credited testimony of Callahan, La Boda, Roberson, Curp, and Hall, five of the replacement employees openly showed themselves, by conduct, if not solely by antiunion statements, to have manifested objective interests contrary to the Union's interest. The replacements wanted to keep their jobs and if the Union returned, consistent with the union taunts, they openly feared that they might well be replaced. That was their explicit fear expressed to President La Boda and Executive Vice President Callahan. They also asked how to get rid of the Union and the pickets.[13] The problem of the allegiance and sympathies of Mari Ann Rasmussen, however, remains.

I credit Respondent's testimony that, though she was interviewed as early as 10 a.m., Rasmussen was not hired as a permanent employee until about 1 p.m. on 9 January 1985. The subsequent 9 January meeting between Respondent and the Union, at which Respondent withdrew recognition, occurred about 2:30 p.m. Rasmussen, therefore, was employed no more than 2 hours (and perhaps as little as 1-1/2 hours) between the time she became a permanent replacement employee and the time that Attorney Bishop read the communication to the Union in which Respondent withdrew recognition and refused to bargain with the Union.

It is true that La Boda testified that from the beginning of their employment, the replacements asked him how to get rid of the Union and how to get rid of the pickets. Even in the absence of explicit employee corroboration, and contrary to the General Counsel's argument (Br. at 10–12), I have credited his testimony. I note, however, that on cross-examination, aside from the vehement antiunion attitudes of replacements Curp and Hall, La Boda could not recall which employees said certain things and, particularly, *when* they uttered their antiunion remarks. This cross-examination resulted from La Boda's and Callahan's emphatic testimony that the employees' antiunion statements all occurred *before* 9 January 1985. Of course, Rasmussen was not hired until after noon on 9 January 1985. I must conclude from Callahan's and La Boda's insistent testimony, that various employees' statements against the Union occurred *before* 9 January and thus flowed from replacements other than Rasmussen, who was not hired until after noon on 9 January.

Rasmussen did not testify at the hearing nor did any testimony, from any source, bear on her union attitude. The only record remotely related to Rasmussens' union sentiments occurred in the cross-examination of replacement of John Roberson. Roberson testified that the replacement employees told Vice President Callahan *on 7 and 8 January* of the taunts of the pickets (concerning the replacements' status), but he placed Rasmussen as among the employees making these statements at that time. If Rasmussen was present, Roberson's testimony that these replacement employee meetings with Respondent occurred on 7 and 8 January must manifestly be incorrect. If his recollection that Rasmussen was present was accurate, then these replacement employee conversations with Callahan, to the extent they relate to Rasmussen's union attitudes, occurred either after 9 January (in which case they would be legally irrelevant) or they could have occurred in the crucial 2-hour period between the time of her 9 January hiring and the time Bishop, about 2:30 p.m., read the withdrawal of recognition to the Union on 9 January.

Although I believe that the credited testimony of Respondent's supervisors and the testimony and conduct of three replacement employees demonstrate objective antiunion attitudes of all employees, see *Roza Watch Corp.*, supra, 249 NLRB at 284, I cannot say that there is *any* evidence in the record, much less evidence that meets the mandated higher legal test of "clear, cogent and convincing," *NLRB v. Pennco, Inc.*, 684 F.2d 340, 342 (6th Cir. 1982), cert. denied 459 U.S. 994 (1982), *NLRB v. Tragniew, Inc.*, above, to show that Rasmussen, in this very brief 2-hour period, demonstrated or expressed an antiunion position, or that Respondent's supervisors, based on *any* objective evidence, reasonably believed she held an antiunion position.

Because of this failure of proof, and notwithstanding that Rasmussen on 9 January may have crossed a hostile picket line or may have expressed anti-Union sentiments in the irrelevant period *after* the witdrawal of recognition, *Odd Fellows Rebekah Home*, 232 NLRB at 144; *NLRB v. Pennco, Inc.*, above, I conclude that Respondent was in possession, at or about 2:30 p.m. on 9 January 1985 (when it withdrew recognition from the Union and thereafter refused to bargain with it) of objective, convincing evidence that, at most, five of the six permanent replacements were antiunion. In these circumstances, at the time it withdrew recognition, Respondent was thus in possession of objective evidence that exactly 5 of the 12, legally relevant members of the appropriate unit were antiunion. *NLRB v. Crimptex, Inc.*, above; *NLRB v. Windham Memorial Hospital*, above; see *Stormor, Inc.*, above. Such circumstances constrain me to conclude, as I do, that Respondent has thus failed to adduce any evidence, much less "clear, cogent and convincing evidence," to rebut the presumption of the Union's continued majority status by establishing either the Union's actual loss of majority or objective evidence forming a reasonable basis for a good-faith doubt of majority status as required by the Board, *Odd Fellows Rebekah Home*, above at 145; and the courts of appeal, *NLRB v. Pennco, Inc.*, supra at 717; *Whisper Soft Mills v. NLRB*, above at 1381.

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[12] Again, we are no longer dealing with the other *Pennco* presumption (of the union's sympathy of replacements).

[13] Even in the absence of corroboration by Curp and Hall, I have credited Callahan and La Boda that these employees made statements against the Union before the 9 January withdrawal of recognition. More important, I find that the totality of replacement employee *conduct*, in the face of taunts from a hostile union picket line before withdrawal of recognition can, and does, demonstrate "clear, cogent and convincing evidence" to support Respondent's heavy rebutting burden of proof. *Pennco, Inc.*, 250 NLRB at 717. Nonetheless, because the replacements' conduct is a fact, just as antiunion statements are facts, I have drawn the inference from their *conduct* that they were antiunion. In this regard, therefore, the General Counsel's citation of *Forbidden City Restaurant*, 265 NLRB 409 (1982), is rendered distinguishable. There, supervisors' unsupported statements regarding the sympathies of unnamed employees comprising one-half the unit were held insufficient to support the employer's burden. The rule is that "at least 50 percent of the unit employees [must] have voluntarily expressed antiunion sentiments [in order to] raise a reasonable doubt regarding the Union's continuing majority status." *Forbidden City Restaurant*, above at 411. There is language in *Stormor, Inc.*, supra, 268 NLRB at 867, cited by Respondent, which, at first blush, is inconsistent with the 50-percent rule. *Stormor, Inc.*, is distinguishable on its facts, the most significant of which are that in *Stormor, Inc.*, unlike the instant case, the number of replacements together with returned strikers far exceeded the number of striking employees; and the *Stormor* unit exceeded 100 employees. See below.

Here, Respondent's precipitate withdrawal of recognition occurred at a time when it still had insufficient evidentiary ammunition to support an assault on the Union's presumptive status. Thus, Respondent's citation of *Stormor, Inc.*, 268 NLRB 860, does not support a contrary position. There, repudiation of the Union by merely 20 percent of the nonstriking employees was coupled with testimony that other groups of permanent replacements and nonstrikers repudiated the Union. This testimony rebutted both the *Pennco* ratio presumption and the presumption of majority status. Here, the ratio presumption has been effectively rebutted. The record shows that, at most, 5 of the 12 unit employees were antiunion. Thus, Respondent has failed to support the second wing of its rebutting burden—loss of actual majority.

The remaining question is Respondent's good-faith doubt. Here, unlike *Stormor, Inc.*, supra, the unit is not 155 but merely 12 employees. Here, Respondent had precise knowledge of the replacements' union attitudes in this small unit. Here, unlike *Stormor, Inc.*, there is no 3-1/2-month period of violence against which to measure the sympathies of otherwise silent striker replacements. Most important, here, unlike *Stormor*, replacements and nonstrikers did *not* exceed the number of strikers. Rather, here, Respondent had good, objective reason to believe that its five replacements appeared to be antiunion; that the six strikers were emphatically prounion; and that it knew nothing of Rasmussen's position. The record shows nothing of any Rasmussen confrontation with pickets, picket line taunts, or any other circumstantial evidence from which it could infer *her* attitude. If Respondent argues (Br. at 31) that the Board should adopt the presumption that striker replacements should be ipso facto presumed to *not* support the Union, *National Car Rental Systems v. NLRB*, 549 F.2d 1203 (8th Cir. 1979), *Soule Glass Co. v. NLRB*, 652 F.2d 1055 (1st Cir. 1981), such argument must be addressed to the Board. Such argument, I have noted, is academic here, since the ratio presumption has been rebutted. Here, the pivotal question is whether Respondent, in a small unit, can prove good-faith doubt when it has actual knowledge of the sympathies of only a minority and is not aware, by hearsay or otherwise, of the sympathies of a majority. Because of the Board's and courts' declarations concerning the policy underpinnings of the strength of the presumption of majority status, I hold that it may not.

I am, therefore, further constrained to conclude (a) that Respondent failed to rebut this presumption of the Union's majority status: that the presumption of continuing majority remains intact; that on 9 January 1985, Respondent withdrew recognition of the Union as the certified statutory representative in the above-appropriate unit at a time when it did not have any objective evidence forming a reasonable basis of a good-faith doubt of the Union's majority status; (b) that on January 1985, by withdrawing recognition of, and refusing to bargain with, the Union, Respondent violated Section 8(a)(5) and (1) of the Act; and (c) that the economic strike of 2 January 1985, by this very act, was converted into an unfair labor practice strike on 9 January 1985 because the unlawful withdrawal of recognition had the effect, as alleged, of prolonging the strike, which remains in effect as of the hearing. *Bay Area-Los Angeles Express*, 275 NLRB 1063 (1985); *Sanderson Farms*, 271 NLRB 1481 (1984).[14]

CONCLUSIONS OF LAW

1. Tube Craft, Inc., Respondent, is an employer within the meaning of Section 2(2), (6), and (7) of the Act.

2. United Steelworkers of America, District 28, and Local 8703, United Steelworkers of America are now, and each of them has been, at all material times, a labor organization or labor organizations within the meaning of Section 2(5) of the Act.

3. The following unit of Respondent's employees constitutes a unit appropriate for collective bargaining within the meaning of Section 9(b) of the Act:

> All clerical employees excluding confidential employees and professional employees, guards and supervisors as defined in the Act and all other employees of Respondent employed at its Cleveland, Ohio plant.

4. Respondent has failed to prove that at any material time on and after 9 January 1985, the Union, by virtue of Section 9(a) of the Act, is not the exclusive representative in that unit for the purposes of collective bargaining

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[14] As the Board observed in *Sanderson Farms*, above at 1481, what had previously been a mere economic strike to

> force the Respondent to agree to economic terms was of necessity converted to a strike to force the Respondent to grant to the Union the recognition to which it was entitled. None of the issues facing the parties could be resolved in any way absent the Respondent's recognition to the Union. Therefore, we conclude that the strike became unfair labor practice strike on 9 August when the Respondent withdrew recognition and informed the Union that it was unilaterally changing wages. We shall, accordingly, order the Respondent to reinstate unfair labor practice strikers on their unconditional offer to return to work.

with respect to rates of pay, wages, hours of employment, and other terms and conditions of employment; or that the basis of clear, cogent, and convincing evidence, entertained a good-faith doubt of the Union's representative status.

5. Respondent, by withdrawing recognition and thereafter refusing to bargain with the Union in the above-appropriate unit, on 9 January 1985 violated Section 8(a)(5) and (1) of the Act.

6. By engaging in the unfair labor practices described above in paragraph 5, Respondent prolonged the economic strike in which the Union engaged, commencing 2 January 1985, and converted the strike, commencing 9 January 1985, into an unfair labor practice strike.

7. The unfair labor practices are unfair labor practices affecting commerce within the meaning of Section 2(6) and (7) of the Act.

THE REMEDY

Having found that Respondent has committed violations of Section 8(a)(5) and (1) of the Act, I shall recommend that it be required to cease and desist therefrom and to take certain affirmative action designed to effectuate the purposes and policies of the Act, including that Respondent, on the Union's request, recognize and bargain with the Union in good faith regarding the appropriate above-described unit, and to post the appropriate notice. Having found that the 2 January economic strike was converted on 9 January 1985 into an unfair practice strike, I shall recommend to place the unfair labor practice strikers in a position protected by the Act should they make an unconditional offer to return to work. Such a protected position must be consistent with my conclusions, above, that by 9 January, all six strikers, then engaged in a mere economic strike, had been permanently replaced. *Industrial Workers Local 289 v. NLRB*, 476 F.2d 868 fn. 23 (1973). Nevertheless, any such striker, for whom there is no immediate employment because the replacement is in situ shall be placed on a preferential hiring list. See *Whisper Soft Mills*, 267 NLRB 813, 819 (1983), enfd. 577 F.2d 805 (1978). On departure of the permanent replacements, the strikers, if there be vacancies, shall be hired before others. *NLRB v. Crimptex, Inc.*, supra, 517 F.2d at 503-504; *NLRB v. Fleetwood Trailer Co.*, above. Backpay shall be computed in the manner as set forth in *F. W. Woolworth Co.*, 90 NLRB 289 (1950), with interest to be computed in the manner prescribed in *Florida Steel Corp.*, 231 NLRB 651 (1977). See generally *Isis Plumbing Co.*, 138 NLRB 716 (1962).

[Recommended Order omitted from publication.]

Schwartz Manufacturing Company ***and*** **United Electrical, Radio and Machine Workers of America (UE).** Cases 18–CA–9323 and 18–CA–9452

July 15, 1988

DECISION AND ORDER

BY CHAIRMAN STEPHENS AND MEMBERS BABSON AND CRACRAFT

On June 27, 1986, Administrative Law Judge Michael O. Miller issued the attached decision. The Respondent filed exceptions and a supporting brief. The General Counsel and the Charging Party each filed cross-exceptions and a supporting brief. The Respondent filed an answering brief to the cross-exceptions.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision[1] and the record in light of the exceptions, cross-exceptions, and briefs and has decided to affirm the judge's rulings, findings,[2] and conclusions only to the extent consistent with this Decision and Order.

The judge found that the Respondent violated Section 8(a)(1) of the Act by coercively interrogating employees concerning union activity, by threatening employees with discharge because of union activity, by prohibiting laid-off employees from engaging in union activity in nonwork areas, and by distributing procompany insignia in coercive circumstances, but did not violate Section 8(a)(3) and (1) of the Act by the actions it took with respect to a layoff of one-third of its work force. For the reasons set forth below, we disagree with several of the judge's findings.

1. The Respondent, Schwartz Manufacturing Company, was primarily engaged in the manufacture, assembly, and nonretail sale and distribution of front-end loaders attachable to tractors. Ninety percent of the Respondent's sales were to Ford Motor Corporation. Ford communicated its orders to Schwartz through monthly Ford reports and periodic releases. In addition, the Respondent's president, Harold Magowan, testified that contact was made with Ford at least once a week. The Ford report received late in each month specified for the current and following 3 months the firm number of loaders and other products Ford had committed to purchase and predicted possible orders for 4 additional months. The Respondent generally based its manpower needs on the 4-month "firm period" Ford was committed to pay for, after which the Respondent regarded the Ford reports as speculative. Ford directed Schwartz to ship loaders by means of releases. Although actual release orders in a given month might vary from commitments in the monthly reports, by year's end Ford generally sought to "net in" undershipments or to "net out" overshipments.

In late May 1985[3] Magowan informed employees of a vacation plant shutdown scheduled for early July and indicated the possibility of additional summer shutdowns. About the same time Plant Manager Robert Benage told employees that business looked good throughout the summer and fall. Benage stated he did not foresee any layoffs but would attempt to give employees 2 weeks' notice of any layoff.[4] Although there was no union organizational activity at the time, Benage also said that "there wouldn't be any union at Schwartz, that it wasn't going to be allowed."

Employees began to discuss unionization during mid-June after management indicated that it did not intend to increase wages. On June 20 and 25, Assembly Foreman Denny Campbell interrogated two assemblers concerning union activity, particularly that of day-shift union activist Don Rol. Also on June 25 another assembler overheard Campbell tell an employee that if Don Rol were in his department he would fire him. Campbell's explanation associated Rol's union activity with the statement overheard. We affirm the judge's finding that Campbell's interrogations and threat violated Section 8(a)(1) of the Act.

Sometime during the third week in June the Respondent received the monthly Ford report. By June the Respondent had substantially overshipped loaders to Ford. In addition, its monthly average of loaders from January through June had been approximately 500 loaders whereas Ford's June

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[1] On September 16, 1986, the Charging Party filed a motion to partially withdraw charge and to withdraw petition in Case 18–RC–13822. By Order dated September 29, 1986, the Board granted the General Counsel's September 18, 1986 contingent motion in support of the Charging Party's motion, thereby dismissing the 8(a)(5) allegations of the complaint and severing Case 18–RC–13822 from this proceeding. Accordingly, this Decision and Order involves no consideration of those portions of the judge's decision relating to the withdrawn proceedings.

[2] The Respondent, the General Counsel, and the Charging Party have excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

[3] All dates are in 1985 unless otherwise indicated.

[4] The Respondent had instituted a series of cumulative layoffs during the summer and early fall months of 1984. On July 28, 1984, 18 employees were laid off for between 1 and 3 months. On August 31, 1984, 11 different employees and 1 employee recalled from the July layoff were laid off for between 6 weeks and 4 months. On September 20, 1984, 18 different employees were laid off for between 1 and 6 months. On September 28, 1984, four additional employees were laid off for between 2 weeks and 5 months.

289 NLRB No. 7

report reflected a drop to about 350 loaders for August.

On Thursday, July 18, Benage announced to employees that there would be a 1-week shutdown in early August because of a reduction in Ford's commitments for August. He also said that Ford business for the final quarter of the calendar year appeared to be picking up. He then expressed awareness of union activity and told the employees that the Company did not want or need a union.

On Friday, July 19, the Respondent's production control manager told Magowan that the Respondent had received few Ford releases for July. Thereafter, the Respondent's sales liaison confirmed that Ford would not send any more July releases and was in the process of "netting out" overshipments but would allow early shipments for August commitments.

On Saturday, July 20, 40 or more employees attended a union meeting. Volunteers were solicited to serve on the Schwartz Workers Organizing Committee (SWOC). On Monday, July 22, the day-shift members of the organizing committee decided to wear buttons and distribute leaflets on Wednesday, July 24.

A few day-shift employees wore organizing buttons to work for the first time on Tuesday, July 23. Early that morning Benage gave employees assurances in the face of a rumor concerning an additional shutdown in September. He stated "that the fall looked very good, that, you know we'd be building up for their fall requirements." At a regular management production meeting later that same day Benage noted Ford's reduced commitments for August. Foremen were directed to select a skeleton crew for the scheduled 1-week August shutdown. Magowan cautioned that "netting out" could require additional shutdowns.

After Tuesday's production meeting Magowan received the July Ford report, which he described as "status quo."[5] After reviewing the July report Magowan called Ford's representative, Grant Ventzke, who confirmed that Ford would commence "netting out" overshipments. According to Magowan's credited testimony, Ventzke stated that a survey of Ford's distribution points and dealers indicated that the "bubble has burst," business was flat, warehouses were full, and the Respondent's shipments would have to be aligned with the requirements of the Ford plan over the next several months.

On Wednesday, July 24, the Schwartz Workers Organizing Committee (SWOC) went public as planned. Several additional day-shift employees wore SWOC buttons to work and posted and distributed a lengthy flyer detailing organizational rights.

Magowan testified that "during the day of the 24th it became apparent to me, after reviewing the shippers and so on that probably a layoff was going to be inevitable. And it was probably during the morning of the 24th, early." That morning Magowan told Benage that "we ought to be looking at the framework of a layoff" and assessing its impact on the Respondent's overall operation. On Wednesday afternoon Benage met with Foremen Stettnichs and Campbell to select specific employees for layoff. Based on Ford's "netting out" and the July Ford report, Benage calculated a 350-loader-per-month production average for August through October. Benage testified that he followed a procedure and formula employed for the previous year's layoffs to determine requisite manpower reductions. On Thursday, July 25, final details of the layoff were approved.

At Thursday's planned lunchtime organizing meeting, employees Rol and Gross contradicted Benage's July 18 statements concerning a competitor's lower wage scales. Foreman Stettnichs was present.[6]

At the end of Thursday's day shift Benage called employees to a meeting that he acknowledged to be "about the Union." He told employees the Respondent did not want or need a union. He suggested that any problems could be worked out on a one-to-one basis between the employees and management. He noted the possibility of strikes, the risks of fines or permanent replacement, and the concession bargaining occurring at a unionized facility in the area.

Benage then announced his decision to change from the planned shutdown to a layoff because, he stated, some employees had complained about financial difficulties that the general 1-week shutdown would cause. He also referred to the July report and Ford's intention to "net out," asserted that absent a layoff there would be additional fall shutdowns, and noted that this layoff like prior ones would be by seniority, department, and shift, with recall when work picked up.

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[5] In fact, the July Ford report increased purchase commitments over those of the June report. Compared with the 4-month "firm" period figures in the June report, the July report showed: for July, small loader purchase commitments remaining constant at 480, and large loader commitments increasing by 30 (from 45 to 75); for August, commitment for small loaders increasing by 30 (from 260 to 290) and large loaders unchanged at 80; and, for September, commitments for both small and large loaders unchanged (at 265 and 80, respectively). The July report also showed the number of loaders overshipped decreasing by 10 (259 in June, 249 in July). (The judge's decision indicates that the number of loaders overshipped was 281 in June and 259 in July, but an independent reading of the record shows the figures to be 259 and 249, respectively.)

[6] We find it unnecessary to decide whether Foreman Campbell unlawfully threatened employee Marlis Anderson on July 25. In light of our agreement with the judge that Campbell unlawfully threatened to discharge employee Don Rol, we conclude that the finding of any additional violation based on Campbell's conversation with Anderson would be cumulative and would not materially affect our remedial Order.

Thursday night and Friday morning SWOC conducted protest rallies. Employees voted overwhelmingly in favor of plantwide shutdowns instead of selected layoffs. Petitions and vote results were presented to and rejected by Benage. On late Friday, July 26, the Respondent posted a list of the laid-off employees by department and shift. Nine employees were laid off contrary to their seniority in their departments.[7] The layoff notice stated: "Due to the economy (or lack of orders), there will be a layoff until orders pick up . . . ."

After the posting a large group of employees marched through office hallways protesting the layoff. Union organizer Robert Kingsley entered Benage's office and angrily told Benage that the layoff decision was discriminatory, and unfair labor practice charges would be filed. Meanwhile, employees chanted union support and demanded recognition of their vote.

On Saturday, July 27, Magowan drafted a letter that was sent out to all laid-off employees on Monday under Benage's signature. The letter stated that due to the lack of foreseeable improvement in market conditions, the employees' layoff would be classified as permanent. About the same time, laid-off employees received personnel "change" notices that they had been "Discharged/Terminated . . . due to economic conditions." The Respondent had no practice of laying off employees permanently. Also, Benage acknowledged the employees' retention of recall rights.

On July 29 night-shift employees Lee Wigton, Greg DeVaney, and Steve Johanssen reported to work wearing their SWOC buttons. Benage greeted them at the door and asked DeVaney and Johanssen whether they had been laid off. When they replied that they had not, Benage asked for their names and departments. Foremen Stettnichs and Campbell, grinning, confronted Wigton, asking him, "What are you doing here, Lee? You're laid off." The foremen's grins turned to frowns when Wigton told them he was not on the layoff list, and they proceeded to check the list.

On August 8, eight of the laid-off employees were recalled with full backpay and eight other employees with less overall plant seniority were permanently laid off and issued similar termination notices. Management explained that "the recent layoffs were not accomplished in the fairest possible manner consistent with both seniority and necessary operating considerations" and that its substitution was an attempt to minimize the possibility of litigation.

The Ford report for August shows "netting out" of 119 small loaders and an increase of 17 commitments for large loaders. The September Ford report reflects that 32 more small loaders were "netted out," and large loader commitments increased by 2. At this point, the Respondent was overshipped by approximately 58 small and 59 large loaders for a total of 117 overshipments. The October Ford report shows the Respondent was undershipped by 69 small loaders but remained overshipped by 37 large loaders. Magowan testified that in late October the Respondent asked Ford to allow late shipments because the Respondent was unsure it could completely satisfy Ford's November commitments. The November Ford report reflected an increase in small loader undershipments from 69 to 211 and a reduction in large loader overshipments from 37 to 12. The record indicates that by December the Respondent was undershipped by a total of approximately 300 loaders.

The representation election was conducted on October 29. The Respondent received a substantial number of releases from Ford during the second week of November. Magowan testified that the Respondent had insufficient inventory to meet the increased demand. Effective November 18, the Respondent recalled the laid-off employees. When orders again increased during the second week of December the Respondent hired an additional 25 employees.

The record indicates that, during the period of layoffs in 1984, when the 4-month average of Ford firm commitments decreased, the Respondent's complement of employees also decreased. When commitments increased again so did the Respondent's complement of employees. The record indicates that from April 1985 through January 1986 there was a steady rise in average 4-month commitments by Ford for total loaders. During the 1985 layoff period, even when the 4-month average Ford firm commitments were rising the employee complement did not change. It remained at a depressed level until 3 months later when employees were recalled in November after the representation election. During this 3-month layoff period a total of 102 loaders were "netted out" in August, a total of 30 loaders were "netted out" in September, and a total of 149 loaders were "netted out" in October. By October, the Respondent had more than "netted out" the 249 overshipments present in July.

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[7] The employees selected out of seniority were Ed Gross, Don Rol, Dale Clyde, Ed Blair, Dennis Reifers, Charles Bauerle, Jan Johnson, John DenBoer, and Craig Latterell. All except Johnson and Latterell were members of the organizing committee from the day shift. Gross, Rol, and Blair attended the Union's initial organizing meeting on June 20. Gross, Rol, Blair, Clyde, and Reifers wore organizing buttons on July 24.

The Respondent did not recall employees until November 18 when it was undershipped by a total of approximately 200 loaders.

Applying *Wright Line*,[8] the judge found that the General Counsel established a prima facie case demonstrating that retaliatory union animus contributed to the layoff decision. The judge then analyzed the sufficiency of the Respondent's business justifications for its actions and found that the Respondent had demonstrated that it would have laid off employees and notified them that their layoff was permanent even in the absence of union activity. We disagree with the judge's analysis. We find that the reasons advanced by the Respondent for its actions were pretextual.

We agree that the General Counsel made a prima facie showing that the Respondent aborted its plant shutdown plans and decided to lay off one-third of its work force in order to discourage recently manifested employee support for union representation. It is uncontroverted that the Respondent was aware of and opposed to unionization. Even prior to the organizing campaign, Benage told employees that the Respondent would not allow a union. The Respondent's subsequent unfair labor practices demonstrated both adamant opposition to the Union's campaign and a willingness to defeat it through unlawful means.

The timing and abruptness of the layoff decision further support an inference of illegal motivation. The layoff announcement occurred the day after SWOC went public with buttons and campaign literature and within a few hours of a union meeting discrediting management. It occurred suddenly and without notice, despite a prior pledge by Benage to attempt to give 2 weeks' notice to employees. It represented a marked departure from management's earlier announced plans to meet its economic and overproduction problems with a 1-week shutdown. Furthermore, the Respondent acknowledged making the layoff announcement only after detailed explication of its antiunion sentiment in a meeting called "about the Union." The import of the message was clear: the layoff was in retaliation for union activity.

The Respondent primarily relies on the July Ford report and confirmation of Ford's plans to "net out" overshipments as business justification for the layoff. We reject this defense. The Respondent has failed to show that it received and relied on any adverse business information or unfavorable change in economic position not already known or suspected at the time it planned for its scheduled 1-week shutdown in August. It has also failed to prove that it was waiting for further confirmation of adverse information before deciding to switch from a shutdown to a layoff. Thus, on July 18 the Respondent announced and gave 2 weeks' advance notice of the August shutdown and explained that the shutdown was necessary because of the reduction of orders in Ford's June program. On July 19 Magowan was apprised that Ford sent few July releases. Thereafter, his subordinates confirmed that Ford would "net out" overshipments. Nevertheless, at the production meeting on Tuesday, July 23, management continued to plan for an August shutdown. There is no evidence that management discussed the alternative of a layoff. Moreover, early Tuesday morning the Respondent's plant manager told employees that rumors of a September shutdown were unfounded, noting that the fall "looked very good."

Suddenly plans changed. What happened between Tuesday morning and Thursday afternoon to justify the abrupt change in plans from a scheduled temporary shutdown to an unexpected layoff? Apart from intensified union activity, the only intervening events were receipt of the July Ford report and a phone call made on the Respondent's initiative confirming that Ford would "net out" overshipments. Neither the phone call nor the July Ford report imparted any new or unanticipated economic information. They merely reaffirmed business information considered and presumably taken into account previously at the Tuesday morning production meeting discussion of shutdown plans. In particular, the July report was strikingly similar to the June report throughout the "firm period" and, in fact, reflected an increase in purchase commitments.

The pretextual nature of the Respondent's economic defense is further underscored by the Respondent's inconsistency in explaining its layoff decision. Employees credibly testified that Benage attributed the layoff decision to expressions of employee concern about the financial hardships of a shutdown. Although Benage referred to expressions of concern by three named employees, his testimony fails to disclose that he told them he would consider a layoff instead of a shutdown. In addition, his purported sensitivity to these employees' complaints contrasts sharply with his apparent indifference to employees' overwhelming post-layoff expression of a preference for a shutdown vis-a-vis a layoff, to say nothing of his and his foremen's expressions of surprise and consternation after they discovered that open union supporters had survived the layoff.

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[8] 251 NLRB 1083 (1980), enfd. 622 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982), approved in *NLRB v. Transportation Management Corp.*, 462 U.S. 393 (1983).

Finally, the Respondent failed to act consistently with its stated policy that this layoff, like prior ones, would be effectuated by seniority, department, and shift. Its original layoff selection included several open and active day-shift members of the organizing committee instead of certain night-shift employees with less seniority. Although perhaps not sufficient to establish an absolute rule for the Respondent's layoffs, there is ample evidence that, in past layoffs, less senior night-shift employees had been laid off first.

The Respondent explains its sudden change of plans as a legitimate response to deteriorating economic conditions, allegedly consistent with the Respondent's own past practice. We dispute neither the existence of economic problems nor the notion that the Respondent could have responded to those problems by laying off a substantial number of employees, as it had done only a year earlier. In spite of so recent and substantial a past practice and the alleged cost advantages of layoffs vis-a-vis shutdowns, however, there is no evidence whatsoever that the Respondent considered layoff even as a contingent alternative to the planned shutdown until 2 days before implementing a layoff. Furthermore, the Respondent belied reliance on any past practice of economically motivated layoffs by deviating from the 1984 layoff pattern in three significant ways: (1) it included in the initial layoff nine day-shift employees whose seniority would have entitled them to retain their jobs; (2) it took the unprecedented step of converting all affected employees to permanent layoff status; and (3) even after completion of the "netting out" process, it waited until it was in a substantially undershipped position before recalling all laid-off employees at once on November 18, after the representation election.

Based on the foregoing, we conclude that the General Counsel established a prima facie case of antiunion discrimination and that the Respondent failed to demonstrate that its sudden change from a scheduled 1-week shutdown to a layoff of one-third of its work force would have taken place even absent the Union's organizing campaign. Accordingly, we find that the July 26 layoff violated Section 8(a)(3) and (1) of the Act.[9] In addition, since the Respondent's August 8 substitution layoff was merely a continuation of the initial layoff and was effectuated for the same unlawful discriminatory reasons (although redressing the burden initially placed on day-shift employees), we likewise find that such substitution violated Section 8(a)(3) and (1) of the Act.

We also find contrary to the judge that the Respondent unlawfully converted the temporary layoff to permanent layoff or discharge. The difference between permanent layoff and discharge does not matter here. In either instance it is clear that the July 29 permanent layoff letter and July 30 and August 8 personnel notices represented an adverse change in laid-off employees' employment status. Our finding of unlawful discrimination is based on all evidence of discriminatory motivation underlying the original layoff decision as set forth above. In addition, we rely on the timing of the personnel notices that were prepared and issued shortly after the July 26 employee protests and rallies. Furthermore, although the Respondent had previously used layoffs to compensate for seasonal slack periods, it had no practice of laying off employees permanently. In sum, we conclude that the Respondent's change of the temporary layoff to permanent layoff or discharge violated Section 8(a)(3) and (1) of the Act.

2. On August 1 Benage excluded laid-off employees Rol and Hallem from the lunchroom during the night-shift's break. Neither employee was engaged in a conversation or union activity at the time of their exclusion. Also, early one October morning prior to commencement of the day shift, Benage ordered laid-off employees Krueger and Miller to leave the employee lunchroom. Krueger and Miller had just completed distribution of union leaflets and were talking to fellow employees. The judge found that the first exclusion was lawful, but the second violated Section 8(a)(1).

We find that both incidents of exclusion violated Section 8(a)(1). There was no rule limiting laid-off employees' access prior to the Union's campaign. The Respondent then selectively denied access to known union activists on the advent of the Union's campaign in order to discourage employees' organizing activities. There is extensive evidence that both before and after these exclusions the Respondent tolerated other forms of nonunion access by individuals not scheduled to work. Both before and after the layoff, laid-off and former employees, friends, and relatives were allowed access to both work and nonwork areas.[10]

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[9] Apart from the planned shutdown for the first week of August, the Respondent failed to make any kind of record establishing if, when, or to what extent employees would have been laid off or the plant would have been shut down after July 26 for nondiscriminatory reasons. We find Benage's bald assertions to employees when announcing the layoff, that absent a layoff additional plant shutdowns would be necessary, to be insufficient to meet the Respondent's burden. We leave for compliance proceedings, the exact determination of amounts of backpay owing. The determination of backpay owed by the Respondent shall take into account any reduction in backpay due to the scheduled 1-week August shutdown.

[10] Assembler Ron Jensen testified, "I never really heard of a policy. It used to be an open door thing. If somebody wanted to come and see

Continued

In these circumstances, we conclude that the Respondent's unprecedented and disparate denial of access to leading union adherents during the height of the Union's organizing campaign and in a context tainted by other unlawful conduct was coercive of union activities. Accordingly, we find that the Respondent's denial of access violated Section 8(a)(1) of the Act.

3. At the conclusion of an October 17 lunchroom meeting at which management urged employees not to vote for the Union, hats with company logo and "Vote No" buttons were brought into the lunchroom and distributed by a nonsupervisory employee. During the meeting management had encouraged the employees to take and wear the hats. Representatives of management were not present during the distribution process but were in the area outside the lunchroom when one of the first employees to leave exited.

The judge found that the Respondent's October 17 distribution of procompany insignia constituted 8(a)(1) coercion. We disagree. Unlike the cases relied on by the judge,[11] the evidence here fails to reveal either any direct involvement by supervisors in the distribution process or any evidence that the supervisors engaged in open surveillance of employees leaving the lunchroom.[12] Under these circumstances, we conclude that the central availability of procompany insignia, in the absence of supervisory involvement in the distribution process or other evidence that management pressured employees into making an observable choice or open acknowledgment concerning their campaign position, did not reasonably tend to interfere with employee rights under the Act. See *Farah Mfg. Co.*, 204 NLRB 173 (1973); *McDonald's*, 214 NLRB 879 (1974); and *Black Dot, Inc.*, 239 NLRB 929 (1978).[13]

AMENDED REMEDY

Inasmuch as all the employees found to have been discriminatorily laid off were subsequently reinstated no further reinstatement order is warranted. Inasmuch as discriminatees Charles Bauerle, Ed Blair, Dale Clyde, John DenBoer, Ed Gross, Jan Johnson, Craig Latterell, Dennis Reifers, and Don Rol were reinstated with full backpay, no further backpay order concerning them is warranted. Inasmuch as discriminatees Hiram Anderson, Steve Blair, Terry Bohnenkamp, Romeo Eagle Horse, Randolph Ekanger, Sharon Hallem, Robert Hoffman, Wesley Jaqua, Larry Krueger, Alan Lawrence, Dennis Lupkes, Mike McKee, John Miller, Arnold Peterson, Mike Sweir, Charles Temple, Richard VanMeveren, William Blair, Sheldon Bohms, Greg DeVaney, Mark Freese, Steve Johannsen, Doyle Schubert, Kevin Tjepkes, and Lee Wigton were reinstated but received no backpay for the period during which they were unlawfully laid off, we shall order the Respondent to make them whole for any loss of earnings or other benefits suffered as a result of the discrimination against them. The loss of earnings and benefits incurred by these employees as a result of the unlawfully motivated layoffs shall be determined as prescribed in *F. W. Woolworth Co.*, 90 NLRB 289 (1950), with interest as prescribed in *New Horizons for the Retarded*.[14]

ORDER

The National Labor Relations Board orders that the Respondent, Schwartz Manufacturing Company, Sioux Falls, South Dakota, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Interrogating its employees in a coercive manner concerning their union membership, activi-

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somebody, they'd just come and see them. Until this union activity came, then they started kicking them out." Jensen testified that prior to this change in policy management allowed his father-in-law to visit on the shop floor.

Assembler Marty Anderson testified that a couple of weeks before the hearing two retirees visited with employees and management in the assembly area. Anderson also testified that during a short 1985 layoff laid-off employee Terry Ingalls, accompanied by her nephew, was observed talking with another employee near the paint booth.

Craig Latterell testified that in the fall of 1985 an employee's father visited the lunchroom during break, Sharon Hallem visited there while laid off in 1984, and an assembler's girlfriend was seen there several times. Latterell observed Benage's October eviction of coworkers Miller and Krueger. Benage hollered, "Get out." This surprised Latterell who had "never seen [Benage] kick anybody out."

Finally, former employee Diana Enyeart testified that she frequently visited the shop and spoke with management after her 1984 layoff.

By contrast, Plant Manager Benage simply stated that he had asked a laid-off employee to leave plant premises prior to the August 1 exclusion

[11] *R. L. White Co.*, 262 NLRB 575 (1982); *Tappan Co.*, 254 NLRB 656 (1981); and *Pillowtex Corp.*, 234 NLRB 560 (1978).

[12] The only evidence concerning the presence of management representatives outside the lunchroom when the employees left was the testimony of employee Fritz. Fritz testified that he was one of the first employees out the door at the end of the meeting and, when he left, he saw Management Representatives Miller, Benage, and Magowan outside the door. There is no evidence concerning what these individuals were doing or how far from the door they were when Fritz saw them. Based on this limited evidence, we find that it has been shown only that management representatives were somewhere outside the door when the first employee left the meeting and that it has not been shown how far from the door the management representatives were or whether they observed the employees, were engaged in conversation among themselves, or were involved in some other activity.

[13] We disavow the judge's suggestion that *McDonald's* has been implicitly overruled.

[14] In accordance with our decision in *New Horizons for the Retarded*, 283 NLRB 1173 (1987), interest on and after January 1, 1987, shall be computed at the "short-term Federal rate" for the underpayment of taxes as set out in the 1986 amendment to 26 U.S.C. § 6621. Interest on amounts accrued prior to January 1, 1987 (the effective date of the 1986 amendment to 26 U.S.C. § 6621), shall be computed in accordance with *Florida Steel Corp.*, 231 NLRB 651 (1977).

ties, and desires or the union membership, activities, and desires of their fellow employees.

(b) Threatening its employees with discharge because of their union membership, activities, or desires.

(c) Disparately denying access to nonwork areas of the plant to off-duty employees who are engaging or have engaged in union activities.

(d) Laying off or discharging its employees for engaging in union or other protected concerted activity.

(e) Discriminatorily selecting employees for layoff on the basis of their union membership, activities, or desires.

(f) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Make whole with interest discriminatees Hiram Anderson, Steve Blair, Terry Bohnenkamp, Romeo Eagle Horse, Randolph Ekanger, Sharon Hallem, Robert Hoffman, Wesley Jaqua, Larry Krueger, Alan Lawrence, Dennis Lupkes, Mike McKee, John Miller, Arnold Peterson, Mike Sweir, Charles Temple, Richard VanMeveren, William Blair, Sheldon Bohms, Greg DeVaney, Mark Freese, Steve Johannsen, Doyle Schubert, Kevin Tjepkes, and Lee Wigton for any loss of earnings and other benefits suffered as a result of the discrimination against them in the manner set forth in the amended remedy section of this decision.

(b) Remove from its files any reference to the July 26 and August 8 layoffs and/or discharges of the discriminatees listed in the amended remedy section of this decision and notify each of them in writing that this has been done and that evidence of these layoffs and/or discharges will not be used against them in any way.

(c) Preserve and, on request, make available to the Board or its agents for examination and copying, all payroll records, social security payment records, timecards, personnel records and reports, and all other records necessary to analyze the amount of backpay due under the terms of this Order.

(d) Post at its Sioux Falls South Dakota plant copies of the attached notice marked "Appendix."[15] Copies of the notice, on forms provided by the Regional Director for Region 18, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material.

(e) Notify the Regional Director in writing within 20 days from the date of this Order what steps the Respondent has taken to comply.

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

Section 7 of the Act gives employees these rights.

To organize

To form, join, or assist any union

To bargain collectively through representatives of their own choice

To act together for other mutual aid or protection

To choose not to engage in any of these protected concerted activities.

WE WILL NOT interrogate you concerning your union membership, activities, or desires.

WE WILL NOT threaten you with discharge because of your union membership, activities, or desires.

WE WILL NOT discriminatorily prohibit laid-off or other off-duty employees from engaging in union activities in nonwork areas of your premises.

WE WILL NOT discharge you or place you on layoff for engaging in union or other protected concerted activity.

WE WILL NOT discriminatorily select you for layoff on the basis of your union membership, activities, or desires.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL make whole with interest discriminatees Hiram Anderson, Steve Blair, Terry Bohnenkamp, Romeo Eagle Horse, Randolph Ekanger, Sharon Hallem, Robert Hoffman, Wesley Jaqua, Larry Krueger, Alan Lawrence, Dennis Lupkes,

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[15] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

Mike McKee, John Miller, Arnold Peterson, Mike Sweir, Charles Temple, Richard VanMeveren, William Blair, Sheldon Bohms, Greg DeVaney, Mark Freese, Steve Johannsen, Doyle Schubert, Kevin Tjepkes, and Lee Wigton for any loss of earnings and other benefits suffered as a result of the discrimination against them.

WE WILL remove from our files any reference to the layoffs and/or discharges of the discriminatees and notify each of them in writing that we have done so and that evidence of these layoffs and/or discharges will not be used against them in any way.

SCHWARTZ MANUFACTURING COMPANY

Mary E. Leary, Esq., for the General Counsel.
R. Clay Bennett, Esq. and *Joanne Ochsman, Esq. (Matkov, Griffin, Parsons, Salzman & Madoff)*, of Chicago, Illinois, for the Respondent Employer.
Robert Z. Lewis, Esq. and *Robin Alexander, Esq.*, of New York, New York, and *Robert Kingsley*, of Sioux Falls, South Dakota, for the Charging Party Petitioner.

DECISION

STATEMENT OF THE CASE

MICHAEL O. MILLER, Administrative Law Judge. This case was heard on 12 days between 14 January and 25 February 1986, in Sioux Falls, South Dakota, based on unfair labor practice charges filed by United Electrical, Radio and Machine Workers of America (UE) (the Union) on 5 August and 13 November 1985[1] and a complaint and amended consolidated complaint issued by the Regional Director for Region 18 of the National Labor Relations Board (the Board) on 3 October and 20 December, respectively. The complaint alleges that Schwartz Manufacturing Company (Respondent or Schwartz) violated Section 8(a)(1), (3), and (5) of the National Labor Relations Act (the Act) by various statements and actions tending to interfere with, restrain, or coerce employees in the exercise of their statutory activities, and by refusing to recognize and bargain with the Union. Respondent's timely filed answers deny the commission of any unfair labor practices. Consolidated for hearing with the complaints, pursuant to a Supplemental Decision and Order issued by the Acting Regional Director on 26 December, are certain challenges and Union-filed objections in the election in Case 18-RC-13822.

All parties were afforded full opportunity to appear, to examine and to cross-examine witnesses, and to argue orally. Briefs, which have been carefully considered, were filed on behalf of the General Counsel, the Union, and the Respondent.

Based on the entire record,[2] including my observation of the witnesses and their demeanor, I make the following

FINDINGS OF FACT

I. RESPONDENT'S BUSINESS AND THE UNION'S LABOR ORGANIZATION STATUS—PRELIMINARY CONCLUSIONS OF LAW

Respondent is a Delaware corporation with an office and plant in Sioux Falls, South Dakota, where it is engaged in the manufacture, assembly, and nonretail sale and distribution of front-end loaders, mixer feeder boxes, and related equipment. Jurisdiction is not in dispute. The complaint alleges, Respondent admits, and I find and conclude that Respondent is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

The complaint alleges, Respondent admits, and I find and conclude that the Union is a labor organization within the meaning of Section 2(5) of the Act.

II. THE UNFAIR LABOR PRACTICE ALLEGATIONS

A. *Background*

Schwartz is wholly owned by Amerequip Corporation; the acquisition from Chromalloy became effective 22 December 1983. Production at Schwartz' Sioux Falls facility was, at the relevant time, limited almost completely to various models and sizes of front-end loaders that are made to be attached to tractors. Schwartz sells approximately 90 percent of its front-end loader production directly to Ford Motor Corporation, Ford Tractor Operations (Ford); the remainder are manufactured to be attached to various other makes of tractors or to be sold to dealers and distributors.

Although its Sioux Falls facility is the only one involved in these proceedings, Schwartz also maintains a facility in Lester Prairie, Minnesota, which manufactures parts for the front-end loaders as well as other farm and truck equipment. In addition to the two Schwartz manufacturing facilities, Amerequip owns two other companies: Arps Manufacturing in New Holstein, Wisconsin, and Brantly Manufacturing in Frederick, Oklahoma. Schwartz in Lester Prairie and Arps in New Holstein are both unionized facilities. There was no collective-bargaining representative at the Sioux Falls facility when the instant organizational activity began.

B. *The Facts—Chronologically*

About 10 June, following an indication that management had ruled out any wage increases in the near future for its Sioux Falls employees, some employees began to discuss the possibility of union organization. Together, Donald Rol and Robert Hoffman decided to contact the Union. Hoffman called Robert Kingsley, the Union's field organizer, and a meeting was scheduled for 20 June at the Union's headquarters.

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[1] All dates are 1985 unless otherwise specified.

[2] Respondent's unopposed motion to correct the record is granted and made a part of this record.

About 19 or 20 June, Rol approached Michael Sweir in the assembly department and asked Sweir to attend the meeting. Foreman Denny Campbell[3] observed this from across the shop and asked Sweir what Rol had been talking about. Campbell continued, "He was talking about a union, wasn't he?" Following Sweir's continued noncommittal responses, Campbell stated, "Anytime Don Rol goes in another department, he's talking about trouble."[4]

Approximately seven employees—Edwin Gross, Michael Sweir, Larry Cundy, Dave Swanson, Ed Blair, Sharon Hallem, and Don Rol—met with Kingsley on 20 June. They decided to canvass their departments to determine the extent of interest in organizing and to ask employees to come to the next meeting.

Before lunch about 25 June, assembler Marlis "Marty" Anderson was approached by Campbell. Campbell told her, "Unions are really bad . . . because they can cost you a lot of money in union dues . . . . If you have any problems you can't go to your foreman, you have to go through a union steward." He then asked her, "Has Don Rol talked to you?" Anderson asked why and about what and Campbell replied, "Well, Don Rol's nothing but a forty-year old radical that's running around causing a lot of trouble, talking about unions, and doesn't know what he's talking about."

After lunch, assembler Ed Gross overheard Campbell in conversation with shipping clerk Robert Deelstra. Campbell pointed out Don Rol, referred to him as "that fucker over there," and stated, "if he'd be in my department, he'd be a long ways down the road . . . I'd fire him . . . I'm glad it's Don Stettnichs' problem." Gross asked what Campbell meant and was told, "Rol over there, he's from one of them union people, trying to get the union in here . . . look at them people down there at Morrell's."[5]

A few days after his first conversation with Anderson, Campbell returned and told her, "Unions are no good, we don't need 'em in the shop."

A second meeting was held at the Union's office on 26 June, attended by all the employees who had attended the first meeting except for Swanson and Cundy. About 10 additional employees also attended, including Marlis Anderson. Night-shift welder Lee Wigton did not attend the meeting but, at the request of Rol and Hoffman, solicited the views of his fellow night-shift employees concerning the Union. Subsequent meetings were held on 1 July at Sharon Hallem's home and on 15 July at the home of Don Rol. At this latter meeting, plans were laid for a major rally to be held on Saturday, 20 July, at Sherman Park.

On the afternoon of 18 July, Plant Manager Robert Benage spoke to employees and their foremen. Benage told them that they could anticipate a 1-week shutdown in August, as they had had in July, because of low production requirements for that month. But, he added, they need not worry about October, November, and December as the Ford business appeared to be picking up. He then told the employees that he had heard rumors of union activity in the plant and stated that the Company did not want or need a union. He referred to the dues unionized employees would be expected to pay and told the employees that if the Company was organized, it could not be as competitive as Bushhog, which, with lower wage plants in Texas and Mexico, was seeking Ford's loader business. If Respondent lost its Ford business, Benage stated, it might just as well shut its doors. He then asked employees to report any threatening or harassing conduct by other employees and promised to take care of any such activities even if it meant discharging the guilty employees.

Late each month, Ford sends Schwartz its "Wholegoods Shipment Schedule," otherwise known as the Ford report. By that report, Ford obligates itself to purchase a given number of loaders over the next 4 months (although deliveries may be accelerated or postponed from one month to another) and predicts possible orders for 4 additional months. Ford authorizes Schwartz to ship the completed loaders, either to warehouses or directly to dealers and distributors, by means of releases. At some times during the year, Schwartz has shipped fewer loaders than Ford has scheduled to that date, a condition known as "undershipped." On other occasions, Schwartz' shipments (based on releases) may actually be ahead of Ford's commitments or "overshipped." By the end of each calendar year, Ford generally seeks to bring the schedule and the shipments into balance either by "Netting in," i.e., increasing their commitments, or by "netting out," i.e., reducing the number of releases.

On Friday, 19 July, Scott Jones, Respondent's production control manager, was advised that Ford would not be furnishing any more releases for July but would allow Respondent to begin shipping some of the loaders under its August commitments. He also learned that Ford intended to "net out" over the next several months. At that point in time, according to the most recently received Ford report, that of June, Respondent was overshipped to Ford by 229 small loaders and 52 large loaders. "Netting out" would mean the reduction in shipments to Ford (and ultimately a reduction in production by this many loadrs. In the period of January through June 1985, Respondent had shipped an average of approximately 200 large loaders and 360 small loaders to Ford each month.[6] In July, Respondent shipped approximately 459 small loaders and 84 large loaders to Ford. Pursuant to the June Ford report, Ford's commitment for August was only 260 small and 80 large loaders some of which had already been shipped in July; its September commitment was for 265 small and 80 large loaders. At least a portion of the "netting out" would apply against these reduced obligations.

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[3] Respondent has admitted that Campbell is a statutory supervisor.

[4] The complaint alleges the foregoing conversation as comprising unlawful interrogation occurring about 20 June. Sweir, however, placed this conversation as having occurred on 19 July. The context of his testimony, indicating that Rol's conversation was his first knowledge of union activity, and the fact that he attended the 20 June union meeting establish that Sweir misstated the month.

[5] Campbell denied making inquiries concerning union activity or suggesting that Rol was making trouble and claimed that he only asked Sweir, "If Don Rol is down there talking to you, how can you get your work done?" Noting the relatively relaxed atmosphere in the plant concerning conversations between employees, the similarity between this statement and others attributed to Campbell, and the demeanor of the witnesses, I credit Sweir.

Campbell admitted that he had a conversation with Anderson concerning his views on the Union wherein, after Anderson suggested that he talk to Don Rol, he asked, "Why would I want to talk to Don Rol? He's a forty-year old kid." He denied interrogating Anderson or threatening to discharge Rol. His denial of the conversation with Deelstra and Gross was corroborated by Deelstra. However, their denials were less convincing than the affirmative testimony of Gross and Anderson. In particular, I find Campbell's explanation of why he could not have had the conversation with Deelstra, a statement to the effect that if he had wanted to fire Rol, he had the authority to do so and would not therefore have had to suggest that Rol's supervisor should fire him, unconvincing. Campbell's possession of general supervisory authority over Rol in no way negates the possibility that he might have suggested that his discharge would be a good idea. Similarly, I find Deelstra's denial of the alleged conversation unconvincing; when he was asked on direct examination whether such a conversation had taken place, he answered, "Not really." Although the General Counsel, on cross-examination, elicited a broader denial, I conclude that his answer on direct is indicative of an effort to avoid directly answering the question. Finally, I note the similar conversation attributed to Campbell by employee Michael Sweir, supra.

Jones advised Harold "Skip" Magowan, Schwartz' president, of the business conditions. Magowan decided to await receipt of the July Ford report, due shortly, before taking any action.

On the afternoon of Saturday, 20 July, a union meeting attended by 40 or more employees was held at Sherman Park in Sioux Falls. Sharon Hallem, Ed Gross, Lee Wigton, Doyle Schubert, Steve Johannsen, Don Rol, Robert Hoffman, Ed Blair, Dan Kirkpatrick, and Merritt Montgomery addressed the group regarding why they supported the Union. Volunteers were solicited to serve on the Schwartz Workers Organizing Committee (SWOC); Gross, Hallem, Rol, Wigton, Hoffman, Ed Blair, Marlis Anderson, Dale Clyde, Wesley Jaqua, Dan Kirkpatrick, Steve Johannsen, Donald Juhnke, John DenBoer, Merritt Montgomery, Charles Bauerle, Teresa Ingalls, Dennis Reifers, Greg DeVaney, Harlan Kruse, John Miller, Kevin T. Jepkes, Mark Freese, Doyle Schubert, Steven Noonan, and Sheldon Bohms volunteered.

The day-shift members of the organizing committee met again on Monday, 22 July, to plan the week's activities. They decided that the organizing committee would go public on Wednesday, 24 July, by wearing SWOC buttons and by distributing a flyer setting forth the employees' legal rights with respect to organizational activities. It was further decided that a meeting would be held on Thursday, 25 July, in the lunchroom, to refute Benage's statements concerning Bushhog, Respondent's competitor.

At the start of the day shift on Tuesday, 23 July, Benage met with the employees to squelch a rumor concerning future plant shutdowns. He stressed, somewhat forcefully, that although there would be a 1-week shutdown in August as a result of the June Ford report, the fall season looked good and no shutdown was planned for September.

Respondent's management, including its foremen, regularly hold production meetings on Tuesday and Thursday mornings of each week. In the production meeting of Tuesday, 23 July, Benage noted the drop in Ford commitments, as reflected in the June Ford report, from approximately 500 loaders per month to about 350. Magowan cautioned that the Ford report in conjunction with advice from Ford that it would begin in "netting out" indicated the possibility of additional shutdowns through the summer. Benage instructed the foremen to select a skeleton crew to work during the August shutdown.

Among those present at the Tuesday production meeting was John Lindner, fabrication department leadman, and, at that time, acting foreman in place of Ron Hofer. Lindner was told to select three employees from his department for the skeleton crew and, later that afternoon or the following morning, Lindner reported to Benage that he had made his selections. Critical to their arguments with respect to the timing of the layoff decision are the General Counsel's and the Union's contentions that this production meeting took place on Thursday morning, 25 July, rather than Tuesday, 23 July. To support this contention they rely primarily on Lindner's testimony to that effect. Reliance is also placed on the testimony of Dennis Reifers, who recalled that his foreman, Campbell, asked him on Thursday afternoon to work during the August shutdown, and that of Ed Gross and Steve Johannsen, to whom Lindner subsequently (on 3 August) expressed his surprise at the timing of the layoff announcement.

Although I am convinced that John Lindner made every effort to testify honestly and accurately regarding all matters about which he was interrogated, I am equally convinced that his testimony concerning the date of this meeting was in error. In reaching this conclusion, I note that Lindner placed this meeting in the last week in July in response to a leading question; he appeared not to independently recall the week in which it occurred. More importantly, he testified with reasonable certainty that Scott Jones, the production control manager, was at the meeting. Jones, however, attended the Tuesday meeting but did not attend any meeting on Thursday; he was in Minneapolis attending a computer training course on that day. His testimony is corroborated by the expense voucher of Keith Brunsting, Respondent's controller. That voucher indicates that Jones traveled to Minneapolis with Brunsting in the latter's private automobile. Attached to the voucher is a receipt indicating meals purchased for two people. I note further, in connection with this credibility resolution, that Don Rol testified that Stettnichs asked him to work on the skeleton crew for the August shutdown "several days before the announcement on Thursday, the 25th, that there would be a layoff." This is some further evidence that the foremen were directed to select the skeleton crew, and the employees for that crew were selected, before Thursday, 25 July.

On that Tuesday, but after the above-described production meeting, Magowan received the July Ford report, setting forth Ford's commitment for loaders for July through October. According to that report, Ford's commitment was for 480 small loaders and 75 large loaders in July (already shipped), 290 small loaders and 80 large loaders in August (a slight improvement over the June report), 265 small loaders and 80 large loaders in September, and 435 small loaders and 145 large loaders in October. The report also showed that Schwartz remained overshipped by 228 small and 31 large loaders as of July. After considering the July Ford report, Magowan called Ford's representative, Ventzke. Ventzke confirmed that Ford would commence "netting out." Ford's warehouses were full and business was flat, he told Magowan and, he said, shipments would be brought in line with the requirements of the Ford plan over the next several months. Magowan called Herbert Miller, Amerequip's vice president of operations and one of its owners, and suggested that a layoff, rather than a plantwide shutdown, might be indicated. Consideration of the layoff continued with discussions among Magowan, Benage, and Jones on Wednesday, 24 July.[7] On Wednesday, Benage, with Foremen Stettnichs and Campbell, worked out the details of the layoff. Benage determined how many people he needed to retain to meet production demands and, he testified, the names of those to be laid off were determined between approximately 10:30 a.m. and 1:30 p.m. On that same day, Magowan informed Miller of his determination that a layoff appeared to be inevitable. Miller directed Magowan to call him back on 25 July with the final details regarding the extent of the layoff. Magowan complied and, between noon and 2 p.m. on Thursday, 25 July, Miller approved the layoff plans.[8]

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[6] As shown by the accumulated plant shipment columns on the Ford reports.

Contemporaneous with management's deliberations concerning the layoff, at least some members of the Union's organizational committee appeared at work on Wednesday, 24 July, wearing their SWOC buttons. The committee also posted and distributed a lengthy flyer detailing employee organizational rights under the Act.

At least some of the employees felt that their display of union support did not go unnoticed by Respondent's supervisors. Craig Latterell believed that Stettnichs stared at him and other employees who were "pro-union" and Mike Sweir felt that his foreman, Campbell, was less friendly and less willing to engage in casual conversation once the emloyees began to wear SWOC buttons. Dennis Reifers heard Foreman Doug Koepp tell Stettnichs that he only counted five people wearing buttons. Ed Blair claimed that on 25 July, Foreman Stettnichs "jumped" Dale Clyde and him "for not getting enough work done and spending too much time talking on the paint line." On 25 July, the first day Marlis Anderson wore her button in the plant, Sweir observed Campbell take notice of the button and walk away. To Anderson, it appeared that he walked in the direction of the office. Later that day, according to Anderson, Campbell returned. He told her:

> You know, if Herb Miller ever thought that there was going to be a union brought into this shop, Herb Miller would say "fuck you, get out, we don't need it" or . . . possibly he might negotiate a 20-cent hour raise, or maybe give you a holiday or take a holiday or something else away from you. . . . If there were a union in the shop you might be able to be sent over to the paint line. Without a union in the shop you can be sent over to the paint line if you ran out of work in your own department, but if there was a union, they could still send you over to the paint line to work if you are out of work in your own department, but you might possibly have to work for their wages, rather than what you are making on your own in assembly.[9]

At noon on Thursday, 25 July, Don Rol and Ed Gross addressed their fellow employees in the lunchroom to refute Benage's statements of the preceding week concerning Bushhog. Their investigation, they told the other employees, revealed that the wages paid the Bushhog workers surpassed those paid by Respondent and included annual cost-of-living increases. Moreover, contrary to what Benage had stated, Bushhog did not have a plant in Mexico; its production facilities were in Alabama, Texas, and Kansas. The wage comparison was written down and given to someone on the night shift for distribution there. Present in the lunchroom during this presentation was at least one supervisor, Don Stettnichs.

At 3:10 p.m. on 25 July, Benage called the employees to a meeting. He opened the meeting by telling the employees that Respondent did not want or need a union and suggested that any problems could be worked out on a one-to-one basis between the employees and management. He alluded to the possibility of strikes and the risks of fines or permanent replacement. He also spoke about other unionized facilities in the geographic area, Morrell and Litton, and mentioned the concession bargaining taking place at Morrell.

After his opening remarks concerning unionization, Benage announced that Respondent had decided to convert the 1-week shutdown into a layoff of approximately 26 employees. He claimed that some employees had approached him and complained that it would be easier on them if there were a layoff of some people rather than a shutdown involving everyone. He also told the employees what the July Ford reports showed and of Ford's intention to "net out." He explained that if Respondent did not have a layoff, the plant would have to be shut down again in September and possibly October, for 2-week periods of time. In response to questions, he stated that the layoffs would be by seniority, department, and shift and, when asked, said that even those wearing SWOC buttons would be recalled when worked picked up.

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[7] Contrary to the contentions of the Union, Benage's testimony in this proceeding, that he learned of the July Ford report from Magowan on Wednesday morning, 24 July, is not "totally inconsistent" with his testimony in the representation case hearing that he learned of it on "Monday, Tuesday, right in there." He did not testify in the earlier hearing with any certainty concerning the date.

[8] Miller testified in the R case hearing but did not testify in the instant proceeding. His testimony in the earlier hearing cannot be said to contradict Magowan's testimony here. Thus, while Miller testified on cross-examination (Tr. R case 47) that he did not play an active role in the layoff decision until the following week, when he received a letter from the employees (discussed infra), he also testified (on recross-examination (Tr. R case 71-72)) that he had discussions with Magowan about the need to reduce manpower and about the extent of the required reduction within a day of when Magowan received the July Ford report.

[9] Campbell recalled making the statements concerning temporary transfers from one department to another in his conversation with Anderson in June. He essentially denied making the other statements attributed to him, asserting that he would not have discussed the Union with Anderson at that point and time because, by then, he was aware of her support for the Union. Anderson impressed me as the more credible witness of the two and Campbell's explanation of why he would not have made such statements to her seemed contrived. I therefore credit Anderson's testimony.

After Benage's announcement of the layoff, the organizing committee met at Sharon Hallem's home and set up a rally to be conducted that evening in the plant parking lot during the night-shift dinner break at 8:45 p.m. The rally was held as planned. Among the employees who spoke were Ed Gross, Sharon Hallem, Don Rol, Dennis Reifers, Lee Wigton, and Steve Johannsen. There was considerable yelling and shouting and the employees were observed by Benage and some of the foremen. To counter Benage's claim that some employees preferred a layoff to a shutdown, a vote was taken on that question. A similar rally and vote was conducted for the incoming day shift at 6 a.m. on Friday, 26 July. The morning edition of the Argus-Leader, the Sioux Falls newspaper, carried an article about the scheduled layoff and the employees' protest. The article featured a photograph of an angry Don Rol and comments by Ed Gross.

Respondent's lunchroom, used by both employees and supervisors, contains three bulletin boards. Two of those boards are glass enclosed and are maintained for the use of Respondent. The third is an uncovered board on which employees may post notices, including such things as personal ads selling cars or boats. Early in the Union's campaign, this third board was also used for the posting of some organizational literature. The Union's flyer, setting forth the employees' legal rights in an organizational campaign, in addition to being distributed to the employees in the plant, was posted on this bulletin board on about Wednesday, 24 July. On 25 July, Ed Gross saw Foreman Don Stettnichs exit; he was carrying a piece of paper in one hand and the cup in the other. Shortly thereafter, when Gross went into the lunchroom he observed that the Union's "Legal Rights" posting was no longer on the bulletin board.

On the following morning, 26 July, Gross observed that Don Rol's notes comparing the Bushhog wages with Respondent's was posted on the bulletin board along with a copy of the newspaper article featuring Rol's picture. At 7:20 a.m. that day, Gross claimed, he observed Foreman Campbell remove the wage comparison from the bulletin board. Later that same day, he claimed he observed Campbell and Stettnichs standing by the bulletin board, looking at the posted newspaper article. He heard Campbell say, "What a mug," and Stettnichs respond, "Wouldn't you like your daughter to bring home something like that." He then saw Campbell take this newspaper article off the board, roll it up, and pocket it.

Campbell and Stettnichs admit the conversation attributed to them with regard to the newspaper article but claim that it took place in the front office where copies of the newspaper itself, and not reproductions of the article, were laying about. Both deny removing any union literature from the employee bulletin board, stating that they knew from a prior Board case that to do so might constitute a violation of the statute. Stettnichs did admit to removing a copy of the newspaper article from the Company's glass-covered bulletin board. Two unit employees, Merle and Ken Baatz, admit to removing union postings from the open bulletin board on a number of occasions.

Noting that no employee other than Gross testified to actual observations of supervisors removing union postings, that Gross did not actually see Stettnichs remove the "Legal Rights" posting, that Merle and Ken Baatz admitted that they had removed some postings, and finally noting the candor of both Campbell and Stettnichs concerning the postings and their actions and comments with regard to them, I credit Stettnichs and, in this instance, Campbell. The General Counsel has failed to prove that Respondent's supervisors removed union postings from the bulletin boards or otherwise prohibited employees from posting union literature.

As previously described, the organizing committee conducted their own "election" among the employees to determine whether the employees favored complete plant shutdowns or selected layoffs. The organizing committee also solicited signatures on petitions asking that the Employer recognize the employees' vote. The petitions and vote results, overwhelmingly favoring shutdowns, were presented to Benage by noon on Friday, 26 July. Benage recalled that it was Don Rol and Sharon Hallem who brought him the petitions; he also acknowledged that Marlis Anderson and Daryl Huff spoke to him about the vote and the petitions. Employee Craig Latterell also claimed to be in the front of the group when the petitions were presented to Benage at the conclusion of Benage's lunch hour.

At the end of the day shift on Friday, Respondent posted, in a locked case, a list of 26 laid-off employees, by shift and department.[10] The notice stated: "Due to the economy (or lack of orders), there will be a layoff until orders pick up . . . ."

For seniority purposes, Schwartz uses the date Amerequip acquired the Sioux Falls plant from Chromalloy, 22 December 1983, rather than the employees' earlier dates of hire by Chromalloy. Of those listed for layoff, nine[11] were laid off while persons in their departments with less Schwartz or less Chromalloy's seniority were retained. The remaining 17[12] were the least senior employees in their departments.

About 3:30 on Friday afternoon, after the layoff list was posted, between 35 and 50 employees gathered at the plant and entered the office. They were accompanied by the union representatives, including Bob Kingsley. Two employees, Don Juhnke and either Greg DeVaney or Charles Bauerle attempted to talk with Benage in the latter's office. Benage followed an apparent company practice of never holding a discussion with more than one employee at a time and insisted that he would only talk to one or the other of these individuals. Juhnke stayed in Benage's office until Kingsley learned that he was in there on his own. Kingsley entered Benage's office, there was a loud and angry confrontation, and Juhnke and Kingsley exited. During this time, the remaining employees were in the office hallway chanting their support for the Union and their demands that Respondent recognize their vote. At one point, Don Rol directed a common, obscene gesture at Foreman Campbell.

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[10] The list, R. Exh. 5, actually contained 28 names. Two employees, Kent Schumacher and Thomas Leesch, quit.

[11] Charles Bauerle, Ed Blair, Dale Clyde, John DenBoer, Ed Gross, Jan Johnson, Craig Latterell, Dennis Reifers, and Don Rol.

[12] Hiram Anderson, Steve Blair, Terry Bohnenkamp, Romeo Eagle Horse, Randolph Ekanger, Sharon Hallem, Robert Hoffman, Wesley Jaqua, Larry Krueger, Alan Lawrence, Dennis Lupkes, Mike McKee, John Miller, Arnold Peterson, Mike Sweir, Charles Temple, and Richard VanMeveren.

During this protest, Ed Gross was standing near the office of Donna Lucas, the accounts payable clerk. According to Gross, Foreman Douglas Koepp[13] looked out of that office, laughed, and was heard to say, "them union fuckers they sure got their just." Koepp denied making any such statement or even looking out of the office during the demonstration. Lucas and Kathryn Thaler, a billing clerk, who were in the office with Koepp during at least part of the demonstration, did not hear Koepp make any such statement. No employees were called by the General Counsel to corroborate Gross' testimony. Considering all the foregoing circumstances, including the confusion inherent in the situation, the noise, the evidence tending to corroborate Koepp, and Koepp's credible demeanor and appearance, I credit Koepp's testimony and find that the General Counsel has failed to sustain her burden of proving that Koepp made the remark attributed to him by Gross.

The demonstration or protest in Respondent's offices lasted between 5 and 10 minutes. The employees left, continuing their chants. Benage admitted that he saw, in addition to DeVaney and Juhnke, Hallem, Rol, Larry Krueger, Charles Temple, and John Miller participating in the demonstration. Also participating were Gross, Marty Barber, Teresa Ingalls, Dale Clyde, and many others.

On Monday, 29 July, Respondent sent a letter, over Benage's signature, to each of the laid-off employees, purporting to "clarify . . . current and future status with the Company." The letter stated, inter alia, the following:

> Last Friday, 27 employees, including yourself, were layed [sic] off. The reduction in force, among the largest we have ever had, cut our production staff by almost 30%. Unfortunately, we do not see any end in sight to the depressed market conditions which the Company has been experiencing. As you know, the agricultural implements business has been stagnant for quite some time, and our forecasts do not show any improvements at all for the next one and a half to two years.
>
> Consequently, I find it necessary to inform you that your layoff must be classified as a permanent [sic] one. I wish that the news were better, but it would only be optimistic "Wishful Thinking" if we said there was any chance of you being recalled to work in the next two years, or ever.

This letter, according to Magowan, was drafted on Saturday, 27 July, and typed for Benage's signature on Monday. As claimed by Magowan, it issued because he felt it would be more fair to the employees if they knew of the improbability of their recall. About the same time that they received this letter, the employees also received change notices, dated "7-30-85," stating that they had been "Discharged/Terminated" as of "7-26-85" "due to economic conditions." Notwithstanding the language of these letters and change notices, Benage acknowledged that the employees retained recall rights.

When employees Lee Wigton, Greg DeVaney, and Steve Johannsen reported for work on the night shift of 29 July, wearing their SWOC buttons, they were greeted at the door by Benage. Benage asked DeVaney and Johannsen whether they had been laid off and, when they said that they had not, asked for their names and departments. Campbell and Stettnichs came up to Wigton, smiling or grinning, and asked him, "What are you doing here, Lee? You're laid off." When Wigton told them that he had not been on the layoff list, their grins changed to frowns and they proceeded to check the list.

Benage claims that he was not very familiar with the employees on the night shift and was meeting everyone at the door, allegedly because of the incident in his office with Kingsley and the accompanying disturbance on Friday afternoon. He does not deny the questions attributed to him by DeVaney and Johannsen. Similarly, Stettnichs admits questioning Wigton. He claims that he raised the question because Douglas Koepp had suggested that Wigton had been laid off. There was no denial of Wigton's claim that the supervisory grins changed to frowns when they learned that Wigton was not among those laid off.

DeVaney, at least, observed no other employees wearing SWOC buttons on the evening of 29 July. No other evidence was adduced to establish that any employees other than these three were or were not wearing such buttons that evening.

About the first of August, laid-off employees Don Rol and Sharon Hallem came into the company lunchroom during the night-shift's lunch break. They were observed by Benage and Magowan. Magowan, stating that they were on private property, ordered them to leave. Neither Hallem nor Rol claimed that he or she engaged in union activity when this occurred. Benage recalled that neither was talking to any other employee when he observed them and ordered them out. Benage asserted that he ordered them to leave because they had been part of what he referred to as the 26 July "mob scene" and he wanted to avoid a repetition of that event. It is essentially uncontradicted that, both before and after this incident, laid-off employees, former employees, and friends and relatives of employees came into the lunchroom and, on occasion, on to the shop floor. Sometimes they were observed by or spoke to members of supervision. Benage and Campbell claimed that, on some occasions, they had asked laid-off employees to leave the premises. Their testimony was uncontradicted.

On 30 July, Marlis Anderson, Ed Gross, Lee Wigton, and Don Rol wrote a long letter to Herbert Miller. They outlined the events surrounding the layoff, the employee vote on the question of a layoff or a shutdown, and Benage's refusal to consider the results of that vote. They also intimated that the layoff was discriminatory and asked Miller to meet with the organizing committee and a representative of the Union.

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[13] Respondent admits Koepp's supervisory status.

Miller responded on 1 August, disclaiming any recognition of the organizing committee and asserting business justifications for the layoff. He stated, however, as follows:

> Seniority was considered in layoffs that were made last week just as it has been in the past. I will review these layoffs to make sure that seniority was respected to the greatest extent possible.

On 1 August, the Union held a meeting at a local motel. At this time a substantial number of employees signed union authorization cards. Other employees signed cards in response to individual solicitations elsewhere. A total of 58 employees, out of 90 then in the unit, signed authorization cards between 1 and 3 August.

On 2 August, the Union demanded recognition as representative of Respondent's employees in the following unit, admitted by Respondent to be appropriate for the purposes of collective bargaining within the meaning of Section 9(b) of the Act:

> All full-time and regular part-time production and maintenance employees employed by the Employer at its Sioux Falls, South Dakota facility, including shipping ad receiving department employees, group leaders, and truckdrivers, excluding office clerical employees, plant industrial engineer, production control clerks, production control helper, cycle counter, guards and supervisors as defined in the Act.

Respondent declined to voluntarily grant recognition. On 5 August, the Union filed ULP charges, alleging the layoff as violative of Section 8(a)(3) and (1). On 6 August, the Union filed a petition, Case 18-RC-13822, seeking certification as the employees' collective-bargaining representative.

On the morning of 8 August, nine of the laid-off employees were called to a meeting with Miller, Magowan, and Benage. Those employees were Ed Gross, Don Rol, Charles Bauerle, Dale Clyde, John DenBoer, Jan Johnson, Craig Latterell, Dennis Reifers, and Steve Blair. The last-named individual was there by mistake; Respondent had intended to call Ed Blair. Miller reviewed the layoff and told them that mistakes had been made, that they had been improperly selected for layoff. They (except for Steve Blair) were all reinstated with backpay; DenBoer declined reinstatement. Miller also discussed the economic reasons for the layoff with these employees. Before the meeting concluded, Rol told Respondent's managers that the Union's organizational efforts would continue. Magowan replied, "That's the other matter we don't want to talk about." Ed Blair was called to a similar meeting the following morning. He was also told of the Company's conclusion that mistakes had been made in the layoffs and that he was being recalled with backpay. Magowan concluded, stating, "Now things are back to normal. I see you are still wearing your button." Blair acknowledged that he was and stated that he would continue to do so.[14]

Magowan testified that Respondent took this action, following receipt of the employees' letter, so that the layoff would follow overall plant seniority, by departments, without regard to shifts, and in order to reduce the possibility of litigation.

On the same day that the eight employees were recalled, Respondent called William Blair, Sheldon Bohms, Greg DeVaney, Mark Freese, Steve Johannsen, Doyle Schubert, Kevin Tjepkes, and Lee Wigton into the office to be told that they were going to be permanently laid off because of economic conditions. They were also told, "when and if business picked up," they would be recalled. The change notices they received stated that each of them had been "terminated due to economic conditions." With the exception of DeVaney and Wigton, all these employees had been hired after 22 December 1983. Wigton's seniority date was 14 November 1983 and DeVaney's was 12 December 1983. At the conclusion of the recall and substitution, the 26 persons who had been laid off were those who had the least overall plant seniority in their departments, without regard to shift.

A hearing on the Union's representation petition was held on 23 August 1985. The principle issue litigated was the eligibility to vote of those who had been laid off. Respondent acknowledged, at that time, that the laid-off employees had recall rights but disputed whether they had a reasonable expectancy of recall. The issue was not resolved at that time. In light of the pending unfair labor practices charges, that issue was necessarily deferred to this proceeding. The laid-off or terminated employees, it was determined, were to vote challenged ballots. The Regional Director's Decision and Direction of Election issued on 1 October and the election was scheduled for 29 October.

On 28 August, at the Union's request, Respondent posted a notice in the plant stating: "laid off employees have recall rights for a period equal to their Schwartz/-Amerequip seniority, up to a maximum of one year."

In the early afternoon of 4 September, Foreman Koepp observed Ed Blair and Dale Clyde performing their work (cleaning and chipping loader parts on the spray painting line in preparation for painting) at a pace that he deemed inordinately slow. He reported this to their foreman, Stettnichs, asking whether it should take 20 minutes for the employees to do a single rack of parts. When Stettnichs replied that it should not, Koepp informed him that these employees were taking that long. Together, they observed Blair and Clyde and their observations corroborated Koepp's earlier impression. Stettnichs then got a report of the morning's production. According to Stettnichs, Clyde and Blair had completed 39 racks that day, averaging 20 minutes per rack. Stettnichs spoke to both employees about their production, warning them that they were working too slowly and spending too much time talking. Shortly thereafter, he gave them documented verbal warnings, repeating what they had been told. Nothing was said linking their warnings to their union activity.

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[14] Magowan did not contradict Blair's testimony.

Clyde and Blair deny that they were working slowly on 4 September and point out that the two of them were doing the work of three men; Harlan Fluit, who normally wire brushed the parts prior to their chipping and cleaning, was absent. Their pace, they claimed, was not such as to slow down production as they were still ahead of the spray painters.[15]

This is not the first time that employees have been given written warnings for "loafing" on the job. Respondent introduced two such warnings that Stettnichs had previously given other employees. Neither is this incident the only time in the recent past when these two employees had been warned about the pace of their work. On 25 July, Stettnichs had spoken to the two of them, "chewing them out" for not getting enough work done and spending too much time talking. Again, about 13 August, after both of them had been recalled from the layoff, Campbell "jumped" them with an accusation that they were spending too much time talking. Although Blair and Clyde deny that the 25 July or 13 August verbal warnings were justified, neither of these incidents is alleged in the complaint to have been discriminatorily motivated and the General Counsel has expressly disclaimed any intention to so allege them. I must therefore assume that they were not so motivated. The record contains no indication that other union supporters were disciplined, fairly or unfairly, following the onset of union activity.

Respondent has adduced evidence through other employees to the effect that, during the period of the layoff, Clyde repeatedly stated that he did not intend to work at a full pace and that he would not work overtime until everyone was called back to work. Similarly, Blair was quoted as saying that he would not work overtime until everyone was called back from the layoff. Although these statements were testified to by employees who were generally opposed to the Union's campaign, they were credibly offered and not contradicted. On the other hand, the testimony of both Blair and Clyde was less than fully credible with respect to the work they were doing on 4 September. Blair was sarcastic and Clyde was a somewhat belligerent and evasive witness.

Just before work on a morning in October,[16] Robert Kingsley, Sharon Hallem, Larry Krueger, and John Miller were distributing union leaflets at the entrance to the lunchroom. Krueger and Miller entered the lunchroom. They had passed out their leaflets and were talking to their fellow employees when the 6:55 a.m. warning buzzer rang. About that point, Benage, who had been alerted to their presence by Campbell, entered the lunchroom and ordered them to leave.

Respondent held meetings with the employees at the end of each shift on 17 October to state Respondent's opposition to the Union's campaign.[17] Magowan, Miller, and Benage were present for the day-shift meeting. At the conclusion of the meeting, Miller announced that the Company had hats and "Vote No" buttons for the employees; he expressed the hope everyone would take one. As the employees left the meeting, Dave Koepp, and employee and the son of a foreman, offered each of them a black baseball-style cap with the Amerequip logo to which had been affixed two "Vote No" buttons. One was a white button, 3 inches in diameter, containing the words "Vote Right—Vote No." The second button, 1-3/4 inches in diameter, was orange with white lettering stating, "Vote No." Although the employees were encouraged to take and wear these hats, the credible evidence establishes that the management representatives were not present in the lunchroom when employees accepted or refused them.[18]

The representation election was conducted on 29 October in afternoon and evening sessions. There were 23 votes cast for the Union, 31 cast against it, and 25 challenged ballots that were sufficient in number to affect the results of the election. Both the Employer and the Union filed timely objections to the conduct of the election. The Employer's objections were overruled by the Acting Regional Director in the Supplemental Decision and Order that issued on 26 December. Certain of the Union's objections, those that were contemporaneous with its unfair labor practice charges, were found to raise substantial issues warranting a hearing and, together with the challenges, were consolidated for hearing with the instant complaint.

All the laid-off employees were recalled by Respondent on 18 November.

C. *Analysis and Conclusions*

1. The 8(a)(1) allegations—prelayoff

a. *Interrogation*

The complaint alleges that Foreman Denny Campbell unlawfully interrogated employees on or about 20 and 25 June. I have found that Campbell questioned employees Mike Sweir and Marlis Anderson whether Don Rol, another employee, was talking about unions. In the course of his questioning, Campbell referred to Rol as "talking trouble" and disparaged both Rol and unions generally. Examining these incidents under the totality of circumstances test required by *Rossmore House*, 269 NLRB 1176 (1984), enfd. sub nom. *Hotel & Restaurant Employees Local 11 v. NLRB*, 760 F.2d 1006 (9th Cir. 1985), I must find them to be violative of Section 8(a)(1). None of the employees involved were known union adherents at that point in time, Campbell initiated the conversations, he questioned two employees about the union activity of a third employee, for which there can be no justification, and his questioning was in the context of remarks hostile to both union activity and to the employee he suspected of engaging in it.

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[15] Stettnichs acknowledged that his calculations with respect to Clyde failed to take into account that Clyde was doing Fluit's work during the morning hours. However, as he told the employees, the warnings were based on his own observations of their work pace and talking that day.

[16] The General Counsel contends that this incident happened on 4 October; Respondent contends that it occurred on 29 October, the day of the NLRB election. I do not believe that the date makes a difference with respect to the legality of Respondent's conduct here.

[17] The General Counsel makes no contentions concerning Magowan's remarks at these meetings.

[18] Magowan's testimony to this effect was corroborated by Benage and several employees. One employee, Marv Fritz, testified that he was the first employee out the door at the meeting's conclusion. When he excited, he saw Miller, Benage, and Magowan outside the door. Only Ed Blair testified that the management representatives were still present when the hats were distributed. I find his testimony less convincing and less credible than that of Magowan, Benage, and other employees. Similarly, I reject his testimony to the effect that he subsequently saw Foreman Stettnichs passing out "Vote No" buttons to employees on the paint line. Stettnichs and the only two employees identified by Blair as having received these buttons from Stettnichs contradicted Blair's testimony, their denials were more credible than Blair's affirmative testimony.

b. *Threats*

On 25 June, Ed Gross overheard Campbell state that if Don Rol were in his department, he would be fired. Campbell explained to Gross that it was Rol's union activity that would cause him to fire Rol. No citation of authorities is required to demonstrate that such a threat violates Section 8(a)(1).

On 25 July, Campbell told Marlis Anderson what he thought Herb Miller, Respondent's vice president, would do if Miller thought that the employees were going to unionize. In a somewhat disjointed statement, he suggested that Miller might say, "Fuck you, get out, we don't need it." Although there is no evidence that Miller had, if fact, ever made such a threat, Campbell's statement that he might clearly threatens retaliation against employees for union activity. See *Dryers Grand Ice Cream*, 279 NLRB 817 (1986) (Member Johansen dissenting), where the Board, in the context of a representation case, stated at 817:

> Here, Burns [a supervisor] did not expressly threaten that he would use his own authority to retaliate against employees who failed to support the Union . . . Burns repeated the theme that the employees had no job security without the Union and, by his reference to a fellow supervisor . . . fueled fears that if the Union lost the election, prounion employees would be discharged by others in management for pretextual reasons . . . . [W]e find that [a] . . . supervisor who himself threatens retaliation, or who by virtue of his equal standing with fellow supervisors, suggests that *other* supervisors will retaliate against prounion advocates . . . reasonably tends to effectively coerce employees in the exercise of their free choice in the election.

See also *NLRB v. Gissel Packing Co.*, 395 U.S. 575, 616–617 (1969), where the Court pointed out that the evaluation of employer threats must take into account "the necessary tendency" of employees "to pick up intended implications . . . that might be more readily dismissed by a more disinterested ear." The Court also pointed out that a "prediction must be carefully phrased on the basis of objective fact to convey . . . demonstrably probable consequences beyond [the employer's] control . . . ." Campbell's statement was not such a carefully proscribed prediction. Moreover, I do not find the statement to be ambiguous merely because it does not say who would be discharged, as agreed by Respondent. And, even if the statement were to be deemed ambiguous, the burden of clarifying it would fall on its creator and, there being no clarification, whatever ambiguity exists must be construed against Respondent. *Pennypower Shopping News*, 253 NLRB 85 (1980). Campbell's statement to Anderson, I find, constitutes an additional threat in violation of Section 8(a)(1).

c. *Prohibiting the posting of union literature*

The complaint alleges that Respondent's supervisors discriminatorily removed prounion postings from an employee-use bulletin board, thereby demonstrating a prohibition against such postings. There was no contention that Respondent actually promulgated any rule against such postings and I have found the evidence insufficient to sustain the General Counsel's burden that Respondent's supervisors removed prounion postings. Accordingly, I shall recommend that this allegation be dismissed.

2. The 8(a)(1) allegation—postlayoff

a. *Implied threat*

The General Counsel contends, but I have found insufficient evidence to establish, that Foreman Douglas Koepp stated in reference to the laid-off employees, "Them union fuckers sure got their justs." I shall therefore recommend that this allegation be dismissed.[19]

b. *Exclusion of laid-off employees from the lunchroom—Objectionable conduct and 8(a)(1)*

On 1 August, Magowan and Benage observed Rol and Hallem in the lunchroom during the night-shift's break and ordered them to leave. Although Rol and Hallem were open union supporters, they were not engaged in any union activity at that time. Their exclusion, although not entirely contrary to company policy, was unusual; most frequently, off-duty or laid-off employees, retirees, and employees' family and friends were allowed to enter the plant without interference. They were excluded, Benage explained, because they had participated in the disturbance in the office on 26 July and he feared a repetition of that event.

On either 4 or 29 October, laid-off employees Larry Krueger and John Miller, with others, were distributing union literature outside the plant entrance before the start of work. Miller and Krueger went in to the lunchroom, where they passed out some additional flyers and left some on the tables. When the 5-minute warning buzzer rang, they had just completed their distribution of union literature and were talking to some of their fellow employees; at that point, Benage observed them and ordered them from the plant. Contrary to Respondent's contention, I find that they were still engaged in a continuous course of union activity at the point of their expulsion.

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[19] Even if I were to have found the statement made as alleged, it would add little support to the General Counsel's 8(a)(3) allegations as Koepp was not involved in either the layoff decision or the selection of employees for layoff. See *John J. Hudson, Inc.*, 275 NLRB 874 (1985) (Member Dennis dissenting).

Although I would agree with Respondent that it did not violate Section 8(a)(1) by its 1 August order that Rol and Hallem leave the premises, both because they were not engaged in any union activity at that time and because Respondent had a reason to fear that the recent 26 July incident might be repeated, I cannot agree that its expulsion of Krueger and Miller was similarly protected. In *Continental Bus System*, 229 NLRB 1262 (1977) (Chairman Fanning concurring, Member Walter dissenting), the Board narrowly construed its earlier holding in *GTE Lenkurt, Inc.*, 204 NLRB 921 (1973), and stated at 1262:

> In order to effectuate the policies of the Act, a no-access rule is valid only if it (1) limits access solely with respect to the interior of the plant and other working areas; (2) is clearly disseminated to all employees; and (3) applies to off-duty employees seeking access to the plant for any purpose and not just to those employees engaging in union activity. Except when justified by business reasons, a rule which denies off-duty employees entry to parking lots, gates, and other nonworking areas will be found invalid.

See also *Tri-County Medical Center*, 222 NLRB 1089 (1976). Krueger and Miller were off-duty employees[20] who were engaged in union activities in the plant lunchroom, nonwork area. See *Hudson Oxygen Therapy Sales*, 264 NLRB 61, 72 (1982). Inasmuch as Respondent did not have any clearly disseminated rule nondiscriminatorily denying access to off-duty employees for all purposes, and, in fact, had no uniformly applied rule at all, its exclusion of these employees who were engaging in union activity must be found unlawful, at least in the absence of a valid business reason for their exclusion. Respondent's reliance on the 26 July scene in its offices is insufficient to justify this exclusion. Even assuming that the 26 July incident was so intolerable as to permit some exclusions, that incident had occurred between 2 and 3 months earlier, under unique circumstances (the sudden announcement of the layoff), and there had been no further incidents of a like nature notwithstanding that the parties were engaged in a hotly contested representation contest. Respondent no longer had a reasonable basis to fear repetition of that event. Respondent, on brief, also alluded to the hostile feelings potentially harbored by laid-off employees and the possibility that such employees might seek to "get even" or disrupt work. This is sheer speculation, based on nothing that had occurred, and speculation must not be allowed to determine the permissible scope of employee union activity. Accordingly, I find that by prohibiting off-duty employees from engaging in union activities in nonwork areas of the plant, Respondent has violated Section 8(a)(1).

c. *Distribution of procompany insignia—Objectionable conduct and 8(a)(1)*

About 17 October, at the conclusion of a meeting where Respondent's managers urged the employees not to vote for the Union, hats with the Amerequip logo and "Vote No" buttons were distributed. They were brought into the lunchroom by a nonsupervisory employee who also distributed them. Respondent's management urged the employees to take and wear the hats but, as I have found, were not present when the hats were distributed. Notwithstanding this finding, the question remains whether Respondent's distribution of these hats and buttons was a coercive attempt to make employees declare their company or union support.

In *Farah Mfg.*, 204 NLRB 173 (1973), the employer made procompany badges available to employees by placing them in an open box in a location where both employees and supervisors could take them. The Board, affirming the decision of the administrative law judge, held that inasmuch as merely providing a supply of the badges at a central location did not pressure the employees into accepting or rejecting them, there was no coercion in violation of Section 8(a)(1). The facts in *Farah* were distinguished from *Garland Knitting Mills*, 170 NLRB 821 (1968), where impermissible pressure was found in the actions of supervisors who, by distributing the badges, observed who accepted or rejected them. In *McDonald's*, 214 NLRB 879 (1974), the Board (Member Jenkins dissenting on other grounds) applied *Farah* to a situation wherein the supervisors merely wore "Vote No" badges and only gave them to employees who requested them. Concluding that *Farah* held that mere distribution, without pressure being placed on the employees to wear open proclamations of support, was not violative of Section 8(a)(1), the Board dismissed the interrogation allegation. Similarly, in *Black Dot*, 239 NLRB 929 (1978), a representation case, the Board concluded that an "employer's conduct in merely making buttons available to employees on a voluntary basis, in the absence of supervisory involvement in the distribution process and unaccompanied by independent coercive conduct," was not objectionable conduct.[21]

In *Pillowtex Corp.*, 234 NLRB 560 (1978), the Board found the requisite coercive conduct, sufficient to set aside an election, in the actions of a supervisor who passed a box of "Vote No" buttons in front of each employee and placed a button of each employee's machine. The Board note that:

> When employees are approached by a supervisor and offered buttons such as the ones in issue, they have only two alternatives: accept the buttons and thereby acknowledge opposition to the Union; or

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[20] As discussed hereinafter, I have concluded that the laid-off employees had a reasonable expectation of recall. Their status is therefore that of off-duty employees. See *S. B. Thomas*, 256 NLRB 791 (1981), holding that if laid-off employees do not have a reasonable expectation of recall, they are not considered as off-duty employees for the purposes of the Board's no-access rules. Implicit in *S. B. Thomas* is the holding that laid-off employees with a reasonable expectation are to be treated as off-duty employees under such rules. Moreover, pursuant to the Decision and Direction of Election, these laid-off employees were to cast challenged ballots in the forthcoming election; they were thus vitally interested, as employees, in the outcome of that election.

[21] The Board also noted that although "a more stringent standard applies to conduct alleged to be objectionable," it believed that *Farah* and *McDonald's* provided adequate criterion to ensure that laboratory conditions were met.

> reject them, and thereby indicate their support for the Union. In either case, the fact that the employees must make an observable choice is a form of interrogation. Furthermore, should employees feel compelled to choose a button containing a message opposite to their views, that is coercion and it likewise interferes with the election.

Pillowtex was applied by the Board in *Tappan Co.*, 254 NLRB 656 (1981) (Member Penello dissenting), where a supervisor merely carried "Vote No" buttons and antiunion T-shirts while he inspected the work of his employees and only gave them to those who asked for them. On the basis of that conduct, the Board reversed the decision of an administrative law judge, found objectionable conduct,[22] and set aside the election. Neither the judge nor the Board distinguished or otherwise referred to *Farah* or *McDonald's*. It would seem that *McDonald's*, at least, has been implicitly overruled.

Finally, in *R. L. White Co.*, 262 NLRB 575, 589 (1982), supervisors carried boxes of procompany T-shirts, in sufficient numbers for each employee to take one, into their departments and made them available to the employees. On those facts, and without regard to whatever statements may have been made by the supervisors, the administrative law judge stated:

> [T]he T-shirts were obviously meant to be worn and to wear a T-shirt of this type implies the employee was in favor of the Company and opposed to the Union. By offering to employees these T-shirts, the Company clearly was attempting to get employees to make an open acknowledgement of their position in favor of the Company and opposed to the Union.

The Board expressly agreed that the Respondent had violated Section 8(a)(1) by distributing and coercively encouraging employees to wear the procompany T-shirts.

Applying the foregoing cases to the facts of this case, I am persuaded that Respondent's distribution of the caps with the "Vote No" buttons was coercive conduct violative of Section 8(a)(1), capable of interfering with the conduct of the election, whether Respondent's management remained in the lunchroom while the hats were distributed. The hats, like the T-shirts in *R. L. White*, were obviously meant to be worn; if worn, they would display an employee's leanings most vividly; Respondent's top management provided the hats with the attached badges in sufficient numbers so that everyone could take one; and the highest official with whom the employees would deal personally urged them to take and wear the hats. Moreover, those top management personnel were immediately outside the lunchroom when at least some of the employees exited the meeting. These circumstances are as coercive as those present in *R. L. White*, *Tappan*, and *Pillowtex*.

3. Section 8(a)(3)

a. *The layoff of 26 employees*

In *Wright Line*, 251 NLRB 1083, 1089 (1980), enfd. 662 F.2d 899 (1st Cir. 1981), the Board set forth the following causation test to be applied in all discrimination cases turning on employer motivation:

> First, we shall require that the General Counsel make a *prima facie* showing sufficient to support the inference that protected conduct was a "motivating factor" in the employer's decision. Once this is established, the burden will shift to the employer to demonstrate that the same action would have taken place even in the absence of the protected conduct.

Resolution of all the 8(a)(3) allegations of the instant case turns on the question of motivation; accordingly, the *Wright Line* test provides the analytical framework for the discussion that follows.[23]

In determining whether a prima facie case has been presented, the trier of fact "must view the General Counsel's evidence in isolation, apart from the respondent's proffered defense." *Hillside Bus Corp.*, 262 NLRB 1254 at 1254 (1982), Member Jenkins dissenting on other grounds. So viewed, I am satisfied that the General Counsel has presented a prima facie case. There was open and extensive union activity, Respondent's supervisors, including those who participated in the decision to lay off the employees and in the selection of the employees to be laid off, were aware of the union activity both generally and specifically with regard to certain especially active employees. And, there was evidence which if credited,[24] would tend to establish animus toward those who would engage in union activity. In this latter regard, I note the interrogations and threats attributed to Dennis Campbell, a supervisor who participated in the selection of some of the employees for layoff. *Lemon Drop Inn*, 269 NLRB 1007 (1984). The most significant factor supporting the General Counsel's prima facie case is timing, always a relevant consideration in determining motivation. *Lemon Drop Inn*, supra. Here, the layoff announcement constituted an abrupt change from management's earlier announced plans to have a 1-week plant shutdown, and that announcement came quickly on the heels of two open, in-plant demonstrations of union support, the wearing of SWOC buttons on Wednesday, 24 July, and the lunchroom meeting to refute Benage's bushhog statements at noon on 25 July.[25] Moreover, Respondent made the announcement in the context of antiunion, though lawful, remarks.

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[22] No exceptions had been taken to the judge's recommended dismissal of the 8(a)(1) allegations.

[23] In so concluding, I reject the Union's argument that Respondent's conduct was so inherently destructive of employee rights that, under *Radio Officers Union v. NLRB*, 347 U.S. 17 (1954), and *NLRB v. Great Dane Trailers*, 388 U.S. 26 (1967), "no proof of intent is necessary, and business considerations are not a defense." Unlike the employers' conduct in *Radio Officers*, *Great Dane*, and subsequent cases applying this principle, Respondent's conduct was not, on its face, directed at union members qua union members. See *Metropolitan Edison Co. v. NLRB*, 460 NLRB 693 (1983), and cases cited. Moreover, as the Board stated in *Wright Line* at 1088, "Of course, the discharge of an employee, in and of itself, is not normally an inherently destructive act which would obviate the requirement of showing an improper motive."

[24] See *SME Cement, Inc.*, 267 NLRB 763 fn. 1 (1983).

Of significance, too, to the General Counsel's prima facie case are Respondent's apparent failures to comply with an earlier stated promise to try to give employees greater notice of layoffs and the apparent failure to more strictly follow plant or departmental seniority. In this latter regard, I note that the majority of those selected out of overall (or Chromalloy) seniority for inclusion in the layoff were among those who had openly proclaimed their membership on the organizing committee and had otherwise been among the most active union proponents.[26] Finally, I note what appears to be surprise, and possibly consternation, on the part of Benage, Campbell, and Stettnichs when Wigton, Devaney, and Johannsen, known union supporters, showed up for work on 29 July, not having been laid off.

Having concluded that the General Counsel has established a prima facie case of discriminatory motivation, it is appropriate to turn to Respondent's affirmative defenses. Respondent's defense to the 8(a)(3) allegations is based primarily on Respondent's intimate relationship with Ford. Ninety percent of Schwartz' business comes from Ford; all parties agree that it is appropriate to examine Respondent's economic defense through the business it does with Ford. In particular, Respondent points to the Ford reports and Ford's announced decision to "net out" as business justification for the layoff. Secondarily, Respondent relies on the bleak farm economy and its expected effect on a producer of farm equipment. In this regard it must be noted that whatever merit there may be to the contentions of the General Counsel and the Union that Respondent's small loaders (those used on tractors of less than about 40 horsepower) sold most frequently to noncommercial "hobby" farmers, construction firms, and landscapers, where the economy was thriving, it remains clear that a substantial portion of Respondent's business was tied to the farm economy. No one disputes the fact that the large loaders are farm equipment. Those large loaders normally constitute about one-third of Respondent's sales,[27] by units, and as they sell for about twice the price of the small loaders, large loaders account for about one-half of Respondent's sales, in dollars. Large loaders, and thus the farm economy, are unquestionably important to Respondent's considerations. Although the parties disagreed regarding the significance of the farm economy to Schwartz, everyone agreed that the farm economy, in general, looked bleak.

As previously noted, sometime usually in the latter half of each month, Respondent receives the Ford report, detailing Ford's loader commitments for the next 4 months and projecting purchases for 4 months beyond that. The Ford reports for April and June (there was no May report) indicated a substantial drop in both large and small loader commitments in the summer with some signs of improvement in the fall. Thus, although small loader shipments had averaged around 400 per month in 1984 and about 380 per month in the first 5 months of 1985 and large loaders had averaged between 190 and 200 month during the same periods, the April report indicated a reduction in commitments for small loaders to 175, 145, and 150 in May, June, and July, respectively, and in large loaders to 190, 35, and 25 for the same months. The employees were advised, in a meeting in May, that the summer looked slow, that there could be some down weeks during the summer, but that there were favorable indications for the fall. Benage told the employees that he would try to give them 2 weeks' notice of layoffs. Although there was no union activity going on at that time, he used the occasion to tell the employees that management was opposed to unionization.

In June, the next Ford report was received. Large loader commitments were still well below average, 135, 45, 80, and 80 for June, July, August, and September, respectively. Similarly, the small loader commitments for those months were 289, 480, 260, and 265. As of this report, Schwartz had moved into a substantial overshipped position on both large (+52) and small (+229) loaders. Had a 1-week vacation shutdown in July not already been scheduled, according to Magowan, some form of curtailment would have been necessary to balance production and commitments. On 18 July, Plant Manager Benage announced that there would be an additional 1-week plant shutdown in August, because of the lowered production requirements. He used this meeting, also, to take note of the union activity and to lawfully state Respondent's objections to organization.

On 19 July, Respondent was informed that Ford was going to "net out," i.e., bring shipments down to the level of its commitments. Few releases were in hand for additional July shipments; no more would be furnished but Respondent was authorized to ship some of August's commitments in July. On 23 July, Respondent received the July Ford report and further confirmation of Ford's intention to "net out." The July Ford report was little different from June's. The small loader commitments were for 480 in July, 290 in August, 265 in September, and 485 in October. The large loader commitments were 75, 80, 80, and 145 for those same months. The less firm projections for November, December, January, and February, however, showed significant improvement. According to that report, Schwartz was 228 small and 31 large loaders overshipped in July. About 250 of the 370 (combined large and small) loaders committed for August were shipped in July.

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[25] Contrary to the General Counsel's contention on brief, Respondent never asserted that the layoff was announced to the employees on Tuesday, 23 July.

[26] Totally lacking in merit is the Union's statistical argument based on the claim that 23 of the 26 laid-off employees "were Union supporters and *had* signed Union cards." In fact, at the time of the layoff, no employees had signed union authorization cards; those cards were not signed until 1 August and the fact that the laid-off employees signed cards at that time is no evidence that they, or the less senior employees generally, were union supporters at the time of the layoffs.

[27] It is misleading to characterize the large loader sales as comprising only 20 percent of Respondent's business, as both the General Counsel and the Union did on brief, by examining only those months surrounding the election. Those were the months when this particular aspect of Respondent's business suffered the worst decline. Moreover, with respect to the question of who purchases small loaders, I have serious questions concerning the accuracy of the Union's sampling methods. A less than representative sampling of dealers would skew the results substantially and there is no showing that the dealers sampled were located in farming communities or represented a fair cross-sampling of Ford tractor dealers.

At the time of the layoff, Respondent had 93 unit employees, approximately its average complement since the first of the year. In the same timespan, it had shipped an average of approximately 560 loaders per month, of which about 35 percent were large loaders. According to Benage's calculations, with Ford netting out, Respondent would only have to produce about 350 loaders per month, a total of about 1100 in August, September, and October. Benage followed the procedure he had used for previous layoffs: taking 15.5 hours as the average direct labor time to produce a loader, adding to that a 20-percent "fudge factor," and 35 percent plus several extra employees for indirect labor, and finally figuring 160 man hours per month, he concluded that a work force of 62 would suffice for the necessary production.[28]

In fact, Respondent shipped a total of 1046 loaders, 764 small and 282 large, to Ford in August through October, and increased its loader inventory from 40 to 183 (large and small). During the same time period, there was a reduction in small loader overshipments from 228 to only 58, and only a small increase in large loader overshipments from 31 to 59.[29]

Respondent notes that since Amerequip acquired Schwartz, it has laid off employees when necessary to balance productive capacities with commitments. The instant layoff may have been its longest lasting single layoff, but it was neither its only layoff nor its deepest one. On 1 July 1984 Respondent had 125 production and maintenance employees, was overshipped by 277 small loaders (although undershipped by 19 large ones), and had Ford reports indicating declines in Ford commitments in much the same magnitudes as those that were to occur in 1985. As in 1985, the 1984 decline occurred most heavily in large loaders. Respondent laid off 18 employees on 28 July 1984, recalled 2 but laid off 12 more at the end of August 1984, and laid off an additional 22 employees in September. By 1 October 1984 there had been a 45-percent reduction in the work force to 69. In mid-October 21 were recalled and the work force reached its new peak of 100 on 14 January 1985. Respondent also testified that layoffs were, for a number of reasons, more efficient than repeated plant shutdowns, including the loss of productivity on shutting down and starting up and the inability to respond quickly to orders during a shutdown. Those reasons appear to be reasonable and logical. The record contains no evidence that Respondent had previously used repeated plant shutdowns to balance manpower and production requirements.

The Union's economist, testifying as an expert witness, acknowledged that a layoff or a reduction in force of some other nature was required by the Ford reports and Ford's stated intention to begin netting out as of late July. He also acknowledged that Respondent's buildup of inventory indicated that, at least into October, Respondent had sufficient manpower to meet its demands for production. The General Counsel and the Union, although conceding that Respondent had some economic justification for its reduction in force, contend nevertheless that the sudden change from a scheduled 1-week layoff to a "permanent" layoff of one-third of the employees was discriminatory. They rely on the Employer's alleged animus, timing, shifting defenses, and the absence of sufficient economic justification for the drastic action taken. I find their assertions with respect to the layoff itself insufficient to overcome Respondent's affirmative defense.

In reaching this conclusion, I take note of the fact that, although suspicious, the timing of the layoff decision is coincidental with receipt of the July Ford report and Ford's stated intention to net out. It also occurred at almost precisely the same time of year as the major layoff in 1984. Moreover, although the General Counsel and the Union make much of their contention that the layoff occurred within hours of open union activity within the shop, it is clear that Respondent had knowledge of the union activity for some time prior to the layoff, rendering that layoff somewhat less precipitous than claimed. Further, although the General Counsel correctly asserts that announcements of the layoff in the context of antiunion remarks would normally justify a connection being made between the two, I must note that Benage used other meetings to make antiunion remarks, even when there was no union activity in progress. The regularity with which he did this, together with the absence of any unlawful statements, tends to negate the significance of the juxtaposition of his remarks with the announcement.

In this same vein, although I have found that there were some 8(a)(1) violations committed before the layoff, I consider it significant that they were all committed by a single first-line supervisor who was not involved in the decision to have a layoff. There were no further violations of Section 8(a)(1) for almost 2 months after the layoffs and those that subsequently occurred were not "hallmark" violations. See *NLRB v. Jamaica Towing*, 632 F.2d 208 (2d Cir. 1980). Animus there was, but not of a sufficient weight to overcome valid explanations of substantial business justification for a layoff that was, at least as to scope and timing, consistent with past practice. See *Plessey Materials Corp.*, 263 NLRB 1392, 1404 (1982).

The General Counsel and the Union contend that Respondent has raised shifting defenses, changing its case from the representation hearing to this proceeding. I find no substantial inconsistencies. They were different proceedings, raising different, albeit somewhat similar, issues. At issue in the R case hearing was the laid-off employees' expectation of recall; Schwartz did not, at that time, bear any burden of establishing the validity of the layoff and thus was not called on to present all the reasons it took the action it did. Its failure, for example, to explain in the R case why it deemed alternating shutdowns with workweeks to be inefficient, does not render that explanation incredible when it was offered in the C case.

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[28] Benage's calculations were, if anything, generous. Taking Ford's commitments for the 3-month period following July and reducing that by the number of loaders overshipped, Schwartz would only have had to produce 274 large loaders and 812 small loaders to meet its Ford commitments. Had Benage used these figures, and determined necessary manpower levels using the more specific number of hours required to manufacture large and small loaders (18 and 14, respectively), he could have reduced manpower levels by another 8 or 10 employees.

[29] Respondent went to an undershipped position on small loaders in November (-69) and December (-211) although remaining slightly overshipped in large loaders until the end of the year, concluding with overshipments of 37 large loaders in November and 12 in December.

Finally, in this regard, it seems clear that Respondent's layoff decision was a reasonable and effective response to its declining production requirements. Perhaps Respondent could have looked further ahead to Ford's projections for November, December, January, and February; made the cut less deep, and increased inventory more. Perhaps it could have acceded to the employees' desires and utilized repeated shutdowns rather than the layoff. Perhaps it could have recalled the employees sooner. However, the action it took was one of the courses available to it, consistent with what it had done in the past, to meet its needs, and even the Union's expert could not say that it was an unreasonable or invalid choice. Indeed, as a careful analysis of the figures shows, Respondent did not even go as far as its own calculations would have permitted in reducing its work force. To conclude that Respondent should have followed some different course of action to deal with the decreased demand for its products would require the trier of fact to substitute his business judgment for that of Respondent. That I cannot do. *Albritton Communications*, 271 NLRB 201, 204 (1984); *Garay & Co.*, 261 NLRB 490, 495 (1982), where the employer's economic defense prevailed notwithstanding stronger evidence of unlawfully expressed animus than exists here and equally suspicious timing. Accordingly, I shall recommend dismissal of the allegation that the layoff of 26 July violated Section 8(a)(3).

b. *Discriminatory selection for layoff*

(1) In general

Approximately two-thirds of Respondent's work force was employed by Chromalloy before Amerequip's acquisition of the Sioux Falls plant on 22 December 1983. As previously noted, 22 December 1983 is the earliest seniority date recognized or utilized by Respondent, as evidenced by uncontradicted testimony and the monthly seniority lists.

Plant Manager Benage, together with Foremen Campbell and Stettnichs, selected the employees to be laid off. Their selections, they claimed, were made on the basis of Amerequip seniority, by department and by shift. Where employees had the same seniority (i.e., 22 December 1983), determinations were made on the employees' ability, versatility, and work habits. This was consistent with Respondent's practice in prior layoffs, according to Magowan.[30] There was no evidence that Respondent had ever utilized the employees' Chromalloy seniority as a basis for layoff selection.

Of the 26 employees selected to be laid off on 26 July, 9 were laid off while Respondent retained others in their departments, but not necessarily on their shifts, with less Chromalloy and, in some cases, less Amerequip seniority. Seven of the nine were SWOC members, at least five of whom had openly proclaimed that membership on Wednesday, 24 July. The General Counsel contends that it was their union activity that motivated Respondent to select them. The General Counsel also notes the reception Lee Wigton, Greg DeVaney, and Steven Johannsen received when reporting to work on 29 July, surprise at their presence, as arguably indicating Respondent's intention to include all known SWOC members in the layoff. Respondent, noting that a selection for layoff based on total Chromalloy-Amerequip seniority would have been contrary to past practice (and would have, and ultimately did, result in the layoff of at least as many SWOC members),[31] contends that its selection process was nondiscriminatory. The selection process, like the layoff as a whole, must be evaluated pursuant to the *Wright Line* test.

(2) Jan Johnson and Charles Bauerle—fabrication department, days

In the absence of the foremen, Benage selected the persons to be laid off on both the day and night shifts from department 51, fabrication. Laid off from the night shift were Randolph Ekanger, Hiram Anderson, and Steve Blair, the three least senior employees on that shift. Laid off from the day shift were Wesley Jaqua, Jan Johnson, and Charles Bauerle, the three least senior employees on that shift. There were, however, three employees remaining on the night shift who had less Amerequip seniority than Johnson and Bauerle. They were Harlan Kruse, Mark Freese, and William Blair. The General Counsel contends that Johnson and Bauerle were discriminatorily selected for layoff from the day shift over these less senior night-shift employees. With respect to those contentions, I find, the General Counsel has failed to establish a prima facie case. In so finding, I note that following seniority within the department and shift, as Respondent did, was contrary to no clearly established company policy. More significantly, I note that Jan Johnson had not engaged in any union activity and the only union activity engaged in by Bauerle before the layoff list was posted was SWOC membership, a fact that the General Counsel failed to prove was known to Respondent. Knowledge is an element on which the General Counsel bears the burden of proof. *Heatilator Fireplace*, 249 NLRB 544 fn. 3 (1980). And, I further note that had Respondent selected, in their place, the least senior employees in fabrication on the night shift, at least one of those, Mark Freese, would similarly have been a SWOC member. Accordingly, I shall recommend that the allegations with respect to Jan Johnson and Charles Bauerle be dismissed.

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[30] There is some evidence, in essentially nonspecific testimony of various employees, that the selection of employees for prior layoffs had sometimes been marred by favoritism. Similarly, there was some general testimony indicating that, in at least some layoffs, the night shift where there was the heaviest concentration of less senior employees was eliminated first, with more senior night-shift employees being transferred to the day shift. The record is not sufficiently specific to establish either favoritism or elimination of the night shift to be the general rule for Respondent's layoffs.

[31] Of the eight ultimately laid off in the place of those whom the Union deemed discriminatorily selected for layoff, seven were SWOC members.

(3) John DenBoer, Don Rol, and Craig Latterell—welding, day shift

Don Stettnichs selected the welders to be laid off. Four individuals from the night shift, those with the least Amerequip seniority, were chosen first: Thomas Leesch (who quit), Terry Bohnenkamp, John Miller, and Richard VanMeveren. Of these, only John Miller was a SWOC member. Eight welders from the day shift were slated for layoff. Four were chosen on the basis of their Amerequip seniority, Dennis Lupkes, Larry Krueger, Charles Temple, and Arnold Peterson. None of these employees had any demonstrable union activity. There was no one on the day shift in the welding department with a seniority date after 22 December 1983 who was not laid off. The fifth day-shift welder selected was Robert Hoffman, one of the initiators of the union activity, an open union supporter and SWOC member. His selection, however, was consistent with his overall seniority and is not alleged to be separately discriminatory. The last three selected were John DenBoer, Craig Latterell, and Don Rol.

John DenBoer was a member of SWOC; the record contains no evidence of any other union activity or of company knowledge of his union activity. He was more senior than a number of other welders on both the day and night shifts *if* seniority under Chromalloy, contrary to company practice, were to be considered. DenBoer had not been laid off in 1984; four night-shift employees with less overall seniority, Wigton, DeVaney, Gerdes, and Kirkpatrick, had been laid off at one time or another during that year, but were not laid off at this time. Three of these four, I note, were active SWOC members.

Stettnichs selected DenBoer, he claimed, because although DenBoer was a good worker, he tended to disrupt other employees with conversation while he took breathers from his work. Stettnichs' observation of this was corroborated by Donnie Juhnke, a SWOC member and union supporter.

The General Counsel has failed to prove either employer knowledge of John DenBoer's union activity or disparate treatment, elements critical to her prima facie case. Moreover, even if I were to assume that Respondent's failure to lay off first from the night shift, or to consider dates of hire before Amerequip's acquisition, were contrary to prior practice and were somehow to surmount the knowledge hurdle, I would still have to find for Respondent with respect to this employee. Respondent has proffered a legitimate and credible explanation for his selection and, had it chosen someone with less Chromalloy seniority from the night shift, it would have had to choose between four other employees, the two least senior of whom, Wigton and DeVaney, were more openly supportive of the Union than DenBoer was.

Craig Latterell attended the July 20 meeting in Sherman Park but did not become a member of SWOC or wear a SWOC button. Without indicating how Stettnichs acquired knowledge of his alleged support for the Union, Latterell testified that, after the union activity became public, he observed Stettnichs directing cold stares at him and at other union supporters. On 26 July he was in the front of the crowd that presented a request to Benage to honor the employees' vote favoring a shutdown. Latterell had begun working for Chromalloy at another plant in 1973 but had not transferred to Sioux Falls until November 1983. If the later date is used for seniority purposes, there were only two persons in the department with lower Chromalloy seniority than he, Wigton and DeVaney, both on the night shift and both open union supporters. Stettnichs selected Latterell for layoff on the basis that he had spent the least amount of time in the department; Stettnichs' testimony is uncontradicted.

Here, as in the case of John DenBoer, I must find that no prima facie case has been made. Lacking is both evidence of any overt union activity and employer knowledge of his union proclivity. I shall therefore recommend that the allegations with respect to John DenBoer and Craig Latterell be dismissed.

Unlike the individual employees previously discussed, Don Rol was openly and actively involved in the Union's campaign. He and Hoffman initiated it, meetings were held in his home, he solicited support for it by canvassing employees in the shop, he spoke at the Sherman Park rally of 20 July, he was a SWOC member, he wore his SWOC button on 24 July, and he addressed his fellow employees in the lunchroom at noon on 25 July, refuting Benage's claims concerning Respondent's competition. His union activity was known to supervision, particularly Stettnichs and Campbell. And, the 8(a)(1) violations attributable to Campbell establish Campbell's animus toward unions generally and toward Rol as a union activist in particular. By this evidence, the General Counsel has established a strong prima facie case of discriminatory selection.

According to Stettnichs, all the employees to be laid off were basically good workers; he chose Rol because he believed Rol to be the newest person in the department. Rol was, in fact, the least senior employee in that department on the day shift, but only *if* Chromalloy seniority was considered. Considering Amerequip seniority however placed him on a par with all the others. In light of Respondent's position that it deemed all those employed on 22 December 1983 to have equal seniority, its reliance on Chromalloy seniority to justify the selection of Rol, without comparing his work habits, tardiness, productivity, or versatility, is inconsistent with its past practice and insufficient to overcome the General Counsel's prima facie case. Accordingly, I must conclude that Respondent laid off Don Rol because of his union activity, in violation of Section 8(a)(3).

(4) Dennis Reifers and Edwin Gross—assembly

Three persons were laid off from the assembly department, all from the day shift, including two class A assemblers, Dennis Reifers and Edwin Gross. Respondent retained Doyle Schubert, a class B (and therefore less skilled and less versatile) assembler on the night shift who had less Amerequip seniority than either of them. It also retained on the day shift two class A assemblers, Marlis Anderson and Marty Barber, and one class B assembler, Ward Jenson, who had less Chromalloy seniority than they did. Reifers was a SWOC member who displayed his membership button openly on 24 July and observed supervisors taking note of those who wore the buttons. He spoke to the employees outside the plant on the evening of 25 July. Gross attended all the meetings, addressed the employees in Sherman Park, was a SWOC member, wore his button on 24 July, and spoke before the employees and Stettnichs at noon on 25 July. Of those assemblers retained, Marlis Anderson and Schubert were SWOC members. She did not wear her button until 25 July, after the time when Respondent claimed the selections for layoff were made. Schubert was one of the speakers at Sherman Park.

Reifers and Gross were selected for layoff by Campbell, their foreman. He selected Reifers for layoff, he claimed, because, for the past 7 or 8 years, Reifers had been primarily crating loaders, which was work others could do. Additionally, he noted, Reifers did only a minimum amount of work and frequently yelled at Anderson to slow down. He chose to retain Marty Barber because of Barber's experience on mixer boxes, Ward Jenson because Jenson had been on mounting kits the longest, and Marlis Anderson because she was the best person on the small loader jig.

Anderson corroborated Campbell's claim that Reifers had, on occasion, told her to slow down. She testified, however, that she was a very fast worker, that others have also protested her pace, and that Reifers' statements to her were in the nature of jokes that did not affect her performance. Reifers testified that he did a number of things besides crating loaders, including working on mixer boxes, and his testimony was corroborated by both Anderson and Campbell. Campbell admitted that Reifers' efficiency rating was 100 percent, although Respondent downplayed the significance of this figure, noting that all, or nearly all, employees were so rated. There was no evidence that Reifers had ever been reprimanded or disciplined for not working to his capacity or for suggesting that others slow their work pace.

According to Campbell, he selected Gross, whom he acknowledged to be experienced in various jobs, because of Gross' record of tardiness and because Gross did not put out any extra effort in his work. Gross' absentee calenders, which Campbell did not have before him when the choices were made, reveal that Gross was tardy 8 times in 1983, 23 times in 1984 including 13 times by the end of July, and only 5 times in 1985. There is no evidence in this record with respect to how Gross' record of tardiness compares with that of other employees who were not laid off. The record does establish that Respondent did not lay off Gross in 1984, when his tardiness record was much worse; in that year, Schubert was laid off. There is also no evidence in this record indicating that Gross was ever reprimanded or disciplined for failing to work to his full capacity.

Based on the foregoing, I must conclude that the General Counsel has established a prima facie case of discrimination with respect to both Reifers and Gross that Respondent has failed to rebut. Reifers and Gross were both known union supporters who worked for, and were chosen for layoff by, Campbell. Campbell is the one supervisor with strongly demonstrated antiunion animus. The reasons asserted by Campbell for their selection, moreover, do not withstand scrutiny. Gross and Reifers were both experienced assemblers, capable of, and experienced at, doing a number of different jobs, as their "A" classifications would attest. Respondent retained two class B assemblers who, by definition were less versatile; one was retained specifically because he had worked at a single job for a long time. The retention of these class B assemblers is directly contrary to Respondent's claim that it endeavored to retain the most versatile employees. I note, too, that no one was selected for layoff among the night-shift assemblers, contrary to the pattern in all other departments, even though the person with least seniority in the department, Doyle Schubert, was on that shift.

With respect to Reifers, I would particularly note that supervision either did not know of his "slow down" statements or did not take them seriously at any time before the layoffs. If they had knowledge and took them seriously, they most assuredly would have taken some corrective action; attempts to slow down the work of other employees is not the kind of conduct the management of any company would tolerate lightly. Similarly, I cannot credit Campbell's alleged reliance on Gross' tardiness record. He received no warnings for tardiness during Amerequip's ownership of the plant and his record was markedly better than it had been in 1984 when he was not included among those to be laid off. Finally, I note the absence of any evidence or even claim that Gross' tardiness was any worse than that of others who were retained.

Accordingly, I must conclude that Respondent laid Dennis Reifers and Edwin Gross off because of their union activity, in violation of Section 8(a)(3) and (1).

(5) Dale Clyde and Edwin Blair—paint department

Five people were selected for layoff from the paint department, three production helpers with the lowest Amerequip seniority from the night shift and spray painter Dale Clyde and production helper Ed Blair from the day shift. Retained on the night shift were two employees with lower Amerequip seniority than Clyde and Blair; one was Sheldon Bohms, a spray painter, and the other was Steven Johannsen, a production helper. There was no one retained on the day shift with a post-22 December 1983 hiring date; Merle Baatz, Kenny Baatz, and Richard Thompson, painters, and Robert Hadrath and Teresa Ingalls, production helpers, who had lower Chromalloy seniority, were not laid off.

Dale Clyde was a SWOC member who wore his button to work on 24 July. Ed Blair was active from the beginning, attending union meetings, speaking at Sherman Park on July 20, and wearing his button as a member of SWOC on 24 July. However, there were also SWOC members among the paint department employees who were not laid off: Steve Johannsen (who also spoke at Sherman Park), Teresa Ingalls, Steve Noonan, and Sheldon Bohms. Merle and Kenny Baatz, who were retained, were opposed to the Union; they removed some union postings and placed certain antiunion literature on the bulletin boards. However, there was no evidence that their views on the Union were known to Respondent at the time of the layoffs.

Don Stettnichs selected the day-shift paint department employees to be laid off. He initially selected Kenny Baatz, whom he believed to be the newest employe in the department, and Ed Blair, whom he deemed to be the slowest. However, he decided to keep Baatz and lay off Clyde (who was actually the newest painter) after Campbell suggested that he would have a problem if he kept Clyde and not Baatz. Baatz, Campbell claimed, was a better painter and Clyde had a problem getting along with people. Campbell's opinion of Clyde's work was corroborated by another painter, Thompson, but disputed to some extent by assembler Marlis Anderson. Both Thompson and Anderson gave testimony tending to corroborate Campbell with respect to Clyde's argumentativeness. Blair's change notices from July 1983 through April 1985 all note that he was a good worker; however, his evaluation for 1984 stated that he was only "fair."

Stettnichs' choice of Clyde as one of the painters to be laid off, on Campbell's suggestion, after having first selected Ken Baatz, is very suspicious. Clyde supported the Union's campaign and Baatz opposed it and Campbell was the most openly antiunion supervisor in the plant. However, even if one assumes that Clyde's union activity was noted by Respondent, there is no evidence that Baatz was known to be antiunion. Moreover, Respondent has put forth a plausible explanation for the substitution, one that was corroborated by other employees, and has thus overcome the General Counsel's prima facie case. Similarly, assuming that a prima facie case has been made out with respect to Blair's layoff, I must find that it had been rebutted by Respondent's evidence. Stettnichs' explanation, that he chose Blair because Blair was the slowest, is supported by Blair's 1984 evaluation. It is further supported by the oral reprimands for insufficient productivity and talking given Blair and Clyde on 25 July and 13 August, which the General Counsel did not allege to have been discriminatory, and by the written warning of 4 September, regarding which I have found insufficient evidence of discriminatory motivation, as discussed infra.

Accordingly, I shall recommend that the allegations with respect to the layoffs of Dale Clyde and Ed Blair be dismissed.

c. *Recall and substitution*

On 8 August, the nine employees discussed immediately above were offered immediate reinstatement and full backpay for the time they had lost. All but DenBoer accepted reinstatement. Eight other employees with lower departmental seniority were laid off in their stead. The recall and substitution followed Herb Miller's receipt of the employees' 30 July letter, Miller's pledge to examine the layoff to ensure that it was done fairly, and the Union's unfair labor practice charges. The layoff, as reconstituted, followed overall (including Chromalloy) plant seniority, by departments, without regard to what shifts the employees were working on. It was, Magowan testified, done at least in part to reduce the possibility of litigation.[32]

The General Counsel and the Union contend that the substitution of eight employees for others earlier laid off is but a continuation of what they alleged to be the unlawful conduct involved in the 26 July layoff. As I have found the evidence insufficient to establish that the 26 July layoff was discriminatorily motivated, it follows that the substitution of eight other employees, to make that layoff conform to overall plant seniority, has similarly not been proven to be discriminatorily motivated. Accordingly, I shall recommend that this allegation be dismissed.

d. *Layoff or discharge?*

About 29 July, Respondent sent each of the laid-off employees a letter stating that, in view of its forecasts indicating no likely improvement in the agricultural implement business for the next 18 months to 2 years, there was little chance of their being recalled with the next 2 years or ever. Accordingly, they were told, their layoffs were being classified as permanent. The change notices that issued about 30 July, and those that issued 8 August, similarly stated that the employees had been "discharged/terminated." Based on this evidence, the General Counsel alleges that Respondent converted the status of the employees from layoff to discharge in violation of Section 8(a)(3). Respondent, citing evidence that at all times, both before and after 29 July, the employees were told they would be recalled when and if work picked up, denies that the employees had been discharged. Respondent also relies on the employees' own unemployment compensation claims describing themselves as having been laid off for lack of work, the Company's failure to contest any of those claims, and the Union's position in the representation case that the employees had a reasonable expectation of recall as evidencing that the employees and their representative did not reasonably believe that they had been discharged. In *Ridgeway Trucking Co.*, 243 NLRB 1048, 1049 (1979), enfd. 622 F.2d 1222 (5th Cir. 1980), employees who were engaged in a work stoppage seeking better wages were ordered to either go to work or leave the premises. Similarly, in *Workroom for Designers*, 274 NLRB 840 (1985), protesting workers were told that if they walked out they would be considered as having quit. In both cases, the employees were found to have been discharged, the Board stating:

> The test for determining "whether [an employer's] statements constitute an unlawful discharge depends on whether they would reasonably lead the employees to believe that they had been discharged . . . . It is sufficient if the words or actions of the employer would logically lead a prudent person to believe his tenure had been terminated."

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[32] Contrary to the Union's contention, offers of reinstatement and backpay aimed at minimizing potential liability are not properly considered admissions by a respondent that it was unlawfully motivated in its initial layoff or discharge decisions. See *Virginia Street Discount Liquors*, 240 NLRB 988, 1007 (1979); *Rudy Patrick Co.*, 204 NLRB 564 fn. 2 (1973); and *Alamo Express, Inc.*, 200 NLRB 178 (1972).

In each of the foregoing cases, words amounting to something less than a clear statement that the employee was discharged were found to convey the intention to discharge. On the other hand in *Valley Bakery*, 226 NLRB 532 (1976), an employee who had been told to "go home" following an outburst at his employer and who deemed himself to have been discharged by those words was found not to have been discharged. Rather, it was determined, he had "jumped the gun" or acted unreasonably in reaching such a hasty conclusion.

In *Maine Apple Growers*, 254 NLRB 501 (1981), seasonal workers who had been temporarily laid off were informed by letter that they would not be recalled. The administrative law judge concluded that the employer had a legitimate business reason for not recalling them; he also concluded that the employer would not have told them so if there had not been a representation case pending wherein the employer was seeking to prevent or discourage those employees from voting. The Board found, contrary to the judge, that the employees enjoyed a reasonable expectation of recall; it did not, however, disturb his conclusion that the employer did not violate Section 8(a)(3) or (1) by converting the layoffs from temporary to permanent or by so informing the employees.

The instant case lies somewhere in the midst of the foregoing cases. The employees were informed that, in view of business forecasts, they should consider their layoffs as permanent. Respondent relied on the permanent layoff letter in the representation case to support its position that these employees had no reasonable expectation of recall and, one must suspect that the letter was prepared and sent in anticipation of the filing of a representation petition, in order to preserve just such an argument. Respondent had no practice of laying off employees permanently.[33] And, at the same time that the employees were sent the letters and the change notices, they were informed that they still had recall rights; they would be recalled if business picked up within a period of 1 year or the length of their employment, whichever was less, pursuant to Respondent's seniority policies. Their recall rights were voiced orally on 26 July, 8 August, and at the representation case hearing on 23 August. The recall policy was posted in the plant, at the Union's request, about 28 August. Moreover, as Respondent noted, the employees considered themselves laid off, not discharged, at least for the purpose of unemployment compensation, the employer did not dispute their UC claims, and the Union has, at all times, maintained that the employees had only been laid off temporarily and expected to be recalled. Whether Respondent's motive in sending out the 30 July change notices and the 29 July letter was to lay a foundation for arguments to be made in a representation case it expected to see filed or to fairly advise the employees that they should not idly await recall, I am satisfied from all the above that Respondent did not intend to discharge the employees. I am also convinced that the employees could not (and did not) reasonably interpret Respondent's action as a discharge. Accordingly, I shall recommend dismissal of this allegation.

e. *The reprimand of Clyde and Blair*

The General Counsel contends that the 4 September warnings given to Clyde and Blair for spending too much time talking and for working too slowly were motivated by their union activity. The evidence, I find, is insufficient to support this contention. Such warnings were consistent with Respondent's practices, these employees had previously been warned for similar conduct, and they had been observed working slowly and talking. Their slow work pace was consistent with their own stated intentions concerning working in the face of what they deemed to be a discriminatory layoff, nothing was said to them linking the discipline to their union activity, and no other union supporters were similarly disciplined. The warnings may not have been entirely fair in light of Harlan Fluitt's absence from the line that day, but I cannot find that they were discriminatory. Accordingly, I shall recommend that this allegation be dismissed.

4. The alleged refusal to bargain

Such limited unfair labor practices as I have found to have occurred do not rise to the level of either "outrageous," "pervasive," or "extensive" as those terms are used in *NLRB v. Gissel Packing Co.*, 395 NLRB 575 (1969), and its progeny to define when a bargaining order on the basis of authorization cards, without an election, is warranted. Virtually all the violations I have found involve Section 8(a)(1) and the most serious of those, involving the actions of a single first-line supervisor, occurred near the outset of the campaign. See *Clark Equipment Co.*, 278 NLRB 498 (1986). As previously noted, none of the postlayoff violations were of the "hallmark" variety and such 8(a)(3) violations as I have found were essentially remedied by the Employer, who quickly reinstated all the employees about whom there was a question of discriminatory selection, with backpay. I cannot find that such violations, in these circumstances, preclude the possibility that the application of traditional remedies will permit a fair election to be conducted. Accordingly, I find it unnecessary to resolve Respondent's contentions with respect to the validity of 10 of the authorization cards and I shall recommend that the complaint's 8(a)(5) allegation be dismissed.

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[33] The few change notices placed in evidence (R. Exhs. 51, 52, 53, and 54) that indicated that a given employee had been terminated or discharged "due to economic conditions" or "lack of work" do not establish such a practice. Three of the four are for an employee with only 4 to 6 weeks of employment and only one was for a unit employee. Two of the four issued in months when Respondent was not laying off other employees and only two issued at times when Respondent was laying off employees in any numbers. Even in the latter two cases, it appears that only these two employees were told that they were being terminated. All the rest of those laid off at the same times were simply told that they were being laid off.

III. THE REPRESENTATION CASE

A. *The Challenged Ballots*

1. The laid-off employees—a reasonable expectancy of recall

The ballots of 24 laid-off employees were challenged by the Board agent conducting the election.[34] Schwartz and the Union agree that the issue with respect to the eligibility of these voters is whether they had a reasonable expectancy of recall in the near and foreseeable future at the time of the election. "In determining whether laid-off employees have a reasonable expectancy of recall, the Board evaluates 'objective factors' which include 'the employer's past experience, the employer's future plans, the circumstances of the layoff, and what the employee[s] w[ere] told about the likelihood of recall.'" *Atlas Metal Spinning Co.*, 266 NLRB 180 (1983); *Tenneco Automotive*, 273 NLRB 103, 105 (1984); *Fabricators of Minnesota*, 273 NLRB 511 (1984).

I am convinced that application of the foregoing standard to the facts of the instant case requires a conclusion that the laid-off employees enjoyed a reasonable expectancy of recall and were eligible voters. First, I note that Respondent's was a cyclical business, with its annual low point falling in the summer and business generally picking up in the fall. In line with the seasonal nature of its business, it regularly laid off and then recalled employees. That practice is recognized by Schwartz' seniority practices, whereby employees retain both seniority and recall rights for a period equal to the lesser of either 1 year or the length of their employment, and its insurance practices, whereby laid-off employees are instructed on how to convert their group to individual coverage. Such conversion facilitates re-entry into the group on recall and manifests a continuing interest in the terms and conditions of employment within the unit. *Atlas Metal Spinning*, supra.

Schwartz, however, contends that 1985 was different from prior years, that its business was at an extremely depressed level for the 3 months preceding the election with a continued poor outlook for many months thereafter, that the agricultural industry that it served was in a severe slump, that tractor prices were increasing, that its shipments were going into Ford's warehouses indicating slow retail sales, and that its inventory was up. The record, however, shows that the situation was not nearly as bleak as Respondent describes it. Portions of the farm economy were depressed but some farmers were making money, depending on their crops or their business acumen. Much of Schwartz' business, moreover, was in small loaders; those loaders were not all destined for the farm economy and Schwartz was seeing increased sales in those loaders. Ford had predicted 6000 loader orders in 1986, with increased orders for small loaders, as evidenced by Schwartz' own OEM report of 27 September 1985; this was an improvement over 1985, at least in total numbers. And, the Ford reports did not indicate any reason to be overly pessimistic. The report for September 1985, the last report received before the election, indicated substantial increases in Ford commitments for October, November, and December 1985 and January 1986 over the corresponding months of a year earlier. The October Ford report, dated 1 November, continued to show improvement over most of the months of a year before. Further, although inventory was at 183 pieces in October, up from 40 in August, it fell rapidly thereafter, to 71 by November. Even at 183, Schwartz had only about one-half a month's production in inventory. At the same time, Respondent had reduced its overshipped position very substantially by October and continued that trend until it was undershipped by nearly 70 small loaders and overshipped by only 37 large loaders by November. Schwartz was even further undershipped by the end of the year. By the time of the election, and thereafter, Respondent no longer had reason to be concerned with the prospect of Ford's continuing to "net out."

Further, unlike the employers in *Tenneco Automative*, supra, *Foam Fabricators*, supra, and *S & G Concrete*, 274 NLRB 895 (1985), where the Board found no reasonable expectancy of recall, Schwartz was not engaged in any longterm effort to reduce the size of its work force. Neither was it faced with the loss of a major customer or with new sources of competition. Every indication this Employer and the employees had at the time of the election tended to indicate that Schwartz' business was picking up and was going to continue in much the same fashion, and at much the same levels, as it had since Amerequip acquired the plant.

Finally, the Board's test calls for consideration of what the employees were told when they were laid off. The employees were told, on the one hand, that their layoffs were "permanent" or that they were "discharged." That statement, I suspect, was purposely phrased with an eye toward the representation case Respondent expected to see filed. On the other hand, the employees were also repeatedly assured that they would be recalled when work picked up. Based on their prior experience with this Employer, and the statements earlier made by the Employer in May and July, they could anticipate that work would pick up in the fall, as it had in the past. I conclude that what the employees were told generally supports their reasonable expectancy of recall. At most, the statements that they were permanently laid off neutralize the statements about recall when work picks up and are neutralized in turn by them.

Accordingly, I must conclude that the 24 laid-off employees had a reasonable expectancy of recall at the time of the election and were eligible voters whose ballots should be opened and counted. I shall therefore recommend that the challenges to their ballots be overruled.

2. The supervisory status of Charles Erickson

The Union challenged the ballot of Charles Erickson, nominally a group leader included within the unit, on the grounds that he was a statutory supervisor. As only the

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[34] The 24 are: Arnold Peterson, Larry Krueger, Michael McKee, John Miller, Doyle Schubert, Kevin Tjepkes, Steve Johannsen, Robert Hoffman, Hiram Anderson, Charles Temple, Wesley Jaqua, Dennis Lupkes, Mark Freese, Sharon Hallem, Sheldon Bohms, Michael Sweir, Greg DeVaney, Richard VanMeveren, Randolph Ekanger, Lee Wigton, Steve Blair, William Blair, Terry Bohnenkamp, and Alan Lawrence.

Union proffered evidence on this issue, the following facts are undisputed:

Until May 1985, Dave Steenblock was the night-shift supervisor, over all the departments, and Erickson was the welding department group leader. In May, Steenblock left and Erickson was the only person remaining on the night shift with authority on behalf of management, overseeing 20 to 30 employees. He continued in this capacity until December. During this period, he was referred to by management as the foreman in at least one notice to employees (U. Exh. 1), he wrote comments on employee change notices concerning the employees' work habits and efficiency and signed those notices as the foreman. Those change notices were cosigned by higher management (U. Exhs. 2, 3, 4, 6, and 7(a)–(i)). He granted vacation leave on his own authority, he issued at least one written reprimand threatening discharge (U. Exh. 5), he orally reprimanded at least one employee, he assigned and checked work, he called job applicants who had formerly worked at the Company and told them to report for work, and he interviewed and hired at least one employee.

In order to establish that an individual is a supervisor within the meaning of Section 2(11) of the Act, it is only necessary that one show that the individual, exercising independent judgment, has the authority to do any one of the following: "hire, transfer, suspend, lay off, recall, promote, discharge, assign, reward, or discipline other employees, or responsibly to direct them, or to adjust their grievances, or to effectively recommend such action . . . ." The undisputed evidence establishes that Erickson possessed, for at least 5 months before the election, and continuing for several months after that, the authority to hire, to assign, to discipline, and to responsibly direct the employees on the night shift. Indeed, if he did not, those employees would have been unsupervised during this entire period. Accordingly, I find that he was a statutory supervisor at the time of the election and recommend that the Union-Petitioner's challenge to his ballot be sustained.

B. *The Objections*

Consolidated for hearing with the unfair labor practice allegations and challenges were four union-filed objections to the conduct of the election plus one allegation uncovered in the course of the investigation. All these objections track unfair labor practice allegations.

As previously set forth, I have found that Schwartz did not discriminatorily lay off or employees on 8 August. Similarly, I have found that it did not discriminatorily discipline Dale Clyde and Ed Blair on 4 September. Accordingly, I shall recommend that the objections to this conduct be overruled.

Union Objection 3 alleges as objectionable conduct the Employers' ejection of Larry Krueger and John Miller from the plant lunchroom about 4 October. Its Objection 6 alleges the Employer's coercive distribution of hats and "Vote No" buttons about 17 October. I have found both of these actions, which occurred after the petition was filed, violative of Section 8(a)(1). Pursuant to the Board's usual policy, a new election is to be directed "whenever an unfair labor practice occurs during the critical period since '[c]onduct violative of Section 8(a)(1) is, a fortiori, conduct which interferes with the exercise of a free and untrammeled choice in an election.'" *Dal-Tex Optical Co.*, 137 NLRB 1782, 1786 (1962), quoted with approval in *Clark Equipment Co.*, 278 NLRB 498, 505 (1986).

Schwartz, however, argues that even if this conduct is found violative of Section 8(a)(1), it is de minimis, minor, or technical in nature, affected only a few employees and, therefore, should not result in the election being set aside. I cannot agree. Unlike the conduct involved in *Clark Equipment*, supra, *General Felt Industries*, 269 NLRB 474 (1984), and *Coca-Cola Bottling Co.*, 232 NLRB 717 (1977), and contrary to the Employer's assertion, the conduct here affected and was known to virtually every employee in the unit. Krueger and Miller were ordered out of the lunchroom while they were engaged in conversation with other employees; those other employees could not help but observe their ejection. Further, that ejection potentially precluded Miller and Krueger from reaching more employees with their prounion message. Schwartz' second violation within the critical period reached even more employees; the hats and "Vote No" buttons were distributed in meetings involving all the employees on both shifts. Moreover, the Board has already held that the coercive distribution of antiunion insignia tends to restrain employee free choice and, in and of itself, warrants that the election be set aside. *Tappan Co.*, 254 NLRB 656 (1981) (Member Penello dissenting); *Pillowtex Corp.*, 234 NLRB 560 (1978). Finally, I take note of the fact that here, unlike *Clark Equipment* and *General Felt*, the vote was close, 23 to 31. The unfair labor practices clearly reached enough employees to have had some effect on the outcome.

C. *Challenges and Objections—Conclusion*

I have heretofore recommended that 24 of the challenged ballots be opened and counted. In the event that the revised tally of ballots establishes that the Union has secured a majority of the valid votes cast, a Certification of Representative should issue. If it does not, I recommend that the election conducted on 29 October 1985 be set aside on the basis of Union Objections 3 and 6, and a rerun election be conducted.

THE REMEDY

Having found that Respondent has engaged in unfair labor practices in violation of Section 8(a)(1) and (3) of the Act, I shall recommend that it be ordered to cease and desist therefrom and take certain affirmative action designed to effectuate the policies of the Act. Inasmuch as Don Rol, Edwin Gross, and Dennis Reifers, the employees whom I found to have been discriminatorily laid off, were reinstated with full backpay, no further reinstatement or backpay order is warranted.

FURTHER CONCLUSIONS OF LAW

1. By interrogating its employees concerning their union membership, activities, and desires or the union membership, activities, and desires of their fellow employees; by threatening employees with discharge because they engaged in union activities; by discriminatori-

ly prohibiting laid-off employees from engaging in union activity in nonwork areas of the plant; and by coercively distributing antiunion insignia in such a way as to interrogate employees concerning their support for the Union or for the Company, Respondent has interfered with, restrained, and coerced its employees in the exercise of the rights guaranteed them in Section 7 of the Act, thereby violating Section 8(a)(1) of the Act.

2. By discriminatorily selecting Don Rol, Edwin Gross, and Dennis Reifers for layoff because they engaged in union activities, Respondent has discriminated against those employees because of their union activities in violation of Section 8(a)(3) and (1) of the Act.

3. The unfair labor practices enumerated above are unfair labor practices affecting commerce within the meaning of Section 2(6) and (7) of the Act.

4. Respondent has not engaged in any unfair labor practices not specifically found herein.

5. The employees who were laid off on 26 July and 8 August 1985 had a reasonable expectancy of recall at the time of the election were eligible voters in that election, and the challenges to their ballots must be overruled.

6. Charles Erickson was a supervisor within the meaning of Section 2(11) of the Act, and the challenge to his ballot must be sustained.

7. Certain of the unfair labor practices set forth in subparagraph (1), above, occurring after 6 August 1985, have interfered with the employees' rights to a free and untrammeled choice in the election conducted in Case 18-RC-13822 on 29 October 1985 and have tainted the results of that election.

[Recommended Order omitted from publication.]

Pacific Northwest Newspaper Guild Local 82 (The Seattle Times) *and* Kenneth Johnston. Case 19–CB–5614

July 15, 1988

DECISION AND ORDER

BY CHAIRMAN JOHANSEN AND MEMBERS BABSON AND CRACRAFT

On June 30, 1987, Administrative Law Judge Jerrold H. Shapiro issued the attached decision. The Respondent filed exceptions and a supporting brief, and the General Counsel and the Charging Party filed answering briefs.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings,[1] and conclusions and to adopt the recommended Order.

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge and orders that the Respondent, Pacific Northwest Newspaper Guild Local 82, Seattle, Washington, its officers, agents, and representatives, shall take the action set forth in the Order.

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[1] We agree with the judge's finding that the increased portion of the membership dues here did not constitute "periodic dues" within the meaning of Sec. 8(a)(3) of the Act. In so doing, however, we find it unnecessary to pass on the judge's discussion of the standard to be applied in determining whether the purposes for which dues payments are expended will cause such payments to fall outside the definition of "periodic dues" as that term is used in Sec. 8(a)(3).

Melvin Kang, Esq., for the General Counsel.
Hugh Hafer, Esq. (Hafer, Price, Rinehart & Schwerin), and *David S. Barr, Esq. (Barr & Peer)*, for the Respondent.
Kathleen A. Anamosa, Esq. (Davis, Wright & Jones), for the Charging Party.

DECISION

STATEMENT OF THE CASE

JERROLD H. SHAPIRO, Administrative Law Judge. The hearing in this case, held 1 April 1987, is based on an unfair labor practice charge filed 13 September 1985 by Kenneth Johnston (Johnston)[1] against Pacific Northwest Newspaper Guild Local 82 (Respondent), and on a complaint issued 15 August 1986 by the General Counsel of the National Labor Relations Board (Board), alleging that Respondent has engaged in unfair labor practices within the meaning of Section 8(b)(1)(A) and (2) of the National Labor Relations Act (Act), by threatening to cause The Seattle Times to discharge its employees Johnston and Tonya King (King) pursuant to the union-security agreement between Respondent and The Seattle Times because Johnston and King "refused to pay an assessment for Respondent's strike fund and monies to build a new headquarters building in Washington, D.C., and for reasons other than the employees' failure to tender periodic dues and the initiation fees uniformly required as a condition of acquiring or retaining commission membership in Respondent." Respondent filed an answer and an amended answer denying the commission of the alleged unfair labor practices and affirmatively alleging that the proceeding was barred by the second proviso of 29 U.S.C. § 411(a)(4) and that the maintenance of the proceeding constitutes an abuse of the Board's processes because The Seattle Times directly and through its agent, Davis, Wright & Jones, effectively, controls Charging Party Johnston in his "employee" and litigant status.

On the entire record, from my observation of the demeanor of Charles Perlik, the only witness, and having considered the posthearing briefs, I make the following

FINDINGS OF FACT

I. THE BUSINESS OF THE EMPLOYER INVOLVED

The Seattle Times is a State of Washington corporation, with an office and place of business in Seattle, Washington, where it is engaged in the business of newspaper publishing, distribution, and sales.

During the 12-month period immediately prior to the issuance of the complaint, The Seattle Times derived gross revenues in excess of $200,000, held membership in or subscribed to various interstate news services, including the United Press International and Associated Press, published various nationally syndicated features, including Doonesbury, and advertised various nationally sold products, including Panasonic video cassette recorders and Ford Motor Company automobiles.

The Seattle Times is, and has been at all times material, an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

II. THE LABOR ORGANIZATION INVOLVED

Respondent Pacific Northwest Newspaper Guild Local 82 is a labor organization within the meaning of Section 2(5) of the Act.

III. THE ALLEGED UNFAIR LABOR PRACTICES

A. *The Evidence*

Respondent is an affiliate of The Newspaper Guild, AFL–CIO (Guild), an International Union, whose principal office is located in Washington, D.C. Respondent's dues structure is established by article XVII of the Guild's constitution. In 1985 article XVII read in pertinent part as follows:

> *Section 2(b).* Monthly dues. The monthly dues fixed and maintained by Locals . . . shall not be

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[1] Johnston filed an amended charge and a second amended charge on 16 September 1985 and 14 August 1986, respectively.

289 NLRB No. 113

less than the Minimum Dues Schedule set forth in Section 2(c) of this Article. In addition, the monthly dues of each member shall include the amounts set forth in Section 2(d) of this Article.

Section 2(c). The Minimum Dues Schedule shall be either that listed under Table A: [sets out a minimum dues schedule under Table A for various wage levels and also includes a Table B] or five percent of one week's regular weekly compensation up to the maximum required by the above schedules, plus $1.50, or a dues schedule which yields at least an equivalent total dues income.

Based on 1985 Convention action, following approval by the general membership by a Guild wide referendum to be held after January 1986, the foregoing paragraph shall be changed to read: "or a percentage of one week's regular weekly compensation up to the maximum required by the above schedules, as follows: 5 percent, plus $1.50, through and including June 30, 1986; and 6 percent, effective July 1, 1986; or a dues schedule which yields at least an equivalent total dues income."

Section 2(d). The monthly dues of each member shall include, for all months except when The Newspaper Guild is in a *reduced dues period* as defined in Section 2(e) of this Article, and except for the one-month period referred to in the second paragraph of Subsection (e) of this Section, the difference between the amounts set forth under Table A and Table B of Section 2(c) of this Article.[2] In lieu of as an alternative to the foregoing, the Minimum Dues of each member shall include 3.2 percent of one week's regular weekly compensation if paid monthly, or 0.745 percent of one week's regular weekly compensation if paid weekly, up to the maximum required by the foregoing.

Section 2(e). Reduced Dues Period. Except for the one-month period referred to in the second paragraph of this Subsection, The Newspaper Guild will be in a *reduced dues period* whenever the International Defense Fund reaches $6 million and will remain in a *reduced dues period* thereafter until the International Defense Fund is below $4,500,000. No accounts receivable shall be counted in calculating the dollar amounts referred to in this Subsection (e). The Secretary-Treasurer shall notify all Locals when TNG is in a *reduced dues period*, and the dues specified in Section 2(d) shall not be payable during said period.

When the dollar amounts in the International Defense Fund reach $6 million for the first time following August 1, 1985, then for the ensuing month the monthly dues of each member shall include dues equal to the rates required under Subsection (d) of this Section, with the income produced thereby to be used exclusively to fund TNG's severance pay liability to its staff.

Also relevant are sections 7(c) and (d), sections 8(a) and (b), and sections 13 and 14 of article XVII, which read as follows:

> *Section 7(c).* Out of every per capita payment under (a)(1) [referring to the per capita tax the local unions are required to remit to the Guild from the dues, initiation fees and assessments collected from the membership], less $1.35, 15 percent shall be deposited in the International Defense Fund effective May 1, 1982, through January 31, 1987 . . . .
>
> *Section 7(d).* The entire amount of every per capita payment under (a)(2) shall be deposited in the International Defense Fund.[3]
>
> *Section 8(a).* An International assessment is hereby levied on each member for the months of July and August 1984 in an amount equivalent to that which would be added to a member's monthly dues, pursuant to Section 2(d) of this Article, for months when TNG is not in a reduced dues period.
>
> Any constitutional provision to the contrary notwithstanding, this assessment shall be deposited to a special account of the General Fund. Funds from the special account shall be used for the exclusive purpose of organizing and attendant expenses.
>
> Members shall not be required to pay both the assessment and Section 2(d) dues for the same month(s).
>
> If in July and/or August 1984, TNG is not in a reduced dues period, amounts collected by TNG under Section 7(a)(2) of this article for either or both of those months shall be deposited to the special account, rather than to the Defense Fund as per Section 7(d) of this Article.
>
> *Section 8(b).* The IEB or the Convention may levy an international assessment for the Defense Fund upon the membership while the Defense Fund contains 15 percent or less of its ceiling figure and after all credit lines have been exhausted in the judgment of the President and the Secretary-Treasurer.
>
> *Section 13.* All funds received by The Newspaper Guild, with the exception of assessments and International Defense Fund per capita, and with the exception of funds earmarked by Locals for the purchase of group insurance for Local members, shall be deposited to the general account. All assessments, Defense fund contributions and International Defense Fund per capita shall be deposited in the International Defense Fund. Funds earmarked by Locals for the purchase of group insurance shall be deposited in an insurance fund account. The three funds shall be kept in separate accounts in a bank or banks. In an emergency, the IEB shall have the authority to transfer money between the general account and the International Defense Fund, but such action shall be reported to the next Convention for specific approval

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[2] Although the language is ambiguous it is undisputed that sec. 2(d) dues are computed by adding the difference between the amounts set forth in Tables A and B to the amount of the sec. 2(c) dues set forth in Table A.

[3] Sec. 7(a)(2) provides that for each payment of dues specified in sec. 2(d) of art. XVII, the full amount shall be remitted by the local unions to the Guild.

> *Section 14.* TNG funds shall be expended only for activity within the constitutional purposes of TNG. Expenditures for strike activities, for other activities of an emergency nature, and for purposes authorized by Convention action or referendum and in the manner and subject to the limitations prescribed thereby, shall be made from the International Defense Fund, at the direction of the IEB. Expenditures also shall be made from the International Defense Fund in accordance with Section 7(g) of this Article[4] . . . . Normal operating expenses and all other expenditures shall be made from the General Fund.

The above-described dues structure in sections 2(c) through (e) of article XVII of the Guild's constitution, first appeared in the Guild's 1972 constitution. It was adopted as the result of action taken by the delegates to the Guild's annual convention held in the summer of 1972. The Guild's finance committee made the following report and recommendation which was adopted by the convention:

> When the Guild first established an International Defense Fund it was thought that the fund could be maintained at the necessary and desirable levels by diverting out of regular monthly per capita payments a specified percentage, with only an occasional need for supplemental contributions from Guild members. Because these supplemental contributions were expected to be sporadic and infrequent, they were labelled "assessments." In recent years, however, it has become evident that in order to maintain the Defense Fund at a desireable level, supplemental contributions have been required on a regular and periodic basis—nearly four years of them, in fact, starting in January 1968. Indeed, it's obvious that the contributions required to maintain the Defense Fund have become an integral and periodic part of the Guild's dues structure.
>
> In fact, it is now clear that the label "assessment" is a misnomer as applied to the International Defense Fund contributions, and the Finance Committee recommends that this convention make whatever changes are necessary to our international Constitution to clarify those payments and recognize them for what they are—a periodic and integral part of the regular dues structure of our union.
>
> What we are saying is that the Finance Committee is urging this convention to change the words to fit the facts; we are not recommending any change in the level or frequency of dues our members are being called upon to pay or the level of reduced dues payments required constitutionally when the Defense Fund reaches two million dollars.

Consistent with the finance committee's report and recommendation, the Guild's constitution committee recommended that article XVII of the constitution be amended so the Guild's dues structure would be as described, supra, in sections 2(c) through (e) of article XVII of the 1985 constitution. The constitution committee's recommended amendment, adopted by the convention, contained the following preamble:

> Whereas the Newspaper Guild (TNG) has for many years maintained a permanent International Defense Fund and regards the continuing vitality of that Fund as essential to the interests of TNG's members; and
>
> Whereas, it was originally conceived that the Fund could be maintained at desired levels by a specific percentage of per capita, with only an occasional need for supplemental contributions; and
>
> Whereas, because supplemental contributions were expected to be sporadic and infrequent they were denominated "assessments"; and
>
> Whereas, in recent years it has become evident that in order to maintain the Defense Fund at desired levels supplemental contributions have been required on a regular and periodic basis (so that, for example, "assessments" were required for 46 consecutive months from January 1968 to November 1971); and
>
> Whereas, it has become self-evident that the contributions required to maintain the Defense Fund are an integral part of TNG's dues structure, and the lable "assessments" is a misnomer; and
>
> Whereas, TNG wishes to clarify the status of these payments and to recognize them as a periodic and integral part of the regular dues structure and not as assessments.
>
> Now, therefore, it is: Resolved, that article XVII of the International Constitution shall be amended as follows:

As I have found, supra, the dues structure as it appears in sections 2(c) through (e) of article XVII of the Guild's 1985 constitution has existed in that form since the Guild's 1972 convention. In 1971, prior to the adoption of this structure, article XVII read, in pertinent part, as follows: section 2(c) provided that monthly dues shall not be less than the minimum dues schedule set forth in that section; section 6(a) required the locals affiliated with the Guild to remit to the Guild, as a per capita tax, a certain percentage of the monthly dues, initiation fees, and assessments they collected from the membership; section 6(c) provided that from each per capita payment of the members' monthly dues remitted to the Guild by the locals, less 10 cents, 40 percent shall be deposited in the International defense fund and that when on or after 1 August 1971 the fund shall exceed $2 million, in the following month and thereafter, out of every said per capita payment, less 10 cents, 30 percent shall be deposited to the fund; Section 7 provided that in an "emergency" the Guild's executive board was empowered to levy International assessments for the International defense fund on the entire membership on the basis of members' regular weekly compensation at a rate of not more than one assessment in 1 month in accordance with a rate schedule set forth in section 7; section 7 defined an "emergency" as whenever the International defense fund fell below $2 million and further provided that when the fund reached $2 million an emergency shall also again exist whenever the fund is below $1,500,000 and would continue only until the fund reached $2 million. As was the case with the Guild's 1985 constitution, supra, the 1971 constitution provided for all assessments and International defense fund contributions and International defense fund per capita to be deposited in the International defense fund rather than the general fund, but in an emergency the Guild's executive board was given the authority to transfer money between the general account and the International defense fund, subject to the approval of the next convention. Also, as was the case with the 1985 constitution, supra, the 1971 constitution provided that "[e]xpenditures for strike activities, for other activities of an emergency nature, and for purposes authorized by Convention action or referendum and in the manner and subject to the limitations prescribed thereby, shall be made from the International Defense Fund, at the direction of the [Guild's executive board]" and that "normal operating expenses and all other expenditures shall be made from the General Fund."

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[4] Sec. 7(g) provides that "[i]n the event a strike or lockout results in a reduction of per capita payments that otherwise would be made to the General Fund, an amount equal to such reduction shall be transferred monthly from the International Defense Fund to the General Fund."

To sum up, the Guild historically has maintained an International defense fund which is currently financed by a percentage (15 percent) of the members' dues and by an increase in dues payments when the defense fund falls below a certain level. Prior to 1972 when the defense fund fell below a certain level as defined by the constitution, the Guild's members, pursuant to the constitution, were required to pay an "assessment," if the Guild's executive board ordered an "assessment," until the amount of money in the fund increased to the level set by the constitution. As a result of the above-described amendment to the constitution in 1972, this "assessment" was referred to as "dues" and became a part of the Guild's dues structure and since then, pursuant to the constitution, whenever the International defense fund falls below a certain figure set by the constitution, the members are required to pay increased dues with the increased portion of the dues being transmitted by the locals to the Guild for deposit in the defense fund until the fund's level has been raised to the level set by the constitution, at which time membership dues are reduced to their former reduced level, as required by the constitution.

Since the above-described amendment to the Guild's constitution, the Guild's members on four separate occasions have been required to pay the increased amount of dues for the purpose of raising the level of the International defense fund to reach the level mandated by the constitution. During the period from 1 January 1972 until 1 April 1987, the date of the hearing in this case, the aforesaid membership dues payments, referred to by the Guild and its members as "Section 2(d) dues" or "regular dues," were made on the following dates: May 1972 through March 1973; March, April, and May 1976; September 1978 through April 1981; and August 1985 through February 1986.

During the last 15 years the Guild has required its members to pay "assessments," in addition to their monthly dues, on three separate occasions: March and April 1975; March and April 1977; and July and August 1984. In each instance these assessments were levied for the specific purpose of paying for the Guild's organizational activities and were collected from the locals affiliated with the Guild pursuant to the procedure described, supra, in section 8(a) of article XVII of the Guild's constitution, as set forth in the 1985 constitution.

During the past 10 years the principal use for the funds in the Guild's International defense fund has been to pay the weekly strike benefits to striking or locked-out Guild members and to pay all the other expenses incidental to the strikes and lockouts involving the Guild's constituent locals, i.e., litigation expenses and salaries of the representatives assigned by the Guild to advise locals during strikes and/or lockouts. Also during a strike or lockout, money from the International defense fund is transferred to the Guild's general fund to compensate for the lower per capita payments by locals when their members are locked out or striking.

In addition, the International defense fund during the past 10 years has been used to make nonstrike- or lockout-related payments, as follows: (1) loans and grants to locals affiliated with the Guild; (2) contributions to unions not affiliated with the Guild; (3) the fees of professionals, i.e., attorneys and accountants, for labor dispute related cases involving affiliated locals; (4) by 1985 convention action, "2(d) dues" payments—payments normally made to the International defense fund—were used to pay more than $400,000 to satisfy the Guild's severance pay liability to Guild employees; (5) in 1985, the Guild's convention authorized an interest-free loan of $750,000 from the International defense fund to the Guild's general fund to be used to purchase a headquarters building for the Guild; (6) for a period of several years the Guild's general fund borrowed money from the Guild's International defense fund and in 1979, by convention action, $678,000 was owed the International defense fund by the general fund as the result of these loans was written off as uncollectible; and (7) administrative and miscellaneous expenses were paid from the International defense fund, including interest on moneys borrowed by the Guild in emergencies, to replenish the defense fund and the cost of printing checks.

Regarding the loans and grants made from the International defense fund to locals for nonstrike- or lockout-related purposes, the record reveals grants or loans for the following purposes: locals' legal expenses incurred in litigating representation and unfair labor practice cases before the National Labor Relations Board; locals' legal expenses incurred in prosecuting contractual grievances before arbitrators; locals' legal expenses incurred in civil lawsuits; expenses incurred by a local in negotiating a nationwide contract, and the expenses incurred by another local whose funds were exhausted as a result of protracted contract negotiations; the expenses incurred by a local in hiring a bankruptcy lawyer to assist it in an effort to keep a potentially bankrupt company in business, and the further expenses incurred by that local in its effort to find a buyer for the business in question; the operating expenses of locals in emergency situations such as, in one case, when a local was without funds because an employer refused to remit its members' monthly dues and, in another case, when a local's funds were depleted by the negotiations of an initial contract and, in another case, a loan of over $200,000 to a local to restore its emergency fund to a level to enable the local to lift its members from the burden of an ongoing special dues rate which was having the effect of eroding membership levels.

Regarding the Guild's contributions from the International defense fund to other unions, the Guild contributed money to support strikes by other unions including a $25,000 contribution to support the striking airline traffic controllers (PATCO), contributed to help locked-out workers represented by other unions, contributed to the campaign being waged by unions in several States against right-to-work legislation outlawing union-security agreements, and contributed $2500 to the Polish Workers Aid Fund to assist workers in Poland.

Regarding the payment of $400,000 in severance pay, the record reveals that by virtue of collective-bargaining contracts with other labor organizations who represent the Guild's employees, the Guild was obligated to pay severance pay to approximately 31 or 32 of its employees who had been permanently terminated due to a reduction in its staff. As described, supra, in the 1985 constitution, the money used by the Guild to meet this severance pay obligation was collected from the membership in the following manner: After the International defense fund in January 1986 reached the $6 million ceiling set by the constitution, the membership paid "2(d) dues" for 1 more month for the sole purpose of raising the necessary amount of money to satisfy the Guild's severance pay obligation. This money, more than $400,000, was not deposited in the International defense fund, but was deposited in a separate trust fund maintained solely for the severance pay moneys.

Regarding the 1985 authorization of an interest-free loan of $750,000 to be used to purchase a headquarters building for the Guild, the record reveals the Guild spends a substantial sum of money renting office space and that the Guild's 1985 convention decided that economically it made more sense for the Guild to own a building rather than pay rent, so the convention authorized the Guild to either build or buy an office building and for the defense fund to make an interest-free loan of $750,000 to the Guild for this purpose.

Regarding the Guild's action in 1979 in writing off as uncollectible $678,000 which the Guild had borrowed from the International defense fund for its general fund, the record reveals that for 8 to 10 years before 1979, part of the per capita membership dues allocated to the International defense fund was never transferred from the Guild's general fund to the defense fund.[5] During those years the general fund showed a deficit, so these moneys that should have been transferred from the general fund to the International defense fund were used with other union funds to pay the day-to-day operating expenses of the Guild. This was done with the full knowledge of membership and was carried as a debt on the general fund's books of account and as an account receivable on the defense fund's books of account. In 1979 these loans totaled over $750,000. The membership, at the 1979 convention, decided to cancel these loans because they did not represent either a true asset or liability of the Guild. Since 1979 there have been no loans from the Guild's International defense fund to the Guild's general fund.

As described in detail supra, the Guild has separate provisions in its constitution for collecting dues, including "2(d) dues," and for collecting "assessments." Consistent with these separate provisions, the Guild provides a receipt form to its locals, which has separate spaces for recording dues and assessments and also provides separate receipt stamps for recording dues and assessments in members' records. Likewise, the Guild's books of account treat "2(d) dues" and "assessments" differently inasmuch as all dues, including "2(d) dues" allocated to the defense fund, are listed by the Guild's accountants as Guild income in computing the Guild's net worth. Assessments, when imposed, are separately recorded and are not included in the accountants' calculations of the Guild's net worth.

As described in detail supra, the Guild's dues are a monthly obligation and the amount of the dues owed varies with members' salaries. During the last 5 months of 1985, so-called reduced dues equaled 5 percent of an individual's weekly compensation, plus $1.50, paid once a month. "Regular dues," also referred to as "2(d) dues," equaled 8.2 percent of an individual's weekly compensation, plus $1.50, paid once a month. "2(d) dues" are collected when the reserves in the Guild's defense fund fall below $4.5 million and continued to be collected until the reserves in the defense fund reach $6 million, at which point the "reduced dues" schedule is reinstituted.[6] The Guild's leadership, within the limits of their ability to estimate the International defense fund's reserves, has followed the formula in the constitution when initiating and ending "regular" dues periods on three of the four occasions when "2(d) dues" were instituted.[7] The record reveals, however, that it is extremely difficult, if not impossible, for the Guild to anticipate when it will be necessary to impose a period of "regular" or "2(d) dues" or to predict with a degree of certainty the length of time such a period will last. The reasons for this unpredictability is that the basis for such decisions depends on a number of unpredictable events such as the failure of one or more of the locals to make their monthly per capita dues payments in a timely fashion, the number and length of the strikes that may occur, the number of employees involved in the strikes, the Guild's inability to negotiate a loan to replenish the International defense fund, or the necessity to repay such a loan.

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[5] The record reveals that the full amount of monthly per capita dues transmitted by the locals to the Guild is placed in the general fund "for the convenience of bookkeeping purposes," and that at the end of the quarterly accounting periods the Guild's auditor directs the bookkeeper to transfer what is constitutionally required from the general fund to the International defense fund.

[6] The reserve levels that trigger "2(d) dues" and "reduced dues" periods have been changed periodically throughout the years by the Guild's membership at annual conventions.

[7] The single exception involved the Guild's decision in February 1985 to wait several months before initiating a "2(d) dues" period, despite a slightly less than $4.5 million reserve.

Respondent and The Seattle Times are parties to a collective-bargaining contract containing a lawful union-security provision which, among other things, provides that if any member of Respondent loses his or her good standing as a member by falling 1 month behind in their dues or assessments, uniformly required as a condition of retaining membership, The Seattle Times shall, on formal notice from Respondent, terminate their employment.

Johnston and King are employed by The Seattle Times in the unit covered by this collective-bargaining contract. In 1981, after having been employed in the contractual unit by The Seattle Times for several years, they resigned their membership in Respondent and agreed to comply with the contractual union-security provision by paying to Respondent the equivalent of periodic dues uniformly required of Respondent's membership. By changing their membership status from full to financial core members, Johnston and King lost a number of rights they had as full members, including the right to vote for or against strike authorizations, the right to strike benefits, and the right to vote at contract ratification meetings or on other issues presented to the membership.

From May 1981 through July 1985 dues were collected by Respondent at the "reduced dues" level and Johnston and King paid these dues without objection. In August 1985 the Guild, as described supra, instituted the collection of "regular dues," also known as "2(d) dues," which remained in effect from August 1985 through February 1986.

In its July 1985 report to the membership about the Guild's convention and in its August 1985 newsletter to the membership, Respondent described the imposition of the "Section 2(d) dues" schedule as a "temporary increase" in dues required by the constitution.

Johnston and King, by letters, notified Respondent they refused to pay the difference between the "reduced dues" and the "2(d) dues," because, as financial core members they stated they believed they were not obligated to pay this additional sum of money, which in their opinion constituted a "special assessment," not the equivalent of "dues." Respondent replied, by letters, that the difference between the former level of dues and the current level was because of the change in the regular periodic dues of Respondent and did not constitute an assessment, and warned Johnston and King, if they did not pay the money Respondent was requesting, Respondent would request The Seattle Times to discharge them, under the terms of the contractual union-security agreement. A copy of this warning was sent to The Seattle Times.[8] Johnston and King eventually paid all the dues being requested, but informed Respondent they were paying all the dues requested under protest.

B. *Discussion and Conclusions*

1. The affirmative defenses

In its amended answer, Respondent alleged two affirmative defenses: (1) "This proceeding is barred by 29 U.S.C. Sec. 411(a)(4), second proviso"; and, (2) "The Seattle Times controls Charging Parties in their employee and litigant status[,] [h]ence maintenance of this proceeding constitutes an abuse of Board process."[9] The sole evidence presented by Respondent in support of its affirmative defenses was an admission of the Charging Party's lawyers, Davis, Wright & Jones, that all the Charging Party's legal fees incurred in connection with the investigation and prosecution of the instant charge before the Board have been paid by The Seattle Times, the Charging Party's employer.[10] For the reasons set forth below I am persuaded that Respondent's affirmative defenses are without merit.

Assuming arguendo that The Seattle Times' payment of the Charging Party's legal fees associated with the filing and the prosecution of the unfair labor practice charges in this case, when considered with other information subpoenaed by Respondent, establishes that The Seattle Times initiated, supported, and assisted the Charging Party in filing and maintaining the charge in violation of the Act, it would not disqualify the Charging Party from filing and maintaining the charge. For, unfair labor practices on the part of The Seattle Times, if established, could neither extinguish the right of its employees to be free from Respondent's alleged unfair labor practices, nor justify the Respondent's alleged statutory infringement of employees' rights. The Act provided Respondent with ready redress if it thought The Seattle Times violated the Act in connection with the filing of the charge in this case. It could have filed an appropriate charge with the Board's General Counsel for her independent determination whether The Seattle Times had violated the Act by initiating or otherwise aiding the Charging Party in the filing of the charges, Respondent did not do so. It is for all of these reasons that I reject Respondent's affirmative defense that because of The Seattle Times' control over the Charging Party's status as a litigant, the maintenance of this proceeding constitutes an abuse of the Board's authority. See *Machinists Local 758 (Menasco)*, 267 NLRB 1147, 1158 (1983); *Union Independiente de Empleados de Servicios*, 249 NLRB 1044, 1047 (1980); *Communications Workers (Ohio Consolidated)*, 120 NLRB 684, 686–687 (1958).

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[8] In its answer and in its amended answer to the complaint and in its "Memorandum Opposing Petitions to Revoke Subpoenas," Respondent admits that, pursuant to the contractual union-security provision in its contract with The Seattle Times, it demanded that The Seattle Times discharge Johnston and King (G.C. Exhs. 1(g), (k), and (l) and R. Exh. 1).

[9] Respondent served The Seattle Times, and Davis, Wright & Jones, the law firm that represents the Charging Party in this proceeding, with subpoenas duces tecum requesting documents and records which it contended were relevant to proving its affirmative defenses. The Seattle Times and Davis, Wright & Jones filed timely petitions to revoke those subpoenas and Respondent filed a memorandum opposing the petitions to revoke. The matter was referred by Deputy Chief Administrative Law Judge William Pannier to Administrative Law Judge Richard D. Taplitz for ruling. On 25 November 1986 Judge Taplitz issued an order granting the petitions to revoke the subpoenas. Respondent has not requested that I consider the propriety of Judge Taplitz' order, but introduced into evidence all the documents relating to the subpoena enforcement issue so as to preserve the issue for review by the Board.

[10] This admission was included in the petition to revoke Davis, Wright & Jones' subpoena.

As to Respondent's remaining affirmative defense dealing with the applicability of the second proviso to 29 U.S.C. § 411(a)(4) to this proceeding, I am of the opinion that regardless of the degree of control exercised by the Charging Party's employer, The Seattle Times, over the filing and maintenance of the charge, the proviso does not apply to this proceeding because: (1) Charging Party Johnston was not a member of Respondent; and (2) the proviso does not preclude relief sought by the filing of an unfair labor practice charge under the National Labor Relations Act.

Johnston, who had been a member of Respondent when he initially began his employment in 1979, resigned his membership in 1981 and, since that time, his sole obligation toward Respondent has been to pay the equivalent of the periodic dues uniformly required to be paid by Respondent's membership, pursuant to the contractual union-security agreement between Respondent and The Seattle Times. As a nonmember of Respondent, Johnston is not bound by the Guild's constitution and/or Respondent's bylaws. Also, unlike Respondent's members, Johnston and the other nonmember employees represented by the Respondent, who have opted for financial core status, are ineligible to vote in Respondent's elections or referendums, including the election of officers and referendums dealing with the subject of dues, and are ineligible to participate at Respondent's membership meetings, including meetings dealing with contract ratification and strike authorization votes, and are ineligible to receive strike benefits.

It is provided in 29 U.S.C. § 411(a)(4) that "[n]o labor organization shall limit the right of any member thereof to institute an action in any court or in a proceeding before any administrative agency. . . ." The second proviso to § 411(a)(4) provides "that no interested employer or employer association shall directly or indirectly finance, encourage, or participate in, except as a party, any such action, proceeding, appearance, or petition." Thus, the protection of the right to sue and the prohibition against employer financial involvement embodied in § 411(a)(4) pertains to a "member" of a labor organization defined in 29 U.S.C. § 402(o) the meaning of the word "member" as used in 29 U.S.C. § 411(a)(4) is as follows:

> "Member" or "member in good standing," when used in reference to a labor organization, includes a person who has fulfilled the requirements for membership in such organization, and who neither has voluntarily withdrawn from membership nor has been expelled or suspended from membership."

The meaning of the word "member" as used in 29 U.S.C. § 411(a)(4) is further delineated in 29 U.S.C. § 411(a)(1) and (2) as follows:

> Every member of a labor organization shall have equal rights and privileges within such organization to nominate candidates, to vote in elections or referendums of the labor organization, to attend membership meetings, and to participate in the deliberations and voting upon the business of such meetings. . . . Every member of any labor organization shall have the right to meet and assemble freely with other members; and to express any views . . . and to express at meetings of the labor organizations his views, upon candidates in an election of the labor organization or upon any business properly before the meeting.

I find that having resigned from membership in Respondent and having none of the rights and obligations normally associated with membership in a labor organization, other than the obligation to comply with the union-security agreement between his employer and Respondent by paying the equivalent of periodic dues, Johnston is not a "member" of a labor organization as that term is used in 29 U.S.C. § 411(a)(4) and for this reason I find the second proviso to § 411(a)(4) does not apply to Johnston's charge in this case. *Klemens v. Air Line Pilots*, 500 F.Supp. 735, 737–738 (W.D. Wash. 1980).

Alternatively, I find that Johnston's charge in this case is not barred by the second proviso of 29 U.S.C. § 411(a)(4) because the proviso does not preclude relief sought by the filing of an unfair labor practice charge under the National Labor Relations Act. In *Painters Local (Saxon Enterprises)*, 273 NLRB 13, 15, 17–18 (1984), the Board affirmed Administrative Law Judge Russell L. Stevens' opinion that the second proviso of § 411(a)(4) was not applicable to the unfair labor practice charges filed in that case because (273 NLRB at 17–18):

> Assuming, arguendo, that [the Employer] indirectly encouraged this litigation, such a fact would not be a defense to the commission of unfair labor practices. Possibly such a fact would be cause for proceeding in some other forum, under some other statute, against persons or firms not party to this controversy, but that fact would be collateral, and irrelevant, to the complaint involved in this controversy.

See also *Adamszewski v. Machinists Local 1487*, 496 F.2d 777 (7th Cir. 1974), in which the court found that the second proviso of 29 U.S.C. § 411(a)(4) did not preclude relief sought pursuant to 45 U.S.C. §§ 151–188 of the Railway Labor Act, if otherwise properly brought. 496 F.2d at 784. The basis for this conclusion was that Section 413 of Title 29 preserved preexisting remedies of union members existing under any other Federal law,[11] and that Section 523(b) further provided that nothing in Sections 401–531 of Title 29 shall supersede or impair the provisions of the Railway Labor Act or the National Labor Relations Act or the rights conferred thereby.[12]

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[11] 29 U.S.C. § 413 provides: "Nothing contained in this subchapter shall limit the rights and remedies of any member of a labor organization under any State or Federal law or before any court or other tribunal, or under the constitution and bylaws of any labor organization."

[12] 29 U.S.C. § 523 (b) provides: "Nothing contained in this chapter [sec. 401–531] and section 186(a–c) of this title shall be construed to supersede or impair or otherwise affect the provisions of the Railway Labor Act, as amended . . .; nor shall anything contained in this chapter be construed to confer any rights, privileges, immunities, or defenses upon employers, or to impair or otherwise affect the rights of any person under the National Labor Relations Act, as amended."

But see *Auto Workers v. Right To Work Foundation*, 376 F.Supp. 1060, 1062 (D.C.D.C. Cir. 1974), affd. in part, vacated in part, and remanded 590 F.2d 1139 (D.C. Cir. 1978), and *Auto Workers v. Right To Work Foundation*, 91 LRRM 2262, 2267 (D.C.D.C. Cir. 1975).

2. The alleged unfair labor practices

For over 25 years the Guild has maintained an International defense fund for the purpose of paying the expenses incurred by its constituent locals connected with strikes and lockouts, including the payment of strike benefits. The International defense fund has also been used to make nonstrike- or nonlockout-related loans and grants to Guild-affiliated locals and to make loans or grants to other unions. Also the International defense fund has been used to pay the Guild's general operating expenses when its treasury lacks sufficient money. In addition money from the International defense fund is transferred to the Guild's treasury for operating expenses during strikes in order to compensate for the lower per capita payments of locals whose members are on strike.

The record reveals that the defense fund's nonstrike- and nonlockout-related payments to Guild-affiliated locals, its payments to other unions, and its payments for other matters unrelated to strikes and lockouts involving affiliated locals, while they involved substantial sums of money, constitute only a very small and insignificant proportion of the International defense fund. It is clear that the expenditures from the International defense fund that had been unrelated to strikes and lockouts involving affiliated locals have been merely incidental to the fund's essential purpose, the payment of the strike- and lockout-related expenses of the Guild's locals, and that absent this essential purpose the fund would not exist.

Prior to 1972 the International defense fund was funded, pursuant to provisions in the Guild's constitution that provided that a percentage of the per capita payments of monthly membership dues transmitted by the locals to the Guild be earmarked for the International defense fund, and further provided that in an "emergency" the Guild's executive board was empowered to levy an "assessment" for the International defense fund on the entire membership. "Emergency," as defined in the constitution, was whenever the defense fund fell below the level of $1.5 million until the fund reached the level of $2 million.

After "emergency assessments" were leveled on the membership for 46 consecutive months from January 1968 to November 1971 the delegates to the Guild's annual convention held in 1972 approved a resolution stating that the "assessments" required to maintain the International defense fund at the level set by the constitution had become a part of the Guild's dues structure and that to label them "assessments" was a misnomer. The delegates voted to amend the constitution to incorporate these "assessments" into the Guild's dues structure and to call them "dues."

The constitution, as amended by the 1972 convention, continued to provide that a percentage of the per capita monthly membership dues payments transmitted by the locals to the Guild be earmarked for the International defense fund. However, with respect to supplemental contributions to the fund so as to keep it at the level required by the constitution, the constitution, as amended by the 1972 convention, provided for an increase in the usual monthly dues paid by the membership, rather than an "assessment." In this regard, the constitution, as amended, provided for an automatic increase in the members' monthly dues when the reserves in the International defense fund fell below a certain amount ($1.5 million in the 1972 constitution) and further provided that this increased amount of dues would continue to be paid until the fund's reserves reached a certain amount ($2 million in the 1972 constitution) at which point the usual dues schedule is reinstated.[13] The amended constitution further provided that the difference between the usual dues and the increased dues would be transmitted to the Guild for the sole purpose of funding the International defense fund.

Since the above-described 1972 amendment to the Guild's constitution, the membership on four separate occasions[14] has been required by the triggering mechanism embodied in the constitution to pay, in addition to the usual amount of monthly dues required by the constitution, the increased amount of monthly dues in order to raise the level of the International defense fund to the level mandated by the constitution. In other words, because the membership in 1972 amended the constitution to include a mechanism to raise their dues to fund the International defense fund when it fell below the levels mandated by the constitution, the members have been required to pay the increased monthly dues 53 out of the 184 months involved or approximately 29 percent of the time. During the remainder of the time the membership has paid the normal monthly dues required by the constitution.

As described above, from May 1981 through July 1985 the normal amount of monthly dues required by the Guild's constitution was collected by Respondent from its membership. There was no requirement during this period that the International defense fund be funded by increased dues. The Seattle Times employees involved in this case, Johnston and King, who, during this period were "financial core" rather than "full" members of Respondent, paid their dues without objection. However, from August 1985 through February 1986 Respondent increased the amount of its monthly membership dues for the purpose of funding the International defense fund. This was done pursuant to the decision of the Guild's membership at the annual convention held in late June 1985, under the following circumstances. Since late March or early April 1985 the International defense fund had been below the level at which the Guild's constitution required members' monthly dues to be increased to finance the fund. Nevertheless, because of the proximity of the annual convention schedule for June 1985 and the prospect of action by the convention delegates that would restructure key elements in the constitution dealing with the funding of the International defense fund, the officials of the Guild did not at that time increase the members' dues payments as required by the constitution.

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[13] The reserve levels that automatically trigger increased and normal dues payments have been changed periodically at the Guild's annual convention.

[14] May 1972 through March 1973; March through May 1976; September 1978 through April 1981; and August 1985 through February 1986.

As a matter of fact, the delegates to the Guild's annual convention held in June 1985 voted to impose, effective August 1985, the increase in monthly dues required by the constitution to fund the International defense fund, and voted to maintain the increased dues payments until the fund reached a new constitutional cutoff point, approved by the delegates, of $6 million—$1 million higher than the previous constitutional level—and also voted to maintain the dues at this increased level for 1 additional month beyond the period needed to reach the $6 million level, with the $400,000 generated by this extra month of higher dues going into a trust fund to pay the severance pay owed by the Guild to the approximately 30 Guild employees terminated due to a permanent reduction in its staff.

The context in which the delegates to the June 1985 convention gave their approval to the above-described matters, follows (see G.C. Exhs. 8 and 10): Initially, the Guild's officials had proposed that the delegates vote to increase the locals' monthly per capita payments to the Guild by 30 percent, which would have meant a sharp permanent increase in the amount of dues paid by the membership. Respondent and other locals were opposed to this and the result was a compromise package that included the above-described increase in the level of the International defense fund from $5 to $6 million and, as described above, the payment of the extra month of increased dues into the Guild's severance pay trust fund. There were also two other items included in the compromise package approved by the delegates: (1) authorization for the Guild to buy or build a building to house the Guild's headquarters operation and for the Guild to borrow, without interest, $750,000 from the International defense fund to do this; and (2) authorization for a referendum, after the International defense fund reached $6 million, whereby the membership would be asked to approve an increase of the minimum monthly dues required by the constitution from 5 percent to 6 percent of a week's salary for the purpose of increasing the minimum strike benefit to $125 per week, financed by a smaller increase in the local's per capita payments to the Guild, than the 30-percent increase initially proposed by the Guild's officials.

In response to Respondent's request that they pay the increased monthly dues payments for the period of August 1985 through February 1986, Johnston and King notified Respondent they refused to pay the difference between their usual monthly dues and the increased dues. They explained to Respondent that as financial core members they did not feel obliged to pay the additional amount which, in their opinion, constituted a "special assessment." Respondent informed them that the difference between the former level of monthly dues and the increased level was due to a change in the regular periodic dues of Respondent and did not constitute an "assessment." Respondent warned Johnston and King if they did not pay all the dues Respondent was requesting Respondent would ask The Seattle Times, under the terms of its union-security agreement with Respondent, to discharge them. Respondent also admittedly requested that The Seattle Times discharge Johnston and King, pursuant to the terms of the contractual union-security provision, for their refusal to pay all the dues Respondent was asking them to pay. Johnston and King eventually paid, under protest, the disputed portion of the dues.

The complaint alleges that by threatening to cause The Seattle Times to discharge Johnston and King pursuant to the terms of a contractual union-security agreement, Respondent violated Section 8(b)(1)(A) and (2) of the Act for the reason that it engaged in this conduct because Johnston and King "refused to pay an assessment for Respondent's strike fund and monies to build a new headquarters building in Washington, D.C., and for reasons other than the employees' failure to tender periodic dues and the initiation fees uniformly required as a condition of acquiring or retaining membership in Respondent." The complaint allegation presents the issue of whether the difference in amount between Respondent's usual monthly membership dues and the increased dues Respondent required of its membership during the period from August 1985 through February 1986 is encompassed within the meaning of the term "periodic dues" as used in Section 8(a)(3) and Section 8(b)(2) of the Act.

The second proviso to Section 8(a)(3) of the Act makes it an unfair labor practice for an employer in a union shop to discriminate against an employee for nonmembership in a labor organization "if [the employer] has reasonable grounds for believing that membership was denied or terminated for reasons other than the failure of the employee to tender the periodic dues and the initiation fees uniformly required as a condition of acquiring or retaining membership." Section 8(b)(2) of the Act makes it an unfair labor practice for a labor organization to attempt to cause "an employer to discriminate against an employee in violation of subsection (a)(3) . . . on some ground other than his failure to tender the periodic dues and the initiation fees uniformly required as a condition of acquiring or retaining membership." The General Counsel contends that the difference in amount between Respondent's usual monthly membership dues and the increased monthly dues Respondent required of its membership during August 1985 through February 1986 is not within the definition of "periodic dues" as that term is used in Section 8(a)(3) and Section 8(b)(2) of the Act, thus, the General Counsel argues, Respondent's threat and attempt to have Johnston and King terminated for refusing to pay the increased dues is a violation of Section 8(b)(2) and (1)(A) of the Act.

In *NLRB v. Food Fair Stores*, 307 F.2d 3 (3d Cir. 1962), the court rejected the respondent union's contention that the word "periodic," as used in "periodic dues," meant "occurring from time to time, recurrent, intermittent" as well as "at regular intervals." Instead the court defined "periodic dues," as used in Section 8(a)(3) and Section 8(b)(2) of the Act, as follows (307 F.2d at 11):

> It is clear that the term "periodic dues" in the usual and ordinary sense means the regular payments imposed for the benefit to be derived from membership to be made at fixed intervals for the maintenance of the organization. An assessment, on

> the other hand, is a charge levied on each member in the nature of a tax or some other burden for a special purpose, not having the character of being susceptible of anticipation as a regularly recurring obligation as in the case of "periodic dues."

Although in *Food Fair Stores* the court stated that "periodic dues" referred, among other things, to payments made to a union "for the maintenance of the organization" and that "assessments," on the other hand, referred, among other things, to a charge levied "for a special purpose," the court did not explain what it meant by "for the maintenance of the organization" or "for a special purpose."

In *Teamsters Local 959 (RCA Service Co.)*, 167 NLRB 1042 (1967), the respondent union, in addition to collecting regular periodic dues, incorporated into its regular dues schedule a previously established assessment per hour worked called "working dues," which was used to support a credit union and building program. The Board held that the "working dues" were assessments and not "periodic dues" within the meaning of Section 8(a)(3). In so doing the Board adopted *Food Fair Stores* above-described definition of "periodic dues" (167 NLRB at 1045).[15] In adopting the court's *Food Fair Stores* definition of what constitutes "periodic dues," the Board in *RCA Service* noted that the union shop was permitted in Section 8(a)(3) of the Act out of concern that nonmembers would be given a "free ride," and from this concluded that dues that do not contribute to the cost of the operation of the union in its capacity as a collective-bargaining agent of the employees were "for a special purpose" and not "for the maintenance of the organization" even though the payments were beneficial to the membership (167 NLRB at 1044–1045).

More recently the Board in *Typographical Union Local 40 (Detroit Free Press)*, 192 NLRB 951 (1971), all but overruled that part of *RCA Service* that differentiated between the allocation of dues payments for collective-bargaining purposes and those earmarked for the institutional expenses of the union. *Detroit Mailers* involved working dues used to finance the old age pension and mortuary funds and printers home maintained by the International union with whom the respondent union was affiliated. The Board held that the portion of the dues payments that were used for those purposes constituted "periodic dues," and in reaching this conclusion stated that in determining the propriety of union discipline pursuant to a valid union-security agreement, no distinction is warranted between that portion of uniform and periodic dues allocated to the costs of collective bargaining and that used for other legitimate institutional expenses. Under Section 8(a)(3), the Board ruled, uniform periodic dues may be required as a condition of membership, if such sums are not devoted to some purpose otherwise contrary to public policy. *Detroit Free Press*, supra at 951, 951-952 (Member Jenkins dissenting). In reaching this result, the Board distinguished *RCA Service* as involving an admitted "assessment," 90 percent of which might never have reached the union treasury (192 NLRB at 952).

As set forth above, the law is settled that Section 8(a)(3) and Section 8(b)(2) of the Act do not allow an employer and a union to condition employment on the payment of uniform "assessments," as opposed to "periodic dues," to a union. *NLRB v. Food Fair Stores*, 307 F.2d 3, 9-16 (3d. Cir. 1962). I am of the opinion that the disputed dues payments involved herein—the increased monthly dues charged the members of the Guild during the period from August 1985 through February 1986—constitute an "assessment" rather than "periodic dues." As described infra, in so concluding, I have been guided by the court's definition of "periodic dues" in *Food Fair Stores*, which definition has been adopted by the Board.[16]

The difference in amount between the dues regularly charged the membership and the increased dues charged during the months of August 1985 through January 1986 does not fit within the definition of "periodic dues" as that term is used in Section 8(a)(3) and Section 8(b)(2) of the Act, because the record establishes that the dues increase was a charge levied on the membership for a special purpose, not having the requisite periodicity and regularity so that it was susceptible of anticipation as a regularly recurring obligation as in the case of "periodic dues." My reasons for reaching this conclusion follow.

The Guild maintains a special fund, the International defense fund, for the special purpose of paying the expenses incurred by its locals relating to strikes and lockouts. The money collected for the defense fund is kept separate and apart from the Guild's general fund and, although some of the money in the defense fund has been used for purposes other than the fund's essential purpose of financing the strike and lockout expenses of its locals, it is undisputed that normally the sole purpose for which increased dues are collected from the membership is to support the International defense fund's essential purpose,[17] and that all other expenditures from the Interna-

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[15] More recently in *Carpenters Local 455 (Building Contractors)*, 271 NLRB 1099, 1100 (1984), the Board reaffirmed its adoption of the *Food Fair Stores* definition of "periodic dues."

[16] I recognize that one of the factors that the Board considers in distinguishing between an "assessment" and "periodic dues" is the purpose for which the union has collected the funds in issue. See *Detroit Mailers*, supra at 952; *Teamsters Local 959 (RCA Service Co.)*, 167 NLRB 1042, 1044–1045 (1967). The Board's decisions in *Detroit Free Press* and *RCA Service* appeared, however, to be hopelessly irreconcilable concerning the nature of the purpose of an expenditure which will cause dues payments to fall outside of the definition of "periodic dues," as that term is used in Section 8(a)(3). Under the circumstances I have followed the Board's most recent decision, *Detroit Free Press*, in which, as described supra, the Board stated that the only expenditures from members' dues that are not encompassed by the term "periodic dues" are those which are used for a purpose which would make their mandatory extraction "inimical to public policy." There is no evidence that any of the purposes for which Respondent has collected the disputed dues payments herein are "inimical to public policy." The fact that some of the moneys may be used to defend strikers in criminal proceedings arising out of strike-related misconduct is not, as contended by the Charging Party, "inimical to public policy."

[17] As described in detail supra, the disputed increase in dues for the months of August 1985 through January 1986 was also to be used to enable the defense fund to make an interest-free loan of $750,000 to the Guild to use to either buy or build a headquarter's building. This, in my opinion, provides additional support for the conclusion that the disputed

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tional defense fund using the increased dues are merely incidental to the fund's essential purpose.

The August 1985–January 1986 dues increase was instituted pursuant to provisions in the Guild's constitution requiring that monthly dues be raised by a specified amount, set by the constitution, whenever the International defense fund has less than a specified amount, set by the constitution, and requires that the increase must continue until the fund is raised to a specified level, also set by the constitution. Either this provision or a similar one has been incorporated in the Guild's constitution since 1972. It is impossible, however, for the Guild to anticipate with any degree of certainty when the International defense fund will fall to a level making it necessary for the Guild to impose a period of increased dues so that the amount of money in the defense fund will reach the level required by the constitution, nor, after instituting such a dues increase, is it possible for the Guild to anticipate with any degree of certainty the length of the period during which the increased dues payments must be maintained so as to meet the constitutional requirement. There is also no certainty that the Guild at the appropriate time will institute the increase in dues payments called for by the constitution, when the International defense fund falls below the level set by the constitution to trigger a dues increase. In this respect the August 1985–January 1986 dues increase, the increase involved herein, should have been instituted several months earlier according to the constitution, but was postponed. Also, inasmuch as the increase in dues at issue was earmarked for a special purpose, it is not surprising that it has been necessary for the Guild to impose such an increase in dues only on a sporadic and intermittent basis during the approximately 15-1/4 years the increased dues requirement has been embodied in the Guild's constitution: May 1972 through March 1973; March through May 1976; September 1978 through April 1981; August 1985 through February 1986. In other words since the members in 1972 amended the constitution to include a mechanism to raise their dues in order to fund the International defense fund when it fell below a level mandated by the constitution, the members have been required to pay the increased dues only 53 out of the 184 months involved, or approximately 29 percent of the time. During the remainder of the time the members have paid the normal dues required by the constitution. Indeed before the dues increase involved in this case, the members had been paying the normal dues required by the constitution continuously for 4-1/4 years.

Considering the special purpose for which the August 1985 through January 1986 increase in dues was levied—to increase the amount of money in the Guild's International defense fund so there would be enough money in the fund to pay the expenses incurred by the locals involved in strikes and lockouts;[18] considering the impossibility of the members being able to anticipate the implementation and duration of the implementation of an increase in dues for this special purpose; considering that the extra moneys collected because of the increased dues levy are placed in a special fund, the International defense fund, and not in the Guild's treasury; considering that the increased dues payments are levied on the members irregularly and at irregular intervals;[19] considering the disparity in the periodicity of the increase of the amount of monthly dues involved herein, with the payments of the normal monthly memberships dues;[20] I find that the increase in monthly dues levied on the membership from August 1985 through January 1986 for the purpose of raising the International defense fund to the level required by the constitution constitutes an "assessment" rather than "periodic dues" inasmuch as the increase was "a charge levied on each member in the nature of a tax . . . for a special purpose, not having the character of being susceptible of anticipation as a regularly recurring obligation." *NLRB v. Food Fair Stores*, supra.

I reject Respondent's contention that the dues increase at issue constitutes "periodic dues," rather than an "assessment" because the Guild's membership in 1972 incor-

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increase in dues herein constitutes a charge in the nature of a tax for a special purpose, for insofar as the increase was to be used to finance the buying or building of a headquarter's building, it plainly is a one-time charge for a special purpose. See *Teamsters Local 439 (Shippers Imperial)*, 281 NLRB 255 (1986).

[18] I reject Respondent's contention that the moneys received by the International defense fund from the increase in dues involved herein was not for a special purpose because the Guild frequently and routinely uses defense fund moneys for general fund purposes. The record reveals that while expenditures from the International defense fund for general fund purposes have at times involved substantial sums of money, that such expenditures constitute a very small and insignificant proportion of the funds which have flowed in and out of the International defense fund. Moreover, the International defense fund's expenditures which have been unrelated to the expenses incurred by affiliated locals due to strikes and lockouts, have been merely incidental to the International defense fund's essential purpose, the payment of strike- and lockout-related expenses incurred by the locals. It is clear that absent this essential purpose the International defense fund would not exist and the Guild's members would not have been required to pay increased monthly dues during the months of August 1985 through January 1986.

[19] I have considered, as pointed out by Respondent, that the Board has held that "periodic dues" within the meaning of Sec. 8(a)(3) may vary from period to period and from member to member, in that the Board has approved dues schedules in which the amount of dues required varied with the individual's salary for a particular period; varied with whether a member was working "at the trade"; varied depending whether the dues were paid on time; and, varied based on attendance at union meetings. In my view these situations differ significantly from the situation posed by the instant case.

[20] The General Counsel also contends that in Johnston's and King's cases the increased dues herein are not "uniformly required" as required by Sec. 8(a)(3) because, as financial core members, Johnston and King pay a proportionately greater share than full members, inasmuch as they are not eligible to receive strike benefits from the International defense fund. Similarly the Charging Party contends the increased dues are not encompassed by the term "periodic dues" as used in Sec. 8(a)(3) because, as financial core members, Johnston and King are not eligible to receive the benefits which the full members derive from the International defense fund. These contentions are without merit because generally a union can "require all employees whom it represents and who are covered by a valid union-security agreement to pay all periodic dues . . . uniformly required as a condition of acquiring or retaining [union] membership," (*Detroit Mailers Union Local 40*), supra at 951–952, (1970), and "[s]o long as the union prescribes non-discriminatory terms and conditions of acquiring membership, it can compel all employees to pay the ordinary and regular union dues under a union-security clause . . . even if some of the employees do not qualify for union membership . . . . provided it does not interfere with employment of the nonmember employees for reasons other than failure to tender the periodic dues and initiation fees uniformly required." *Plumbers Local 81 (Morrison Construction)*, 237 NLRB 207, 210 (1978).

porated into the Guild's dues structure an increase in members' "dues" for the purpose of raising the level of the International defense fund to the level mandated by the constitution whenever the fund fell below that level, and has since then consistently referred to this charge as "dues" rather than an "assessment." In this regard, the record reveals, as described in detail supra, that prior to the amendment of the constitution in 1972 the term "assessment" was used by the Guild and its constitution to refer to the charge levied on the members to raise the level of the International defense fund to the level mandated by the constitution. In 1972 the Guild's membership amended the constitution to change the term "assessment" to "dues" and made the charge a part of the Guild's dues structure. Before and after the 1972 constitutional amendment, however, the substance of the relevant constitutional provisions that dealt with this subject remained virtually the same except that what was now called "dues" had formerly been called an "assessment." The sole substantive change was that now the Guild's executive board was not given discretion by the constitution, but was required to institute a "dues" increase whenever the International defense fund fell below the level set by the constitution. However, as noted supra, the Guild ignored the constitution and exercised its discretion in 1985, when it delayed instituting the dues increase at issue for a period of several months. Under the circumstances, the fact that what was formerly called an "assessment" is now called "dues" is only a matter of semantics and of very little help in resolving the question presented for decision. In other words, for the foregoing reasons, I am of the opinion that the fact the Guild refers to the disputed charge levied on its members as "dues," rather than an "assessment," and has formally made the disputed charge a part of its dues structure, is not sufficient to rebut the conclusion, based on the record as a whole, that the disputed charge did not constitute "periodic dues" within the meaning of Section 8(a)(3) and Section 8(b)(2) of the Act.[21]

The difference in amount between the monthly dues regularly charged the Guild's members and the increased monthly dues charged them in February 1986, does not fit within the definition of "periodic dues" as that term is used in Section 8(a)(3) and Section 8(b)(2) of the Act, inasmuch as the record establishes that the increase was a special one-time assessment designed to meet an emergency situation. As described in detail supra, the increase in monthly dues charged the Guild's members in February 1986 was the result of a vote by the delegates to the Guild's annual convention held in June 1985 to amend the constitution so the increased dues mandated by the constitution to replenish the International defense fund would continue for 1 additional month for the purpose of generating money to pay the $400,000 in severance pay owed to the Guild's employees who had been terminated due to a permanent reduction in the Guild's staff. Pursuant to this constitutional amendment the Guild's membership was required to pay in February 1986 an additional month of increased dues and the increased portion of the dues was placed in a special severance pay trust fund, separate and apart from the Guild's other funds. In other words, the increased February 1986 membership dues was a temporary charge on the membership, imposed for only a period of 1 month for the purpose of meeting an emergency situation involving the payment of severance pay owed by the Guild, and the additional funds collected by the increase were kept in a separate trust fund apart from the Guild's general operating funds. In view of these circumstances it is apparent that the increased dues levied on the membership in February 1986 constituted an "assessment" rather than "periodic dues" because the increase was "a charge levied on each member in the nature of a tax . . . for a special purpose, not having the character of being susceptible of anticipation as a regular recurring obligation as in the case of "periodic dues" *NLRB v. Food Fair Stores*, supra, 307 F.2d at 11.

It is for the reasons set forth above that I find the difference between the Guild's usual monthly dues payments imposed on its members and the increase in said payments during the period from August 1985 through February 1986 did not constitute "periodic dues" within the meaning of Section 8(a)(3) and Section 8(b)(2) of the Act. I therefore find that by attempting to cause The Seattle Times to discharge its employees Kenneth Johnston and Tonya King for refusing to pay the above-described increase in dues, that Respondent violated Section 8(b)(2) and (1)(A) of the Act.

CONCLUSIONS OF LAW

1. Respondent Pacific Northwest Newspaper Guild Local 82 is a labor organization within the meaning of Section 2(5) of the Act.

2. The Employer, The Seattle Times, is an employer engaged in commerce and business activities which affect commerce, within the meaning of Section 2(6) and (7) of the Act.

3. By attempting to cause The Seattle Times to discharge Kenneth Johnston and Tonya King in violation of Section 8(a)(3) of the Act, Respondent has engaged in and is engaging in unfair labor practices within the meaning of Section 8(b)(2) and (1)(A) of the Act.

4. The aforesaid unfair labor practices affect commerce within the meaning of Section 2(6) and (7) of the Act.

THE REMEDY

Having found that Respondent violated Section 8(b)(2) and (1)(A) of the Act by attempting to cause The Seattle Times to discharge employees Kenneth Johnston and Tonya King because they refused to pay to Respondent the increase in their monthly membership dues imposed during the period of August 1985 through February

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[21] The *Detroit Free Press*, supra, relied on by Respondent, is distinguishable because there "[n]obody contend[ed] . . . that the dues were other than periodic" (192 NLRB at 952). In the instant case the percentage of the members' dues paid regularly each month to finance the International defense fund, which payments are not challenged in this case, are identical to the regular monthly dues payments imposed at fixed intervals involved in the *Detroit Free Press*. In sharp contrast, the increased dues payments at issue in the instant case, for the special purpose of raising the International defense fund to the level required by the constitution, lack any degree of periodicity or regularity so as to be encompassed within the term "periodic dues" as used in Sec. 8(a)(3) and Sec. 8(b)(2) of the Act.

1986, I shall recommend that Respondent cease and desist therefrom and take certain affirmative action designed to effectuate the policies of the Act.

I shall recommend that Respondent make Johnston and King whole for the monetary loss they suffered as a result of the discrimination against them, by refunding to them a sum equal in amount to the increased portion of the monthly dues they paid to Respondent for the period of August 1985 through February 1986, with interest thereon computed in the manner set forth in *New Horizons for the Retarded*, 283 NLRB 1173 (1987).[22]

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[23]

ORDER

The Respondent, Pacific Northwest Newspaper Guild Local 82, Seattle, Washington, its officers, agents, and representatives, shall

1. Cease and desist from

(a) Causing or attempting to cause The Seattle Times to discharge any employee for his or her failure to tender to the Respondent any sum of money other than the periodic dues and the initiation fees, uniformly levied, as defined in the Act, or in any other manner causing or attempting to cause that Company to discriminate against its employees in violation of Section 8(a)(3) of the Act.

(b) Restraining or coercing employees of The Seattle Times in the exercise of their right to refrain from any or all concerted activities guaranteed them by Section 7 of the Act, except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized by Section 8(a)(3) of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Make Kenneth Johnston and Tonya King whole for the monetary loss they suffered as a result of the discrimination against them, by refunding to them a sum equal in amount to the increased portion of the monthly dues they paid to Respondent for the period of August 1985 through February 1986, with interest.

(b) Notify the employer, The Seattle Times, in writing, and advise Kenneth Johnston and Tonya King, in writing, that it rescinds any request or demand that the employees be discharged or not allowed to work and that it has no objection to their continued employment with unimpaired rights and privileges.

(c) Post at its business copies of the attached notice marked "Appendix."[24] Copies of the notice, on forms provided by the Regional Director for Region 19, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to members are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material.

(d) Forward a sufficient number of signed copies of the notice to the Regional Director for Region 19 for posting by the Employer at its place of business in Seattle, Washington, in places where notices to employees are customarily posted, if the Employer is willing to do so.

(e) Notify the Regional Director in writing within 20 days from the date of this Order what steps Respondent has taken to comply.

APPENDIX

NOTICE TO MEMBERS
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

WE WILL NOT cause or attempt to cause The Seattle Times to discharge any employee for his or her failure to tender to us any sum of money other than the periodic dues and the initiation fees, uniformly required, as defined in the National Labor Relations Act, or in any other manner causing or attempting to cause that Company to discriminate against its employees in violation of Section 8(a)(3) of the National Labor Relations Act.

WE WILL NOT restrain or coerce employees of The Seattle Times in the exercise of their right to refrain from any or all concerted activities guaranteed to them by Section 7 of the National Labor Relations Act, except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized by Section 8(a)(3) of the National Labor Relations Act.

WE WILL make Kenneth Johnston and Tonya King whole for the monetary loss they suffered as a result of our discrimination against them, by refunding to them a sum equal in amount to the increased portion of the monthly membership dues they paid to use for the period of August 1985 through February 1986, with interest.

WE WILL notify The Seattle Times, in writing, and advise Kenneth Johnston and Tonya King, in writing, that we rescind any request or demand that they be discharged or not allowed to work and that we have no objection to their continued employment with unimpaired rights and privileges.

PACIFIC NORTHWEST NEWSPAPER GUILD
LOCAL 82

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[22] See generally *Isis Plumbing Co.*, 138 NLRB 716 (1962).

[23] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

[24] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

Spann Building Maintenance Co. *and* **Veronica Lewis.** Case 14–CA–16799

July 15, 1988

SECOND SUPPLEMENTAL DECISION AND ORDER

BY CHAIRMAN STEPHENS AND MEMBERS JOHANSEN AND BABSON

On April 11, 1984, Administrative Law Judge Marion C. Ladwig issued the attached decision finding that the Respondent, Spann Building Maintenance Co., violated Section 8(a)(1) of the Act by suspending and later discharging employee Veronica Lewis. The Respondent filed exceptions and a supporting brief.

On June 28, 1985, the National Labor Relations Board issued a Decision and Order,[1] finding that the contentions raised by Lewis could be resolved under the grievance and arbitration provision of the collective-bargaining agreement between the Respondent and the Union that represented Lewis' bargaining unit. The Board further found that the Union had invoked the grievance procedure on Lewis' behalf and that the procedure had not run its course, as the grievance had not been withdrawn or submitted to arbitration. The Board, therefore, deferred to the contractual grievance-arbitration procedure the unfair labor practice allegations concerning Lewis' discharge.

Thereafter, Lewis petitioned the United States Court of Appeals for the Eighth Circuit for review of the Board's Order. On September 17, 1986, the court denied Lewis' petition for review but remanded the case for the Board "to consider the limited issue of the propriety and extent of the Board's retention of jurisdiction."[2]

On remand, the Board on June 24, 1987, issued a Supplemental Decision and Order[3] revising its prior Order to provide for further consideration of the case in the event that either the Respondent or the Union resisted or impeded prompt processing of Lewis' grievance. Thus, the revised Order[4] provided that the Board retained jurisdiction for the

> limited purpose of entertaining an appropriate and timely motion for further consideration upon a proper showing that either (a) the dispute has not, with reasonable promptness after the issuance of this Supplemental Decision and Order, either been resolved by amicable settlement in the grievance procedure or submitted promptly to arbitration, or (b) the grievance or arbitration procedures have not been fair and regular or have reached a result which is repugnant to the Act.

On February 16, 1988, the General Counsel filed a motion for further consideration. The motion requests the Board to consider the case on the merits, as it contends that the Union has refused to proceed to arbitration with the grievance concerning Lewis' discharge and that a purported settlement between the Respondent and the Union did not remedy the alleged unfair labor practice. In support of the motion, the General Counsel attached a letter dated January 6, 1988, from the Union to the Respondent. The letter states that the Union does not intend to pursue Lewis' grievance to arbitration and "considers the matter as settled based on the fact that Lewis was reinstated to employment . . . ." The letter further states that the Union has "no intention of reopening this matter." Also attached to the General Counsel's motion is a letter dated January 8, 1988, from the Respondent to a representative of the General Counsel, enclosing the Union's letter. Based on the Union's letter, the Respondent's letter contends that the Board should defer to the settlement agreement between the Respondent and the Union, citing *Alpha Beta Co.*, 273 NLRB 1546 (1985). The Respondent's letter asserts that, while Lewis quit 30 days after she was reinstated, the Respondent has about 1000 employees who are represented by the Union, and it would be a destructive influence on the parties' bargaining relationship if the Union were to proceed to arbitration when it does not deem grievances to be meritorious or when an equitable resolution can be reached short of arbitration.

On February 24, 1988, the Respondent filed a cross-motion for dismissal and opposition to the General Counsel's motion for further consideration, contending that the Board should defer to the settlement of the grievance and dismiss the complaint. The Respondent argues that deferral to the settlement will effectuate the purposes of the Act for the reasons stated in its January 8 letter. The Respondent further contends that the collective-bargaining process would be undermined if a grievant can circumvent the grievance process for her personal benefit and to the detriment of the collective good.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

Having considered the General Counsel's motion and the Respondent's cross-motion and opposition, we decline to defer to the asserted settlement. Con-

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[1] 275 NLRB 971.

[2] *Lewis v. NLRB*, 800 F.2d 818, 821 (8th Cir. 1986). Lewis then petitioned the court for rehearing en banc. On November 13, 1986, the court denied the petition.

[3] 284 NLRB 470.

[4] Id.

289 NLRB No. 118

trary to the Respondent, we find *Alpha Beta* inapposite. In *Alpha Beta*, the union filed grievances on behalf of a number of discharged employees. The union pursued the grievance procedure and, as a result of discussions between the union and the discharged employees' employers and with the informed consent of the affected employees, an agreement was reached providing that 15 of the employees would be reinstated without backpay and 4 would be considered voluntary quits. The employees thereafter filed unfair labor practice charges, but the Board deferred to the grievance settlement and dismissed the complaint.

Unlike *Alpha Beta*, however, in the present case we do not find that the grievance was settled. As recounted in our Decision and Order in this case, the Union filed a grievance over Lewis' discharge and discussed resolution of the grievance with the Respondent, but the Respondent's settlement offer was rejected by the Union.[5] After further efforts to reach an acceptable settlement failed, Lewis filed an unfair labor practice charge. After the charge was filed the Respondent's personnel manager twice contacted Lewis directly and offered her reinstatement at a different work location. Lewis finally accepted this offer. There was no mention that the reinstatement was to constitute settlement of the grievance, and neither Lewis nor the Union withdrew the grievance. Thus, the alleged disposition of the grievance here differs from the settlement in *Alpha Beta* in that it was neither negotiated by the Union, a party to the contractual grievance and arbitration procedure, nor approved as the settlement of the grievance by the affected employee who instituted the charge.

It is apparent from this sequence of events that Lewis' reinstatement did not constitute a settlement of the grievance. Rather, after Lewis filed the unfair labor practice charge, the Respondent, outside the channels of the grievance procedure and without involving the Union, contacted Lewis directly and arranged for her to resume working. This was clearly an effort by the Respondent to limit its potential backpay liability in the event that Lewis prevailed in her unfair labor practice case. This informal arrangement, entered into without the involvement of the Union, which was the grievant in the grievance proceeding, did not purport to be a settlement of the grievance. That the Union some 4-1/2 years later now states that it considers the matter settled because Lewis was reinstated does not retroactively change the nature of the Respondent's arrangement with Lewis and transform it into a settlement.

Additionally, we are not persuaded by the Respondent's arguments that the Board's failure to defer and to dismiss the complaint would be detrimental to the collective-bargaining process and to its relationship with the Union. Having found that the grievance was not settled or otherwise resolved, we have nothing to which to defer. Moreover, while the Board's deferral policy, as stated in *United Technologies Corp.*, 268 NLRB 557 (1984), and *Olin Corp.*, 268 NLRB 573 (1984), attempts to accommodate the Board's statutory mandate with private grievance-arbitration procedures established by contract, the Board does not defer to all grievances, regardless of their nature or disposition, in order to avoid any possible interference with the grievance-arbitration process.

As the Union has made clear that it will proceed no further in its grievance over Lewis' discharge and we find that the grievance was not settled, we find it appropriate, consistent with the terms of the Order previously entered in this case, to determine the merits of the complaint. Having considered the judge's decision and the record in light of the exceptions and briefs, we find, for the reasons stated by the judge, that the Respondent's suspension and discharge of Lewis violated Section 8(a)(1) of the Act. We, therefore, affirm the judge's rulings, findings,[6] and conclusions and adopt his recommended Order.[7]

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge and orders that the Respondent, Spann Building Maintenance Co., St. Louis, Missouri, its officers, agents, successors, and assigns, shall take the action set forth in the Order.

Robert S. Seigel, Esq., for the General Counsel.
John J. Gazzoli Jr., Esq. (Lewis & Rice), of St. Louis, Missouri, for the Respondent.

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[5] See 275 NLRB 971.

[6] The Respondent has excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

[7] In accordance with our decision in *New Horizons for the Retarded*, 283 NLRB 1173 (1987), interest on and after January 1, 1987, shall be computed at the "short-term Federal rate" for the underpayment of taxes as set out in the 1986 amendment to 26 U.S.C. § 6621. Interest on amounts accrued prior to January 1, 1987 (the effective date of the 1986 amendment to 26 U.S.C. § 6621), shall be computed in accordance with *Florida Steel Corp.*, 231 NLRB 651 (1977).

DECISION

STATEMENT OF THE CASE

MARION C. LADWIG, Administrative Law Judge. This case was tried at St. Louis, Missouri, November 14, 1983.[1] The charge was filed by Veronica Lewis June 23 and the complaint was issued July 28. The Company discharged cleaning service worker Lewis for engaging in a heated discussion with her supervisor over his transferring her, without her consent, to a distant job seniority. The Company and Union failed to settle a grievance challenging the discharge, and no one seeks to take the unsettled grievance to arbitration.

The primary issues are (a) whether the Company, the Respondent, unlawfully suspended and discharged Lewis for engaging in protected concerted activity in violation of Section 8(a)(1) of the National Labor Relations Act, and (b) whether the case should be deferred to the arbitral forum.

On the entire record, including my observation of the demeanor of the witnesses, and after consideration of the briefs filed by the General Counsel and the Company on both the merits and in response to a Notice to Show Cause on the deferral issue, I make the following

FINDINGS OF FACT

I. JURISDICTION

The Company, a Missouri corporation, cleans and maintains commercial buildings in the St. Louis, Missouri area, where it annually receives goods valued over $50,000 directly or indirectly from outside the State and performs services valued over $50,000 for enterprises either located outside the State or located within the State and receiving goods valued over $50,000 directly from outside the State. The Company admits and I find that it is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act and that Service Employees International Union, Local No. 50, AFL-CIO (the Union) is a labor organization within the meaning of Section 2(5) of the Act.

II. ALLEGED UNFAIR LABOR PRACTICES

A. *Suspension and Discharge of Lewis*

1. Seniority rights disregarded

Cleaning service worker Veronica Lewis was employed under the Union's multiemployer collective-bargaining agreement (G.C. Exh. 2), which specifically provided for job security (sec. 8.01) and that "No employee shall be transferred except by mutual consent" (sec. 8.02). Since her first employment in 1979, she had been transferred twice from one job to another, but each time with her consent. (Her seniority dated from March 2, 1981, when she was rehired after having a baby.)

Since June 1, 1981, she had been working in the Meramec building, one of the 7-Up Company's buildings in Clayton, Missouri. Her job seniority (next to the highest among the cleaning employees in that building) entitled her to remain on that job unless she consented to a transfer.

In January, after rebidding the 7-Up account, the Company decided to ignore the employees' job seniority at the Meramec building. The new contract, effective February 1, called for a reduction in the cleaning staff from 26 to 15 workers at the Meramec and the next-door Headquarters building (connected by an overhead walkway). As acknowledged in the Company's brief, "To effect the reduction, and to ensure that 7-Up was given the best service possible, Respondent's officials instructed the supervisor at the 7-Up account, Dave Kipping, to select the best workers, regardless of seniority, and to lay off the rest, notwithstanding language in the current union contract" that "questioned the propriety" of ignoring seniority.

In the latter part of January, Project Supervisor Kipping changed Lewis' job assignment, first reassigning her work in the Meramec bulding and then assigning her work in the Headquarters building. He told her that under the new 7-Up contract, some of the employees would have to go, but he did not reveal his decision to lay her off. On January 26, she submitted a grievance to him, complaining about someone else being assigned to do her work (G.C. Exh. 3). As she credibly testified, she showed him a copy of the union agreement, pointing out the part "that you have to ask a person" before making a transfer, unless "they lose the whole contract completely." Kipping responded that he did not want to look at it and "said he'd do what he wanted to do." (Tr. 24.) (I discredit his claim that when Lewis handed him the grievance, he merely said "Fine" and did not discuss it (Tr. 84-85).)

The next evening, January 27, Supervisor Kipping informed Lewis that she was being transferred (Monday, January 31) to West Port Plaza. "I told him that he can't transfer me without my permission," that "I can't go to West Port Plaza for the simple reason that my car is raggily," and that the buses do not run out there in the evenings. Kipping "said that's how it is and that's how it's going to be." Then when she said she did not want to work at West Port Plaza and was not going, he stated, "You don't have to go to West Port Plaza but you're not going to be working here." (Tr. 26.) (I discredit Kipping's claim that he merely referred her to personnel when she asked why she was being transferred (Tr. 87). Lewis impressed me most favorably as an honest, forthright witness, and I credit her version of the conversation.)

The next morning, January 28, Lewis called from her day job and talked to Personnel Manager Suzanne Bopp, who said that Kipping had told Bopp that Lewis and her sister (Stephanie Sykes) were "available to go" to West Port Plaza. Lewis denied telling Kipping that she wanted to go there.

That Friday evening, January 28, was to be her last day at the 7-Up account, where she had public transportation. Although her seniority entitled her to remain at her Meramec building job unless she consented to a transfer, her supervisor was ignoring her seniority and had told the personnel manager that she was available for transfer to the distant assignment, beyond the evening bus line. There was no job steward to assist her in protecting her seniority rights. She had already filed a grievance, complaining about being reassigned, but since then she had learned that the Company was compelling her to take the distant transfer or be laid off, despite her contractual rights.

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[1] All dates are in 1983 unless otherwise indicated.

It was under these circumstances that Lewis met with Project Supervisor Kipping to invoke her seniority rights under the collective-bargaining agreement.

2. Job seniority invoked

When Lewis arrived at work Friday, July 28, on the 5:30 p.m. shift, John Harris (another service worker in the Meramec building) told her that Dave Kipping wanted to see Harris at the end of the evening shift, but that no, he was not waiting because "they was saying that somebody was taking over his job." Lewis followed Harris to Kipping's basement office in the Headquarters building and waited outside the supervisor's open door, out of Kipping's view. (Tr. 33-34.)

Kipping confirmed Harris' layoff. Harris became enraged and loudly protested. He questioned Kipping's waiting until "I get through doing my work" that evening "and then just ship me off to West Port Plaza" (Tr. 36).

Lewis then entered the office and asked Kipping why he told Personnel Manager Bopp that Lewis was available to go to West Port Plaza (in effect, disputing Kipping's denial). In a louder than normal voice, Lewis "asked him how in the hell was he going to put less seniority in my place and I'm the second highest seniority." In his usual loud voice, Kipping responded that was how it was going to be. She showed him the union agreement and told him, "You have to ask the person, do they want to transfer," but Kipping again responded "that's how it is and that's how it's going to be." (Tr. 36, 42.) (Kipping claimed that Lewis instead said, "goddamn you, you don't tell me a goddamn thing" why she was being transferred (Tr. 92, 115), but Lewis credibly denied using the word "goddamn" (Tr. 174).)

Harris (who did not testify) then resumed his loud protests until the 7-Up contact representative Allen Dorsey (who also did not testify) came downstairs and entered the office. Kipping's testimony is undisputed that Harris was very loud, profane, and abusive, and leaned over Kipping's desk, causing Kipping to feel physically threatened (Tr. 91). Kipping directed Harris to go back to work.

When Dorsey entered, he said they were getting too loud and that they would have to keep the noise down (Tr. 37, 62). As Lewis credibly testified, Harris told Dorsey something like "You ain't got nothing to do with this." Kipping said he would take care of it, and Dorsey left. After some further conversation, Harris also left.

Before leaving the office, Lewis spoke to Kipping's assistant Jim Weiniecke (who had walked in), repeating the question, "How in the hell are you going to put less seniority in my place?," without any response (Tr. 38).

3. The suspension and discharge

Shortly after the incident in his office, Supervisor Kipping went to the Meramec building (where Lewis was getting a soda before going to work) and told both Harris and Lewis that they were suspended for further investigation. A security guard escorted Harris from the property and Kipping escorted Lewis. (Tr. 40, 63, 95.)

Kipping testified that his only reason for suspending Lewis was the January 28 incident in his office (Tr. 124).

On January 31, Kipping prepared a written report of the incident, delivered it (with the 7-Up security incident report) to Personnel Manager Bopp, and discussed it with her (Tr. 137). On February 4, the Company sent Lewis a discharge letter, stating that her employment "has been terminated effective 2/3/83 due to improper conduct and the use of abusive language to the customer and to your supervisor" (G.C. Exh. 5).

At the trial, Personnel Manager Bopp testified that the January 28 incident was the sole basis for the discharge (Tr. 163) and that she and President R. L. Hardy (who did not testify) relied on Supervisor Kipping's report and the 7-Up security incident report in deciding to discharge Lewis (Tr. 137). I note, however, that there is nothing in either report to support the statement in the discharge letter that Lewis used "abusive language to the customer." (The General Counsel does not contend that the Company unlawfully discharged Harris, who did shout at the 7-Up representative Dorsey and who has withdrawn the grievance challenging his discharge.)

Kipping's January 31 report (R. Exh. 2) asserts that Lewis "became loud, abrasive and used profane language," without mentioning any abusive language to the customer. The 7-Up security incident report (R. Exh. 3), introduced in evidence as a document on which the Company relied in making its decision to discharge Lewis (Tr. 101), refers to misconduct of Harris—not Lewis—toward Dorsey. It states that it was prepared at 7:15 p.m., January 28, and that

> At 6:05 PM it was reported to security Guard Cole by 7-Up contracting manager Allen Dorsey that a disturbance was in progress on P-1 level. I immediately responded to P-1 where I was met by Spann Supervisor David Kipping who stated that he wanted Spann employees Veronica Lewis and John Harris removed from the premises. I then proceeded to the Meramac building to tell John Harris to leave the building. He stated to me that I was lying and he wasn't going to leave because his supervisor told him to stay and work. . . . I then proceeded immediately to escort him out . . . .
>
> I then located Allen Dorsey to get his statement on what happened to cause the incident. He stated that he was getting supplies on P-1 level when he heard loud voices and bad language being used. He then stated that he instructed Spann employee John Harris that his actions were not permitted on 7-Up property. He then told Allen Dorsey that the situation was none of Allen Dorsey's damn business. Allen Dorsey then stated that he went for security personnel.

Security guard Cole did not testify. Whether or not his report was accurate, there is nothing in it to support the claim that Lewis used abusive language to the customer. I therefore find that this purported reason for Lewis' discharge was pretextual.

I also note that by the time of trial, Supervisor Kipping had fabricated another purported reason for suspending Lewis. Although he made no mention of it in his January 31 report, Kipping claimed that when Allen Dorsey entered his office January 28, Dorsey said that "these people have got to leave, now" (Tr. 93). He repeated this claim on cross-examination. "He said John and Veronica will have to go. They're going to have to leave. We cannot tolerate them here . . . . He said most definitely they will have to leave . . . . I do not remember what I told the Board agent, but Mr. Dorsey did tell me they'd have to leave the building." (Tr. 119-120.)

This testimony was obviously fabricated to bolster the company defense. If the 7-Up representative had said that Harris and Lewis must leave the building at once, undoubtedly Kipping would not have flouted the order by instructing Harris (or Harris and Lewis) to return to work. According to Kipping, "I told [Harris] at that time to go back to his station and to begin work . . . . Because I did not want to suspend him in front of other service workers. I didn't think it was professional and I didn't want to embarrass him." When asked about Lewis, Kipping claimed, "Same way, yes. I told them to go back to their stations. I . . . would not reprimand or tell anyone they were suspended in front of other people." (Tr. 94.) (Kipping claimed that an employee and an unknown person with a service cart were standing outside the door (Tr. 117).)

I discredit, as an afterthought, Kipping's claim that Dorsey told him that Harris and Lewis must leave the building. (By his demeanor on the stand, Kipping appeared willing to give whatever testimony might help the Company's cause.) I also discredit Kipping's claim that Dorsey was standing outside the office door when Lewis entered (Tr. 118), that Dorsey was standing there when she made her protest (Tr. 116), and that before entering the office, Dorsey went upstairs and got the security guards (Tr. 93).

4. Contentions and concluding findings

The General Counsel contends that when Veronica Lewis protested her layoff to Supervisor Dave Kipping on January 28, she was endeavoring to enforce the provisions of the collective-bargaining agreement and was engaged in protected concerted activity. Citing *Interboro Contractors*, 157 NLRB 1295 (1966), enfd. 388 F.2d 495 (2d Cir. 1967), the General Counsel argues that "The fact that Lewis' complaint to Supervisor Kipping . . . . was made by Lewis alone does not make her conduct any less concerted." He also argues that under the authorities, Lewis' use of a mild epithet, "how in the hell" (or even "goddamn," as claimed by Kipping) "was not so flagrant or egregious to warrant the removal of the Act's protection."

The Company contends that Lewis' conduct was neither concerted (being mere "personal gripes about her job alone") nor protected. Although conceding that "It is well settled that employees cannot lawfully be discharged for rude or impertinent conduct in the course of presenting grievances to an employer," the Company contends that Lewis crossed the line of protected activity "when she chose to join Harris on January 28 in the verbal and physical intimidation of Kipping, her supervisor, in a public location, in front of other employees and an important customer representative, Allen Dorsey." Despite her later reinstatement, the Company contends that her "vituperative behavior" rendered her "unfit for future service." Relying on discredited testimony, the Company contends that most important, Dorsey "could hear the profanity and uproar and *demanded* that Lewis and Harris be removed from the premises." The Company also contends that "Lewis' outburst was violent, loud, and abusive" and that "she was discharged for her *public disturbance*, which *threatened customer relations*." The credible evidence does not support these contentions.

I find that Lewis made a reasonable and honest attempt to persuade Supervisor Kipping in the January 28 meeting to honor her job seniority under the collective-bargaining agreement, and that in doing so, she was engaged in concerted activity. *NLRB v. City Disposal Systems*, 465 U.S. 822, 841 (1984). In this recent decision, the United States Supreme Court held that

> The NLRB's *Interboro* doctrine recognizes as concerted activity an individual employee's reasonable and honest invocation of a right provided for in his collective-bargaining agreement. We conclude that the doctrine constitutes a reasonable interpretation of the Act.

The remaining question is whether Lewis was engaged in protected activity when she protested to Supervisor Kipping in his office, in a louder than normal voice, "how in the hell" was he going to put an employee with less seniority in her place (or, as claimed by Kipping, told him "goddamn you, you don't tell me a goddamn thing"). Although as many as two employees may have overheard Lewis' remark through the open door, it was not overheard by the 7-Up representative Dorsey, who arrived later when employee Harris was using "very loud, profane, and abusive" language and who stated they would have to keep the noise down.

In *City Disposal Systems* (465 U.S. at 837), after upholding "the Board's judgment that the employee is engaged in concerted activity" when his statement or action is based on a reasonable and honest belief in a collectively bargained right, "just as he would have been had he filed a formal grievance," the Supreme Court noted that "An employee may engage in concerted activity in such an abusive manner that he loses the protection of § 7" of the Act, citing *Crown Central Petroleum Corp. v. NLRB*, 430 F.2d 724, 729 (5th Cir. 1970).

Crown Central involved the disciplining of two employees for statements they made during a grievance meeting. The court of appeals (430 F.2d at 729) ruled that "An employee may not act with impunity even though he is engaged in protected activity. His rights, derived from Section 7, must be balanced against the employer's right to maintain order in his business by punishing acts of insubordination." In approving "the balance struck by the Board," the court observed (at 730) that "On the employer's side of the scale lies the injury done the Company by intemperate and insubordinate remarks directed toward a supervisor during a grievance meeting and in the presence of four other employees"—distinguishing a situation in which "all the plant employees were present." The court ruled (at 731) that

> Here the remarks were pertinent to a discussion of the grievance under consideration at the meeting. "[A]s long as the activities engaged in are lawful and the character of the conduct is not *indefensible* in the context of the grievance involved, the employees are protected under § 7 of the [A]ct." Neither do we think the language used by Harris and Gilliam was so opprobious as to carry them "beyond the pale" of the Act's protection. It has been repeatedly observed that passions run high in labor disputes and that epithets and accusations are commonplace. Grievance meetings arising out of disputes between employer and employee are not calculated to create an aura of total peace and tranquility where compliments are lavishly exchanged.

As found by the court (at 726), employee Harris stated or implied in the meeting involving his own grievance that the supervisor's denial that overtime was ordered was a lie, that Harris used profanity in doing so, and that he reminded the supervisor and other company representatives "that they would be called upon after death and in the hereafter—in a bargaining session yet to come—to answer for their earthly prevarications." The court enforced the Board's Order, upholding the finding that the company violated Section 8(a)(1) by giving Harris a reprimand and warning for "abusive and insubordinate language directed at supervisor" and by giving employee Gilliam (chairman of the Workmen's Committee) a 1-day suspension for having tolerated and joined in Harris' conduct.

Here, cleaning service worker Lewis was, in the absence of a union steward on the job, presenting her own protest or oral grievance to Supervisor Kipping in his office. Her remarks were pertinent to her protest that her job seniority rights under the union agreement were being violated. I find it clear that her conduct was not "indefensible" in the context of the discussion, and that her language "how in the hell" (or, as claimed by Kipping, "goddamn you, you don't tell me a goddamn thing") was not "so opprobrious to carry" her "beyond the pale" of her Section 7 rights. I therefore find, on balancing her Section 7 rights "against the employer's rights to maintain order in his business by punishing acts of insubordination," that the Company suspended her January 28 and discharged her February 3, 1983, for engaging in protected concerted activity, in violation of Section 8(a)(1) of the Act. In view of this finding, I find it unnecessary to rule on whether the suspension and discharge also violated Section 8(a)(3).

B. *The Deferral Issue*

1. Unresolved grievance

Section 5.02 of the collective-bargaining agreement (G.C. Exh. 2) provides that "The Employer agrees that he will not discharge any employee except for justifiable reason, which reason shall be given to the employee immediately upon discharge."

Section 19.01 of the Grievance and Arbitration Procedure provides that "a grievance is defined as an employee or Union's dispute, claim or complaint involving the interpretation or application of the provisions of this agreement"; that "the Employer and the Union shall make an honest and sincere effort to adjust" such a dispute "in an amicable manner"; and that if they are unable to do so, "the question may, at the option of the Union," be submitted to arbitration. The agreement is silent on the disposition of a dispute if the grievance remains unresolved in the three-step grievance procedure and the Union, as in the present case, takes its option not to submit the question to arbitration and fails to proceed with the selection of an arbitrator. (The agreement does not provide in this event for withdrawal or settlement of the grievance, or for acceptance of the Employer's last offer.)

Lewis did not file a grievance contesting her termination, but the Union did file a grievance under Section 19.01, naming "Local 50" as the aggrieved party, alleging the "unjust discharge of John Harris and Ms. V. Lewis." The Company and Union held the second-step meeting February 15 (R. Exh. 15); the Union submitted a request for an arbitration panel in the Lewis case March 10 (R. Exh. 16); the parties held the third-step meeting April 7; and on May 5, the Union notified the Company that in the Harris case "The Union hereby withdraws this grievance" (R. Exh. 17).

In the April 7 meeting, the Company offered to settle the Lewis discharge grievance by offering her reinstatement at a different place, without backpay or seniority. The Union's spokesman, Research Specialist Margaret McCann, stated that Lewis' seniority would be a key to settling the grievance. (Tr. 179, 185.) After checking with Lewis, McCann stated in the May 5 letter to the Company that "The settlement offer was unacceptable, therefore, we need to select an arbitrator for the case" (R. Exh. 17).

Meanwhile, although McCann continued to seek a satisfactory settlement, she notified Lewis (but not the Company) that a union in-house panel had voted that the grievance was not arbitrable. McCann explained that the Union's "first criteria is getting people their jobs back," and "she could have her job back" under the Company's offer (but at a different location and without backpay, seniority, or other benefits). (Tr. 191-192.) She testified positively that the Union was not arbitrating the case (Tr. 191).

In a telephone conversation on May 31, Personnel Manager Bopp told McCann that the Company would offer Lewis a job in the nearby Blue Cross building on Forest Park, but without her prior seniority (Tr. 181-182). McCann confirmed this offer in writing (stating in r June 1 letter to Bopp reviewing the stats of several evances that in the Lewis case, "Settlement pending: einstatement to former position in another building" (R. xh. 18), but the Union continued to insist upon the res- ration of Lewis' seniority as a condition for settling the ievance (Tr. 185). Lewis was also asking for vacation y (Tr. 158).

Finally on June 16 (over 4 months after the discharge), ersonnel Manager Bopp reaffirmed the Company's posi- on in writing offering in settlement of the grievance re- statement at another place, without backpay, seniority, r vacation pay. She offered again to place Lewis in the lue Cross building, with the "date she starts work" to become her new seniority date." (R. Exh. 19.)

Lewis refused the settlement offer, and the grievance emained unresolved (Tr. 188–189).

2. Reinstatement after charge filed

On June 23, a week after the Company's last offer to ettle the grievance, Lewis filed the charge in this pro- ceeding.

About a week later, Personnel Manager Bopp telephoned Lewis about filing the charge. As Lewis credibly testified, "I say yes, that's right because . . . you didn't give me backpay, you didn't give me my seniority, and you didn't give me my vacation checks, you didn't give me nothing." At that point (as Lewis further testified without any rebuttal), Bopp stated "we'll [also] give you your vacation checks and we'll give you your seniority back." Lewis, having been off the job about 5 months, refused to settle the charge on that basis. (Tr. 171.)

Lewis remained off the job another month until Personnel Manager Bopp again contacted her, a few days before the complaint was issued July 28. When Lewis returned the call July 25, Bopp offered to reinstate her August 1 at the Blue Cross building—without backpay, without the previously offered seniority and vacation pay, and without any mention of settling either the pending NLRB charge or the unresolved grievance. Lewis agreed and returned to work August 1. (Tr. 172–173.)

3. Contentions of the parties on deferral

In his brief on the merits, the General Counsel disputes the Company's defense that a settlement of Lewis' grievance forecloses a Board remedy. He contends that the argument is frivolous because it is "patently obvious" that there was never a settlement of the grievance. "It is abundantly clear that Respondent's reinstatement of Lewis on August 1" was not in settlement of the grievance, but "was designed solely to toll Lewis' backpay after the instant charge had been filed."

In its original brief, the Company proffered two theories for arguing that the Lewis grievance was settled. First, after citing McCann's disclosure at the trial that the Union decided to forgo arbitration because of the reinstatement offer, the Company goes outside the record and asserts—without citing any supporting evidence—that "it is generally understood that failure to arbitrate constitutes a settlement of the grievance on the basis of Respondent's last offer." Second, contrary to the undisputed evidence, the Company argues that Lewis was reinstated as a result of a settlement of her grievance.

Both parties later filed briefs in response to my March 1, 1984 Notice to Show Cause "whether the issues in this case should be deferred to the grievance-arbitration provisions of the collective-bargaining agreement, with the Board retaining jurisdiction for the limited purpose stated" in the recent Board decision in *United Technologies Corp.*, 268 NLRB 557 (1984).

In his response, "the General Counsel vigorously opposes deferral of this case to the grievance-arbitration procedure," contending that immediate remedial action is critical to protect Lewis' own statutory rights and to prevent other employees from being discouraged in the exercise of their statutory rights. He argues that the first and foremost reason "this case should not be deferred to the parties' grievance-arbitration procedure is that this procedure has already been utilized by the parties without any resolution of the issue having been reached." Furthermore, nothing in *United Technologies* "disturbs the settled tenet that deferral requires two parties to the grievance-arbitration procedure ready and willing to process the grievance through arbitration." Here the Company does not seek arbitration; "the Union has no intention of pursuing Lewis' grievance through any further steps of the grievance procedure"; and it would not be appropriate to defer but retain jurisdiction for further consideration on a showing that the dispute "has not . . . been resolved by amicable settlement of the grievance or submitted promptly to arbitration." The General Counsel also contends that the operative events occurred over a year ago; the case was tried well before the decision in *United Technologies* was issued, and forcing the Company and Union "to, in effect, relitigate this entire case in another forum would be, at best, fundamentally unfair and a gross drain upon the parties' resources."

The Company in its response continues to argue that a settlement was reached and that Lewis was reinstated "as a result" of that settlement. It erroneously contends that Union Representative McCann testified that the Union was "satisfied" with the reinstatement offer (to a different place, without backpay, accrued seniority, or vacation pay)—contrary to the undisputed evidence that both the Union and Lewis continued to seek a satisfactory settlement after the Union's no-arbitration decision was reached. It also erroneously contends that "Only after the offer was accepted did Miss Lewis or the union representative convey any disagreement to the Company"—contrary to the undisputed evidence that the offer for reinstatement alone, as well as the offer for reinstatement plus seniority and vacation pay to settle the NLRB charge, was rejected until weeks later when the Company again made the reinstatement offer, not to settle either the grievance or charge, but obviously to toll backpay. Although the Company does not seek arbitration, it argues that the "spirit of deferral is clearly in line with the policies expressed by the Board in *United Technologies*," and contends that "the Board should defer to the resolution of this dispute through the contractual grievance-arbitration machinery" (i.e., defer to the purported settlement).

4. Concluding findings on deferral

The Company and Union have agreed to a dispute resolution machinery, but submission to arbitration is at the Union's option. The collective-bargaining agreement does not provide for withdrawal or settlement of a grievance, or for acceptance of the Company's last offer, if the parties reach a deadlock in resolving the grievance and no arbitration is held.

Because of the Union's "first criteria in getting people their jobs back," it decided (without informing the Company) that Lewis' discharge grievance was not arbitrable in view of the Company's offer to reinstate her—at a different location, without backpay, seniority, or vacation pay. The Union and Lewis continued to seek a more satisfactory settlement of the grievance, until a deadlock was reached when the Company reaffirmed its decision in its June 16 letter not to offer more than reinstatement alone and the settlement offer was rejected.

It was a week after this deadlock in settlement efforts that Lewis filed her NLRB charge. About a month later, the Company offered (and Lewis accepted) reinstatement, not in settlement of either the charge or the grievance, but to toll any backpay. Neither the Company nor the Union seeks arbitration of the grievance.

In *United Technologies Corp.*, above, 268 NLRB 557 at 560, in contrast to this case, the respondent employer "expressed its wilingness, indeed its eagerness, to arbitrate the dispute." There, the employer (id. at 557) denied the union's grievance at the third step, the union withdrew its grievance "without prejudice"; the employer filed its own grievance to protest the union's refusal to withdraw the grievance "with prejudice"; and the union refused the employer's request to arbitrate the matter. The Board ruled (at 559) that

> Where an employer and a union have voluntarily elected to create dispute resolution machinery culminating in final and binding arbitration, it is contrary to the basic principles of the Act for the Board to jump into the fray prior to an honest attempt by the parties to resolve their disputes through that machinery. For dispute resolution under the grievance-arbitration process is as much a part of collective bargaining as the act of negotiating the contract. In our view, the statutory purpose of encouraging the practice and procedure of collective bargaining is ill served by permitting the parties to ignore their agreement and to petition this Board in the first instance for remedial relief.

In the present case, the charge was not filed until the parties made an honest attempt over a 4-month period to resolve the Lewis discharge grievance through the dispute resolution machinery, but failed to reach a settlement. The Union exercised its contractual option not to take the grievance to arbitration. The Company is not seeking a deferral to the arbitral forum, but is seeking a deferral to a purported settlement.

In effect, the Company is seeking to graft unto the grievance-arbitration procedure a waiver provision that a failure to arbitrate constitutes a settlement of the grievance on the basis of the Company's last offer. That is a matter for negotiations, not something to be inferred. As negotiated, Section 19.01 of the collective-bargaining agreement gives the Union an unrestricted option, stating that "representatives of the Employer and the Union shall make an honest and sincere effort to adjust [the grievance] in an amicable manner. In the event, however, of the inability of the Employer and the Union to reach an agreement on the issue in dispute, the question may, at the option of the Union," be submitted for arbitration.

Having found that the charge was not filed until all the dispute resolution machinery required by the collective-bargaining agreement had been utilized without any resolution of the Lewis discharge grievance being reached, and that neither the Company nor the Union is seeking arbitration of the grievance, I find that the policies of the Act would not be effectuated by deferring this case to the arbitral forum.

CONCLUSIONS OF LAW

1. By suspending Veronica Lewis January 28 and discharging her February 3, 1983, for engaging in protected concerted activity, the Company engaged in unfair labor practices affecting commerce within the meaning of Section 8(a)(1) and Section 2(6) and (7) of the Act.

2. The policies of the Act would not be effectuated by deferring this case to the arbitral forum.

REMEDY

Having found that the Respondent has engaged in certain unfair labor practices, I find it necessary to order it to cease and desist and to take certain affirmative action designed to effectuate the policies of the Act.

The Respondent, having unlawfully suspended and discharged an employee, must make her whole for any loss of earnings and other benefits, computed on a quarterly basis from date of suspension to date of her reinstatement, less any net interim earnings, as prescribed in *F. W. Woolworth Co.*, 90 NLRB 289 (1950), plus interest as computed in *Florida Steel Corp.*, 231 NLRB 651 (1977).

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[2]

ORDER

The Respondent, Spann Building Maintenance Co., St. Louis, Missouri, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Suspending, discharging, or otherwise disciplining any employee for engaging in protected concerted activity.

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[2] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

(b) In any like or related manner restraining or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Make Veronica Lewis whole for any loss of earnings and other benefits suffered as a result of the discrimination against her, in the manner set forth in the remedy section of the decision.

(b) Remove from its files any reference to the unlawful discharge and notify the employee in writing that this has been done and that the discharge will not be used against her in any way.

(c) Preserve and, on request, make available to the Board or its agents for examination and copying, all payroll records, social security payment records, timecards, personnel records and reports, and all other records necessary to analyze the amount of backpay due under the terms of this Order.

(d) Post at its facilities in the St. Louis, Missouri area, copies of the attached notice marked "Appendix."[3] Copies of the notice, on forms provided by the Regional Director for Region 14, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material.

(e) Notify the Regional Director in writing within 20 days from the date of this Order what steps the Respondent has taken to comply.

IT IS FURTHER RECOMMENDED that the complaint be dismissed insofar as it alleges violations of the Act not specifically found.

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

WE WILL NOT suspend, discharge, or otherwise discipline any employee for invoking seniority rights under the union agreement.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL make Veronica Lewis whole for any loss of earnings and other benefits resulting from her suspension and discharge, less any net interim earnings, plus interest.

WE WILL notify her that we have removed from our files any reference to her suspension and discharge and that the suspension and discharge will not be used against her in any way.

SPANN BUILDING MAINTENANCE CO.

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[3] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

General Teamsters Union, Local 483 *and* Ida Cal Freight Lines, Inc. Case 19–CC–1715

July 15, 1988

DECISION AND ORDER

BY CHAIRMAN STEPHENS AND MEMBERS BABSON AND CRACRAFT

On September 18, 1986, Administrative Law Judge David G. Heilbrun issued the attached decision. The General Counsel filed exceptions and a supporting brief; the Respondent, General Teamsters Union, Local 483, filed cross-exceptions, a supporting brief, and a separate answering brief; and the Charging Party, Ida Cal Freight Lines, Inc., filed a brief.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions, the cross-exceptions, and briefs and has decided to affirm the judge's rulings, findings, and conclusions, as modified, and to adopt the recommended Order.

Ida Cal Freight Lines, Inc. is a trucking firm, operating in 36 States from its Nampa, Idaho terminal. At the time of the hearing, Ida Cal had 135 employee-drivers who were covered by a collective-bargaining agreement that expired February 28, 1986. Ida Cal also had 80 to 85 owner-operators whose employee status is in issue. The Respondent contends that the owner-operators are employees; Ida Cal argues that they are independent contractors.

On November 8, 1985, the Respondent filed an 8(a)(5) charge against Ida Cal, alleging that Ida Cal had failed to apply the terms of the existing collective-bargaining agreement to the owner-operators. On January 29, 1986, the Regional Director dismissed the charge on the ground that the owner-operators are independent contractors, and the General Counsel thereafter denied the Respondent's appeal of the dismissal. In November 1985, the Respondent also filed a grievance seeking a determination that the owner-operators were covered by the collective-bargaining agreement. Subsequently, it demanded arbitration of the grievance. Ida Cal rejected the grievance on substantive and procedural grounds and refused to arbitrate the matter. In January 1986 the Respondent Union filed a Section 301 action in United States District Court for the District of Idaho presenting the owner-operator issue. In February 1986 Ida Cal filed an 8(b)(4)(ii)(A) charge against the Respondent, resulting in the complaint giving rise to this proceeding. On April 16, 1986, the United States District Court stayed its proceedings pending the Board's decision in this case.

Underlying the 8(b)(4)(ii)(A) issue is the dispute over the status of owner-operators. We agree with the judge, for the reasons set forth in his decision, that the owner-operators, including those who have lease-purchase agreements with Ida Cal, are independent contractors and not statutory employees. In addition to *Don Bass Trucking*, 275 NLRB 1172 (1985), and *Precision Bulk Transport*, 279 NLRB 437 (1986), on which the judge correctly relied, see *Container Transit*, 281 NLRB 1039 (1986).

We do not agree with the judge that the complaint warrants dismissal because of insufficiency in the pleading. The complaint's substantive allegations, paragraphs 5 and 6, allege:

> 5.
>
> (a) On or about November 11, 1985, Respondent filed a grievance with Ida Cal pursuant to the terms of the Contract *requesting* that "owner-operators" be covered by the Contract including the union security clause . . . .
>
> (b) At all times material *since* November 11, 1985, Respondent *has* demanded that Ida Cal proceed to arbitration pursuant to the terms of the Contract regarding the grievance described above in subparagraph (a).
>
> 6.
>
> On or about January 7, 1986, Respondent filed suit under Section 301 of the Act *asking* that the "owner-operators" be covered by the terms of the Contract, including the union security clause . . . . [Emphasis added.]

Paragraph 9(a) states that an object of the Respondent's conduct "is and has been," to force the independent contractors to join the Respondent, and paragraph 9(b) alleges that an object "*is*, and has been," to require Ida Cal to enter into an agreement prohibited by Section 8(e) of the Act. (Emphasis added.)

Although the judge's decision is not entirely clear, it appears that the judge viewed the General Counsel's position to be that the Respondent's conduct was lawful at the outset and became unlawful only upon the Regional Director's January 29, 1986 determination that the owner-operators are independent contractors. The judge concluded that the complaint is inadequate because it alleged only that the Respondent engaged in the original actions of November 1985 and January 1986 and not that the Respondent has continued to maintain those actions in the sense of not withdrawing them. In the

289 NLRB No. 120

judge's opinion, the latter was "the real contention" and "should have been so pled." We disagree.

We view the General Counsel's position to be that the owner-operators are independent contractors and that the Respondent's filing of the grievance and lawsuit, and the continuation of those actions, violated Section 8(b)(4)(ii)(A). We find that the complaint properly pleads the filing of the grievance and the filing of the lawsuit in a straightforward manner. Although the complaint does not specifically allege that the Respondent is continuing to press its actions, the complaint language adequately indicates that the actions are ongoing. Accordingly, we conclude that the complaint is sufficient to plead the General Counsel's theory of the case.

Alternatively, the judge recommended that the complaint be dismissed on the merits. For the following reasons, we agree.

In *Hotel & Restaurant Employees Local 274 (Warwick Caterers)*, 269 NLRB 482 (1984), the Board held that a Regional Director's dismissal, and the General Counsel's upholding the dismissal, of a union's prior 8(a)(5) charges involving single-employer and accretion issues did not preclude the union from raising the issues as a defense to an 8(b)(7)(C) allegation. The Board held that such dismissal did not serve as a determination of the unit issues. The Board stated (269 NLRB at 483):

> [T]he Board is bound to hear, receive, and consider the Respondent's answer at a trial-like hearing. The Regional Director's prior consideration and investigation of the earlier charge serves a more limited and discretionary function than the hearing necessary under the Act and cannot, therefore, serve as replacement for the Board's adjudicatory responsibility.

In its supplemental decision following remand to the judge, the Board rejected the union's defense on the merits and concluded that the union's picketing violated Section 8(b)(7)(C). *Hotel & Restaurant Employees Local 274 (Warwick Caterers)*, 282 NLRB 939 (1987). The Board, however, reversed the judge's finding that the union violated Section 8(b)(3), (2), and (1)(A) by insisting on arbitration and seeking through the grievance procedure to compel application of its bargaining agreement with Elan to Warwick Caterers' employees, a separate unit. The Board held that the union's grievance action did not violate the Act because the unit question had not previously been determined by the Board. The Board stated, "Therefore, at that point, it was not unreasonable for the Union to continue to maintain its position on the single-employer and accretion issues and attempt to have an arbitrator resolve the dispute." 282 NLRB 939.

The two *Warwick Caterers* decisions are applicable in this proceeding to both the grievance-arbitration and the Section 301 actions. The complaint alleges, in essence, that the Respondent took these actions to compel union representation of the independent contractors. Although the Respondent did take the actions to compel representation of Ida Cal's owner-operators, there had been no adjudicatory determination at that time, or at the time of the complaint or the hearing, that the owner-operators were independent contractors. Furthermore, the Respondent's actions were consistent with a goal of obtaining an adjudication, through arbitration or court action, of the status of the owner-operators; the Respondent did not strike or picket. In addition, the Respondent's contention that the owner-operators are statutory employees was not unreasonable. The lease and lease-back or lease-purchase arrangements are recent developments. They began in 1984, often involving former employee drivers; the arrangements increased during 1985 and into 1986. Importantly, in determining owner-operator status, the Board uses the right-of-control test, which depends on the facts of *each* case, which is not determined by any one factor, and which often presents a close issue of fact.

Teamsters Local 705 (Emery Air Freight), 278 NLRB 1303 (1986), enf. denied in relevant part and remanded 820 F.2d 448 (D.C. Cir. 1987), in which the Board held that the union's grievance filing violated the Act, is distinguishable. The Board found that the union's grievance was not intended to preserve existing bargaining unit jobs, a legitimate work preservation object, because the union never represented the employees who did the work. Rather, in the context of threats and a strike, which had an unlawful secondary object, the Board concluded that the Union's grievance filing likewise had an illegal objective. By contrast, here the Respondent did not threaten or strike, and because the question whether owner-operators are employees turns on the facts of each case and had not yet been determined through an adjudicatory process, the Respondent had a legitimate object in seeking a resolution of the issue through grievance arbitration and through a Section 301 lawsuit.[1]

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[1] Chairman Stephens and Member Cracraft find it unnecessary to decide whether *Emery Air Freight* was correctly decided; they agree it is distinguishable.

Member Babson agrees that *Emery Air Freight* is distinguishable and further finds it unnecessary to pass on the judge's discussion of that case here. In dismissing the complaint, Member Babson additionally relies on the fact that Ida Cal had control over the independent contractors that were the subject matter of the grievance and of the Sec. 301 action filed by the Respondent.

For the above reasons, we agree with the judge that the complaint should be dismissed.

ORDER

The recommended Order of the administrative law judge is adopted and the complaint is dismissed.

Daniel R. Sanders, for the General Counsel.

Louis L. Uranga (Uranga & Uranga), of Boise, Idaho, for the Union Respondent.

Robert M. Pattison (Jackson, Lewis, Schnitzler & Krupman), of San Francisco, California, for the Charging Party.

DECISION

STATEMENT OF THE CASE

DAVID G. HEILBRUN, Administrative Law Judge. This case was heard 14 and 15 May 1986 at Boise, Idaho. The charge was filed 12 February 1986 and the complaint issued 28 February 1986. The primary issue is whether General Teamsters Union, Local 483 (Respondent) threatened, restrained, or coerced persons with an object of forcing or requiring those self-employed to join a labor organization, or an employer to enter into an agreement prohibited by Section 8(e) of the National Labor Relations Act, and culminated such conduct by filing suit under Section 301 of the Act, in violation of Section 8(b)(4)(ii)(A) of the Act.

On the entire record, including my observation of the demeanor of witnesses and after consideration of briefs filed by the parties, I make the following

FINDINGS OF FACT

I. JURISDICTION

Ida Cal Freight Lines, Inc. (Ida Cal) maintains an office and principal place of business in Nampa, Idaho, where it is engaged as an intrastate and interstate trucking company with annual gross sales of goods and services valued in excess of $500,000, of which more than $50,000 was derived from customers outside the State of Idaho or were provided customers within Idaho, which were themselves engaged in interstate commerce by other than indirect means. Additionally, Ida Cal annually purchases and receives goods and materials at its Idaho facilities valued in excess of $50,000, which were received directly from sources outside that State, or from suppliers within Idaho, which in turn had obtained them directly from sources outside the State. On these admitted facts, I find that Ida Cal is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

II. ALLEGED UNFAIR LABOR PRACTICES

A. *Basis of Analysis*

1. The independent contractor issue

a. *Company operations*

Ida Cal is a trucking firm engaged as an irregular route common carrier under Interstate Commerce Commission (ICC) regulation. From a Nampa, Idaho terminal it operates in 36 States.

Its complement of drivers was formerly a standard work force of the industry and represented in collective bargaining by Respondent. Early in 1984 the imminent retirement of certain trucking equipment led to creation of several lease-purchase agreements, often with persons Ida Cal had been employing. In such cases, the lessee typically paid 10 percent down on one or more tractor units with potential for monthly payments over 3 years to a time of optional buy-out. Coextensively, the lessee was committed to a "transportation agreement" in which as "contractor" an industry termed "truck and driver" would be furnished Ida Cal.

The number of such lease and lease-back arrangements increased during 1985 and into 1986. The contracting person or entity was termed an "owner-operator." Additionally, Ida Cal utilized truck and driver services by other contractors who simply owned tractors or controlled such equipment by some unrelated means. In the recent representative past, an approximate overall configuration was that Ida Cal had 80 to 85 owner-operators based on 30 transportation agreements with outsiders, plus 8 to 10 lease and transportation agreements of which half were with persons who previously had been company drivers and which covered a total of 15 tractor units. In contrast with combined services provided by these owner-operators, a numerically predominant group of 135 "employee drivers" remains as the major component of Ida Cal's total personnel.

Ida Cal strives to provide reliable trucking of food products and freight by an array of pickup, delivery, backhauling, brokered loads, and related services. To this end, it requires company drivers and invites owner-operators, or their hired drivers, to telephone in on a regular basis for dispatch. The system also involves frequent calling to dispatchers from the road, customer premises, or distant points. The entire activity is permeated with regulatory requirements and traditional business practices under which driving logs, trip reports, bills of lading, expense receipts, and miscellaneous related documents are accumulated for submission on completion of specific trips.

b. *The documented arrangements*

The basic equipment lease served to identify units, establish costs and values, state maintenance, repair, operation, and insuring covenants, express the lessee's right of termination and lessor's rights in event of default, and closed with standard contractual verbiage. The transportation agreement evolved from what was originally used in 1984–1985 to one of revised form and content as introduced for 1986. Both covered compensation to owner-operators, apportionment of insurance coverages, establishment of impress account (later "escrow fund") and recitations of regulatory compliance. In terms of direct fulfillment of purpose, the earlier edition stated simply that the owner-operator "will either drive the Equipment or provide a driver at his own expense [as controlled and directed by Contractor]." A "Policy Statement, 1985" as its Exhibit A enlarged on various financial aspects of the transportation agreement. The current version is pronouncedly more detailed, tightly specifies numerous rights of Ida Cal, states that the owner-operator "shall determine the means and methods of performance of all transportation services [so] undertaken," and expressly disclaims any intent by the parties to create an "EMPLOYER-EMPLOYEE" relationship by the contract. An even more extensive "Addendum" became effective during April 1986.

Ida Cal publishes and disseminates an "Information, Policies and Procedures" binder covering a variety of subjects with numerous reminders concerning Department of Transportation (DOT) and Federal Highway Administration (FHA) regulations, plus an extensive closing portion on the correct handling of perishable loads. This document, suitable as it is for the guidance of those actually driving trucks, was incorporated by reference in original transportation agreements for compliance by the contracting owner-operator.

c. *Indicia of status*

Ida Cal's many regular company drivers continue to be treated as employees under the general terms and conditions obtained from the most recent collective-bargaining agreement. Thus, they are paid on a per mile, per weight basis by weekly net checks after standard withholdings, have vacation and holiday benefits, receive noncontributory group life, health and dental insurance, and are to observe particular rules of motoring, routing, and refueling.

Owner-operators earn a percentage of revenue paid by customers for the loads hauled, purchase their own fuel, pay for repair and maintenance costs of the leased tractor unit, select their own itinerary subject to delivery commitments, employ qualified drivers at their discretion, and draw against their impress/escrow account for expense money. In practical terms, the chief document passing regularly from Ida Cal to owner-operators is a weekly "settlement sheet." Ken Hobbs is employed as a full-time accountant to prepare, to issue, and to correct the settlement sheets and accompanying paperwork in support of the various credits and deductions. It is here that compensation of owner-operators is entered based on the principal contractual basis of 73 percent of revenue plus special revenue items for other compensable services. From total earnings, the numerous deductions or adjustments are made. Most frequently these cover fuel purchases when made from Ida Cal itself, rated fuel, and mileage taxes in the states traveled, repair or maintenance services when procured from Ida Cal, insurance premium payments for coverage arranged through Ida Cal or on its own policies, and proportional payments of the basic equipment lease cost amounts. The net yielded from all applicable calculations represents clear income to the owner-operators after payment due for the leased tractors, contractual outlays, and particular operating expense of the weekly period in question. Owner-operators do not receive vacation, holiday, nor insurance benefits from Ida Cal. After a return home, they are not required to accept new loads if they have not reported availability. When at a distant delivery point, and following delivery, they are permitted to obtain brokered loads to other points or generally back toward the Pacific Northwest subject to approval by Ida Cal's dispatcher. The power of approval is retained in order to better assure that equipment actually at some distant point will be first committed to customer needs at that location.

DOT regulations prescribe minimum qualifications for those operating motor vehicles, require the thorough completion of a daily log showing driving, duty, and rest times within the spacing of 24-hour and 8-day limits, and characterize a regulated motor carrier as "employ[ing] a person to drive when it so requires or permits" this function in its business and regardless of whether the vehicle is owned by the motor carrier. In these regards, Ida Cal administers DOT driving tests to persons proposed by owner-operators for a $50 charge, and monitors trip log submissions by owner-operators or their hired drivers. Further, the earlier version of the equipment lease recited that Ida Cal was not to be considered owner of the leased unit, a point about which the current equipment lease is silent.

d. *Particularized evidence*

Within the broad operational outline shown to be typical there are significant variations, practices or episodes to consider. The most evident consists of correspondence or memoranda that relate to this issue.[1] On 26 February 1985 Executive Vice President Paul Sudmeier wrote to "Gerry" of T&G Leasing, Inc., an entity with whom a three-unit equipment lease had been in effect. Sudmeier's letter advanced implications of "undependability and dishonesty" as the basis for an asserted breach of the transportation agreement and, relatedly, the equipment lease under its sections 1 and 3(d). Gerry was requested to immediately turn in unit 196, with the writer's hope expressed that other units under lease would be run better to avoid further terminating.

On 25 and 28 June 1985, Day issued memoranda to all owner-operators concerning per mile insurance rates that were increased and, as an addendum to the Company's policies statement at the time, the "release" of a contractor to secure loads was preconditioned on detailed advice to a dispatcher of its destination, and revenues to the contractor would not be settled until actually received by Ida Cal.

On 26 September 1985, Richard Carter, Ida Cal's president, issued a lengthy memorandum to all owner-operators on the subject of insurance rates, with particular reference to a current "industry crisis" and the likelihood of soon sharply increased premium rates for less coverage. The memorandum advised that a "dramatic" increase to 6 cents per mile would be imposed effective 1 October 1985, and that this could soon increase to another penny if insurance carriers invoked a penalty clause for a retro-fund reserve. Carter's memorandum closed with a pointed reminder of how accident-free driving would be the best salvation into the immediate future. On 10 October 1985, Day tersely advised owner-operators that the retro-fund surcharge had been implemented by the insurance carrier, resulting in a retroactive increase of 1 cent per mile subject to reversion again to a basic 6 cents if no claims arose during a 60-day period.

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[1] I disregard a memorandum written 30 November 1983 from then-operations manager John Day to all drivers on grounds that it predates material times of this case.

On 27 January 1986, Sudmeier wrote to an Idaho attorney for certain owner-operators including T&G Leasing. This letter alluded to considerable "unpaid rent" on several of the tractor units leased to T&G, and demanded their return or payoff by an early date.

Illustrative testimony was given by owner-operators Richard Smith and Robert Stewart, by former owner-operator Jeff White, and by former company driver Howard Morris. Smith is actually Ida Cal's director of maintenance, and in a capacity separate from this employment an owner-operator of three tractors leased from the Company. Smith hires his own drivers in reliance on Ida Cal's screening, and otherwise routinely fulfills a transportation agreement. He testified that maintenance and mechanical repair of his leased tractors would be undertaken most efficiently and economically because of personal expertise, either as an activity reimbursable to Ida Cal at its Nampa facility or to the extent that his drivers had such needs when on the road.

Stewart is independently purchasing his own truck and for 2 years has contracted services to Ida Cal under which he, his son, and occasionally his wife have driven. All three are company qualified to drive, yet Stewart testified that on some trips his wife is along largely for companionship. Stewart also testified that he wishes not to drive eastward from Idaho, and this preference is accommodated by Ida Cal dispatchers. Stewart had previously driven for T&G Leasing in its hauling for Ida Cal, however that relationship ended in a pay dispute he had with Jeff White as a principal of T&G.

White testified at Respondent's behest, outlining that he was a former company driver who converted to owner-operator in November 1984. He personally drove for 3 months until February 1985, when, because of chargeable accidents, he hired a driver for continuation under a transportation agreement. His entire arrangement with Ida Cal later terminated when his hired driver totaled the unit, and White is without information about any insurance proceeds or outcome of any claim by the hired driver for injuries. White is unfamiliar with the concept of brokered loads. A settlement sheet to White dated 11 October 1985 shows that deductions of that particular week included an amount of $514.90 for gross wages, subsistence, and employer withholdings on a driver named Roy Harwood. Hobbs explained in rebuttal testimony that Harwood had been offered to T&G as an available driver for a particular trip that week spanning 2186 miles. White testified that he attempted to stay in good stead with Ida Cal's dispatchers by always accepting a "forced dispatch."[2]

Morris also testified for Respondent as a former company driver from July 1983 to August 1985, during June 1985 he drove a 2-week period for owner-operator R. K. Wilson. This brief timespan was one in which Morris had actually tried out the condition of an R. K. Wilson tractor for possible purchase or lease as his own. Morris recounted that while an Ida Cal company driver his preferences as to load-taking and destinations were diminished by the advent of Gary Wilson as "chief dispatcher." Gary Wilson has in fact been Ida Cal's manager of operations since May 1985. Morris also testified to incidents when as a company driver in September 1984 he obtained a brokered load through negotiations, and when later driving for R. K. Wilson was directed by Ida Cal's dispatcher to pick up a brokered load and enter into a trip lease for its hauling with the broker.

The composite of testimony regarding the Ida Cal information policies binder is to the effect that it is fully complied with where written in regard to governmental regulations, is a basic source of guidance concerning vehicle inspection, operation, and care, is informational concerning general company dealings, and is technically valuable for its intricate description of refrigeration trailers.

e. *Holding*

A sharp focusing on this issue is provided from two recent Board decisions. In *Don Bass Trucking*, 275 NLRB 1172 (1985), a highly similar factual situation was involved as to an intrastate common carrier, and the significance of government-imposed regulations was specifically addressed. The Board favorably cited *Air Transit*, 271 NLRB 1108 (1984), in which the accepted reasoning was that more extensive regulation of the industry afforded lessened opportunity for control by a putative employer. To the extent inconsistent the earlier *Mitchell Bros. Truck Lines*, 249 NLRB 476 (1980), was expressly overruled.

Precision Bulk Transport, 279 NLRB 437 (1986), was another case of comparable facts, and here the Board held that equipment leases setting forth required ICC terminology fixing "exclusive possession, control, and use" of a truck with the carrier was an insufficient limitation on entrepreneurial status, and that countering facts showing enjoyment of certain freedom by owner-operators plus the business risks they bore were, as a composite matter, more indicative of the independent contractor relationship.[3]

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[2] Forced dispatch is a per mile payment to owner-operators when they drive empty from a distant point to some other distant pickup point. An instance appears in White's settlement sheet of 11 October 1985 on which $172.80 was paid for 384 miles at 45 cents per mile in connection with load No. LA 14307.

[3] In this same vein, it is unavailing for Respondent to argue, as it does in its brief at 6, that deeming the carrier an "owner of said Equipment for the purpose of subleasing" is an "additional" control going "one step further" than government-imposed regulations. In reality, 45 C.F.R. Sec. 1057.12(d)(2) of the ICC expressly authorizes such a provision in any written lease.

Here the principal subjects of lease content, personal investment by owner-operators and their discretion in hiring drivers, method of compensation, latitude in trip routing, responsibility for taxes, fees, and insurance, conditional right to obtain brokered loads, and emancipation from originating dispatch requirements all signify that an independent contractor relationship did arise as recited between the parties in the revised transportation agreement and as influentially noted by the Board in *Don Bass Trucking*. The applicable common law test for these situations is identically stated in both *Don Bass Trucking*, 275 NLRB at 1173, and *Precision Bulk Transport* to be:

> Where the one for whom the services are performed retains the right to control the manner and the means by which the result is to be accomplished, the relationship is one of employment; while, on the other hand, where control is reserved only as to the result sought, the relationship is that of an independent contractor. The resolution of this question depends on the facts of each case, and no one factor is determinative.

On the whole record, I find that Ida Cal has not retained a right of controlling actual manner and means by which owner-operators perform their services. What is seen instead is a comprehensive contractual arrangement in which Ida Cal possesses enormous leverage and insinuates deeply into the handling of cost expenditures by or on behalf of owner-operators, yet leaving still a core situation of entrepreneurial risk-taking with typical prospects for business profit or loss depending on diligence and decision making.

On specifics, Ida Cal's processing of nominated drivers is essentially a service for a fee, with an eye to what DOT requires, and its information binder a useful compendium with which owner-operators comply fully when necessary and discretionarily otherwise.[4] Ida Cal's strictness in requiring reliable fulfillment of the truck and driver agreements is no more than other posturings between customer and supplier in a generally arm's-length business relationship.[5] Further, a "sharp contrast," of the type the Board notes,[6] is demonstrated in the comparison of capital investment, truck maintenance costs, compensation formula, occupational benefits and availability for work assignments as between owner-operators and regular company drivers.

Such contrasts predominate, even with some exception, as with former company driver Morris' isolated role in the full cycle of a brokered load, and the self-inflicted oddity of White being forced off his own leased truck. In the first instance, a particular business transaction went from potential to actual under close supervision of an employee available for this purpose, and as to the second instance Ida Cal did no more than harmonize its operations with lawful industry regulations. While *Don Bass* was an intrastate carrier only, and *Precision Bulk* involved contracts viewed more as "trip leases," the facts of this case constitute an indistinguishable amalgamation of these two recent precedents.

Here the essential objective was, as Sudmeier summarizingly testified, the creation of administratively feasible permanent transportation leases with prudent autonomy retained by the owner-operators, plus a residual potential for acquiring mutually remunerative brokered, trip-leased backhauls when available, convenient and not any impediment to Ida Cal's basic servicing of customers. I therefore find that none of the persons having transportation agreements with Ida Cal, or their hired drivers, and regardless of whether the unit or units in use were leased from Ida Cal, were its employees within scope of the established bargaining unit as last defined by the phraseology "all over-the-road truck drivers, short-line pickup and delivery drivers and full-time loaders and unloaders."[7]

2. The 8(b)(4)(ii) issue

a. *Background*

A settled collective-bargaining relationship between these parties has resulted in various past labor contracts. The most recent was one of 3 years' duration from 1 March 1983 to 28 February 1986. Following its expiration, no new labor contract has been reached. The last one expressly entitled Ida Cal to subcontract "all or any portion of its work," and provided as article XVIII on adjustment of grievances that any "differences and controversies relative to the application or interpretation of any of the provisions of this agreement" were subject to decisions "final upon both parties" by a four-member board of arbitration including, where necessary to resolution, a selected "fifth party."

Following some years as a subsidiary of major corporations, Ida Cal was returned to "local ownership" in June 1983. Shortly after this, the prospect of creating operator-owners arose, and as early as 12 October 1983 Respondent's secretary-treasurer, Roy Corson wrote to Carter with notice that the bargaining agent would consider any such persons covered by its then-current labor agreement. Corson also requested a meeting to discuss "infusion" of owner-operators to the unit at Ida Cal. Further correspondence on the subject was exchanged, and one inconclusive grievance resulted during the period of mid-1984 to early 1985.

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[4] The information binder is further discountable in its material on "pretrip inspections," ostensibly in reference to DOT regulation No. 392.7. This subject of the voluminous Federal Motor Carrier Safety Regulations Pocketbook presumes only to forbid vehicle operation by a driver unless nine enumerated "parts and accessories" of the vehicle are "in good working order." The information binder expands on these nine, one of which is simply "tires," yet except for "critical tire *wear*" (emphasis supplied) no mention is made of assessing proper tire pressure. In a subsequent page entitled "equipment care" drivers are exhorted to pridefully manage the rigs, and regarding tire pressure as "important for safety reasons" to check it periodically and while enroute "bump tires" at every stop. The literal result of this configuration is that bumping of tires would not necessarily be required when starting a trip, an unlikely circumstance showing still more that the information binder is simply not to be taken that seriously.

[5] The Board referred specifically to testimony in *Don Bass Trucking* that owner-operators were subject to termination for failure to comply with terms of the lease or other inappropriate derelictions.

[6] *Don Bass Trucking*, supra, fn. 13; *Precision Bulk Transit*, supra, fn. 14.

[7] *Cf. J. R. Simplot Co. v. Idaho*, 122 LRRM 2278, Idaho Sup. Ct. (1986), where potato loaders under contract to processing firms were held as independent contractors.

b. *Current posture*

In November 1985, Respondent filed a grievance relative to the owner-operators, seeking a concession that they be covered by all conditions of the labor agreement and that financial relief flow to the Union and those of the "owner-operator division." The grievance was rejected on substantive and procedural grounds, following which Respondent unsuccessfully attempted to obtain Ida Cal's participation in the joint process of selecting an impartial fifth arbitrator. Additionally, by letter dated 8 January 1986, Respondent's counsel, Louis L. Uranga, wrote clarifyingly to Carter about the grievance.

On 17 January 1986, Attorney Uranga filed civil action No. 86-1023 in United States District Court for the District of Idaho invoking Section 301 of the Act. The complaint formally presented the essential owner-operator developments, seeking declaratory and monetary relief, plus that as would further appear "just and proper" to the court. The record does not disclose when the summons and complaint in this action were served on defendant Ida Cal, however, a final exchange of correspondence occurred between the parties in late January 1986, showing them still deadlocked on the fundamental dispute.

Concurrent with these dynamics Respondent had, on 8 November 1985, filed an 8(a)(5) charge against Ida Cal as Case 19-CA-17931. This was dismissed on 29 January 1986 by the Regional Director with *Don Bass Trucking* as the referenced authority. An appeal of this dismissal was denied on behalf of the General Counsel by letter dated 27 February 1986 in which a page of rationale also associating to *Don Bass* was contained. The final development to date in the lawsuit then occurred on 16 April 1986 when the court dealt with pending motions as supported by memoranda submitted following oral argument. An order of that date denied Ida Cal's Motion for Summary Judgment and granted plaintiff's motion to stay proceedings in order that the litigation "be held in abeyance until a decision is reached in the NLRB action filed by defendant Ida Cal."

c. *Holding*

As a threshold reason, this complaint warrants dismissal because of insufficiency in the pleading. Paragraphs 5 and 6 of the complaint, setting forth the heart of the matter, allege only that in November 1985 and early January 1986 Respondent grieved to arbitration and filed suit in United States district court, respectively. Complaint paragraphs 8 and 9 allege effects and objective of such activity, and beyond this the complaint, as formally amended at the hearing in minor inadvertent regards, contains only predictable conclusionary verbiage.

Thus, a fair reading of this fundamental pillar of labor relations law litigation is that it accuses Respondent of having pressed for arbitration on a broad contractual question, and having sought to compel this avenue of resolution under familiar Federal district court jurisdiction. However, facts of the case show that both actions were well *prior* to the Regional Director's administrative determination to which theory of the complaint is closely keyed, *and* the ordered stay of Federal district court proceedings as issued in April 1986.

The chronology of the situation is a critical consideration, for at the point in time when Respondent's conduct set forth in paragraphs 5 and 6 of the complaint took place the General Counsel would presumably not have then theorized that it triggerred a violation of Section 8(b)(4)(ii)(A). It was only because of the Regional Director's administrative determination on 29 January 1986, a decision later upheld on appeal, that the General Counsel's position tilts.

What follows is the inescapable conclusion that Respondent is not being accused of its original actions in November 1985 and January 1986, but of maintaining those actions in the sense of not withdrawing the dispute from arbitration under the now-expired contract and relatedly discontinuing its court case. This being the real contention, it should have been so pled, but I must deal with the complaint as actually presented. The Agency is cloaked with both congressional and judicial imprimaturs of expertise, and this must manifest in matters as basic as complaint drafting. I recognize that paragraph 10 of the complaint does read, in reference to Respondent's activities as referred to in paragraphs 5, 6, 8, and 9, that it "did engage in, and is engaging in, unfair labor practices." However, such mere conclusionary phrasing is insufficient to put Respondent on notice that it should, from the time the complaint issued on 28 February 1986, be prepared to defend not only its actions as originally legitimately done, but also its role in a continuum of events colored by the particularly extraneous factor of governmental voice exemplified in the Regional Director's official refusal to issue complaint in the CA case. The fact that Uranga had introduced himself into the grievance procedure by corresponding to Carter on 8 January 1986 is insufficient to change the technical character of the lawsuit he then filed on 17 January 1986, nor is there significance in this regard that the Union continued with board of arbitration activity during late January 1986.

Imprecision arises from the mutually exclusive assertions contained in paragraph 6 of the complaint as compared with the General Counsel's opening statement of record. In the former, Respondent's challenged action is correctly termed, asking the court to declare that owner-operators be covered by the union-security clause of the collective-bargaining agreement then in effect. As would therefore be assumed, the actual Federal district court complaint is silent on any traditional attempt to judicially compel arbitration, either in its averments or its paragraph for relief. However, the General Counsel's opening statement describes this action under Section 301 of the Act as one "to compel arbitration of the issue." A fundamental difference exists between these two notions.[8] If a section 301 action seeks direct relief from the court it is founded in *content* of the collective-bargaining agreement; if it seeks only to compel arbitration, which if ordered need not necessarily involve the court any further in the controversy, the lawsuit must pass muster under *Steelworkers v. Warrior & Gulf Navigation Co.*, 363 U.S. 574 (1960), and be subject to a defendant's resistance under principles associated to the doctrine of that case. Stated otherwise, the second type of action is not within the literature on conflict and reconciliation between the arbitral and legal forums, but instead only a court involvement to the extent of assessing substantive arbitrability.

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[8] See *Pressmen & Plate Makers Local 4 v. NLRB*, 794 F.2d 420 (9th Cir. 1986), in which the court observed that "the Union has not attempted to compel arbitration through a Section 301 suit."

Interestingly, the employer had also drifted into a self-contradictory position during the eventful month of January 1986. Following institutional skirmishing in the exchange of correspondence between the parties during November and December 1985, an escalation was first seen when Uranga wrote to Carter on 8 January 1986 in support of his client's grievance. Then against the background of midmonth filing of complaint in court the parties engaged in board of arbitration activity, and by 28 January 1986 the matter was sufficiently crystalized that Carter summarized Ida Cal's position in a two-page letter of that date written to union participants on the Board of Arbitration. This lawyer-like communication rejected grievance No. 3340, raised the specter of 8(b) and 8(e) violations were the employer to succumb, and, as a stated defense that could be "in part, in the alternative" claimed that Respondent had breached the contract "by resorting to other forms for relief" beyond the grievance procedure. This last quoted passage could only refer to the freshly filed lawsuit in Federal district court, and shows that the employer did not then consider such action to be a furtherance of the contractual grievance procedure. The charge in this matter, filed only 15 days later by counsel of record here, particularizes the asserted unfair labor practice conduct within the meaning of Section 8(b)(4)(ii)(A) in the disjunctive, with phraseology touching *both* on the seeking of "arbitration or court award" but *without* associating the two distinct concepts. Respondent's answer to the complaint essentially admits paragraphs 5(a) and (b), however, these are devoid of allegations introducing the concept of judicially compelled arbitration. Finally, it is noteworthy that the answer admits only having "demanded arbitration until" issuance of complaint, and having voluntarily agreed to stay the court proceedings afterwards.

The critical significance of this overall interplay of positioning, conduct, and bindingly written expression by the parties is that arbitration was invoked only on the informal plane of collective-bargaining dealings, a court declaration of contract application to the basic dispute was sought, and there was never a linking of the two approaches by Respondent. This lack of nexus means that for reasoning purposes in relation to the concept of coercive "threatening" under Section 8(b)(4)(ii)(A), the only view that may be undertaken of the court action is one confined to its intrinsic thrust and *not* as a matter associated to, or extending from, the contractual clause on adjustment of grievances.

As an entirely independent basis for disposition, I believe this complaint must be dismissed on direct examination of its merits. In this alternative consideration of the case, there are two distinct grounds on which dismissal is mandated. The first is that Respondent has correctly theorized it is entitled to a hearing of some sort in terms of the dispute, and the second that irregardless its filing of suit is protected by the applicability of the United States Supreme Court's decision in *Bill Johnson's Restaurants v. NLRB*, 461 U.S. 731 (1983), to this proceeding.

Aside from the fundamental inclination in our jurisprudence to accord fair hearing of disputes, the facts here singularly command such an entitlement. This is particularly true when the significance of refusal by the General Counsel to issue an unfair labor practice complaint as sought by a charging party is considered. Such declination to act was well described by the court in *Electrical Workers UE v. General Electric Co.*, 407 F.2d 253 (2d Cir. 1968), as "administrative only, neither formally adversarial nor like a trial." Another court held that unless the "rare case" of a "pure question of Board law which involved no factual issues or contract interpretation issues" obtained, the General Counsel's adoption of a Regional Director's refusal to issue complaint was "a final and unreviewable decision . . . before any adversarial process or full hearing on the merits." *Edna H. Pagel, Inc. v. Teamsters Local 595*, 667 F.2d 1275 (9th Cir. 1982). Relatedly, the unreviewability of the General Counsel's manner of investigating unfair labor practice charges and determination of whether to issue complaint thereon is well settled. Vaca v. Sipes, 386 U.S. 171 (1967); *Dunn v. Retail Clerks Assn.*, 307 F.2d 285 (6th Cir. 1962); *United Electrical Contractors Assn. v. Ordman*, 366 F.2d 776 (2d Cir. 1966), cert. denied 385 U.S. 1026 (1967). From this composite of principles, *Hotel & Restaurant Employees Local 274 (Warwick Caterers)*, 269 NLRB 482 (1984), is an indistinguishable precedent for dismissal here. In *Warwick* a union's 8(a)(5) charge founded in alter ego theory was rejected, whereupon its continued picketing was charged by the employer as being violative under Section 8(b)(7)(C) of the Act. On presentation to the Board, a remand of proceeding was ordered to substitute a "trial-like hearing" for the Regional Director's earlier upheld dismissal of the 8(a)(5) charges. The Board termed such prior consideration and investigation into the union claim of continuing rights of recognition and contract enforcement, as also separately sought through arbitration, a "more limited and discretionary function than the hearing necessary under the Act and cannot, therefore, serve as a replacement for the Board's adjudicatory responsibility." Here Respondent is jeopardized from challenging the Regional Director's finding that owner-operators are independent contractors, and essentials of the situation clearly warrant a "trial-like" adversarial presentation. Regardless of the conviction by which the Regional Director is now persuaded that coercion arises from Respondent having filed suit, this subordinates to the labor organization's entitlement to hearing. In this regard, it is totally conjectural to say, as the Charging Party argues in its brief at 37, that Respondent "surely made its best case in its presentation to the Regional Director in support of the charge in Case 19–CA–17931." On the contrary, there is no basis for such a presumption, nor can it now be known what extent of presentation may have been made by Respondent at that administrative level.

Regarding the second independent ground for dismissal, I emphasize that the decision in *Bill Johnson's Restaurant* was a suppressive holding in limitation of Board authority, and the exception carved out by the court was to suits having "an objective that is illegal under federal law." The Board has applied this distinction in *Teamsters Local 705 (Emery Air Freight)*, 278 NLRB 303 (1986), where even assuming the applicability of *Bill Johnson's* the union was there found to have undertaken a plainly "unlawful secondary objective" when the work to which a grievance in question pertained had never in the recent past been performed by employees it represented and thus a legitimate work preservation objective could not have been present. Here the facts are diametrically opposite for the work sought to be preserved within the bargaining unit has been traditionally covered by Respondent's contract as a reflection of its role in the exclusive representation of such persons.[9]

CONCLUSIONS OF LAW

1. Ida Cal Freight Lines, Inc. is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

2. Respondent is, and at all times material has been, a labor organization within the meaning of Section 2(5) of the Act.

3. Respondent has not committed any of the unfair labor practices alleged in this complaint.

Disposition

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[10]

ORDER

The complaint is dismissed.

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[9] It is unavailing for Charging Party to advance *Laundry Workers Local 3 (Virginia Cleaners)*, 275 NLRB 697 (1985), for there again a labor organization had engaged in an objective that was illegal under Federal law by seeking state court enforcement of fines that it had unlawfully imposed under the Act.

[10] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

Whittaker Corporation, Kettenburg Marine Division *and* **Milton E. Johnston.** Case 21-CA-21801

July 18, 1988

DECISION AND ORDER

BY CHAIRMAN STEPHENS AND MEMBERS BABSON AND CRACRAFT

On June 3, 1983, Administrative Law Judge Roger B. Holmes issued the attached decision. The General Counsel filed exceptions and a supporting brief, and the Respondent filed an answering brief.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings, and conclusions only to the extent consistent with this Decision and Order.

The judge found that Milton E. Johnston, the Charging Party, was discharged for the statements he made at an employee meeting called by the Respondent's president, Larry Miller, on November 22, 1982. The judge concluded, however, that Johnston's statements were not concerted activity within the meaning of Section 7; therefore, his discharge was lawful under the Act. We disagree.

The facts are not in dispute. On November 22, 1982, the Respondent's president, Larry Miller, conducted a series of meetings in his office with the employees, department by department, to inform them that they would not be receiving their regular annual wage increases. At each meeting, he invited questions, and several employees asked questions about his announcement. At the last of these meetings, after Miller completed his statement, Johnston raised his hand and stated:

> Well, I don't remember us being called together when there's been a good year and saying here's something extra. But now that there's a little downturn, I feel we're being asked to bear the brunt of it by not having an increase.

He further stated that, because he had not had the benefit of consulting the Company's books, he did not believe he could come to the same conclusion as the Respondent. Miller responded that the Respondent did not have to open its books to the employees. Johnston replied that he had not asked to see the books but merely stated that they were a source of information that he did not have. No other employee commented at the meeting on the wage policy; however, several employees expressed agreement with Johnston's comments afterwards. In reaction to Johnston's comments, the Respondent discharged him the next day for insubordination.

The Board held in *Meyers Industries*, 268 NLRB 493, 497 (1984) (*Meyers I*), remanded sub nom. *Prill v. NLRB*, 755 F.2d 941 (D.C. Cir. 1985), cert. denied 474 U.S. 948 (1985), reaffd. 281 NLRB 882 (1986) (*Meyers II*), enfd. sub nom. *Prill v. NLRB*, 835 F.2d 1481 (D.C. Cir. 1987), cert. denied 128 LRRM 2664 (June 20, 1988), that "in general, to find an employee's activity to be 'concerted,' we shall require it to be engaged in with or on the authority of other employees, and not solely by and on behalf of the employee himself." The Board thereby overruled *Alleluia Cushion Co.*, 221 NLRB 999 (1975), and similar cases which held that the individual assertion of a matter "of common concern" to other employees was concerted activity.[1] The Board cautioned, however, that

> the definition of concerted activity we set forth . . . is by no means exhaustive. We acknowledge the myriad of factual situations that have arisen, and will continue to arise, in this area of the law.
>
> We also emphasize that, under the standard we now adopt, the question of whether an employee engaged in concerted activity is, at its heart, a factual one . . . . [268 NLRB at 496–497]

Specifically in *Meyers I*, 268 NLRB at 494, and again in *Meyers II*, 281 NLRB 882, we reaffirmed *Root-Carlin, Inc.*, 92 NLRB 1313, 1314 (1951), and other cases holding that "the guarantees of Section 7 of the Act extend to concerted activity which in its inception involves only a speaker and a listener, for such activity is an indispensable preliminary step to employee self-organization." Thus, the "activity of a single employee in enlisting the support of his fellow employees for their mutual aid and protection is as much 'concerted activity' as is ordinary group activity." *Owens-Corning Fiberglas Corp. v. NLRB*, 407 F.2d 1357, 1365 (4th Cir. 1969). Such individual action is concerted as long as it is "engaged in with the object of initiating or inducing . . . group action . . . ." *Mushroom Transportation Co. v. NLRB*, 330 F.2d 683, 685 (3d Cir. 1964).[2]

Furthermore, the object of inducing group action need not be express. For instance, "[i]t is obvious that higher wages are a frequent objective of organizational activity, and discussions about wages are necessary to further that goal." *Jeannette Corp. v. NLRB*, 532 F.2d 916, 918 (3d Cir. 1976).

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[1] We therefore do not rely on the judge's discussion of such cases.

[2] See also *Vought Corp.*, 273 NLRB 1290, 1294 (1984), enfd. 788 F.2d 1378 (8th Cir. 1986).

289 NLRB No. 116

"[D]issatisfaction due to low wages is the grist on which concerted activity feeds." Id. at 919.

Particularly in a group-meeting context, a concerted objective may be inferred from the circumstances. Indeed this case is strikingly similar to *Enterprise Products*, 264 NLRB 946 (1982), in which the Board found an employee's statements in analogous circumstances concerted. There, an employer called a meeting to ask employees to increase their productivity and to offer in exchange tickets to athletic or public amusement events. At this meeting the employer also told employees that it could not increase their wages or give them their customary annual bonuses. The employer asked the employees' opinion of its incentive proposal, and one employee responded, "No more money, no more production." For this he was discharged.

The Board found the remark to be concerted activity, noting that it concerned a common condition of employment and that the meeting was the employees' first opportunity to protest the employer's proposal. Id. at 947–948. Moreover, the employer there, by calling the meetings and soliciting the employees' responses, had "lumped [them] together and viewed [them] as a group." Id. at 949, quoting *Frank Briscoe, Inc. v. NLRB*, 637 F.2d 946, 949 (3d Cir. 1981).

The Board adopted the administrative law judge's decision in *Enterprise Products*, 264 NLRB at 949, in which it was conceded that:

> Cibrian's [the charging party] remarks had not constituted an overt appeal to his coworkers in the sense of having taken over the meeting, Brutus-like, to make an address to them seeking sympathy and support. . . . Cibrian had been the first employee whose opinion had been sought . . . . Accordingly, an employee in Cibrian's position likely would be aware that his reasons would be heard and considered by those who would answer after him. Thus, that he had directed his answer to [the respondent's president] would not have made him oblivious of its effect on other employees present . . . .[3]

Here, the Respondent's president called together the employees to announce that their anticipated wage increases would not be forthcoming. As these meetings provided the employees with their first knowledge of the Respondent's decision to suspend the wage increases, they were also the employees' first opportunity to comment on or protest that action. Johnston, not having had a chance to meet with any employee beforehand, made his statements as a spontaneous reaction to the Respondent's announcement. He phrased his remarks not as a personal complaint, but in terms of "us" and "we." Obviously, they were addressed to everyone assembled to discuss the topic of the proposed wage increase suspension, including his fellow employees.[4] His statements implicitly elicited support from his fellow employees against the announced change.

We find that, in the presence of other employees, Johnston protested, at the earliest opportunity, a change in an employment term affecting all employees just announced by the Respondent at that meeting. This is clearly the initiation of group action as contemplated by the *Mushroom Transportation* line of cases which was specifically endorsed by *Meyers II*, supra.

The judge erroneously concluded that Johnston did not engage in concerted activity because he did not try to enlist group support after the meeting and because actual group activity did not occur. In the context here, these facts are irrelevant. An employee does not have to engage in *further* concerted activity to ensure that his initial call for group action retains its concertedness. In addition, employees do not have to accept the individual's invitation to group action before the invitation itself is considered concerted.[5] *El Gran Combo*, 284 NLRB 1115 (1987); *Mushroom Transportation Co.*, supra at 685.

In light of all the circumstances, we find that Johnston's remarks at the November 22 meeting were concerted activity protected by Section 7 of the Act. Accordingly, his discharge violated Section 8(a)(1).

AMENDED CONCLUSION OF LAW

By discharging Milton E. Johnston on November 22, 1982, in retaliation for his protected concerted activity, the Respondent engaged in unfair labor practices affecting commerce within the meaning of Section 8(a)(1) and Section 2(6) and (7) of the Act.

REMEDY

Having found that the Respondent has engaged in certain unfair labor practices, we shall order it o cease and desist and to take certain affirmative action designed to effectuate the policies of the Act. We shall order it to offer Milton E. Johnston immediate and full reinstatement to his former job, with backpay to be computed in the manner prescribed in *F. W. Woolworth Co.*, 90 NLRB 289 (1950), with interest as prescribed in *New Horizons for the Retarded*.[6] We shall also order the Respondent to remove any reference to the discharge from its files. *Sterling Sugars*, 261 NLRB 472 (1982).

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[3] See also *Autumn Manor*, 268 NLRB 239, 244 (1983); *F. W. Woolworth Co.*, 251 NLRB 1111, 1114–1115 (1980), enfd. 655 F.2d 151 (8th Cir. 1981); *J. P. Stevens & Co.*, 219 NLRB 850 (1975), enfd. 547 F.2d 792 (4th Cir. 1976); *Rinke Pontiac Co.*, 216 NLRB 239 (1975); *Prescott Industrial Products Co.*, 205 NLRB 51 (1973), enfd. as modified 500 F.2d 6 (8th Cir. 1974); *Hugh H. Wilson Corp.*, 171 NLRB 1040, 1046 (1968), enfd. 414 F.2d 1345 (3d Cir. 1969); *Guernsey-Muskingum Electric Corp.*, 124 NLRB 618 (1959), enfd. 285 F.2d 8 (6th Cir. 1960).

[4] As one employee testified, Johnston "probably said something the rest of us didn't have the nerve to say . . . ."

[5] Nevertheless, Johnston's statements did elicit such support, albeit, after the meeting. This postmeeting support shows that other employees interpreted Johnston's remarks the same way we have.

ORDER

The National Labor Relations Board orders that the Respondent, Whittaker Corporation, Kettenburg Marine Division, San Diego, California, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Discharging any employee for making statements to enlist support from employees to protest terms or conditions of employment.

(b) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Offer Milton E. Johnston immediate and full reinstatement to his former job or, if that job no longer exists, to a substantially equivalent position, without prejudice to his seniority or any other rights or privileges previously enjoyed, and make him whole for any loss of earnings and other benefits suffered as a result of the discrimination against him, in the manner set forth in the remedy section of the decision.

(b) Remove from its files any reference to the unlawful discharge and notify the employee in writing that this has been done and that the discharge will not be used against him in any way.

(c) Preserve and, on request, make available to the Board or its agents for examination and copying, all payroll records, social security payment records, timecards, personnel records and reports, and all other records necessary to analyze the amount of backpay due under the terms of this Order.

(d) Post at its San Diego facility copies of the attached notice marked "Appendix."[7] Copies of the notice, on forms provided by the Regional Director for Region 22, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material.

(e) Notify the Regional Director in writing within 20 days from the date of this Order what steps the Respondent has taken to comply.

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

Section 7 of the Act gives employees these rights.

To organize

To form, join, or assist any union

To bargain collectively through representatives of their own choice

To act together for other mutual aid or protection

To choose not to engage in any of these protected concerted activities.

WE WILL NOT discharge any employee for making statements to enlist support from employees to protest terms or conditions of employment.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL offer Milton E. Johnston immediate and full reinstatement to his former job or, if that job no longer exists, to a substantially equivalent position, without prejudice to his seniority or any other rights or privileges previously enjoyed and WE WILL make him whole for any loss of earnings and other benefits resulting from his discharge, less any net interim earnings, plus interest.

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[6] In accordance with our decision in *New Horizons for the Retarded*, 283 NLRB 1173 (1987), interest on and after January 1, 1987, shall be computed at the "short-term Federal rate" for the underpayment of taxes as set out in the 1986 amendment to 26 U.S.C. § 6621. Interest on amounts accrued prior to January 1, 1987 (the effective date of the 1986 amendment to 26 U.S.C. § 6621), shall be computed in accordance with *Florida Steel Corp.*, 231 NLRB 651 (1977).

[7] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

WE WILL notify him that we have removed from our files any reference to his discharge and that the discharge will not be used against him in any way.

WHITTAKER CORPORATION, KETTENBURG MARINE DIVISION

Robert R. Petering, for the General Counsel.
Roy E. Potts and *Robert C. Hayden, Esqs. (Overton, Lyman & Prince),* of Los Angeles, California, for the Respondent.

DECISION

ROGER B. HOLMES, Administrative Law Judge. The unfair labor practice charge in this case was filed on December 6, 1982, by Milton E. Johnston.

The General Counsel's complaint was issued on January 7, 1983, against Whittaker Corporation, Kettenburg Marine Division. The General Counsel alleges in his complaint that the Respondent has engaged in conduct that violates Section 8(a)(1) of the Act. In summary, the General Counsel alleges that the Respondent terminated employee Milton E. Johnston from employment on November 23, 1982, and since that time, has failed to reinstate him because Johnston had engaged in conduct protected by Section 7 of the Act. In the answer to the complaint allegations, the Respondent denied the commission of the alleged unfair labor practices.

The trial in this proceeding was held on April 6, 1983, at San Diego, California. The time for the filing of posttrial briefs was set for May 11, 1983. The counsel for the General Counsel and the attorneys for the Respondent filed briefs, which were argued persuasively from their respective points of view.

FINDINGS OF FACT

I. JURISDICTION

The jurisdiction of the Board over the business operations of the Employer is not an issue in this proceeding. The Employer is engaged in the operation of a boat and yacht repair facility at San Diego, California. The Employer's business operations meet the Board's direct inflow jurisdictional standard.

II. THE WITNESSES AND CREDIBILITY RESOLUTIONS

Five persons were called to testify as witnesses during the trial of this proceeding. In alphabetical order by their last names, they are Milton E. Johnston, who is the Charging Party and the alleged discriminatee in this case; Gary A. Klers, who has been employed by the Respondent for the past 17 years and who was a supervisor for the Employer at the time of the trial; Linda Bodenhamer Klers, who has been the personnel administrator for the Respondent for the past 4-1/2 years; Larry E. Miller, who is the president of the Respondent; and Albert G. Schmidt, who is an electrician and who has worked for the Respondent for the past 2-1/2 years.

The findings of fact to be set forth in the sections to follow will be based on portions of the testimony from each of the five witnesses who testified at the trial, and findings will be based on documentary evidence and a tape recording introduced during the trial proceedings. It should be noted at the outset of this decision that a substantial number of the facts are not in dispute. However, the recollections of some of the witnesses differed concerning some of these past events. Understandably, in view of the passage of time between the occurrence of the events and the time of the trial, some witnesses were able to recall some things better than others. In addition, I have considered the fact that the witnesses viewed the events as they occurred from their own perspective, and this may explain some of the differences among the witnesses when they related their accounts at the trial.

In relying on certain portions of the testimony from each witness, I have also considered the demeanor of the witness on the stand during the trial; the consistency of the witness' account when it is considered in the context of the testimony from other witnesses and certain facts, which are not in dispute; the ability of the witness to recall the events in question because at times some witnesses were not as certain in recalling a particular event; and the employment position of the witness in the sense that a witness was identified more closely with one of the parties and therefore may have had a potential interest in the outcome of the litigation. With the foregoing in mind, I have based the findings of fact on the portions of the testimony that seem to me to be credible, accurate, and reliable. (See, for example, *Krispy Kreme Doughnut Corp.,* 245 NLRB 1053 (1979), regarding the acceptance of some, but not all, of the testimony of a witness.) Although all the testimony and the documentary evidence introduced at the trial have been considered, the findings of fact to be set forth will be limited to the credited evidence in the proceeding. (See, for example, *ABC Specialty Foods,* 234 NLRB 475 (1978).)

III. THE EVENTS IN NOVEMBER 1981

Milton E. Johnston worked as a machinist for the Employer from January 1972 until his termination from employment on November 23, 1982.

Introduced into evidence as the General Counsel's Exhibit 5 was a copy of a petition, which Johnston had prepared, and which Johnston began circulating among employees of the Employer on November 16, 1981. The handwritten document consists of four pages, and it is dated November 16, 1981. The document expresses the employees' appreciation for the Company's granting of a retroactive pay raise, and it also asks for the Company's consideration of additional fringe benefits for the employees. The fringe benefits mentioned in the document pertain to adding six paid holidays over a 3-year period to the time between Christmas Eve and New Year's Day, and also to implementing a plan of $75 a week payments in the event of an accident, hospitalization, or after the eighth day of an illness. Johnston's name appears on page 3 at the top of a list of 11 names.

On the second day that Johnston circulated the petition, Bob Ballinger told Johnston that he wanted Johnston to accompany him to Miller's office. Miller had heard from a supervisor that Johnston was unhappy, that Johnston had been doing a lot of complaining, and that

Johnston was passing something around. (See Tr. 70–71.) Johnston, Ballinger, and Miller were the persons who were present in Miller's office during the conversation. Johnston testified (Tr. 26–27):

> Mr. Miller addressed me on the subject of equity among—of the other divisions of the corporation and other yards in the area regarding increases in the benefits and salaries. And he wanted me to understand that Kettenburg was a seperate [sic] entity and that we could not necessarily enjoy the same benefits that other divisions of the corporation had and keep pace with other yards in the area. And they felt that if he talked to me personally and explained to me, that it would [be] a better situation.

At the trial, Johnston acknowledged that he had never delivered the petition to the Company. Miller testified that he had not seen the General Counsel's Exhibit 5 prior to the time that the document was handed to him on the witness stand at the trial. According to Miller, the conversation he had with Johnston in November 1981 and the rumor he had heard that Johnston may have been circulating a petition in November 1981, had no effect on Miller's decision a year later in November 1982 to terminate Johnston from employment with the Company. (See Tr. 71.)

IV. THE EVENTS BEGINNING IN JANUARY 1982

Beginning in January 1982, Johnston was granted a leave of absence from work at the Company.

According to Linda Klers, the Company basically grants a 30-day leave of absence, but with another 30 days for medical leave. She stated (Tr. 52):

> And in Mr. Johnston's case, he had given us information that he would be back within a specified period of time, and that had been changed three or four different times whenever we could reach him to find out when, indeed, he could come back. And it basically extended from the latter part of January to the first part of May, so we just don't normally have leave of absences of that extent, nor do we continue to employ that individual. He would have been in a layoff status, and we would have employed someone else in his place.

According to Miller, the Company's policy normally is to terminate an employee if the employee overstays his leave of absence. Miller explained that the Company would not know whether such an employee would ever return to work, and, therefore, the Company replaces the employee. Miller stated that it was reported to him that Johnston had overstayed his leave of absence. When Miller was questioned at the trial regarding why the Company did not terminate Johnston when he had overstayed his leave of absence, Miller replied, "Frankly, I don't know."

V. THE EVENTS ON MONDAY, NOVEMBER 22, 1982

On Monday, November 22, 1982, Company President Miller held separate meetings with about four or five groups of employees from various departments at the facility. Regarding his purpose for holding those meetings with employees, Miller said at the trial, "Purpose of the meeting was to advise the employees that I decided that our division in total would not be receiving an increase in their hourly rates." Miller did not speak to the different groups from a prepared text, but he attempted to convey the same words to each group. He conducted each meeting in the same manner and with the same format. Each meeting lasted for approximately 15 or 20 minutes.

After Miller had spoken to the employees and invited questions from them in one of the meetings, an employee named Buroyo told Miller that the most important thing was for the employees to get a full 40-hour workweek. Miller said that Buroyo also stated at the meeting that Buroyo understood how difficult it was because all the other people in the area were charging less than the Company was charging, and that, if he could get 40 hours a week, he would be happy.

Miller also recalled a comment from another employee in one of the meetings. That employee was fearful that the Company was going into a deeper trough from an economic standpoint. The employee wondered why the Company did not reduce its rates to a level comparable to the rates charged by other companies in the area.

Miller further recalled that still another employee asked him to repeat "when it was that I was going to review this situation for wages again, and I answered him, six to nine months."

All the foregoing took place before the last meeting of employees on November 22, 1982, which was the meeting at which Johnston was present. That last group met with Miller about 2:45 following the afternoon break period. The employees were from the machine shop department and the engine repair department. About 9 or 10 employees were in that group.

Miller recalled how the meeting began on that occasion. He stated (Tr. 82):

> Well, when everybody came into the room, my office's not too large, but when everybody came into the room I said I had chairs around and I said, "Okay, gentlemen, grab a chair." Well, Milt went up to the chair that was next to my office and he grabbed it and he shook the chair, and I think I might have said, "What's this?"

Miller then spoke to the employees who were present in that last meeting. He testified (Tr. 74, 76, and 77):

> Okay. The purpose of this meeting is to advise you that after careful consideration and thought, that it will not be possible for the employees of Kettenburg Marine Divion [sic] to receive an increase in your pay at this time.
>
> . . . .
>
> And the reason for this is that the rate of increase that I would typically put through at this time of year, if—if done, would cause our charging rate to go from thirty-three fifty an hour currently to approximately thirty-six dollars. We're in the midst of

> the highest unemployement [sic] of people in the boat repair and ship repair in San Diego that we've been in in many years, and we're in the midst of the worst economic downturn that this country has dealt with since World War II. And the reason for not putting through these increases at this time is that I am sure that if we charge thirty-six an hour instead of the thirty-three fifty, which is already high compared to the competition, that we would be effectively driving jobs away from this business, working a hardship on the employees as well as the company in lost revenues and lost wages for employees.
>
> The other part of the—the other part of my talk was that—that because of the fact it's difficult at this point to know what the near term future holds, I'm going to review this situation in the next six to nine months and have another look at it, and I sincerely hope that at that point in time, that I'll have more confidence in the market and the general economy, and that some type of an increase will be possible at that time. And I also want you to know that this not only affects you as the hourly workers of this company, but it affects myself. I will not take an increase, nor will anybody that works for me till this period of time is over . . . [until] I feel that it's wise for the business to resume with increases and charging rates, as well as increases for hourly rates, for the employees.
>
> I think that is about all I said.

Johnston said that he made his comments to Miller at the meeting after Miller had stopped and appeared to be waiting. Johnston said, "I raised my hand and was acknowledged and spoke." Johnston stated at transcript 108 regarding his comments to Miller at the meeting:

> Well, I don't remember us being called together when there's been a good year and saying here's something extra. But now that there's a little downturn, I feel we're being asked to bear the brunt of it by not having an increase.

Johnston further testified (Tr. 109) regarding his comments at the meeting:

> . . . and I believe I said that I don't have the benefit of the books, so I cannot—I don't believe that I can come to the same conclusion that you can. At that time, Mr. Miller directed a statement to me that a company does not have to open its books and is not about to open its books to its employees. I replied in that I had not asked to see the books, but as a sorce [sic] of information that I didn't have.
>
> Q. In other words, it's your testimony that as to that exchange and your comments about the books, you were speaking in the first person, you were saying "I," you weren't saying "employees"?
>
> A. That is true.

According to employee Schmidt who was present at that meeting, Miller then asked if there were other questions. Dick Harris brought up the subject of the back gate at the facility being locked, which prevented the employees from having access to the parking lot. Miller asked Ballinger if the gate could be opened in the morning and in the evening so that the employees could use it to get in and out. Ballinger said it could be done.

After the meeting had concluded, some of the employees talked about the meeting. Schmidt said, "Well, I think we felt that Milt had probably said something the rest of us didn't have the nerve to say, and that he had been misunderstood by Mr. Miller." (See Tr. 104.) At the trial, Schmidt expressed his feelings that Johnston's comments were not appropriate. Schmidt said that Johnston was not present during that conversation after the meeting. There is no evidence that Miller or any other company management or supervisory person was made aware of the conversation described by Schmidt.

Miller was the one who made the decision to terminate Johnston from employment. At the trial, Miller stated his own reaction to the comments that Johnston had made at the meeting. "My reaction was that it was a rather insubordinate action . . . and that it was an affront on my word and . . . another way of indicating, perhaps, that I wasn't being truthful." (See also Tr. 65-66 where Miller gave his views and see Tr. 58-63 and 66-68 regarding the receipt into evidence, over timely objection, of the testimony regarding Miller's opinion of Johnston's comments at the meeting.)

During the same afternoon of the meeting, Miller called Linda Klers into his office. Miller told her what had happened in the meeting and his reaction to the comments. He also said he was considering the termination of the employee who made the comments, and he asked for her views regarding whether there were any problems involved in terminating the employee. According to Miller, Linda Klers advised him that she did not perceive any problems. He said, "Then I told her to prepare the documents for termination."

VI. THE EVENTS ON TUESDAY, NOVEMBER 23, 1982

In accordance with her standard procedure at the Company, Linda Klers prepared the papers relating to the termination of Johnston from employment. Introduced into evidence as the General Counsel's Exhibit 2 was a copy of the Employer's "Separation Report" regarding Johnston. Klers typed the document, and she took it to Miller for his approval. At that time, Klers also asked Miller some questions. During her testimony at the trial, the following occurred, which is reflected at transcript 50:

> Q. Did you at that time ask him anything further about what had happened at the meeting?
>
> A. Yes, I did. I wanted to know for my own self if there was any—when Mr. Johnston had made the comment, if there had been anyone else making any kind of pains, or did anybody gasp, or did anybody just not believe that he had made that comment, or was there any kind of reaction from anyone else in the room, and he said, absolutely, that the comment was made, and that that was the extent of it.
>
> Q. What was the reason for that inquiry?

> A. Well, just because it's part of my job, and the fact that I possibly—because of the concerted activity, and I try to look at all aspects of any kind of a termination.

Miller approved the "Separation Report" at that time, and he also signed Johnston's final paycheck. In part, the General Counsel's Exhibit 2 shows the following concerning the Employer's reason for the termination:

> Mr. L. E. Miller, Company President, called a group meeting to inform employees that there would be no salary increase at this time. Mr. Johnston challenged that decision, stating he did not know whether he could accept the decision or not without examining the books and records of the Company. Such comments are not in the best interest of our Company.

About 5 minutes before 4 p.m. on Tuesday, November 23, 1982, Johnston was told by his supervisor, Byron Burkhardt, to report to the office of Linda Klers. In her office, she informed Johnston that he was being separated from the Company, and that the information was contained in the "Separation Report." She then gave him a copy of the document. According to Klers, Johnston made the comment to her, "that's not what he had meant." Klers told Johnston that his supervisor was waiting for him in the shop area in order to make arrangements for Johnston to pick up his tools. Johnston then left Klers' office and talked with Burkhardt. Johnston made arrangements to return to the facility the next day in order to pick up his tools and clean out his locker.

VII. THE EVENTS ON WEDNESDAY, NOVEMBER 24, 1982

On Wednesday, November 24, 1982, Johnston returned to the Employer's facility. He got his tools and cleaned out his locker. After he had done those things, Johnston asked Burkhardt if he could use the telephone in the office in order to call upstairs to see if he could have a talk with Miller. Burkhardt informed Johnston that Miller already had left for the Thanksgiving holiday.

VIII. THE EVENTS ON MONDAY, NOVEMBER 29, 1982

On Monday, November 29, 1982, Johnston went to the Employer's office around 11 a.m. and asked a secretary if he could see Miller. She replied that Johnston could see Miller, but he was busy on the telephone at that moment. Johnston waited, and then he had a conversation with Miller in his office.

Introduced into evidence as the General Counsel's Exhibit 4 was a microcassette containing a tape recording made by Johnston of his conversation with Miller on November 29, 1982, in Miller's office. There are what appear to be other conversations and other matters on the tape recording. To avoid any misunderstanding, the only portion of the tape recording that was actually received in evidence pertains to the conversation between Johnston and Miller, which is the first conversation on side A of the cassette. The other conversations and other matters are not part of the record in this case, and they have been disregarded. (In an earlier case before me, issues regarding the admissibility of two secretly made tape recordings were discussed. See *Plumbers Local 598 (Rust/W.S.H.)*, 255 NLRB 450 (1981).)

Introduced into evidence as the General Counsel's Exhibit 3 was a typed transcript made by Johnston of his tape recording, which was introduced as the General Counsel's Exhibit 4. The transcript appears to be substantially accurate in reflecting what is discernible from the tape recording. There are a few words that are not so loud or so clear as to be free from doubt when the recording is played on ordinary office equipment.

In summary, Johnston asked Miller on November 29, 1982, for a letter of recommendation from the Company. Miller agreed to prepare such a letter and to have it ready for Johnston by the next afternoon.

Johnston then asked to discuss the subject of his dismissal. Miller agreed to do so. Johnston expressed his view that his dismissal "was rather highhanded and dictatorial as far as what, to me, was a comment to a statement you made upon request for comment." Miller expressed his view that Johnston's comment about examining the Company's records was "just another way of saying to me, well, I don't believe you." Miller was of the opinion that if he had to "put on a seminar about everything that's done," that would be all he would be doing. Miller also expressed his view that "if somebody feels they need, after I say something, to check the records to see about that, well, that's a real problem."

Johnston expressed his view that he had not made a request at the meeting to examine the Company's books. Johnston said that although his first statement at the meeting could have been misunderstood, he also said at the meeting that he did not ask to see the Company's books after Miller stated something to the effect that no company was going to open its books. Johnston further said, "I was making a statement and commenting that I could not come to the same conclusions as you do because I do not have the same sources of information."

Miller stated his view that he could not have a situation where a person was doubting that Miller was telling the truth. Miller related that he had agonized over the matter for 3 months, and he realized that he had to do what he did for the welfare of the Company and the employees. Miller pointed out the decision applied to everyone in the Company. Miller expressed the view that work in the repair yard was "very price sensitive," and that the Company's billing rate was not going to increase because of the "tough economy" into 1984. Miller said Johnston was "welcome to your opinions," but Miller wanted people "that trust what I'm saying the way it is, and that's that." Miller added, "And that's the only thing I've been telling people since I've been here is the truth."

Miller told Johnston that he would comment in the letter of recommendation about the quality of Johnston's work and his tenure with the Company, and that he would not put in any comment about the incident or anything "negative at all."

IX. CONCLUSIONS

In its decision in *Hawthorne Mazda*, 251 NLRB 313, 315 (1980), the Board held:

> Section 7 of the Act guarantees employees the right to engage in "concerted activities for the purpose of mutual aid or protection." It is axiomatic that employees who band together for the purpose of presenting grievances to their employer are engaged in protected, concerted activity within the meaning of Section 7.[24] It follows that an individual employee's attempt to induce fellow workers to join in a petition regarding a common grievance is protected activity.[25] Similarly, an employee engages in protected activity when he presents to the employer grievances on behalf of other employees.[26]

In its decision in *Mills Patrol Service*, 264 NLRB 323, 324 (1982), the Board observed, "In order for activity to be protected by Section 8(a)(1), it must be concerted in nature." In a case that involved union activities, the Board stated, "Employees promoting a union are by that action engaged in protected concerted activities, and individual acts in furtherance of that objective do not lose their protection merely because others are not consulted." *Ohio Valley Graphic Arts*, 234 NLRB 493 (1978).

Among the cases which are relied on by the General Counsel is the Board's decision in *Alleluia Cushion Co.*, 221 NLRB 999 (1975). With regard to its *Alleluia Cushion* decision, the Board stated in *Pink Moody*, 237 NLRB 39 (1978):

> In *Alleluia Cushion, supra*, we held that where an employee speaks up and seeks to enforce statutory provisions relating to occupational safety designed for the benefit of all employees, in the absence of any evidence that fellow employees disavow such representation, we will find implied consent thereto and deem such activity to be concerted. In *Air Surrey* [229 NLRB 1064 (1977)], we found as concerted activity an employee's individual inquiry at his employer's bank as to whether the employer had sufficient funds on deposit to meet the upcoming payroll, because the matter inquired into by the employee was of vital concern to all employees. And in *Dawson Cabinet Company, Inc.*, 228 NLRB 290 (1977), we extended the *Alleluia Cushion* principle in order to find as concerted activity a female employee's individual refusal to perform a certain job unless she was paid the same wages as a male employee doing the same job, because the employee was attempting to vindicate the equal pay rights of the female employees.

There are, of course, many Board decisions where the *Alleluia Cushion* legal principle has been applied. In an earlier case before me, the legal principle was applied to an employee's making a complaint about carbon monoxide fumes in the work area to the Department of Health and Environmental Sciences of the State of Montana. *Bighorn Beverage*, 236 NLRB 736 (1978). The United States Court of Appeals for the Ninth Circuit did not agree with that portion of the holding. 614 F.2d 1238 (1980). In another case before me, the *Alleluia Cushion* legal principle was applied to an employee's filing of a complaint with the California Fair Employment Practices Commission. However, the Board found actual concerted activity, as distinguished from an *Alleluia Cushion* theory, regarding the events at the meeting held on May 22, 1979, "when Johnson [the Charging Party in that case] asserted that she should be paid as much as the male business agents, other union members joined with her and protested that it was unlawful for Respondent to pay her less than the men." *Hotel & Restaurant Employees Local 28*, 252 NLRB 1124 (1980).

In *Diagnostic Center Hospital Corp.*, 228 NLRB 1215 (1977), the *Alleluia Cushion* legal principle was applied where an employee had written a letter to the company's chairman of the board regarding a 10-percent wage increase and in protest of "alleged practices of 'racism, sexism and favoritism.'" See also the Board's decision in *Self Cycle & Marine Distributor Co.*, 237 NLRB 75 (1978), regarding an employee's filing of an unemployment compensation claim with a state agency. See further the Board's decision in *Michigan Metal Processing Corp.*, 262 NLRB 275 (1982), regarding two employees jointly filing a complaint with the Occupational Safety and Health Administration.

As indicated above, there are many Board decisions where the *Alleluia Cushion* legal principle has been applied. The foregoing cases are by no means intended to be an exhaustive list. Instead, they illustrate the type of activity where the *Alleluia Cushion* legal principle has been applied.

To paraphrase and to summarize Johnston's statements to Miller at the meeting on November 22, 1982, his statements were to the effect that: (1) employees of the Company had not been called together and given "something extra" when the Company had experienced a good year, but the employees were being asked to bear the brunt of an economic downturn by not receiving an increase; (2) that Johnston did not have the benefit of seeing the Company's books, so he could not come to the same conclusion that Miller had reached; and (3) that Johnston had not asked to see the Company's books, but that he did not have the Company's books as a source of information. (See sec. 5 for the complete findings of fact.)

Insofar as the record shows, Johnston acted alone in making his statements to Miller at the meeting. For example, he did not seek support from other employees either before or after the meeting. That observation is not made in the sense of being critical, but simply to reflect the circumstances in which the comments were made. It is significant that no other employee joined in Johnston's statements during the meeting, or in any way indicated group action or approval of his statements at the meeting. Afterward, there was some conversation about Johnston's comments. That was described by Schmidt. However, Johnston was not a participant in that conversation, and there is no evidence of company knowledge of that conversation among the employees at the time that the Company terminated Johnston. Although some other employees made comments to Miller during the various meetings Miller held that day, the subject matter of their comments did not pertain to the subject matter of Johnston's comments. For example, note the finding in *Rinke Pontiac Co.*, 216 NLRB 239, 242 (1975), "As indicated above, Terpevich's [the Charging Party in that case] activity at the October 25 meeting was essentially a continuation of the group discussions in which he and other salesmen participated among themselves following the Respondent's institution of the new insurance program with its incentive pay features." In addition, note also the following: "Moreover, it appears that Terpevich was not alone in raising questions about the pay plan at this meeting. Salesman Fuhrman also challenged its legality."

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[24] See *N.L.R.B.* v. *Washington Aluminum Company, Inc.*, 370 U.S. 9 (1962).

[25] *Owens-Corning Fiberglas Corporation* v. *N.L.R.B.*, 407 F.2d 1357, 1365 (4th Cir. 1969); *Salt River Valley Water Users' Association* v. *N.L.R.B.*, 206 F.2d 325 (9th Cir. 1953).

[26] *N.L.R.B.* v. *Guernsey-Muskingum Electric Cooperative, Inc.*, 285 F.2d 8 (6th Cir. 1960); *Hugh H. Wilson Corporation* v. *N.L.R.B.*, 414 F.2d 1345, 1348 (3d Cir. 1969).

There was no collective-bargaining agreement applicable to the employees of the employer at the times material, and thus Johnston was not seeking to enforce the terms of a collective-bargaining agreement in making his comments to Miller at the meeting. In addition, the circumstances here are different from those where an employee was attempting to assert a right to ask a question of the Employer at a meeting prior to a representation election, and the Board found that the employee was "presenting such a grievance in protesting that he had been improperly forbidden the opportunity to ask a question which he thought would aid himself and his fellow employees in making a decision as to a collective-bargaining representative." *Prescott Industrial Products Co.*, 205 NLRB 51 (1973).

The events, which occurred in November 1981 and which are described in section 3 of this decision, are remote in point of time insofar as the termination of Johnston on November 23, 1982, is concerned. A link or connection between the events in November 1981 and the events in November 1982 has not been established. The Respondent points out that no adverse action was taken by the Company against Johnston in November 1981. Furthermore, the Respondent points out that Johnston took an extended leave of absence from work beginning in January 1982, but the Company took no action to terminate Johnston despite the Company's usual policy to do so in such circumstances. Thus, the foregoing is some indication that Miller did not harbor animosity toward Johnston because of Johnston's activities in November 1981. In contrast, see the Board's decision in *Hansen Chevrolet*, 237 NLRB 584 (1978), where the time period involved was only 4 days. At 589, it is stated: "In any event, Prescott [the supervisor who made the decision to terminate the employee] knew that only 4 days before, Suggs [the Charging Party in that case] had been actively soliciting other employees to join in a concerted effort to obtain a change in the pay and fringe plans, and that Suggs still wished to write Mann [the company president] a letter."

After considering the foregoing, I conclude that the statements made by Johnston at the meeting held on November 22, 1982, do not constitute protected concerted activities within the meaning of the National Labor Relations Act. I further conclude that the Employer's termination of Johnston on November 23, 1982, because of the statements made by him on the previous day, did not violate Section 8(a)(1) of the Act. Accordingly, I must recommend to the Board that the General Counsel's complaint be dismissed.

CONCLUSIONS OF LAW

1. The Respondent is an Employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

2. The Respondent has not engaged in the unfair labor practices alleged in the General Counsel's complaint in this proceeding for the reasons which have been set forth above.

[Recommended Order for dismissal omitted from publication.]

United States Postal Service (Main Post Office) *and* **Atlanta Metro Area Local, American Postal Workers Union, AFL-CIO** *and* **Amalgamated Local 310, National Post Office Mail Handlers, Watchmen, Messengers and Group Leaders Division of Laborers' International Union of North America, AFL-CIO.** Cases 10-CA-22420(P) and 10-CA-22671(P)

July 19, 1988

DECISION AND ORDER

By Chairman Stephens and Members Johansen and Babson

Upon charges filed by Atlanta Metro Area Local (Metro), affiliated with the American Postal Workers Union, AFL-CIO (APWU) and Amalgamated Local 310 (Local 310), affiliated with the National Post Office Mail Handlers, Watchmen, Messengers and Group Leaders of the Laborers' International Union of North America, AFL-CIO (Mail Handlers), the General Counsel of the National Labor Relations Board issued an order consolidating cases and a consolidated complaint against the United States Postal Service, the Respondent, alleging that it has violated Section 8(a)(5) and (1) of the National Labor Relations Act. The Respondent filed an answer and an amended answer, and on September 24, 1987, the Respondent filed a motion to transfer the proceeding to the Board and a Motion for Summary Judgment. On September 29, 1987, the Board issued an Order Transferring Proceeding to the Board and Notice to Show Cause. On October 13, 1987, the General Counsel filed her response to the Board's Notice to Show Cause in which she agreed with the Respondent that this proceeding should be transferred to the Board and moved for summary judgment in her favor. Thereafter, the Respondent's request for "Special Leave to File a Reply to the Response of Counsel for the General Counsel to the Board's Notice to Show Cause" was denied.[1] Subsequently, however, the Respondent was granted leave to file a supplemental memorandum of law.

The determinative facts in this case are not in dispute. Based on the results of an investigation into gambling activity at the Atlanta, Georgia Post Office in the summer of 1986, the Respondent disciplined and discharged a number of employees in the bargaining units represented by the Mail Handlers and the APWU. The Unions[2] filed grievances on behalf of the employees and in the course of preparing the grievances discovered that some supervisors also had been involved in the gambling activity. Subsequently, the Unions requested the Respondent to provide them with information regarding the disciplining of supervisors arising out of the investigation into the gambling activity.[3] APWU, through Metro, requested this information to establish that the disciplinary action taken against the bargaining unit employees was "harsh, punitive, disparate and not for just cause," while the Mail Handlers, through Local 310, asserted that the information was necessary to show disparate treatment of unit employees by the Respondent. The Respondent refused to supply the Unions with the requested information.[4]

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

Ruling on the Motions for Summary Judgment

The requested information clearly deals with individuals outside the bargaining unit[5] and, therefore, the General Counsel has the burden of demonstrating the information's relevance.[6] The standard for determining the relevancy of requested information is a liberal discovery-type standard that merely requires that the information have some bearing on the issue between the parties.[7]

Here, the General Counsel asserts that the information regarding the discipline given supervisors for breaching the Respondent's regulations prohibiting gambling activity has some bearing on the grievances alleging harsh, unjust, and disparate treatment of unit employees for violating the same rule. The Respondent attempts to rebut this argu-

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[1] The Respondent has requested oral argument. The request is denied as the record and briefs adequately present the issues and the positions of the parties.

[2] We accept the Respondent's assertion in its amended answer that Local 310 and Metro are not bargaining agents of the Mail Handlers and APWU for the purpose of processing grievances but that they are, instead, the contractually authorized agents of the APWU and Mail Handlers. Acceptance of this assertion, however, has no impact on our determination, as the Respondent admits the agency status among the APWU and the Mail Handlers and their affiliated locals. In this regard, the "Unions," as used in this decision, refer collectively to the APWU and Mail Handlers and/or their affiliated locals, Metro and Local 310.

[3] The filings of the parties do not indicate precisely the requests made by the Unions. The Respondent states that the Unions requested copies of investigative memoranda dealing with supervisors compiled by the Postal Inspection Service as part of the investigation into the gambling activity. The General Counsel states that the APWU, through Metro, requested "certain information with regard to the disciplining of supervisors arising out of the gambling activity." The Respondent also states that the Mail Handlers, through Local 310, requested "all documents concerning the discipline and alleged misconduct of supervisory employees involved in the illegal lottery."

[4] The Respondent did provide the Unions with information they requested relating solely to bargaining unit employees.

[5] The Respondent notes that the Postal Reorganization Act prohibits the Board from including supervisors in a bargaining unit. See 39 U.S.C. § 1202(1).

[6] See *Pfizer, Inc.*, 268 NLRB 916, 918 (1984), enfd. 763 F.2d 887 (7th Cir. 1985).

[7] Ibid. See also *Conrock Co.*, 263 NLRB 1293, 1294 (1982) (information of even probable or potential relevance to the union's duties must be disclosed), enfd. mem. 735 F.2d 1371 (9th Cir. 1984).

289 NLRB No. 123

ment by stating that the supervisors and unit employees have different responsibilities, are judged by different criteria and, therefore, are not similarly situated for purposes of discipline. The Respondent argues that the discipline received by the supervisors for violating the antigambling rule is not relevant to the grievances. We disagree.

It is undisputed that the Respondent's restrictions on gambling activity apply equally to supervisors and unit employees. Although, as the Respondent asserts, there may be legitimate reasons for imposing different degrees of discipline on supervisors and unit employees for similar misconduct, the only reason offered to justify such a disparity for the gambling violation here is the different level of responsibility exercised by each group. We do not agree, however, given the nature of the rule involved and its applicability to both groups that the different degrees of responsibility accorded each group automatically translates into different standards of discipline in this instance, thereby compelling a finding that the requested information has no bearing on the grievances.[8] Nor do we agree with the Respondent's assertion in its supplemental memorandum of law that *Marshall v. Western Grain Co.*, 838 F.2d 1165 (11th Cir. 1988), supports its Motion for Summary Judgment.

In *Marshall* the court concluded that the plaintiffs had not established a racial discrimination claim under Section 703(a) of Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e et seq., by showing that the employer had given severance pay to nonminority, nonunit employees while refusing to give severance pay to the minority, unit employees, where the collective-bargaining agreement restricted severance pay for the unit members. In reaching this conclusion the court stated that unit and nonunit employees are "never" similarly situated. The Respondent seizes on this statement as support for its contention that the unit employees and supervisors in this case are not similarly situated for purposes of discipline and, therefore, that the requested information is not relevant. The context of the court decision, however, shows that, essentially, the court found that unit and nonunit employees can never be similarly situated for purposes of establishing a Title VII claim when one set of rules applies to the unit employees (through the collective-bargaining agreement) and another set of rules applies to the nonunit employees. That is not the situation in the instant dispute. Here, the same rule (a prohibition on gambling) is applicable to both the unit employees and the supervisors. Indeed, the reason offered by the Respondent in its Motion for Summary Judgment as support for its argument that the two groups are dissimilar was not that different rules controlling gambling applied to the two groups but that the groups had different degrees of responsibilities. Thus, because the gambling prohibition here applies to both groups, the requested information potentially has "some bearing" on whether the unit employees were harshly, unjustly, or disparately treated. In rejecting the Respondent's arguments, we also note that "[a]rbitrators regularly consider such evidence as relevant to determining whether a unit employee has been disciplined for just cause."[9] In this regard, an arbitrator who addressed the very information request involved here found the information relevant to the issue of the appropriateness of the discipline imposed on the unit members and to the defense of condonation. (See G.C. Exh. 3.)

Further, to the extent the Respondent seeks to justify at the arbitration any disparity that is exposed, the arbitrator can determine the weight to be given the evidence in light of the justification offered. Although the requested information, even if it contains evidence of disparate treatment, may not provide conclusive proof of the allegations in the grievances, this does not mean that the information fails to meet the relevancy standard by which such requests are judged.[10] Under the circumstances of this case, where both supervisors and unit employees violated the Respondent's gambling prohibition—a prohibition that applies equally to both groups—evidence relating to the discipline given supervisors is information that has some bearing on the determination of whether the unit employees have been treated harshly, unjustly, or disparately.[11]

Further, we agree with the arbitrator who found that information of this type is relevant to the defense of condonation. For example, if the requested information reveals that supervisors engaged in gambling activities with the bargaining unit employees, the Unions can claim that the Respondent condoned the activity. This defense may or may not prevail. We are not concerned with the merits of a nonfrivolous defense, however, but only with the information's relevance to it.[12]

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[8] See *Department of Defense Dependent Schools*, 28 FLRA No. 33 (July 28, 1987). On remand from the court of appeals the Federal Labor Relations Authority reversed its original decision and found information on adverse actions taken against supervisors for making false statements necessary to the union's representational responsibilities. The union sought the information as evidence of disparate treatment given to unit employees for engaging in the same misconduct as the supervisors, i.e., making false statements.

[9] *North Germany Area Council v. Federal Labor Relations Authority*, 805 F.2d 1044, 1048 (D.C. Cir. 1986).

[10] See *Pfizer, Inc.*, supra, 268 NLRB at 918 (information need not be dispositive of the issue between the parties but need only have some bearing on it).

[11] The Respondent also argues that allowing disclosure of the requested information, in effect, requires it to apply the bargaining unit's disciplinary standards to supervisors. The Respondent claims such an imposition of unbargained-for disciplinary standards for supervisors interferes with its broad discretion in this area. We disagree. As stated, any disparity in the discipline given supervisors and unit employees and its significance can be explained by the Respondent and that explanation can be considered by the decision maker in determining the weight to be given evidence of disparity.

Accordingly, we find that the General Counsel has carried her burden of establishing the relevance of the requested information and that the Respondent has not refuted its relevance.

Even assuming the information's relevance, however, the Respondent asserts that the information need not be disclosed because it is confidential.[13] In attempting to carry its burden of proof on this issue, as the party asserting confidentiality, the Respondent contends that disclosure should not be required because of the sensitive nature of the information. The Respondent notes that the information may show that the supervisors violated postal regulations and possibly state and Federal law. The Respondent further asserts that allowing access to such information risks eroding the undivided loyalty it requires of its supervisors.[14] The Respondent claims that supervisors will be less willing to act if the Unions can embarrass and harass the supervisors by gaining access to the type of information requested here. We do not agree that these asserted reasons for keeping the information confidential outweigh the Unions' interest in gaining access to the information.

That disclosure of the information may reveal that supervisors violated the Respondent's prohibition and possibly state and Federal laws against gambling is not a sufficient reason for finding that the information must remain confidential. Otherwise, virtually all requests for information on activities leading to disciplinary or potential legal action would be found to have such status. Moreover, unlike information reflecting confidential assessments by testing professionals of an individual's "basic competence," no established public policy against disclosure of the information requested here exists.[15] The information in question concerns willful activity of a kind that the Respondent has itself made the public basis for discipline and discharges of employees. Further, there was no showing that the supervisors expected the requested information to remain confidential or that the Respondent made a commitment to the supervisors to keep the information confidential.[16]

We recognize that the Respondent has a strong interest in preserving supervisor loyalty. We disagree with the Respondent, however, that disclosure of the requested information to the Unions for use in grievance proceedings threatens this interest. In the instant case, both supervisors and unit employees engaged in gambling activity and the Respondent itself investigated the activity. Thus, the unit employees who participated in the prohibited activity were as aware of any supervisory involvement as was the Respondent. In these circumstances we fail to perceive the threat that the Union's requests pose to the supervisors' loyalty. Moreover, as the General Counsel points out, supervisors who have engaged in prohibited conduct already have compromised their loyalty and have undermined their authority to enforce their employer's rules.

Thus, we find that the Respondent's interests in keeping the information confidential do not outweigh the Unions' interests in having the information disclosed.

Finally, the Respondent argues that it need not disclose the information because it is restricted from doing so under the Privacy Act of 1974, 5 U.S.C. § 552(a). The Respondent admits, however, that the requested information is stored in two record systems which provide for disclosure pursuant to the routine uses exception in the Privacy Act. Further, the Respondent admits that one of the routine uses which both record systems provide for is the following:

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[12] Cf. *Pfizer, Inc.*, supra, 268 NLRB at 918 (Board is not concerned with merits of a grievance in passing on information request).

[13] See *Pfizer, Inc.*, supra, 268 NLRB at 919.

[14] The Respondent also asserts that it has an inherent right to keep confidential from the Union all information in a supervisor's personnel file "in virtually any circumstance" because revealing such information to the Union would tend to impair the supervisor's loyalty to the Respondent. It cites *Postal Service*, 280 NLRB 685 (1986), enfd. 841 F.2d 141 (6th Cir. 1988), as supporting this assertion, claiming that *Postal Service*, reflects the "mirror image" of the Respondent's request here. We disagree. In *Postal Service*, the majority concluded that a list of union officials and stewards who had applied for supervisory positions was relevant and ordered its disclosure to the union. In reaching this result the majority reasoned that the possibility that union officials or stewards might be disloyal to the union if they were aspiring to positions in management made it reasonable for the union to exclude them from union representational functions in order to avoid undermining employee confidence in the collective-bargaining representative. The majority thus found that the names of those who were applying for supervisory positions were relevant to the union's interest in avoiding injurious conflicts of interest in its representatives. It is clear, for the reasons stated below, that no such conflict-of-interest potential is implicated here. What the Respondent's argument amounts to is that it should never have to disclose anything about its supervisors to the Union if that disclosure would displease the Respondent's supervisors. The *Postal Service* case on which the Respondent relies provides no support for that proposition. Member Johansen dissented in *Postal Service* on other grounds.

[15] Compare *NLRB v. Detroit Edison Co.*, 440 U.S. 301, 318 (1979) (in denying a request for psychological test results the court took judicial notice of established professional and governmental policies against disclosure and the sensitivity of any human being to disclosure of psychological information that may be taken to bear on the person's basic competence), with *Salt River Valley v. NLRB*, 769 F.2d 639, 642 (9th Cir. 1985) (in requiring disclosure of employee's personnel file the court relied on fact that though the information may demonstrate employee's level of success at his job, it did not attempt to provide an objective measure of his intelligence or psychological fitness).

[16] See *Salt River Valley*, supra, 769 F.2d at 642 (in requiring disclosure of employees' personnel file the court relied on employees' lack of expectation of confidentiality and lack of employer's committment to employees that information would remain confidential). Cf. *Detroit Edison Co.*, supra, 440 U.S. at 306 (employer made express commitment to employees that information would remain confidential).

> Pursuant to the National Labor Relations Act, records from this system may be furnished to a labor organization upon its request when needed by that organization to perform properly its duties as the collective bargaining representative of postal employees in an appropriate unit.

Nonetheless, the Respondent asserts that the requested information is not relevant to the Unions' performance of their duties as collective-bargaining representatives and, therefore, the information need not be disclosed. Of course the problem with this argument is that its premise (that the information is not relevant) is erroneous. Thus, given our finding that the requested information is relevant and given that the very use for which the information has been requested is defined as a routine use for the information, we find that the Privacy Act does not prevent disclosure of the information.[17]

Accordingly, we find that the Respondent violated Section 8(a)(5) and (1) of the Act by failing to furnish the requested information to the Unions, and we grant the General Counsel's Motion for Summary Judgment.[18] On the entire record the Board makes the following

FINDINGS OF FACT

I. JURISDICTION

The Respondent provides postal services for the United States of America and operates various facilities throughout the United States in the performance of that function, including its facility in Atlanta, Georgia, the only facility involved in this proceeding. The Board has jurisdiction over the Respondent and this matter by virtue of Section 1209 of the Postal Reform Act of 1970.

II. LABOR ORGANIZATION

The complaint alleges and the Respondent admits that the Unions are labor organizations within the meaning of Section 2(5) of the Act.

III. ALLEGED UNFAIR LABOR PRACTICE

A. *Recognition*

Since about July 1974, the APWU has been, and remains, the exclusive representative of employees in the following appropriate unit by virtue of Section 9(a) of the Act:

> All maintenance employees, special delivery messengers, motor vehicle employees and postal clerks employed by the Respondent.

Since about July 1971, the Mail Handlers has been, and remains, the exclusive representative of the employees in the following appropriate unit by virtue of Section 9(a) of the Act: "All mail handlers, watchmen, messengers and group leaders."

The Respondent has been a party to successive collective-bargaining agreements with the APWU and the Mail Handlers since about July 1974 and July 1971, respectively.

B. *Request and Refusal*

About February 17, 1987, the APWU, through Metro, requested the Respondent to provide it with information regarding the disciplining of supervisors arising out of a gambling raid that resulted in disciplinary action against employees in the unit APWU represents.

About January 15 and May 12, 1987, the Mail Handlers, through Local 310, requested the Respondent to provide it with information regarding the disciplining of supervisors arising out of a gambling raid that resulted in disciplinary action against employees in the unit the Mail Handlers represents.

Since about January 29, 1987, the Respondent has refused to provide the requested information to the Mail Handlers or its Local 310 and since about February 20, 1987, it has refused to provide the requested information to the APWU or its Metro local. We find that these refusals constitute unlawful refusals to bargain in violation of Section 8(a)(5) and (1) of the Act.

CONCLUSIONS OF LAW

By refusing on and after January 29, 1987, to bargain with the Mail Handlers and by refusing on or after February 20, 1987, to bargain with the APWU by refusing to produce the information these Unions requested concerning the disciplinary records of supervisors involved in gambling activity at the Respondent's Atlanta facility, the Respondent engaged in unfair labor practices affecting commerce within the meaning of Section 8(a)(5 and (1) and Section 2(6) and (7) of the Act.

THE REMEDY

Having found that the Respondent engaged in unfair labor practices, we shall recommend that it be ordered to cease and desist and that it take certain affirmative action necessary to effectuate the policies of the Act.

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[17] See *Postal Service*, supra at 693, enfd. 841 F.2d 141 (6th Cir. 1988).

[18] The Respondent's Motion for Summary Judgment is denied.

We shall, inter alia, require the Respondent to furnish the Unions, on request, the disciplinary records of supervisors involved in gambling activity at the Respondent's Atlanta facility.

ORDER

The National Labor Relations Board orders that the Respondent, United States Postal Service, Atlanta, Georgia, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Refusing to bargain collectively with the Unions, American Postal Workers Union, AFL-CIO and the National Post Office Mail Handlers, Watchmen, Messengers and Group Leaders Division of Laborers' International Union of North America, AFL-CIO by refusing to furnish them or their affiliated Locals, Atlanta Metro Area Local and Amalgamated Local 310, respectively, the requested disciplinary records of supervisors involved in gambling activity at the Respondent's Atlanta facility.

(b) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) On request, furnish the Unions, or their affiliated Locals named above, the requested disciplinary records of supervisors involved in gambling activity at the Respondent's Atlanta facility.

(b) Post at its facility in Atlanta, Georgia, copies of the attached notice marked "Appendix."[19] Copies of the notice, on forms provided by the Regional Director for Region 10, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material.

(c) Notify the Regional Director in writing within 20 days from the date of this Order what steps the Respondent has taken to comply.

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

WE WILL NOT refuse to bargain with American Postal Workers Union, AFL-CIO and National Post Office Mail Handlers, Watchmen, Messengers and Group Leaders Division of Laborers' International Union of North America, AFL-CIO by refusing to furnish them or their affiliated Locals, Atlanta Metro Area Local and Amalgamated Local 310, respectively, the requested disciplinary records of supervisors involved in gambling activity at our Atlanta facility.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL, on request, furnish the Unions, or their affiliated Locals named above, the requested disciplinary records of supervisors involved in gambling activity at our Atlanta facility.

UNITED STATES POSTAL SERVICE

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[19] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

Bellwood Printing Pressmen, Assistants' and Specialities Union No. 670, Subordinate to the Graphic Communications International Union (Reynolds Metals Company) *and* Ronald E. Evans and International Association of Machinists and Aerospace Workers, Lodge No. 10. Case 5–CD–288

July 19, 1988

DECISION AND DETERMINATION OF DISPUTE

BY CHAIRMAN STEPHENS AND MEMBERS JOHANSEN AND BABSON

The charge in this Section 10(k) proceeding was filed on January 19, 1988, by Ronald E. Evans, an individual, alleging that the Respondent, Bellwood Printing Pressmen, Assistants' and Specialities Union No. 670, Subordinate to the Graphic Communications International Union (Local 670), violated Section 8(b)(4)(D) of the National Labor Relations Act by engaging in proscribed activity with an object of forcing Reynolds Metal Company, the Employer, to assign certain work to employees it represents rather than to employees represented by International Association of Machinists and Aerospace Workers, Lodge No. 10 (IAM). The hearing was held on February 25, 1988, before Hearing Officer Steven John Anderson.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board affirms the hearing officer's rulings, finding them free from prejudicial error. On the entire record, the Board makes the following findings.

I. JURISDICTION

Reynolds Metals Company, a Delaware corporation, is engaged in the manufacture and distribution of aluminum products from its facility known as the Bellwood printing plant which is located in Richmond, Virginia. The Employer annually sells and ships goods directly from its Bellwood printing plant to points located outside the State of Virginia, which goods are valued in excess of $50,000. The parties stipulate, and we find, that the Employer is engaged in commerce within the meaning of Section 2(6) and (7) of the Act and that Local 670 and IAM are labor organizations within the meaning of Section 2(5) of the Act.

II. THE DISPUTE

A. *Background and Facts of Dispute*

The Employer manufactures aluminum foil-backed labels, paper, and cartons at its Bellwood printing plant. The Employer currently has collective-bargaining agreements with both Local 670 and IAM. Local 670 was certified by the Board on May 21, 1958, as exclusive representative of the Employer's hourly production and maintenance employees, including its electricians. The electricians perform both new construction and repair electrical work at the plant. On August 22, 1958, pursuant to an agreement reached between the two Unions, Local 670 delegated the representation of certain employees engaged in the "manufacturing, erecting, repairs and dismantling of all machines and the work done by employees assigned to the machine shop" to IAM. The machinists perform all the mechanical repair work at the plant. They also build and install machines and piping, do rigging work for large equipment, and perform all the welding at the plant. IAM has never been certified by the Board, but since 1958 the Employer has voluntarily recognized IAM as the exclusive representative of all employees who perform the work of manufacturing, erecting, repairing, and dismantling of all machines.

The electrical panels in the Bellwood plant are typically affixed to brackets that can be mounted on the floor, on walls, or on existing platforms. These electrical panels can be mounted on brackets by themselves or on brackets holding other panels such as hydraulic, pneumatic, or mechanical panels. The brackets can be made out of steel or aluminum channel or angle iron, perforated channel iron known as "kindorf," and wood. The brackets made out of channel or angle iron are fabricated by the machinists at the plant. The brackets made out of kindorf are prefabricated. The installation of brackets for electrical panels can range from a simple procedure of mounting kindorf brackets by clamps or bolts to the more complex procedure of welding or milling of the channel or angle iron brackets and then mounting them.

In July 1987 a grievance was filed by Roger Young, an electrician represented by Local 670, claiming that certain work which belonged to Local 670 was being performed on overtime by the machinists represented by IAM. According to Young, he had been installing an electrical panel which required that brackets be attached to a platform on which to hold the panel, but after he left at the end of his shift, a machinist hung the brackets and was paid overtime as a result. This grievance was processed through the last step of the grievance procedure. The Employer denied the grievance because the machinist had been assigned to do the installation before Young started the project. The grievance did not go to arbitration.

289 NLRB No. 129

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By letter dated January 6, 1988, Thomas Smith, Local 670's business representative, informed R. D. Kroniser, the Employer's plant personnel manager, that Local 670 intended to establish an "information picket . . . for the purpose of resolving the work jurisdiction dispute" between Local 670 and IAM concerning the assignment of the electrical bracket work.

B. *Work in Dispute*

The disputed work involves the installation of brackets for electrical panels at the Employer's Bellwood printing plant.[1]

C. *Contentions of the Parties*

The Employer contends that the status quo should be maintained and that, in conformance with the historical plant practice, employees represented by either or both Unions should be assigned the work in dispute, as determined by the Employer based on considerations of skill, efficiency, and availability of manpower.

Local 670 contends that the disputed work should be awarded to the electricians whom it represents. In this regard, Local 670 claims that the installation of electrical panel brackets has always been the electricians' work; is more closely related to recognized electrical work; and does not constitute the machinists' work as described by the current IAM collective-bargaining agreement. Local 670 further contends that the disputed work should not be awarded to both Unions because such action would create grievances relating to the allocation of overtime between the two bargaining units.

IAM contends that the machinists whom it represents should be awarded the installation of all electrical brackets with the exception of the installation of the kindorf brackets, because, inter alia, only the machinists perform welding work. IAM states that it does not oppose sharing the work of installation of the kindorf brackets with the electricians represented by Local 670 because, according to IAM, this is consistent with the Employer's past and current practices.

The Charging Party contends that the disputed work should be awarded to the electricians represented by Local 670 because this work involves installation of electrical equipment which has been performed by electricians in the past.

D. *Applicability of the Statute*

Before the Board may proceed with a determination of the dispute pursuant to Section 10(k) of the Act, it must be satisfied that there is reasonable cause to believe that Section 8(b)(4)(D) has been violated and that the parties have not agreed upon a method for the voluntary adjustment of the dispute.

As noted above, Local 670 threatened the Employer on January 6, 1988, that it would picket unless the jurisdictional work dispute was resolved. We find that an object of Local 670's threat was to force or require the Employer to assign the disputed work to employees represented by it. We, therefore, find reasonable cause to believe that a violation of Section 8(b)(4)(D) has occurred and there is no contention that there is an agreed-upon method for voluntary adjustment of the dispute within the meaning of Section 10(k) of the Act.[2] Accordingly, we find that the dispute is properly before the Board for determination.

E. *Merits of the Dispute*

Section 10(k) requires the Board to make an affirmative award of disputed work after considering various factors. *NLRB v. Electrical Workers IBEW Local 1212 (Columbia Broadcasting)*, 364 U.S. 573 (1961). The Board has held that its determination in a jurisdictional dispute is an act of judgment based on common sense and experience, reached by balancing the factors involved in a particular case. *Machinists Lodge 1743 (Jones Construction)*, 135 NLRB 1402 (1962).

The following factors are relevant in making the determination of this dispute.

1. Certifications and collective-bargaining agreements

It is undisputed that the 1958 Board certification does not define in specific terms Local 670's work jurisdiction. Similarly, Local 670's current collective-bargaining agreement with the Employer does not contain a provision delineating the scope of the Union's work jurisdiction except to indicate that the Union is the representative of all production and maintenance employees excluding the machinists and certain other employees. Although the 1958 memorandum agreement between the Unions is more illuminating, it likewise does not specifically mention electrical bracket installation work in its description of each Union's work jurisdiction. According to this memorandum, Local 670 has jurisdiction over "the testing, making ready, and operating and adjusting machines," while IAM has jurisdiction over "the manufacturing, erecting, repairs and dismantling of all machines and the work to be done by employees assigned to the machine shop."[3] Article III, section 2, of IAM's current collective-bargaining agreement with the Employer defines a covered "employee" in a fashion comparable to the description of IAM's work provided by the 1958 memorandum agreement.

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[1] No dispute exists as to the Employer's assignment to the machinists represented by IAM of bracket fabrication work that requires welding.

[2] It was stipulated that there does not exist an informal dispute resolution mechanism agreed to by all the parties.

Our review of the Board's certification of Local 670, the 1958 memorandum agreement executed by the two Unions, and Local 670's and IAM's collective-bargaining agreements reveals that these documents are sufficiently broad to encompass the type of work in dispute and that there is no specific reference to the installation of electrical panel brackets. In addition, none of these documents specifically indicates that the installation of electrical panel brackets is the work of employees represented by one of the Unions to the exclusion of the other. Accordingly, we find that the factors of certification and collective-bargaining agreements are inconclusive.

2. Company preference and past practice

The Charging Party, employed as an electrician at the Bellwood plant for 14 years, testified that he has seen electricians and machinists, separately and together, perform the disputed bracket installation work for electrical panels. He testified that he was not aware of any pattern relating to how this work is assigned to the employees, but that it is assigned to whomever "the supervisors want." In contradiction to the above testimony, the Charging Party also testified that Local 670 has never given up its exclusive right to the disputed work and recalled an incident of 8 years ago when George Southworth, a supervisor at the Bellwood plant, asked him, as the shop steward, for permission to have a machinists instead of an electrician perform the disputed work.

Local 670 presented two witnesses, Keith Grady and Roger Young. Keith Grady, a trustee and shop steward of IAM and a machinist at the Bellwood plant for 30 years, testified that bracket installation work has always been the sole responsibility of the machinists, but that he did not object to assigning the installation of brackets using kindorf to the electricians. He testified, primarily based on his own experience, that 95 percent of the bracket installation work is performed by the machinists and the remaining 5 percent by the electricians. When recalled as a witness for IAM, Grady indicated that he has performed bracket installations using kindorf, but individually prefers to use a stronger metal. Roger Young, an electrician employed 2 years at the Bellwood plant, testified that he has installed kindorf and angle iron brackets for electrical panels several times.

Wiley Via, the plant manager, George Southworth, currently a maintenance foreman, and Jessie Shelton, a mechanical maintenance supervisor, testified on behalf of the Employer. Their testimony reveals that since at least 1963 the Employer has had a practice of having employees represented by either Union perform the disputed bracket installation work. The Employer's witnesses testified that the Employer's selection for the assignment depends on the circumstances involved, including the skills needed, the availability of employees, and overall efficiency concerns. No contrary evidence was presented. Southworth testified that both the electricians and the machinists have been assigned the disputed work and any welding that may be involved is done separately by the machinists. In this respect, Southworth's testimony is consistent with testimony from the Charging Party and the Unions' witnesses.

The IAM's claim that the electricians worked only with kindorf brackets was refuted by the Employer's witnesses. The Employer's witnesses testified that the electricians had also used channel and angle iron. This was corroborated by Roger Young, an electrician. Young testified that he had recently installed a bracket built from angle iron. Young's testimony on this point was not specifically refuted.

The preponderance of the evidence shows that the installations of electrical panel brackets using kindorf have been performed by both the electricians and the machinists. The more complex installations, which usually require welding, are often performed by the machinists alone because they have the welding skills and the electricians do not, but that the electricians sometimes perform a complex bracket installation with the welding portion of the assignment being done by the machinists. The preponderance of the evidence further shows that, during the last 25 years, the Employer's practice is to assign the installation of brackets for electrical panels at its Bellwood printing plant to the electricians represented by Local 670 or to the machinists represented by the IAM depending on the circumstances involved, including the skills needed, the availability of employees, and overall efficiency concerns. Accordingly, the factor of the Employer's past practice supports an award to employees represented by both Unions and does not favor an exclusive award of the work in dispute to employees represented by either Union.

The record reflects that the Employer's preference is to continue assigning the disputed bracket installation work to employees represented by either Local 670 or IAM depending on the nature of the work and the circumstances involved. Consequently, we find that the factor of employer preference also favors an award of the electrical panel bracket installation work to employees represented by both Unions rather than exclusively to one particular group of employees.

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[3] In view of the conflicting and inconclusive evidence, we do not construe "machines" to include or exclude brackets for electrical panels.

3. Relative skills

Plant Manager Via testified that to install brackets for electrical panels the following skills are needed generally: measuring and cutting materials; drilling holes; and sometimes tapping holes, welding, and milling of slots. He indicated that the electricians do not possess the welding and milling skills. The record reflects that the machinists have all these skills.

There is no dispute that both the electricians and the machinists have the requisite skills to perform installations involving kindorf brackets. There is also no dispute that the machinists have the requisite skills to perform installations of brackets made out of heavier materials. The dispute centers on whether the electricians have the requisite skills to perform the installations involving the heavier materials.

The Charging Party and witnesses for the Employer and Local 670 testified that the electricians possess the requisite skills to perform the installations of brackets made out of heavier materials. Their evidence was supported by further testimony indicating specific examples of bracket installations involving heavier materials which were performed by electricians. No contrary evidence from IAM was presented.[4]

Based on the preponderance of the evidence, we find the factor of relative skills favors awarding the disputed work to employees represented by both Unions and does not favor an exclusive award of the work in dispute to employees represented by either Union.

4. Economy and efficiency of operation

The Employer's witnesses presented evidence that economy and efficiency are best promoted by the assignment of the disputed bracket installations to either the electricians or the machinists, depending on the circumstances involved. In this regard, Plant Manager Via testified that the Employer assigns the installations of electrical panels based on the complexity of the job, employee availability, and sometimes the skills required to do the job. His testimony was corroborated by Foreman Southworth. According to Via's testimony, it is more efficient for the Employer to make the selection between electricians and machinists on a case-by-case basis to achieve a more efficient utilization of manpower and less employee idle time because the number of electricians and machinists on the job fluctuates. Via explained that the Employer does not assign only the kindorf bracket installations to the electricians or all the bracket installations to the machinists because the electricians can perform installations besides those involving kindorf and the machinists are not always available when all the brackets need to be installed. Via also testified that no accidents or safety problems have arisen in connection with the performance of the disputed work. The Unions and the Charging Party did not present any evidence to refute the Employer's evidence relating to this factor. Therefore, the considerations of economy and efficiency favor allowing the Employer to use its discretion in assigning the disputed bracket installation work to either the electricians or the machinists represented by the Unions, rather than making an exclusive assignment.

Conclusions

After considering all the relevant factors, we conclude that none of the factors favors an award of the disputed work involving the installation of brackets for electrical panels to employees represented by one Union to the exclusion of other employees to whom the Employer has assigned such work in the past. In these circumstances, we conclude that employees represented by either Union are entitled to perform the work in dispute and that the Employer has the right to assign the work, in accordance with its past practice, to employees represented by either Union, depending on the circumstances involved.[5] We reach this conclusion relying on the factors of company preference and past practice, relative skills, and economy and efficiency of operation. In making this determination, we are awarding the work to employees represented by either Union, not to the Unions or their members. The determination is limited to the controversy that gave rise to this proceeding.

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[4] IAM presented testimony to the effect that because brackets using heavier materials usually are fabricated and welded by the machinists (work not in dispute), the electricians cannot perform the entire bracket work. Based on the record as a whole, we do not find persuasive this attempt to have the assignment of the disputed work dictated by what skills are needed to perform work not in dispute.

[5] *Machinists District 118 (Meredith Printing)*, 243 NLRB 892 (1979); *Harley Davidson Motor Co.*, 234 NLRB 1121 (1978); *Machinists Lodge 70 (General Electric Co.)*, 233 NLRB 356 (1977).

DETERMINATION OF DISPUTE

The National Labor Relations Board makes the following Determination of Dispute.

1. Employees of Reynolds Metals Company represented by Bellwood Printing Pressmen, Assistants' and Specialities Union No. 670, Subordinate to the Graphic Communications International Union and employees of the Employer represented by International Association of Machinists and Aerospace Workers, Lodge No. 10, are entitled to perform the work of installing the brackets for electrical panels at the Bellwood printing plant located in Richmond, Virginia.

2. Bellwood Printing Pressmen, Assistants' and Specialities Union No. 670, Subordinate to the Graphic Communications International Union is not entitled by means proscribed by Section 8(b)(4)(D) of the Act to force Reynolds Metals Company to assign the disputed bracket installation work exclusively to employees represented by it.

3. Within 10 days from this date, Bellwood Printing Pressmen, Assistants' and Specialities Union No. 670, Subordinate to the Graphic Communications International Union shall notify the Regional Director for Region 5 in writing whether it will refrain from forcing the Employer, by means proscribed by Section 8(b)(4)(D), to assign the disputed work in a manner inconsistent with this determination.

Lapeer Foundry and Machine, Inc. ***and*** **International Union, United Automobile, Aerospace and Agricultural Implement Workers of America, UAW** ***and*** **John J. Curran, Jr. and Lapeer Foundry and Machine, Inc. Employees' Committee, Party in Interest.** Cases 7-CA-20895, 7-CA-21140, 7-CA-21612, and 7-CA-21830

July 20, 1988

DECISION AND ORDER

BY CHAIRMAN STEPHENS AND MEMBERS JOHANSEN AND BABSON

On July 29, 1983, Administrative Law Judge William A. Gershuny issued the attached decision. The General Counsel filed exceptions and a supporting brief and the Respondent filed an answering brief.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings,[1] and conclusions[2] as modified, and to adopt the recommended Order as modified and set forth in full below.

I. THE BARGAINING ORDER

The judge found that commencing with the Union's organizational campaign, the Respondent engaged in a course of serious unfair labor practices that affected virtually all employees at the plant.[3] He concluded that these unfair labor practices in the small unit precluded the possibility of holding a fair election. Noting that a majority of the Respondent's production and maintenance employees had signed union authorization cards during June 1982,[4] the judge concluded that the imposition of a bargaining order would best protect the employees' sentiments pursuant to *NLRB v. Gissel Packing Co.*, 395 U.S. 575 (1969).[5] The judge, however, did not make the bargaining order retroactive to June 30, the date on which the Respondent had embarked on its course of unlawful conduct. The General Counsel has excepted to the judge's failure to make the bargaining order retroactive to that date. We find merit in the General Counsel's exception.

Although acknowledging that the Board has issued retroactive bargaining orders since *Trading Port, Inc.*, 219 NLRB 298 (1975), the judge decided that the entry of a prospective bargaining order in this case would best effectuate the purposes of the Act. He reasoned, inter alia, that a retroactive bargaining obligation was inappropriate because the Union had failed to demand recognition when it obtained majority status, and because the retroactive order might have deleterious effects on the Respondent's already precarious financial condition. We note, however, that in *Peaker Run Coal Co.*, 228 NLRB 93 (1977), the Board rejected the argument that a retroactive bargaining order is inappropriate in the absence of a demand for recognition and bargaining. See also *Rodeway Inn of Las Vegas*, 252 NLRB 344 fn. 3 (1980). Furthermore, speculation concerning the effects of a bargaining order on the Respondent's financial condition will not deter the Board from ordering relief that is necessary to remedy the Respondent's unlawful conduct and to restore the status quo ante. Accordingly, we find that, consistent with precedent, the Respondent's bargaining obligation should attach as of the date that the Respondent embarked on its unlawful antiunion campaign. *Groves Truck & Trailer*, 281 NLRB 1194 (1986); *Martin City Ready Mix*, 264 NLRB 450, 453 (1982). We shall therefore order the Respondent to bargain with the Union as of June 30.

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[1] The General Counsel has excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

[2] The judge found that William Childers Sr. was an agent of the Respondent and that his conduct therefore was imputable to the Respondent. The Respondent did not except to these findings. The General Counsel has excepted to the judge's failure to find that Childers Sr. was a supervisor under the Act. In light of the adopted finding that the conduct of Childers Sr. is imputable to the Respondent, we find it unnecessary to address the General Counsel's contention.

The judge further found that the Respondent did not violate the Act by refusing to recall employees Fenslau, Elmore, Campbell, Elder, Collins, Jenkins, and Spencer. Although we adopt the judge's findings, we do not rely on his conclusion that the involvement of Fenslau, Elmore, and Campbell in the April 1982 theft of parts from the plant constituted a legitimate reason for the Respondent's refusal to recall them. The record establishes that the Respondent recalled employee Cichoracki even though it knew that he was involved in the same theft. We also do not rely on the judge's conclusion that Elmore's suspected involvement in the theft of plant equipment on June 30, 1982, constituted a legitimate reason for the Respondent's refusal to recall him because the record establishes that the Respondent did not have any evidence that Elmore committed this theft. Furthermore, we do not rely on the judge's finding that Spencer's constant complaints about having to do foundry work constituted a legitimate reason for the Respondent's refusal to recall him because the record does not show that Spencer made such complaints constantly.

[3] These unfair labor practices included the Respondent's interrogation of employees about their union sentiments, solicitations of and promises to remedy employee complaints, threats to discharge or lay off employees because of their union activities, and promises to employees of improved working conditions if they abandoned the Union. The judge also found that the Respondent violated Sec. 8(a)(2) and (1) by suggesting and assisting in the formation of an employee in-plant committee. The Respondent did not except to these findings.

[4] All dates hereafter are 1982 unless otherwise indicated.

[5] The Respondent did not except to the judge's issuance of a bargaining order.

289 NLRB No. 126

II. THE UNILATERAL LAYOFF OF NOVEMBER 29

Having determined that the Respondent's bargaining obligation attached on June 30, we next consider the General Counsel's contention that the Respondent's unilateral layoff of seven employees on November 29 violated Section 8(a)(5). The General Counsel argues that the Respondent breached its duty to bargain by unilaterally laying off these employees without notice to the Union. In addressing this argument, we must determine what bargaining obligation the Respondent assumed concerning these layoffs, which were caused solely by economic factors. We note that, depending on the factual situation and the allegations set forth in the complaint, Board decisions have required employers to bargain over the decision to lay off for economic reasons and the effects of that decision or have required bargaining only over the effects of the decision to lay off.[6] For the reasons set forth below, we conclude that an employer's decision to lay off employees for economic reasons is a mandatory subject of bargaining and that the Respondent violated the Act by failing to bargain over its layoff decision and the effects of that decision.

The Respondent's decision to lay off the employees on November 29 constituted an economically motivated business decision that resulted in the loss of work for unit employees. In determining the Respondent's bargaining obligation in this circumstance, we shall apply the principles set forth in *Otis Elevator Co.*, 269 NLRB 891 (1984) (*Otis*).[7] Although all four Board Members in *Otis* agreed that the employer's decision was not a mandatory subject of bargaining, they applied different legal analyses in reaching their conclusions. The plurality opinion of Chairman Dotson and Member Hunter applied a two-factor test—whether the decision turned on a change in the nature or direction of the business or whether it turned on labor costs—and concluded that the decision turned on a change in the nature of the business. In a concurring opinion, Member Dennis applied a two-step test: (1) whether the decision was amenable to resolution through the bargaining process, and, (2) if so, whether the benefit for labor-management relations and the collective-bargaining process outweighed the burden placed on management. Concluding that the decision to consolidate operations was not amenable to resolution through the bargaining process, she agreed that the decision was not a mandatory subject of bargaining.[8] Under either the two-factor or two-step test, we find that the Respondent's decision to lay off the seven employees for economic reasons was a mandatory subject of bargaining.

When a business is confronted with an economic problem such as declining sales, excessive inventory, or an unprofitable department, it may have several options to address this problem. Management may decide, for example, to lay off employees, to shut down the unprofitable department, or to consolidate operations and transfer work to a more efficient plant. Although job losses may result whether the decision is to lay off, shut down, or consolidate, the focus of the decision to lay off differs from the focus of the other two decisions in a critical manner. In deciding to lay off employees, management directly alters employees' terms of employment. This decision, like the decision to reduce workers' wages, necessarily turns on labor costs because the decision itself is to modify terms of employment to save money during economic downturns. By contrast, the decisions in *FNM* to shut down and in *Otis* to consolidate part of the business involved a direct modification of the business structure. Those decisions had only a *secondary effect* of altering employees' terms of employment. Accordingly, pursuant to the *Otis* plurality two-factor test, the decision to shut down part of the business or consolidate operations affects the scope, direction, or nature of the business and need not be bargained.[9] On the other hand, the decision to lay off turns on labor costs and must be bargained.

The *Otis* two-step test of Member Dennis mandates the same conclusion. A decision to lay off is predicated on the assumption that savings will accrue from reduced labor costs during a period when a full complement of workers is unnecessary. Labor-related considerations therefore form the basis for the decision. As a union has control over this labor-related factor, it can offer alternatives to the layoff, such as wage reductions, modified work rules, or part-time schedules for a larger group, to save the company money during the economic downturn. Accordingly, the layoff decision is amenable to resolution through the collective-bargaining process. With regard to the burden placed on the business, we note that a decision solely to lay off employees does not involve an investment of capital, an alteration of the company's basic operations, nor a need for confidentiality. Although management has a legitimate concern with the need for speed and flexibility in effectuating a layoff to remedy its economic plight, we believe that the legal requirements that exist to ensure meaningful bargaining in a timely fashion address this concern adequately.[10] We therefore find that the burden borne by management in having to bargain over an economic layoff decision is outweighed by the benefit for the collective-bargaining process.

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[6] Compare *Felbro, Inc.*, 274 NLRB 1268 (1985), enfd. in relevant part sub nom. *Garment Workers Local 512 v. NLRB*, 795 F.2d 705 (9th Cir. 1986); *Gulf States Mfrs. Co.*, 261 NLRB 852 (1982), modified 704 F.2d 1390 (5th Cir. 1983); *Peat Mfg. Co.*, 261 NLRB 240 (1982) (employer violates Sec. 8(a)(5) by failing to bargain over the decision to lay off) with *Intersystems Design Corp.*, 278 NLRB 759 (1986); *Tylertown Wood Products*, 251 NLRB 515 (1980) (employer must bargain over the effects of the decision to lay off).

[7] *Otis* concerned an employer's decision to consolidate its operations and transfer the bargaining unit work to another facility. The Board determined whether the employer was obligated to bargain over this decision in light of the Supreme Court's holding in *Fibreboard Paper Products Corp. v. NLRB*, 379 U.S. 203 (1964), and *First National Maintenance Corp. v. NLRB*, 452 U.S. 666 (1981) (*FNM*). The Court held that the employer's decision in *Fibreboard* to subcontract unit work was a mandatory subject of bargaining, whereas it held in *FNM* that an employer's decision to shut down part of its business was not a mandatory subject of bargaining.

[8] In another concurring opinion, Member Zimmerman applied a test that encompassed only the first step of the Dennis two-step test. He also concluded that the employer's decision was not amenable to resolution through collective bargaining.

[9] An employer may still be required to bargain over a layoff as an *effect* of these nonbargainable decisons, however. See *Litton Business Systems*, 286 NLRB 817 (1987).

In light of the above analysis, we conclude that the decision to lay off employees for economic reasons is a mandatory subject of bargaining. Consequently, an employer must provide notice to and bargain with the union concerning the decision to lay off bargaining unit employees and the effects of that decision. Our conclusion is consistent with those of several circuit courts of appeal that have addressed this issue. See, e.g., *NLRB v. Advertisers Mfg. Co.*, 823 F.2d 1086 (7th Cir. 1987); *Garment Workers Local 512 v. NLRB*, 795 F.2d 705 (9th Cir. 1986); *NLRB v. Carbonex Coal Co.*, 679 F.2d 200 (10th Cir. 1982). As the Seventh Circuit emphasized in *NLRB v. Advertisers Mfg. Co.*, supra at 1090:

> Laying off workers works a dramatic change in their working conditions (to say the least), and if the company lays them off without consulting with the union and without having agreed to procedures for layoffs in a collective bargaining agreement it sends a dramatic signal of the union's impotence.
>
> . . . .
>
> Layoffs are not a management prerogative. They are a mandatory subject of collective bargaining. Until the modalities of layoff are established in the agreement, a company that wants to lay off employees must bargain over the matter with the union.

This requirement will ensure that the employees' bargaining representative will have the opportunity to propose less drastic alternatives to the proposed layoff. Moreover, the employer's duty to bargain will require meaningful negotiations concerning the decision to lay off, and not merely the notification to the union of a decision that is a fait accompli. To ensure meaningful negotiations, we will continue to scrutinize the "totality of the [parties'] conduct throughout the course of bargaining . . . ." *Atlanta Hilton & Tower*, 271 NLRB 1600, 1603 (1984). In light of the economic circumstances motivating a company's decision to lay off employees, however, we will require that negotiations concerning this decision occur in a timely and speedy fashion. Thus, should a union fail to request bargaining in a timely fashion once the company has provided it with notice of the layoff decision, we will find that the company has satisfied its bargaining obligation. See, e.g., *Paramount Liquor Co.*, 270 NLRB 339, 343 (1984); *Smyth Mfg. Co.*, 247 NLRB 1139, 1168 (1980). Furthermore, the establishment of compelling economic circumstances may excuse a company's failure to bargain over the layoff decision. See, e.g., *Aquaslide 'N' Dive Corp.*, 281 NLRB 219 fn. 2 (1986); *Advertisers Mfg. Co.*, 280 NLRB 1185 (1986). We emphasize, however, that only in extraordinary situations will this exception apply. See *Angelica Healthcare Services Group*, 284 NLRB 844 (1987).

To illustrate the limits of our holding, we stress that our analysis today applies only to an economically motivated decision to lay off employees. We recognize that a managerial decision is often not easily categorized under a label such as layoff or consolidation. For example, the permanent contraction of a company's work force, which might be viewed as a mass layoff, may be part of a change in the scope and direction of the business enterprise and, therefore, not bargainable under *FNM*, supra. In this regard, we reaffirm the caveat that "the appellation of the decision is not important" to a determination of whether the decision requires bargaining. *Otis*, 269 NLRB at 893. Nothing in today's decision concerns an employer that shuts down a part of its business for economic reasons; the Court has made clear that bargaining over that decision is not required. *FNM*, supra. Nor does this decision affect in any way the Board's *Otis* rationale concerning an employer's decision to consolidate its operations and transfer work to another facility. Finally, we do not address layoffs that occur pursuant to a collective-bargaining agreement.

Applying our analysis to the present situation, we find that the Respondent violated Section 8(a)(5) and (1) through its unilateral layoff of the seven employees on November 29. The General Counsel has not alleged that the layoffs occurred as a result of discriminatory reasons on the Respondent's part. Indeed, the record establishes that the layoffs resulted from a lack of orders. To address this economic problem, the Respondent decided to lay off seven employees without notifying the Union or bargaining over the decision. The layoff was not the result of the Respondent's decision to change the nature or scope of the business. Rather, the decision was to effect changes in these employees' terms of employment to reduce labor costs during a period of economic difficulty. The Respondent was thus obligated to bargain over this decision. The record is devoid of evidence that this unilateral layoff was in accord with an established past practice whereby the Respondent had laid off employees without notice to or bargaining with the Union. Nor has the Respondent demonstrated compelling economic circumstances justifying unilateral action. Cf. *Aquaslide 'N' Dive Corp.*, supra. Accordingly, the Respondent's failure to notify and bargain with the Union regarding the November 29 layoffs violated Section 8(a)(5) and (1).

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[10] As discussed below, once the employer has given the union notice of the proposed decision to lay off employees, we will require that the union make a timely request to bargain and will then require that the bargaining occur in a timely and meaningful fashion.

THE REMEDY

Having determined that an employer violates the Act by failing to bargain over its decision to lay off employees, we must formulate a remedy that redresses the wrong committed. As the Supreme Court has observed, our "task in applying § 10(c) is to take measures designed to recreate the relationships that would have been had there been no unfair labor practice." *Franks v. Bowman Transportation Co.*, 424 U.S. 747, 769 (1975). With this responsibility in mind, we conclude that ordering the employer to bargain with the union concerning the layoff decision, as well as the effects of that decision, and to reinstate the laid-off employees with backpay constitutes the appropriate remedy for this decision-bargaining violation.[11] See *NLRB v. Sandpiper Convalescent Center*, 824 F.2d 318 (4th Cir. 1987); *NLRB v. Advertisers Mfg. Co.*, supra. The employer's backpay liability shall run from the date of the layoffs until the date the employees are reinstated to their same or substantially equivalent positions or have secured equivalent employment elsewhere. Backpay shall be based on the earnings that the employees normally would have received during the applicable period, less any net interim earnings, and shall be computed in the manner prescribed in *F. W. Woolworth Co.*, 90 NLRB 289 (1950), with interest to be computed in the manner prescribed in *New Horizons for the Retarded*.[12]

We believe that the remedy requiring bargaining and full backpay relief furthers the purposes of the Act. This remedy provides an economic incentive for an employer to comply with the "rule that requires an employer to negotiate with the union before changing the working conditions in the bargaining unit . . . [thereby] prevent[ing] the employer from undermining the union by taking steps which suggest to the workers that it is powerless to protect them." *NLRB v. Advertisers Mfg. Co.*, supra. Furthermore, these discussions may result in less drastic alternatives being effected, or they may convince the union that the layoffs represent the only reasonable solution to the employer's economic problem. As bargaining may preclude the necessity of laying off employees, we find that backpay commencing on the date of the layoff is warranted to remedy a failure to bargain. In making this determination, we recognize that a reviewing court may question this award of full backpay in the absence of evidence demonstrating that bargaining would have prevented the layoffs. We do not require such a showing, however, for two reasons. First, requiring a finding that bargaining would have prevented the layoffs to justify a backpay order requires the Board or a court to engage in a post-hoc determination of the economic situation, instead of letting the parties decide themselves at the time of the layoff. This requirement thus unnecessarily injects the Government into an area in which the collective-bargaining process should be permitted to function. Second, the requirement is contrary to our customary policy to order a respondent to restore the status quo when the respondent has taken unlawful unilateral action to the detriment of its employees. The "consequences of Respondent's disregard of its statutory obligation should be borne by the Respondent, the wrongdoer herein, rather than by the employees." *Hamilton Electronics Co.*, 203 NLRB 206 (1973). See also *Southwest Forest Industries*, 278 NLRB 228 (1986). We therefore find that full backpay relief is appropriate.

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[11] By contrast, requiring bargaining over the decision and reinstatement with full backpay does not constitute an appropriate remedy for an effects-bargaining violation. In that situation, the propriety of the employer's decision is not in question. In order to ensure that bargaining will occur over the effects of the decision, however, we order a limited backpay remedy pursuant to *Transmarine Navigation Corp.*, 170 NLRB 389 (1968), should an employer fail to bargain over the effects. See *Litton Business Systems*, supra at 822. This limited backpay remedy requires that backpay run from 5 days after the date of the Board's decision until the occurrence of the earliest of the following conditions: (1) the date the employer bargains to agreement with the union on those subjects pertaining to the layoff about which the employer is required to bargain; (2) a bona fide impasse in bargaining; (3) the failure of the union to request bargaining within 5 days of the Board's decision and order or to commence negotiations within 5 days of the employer's notice of its desire to bargain with the union; or (4) the subsequent failure of the union to bargain in good faith; but

> in no event shall the sum paid to any of these employees exceed the amount he would have earned as wages from the dates on which he was laid off or terminated to the time he was recalled or secured equivalent employment elsewhere, or the date on which the Respondent shall have offered to bargain, whichever occurs sooner; provided, however, that in no event shall this sum be less than these employees would have earned for a 2-week period at the rate of their normal wages when last in the Respondent's employ. [Id.]

[12] In accordance with our decision in *New Horizons for the Retarded*, 283 NLRB 1173 (1987), interest on and after January 1, 1987, shall be computed at the "short-term Federal rate" for the underpayment of taxes as set out in the 1986 amendment to 26 U.S.C. § 6621. Interest on amounts accrued prior to January 1, 1987 (the effective date of the 1986 amendment to 26 U.S.C. § 6621), shall be computed in accordance with *Florida Steel Corp.*, 231 NLRB 651 (1977).

Having found that the Respondent failed to bargain over the November 29 layoffs in violation of the Act, we shall order the Respondent to bargain with the Union concerning that layoff decision and the effects of that decision. The Respondent shall reinstate employees Childers, Krohn, Mauk, and D. Farrier and award them backpay as specified above. With respect to employees Hill, Kalar, and Miles, whose layoffs were converted to permanent layoffs on December 8, their backpay and reinstatement rights shall be cut off as of that date. We provide the more limited remedy as to those three because we have affirmed the judge's finding that, contrary to the General Counsel's allegations, the conversion of their temporary layoffs to permanent layoffs was not a sham done for unlawful motives and because the General Counsel did not allege that the unilateral decision to make the layoffs permanent violated Section 8(a)(5) of the Act.[13]

ORDER

The National Labor Relations Board orders that the Respondent, Lapeer Foundry and Machine, Inc., Lapeer, Michigan, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Refusing to recognize and to bargain with the International Union, United Automobile, Aerospace and Agricultural Implement Workers of America, UAW or its designated local union as the exclusive bargaining representative of the employees in the following appropriate unit:

> All production and maintenance employees, including tool room employees, shipping and receiving employees, truck drivers, employed by the Respondent at the Lapeer plant, but excluding office clerical employees, technical employees, professional employees, guards and supervisors as defined in the Act.

(b) Interrogating employees concerning their union membership and sentiments.

(c) Soliciting employee complaints and promising to remedy them as an inducement to employee rejection of the Union as their bargaining representative.

(d) Threatening employees with discharge or layoffs because of their union activities.

(e) Promising employees improved working conditions if they rejected the Union as their bargaining representative.

(f) Creating, dominating, or interfering with the formation or administration of any labor organization (or in-plant committee) or contributing financial or other support to it.

(g) Unilaterally laying off employees without providing the Union with notice and opportunity to bargain about the decision to lay off employees, and the effects of that decision.

(h) In any other manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Recognize and, on request, bargain with the Union as of June 30, 1982, as the exclusive bargaining representative of the employees in the above-described unit with respect to rates of pay, wages, and other terms and conditions of employment, and, if an understanding is reached, embody the understanding in a signed agreement.

(b) On request, bargain with the Union concerning the decision to lay off employees on November 29, 1982, and the effects of that decision.

(c) Reinstate and make whole those employees laid off on November 29, 1982, for any loss of pay or other employment benefits suffered as a result of its unlawful conduct in the manner set forth in the remedy portion of this decision.

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[13] We do not agree with our colleague that the Respondent failed to establish that employees Miles, Kalar, and Hill were permanently laid off or that the reinstatement and backpay rights of those employees should be left for the compliance stage of the proceeding. Initially, we note that the General Counsel alleged in the amended complaint that the Respondent had *permanently* laid off those three employees on December 8. Furthermore, we have adopted the judge's specific finding that the Respondent decided to lay off those employees *permanently* for legitimate business reasons, i.e., the lack of steady work for those employees to perform in the foreseeable future. The fact that two of them may have been recalled subsequently does not change the nature of the decision here. This permanent layoff decision was independent of the November 29 decision to effect a temporary layoff. The General Counsel chose to allege that the subsequent decision to make the layoffs permanent was discriminatory, but the judge dismissed that allegation and the General Counsel has not excepted to that dismissal. Contrary to the implication of our colleague's dissent, whether the Respondent may have violated Sec. 8(a)(5) by deciding to make the layoffs permanent without notifying the Union or affording it an opportunity to bargain over that decision cannot be ascertained because no violation of that section of the Act was alleged in the complaint or litigated at the hearing. Thus, we conclude that the Respondent's action in making those three employees' layoffs permanent has not been shown to be unlawful and that those employees therefore would not have been employed by the Respondent as of December 8 regardless of the Respondent's earlier unlawful action. Consequently, the remedy of backpay should be tolled as of that date. Finally, we do not leave this issue for compliance because the parties have litigated the lawfulness of the Respondent's permanent layoff decision and we have adopted the judge's conclusion regarding this issue.

(d) Preserve and, on request, make available to the Board or its agents for examination and copying, all payroll records, social security payment records, timecards, personnel records and reports, and all other records necessary to analyze the amount of backpay due under the terms of this Order.

(e) Post at its Lapeer, Michigan plant copies of the attached notice marked "Appendix."[14] Copies of the notice, on forms provided by the Regional Director for Region 7, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material.

(f) Notify the Regional Director in writing within 20 days from the date of this Order what steps the Respondent has taken to comply.

MEMBER JOHANSEN, concurring in part and dissenting in part.

I join my colleagues in all aspects of this decision except in their findings, reflected in the remedy portion of the decision, that the layoffs of employees Miles, Kalar, and Hill were converted to permanent layoffs on December 8, 1982, and that the make-whole remedy for these employees is tolled as of that date. In my view, there is no substantive finding concerning the permanent layoff notices issued these employees December 8 on which to base a conclusion that the Respondent is purged of liability for its failure to bargain over the November 29 layoff. If, however, the Respondent can show that any of their jobs were abolished on December 8 or thereafter and thereby toll its obligations for reinstatement and backpay, it should raise those issues at the compliance stage of the proceeding. In that event, the burden is on the Respondent to prove that any one of these jobs is no longer available.[1]

When the judge described these employees as being "on permanent layoff status," his language merely acknowledged the Respondent's description of the written notices it sent out on December 8. The judge's analysis did not purport to resolve whether the Respondent made a decision prior to December 8 to which no bargaining obligation attached or even that it made any decision at all before issuing the permanency notices. With no allegation that the permanency notices violated Section 8(a)(5), there was no reason for him to resolve that issue, and thus his discussion of the notices in dismissing the 8(a)(3) allegations tracked the terminology of the notices themselves, which even the Regional Director adopted in issuing complaint. To attach any further meaning to the judge's language is to render a distinction without substance.[2]

Two observations are made to justify a limited make-whole remedy for these employees: (1) the "conversion" to permanent layoff status on December 8 "was not a sham done for unlawful motives"; and (2) the General Counsel did not allege the "conversion" independently to violate Section 8(a)(5). I neither take issue with these observations nor apprehend their relevance. The fact that the permanency notices were not "a sham" but genuinely economically motivated no more mitigates the Respondent's liability for its unilateral action than the fact that the layoff announced 9 days earlier was itself a response to economic hardship. As set forth more fully in the remedy portion of this decision, our theory of violation has nothing to do with unlawful motive or lack of substantial business justification for the Respondent's unilateral action but is based on *the fact of unilateral action itself.* The Respondent was no more privileged to proceed unilaterally when it declared some of the layoffs permanent on December 8 than when it laid off the workers in the first place, and permanency notices did nothing to cure the defect of that unilateral action.

As to the second observation—that allegations over the permanency notices were based not on Section 8(a)(5) but on Section 8(a)(3)—making no assumptions as to the legality under Section 8(a)(5) of the December 8 notices, I note the following: Because it is clear from the record that the Respondent did not offer to bargain over the November 29 layoffs, it could not lawfully have made determinations about the permanency of any of those layoffs based solely on economic data at hand on December 8. Rather, it would have had to base its projections also on the outcome of November 29 layoff bargaining—bargaining that had not occurred; or else it could only have assumed that those negotiations would have validated the decision to effect an indefinite layoff on November 29; that Miles, Kalar, and Hill would have been among those lawfully placed on indefinite layoff on November 29; and that further economic decisions could be lawfully predicated on those assumptions.

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[14] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

[1] See *Mastro Plastics Corp.*, 136 NLRB 1342, 1357-1358 (1962), enfd. in pertinent part 354 F.2d 170, 176 (2d Cir. 1965).

[2] References in the record to economic justification for the permanency notices are too vague to support any viable distinction between the Respondent's action on the dates of the two sets of notices—and certainly insufficient to support a finding that the December notices were based on a decision to which no bargaining obligation would have attached. Labels of "permanency" notwithstanding, two of the three employees were recalled within months to the same departments from which they had been laid off, and the Respondent's conflicting testimony concerning the third, Kalar, suggests that his work was either contracted out or absorbed by three other individuals after he was laid off—in neither case suggesting an unbargainable decision. Respondent witness Rassey's testimony goes far in negating any inference as to a distinction of substance in that he twice could not recall whether the second set of notices announced a "definite" or "indefinite" layoff.

These are the types of assumptions my colleagues and I are unwilling to make in ordering the Respondent before bargaining to restore conditions to the status quo ante prior to November 29 by extending full reinstatement and backpay relief to the other four employees laid off on that date. As stated in the remedy portion of the decision, it is not the Board's policy in cases of unbargained layoffs to engage in a post-hoc determination of the parties' economic situation, and I am unwilling to do so here to conclude, as do my colleagues, that Miles, Kalar, and Hill would not have been employed by the Respondent as of December 8 irrespective of a failure to bargain on November 29. In short, with an unremedied refusal to bargain accruing from November 29, it is simply not possible to ascertain what the employment status of these employees would have been when the Respondent asserted its claim of exacerbated economic hardship on December 8 or to conclude that make-whole liability for their original layoffs has been negated upon that assertion even if the permanency notices were accomplished in otherwise full compliance with Section 8(a)(5).

This is not to suggest that the Respondent is foreclosed from showing that any number of other events recognized as tolling make-whole liability, such as the elimination of jobs,[3] cessation of pertinent segments of its operations,[4] or other decisions not subject to mandatory bargaining, have intervened either on December 8 or thereafter. Such issues may be raised and resolved at the compliance stage of this proceeding without the need to litigate a further charge.

Accordingly, I cannot conclude that either of the stated justifications supports limiting the term of the make-whole remedy affecting these three employees.

APPENDIX

Notice To Employees
Posted by Order of the
National Labor Relations Board
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

Section 7 of the Act gives employees these rights.

To organize

To form, join, or assist any union

To bargain collectively through representatives of their own choice

To act together for other mutual aid or protection

To choose not to engage in any of these protected concerted activities.

We will not refuse to recognize or bargain with the International Union, United Automobile, Aerospace and Agricultural Implement Workers of America, UAW, or its designated local union as the exclusive bargaining representative of our employees in the following appropriate unit:

> All production and maintenance employees, including tool room employees, shipping and receiving employees, truck drivers, employed by the Respondent at the Lapeer plant, but excluding office clerical employees, technical employees, professional employees, guards and supervisors as defined in the Act.

We will not interrogate employees concerning their union membership and sentiments.

We will not solicit employee complaints and promise to remedy them as an inducement to employee rejection of the Union as their bargaining representative.

We will not threaten employees with discharge or layoff because of their union activities.

We will not promise employees improved working conditions if they reject the Union as their bargaining representative.

We will not create, dominate, or interfere with the formation or administration of any labor organization (or in-plant committee) or contribute financial or other support to it.

We will not unilaterally lay off employees without providing the Union with notice and opportunity to bargain about the decision to lay off employees and the effects of that decision.

We will not in any other manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

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[3] See *Mastro Plastics Corp.*, supra.

[4] See, e.g., *Collateral Control Corp.*, 288 NLRB 308 (1988).

WE WILL recognize and, on request, bargain with the Union as of June 30, 1982, as the exclusive bargaining representative of the employees in the above-described unit with the respect to rates of pay, wages, hours, and other terms of employment, and, if an understanding is reached, embody such understanding in a signed agreement.

WE WILL, on request, bargain with the Union concerning the decision to lay off employees on November 29, 1982, and the effects of that decision.

WE WILL reinstate and make whole those employees laid off on November 29, 1982, for any loss of pay or other employment benefits suffered as a result of our unlawful conduct in the manner set forth in the remedy portion of the Board's decision.

LAPEER FOUNDRY AND MACHINE,
INC.

John Ciamanitaro, Esq., for the General Counsel.
Douglass A. Witters, Esq. (Clark, Hardy, Lewis, Pollard & Page), of Birmingham, Michigan, for the Respondent.

DECISION

STATEMENT OF THE CASE

WILLIAM A. GERSHUNY, Administrative Law Judge. A hearing was conducted in Flint, Michigan, on May 10-13, 1983, on complaint issued April 15, 1983, alleging a number of violations of Section 8(a)(1), (2), (3), (4), and (5) of the Act during the course of an organizational drive and seeking, inter alia, a bargaining order.

On the entire record, including my observation of witness demeanor, I make the following

FINDINGS OF FACT AND CONCLUSIONS OF LAW

I. JURISDICTION AND LABOR ORGANIZATION

The complaint alleges, the answer admits, and I find that Respondent is an employer subject to the Act and that the Union is a labor organization within the meaning of Section 2(5) of the Act.

II. UNFAIR LABOR PRACTICES

A. *Background*

Respondent acquired the foundry at Lapeer at a bankruptcy sale and, with a $1 million loan from the Economic Development Corporation for the rehabilitation of the plant and equipment by May 1982, began the hiring process in September 1981. The prior owner had had serious problems with the union representing its employees, had a poor reputation among its customers, and had gone into bankruptcy. The plant and equipment remained idle for more than 1-1/2 years and, at the time of acquisition by Respondent, were in a terrible state of disrepair. Respondent hired many of the former employees, despite knowledge of their prior union membership; others, with no prior foundry experience, were screened, trained, and referred by the Michigan Employment Security Commission to Respondent who received a tax credit for maintaining an on-the-job training program.

Limited production began in January due to the lack of orders. During the next 6 months, Respondent was plagued with numerous customer complaints about product quality and frequent equipment breakdowns. Employees were not laid off, but rather were used for plant rehabilitation so as not to jeopardize the Company's loan.

During June 1982, a majority (18) of the approximately 27 production and maintenance employees signed union authorization cards. A representation petition was filed on June 28 and served on June 29. By notice served August 27, a hearing on the petition was scheduled for September. However, none was conducted due to the filing of charges on July 6 and September 7, 1982, and January 10 and March 3, 1983.

B. *The Status of Childers Sr.*

The complaint alleges that Childers Sr., either as a supervisor or as an agent of Respondent, engaged in conduct violative of Section 8(a)(1). Respondent contends that he was a leadman only and that his conduct is not attributable to it.

Childers, with 23 years' foundry experience with the former owner, was one of the first employees hired in the fall of 1981. Placed in charge of the automatic molding operation, Childers, in 1982, worked directly under Plant Superintendent Cappella; he was paid at the hourly rate of $7, in contrast to the $5 rate for other production employees; a number of admittedly nonsupervisory employees similarly were paid $7 per hour; he assigned work to, and directed the work of, a number of production employees; he discussed complaints with employees and took their complaints to management; he claimed to have authority to issue verbal reprimands and to suspend and discharge employees, although there is no evidence that such authority ever was exercised. With other department leaders, he attended regular production meetings conducted by Cappella and President Rassey; and, at Rassey's request, he admittedly solicited grievances from production employees and interrogated them as to their involvement in the organizational campaign.

There is grave doubt in my mind whether the evidence supports the contention of supervisory status. Childers was not salaried and there is no evidence that he exercised discretion in the production operation or the authority he claimed to possess when he gave an affidavit to the Board. At the hearing, Childers, an older man, clearly was confused and testified that, although he had been offered that authority, he had refused to accept it. Moreover, there is evidence suggesting that no employee believed him to have that authority and, indeed, employees seeking time off or with complaints went directly to Rassey or Cappella.

There is, however, no need to decide that issue because the record clearly reflects that, at all relevant times, he was placed by Rassey in such a position that he would be considered by employees as its agent, as defined in Section 2(13) of the Act. *B-P Custom Building*

Products, 251 NLRB 1337 (1980); *Han-Dee Pack*, 249 NLRB 725 (1980).

Childers conveyed to employees information received from Rassey and Cappella about the Company's attitude toward organization; he was instructed by Rassey to determine the nature of employee complaints and to report to him; he was told by Rassey he was the "spokesman" for the employees; he was authorized to be Rassey's spokesman concerning the creation of an in-plant committee; and he obtained from the front office the material and clerical assistance in early September to enable the employees to conduct an election to determine whether they wanted Petitioner or a committee to represent them. Thus, whether his authority rose to the level of a supervisor, Childers was placed by management in a position where employees reasonably could believe he spoke on their behalf. Accordingly, his conduct during the summer of 1982 is imputable to Respondent.

C. *Childers' June 30 Meeting with Employees*

On June 29, Respondent was served with the representation petition. The next day, June 30, the plant's second furnace unexpectedly blew a coil, thereby shutting it down along with the other furnace that also was down for major repairs. A layoff of all nonessential employees was decided. In a morning meeting with Rassey concerning the furnaces, Childers was shown the petition and reminded of their conversation the year before, in which Rassey said he would close the plant if the Union "got in." He was also asked to find out why the employees were unhappy and wanted a union.

He did so shortly thereafter, while having lunch with a number of employees in the lunchroom. Within hearing of all, he said that he had just come from a meeting in the office; that Rassey was just served with the petition; that the furnace problem would necessitate a lengthy layoff; that two employees, Fenslau and Spencer, would not be recalled because employees had complained that their hourly rate ($7) was higher than theirs ($5); that management blamed Kolar, Fenslau, and Spencer for the Union; and that it was a bad time to organize. He also asked who had signed cards.

I find and conclude that this meeting constituted an unlawful interrogation of employees about their union activities, an unlawful threat that employment would be denied to those employees responsible for the organizational drive, and an unlawful promise that employee complaints would be remedied by not recalling certain employees whose hourly rates were higher than most production employees, all in violation of Section 8(a)(1) of the Act.

Whether subsequent layoffs or refusals to recall certain employees were unlawful is considered below.

D. *Childers' Solicitation of Grievances*

Within days of the June 30 furnace breakdown and layoffs, Childers was asked by Rassey to find out what the employee problems were. He did so on a number of occasions, telling employees to inform him of their complaints. He then would relay the complaints to Rassey, who would straighten them out. Given the pendency of a representation proceeding, there is no question about Rassey's intent—it was to discourage employee support of a union as their bargaining representative by demonstrating his willingness to deal directly and promptly with their complaints. Such activity is violative of Section 8(a)(1).

E. *Respondent's Antiunion Animus*

The credible record evidence is overwhelming that, from September 1981 when it first began hiring its work force, management made it known that the plant would close if a union came in. Plant Superintendent Cappella testified that this attitude of the Company was "common knowledge." He admitted telling a number of employees that the Company could not afford "GM" wage rates. Rassey admitted telling job applicants that, if the Company had labor problems similar to those of the former owner, "I'd be forced to shut down, too." Other credible employee testimony reflects that, at various times, Rassey told them that he would not be afraid to shut down if a union came in and that he had told this to the city's redevelopment authority. In addition, on the morning of June 30, following breakdown of the furnace and receipt of the petition, Rassey reminded Childers Sr. what he had told him in September—he would close the plant if a union came in. Rassey's intentions in telling this to all job applicants, including employees of the former owner who had been represented and who had seen the plant go into bankruptcy because of labor difficulties, were manifest—if you want continued employment, do not organize.

This animus on the part of Respondent is highly relevant in considering the lawfulness of other conduct of Respondent.

F. *Cappella's Interrogation*

Plant Superintendent Cappella admitted asking an employee, in early July after filing of the petition, if he had signed an authorization card. The employee, a relative of Cappella's wife, was at the Cappella home with his family and asked Cappella if the Company was going to "make it." Cappella replied that it would and asked if the employee had signed a card. The employee responded that he had not. However innocent this conversation may have been, it is, under the circumstances present here, violative of Section 8(a)(1) of the Act because of its tendency to interfere with the free exercise of the statutory right of employees to organize.

G. *Rassey's July 8 Meeting with Hill*

Credible evidence establishes that, on July 8, laid-off employee Hill returned to the plant to meet with Rassey about the continuation of his medical insurance coverage. During their conversation, Rassey said that he would sponsor ball teams, picnics, and bowling leagues (subjects never mentioned before); that he would initiate an incentive program; that the employees did not need a "third party," but that they could settle their problems directly with him; and that he had told the city he would close if a union came in. Rassey's statements constitute unlawful promises of benefits in order to undermine employee support for the Union, an unlawful threat to cease doing business if forced to deal with a union, and an unlawful solicitation of grievances to be handled without the need for a bargaining representative, all in violation of Section 8(a)(1).

H. *Rassey's July 16 Meeting with Curran*

In support of the allegations of paragraph 12 of the complaint, employee Curran testified that, in a July 16 meeting with Rassey in the latter's office, Rassey told him the Company was "in trouble" with the Board and that he should keep his mouth closed about the Union; he inquired whether Curran had spoken with the Board and as to the substance of that conversation. During Rassey's lengthy testimony, he was not asked about this meeting.

Nevertheless, paragraph 12 must be dismissed for want of proof, as I am unable to credit any of Curran's testimony, based primarily on my observation of his demeanor on the stand. He was aggressive and hostile and his testimony was exaggerated. Moreover, by his own admission, Curran was having personality problems of such a bizarre nature as to cast serious doubts on his ability to accurately recount events and conversations. He regularly carried with him a tape recorder so that there would be no "misunderstandings" in his daily dealings with Rassey or Cappella. During another meeting with Rassey on September 10 (discussed below), Curran lost control of himself, throwing papers at Rassey and storming out of the office and the plant. The following morning, he returned to meet again with Rassey at the latter's office, armed with a tape recorder and accompanied by his wife, who was to serve as a witness.

I. *The September 1 Meeting*

On the morning of September 1, 4 days after having been served with a notice scheduling a hearing for September 8 on the representation petition, Rassey met with all employees. The credible testimony of employees Kalar, Stroup, and Hill and the admissions of Childers Sr. and Cappella establish that Rassey suggested the formation of an in-plant committee that would function in lieu of a union; that, with the assistance of management and on company time, the employees voted to be represented by the committee rather than by the Union; that, thereafter, Cappella designated three employees to serve on that committee; that the committee never functioned; and that, thereafter, at the direction of Rassey and again on company time, a "decertification affidavit" was circulated among the employees.

More specifically, Rassey advised the employees of the scheduled hearing; told them that, although he could not advise them what to do or assist them, if the hearing were to be canceled a decertification petition would be needed immediately; told them that they should consider whether they wanted a shop committee to serve as their bargaining representative; and suggested they give him three names of persons to serve on that committee. The employees thereafter conferred in private and on company time, during which time some employees stated that the plant would close if a union came in. They decided to conduct a secret election that afternoon. With material and clerical assistance from the front office, ballots reading, "Would you like to form your own bargaining unit and your own committee to represent you?" were distributed. Eighteen employees voted "yes" and eleven voted "no." The ballots were then stored in the office safe. The following day, Cappella designated three employees to serve on the committee, which never came into existence otherwise. Thereafter, one employee was instructed by Rassey to circulate an affidavit addressed to the Board, advising that the employees wanted to be represented by an in-plant committee and not by Petitioner. There is no evidence as to the disposition of this document.

I find and conclude that these acts on the part of Rassey and Cappella constitute a violation of Section 8(a)(1) and (2) of the Act and represent a bald attempt to interfere with and frustrate the statutory representation processes.

J. *The June 30–July 1 Layoffs and Subsequent Recalls*

1. The layoffs

On June 30, 1 day after being served with the petition, Respondent experienced a major, unexpected coil burnout in its only remaining operational furnace. The other, at the time, was undergoing major repairs to its coils. There is no contention and the record does not suggest that a breakdown did not occur or that it was other than unforeseen. Nor is there any doubt about the fact that the breakdown left Respondent with no iron-pouring capacity for some weeks.

Eighteen employees, not essential to furnace repairs, were laid off on June 30 and July 1. All but one were card signers; one card signer was not laid off.

The contention is that the layoffs were discriminatory and, thus, unlawful, as evidenced by their timing and the fact that, in the past when both furnaces were down, the entire work force was retained.

I find and conclude that the June 30 and July 1 layoffs were not unlawful. The testimony of Cappella and Rassey in this respect is undisputed by any General Counsel witness with a knowledge of the plant's overall operation and is credible.

When Respondent acquired the plant in September 1981, both furnaces were dismantled. One was operational by December and both by January. Normally only one furnace is used at any one time. Prior to June, there never was an occasion when both were down at the same time due to coil problems. When furnace relining was necessitated, it was done in a day or two and the employees were reassigned to plant and equipment rehabilitation work generally, because Respondent was contractually obligated to complete plant rehabilitation by May 1982.

On June 30, one furnace was down for repairs and the other "blew" a coil, requiring outside repairs, which normally take from 3 to 6 weeks. Faced with severe budgetary constraints (a fact not disputed), Rassey and Cappella, after consultations with the outside coil expert, laid off all employees not essential to the furnace teardown and repair. Although there may have been work for some employees in the core, grinding, and molding operations, it was decided not to continue those operations due to the uncertainty of a startup date and the fact that cores and moldings cannot be kept for any period of time. After further consultations with the expert, Respondent decided to attempt an innovative means of operating the furnance with fewer than all coils. By July 4, the experiment proved successful and the furnace was operational. Recalls began immediately.

The Act preserves to all employers, including those who openly display antiunion animus, the right to make business decisions for good reasons, bad reasons, or simply no reason at all, so long as the actual reason is not an unlawful one. And if, as here, the credited evidence is *suggestive* of both a lawful and an unlawful reason for that decision (i.e., to lay off and recall certain employees), the employer nevertheless acts lawfully if the same decision would have been made even if there were no protected employee activities. *NLRB v. Transportation Management Corp.*, 462 U.S. 393 (1983).

I find and conclude that the layoffs of June 30 and July 1 were undertaken solely for legitimate business reasons and that, in any event, Respondent would have made the same layoff decisions irrespective of the employees' involvement or suspected involvement in the organizing effort.

Never before had Respondent been faced with a comparable operational crisis. In the past, there had been general rehabilitation work that was available to the employees; in the past, the furnace shutdowns were for but brief periods; and, in the past, similar budgetary constraints were not experienced. Thus, the General Counsel's "past practice" theory is without credible factual support. In addition, the timing of the breakdown was simply fortuitous, there being no suggestion in this record of Respondent's involvement in the timing of the breakdown. It should be added, Respondent's imaginative method of bringing the furnace into full operation while the coil was being repaired not only suggests a strong profit motive on the part of this small businessman, but also dispels completely any inference of unlawful motivation in the layoffs.

2. The recalls

Several days after the June 30–July 1 layoffs, Respondent began the recall of employees. Of the 11 recalled, 10 were card signers and 1, Kalar, was a "suspected ringleader." Seven, all card signers, were not recalled. The decisions were made on the basis of a review of the work record of each, as reflected in company records and as personally known by Rassey and Cappella. In this connection, I credit their testimony, which I believe to be candid and convincing and consistent with the undisputed evidence of a startup operation plagued by costly equipment breakdowns, poor production quality, slow sales, and tight budgetary constraints. On the other hand, the testimony of the seven employees not recalled was disturbingly exaggerated, painting an unreal picture of the operation and their duties.

The circumstances surrounding the decision not to recall will be discussed separately as to each of the seven employees.

Fenslau, a truckdriver and mechanic, was laid off on July 1 after completing a customer delivery. He had a "horrible" work record, with 13 warnings for being late (more than the other 6 employees combined). Moreover, 2 months earlier, on April 23, 1982, in the presence of a police officer called to the plant, he admitted stealing parts from the plant valued at several thousand dollars, and implicated three other employees. Credible testimony in this regard of the police officer, Rassey, and Cappella establishes that, after Rassey consulted with the police, each of the four was given another chance to prove himself, was put on job probation for 6 to 12 months, and was told to return the property immediately. Criminal charges were not filed by Rassey. Some, but not all, of the property was returned and, while his work improved for a week or so, he developed an attitude of not wanting to work. Finally, Rassey learned from a customer that, during the course of Fenslau's July 1 delivery run, Fenslau told the customer that there would be a union at the foundry, that the foundry would be shut down, and that the customer should purchase his castings elsewhere. Fenslau did not deny making these statements.

As found above, Childers Sr. (Respondent's agent) told employees on June 30 that Fenslau would not be recalled because other employees were complaining of his higher rate of pay and that Fenslau was one of three suspected ringleaders in the organization drive. Childers, however, played no role in the final decision about recall.

I am unable to find that the decision not to recall Fenslau was motivated by either of these factors. If Rassey wanted to placate the employees, he could simply have reduced Fenslau's hourly rate. As noted above, one of the other suspected ringleaders was recalled from the June 30 layoff.

Absenteeism, tardiness, and employee theft are national problems of epidemic proportions and neither this conduct nor the making of disparaging statements to a customer concerning the viability of the employer is conducive to the maintenance of the kind of employer-employee relationship that the policy of this Act seeks to foster.

I find and conclude that Fenslau's union activities were not to any degree a motivating factor in the decision not to recall him from layoff and that the decision about him was not unlawful, nor was his hourly rate a motivating factor.

Elmore, the crane operator who handles tons of hot iron, frequently was found sleeping in the elevated cab of the crane and was reprimanded orally at least once for carelessly dropping a load. He, like Fenslau, admitted the theft of valuable parts from the plant and was put on job probation. Moreover, he was suspected by Cappella of having stolen plant equipment on June 30, when he was laid off. He was not a suspected organization leader. He had no prior foundry experience and was employed in the training program.

As in the case of Fenslau, I find and conclude that his card-signing activity and his union support were not to any degree a motivating factor in the decision not to recall him and that the decision was lawful.

Campbell, a job trainee who worked as a "floater" with no specific production job, had an excessive absenteeism problem and received a warning for yelling at other employees. He was implicated by Fenslau in the plant thefts and, according to the police report, admitted his involvement. I find that his minimal protected activity—card signing—was not to any degree a motivating factor in the decision not to recall him and that the decision was lawful.

Elder, also a job trainee with no prior foundry experience, had difficulty following instructions and, partially as a result, received work-related injuries. In addition, he had falsely given as an application reference the name of a friend of Rassey, although he was not known to that person. The failure to recall him was not motivated to any degree by his union support or his activity in distributing cards and the decision was lawful.

Collins, a job trainee employed as a janitor and a card signer but not otherwise active in the campaign, had difficulty performing his assigned work to the satisfaction of Cappella to the point of open disagreement. I find nothing in this record to indicate that the union activity at the plant played any role whatever in the decision not to recall him and that the decision was lawful.

Jenkins, also a job trainee, had received a number of warnings for tardiness, was a slow worker, and openly stated he did not care to work in a foundry. Again, union activity played no role in the decision not to recall him and the decision was lawful.

Spencer, with no foundry experience, was hired at an hourly rate to reconstruct and make repairs to the roof (which in part had fallen in), rather than contracting with an independent roofer to do the work. When not performing roofing work, he was used on various production jobs. He had difficulty working with Curran, who did roofing carpentry work, complained constantly about having to do foundry work or anything less than a total roof replacement. He, like Fenslau, was paid at a higher hourly rate than other production employees and was described by Childers Sr., on June 30, as a suspected ringleader. Like Fenslau, he was not recalled, I find, for reasons having nothing to do with the union activities at the plant or his hourly rate of pay. I find the decision to be lawful.

K. *The "Discharge" of Curran on September 10*

In support of the allegations of paragraphs 18 to 20 of the complaint (the constructive discharge of Curran for the unlawful purpose of pacifying other employees who perceived favoritism), the General Counsel elicited the testimony of Curran and his wife (a nonemployee). The former testified that he was called to Rassey's office on September 10 where he was handed a three-quarter-inch-thick stack of AVOs (avoid verbal orders) and was asked to sign them to "pacify" some employees who thought him to be receiving special treatment; that he did not read the documents, thought the whole thing to be a joke, "saw red," and threw them back at Rassey, saying, "I'm going to get out of here and do you and me a favor"; that he did not report to work the following morning, but instead returned to Rassey's office with a tape recorder and his wife as a witness; that Rassey again told him all he had to do was to sign the reprimands and everything would be all right; that he suggested to Rassey that he continue to work for him on a contractual basis, to which Rassey agreed; and that he never returned to the plant thereafter, because he thought he was discharged. His wife corroborated his testimony, but contradicted him about the color of the reprimand slips.

For reasons discussed above (see sec. II,H), I am unable to credit the testimony of Curran. In addition, his testimony about the documents simply is untrue: AVOs are not warning slips; they are white and not orange; and an entire pad of AVOs is not three-quarter-inch thick. Under the circumstances here, the testimony of his loyal wife similarly is not credited.

I instead credit the testimony of Cappella, Rassey, and Office Manager Reside. Their testimony was convincing and consistent with undisputed facts relating to Curran's conduct on the job. Reside testified that, as she had done in the case of other employees, she prepared and gave to Rassey nine warning notices based on information obtained from Curran's timecards (failure to punch in or out; reporting late) and one slip based on Curran's unauthorized entry into the office and his rummaging through the Company's accounts receivable files. After overhearing the discussion between Rassey and Curran on September 10, she prepared one last slip, noting that Curran refused to accept the other warnings and "quit 9/10/82." Rassey testified that Curran was called in to discuss his work habits, which were changing for the worse; that Curran refused to look at the warning slips, threw them back at him, and left the office and plant before the end of the shift; that the following morning, he called Curran to inquire about a handsaw (Curran regularly carried both company and personal property on his truck) and Curran stated he would be right down to the plant; that Curran, his wife, and his tape recorder arrived soon after; that Curran admitted getting hot the day before, thinking that Rassey was "coming after me to fire me"; that he never demanded that Curran sign the notices; and Curran suggested they enter into a contractual relationship, to which he agreed.

I find and conclude, based on the credited evidence, that Curran voluntarily quit his employment on September 10 when confronted with undisputed evidence of improper conduct on the job; that Respondent's confronting Curran with such evidence was solely for the purpose of disciplining and counseling an errant employee; and that, in doing so, it was not Respondent's intent to pacify other employees who perceived that Curran was receiving favoritism from Respondent or who were seeking to organize a union. As to these allegations, the General Counsel's contention is a severely strained one, ignoring undisputed evidence of bizarre behavior and flagrant disregard for company rules requiring use of the timeclock and the privacy of company business records. Curran's job was not in jeopardy on September 10. Rather, Respondent was exercising its protected right to manage its business and direct its work force to ensure its continued viability. Curran, for reasons known best to himself, elected not to discuss his refusal/failure to clock in or out on a number of occasions and his unauthorized review of business accounts. This record can support but a single conclusion—that Curran voluntarily quit his employment on September 10—and the allegations must be dismissed.

L. *The November 1982 Layoffs*

Paragraphs 22 and 31 of the complaint as amended allege the unilateral layoff of seven employees on November 29, 1982, without notice to the Union and without opportunity to bargain, in violation of Section 8(a)(5). The complaint does *not* allege the layoffs to be discriminatory in violation of Section 8(a)(3).

It is undisputed that Respondent gave no notice to the Union of the layoffs and afforded it no opportunity to bargain over the decision itself or its effects. Of course, the Union had not at that time been certified or recognized as the bargaining agent for the unit employees. Whether Respondent was under a duty to bargain with the Union over the November 29 decision to lay off the seven employees and, if so, whether Respondent initially must reinstate the employees with backpay pending such bargaining are issues considered below in the remedy section of this decision.

M. *The Permanent Layoffs of December 8, 1982*

Paragraph 21 of the amended complaint alleges that three of the seven employees who were laid off on November 29 were "permanently" laid off on December 8 because of their union activities and, in the case of one, for the additional reason that he threatened to take a vacation pay claim to the Board. Although paragraph 30 of the complaint alleges only a violation of Section 8(a)(4), it is clear from the wording of paragraph 21 that the General Counsel intended to plead also a violation of Section 8(a)(3). However, no 8(a)(5) violation is alleged.

One of those three, Miles, was not called to testify. Another, Kalar, testified that, when originally laid off, it was for "at least 2-3" weeks, but that on December 9 he received a written notice saying his layoff was permanent because there was no foreseeable need for his services, despite the existence of uncompleted work in the pattern shop; that the pattern shop had unsuccessfully tried to make new patterns and finally resorted to purchasing them from suppliers; that new patterns needed adjustment before use; that the level of pattern repair work decreased in the 6 months prior to his layoff; that, in November, he was unsuccessful in making a new pattern for a Chrysler job; that, during a December 8 meeting with Rassey concerning his claim for vacation pay, Rassey took the position that Kalar was ineligible, Kalar said he would call the Board about it and Rassey said, "go ahead"; and that the vacation pay claim was subsequently disallowed by a state agency on grounds of ineligibility. The third employee, Hill, testified that on December 12, Rassey told him he was permanently laid off because Respondent was no longer going to do corework (the work performed by Hill); that several weeks later Rassey called to inquire about the location of the notebook containing formulas for coremaking, so that a "few little jobs" could be done; that in March 1983, he was recalled to perform corework principally; and that his union activity consisted solely of signing a card.

Cappella and Rassey testified without contradiction that Miles was laid off because of a lack of steady work of the kind he performed. As to Hill's corework, both testified that there simply were no cores to be made for the foreseeable future and that Hill ultimately was recalled when work in the core department resumed. As to Kalar, again both testified that patterns for use at the foundry were made outside; that a full-time patternmaker was not needed for the pattern repair work (which could be done part time by others); that, due to a severe decline in sales, there was insufficient work to keep Kalar busy 2 hours a day; that there was no foreseeable work for months; and that business considerations were the only reasons for Kalar's permanent layoff.

For reasons set forth above, I credit the testimony of Rassey and Cappella over that of the employees. Again, it should be noted that the testimony of the employees was based on surmise and speculation, rather than on hard information about the operation of the plant and Respondent's business prospects. On the other hand, the testimony of Rassey and Cappella about to the Company's declining sales stands uncontroverted on this record.

On this record, I find the conclusions to be inescapable: that the three employees were put on permanent layoff status solely for legitimate business reasons, having nothing to do with their union activities or Kalar's vacation pay claim and threat to "call the Board"; that the same decision would have been made irrespective of such employee activity; and that the December 8 decision was not unlawful.

REMEDY

Having found that Respondent violated Section 8(a)(1) and (2) of the Act, Respondent will be directed to cease and desist therefrom and to post an appropriate notice to employees.

Moreover, for reasons set forth below, Respondent will be directed to bargain with the Union on request. On June 28, 1982, when it filed a representation petition, the Union represented a majority (18) of the employees at the plant. By September 1, when Respondent succeeded in "convincing" the employees that they might want their own in-plant committee to represent them rather than the Union, that majority had been lost, with a majority of the employees (18) now voting to reject the Union. Respondent's unlawful conduct during that period has been recited above and need not be repeated here. Moreover, the unit is small and, thus, any antiunion conduct tends to be magnified. Finally, the unlawful conduct touched virtually every employee in the unit. Accordingly, I find and conclude that, due to Respondent's serious and pervasive unfair labor practices, the possibility of ensuring a fair election is slight, and employee sentiment, on balance, would be better protected through a compulsory bargaining order. *NLRB v. Gissel Packing Co.*, 395 U.S. 575 (1969).

The more serious issue, however, is whether that bargaining order should be prospective or retroactive, i.e., whether the purposes of that Act would be served best by ordering reinstatement with backpay of the seven employees laid off in late November for legitimate business reasons, all but three of whom were subsequently recalled (see sec. II,L and M, above), as a prerequisite to decision and/or effects bargaining. This issue was not addressed in the General Counsel's brief.

Since *Trading Port*, 219 NLRB 298 (1975), when a split Board rejected the prospective bargaining order approach of *Steel-Fab*, 212 NLRB 363 (1974), it has been Board policy to make *Gissel* bargaining orders retroactive and each court of appeal that has considered the policy has endorsed it. *Alumbaugh Coal Corp. v. NLRB*, 635 F.2d 1380 (8th Cir. 1980); *Hedstrom Co. v. NLRB*, 629 F.2d 305 (3d Cir. 1980), cert. denied 450 U.S. 996 (1981); *Ann Lee Sportswear v. NLRB*, 543 F.2d 739 (10th Cir. 1976); and *Plumbers Local 669 v. NLRB*, 681 F.2d 11 (D.C. Cir. 1982). In *Trading Port*, bargaining was ordered as of the date of union demand for recognition. If applied here, *Trading Port* would compel bargaining from a date *prior* to the November layoffs and would further require the reinstatement of the seven employees with backpay as a condition precedent to such bargaining, because notice and opport;unity to bargain was not given to the Union. This would be so, although the layoffs were not alleged to be violative of Section 8(a)(1) or (3) and were found above to be for purely legitimate business reasons related to a severe and continuing decline in business.

Although strictly bound by Board precedent and policy, I nevertheless am of the opinion that *Trading Port* was not intended to be applicable to the circumstances of this case for a number of reasons: (1) Here, unlike *Trading Port*, the Union never evidenced its majority status or made a demand for recognition. The Union had a majority status as of June 28 when it filed its petition, yet did not demand recognition. It made no recognition demand at the time of the initial unfair labor practice charge of July 6, 1982 (layoffs of June 30), even though it specifically claimed in that charge to represent a majority of unit employees at the time. Nor did it seek recognition at the time it filed the second charge (company effort to establish in-plant committee), when it knew it had lost majority status due to Respondent's conduct. Rather, the Union delayed any contract with Respondent until November 19 (almost 5 months after achieving majority status) and then, remarkably, it made a general, pro forma demand, at the request of the General Counsel, only for contract bargaining and not recognition (Jt. Exh. 1). The record thus compels the conclusion that the union letter of November 19 was solely for the purpose of litigative posturing. (2) The June layoffs (and the subsequent recalls) were not violative of Section 8(a)(1), (3), or (4) and were not alleged to be violative of Section 8(a)(5). (3) The November layoffs were not alleged to be unlawful under Section 8(a)(1) or (3) and were found to be dictated solely by legitimate business reasons.

Given the absence of a demand for recognition, the propriety of the June layoffs, the legitimate business reasons for the November layoffs, the precarious nature of Respondent's financial condition resulting from his effort to resurrect a failed business (which is uncontroverted), the uncontroverted evidence of employee Fenslau's efforts to sabotage Respondent's business relationship with a customer, and the possibility that a retroactive bargaining order coupled with a restoration of the status quo might jeopardize the continuing viability of this small business and the remaining jobs, I am of the opinion that the purposes of the Act are best served and the interests of the parties best balanced by the entry of a prospective bargaining order, effective as of the date of this Order.

[Recommended Order omitted from publication.]

Cincinnati Suburban Press, Inc., a Subsidiary of Suburban Communications Corp. *and* **Gregory A. Flannery.** Case 9–CA–23931

July 20, 1988

DECISION AND ORDER

By Chairman Stephens and Members Johansen and Babson

On October 14, 1987, Administrative Law Judge Donald R. Holley issued the attached decision. The General Counsel and the Charging Party filed exceptions and supporting briefs.[1] The Respondent file an answering brief and a brief in support of the decision.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings,[2] and conclusions only to the extent consistent with this Decision and Order.

The judge concluded that the Respondent did not violate Section 8(a)(1) and (3) when it suspended and discharged Gregory A. Flannery because he wrote and had published an article entitled, "Dirty Tricks in the Newsroom." Contrary to the judge, however, for the reasons set out below, we find that the Respondent's actions violated the Act.

The Respondent is an Ohio corporation with an office and place of business in Cincinnati, Ohio. The Respondent publishes and distributes a chain of weekly newspapers in the Cincinnati metropolitan area. Gregory A. Flannery, the Charging Party, was employed as a reporter in the Respondent's editorial department from November 1984 until his discharge on February 2, 1987.

In October 1985 Flannery helped to initiate a union organizing campaign among employees in the Respondent's editorial department. The union campaign culminated in a Board-supervised election in April 1986 in which the editorial department employees voted against union representation by a vote of 24 to 19. The efforts to organize the Respondent's editorial department employees, however, did not end with the April 1986 election. Flannery and other employees formed a committee called "The April '87 Committee," which immediately began efforts to organize the employees leading to an April 1987 election. Toward this goal, in June 1986 Flannery and others mailed to the Respondent's employees an "opinion survey." In July 1986 the results of this survey were mailed to employees and certain members of management. Flannery also passed out prounion "business cards" at the July company picnic, which was attended both by employees and management personnel.

The Respondent was well aware of Flannery's continuing efforts to organize its employees. The uncontroverted evidence reveals that in August 1986 when some literature that had been posted on the employee bulletin board was taken down, Dan Crowe, the Respondent's vice president, spoke with Flannery and asked him how long the union "agitating" was going to continue. Flannery responded that it would continue until April 1987 when another election could be held. Furthermore, in October 1986 Flannery posted on the employee bulletin board a handwritten "Six Month Update," which urged employees to vote for union representation in April 1987. On October 16, 1986, Douglas Sandhage, the Respondent's executive editor, asked Flannery if he had posted the document. Flannery admitted to Sandhage that he had.

In December 1986 an article that Flannery wrote entitled, "Dirty Tricks in the Newsroom," was published in *The Cincinnati Review of Politics and the Arts.*[3] The article, which is reproduced in full in the judge's decision, purports to recount the April 1986 union campaign and the opposition encountered during the drive. Written as an historical review of the union drive, the article discusses the purported antiunion acts of certain of the Respondent's supervisors and employees. Flannery testified, without contradiction, that he gave copies of the published article to fellow employees and talked about using the article as part of the union campaign.

The Respondent first became aware of the article on January 9, 1987. The undisputed testimony reveals that Managing Editor Dennis O'Conner telephoned Sandhage on January 9, 1987, and told him about the article. Although he had not yet seen the article, O'Conner told Sandhage that he considered it libelous. O'Conner obtained a copy of the article at Sandhage's request and gave it to Sandhage who, in turn, contacted Margaret Halva, vice president of personnel for Suburban Communications Corp. On January 12, 1987, Halva began an investi-

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[1] Thereafter, the Charging Party filed a document entitled "Charging Party's Citation to Further Authorities."

[2] We agree with the judge that the Respondent violated Sec. 8(a)(1) by maintaining rules 18 and 29. We make clear, however, that the Respondent may adopt rules in which the content of the rules is necessary to the credibility of the institution and/or the quality of its product, and the rules themselves are narrowly tailored, unambiguous, and designate the category of employees to whom the rules are applicable; provided, however, that such rules do not improperly impinge on the relevant rights of the affected employees. See *Peerless Publications*, 283 NLRB 334 (1987).

[3] Although the record does not reveal the circulation of the *Cincinnati Review*, it does indicate that this publication was available for purchase at area bookstores.

289 NLRB No. 127

gation into the circumstances surrounding the article and, on January 22, 1987, Halva suspended Flannery without pay pending completion of the investigation. Although Halva interviewed employees named in the article and others during her investigation, at no time did she or Sandhage interview Flannery or question him about the article. Based on Halva's recommendation, the Respondent discharged Flannery on February 2, 1987. It is undisputed that the Respondent suspended and discharged Flannery solely because of the article "Dirty Tricks in the Newsroom."[4]

The judge concluded that Flannery's publication of "Dirty Tricks in the Newsroom" was not concerted activity under *Meyers Industries*, 281 NLRB 882 (1986), (*Meyers II*), which defines "concerted" activity for the purpose of determining the existence of certain types of violations of Section 8(a)(1) of the Act. The General Counsel has excepted to the judge's decision, inter alia, on the ground that the judge failed to analyze Flannery's discharge under Section 8(a)(3). The General Counsel argues that Flannery's article was "inextricably intertwined" with the ongoing union organizing effort and that his suspension and discharge because of the article thus violated Section 8(a)(3). We find merit in the General Counsel's exception.

Section 7 of the Act gives employees, inter alia, "the right to self-organization, to form, join, or assist labor organizations . . . and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection . . . ." Even though an employee may be acting alone, an employee attempting to form, join, or assist a labor organization is nevertheless protected by Section 7 of the Act. *Carpenters Local 925*, 279 NLRB 1051, 1055 fn. 40 (1986). In *Auto Workers Local 980*, 280 NLRB 1378 (1986), we adopted the judge's finding that the employer union violated Section 8(a)(3) and (1) when it discharged an employee for providing information about her labor dispute to a newspaper reporter. Implicit in our decision was the conclusion that the employee's action in publicizing her labor dispute was within the scope of activities protected by Section 7. Accord: *Operating Engineers Local 139 (AGC of Wisconsin)*, 273 NLRB 992 (1984), enf. denied on other grounds 796 F.2d 985 (7th Cir. 1986) (publication of a newspaper to question union representatives and persuade the union to change its position is protected by Section 7).[5]

Although the attempts to organize the Respondent's editorial department employees resulted in a Board-supervised election in which the Union was defeated, it is clear both that Flannery and others continued their unionizing efforts and that the Respondent had actual knowledge of those continued efforts. Prounion materials were openly mailed to employees and management, posted on employee bulletin boards, and distributed at the company picnic. Furthermore, the Respondent's knowledge of Flannery's involvement in the ongoing organizing campaign is evidenced by the questioning of Flannery by Crowe and Sandhage in August and October 1986, respectively. Flannery's article, "Dirty Tricks in the Newsroom," recounted his version of the union campaign and was plainly one aspect of the continuing efforts to organize. Thus, we conclude that Flannery's writing and publication of "Dirty Tricks in the Newsroom" was union activity protected by Section 7 and that a discharge based on it constitutes discrimination in violation of Section 8(a)(3).

The Respondent argues that, even if Flannery's conduct is otherwise within the scope of activities protected by Section 7, Flannery lost the protection of the Act because his article was false or abusive and injured the Respondent's reputation. In *NLRB v. Electrical Workers IBEW Local 1229 (Jefferson Standard)*, 346 U.S. 464 (1953), the Supreme Court held that employees may communicate with third parties in circumstances where the communication is related to an ongoing labor dispute and where the communication is not so disloyal, reckless, or maliciously untrue as to lose the Act's protection. See also *Emarco, Inc.*, 284 NLRB 832 (1987). Applying these standards to the case at bar, we find that Flannery's article was not so disloyal, reckless, or maliciously untrue so as to lose the

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[4] The Respondent's letter to Flannery, informing him of the Company's decision to discharge him, stated:

> The Company has completed its investigation of your violation of Company Rules 18 and 29:
>
> 18. Making false, vicious or malicious statements concerning any employee, supervisor, the Company, or its product.
>
> 29. Unlawful, improper or unseeming conduct on or off the Company premises or during non-working hours which affects the employee's relationship to his/her job, to his/her fellow employees or to his/her supervisors, or affecting the Company's product reputation or goodwill in the community.

Our investigation has revealed that you did, indeed, violate these rules. The seriousness of these violations warrants your immediate discharge. Your suspension of January 22, 1987 is converted to an immediate discharge.

Your discharge under Rules 18 and 29 is based on the following: Your conduct and the article you authored in the Cincinnati Review, injured the reputation, image, integrity and truthfulness of Cincinnati Suburban Press newspapers, its management, and has embarrassed, humiliated and ridiculed your fellow employees.

Your disruptive conduct has impaired employee relationships with fellow employees and our supervisors.

[5] Although the Seventh Circuit Court of Appeals denied enforcement to our decision in *Operating Engineers Local 139*, the court expressly noted that it "would sustain the NLRB's alternative finding that an individual employee engages in concerted activity by taking action to align the union membership with his own position against the union representatives." 796 F.2d at 989.

Act's protection. Although the Respondent argues that Flannery's article was inaccurate, it has failed to show any evidence of malice or recklessness on Flannery's part. The Respondent's mere labeling of Flannery's article as "libelous" or "slanderous" cannot substitute for affirmative evidence of malice.

In contending that Flannery's conduct was unprotected, the Respondent relies heavily on the sentence in Flannery's article that, "One effort at persuasion by executive editor Doug Sandhage would have been laughable had it not indicated an insidious disregard for the truth." The Respondent argues that this language impugned its integrity and the truthfulness of its newspapers. It is clear, however, that the reference to Sandhage in the article related solely to, and was made in the context of, reciting management's opposition to the Union, and it neither disparaged Sandhage's personal integrity or truthfulness with respect to the publication of the newspaper nor disparaged the integrity or truthfulness of the Respondent's products, the publication of a newspaper, generally. In these circumstances, we conclude that Flannery's reference to Sandhage in the article was not such as to forfeit the protection of Section 7. See *Emarco*, supra, and *Richboro Community Mental Health Council*, 242 NLRB 1267 (1979).

Furthermore, while substantial evidence was submitted by the parties regarding whether the article accurately revealed the number of "merit increases" Sandhage allegedly claimed the Respondent gave employees in 1985, the judge found that Flannery "sought in his article to state what he honestly believed Sandhage had said to [Flannery] and others about merit increases given in 1985." We also note that the record contains substantial evidence to support Flannery's version of the other disputed factual assertions contained in the article. Although the Board need not determine whether the assertions were, in fact, accurate,[6] this evidence negates the Respondent's contention that the article was "maliciously untrue." Thus, there is no showing that Flannery's article was written with a reckless disregard for the truth or maliciously with a deliberate intent to damage the Respondent. Nor can we find that the article, in the context of an ongoing union campaign, was so disloyal as to remove Flannery's conduct from the Act's protection.

Having found that Flannery was engaged in protected union activity under Section 7 of the Act when he wrote and had published the article "Dirty Tricks in the Newsroom," we conclude that the Respondent violated Section 8(a)(3) and (1) when it suspended Flannery on January 22, 1987, and discharged him on February 2, 1987, for having written the article.[7]

ORDER

The National Labor Relations Board orders that the Respondent, Cincinnati Suburban Press, Inc., a Subsidiary of Suburban Communications Corp., Cincinnati, Ohio, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Suspending, discharging, or otherwise discriminating against any employee for engaging in protected union activity.

(b) Distributing, maintaining in effect, or enforcing company rule 18 involving the making or publishing of "false" statements.

(c) Distributing, maintaining in effect, or enforcing company rule 29 involving prohibition of "improper" or "unseeming" employee conduct on and off company premises.

(d) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Offer Gregory A. Flannery immediate and full reinstatement to his former job or, if that job no longer exists, to a substantially equivalent position, without prejudice to his seniority or any other rights or privileges previously enjoyed, and make him whole for any loss of earnings and other benefits suffered as a result of the discrimination against him, with interest.[8]

(b) Remove from its files any reference to the unlawful suspension and discharge and notify the employee in writing that this has been done and that the suspension and discharge will not be used against him in any way.

(c) Preserve and, on request, make available to the Board or its agents for examination and copying, all payroll records, social security payment records, timecards, personnel records and reports, and all other records necessary to analyze the amount of backpay due under the terms of this Order.

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[6] See, e.g., *Professional Porter & Window Cleaning Co.*, 263 NLRB 136, 139 fn. 12 (1982).

[7] In light of our disposition of this case, we do not pass upon the judge's analysis under *Meyers II*. Similarly, we find it unnecessary to pass on the General Counsel's other contentions that Flannery's suspension and discharge were unlawful.

The General Counsel requests a visitatorial clause authorizing the Board, for compliance purposes, to obtain discovery from the Respondent under the Federal Rules of Civil Procedure under the supervision of the United States court of appeals enforcing this Order. Under the circumstances of this case, we find it unnecessary to include such a clause. Accordingly, we deny the General Counsel's request. See *Cherokee Marine Terminal*, 287 NLRB 1080 (1988).

[8] Backpay for the unlawful suspension and discharge shall be computed in the manner prescribed in *F. W. Woolworth Co.*, 90 NLRB 289 (1950), with interest computed as prescribed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987).

(d) Withdraw and abolish its company rule 18 involving the making or publishing of "false" statements.

(e) Withdraw and abolish its company rule 29 involving prohibition of "improper" or "unseeming" employee conduct on and off company premises.

(f) Post at its East and West Cincinnati, Ohio facilities copies of the attached notice marked "Appendix."[9] Copies of the notice, on forms provided by the Regional Director for Region 9, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material.

(g) Notify the Regional Director in writing within 20 days from the date of this Order what steps the Respondent has taken to comply.

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[9] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated the NationalLabor Relations Act and has ordered us to post and abide by this notice.

Section 7 of the Act gives employees these rights.

To organize

To form, join, or assist any union

To bargain collectively through representatives of their own choice

To act together for other mutual aid or protection

To choose not to engage in any of these protected concerted activities.

WE WILL NOT suspend, discharge, or otherwise discriminate against any employee for engaging in protected union activity.

WE WILL NOT distribute, maintain in effect, or enforce company rule 18 involving the making or publishing of "false" statements.

WE WILL NOT distribute, maintain in effect, or enforce company rule 29 involving prohibition of "improper" or "unseeming" employee conduct on and off company premises.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL offer Gregory A. Flannery immediate and full reinstatement to his former job or, if that job no longer exists, to a substantially equivalent position, without prejudice to his seniority or any other rights or privileges previously enjoyed and WE WILL make him whole for any loss of earnings and other benefits resulting from his discharge, less any net interim earnings, plus interest.

WE WILL withdraw and abolish our company rule 18 involving the making or publishing of "false" statements.

WE WILL withdraw and abolish our company 29 involving prohibiting of "improper" or "unseeming" employee conduct on and off company premises.

CINCINNATI SUBURBAN PRESS, INC.,
A SUBSIDIARY OF SUBURBAN COMMUNICATIONS CORP.

Carol Shore, Esq., for the General Counsel.
Richard L. Way, Esq., of Bloomfield, Michigan, for the Respondent.

DECISION

STATEMENT OF THE CASE

DONALD R. HOLLEY, Administrative Law Judge. On an original charge filed in Case 9-CA-23931 on 23 January 1987[1] by Gregory A. Flannery, and amended charges filed by the same individual on 23 and 26 February, the Regional Director for Region 9 of the National Labor Relations Board issued a complaint on 9 March, which alleged, in substance, that Cincinnati Suburban Press, Inc., a Subsidiary of Suburban Communications Corporation (Respondent) violated Section 8(a)(1) and (3) of the National Labor Relations Act (the Act) by suspending Flannery on 22 January, discharging him on 2 February, and promulgating and maintaining, since 23 August 1986, two invalid company rules. Respondent filed timely answer to complaint denying it had engaged in the unfair labor practices alleged.

The case was heard in Cincinnati, Ohio, on 30 April. All parties appeared and were afforded full opportunity to participate. On the entire record, including the posthearing briefs filed by the parties, and my observation of the demeanor of the witnesses I make the following

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[1] All dates herein are 1987 unless otherwise indicated.

FINDINGS OF FACT

I. JURISDICTION

Respondent, an Ohio corporation, with an office and place of business in Cincinnati, Ohio, is engaged in the publication, circulation, and distribution of a chain of weekly newspapers in the Cincinnati, Ohio metropolitan area. During the 12-month period preceding issuance of the complaint, it derived gross revenues from the conduct of the above-described business in an amount exceeding $200,000, held membership in or subscribed to various interstate news services, and advertised various nationally sold products, including Marlboro cigarettes and Owens-Corning fiberglass. It is admitted, and I find, that Respondent is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

II. STATUS OF LABOR ORGANIZATION

It is admitted, and I find, that the Newspaper Guild (the Union and/or the Guild) is a labor organization within the meaning of Section 2(5) of the Act.

III. THE ALLEGED UNFAIR LABOR PRACTICES

Facts

The facts concerning events that gave rise to this proceeding are, for the most part, not in dispute.

The Cincinnati Suburban Press, Inc. is one of seven subsidiaries of Suburban Communications Corporation (SCC). It commenced business in the Greater Cincinnati, Ohio area in 1972, when it purchased weekly community newspapers that were already established. Since then, it has acquired additional established weekly community newspapers and created others. At the time of the hearing, it published 19 weekly community newspapers, shoppers (advertising for retail concerns), and *Reds Vue*, a tabloid that focuses on the activities of the Cincinnati Reds baseball team.[2] Its circulation approximates 260,000, and some 6000 advertisers utilize the papers.

During 1985, the Guild attempted to organize certain employees in Respondent's editorial department. Although Respondent employs approximately 200 employees in its Cincinnati operations, only approximately 40 work in its editorial department. Those employees who work in the east division office located in the Mt. Carmel section of Cincinnati and in its west division located in the Monford Heights area are involved in this proceeding.

The record reveals that alleged discriminatee Gregory Flanner was one of the employees who originally contacted the Guild in 1985 regarding representation for editorial department employees. Flannery, a reporter in the west division office, solicited for the Union during the 1985 campaign, wrote and distributed literature for the Union, and acted as the Union's observer at an NLRB-supervised election held on 10 April 1986. The Union lost the election 24 to 19.

Flannery's testimony in the instant proceeding reveals the Union's failure to win the 1986 election did not cause him to abandon his efforts to obtain representation for Respondent's editorial employees. Subsequent to the election, he and a segment of those employees formed what they called the April '87 committee, which immediately commenced efforts to cause employees to vote for union representation when a second election could be held in April 1987. Thus, in June 1986, Flannery and another employee prepared and mailed to the homes of editorial department employees a survey, which sought employee responses to inquiries concerning their satisfaction with their pay, other conditions of employment, and the actions of management. In late July, the results of the survey were mailed to Respondent management. Subsequently, Flannery attended a company picnic in late July and distributed business-type cards that urged employees to obtain union representation if they wanted better pay and a better deal.[3] Thereafter, in October 1986, Flannery prepared and posted on Respondent's employee bulletin board a document entitled "*SIX-MONTH UPDATE*." In the document, he alleged that certain nonbargaining unit employees had received promotions, that others received better vacation pay, and he observed editorial department employees had received nothing but more work. The so-called update, espoused the need for union representation.[4] With respect to his literature-posting activities, Flannery testified that when he questioned Doug Sandhage, executive editor, and Dan Crowe, a Respondent vice president, about literature that had been removed from the bulletin board in August, Crowe asked him how long the literature posting and agitating for the Union was going to continue. Flannery replied it would continue until they could have another election in April 1987.[5]

Respondent's employee handbook reveals it opposes union representation of its employees. Moreover, during the 1985 union campaign, the editorial staff was divided on the issue of representation, and a number of antiunion employees actively campaigned against representation by the Guild.[6]

In December 1986, Flannery composed an article entitled, "Dirty Tricks in the Newsroom," which was published in late December in a quarterly periodical named *The Cincinnati Review*. Although the record fails to reveal precisely how or to what extent *The Cincinnati Review* is circulated in the Cincinnati area, it does reveal it is available at bookstores. It is undisputed that Flannery's submission of the "Dirty Tricks in the Newsroom" eventually caused Respondent to suspend him on 22 January 1987 and discharge him on 2 February 1987. Consequently, the article is quoted in its entirety below:[7]

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[2] The names of the 19 individual newspapers are set forth in R. Exh. 2. Most have been published for more than 20 years. The oldest, the *Clermont Currier-Press*, was first published in 1826.

[3] See G.C. Exh. 4. Management as well as employees attended the picnic.

[4] See G.C. Exh. 6.

[5] Flannery admitted Respondent management had previously given him unqualified permission to post literature on the bulletin board.

[6] See, for example, G.C. Exh. 10.

[7] See G.C. Exh. 7.

IN RESEARCHING A STORY on the occult in Cincinnati, I once asked the high priestess of a witches' coven for an interview. She said, "I was told never to trust reporters." But I got the interview after praising the advice of her counselors.

Now that I have tried (and failed) to unionize a newsroom, I have a deeper respect for the witch's warning.

Last winter I chaired a campaign to elect the Cincinnati Newspaper Guild bargaining agent for the 43 editorial employees of Cincinnati Suburban Press. The company publishes 19 weekly newspapers. We expected strong opposition from management. But we did not expect dirty tricks from fellow reporters.

When we filed election petitions with the National Labor Relations Board in January, 65 percent of our staff had signed union membership cards. Yet when NLRB agents counted the ballots on April 10, we lost by five votes.

What made the difference? Part of the staff was swayed by an environment of distrust that resulted from tactics our editors would have decried had they been used in a political campaign: phony letters. Spying. Cover-up.

Six weeks before the election, we realized the union organizing committee had a leak. Someone was feeding information to management. One of our late-night discussions about the union's constitution appeared in printed form as an anti-union leaflet distributed by the company—on the very day after we had met.

Literature from the Cincinnati chapter of the Society of Professional Journalists (SDX) was falsified and distributed to the staff; that is, someone doctored an SDX membership application, inserting the admonition, "There are several ways to become a professional journalist—joining the Guild isn't among them." Virginia Watson Rouslin, journalism teacher at the University of Cincinnati and president of the SDX Chapter, said the application was falsified. SDX has no position on the Guild.

A phony record of minutes from a meeting of the Guild was posted in the editorial offices. This deception was not so clever as the SDX job. Guild president Paul Furiga recognized the forgery immediately; its author had used the wrong stationery.

Adherence to fact is the core of journalistic integrity, yet two staff members kept silent when factual errors were used to management's advantage. Dan Crowe, vice president and general manager of Cincinnati Suburban Press, claimed in a speech that the company had never laid off any employees. But shortly after the election, photographer Mark Bowen, leader of the anti-union campaign, said he was one of two longtime employees once laid off by the company. Bowen said he didn't tell his colleagues because the disclosure might have lost votes for his side. Bowen was named the company's "Journalist of the Year" for 1985.

Open and free discussion is the ideal of the American press, yet we found ourselves struggling just to be heard in the newsroom. Pro-union literature, posted with the explicit permission of management, disappeared from the employees' bulletin board.

Even a notice from the NLRB announcing voting procedures was defaced. The bifurcated way this incident became known illustrates the atmosphere in our two newsrooms (East and West divisions) at the time of the election. Amy Williams, a copy editor in the company's West division, saw that someone had marked an "X" in the "no" box on a sample ballot. The notice containing the ballot, posted in compliance with federal law, contained a warning against marking the ballot. Williams and I worked in the same office, but because there could be so little open exchange of information, I learned that the ballot had been defaced only after she called her husband Joel Williams, a copy editor in the East division, who then told reporter Jane Kammer Habig, a member of the organizing committee, who in turned phoned me.

Front-line supervisors opposed the union, but with no small amount of distaste for the task. Anti-union journalists, on the other hand, ostracized the few friends the Guild had left in the West division, making it difficult to discuss the union or even to point out destructions of government property by members of the staff.

The most striking ploy by the anti-union campaign was worthy of Chicago's electoral legends. The dead didn't try to vote, but columnist Terry Gingrich did. Gingrich didn't work in either of our newsrooms. Since NLRB regulations only allowed office employees to participate, Gingrich's ballot was invalidated, with the consent of the company's attorney.[1]

The level of argument presented by those opposed to the Guild did not always indicate thorough going research or critical analysis. Still, it sufficed. Reporter Joe Jacobs, for example, fretted that contract negotiations would lead to the loss of Nerf-basketball in the newsroom.

REPORTER STAN KLEINE, who helped initiate contact with the Guild, had a change of heart during the campaign. We found out the hard way, when Kleine started wearing a handmade label button with the message, "CBS." His translation: "Collective bargaining sucks."

That's not the kind of argument that lends itself to examination of labor law or analysis of economic history. Nor did the tactics of the oppostion [sic] reflect the toleration and ethical restraint one would expect in a newsroom.

Granted, different aims govern the actions of a reporter on the beat and a union foe at the office. But persuasion that distracts from the issue, or depends on falsified literature, or is founded on information obtained through breach of confidence, is morally indistinguishable from the deception and evasion for which journalists sometimes criticize public officials.

> In addition to the insurgent anti-union effort waged by co-workers, management used a heavy hand in defeating the Guild. The staff was divided into four groups compelled to attend anti-union harangues by company attorneys at local hotels. Literature of dubious veracity was mailed to employees' homes, placed on their desks and posted on office bulletin boards.
>
> One effort at persuasion by executive editor Doug Sandhage would have been laughable had it not indicated an insidious disregard for the truth. In January, Sandhage confided to me that CSPI had given 20 merit raises to editorial employees in 1985. Later the same day he told another reporter the company had given 12 merit raises last year. To still another reporter Sandhage said 11 merit raises had been given.
>
> As the campaign heated up, several reporters and copy editors were given "merit" raises, combined with a stiff dose of propaganda. When the NLRB inquired, Sandhage went back to those reporters and copy editors to make a clarification: They had received "adjustments," not merit raises, he said, and the company didn't give merit raises.
>
> If duplicity and sneaking about marked the employees' efforts to thwart the Guild, bullying characterized management's efforts. Jane Kammer Habig, a member of the organizing committee, had her hours cut by one-third. I was placed on probation—an action rescinded after the NLRB issued a complaint against the company. Lynn Ratterman, a West division reporter, was fired the day after she signed a union membership card; the NLRB investigated but did not issue a complaint since she was a probationary employee.
>
> QUESTIONS ABOUT PRESS CREDIBILITY usually dwell on ideological bias, but there is another issue. What is sometimes lacking in contemporary journalism is commitment to a rigorous methodology in the pursuit and dissemination of truth. A recent edition of the *Quill*, published by SDX, asked if journalism schools adequately train students in the practice of skepticism. An equally important question is whether journalists are sufficiently trained in the art of fair play.
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> [1] Jane Kammer Habig, a member of the organizing committee, had her hours cut by one-third. I was placed on probation . . . . Lynn Ratterman . . . was fired the day after she signed a union membership card.

Although the record reveals Flannery obtained some of the alleged facts set forth in the above-described article from other employees, it is clear he composed the article without consulting with any of his fellow employees. He testified the audiences he was attempting to reach through the article were his fellow employees and other labor supporters in town. After the article was published, Flannery distributed approximately five copies of it to his fellow employees, and he gave copies to Guild members who work at the *Post* and *Enquirer*, two Cincinnati daily newspapers.[8] He testified he engaged in that activity as part of an effort to demonstrate the need for a union at Respondent. Additionally, Flannery testified that at a meeting held at employee Jim Broderick's house on 21 January there was discussion of possible use of the article as background information on the ongoing union campaign for the Guild. Broderick corroborated his testimony concerning the meeting.

Respondent management learned of the existence of the above-described article on 9 January. After Doug Sandhage, Respondent's executive editor who oversees both the east and the west divisions read the article, he contacted Margaret Halva, SCC vice president of personnel, indicating he felt Flannery should be fired for referring to him in the article as one who has an insidious disregard for the truth. Halva, in turn, contacted John Reddy, an SCC vice president who was then acting general manager of Respondent's Cincinnati operation. Reddy instructed Halva to conduct an investigation to ascertain the facts and circumstances surrounding the article and its impact on their operation.

While Halva testified she started receiving calls from employees about Flannery's article during the week of 12 January, the record fails to reveal that any of the employees named in the article were aware of it until around the third week in January. Apparently, employee Joe Jacobs was the first employee named in the article to actually read it. He testified that during the third week in January his immediate supervisor, Dick Maloney, called him to indicate he was going to come to his home with something he would not be happy about. Maloney subsequently took a copy of the article to Jacobs' home and the employee read it. He reacted by refraining from talking to Flannery for about a week and keeping discussions with Flannery on a professional level thereafter.[9] Similarly, Mark Bowen, a photographer who was assigned to Respondent's west division, testified he became aware of Flannery's article when Allison Smith, the associate editor in the west division office, provided him with a copy. Bowen testified he reacted by telling Allison, Doug Hubbuch, managing editor of the west division, and Sandhage that the portion of the article related to him was a lie and was misleading.[10] Bowen, whose desk was near Flannery's, requested and received Sandhage's permission to move his desk to the far side of the west division office. Additionally, he was informed he would not be required to accompany Flannery on assignments; that he could travel independently if Flannery required.

Halva indicated during her testimony that she discussed the Flannery article with Sandhage, Hubbuch, Smith, and Flannery's immediate supervisor, Laura Hobbs, during the period extending from 12 to 22 January. She claims she ascertained through such discussions that there was considerable disruption in the newsroom of the west division office[11] and, for that reason, she recommended to Reddy on Monday, 19 January, that Flannery be suspended.

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[8] The parties stipulated that on 27 April 1987 the assistant managing editor of the Cincinnati Post saw a copy of Flannery's article posted on the Guild bulletin board at her paper.

[9] Jacobs admittedly made the remark concerning Nerf-basketball attributed to him in the article.

[10] Bowen indicated he was selected journalist of the year in 1985 before the union campaign began and Flannery's phraseology in the article erroneously made it appear he was rewarded because he was antiunion.

In Reddy's absence, Halva suspended Flannery on 22 January. At that time, she handed him a suspension letter that had been prepared at Reddy's direction and a list of items that were to be investigated to determine the discipline to be imposed on him.[12] The letter indicated Flannery was to be suspended pending completion of an investigation in regard to his violation of the following company rules:

> 18. Making false, vicious or malicious statements concerning any employee, supervisor, the Company, or its product.
>
> 29. Unlawful, improper or unseeming conduct on or off the Company premises or during non-working hours which affects the employee's relationship to his/her job, to his/her fellow employees or to his/her supervisors, or affecting the Company's product reputation or goodwill in the community.

The above-described suspension letter indicated the following list of matters would be considered by Respondent in its investigation:

> 1. Disloyalty
> 2. Adverse impact on image of CSPI.
> 3. Allegation—Managements insidious disregard for the truth.
> 4. Creation of dissention and disruption.
> 5. Attitude and conduct
> 6. Adverse effect on newspapers reputation.
> 7. Adverse effect on integrity of newspaper.
> 8. Malicious and vicious statements.
> 9. Violation of ethical standards associated with journalistic responsibilities.
> 10. Bringing into question the truthfulness of the newspapers publications.
>
> Your article in Cincinnati Review, your conduct with employees and supervision.

On Tuesday, 20 January, Halva continued her investigation of the Flannery matter by interviewing persons mentioned in the article.[13] Sandhage testified he told Halva, and Reddy as well, that the portion of Flannery's article related to him contained errors and was untrue;[14] that he felt the article went against every grain of everything they had ever taught Flannery; and that he thought something should be done about it.[15] Jacobs testified he told Halva he was disappointed, shocked, and outraged when he read the article as it portrayed him as an idiot. He added he expressed concern that the comments in the article might damage him professionally. The record fails to reveal what Supervisors Kleine and Williams and employee Bowen discussed with Halva when she interviewed them.[16]

After discussing Flannery's article with the persons named in it, Halva caused Personnel Administrator Hamilton to ascertain whether Flannery had signed off on and had thereby indicated that he was aware of the Company's rules, its editorial policy, its ethics policy, and his job description.[17] It is undisputed that Flannery was familiar with the Company's rules, policies, and his job description.[18] Similarly, it is uncontested that Flannery attended several libel seminars while employed by Respondent, and he was thus familiar with the subject.

On 2 February, Flannery was terminated by a letter from Reddy, the body of which states:[19]

> The Company has completed its investigation of your violation of Company Rules 18 and 29.
>
> 18. Making false, vicious or malicious statements concerning any employee, supervisor, the Company, or its product.
>
> 29. Unlawful, improper or unseeming conduct on or off the Company premises or during non-working hours which affects the employee's relationship to his/her job, to his/her fellow employees or to his/her supervisors, or affecting the Company's product reputation or goodwill in the community.
>
> Our investigation has revealed that you did, indeed, violate these rules. The seriousness of these violations warrants your immediate discharge. Your suspension of January 22, 1987 is converted to an immediate discharge.
>
> Your discharge under Rules 18 and 29 is based on the following:

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[11] No evidence that would reveal production was affected was offered by Respondent.

[12] G.C. Exh. 8.

[13] Although Halva testified the employees voluntarily came to the office to see her, but the record reveals they were summoned to appear.

[14] Flannery admitted he mistakenly placed his conversation with Sandhage concerning merit increases as having occurred in January 1985, when it actually occurred in December 1986.

[15] Respondent placed accrediting evidence, in the form of handwritten documents that revealed merit increases, pay adjustments, and probationary increases given to employees during 1985 and the first quarter of 1986, in the record as its Exhibits 11 and 12 to support Sandhage's claim that he, as a member of Respondent's salary administration committee, would not have told Flannery or others in 1985 that differing numbers of merit increases had been given. Flannery testified Sandhage told him 20 merit increases had been given in 1985, but he later stated, in a conversation he had with Donna Pazdera Conner, that 12 had been given in 1985. As a rebuttal witness, Jane Habig credibly testified Sandhage told her in late December 1985 that 11 merit increases had been given and he was giving her a 30-cent merit increase effective immediately. She credibly testified her increase was delayed until January 1986, and that Sandhage called her to the office at that time to tell her the increase was a pay adjustment rather than a merit increase. Flannery and Habig were credible witnesses and I believe them. I am convinced Flannery sought in his article to state what he honestly believed Sandhage had said to him and others about merit increases given in 1985.

[16] Halva testified reporter Jenny Key and receptionist Ruthie Day approached her to discuss office reaction to the article at some unstated time.

[17] Sandhage summarized Respondent's editorial and/or news policy indicating it is that Respondent will be a local newspaper, will be authoritative, and will be trustworthy and honest. He testified the ethics policy requires that employees be objective, truthful, fair, and balanced when reporting news.

[18] The reporter job description requires that reporters "maintain a positive public relations image for the newspapers." See R. Exh. 7.

[19] G.C. Exh. 9.

> Your conduct and the article you authored in the Cincinnati Review, injured the reputation, image, integrity and truthfulness of Cincinnati Suburban Press newspapers, its management, and has embarrassed, humiliated and ridiculed your fellow employees.
>
> Your disruptive conduct has impaired employee relationships with fellow employees and our supervisors.

The parties stipulated that Supervisor James Sulkin was terminated for violating company rules 18 and 29 in January 1986 because work stopped on an occasion when he agreed vocally with an employee that a union was needed at Respondent. Additionally, Halva testified an executive in another subsidiary of SCC was terminated pursuant to rules 18 and 29 because he uttered a slanderous remark.

Analysis and Conclusions

To sustain the complaint allegation that Flannery was suspended and thereafter terminated by Respondent because he engaged in protected concerted activity, the General Counsel's evidentiary burden was to prove: (1) that Flannery engaged in "concerted" activity; (2) that the activity was protected; (3) that Respondent was aware of the concerted nature of the activity; and (4) that Respondent suspended and thereafter discharged Flannery because he engaged in protected activity.

Obviously, a threshold issue in this case is whether Flannery engaged in "concerted" activity within the meaning of Section 7 of the Act when he prepared "Dirty Tricks in the Newsroom." Although the record reveals he obtained information set forth in the article from other employees, it is clear he did not discuss his intention to write and publish the article with other employees before he acted. Notwithstanding the fact that he alone prepared and caused the article to be published, the General Counsel contends his activity was "concerted" as it constituted a continuation of the organizational activity he and other employees were engaged in immediately prior to the time the article was written and published.

Emphasizing the fact that Flannery prepared the article without first discussing it, or revealing his intention to write it, with other employees, Respondent contends Flannery's activity was not "concerted." It further contends the activity under consideration was divorced from the organization campaign then in progress as the article made no reference whatsoever to an ongoing union campaign. It contends the article merely constituted an anatomy of a union campaign, which had occurred some 9 months before the article was written and published.

The Board's broad definition of "concerted activity" is set forth in *Meyers Industries*, 268 NLRB 493, 497 (1984) (*Meyers I*). There it stated:

> In general, to find an employee's activity to be "concerted," we shall require that it be engaged in with, or on the authority of other employees, and not solely by and on behalf of the employee himself.

The above definition was restated and futher explained in *Meyers Industries*, 281 NLRB 882, 887 (1986) (*Meyers II*). There the Board observed:

> We reiterate, our definition of concerted activity in *Meyers I* encompasses those circumstances where individual employees seek to initiate or to induce or to prepare for group action, as well as individual employees bringing truly group complaints to the attention of management.

Applying the foregoing principles to the facts in the instant case, I find the General Counsel has failed to prove that Flannery engaged in "concerted activity" when he wrote "Dirty Tricks in the Newsroom." To establish that the activity was concerted, the General Counsel was obligated to prove that: (1) the activity was undertaken "with, or on the authority of other employees" (*Meyers I*); or (2) that, by engaging in the activity, the employees sought to "initiate or to induce or to prepare for group action" (*Meyers II*). Noting the facts, supra, reveal Flannery did not discuss the content of his article, or his intention to write it, with other employees before it was prepared and published, I am precluded from finding Flannery's activity was engaged in "with, or on the authority of other employees."

Similarly, in my view, the facts in this case do not warrant a finding that the article under consideration was written to "initiate or to induce or to prepare for group action." The General Counsel's principal contention is that the testimony and evidence, which reveal Flannery was engaged in an ongoing organization campaign with other employees, adequately placed Respondent on notice of the fact that his composition of the "Dirty Tricks in the Newsroom" constitute concerted activity. Noting the article makes absolutely no reference to an ongoing union campaign, I find it failed to place Respondent on notice that the article was part and parcel of the ongoing union campaign. Second, the General Counsel adduced what I consider to be subjective testimony, which was to the effect that: Flannery intended to gain the support of outside union supporters and employees in the ongoing campaign by composing the article; copies of the article were distributed to employees after it was published; and, when the article was produced at the 21 January employee meeting, there was discussion concerning possible use of the article as background in the ongoing organizational campaign. I attach minimal significance to such subjective testimony because the record clearly fails to reveal Flannery's reasons for composing the article were known by Respondent, and it fails to reveal Respondent was aware that copies of the article had been distributed among employees or that the article had been discussed at a meeting of employees. In the final analysis, I, in agreement with Respondent, conclude that, in the circumstances of this case, the content of the article must be viewed to determine whether it was intended to "initiate or induce or prepare for group action." Clearly, the article, which fails to request or suggest that persons who read it should take any action whatsoever, fails to reveal it was composed or published to "initiate or induce or prepare for group action."

In sum, for the reasons stated, I find that the General Counsel has failed to prove that Flannery was engaged in concerted activity when he wrote and published "Dirty Tricks in the Newsroom." Additionally, I find the record fails to reveal that Respondent was aware, at the time it suspended and subsequently discharged Flannery, that he was engaged in concerted activity when he wrote and/or published the article under discussion. In the circumstances described, Respondent did not violate the Act as alleged by suspending and thereafter terminating Flannery because he wrote the article. Accordingly, I recommend that those portions of the complaint that allege the employee was suspended and discharged in violation of Section 8(a)(1) and (3) be dismissed.

Remaining is resolution of the issues raised by paragraph 5 of the complaint. There, the General Counsel alleges that by promulgating and maintaining rules 18 and 29 since August 23, 1986, Respondent violated Section 8(a)(1) of the Act.

The record, specifically Flannery's testimony, reveals rules 18 and 29 have been set forth in Respondent's employee handbook since at least November 1984. As it is clear the rules were promulgated far beyond the 10(b) period, the promulgation allegation is without merit.[20]

As noted above, the rules under discussion are contained in Respondent's employee handbook, which is given to employees when they are hired. They prohibit employees from:

> 18. Making false, vicious or malicious statements concerning any employee, supervisor, the Company, or its product.
>
> 29. Unlawful, improper or unseeming conduct on or off the Company premises or during non-working hours which affects the employee's relationship to his/her job, to his/her fellow employees or to his/her supervisors, or affecting the Company's product reputation or goodwill in the community.

In support of the contention that rule 18 was unlawfully maintained, the General Counsel cites *American Cast Iron Pipe Co.*, 234 NLRB 1123 (1978), enfd. 600 F.2d 132 (8th Cir. 1979), and *Spartan Plastics*, 269 NLRB 546, 552 (1984). In *American Cast Iron*, the Board considered the legality of three (3) rules: (1) rule 27, which prohibited distribution on company property of any "written or printed matter of any description not in the performance of company business without Company permission"; (2) rule 29, which prohibited "Making false, vicious or malicious verbal statements concerning any employee, the Company or its products and methods of manufacture"; and, (3) rule 30, which prohibited "Distribution of false, vicious or malicious written statements about any employee, the Company, its products or methods of manufacture on Company property." The Board affirmed without comment, Judge Leiner's finding that rules 29 and 30 were unlawful per se because they prohibited and punished the merely "false," as opposed to the "vicious or malicious," and were therefore overbroad.

When enforcing the Board's Order in *American Cast Iron*, the Eighth Circuit stated, "We agree with the Board that the major flaw in both rules (29 and 30) is that they proscribe 'false' as well as 'vicious or malicious' statements." The court then observed (at 137):

> It is well-established that, while employers may proscribe "maliciously false" statements, employers may not proscribe and punish for publication of "false" statements. *Texaco, Inc. v. NLRB*, 462 F.2d 812, 815 (3d Cir.), *cert denied*, 409 U.S. 1008, 93 S.Ct. 442, 34 L.Ed.2d 302 (1972); *Owens-Corning Fiberglas Corp. v. NLRB*, 407 F.2d 1357, 1366 (4th Cir. 1969). Punishing employees for distributing merely "false" statements fails to define the area of permissible conduct in a manner clear to employees and thus causes employees to refrain from engaging in protected activities.

In the instant case, Respondent's rule 18 is substantially identical to rule 29, which was considered by the Board and the court in *American Cast Iron*. It is unlawful, as alleged, for the reasons set forth above.

In my view, the court's reasoning in *American Cast Iron* applies with equal force to Respondent's rule 29. By prohibiting improper or unseeming" conduct on and off the company premises, the rule fails to define the area of permissible conduct in a manner clear to employees. Viewing Respondent's actions in the instant case, which presented a close "concerted" activity issue, employees may reasonably assume that Respondent may utilize rule 29 to punish them for engaging in lawful protected concerted activity in the future because it considers such activity to be "improper or unseeming." Thus, rule 29 may well cause employees to refrain from engaging in protected activities.

In sum, I find, for the reasons indicated, that, by maintaining rules 18 and 29 since 23 August 1986, Respondent violated Section 8(a)(1) of the Act as alleged.

CONCLUSIONS OF LAW

1. Cincinnati Suburban Press, Inc. is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

2. The Guild is a labor organization within the meaning of Section 2(5) of the Act.

3. By maintaining rules that prohibit employees from making "false" statements or engaging in "improper" or "unseeming" conduct on and off company premises without clearly defining areas of permissible conduct in a manner clear to employees, Respondent caused and is causing employees to refrain from engaging in protected activities in violation of Section 8(a)(1) of the Act.

4. Respondent did not violate Section 8(a)(1) and (3) of the Act by suspending Gregory Flannery on 22 January 1987, or by terminating his employment on 2 February 1987.

THE REMEDY

Having found that Respondent has engaged in certain unfair labor practices, I shall recommend that it be ordered to cease and desist therefrom and take certain affirmative action designed to effectuate the policies of the Act.

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[20] At some earlier time, rule 29 was apparently numbered rule 31 in the employee handbook, but the text has not varied.

The General Counsel requests that a visitatorial clause be included in any order issued in this case. Compliance with the order in this case will pose no complicated problems. Accordingly, the request is denied.

[Recommended Order omitted from publication.]

Brannan Sand and Gravel Co. *and* **Teamsters Construction Workers, Local Union No. 13, AFL-CIO.**[1] Case 27-CA-9329-3

July 20, 1988

ORDER DENYING MOTION TO DISMISS AND REMANDING PROCEEDING

BY CHAIRMAN STEPHENS AND MEMBERS JOHANSEN, BABSON, AND CRACRAFT

On September 23, 1986, Administrative Law Judge Gerald A. Wacknov issued his decision in this proceeding[2] finding that the Respondent violated Section 8(a)(5) and (1) by failing to bargain in good faith with the Union regarding the terms of a successor collective-bargaining agreement, by unilaterally discontinuing provisions of the expired collective-bargaining agreement, and by placing contract proposals into effect prior to an impasse in bargaining. Subsequently, the Respondent filed exceptions and a supporting brief and the General Counsel filed cross-exceptions and an answering brief.

Thereafter, on June 23, 1987, the Respondent filed a motion to dismiss the complaint in this case based on the Board's decision in *John Deklewa & Sons, Inc.*,[3] which issued after the judge's decision and after the exceptions had been filed in this case.[4] On July 7, 1987, the General Counsel filed an opposition to the Respondent's motion.

On October 30, 1987, the Board issued a Notice to Parties of Opportunity to Submit Statements of Position. The notice invited the parties[5] to address the following issues raised by *Deklewa*, but not discussed or decided there:

1. May construction industry bargaining relationships that originated prior to the effective date of the 1959 amendments to the Act and that have thereafter continued without interruption be presumed to be other than Section 9 relationships under the holdings of *John Deklewa & Sons*, supra?
2. In determining the current status of a construction industry bargaining relationship that originated prior to the 1959 amendments, is it necessary to consider whether the relationship was lawful at the outset?
3. Would the Board be barred by Section 10(b), as construed in *Machinists Local 1424 v. NLRB (Bryan Mfg. Co.)*, 362 U.S. 411 (1960), from making a determination regarding the lawfulness of pre-1959 events?
4. What record evidence, if any, pertaining to the initial or continuing aspects of recognition is necessary to establish a Section 9 relationship when the recognition predated 1959? The parties should specifically address the record evidence in this case and raise any additional relevant evidence which might warrant a remand.

Subsequently, the Respondent, the General Counsel, the Rocky Mountain Chapter of the Associated Builders and Contractors, Inc., Associated Builders and Contractors of Wyoming, Inc., the American Federation of Labor and Congress of Industrial Organizations, the AFL-CIO's Building and Construction Trades Department, and the Associated General Contractors of America, filed briefs and statements of position.

The record reveals the following relevant facts. The Respondent is engaged in the construction industry as an asphalt paver and in the sand and gravel business. The Respondent and the Union had a collective-bargaining relationship for more than 30 years, the origins of which predated the enactment of Section 8(f) of the Act in 1959. The parties' latest contract expired on June 30, 1985,[6] and the Respondent gave proper notice to the Union in April that the Respondent wished to terminate the agreement. Negotiations for a new contract commenced on June 7, and the parties met on 10 occasions through October 21 without reaching an agreement.

The Respondent's contract proposals sought to delete or change substantially virtually every significant provision of the expired contract. In response to the lack of progress in negotiations, the Union began a strike on July 3. On that same date the Respondent advised the Union that it would begin hiring permanent replacements, would stop enforcing the union-security provision of the expired contract, and, because there was an impasse in bargaining, would implement its last wage offer made to the Union. The Union replied that even though there was a strike, there was no impasse, and the Union expected to continue negotiating with the Respondent.

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[1] On November 2, 1987, the Teamsters International Union was readmitted to the AFL-CIO. Accordingly, the caption has been amended to reflect that change.

[2] The judge's decision also encompassed Cases 27-CA-9329-2, 27-CA-9391, and 27-CA-9527, involving the Respondent and Laborers' International Union of North America, Local No. 86. Those cases were severed from this case by Board Order of October 30, 1987.

[3] 282 NLRB 1375 (1987), enfd. sub nom. *Iron Workers Local 3 v. NLRB*, 843 F.2d 770 (3d Cir. 1988).

[4] The Board held in *Deklewa* that it would apply the new principles set forth there "to all pending cases in whatever stage." 282 NLRB 1389.

[5] In addition, the Board invited various other entities to submit statements of position as amici curiae.

[6] All subsequent dates are in 1985 unless stated otherwise.

289 NLRB No. 128

By letter dated July 9, the Respondent advised the Union that it intended to implement for returning strikers and replacement employees its proposals pertaining to subcontracting, hours of work, and overtime, and that all employees would be covered under the Respondent's health and welfare and deferred compensation plan. The Respondent presented its final proposal at the bargaining session on July 19, and on July 23 the Respondent notified the Union that the various proposals had been implemented. The Union was still on strike at the time of the hearing in this case.

Analyzing the evidence pursuant to principles evolved under Sections 9(a), 8(d), and 8(a)(5) of the Act, without reference to Section 8(f)'s provisions for construction industry collective-bargaining relationships, the judge found that throughout the negotiations the Respondent insisted on proposals which it knew would not be accepted by the Union, and which ensured the futility of bargaining. Accordingly, the judge concluded that the Respondent failed to bargain in good faith, unlawfully made unilateral changes in employees' terms and conditions of employment, and that the employees' strike was an unfair labor practice strike.

Positions of the Parties

The General Counsel contends that the Board should presume irrebuttably that construction industry bargaining relationships which started before the effective date of the 1959 amendments to the Act and which have continued without interruption are governed by Section 9(a) of the Act, and therefore the Respondent was obligated to bargain in good faith with the Union over the terms of a successor contract. The General Counsel adds that because the relationship in question here predates the enactment of Section 8(f), it was at its inception either a lawful 9(a) relationship or an unlawful relationship under Section 8(a)(2) of the Act. The General Counsel submits that the Board should conclude that the Respondent recognized the Union under Section 9(a) as the majority representative of the unit employees because the law presumes that parties act lawfully. Further, the General Counsel argues that Congress intended that Section 8(f) would operate prospectively only, and therefore relationships established before Section 8(f)'s enactment cannot be regarded as relationships protected by Section 8(f). Alternatively, the General Counsel asserts that, even if Section 8(f) had retroactive effect, that retroactivity was necessary to shelter nonmajority bargaining relationships only for the 6 months preceding Section 8(f)'s enactment because of Section 10(b). Accordingly, the General Counsel argues that the legality of the relationship at issue here stems from Section 9 and is shielded by Section 10(b). In any event, the General Counsel contends that Section 10(b) of the Act bars the Respondent from asserting that the relationship was an unlawful 8(a)(2) agreement at its inception.

In agreement with the General Counsel, the AFL-CIO and its Building and Construction Trades Department urge that collective-bargaining relationships in the construction industry which have existed continuously since before the enactment of Section 8(f) should be treated in the same manner as relationships in industries not covered by Section 8(f). Accordingly, the AFL-CIO argues that because Section 9(a) is applicable to the parties' relationship, there was a presumption of majority support on the expiration of the last collective-bargaining agreement, which is rebuttable by showing relevant circumstances existing at that time, but not by inquiry into events concerning the legality of the inception of the relationship.

The Respondent contends that under *Deklewa*, supra, construction industry bargaining relationships which originated prior to the enactment of Section 8(f) and which have continued uninterrupted may not be presumed to be 9(a) relationships, and that to establish a 9(a) relationship here the General Counsel must show that the Union was certified as a result of a Board election or at least that voluntary recognition was based on a card check. In this regard, the Respondent asserts that there is available evidence which demonstrates that its relationship with the Union was a voluntary prehire agreement as contemplated by Section 8(f). Further, the Respondent argues that in determining the current status of a construction industry bargaining relationship that began prior to the 1959 amendments, it is unnecessary to consider whether the relationship was lawful at the outset because, by Section 8(f), Congress intended to legalize all such relationships. Thus, the Respondent submits that Section 10(b) is not applicable here. In any event, the Respondent contends that it is not necessary to determine the status of pre-1959 construction industry bargaining relationships in this case because the Respondent did not agree to a contract containing a union-security clause or a recognition clause until 1966.

The Rocky Mountain Chapter of the Associated Builders and Contractors, Inc., the Associated Builders and Contractors of Wyoming, Inc., and the Associated General Contractors of America contend that both *Deklewa* and the legislative history of Section 8(f) demonstrate that there is no logical or factual basis for presuming that a bargaining relationship initiated in the construction industry before 1959 is or was a 9(a) relationship. Instead, these amici argue that the Board must presume that an agreement between a construction industry employer and a union is an 8(f) agreement and that this presumption is rebuttable only by evidence of Board certification or recognition by the employer concurrent with a showing that the union has majority support.

Discussion and Conclusions

After careful consideration of the parties' and amici's arguments, we conclude that all construction industry bargaining relationships, including those which began prior to the enactment of Section 8(f), cannot be presumed to be 9(a) relationships; that the lawfulness of the origination of the relationship is irrelevant to determining the current nature of the relationship; and that Section 10(b) as construed in *Machinists Local 424 v. NLRB (Bryan Mfg. Co.)*, 362 U.S. 411 (1960), does not preclude finding that a construction industry bargaining relationship, whatever its age, is not a 9(a) relationship. We also hold that we will find full 9(a) status with respect to all construction industry bargaining relationships only if the signatory union has been certified following a Board election or has been recognized on the basis of an affirmative showing of majority support. (See discussion, infra, at 980). Applying these principles to the facts of this case, we conclude that the case must be remanded for further consideration and for the parties to have an opportunity to introduce relevant evidence.

In *Deklewa*,[7] supra, the Board overruled the "conversion doctrine," under which a bargaining relationship which began as an 8(f) relationship could be found to have "converted" into a full 9(a) relationship by means other than a Board election or voluntary recognition based on a simultaneous showing of majority support.[8] The Board in *Deklewa* also emphasized that "[i]n light of the legislative history and the traditional prevailing practice in the construction industry" the burden of proving 9(a) status in construction industry cases is on the party asserting the existence of a 9(a) relationship. *Deklewa*, supra at 1385 fn. 41.[9] This allocation of the burden of proof reflects the Board's recognition that, in enacting Section 8(f), Congress found that entering into prehire agreements was the prevalent practice in the construction industry.[10] As fully set forth in *Deklewa*, a review of the legislative history demonstrates that prior to the 1959 amendments

> it had become established practice in the construction industry for employers to recognize and enter into collective-bargaining agreements with a construction industry union for periods ranging from 1 to 3 years even before any employees had been hired.

S. Rep., 1 Leg. Hist. 423. *Deklewa*, supra at 1380. This practice had become so widespread and routine that Congress deemed it necessary to add Section 8(f) to the Act because the Board's application of Section 8(a)(2) to the industry was resulting in "substantial instability in the industry by the invalidation of established industry practices . . . ." *Deklewa*, supra at 1380.

Several Board decisions since *Deklewa* have clarified the means by which a party can prove 9(a) status in the construction industry. In *American Thoro-Clean, Ltd.*, 283 NLRB 1107, 1108–1109 (1987), the Board stated:

> In doing away with the conversion doctrine as applied to collective-bargaining agreements permitted under Section 8(f), we held in *Deklewa* that in light of the legislative history of Section 8(f), and the prevailing practice in

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[7] *Deklewa* set forth the following principles: (1) a collective-bargaining agreement permitted by Sec. 8(f) shall be enforceable through the mechanisms of Sec. 8(a)(5) and Sec. 8(b)(3); (2) such agreement will not bar the processing of valid petitions filed pursuant to Sec. 9(c) and 9(e); (3) in processing such petitions, the appropriate unit normally will be the single employer's employees covered by the agreement; and (4) on the expiration of such agreements, the signatory union will enjoy no presumption of majority status, and either party may repudiate the 8(f) bargaining relationship.

[8] Accordingly, the Board overruled in relevant part *R. J. Smith Construction Co.*, 191 NLRB 693 (1971), enf. denied sub nom. *Operating Engineers Local 150 v. NLRB*, 480 F.2d 1186 (D.C. Cir. 1973). Under the conversion theory, a 9(a) relationship could be established by showing, for example, that during a relevant period unit employees were referred from an exclusive hiring hall, that a majority of unit employees were members of the signatory union, or that the 8(f) contract contained an enforced union-security clause.

[9] This latter point is not necessarily a change in the law. See *Stine Scovil Construction Co.*, 269 NLRB 465 (1984), in which the Board refused to find that a construction industry employer's admitted failure to abide by a collective-bargaining agreement violated Sec. 8(a)(5) because the General Counsel failed to allege or submit proof that the union had 9(a) status or that the contract was not an 8(f) contract. *Carmichael Construction Corp.*, 258 NLRB 226 fn. 1 (1981), enfd. 728 F.2d 1137 (8th Cir. 1984), cited by the AFL–CIO and its Building and Construction Trades Department, is not to the contrary. There, the Board, in affirming a judge's conclusion that the respondent employers violated Sec. 8(a)(5), relied on the respondents' admissions that the union had majority status. Similarly, *Bay Area Sealers*, 251 NLRB 89 (1980), modified on other grounds 665 F.2d 970 (9th Cir. 1982), also cited by the AFL–CIO, is consistent with placing the burden of proving 9(a) status on the party asserting it. There, the Board affirmed a judge's finding that, although the respondent employer proved that it was engaged primarily in the construction industry, the General Counsel successfully satisfied its prima facie burden of establishing that the union was the 9(a) representative of unit employees at the time the parties' collective-bargaining agreement was executed.

[10] *Deklewa* did not modify longstanding precedent holding that the threshold burden of resolving any ambiguity concerning whether an employer is primarily in the building and construction industry falls on the party seeking to avail itself of 8(f)'s statutory exception. See *Carpet Local 1247 (Indio Paint)*, 156 NLRB 951 fn. 1 (1966). Here, it is undisputed that the Respondent is an employer engaged primarily in the building and construction industry.

> the construction industry, the party to an 8(f) relationship which asserts the existence of a collective-bargaining relationship under Section 9(a) of the Act would have the burden of affirmatively proving the existence of such a relationship, through either (1) a Board-conducted representation election or (2) a union's express demand for, and an employer's voluntary grant of, recognition to the union as bargaining representative, based on a showing of support for the union among a majority of the employees in an appropriate unit. [Citation omitted.]

Further in *Precision Striping*, 284 NLRB 1110 (1987), the Board pointed out that an employer-conducted poll prior to the initial recognition may, in proper circumstances, establish a Section 9 bargaining relationship in the construction industry.[11]

Notwithstanding the emphasis in *Deklewa* and its progeny on traditional means of proving 9(a) status, the General Counsel and the AFL–CIO and its Building and Construction Trades Department contend that there should be another way to establish 9(a) status in the construction industry, i.e., by showing that the collective-bargaining relationship began before the enactment of Section 8(f). We note initially that this theory has no support in Board precedent. Of course, the theory would have been equally arguable under the rule of *R. J. Smith* as an alternative to the now-abandoned conversion doctrine,[12] or at any time subsequent to Section 8(f)'s enactment, but our review of precedent failed to reveal any indication that it was so argued.[13]

More importantly, reliance on the mere fact that a collective-bargaining relationship predates Section 8(f) to establish 9(a) status differs fundamentally from reliance on a Board election or recognition based on a contemporaneous showing of majority support for the union because it does not take into account employees' representational desires and does not further the fundamental statutory interest in employee free choice. In this respect, such a presumption shares some of the same shortcomings that led the Board to abandon the conversion theory in *Deklewa*. Indeed, the conversion doctrine at least required proof that at some point after the parties entered into an 8(f) relationship, the union actually achieved majority support in a permanent and stable employee work force. The theory advanced here would eliminate the need for any such showing based on an irrebuttable presumption arising from the mere fact of a continuous bargaining relationship entered into before the enactment of Section 8(f).

Furthermore, the presumption urged in this case has no basis in fact. The Board recently stated in *Buckley Broadcasting Corp.*, 284 NLRB 1339 (1987), that

> [a]s an evidentiary matter, presumptions should arise when it is believed that proof of one fact renders the inference of the existence of another fact so probable that it is sensible and timesaving to assume the truth of the inferred fact until it is affirmatively disproved. [Fn. omitted.]

Buckley, supra.[14] Applying this principle here, we find no basis for such a presumption because the fact of a construction industry bargaining relationship in existence prior to the enactment of Section 8(f) does not support an inference that the parties must have initiated their relationship under Section 9(a). As previously indicated here and in *Deklewa*'s review of the legislative history, the facts overwhelmingly support a contrary presumption. In particular, Congress stated:

> In the building and construction industry *it is customary* for employers to enter into collective bargaining agreements for periods of time running into the future, perhaps 1 year or in many instances as much as 3 years. Since the vast majority of building projects are of relatively short duration, such labor agreements necessarily apply to jobs which have not been started and may not even be contemplated. The practice of signing such agreements for future employment is not entirely consistent with the Wagner Act rulings of the NLRB that exclusive bargaining contracts can lawfully be concluded only if the union makes its agreement after a representative number of employees have been hired . . . .[15] [Emphasis supplied.]

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[11] See also *W. L. Miller Co.*, 284 NLRB 1180 (1987), and *Kephart Plumbing*, 285 NLRB 612 (1987).

[12] In this regard, we note that *R. J. Smith*, supra, implicitly overruled the proposition, set forth in *Bricklayers Local 3 (Eastern Washington Builders)*, 162 NLRB 476 (1966), enfd. 405 F.2d 469 (9th Cir. 1968), that Sec. 8(f) applies only to the situation where parties are entering into an initial contract, and not to succeeding contracts. *Deklewa* did not disturb that aspect of *R. J. Smith* and, in holding that successor construction industry bargaining agreements are presumed to be 8(f) contracts, we expressly overrule *Bricklayers*. We also overrule *Williams Enterprises*, 212 NLRB 880 (1974), enfd. mem. 519 F.2d 1401 (4th Cir. 1975), and *Dallas Building Trades Council (Dallas County Construction Employers' Assn.)*, 164 NLRB 938 (1967), enfd. 396 F.2d 677 (D.C. Cir. 1968) on this point.

[13] See, e.g., *Operating Engineers Local 542 (R. S. Noonan)*, 142 NLRB 1132 (1963), enfd. 331 F.2d 99 (3d Cir. 1964), cert. denied 379 U.S. 889 (1964); *Ellis Tacke Co.*, 229 NLRB 1296, 1299–1300 (1977).

[14] While presumptions must as an initial matter have some basis in fact, they normally have a policy as well as a factual basis. See *Fall River Dyeing Corp. v. NLRB*, 482 U.S. 27 (1987).

[15] S. Rep. No. 187, 1 Leg. Hist. 424.

We also find no merit in the General Counsel's effort to use Section 10(b) to support an irrebuttable presumption of initial 9(a) status or otherwise bar a determination that any construction industry relationship predating Section 8(f) was a nonmajority prehire agreement at its inception. Relying on earlier precedent,[16] she asserts that the policies which the Supreme Court understood in *Bryan Mfg.* to underlie Section 10(b) as an affirmative defense could in this case preclude a defense based on evidence of unlawful minority union recognition predating the 6-month limitations period. *Bryan*, which was decided shortly after Section 8(f)'s enactment, involved the straightforward question of whether respondents employer and union could invoke Section 10(b) against alleged violations of Sections 8(a)(2) and 8(b)(1)(A) where the bargaining agreement was executed more than 6 months from the date of the charge. In holding that Section 10(b) was a viable bar to the complaint, the Court stated (362 U.S. at 419):

> Where, as here, a collective bargaining agreement and its enforcement are both perfectly lawful on the face of things, and an unfair labor practice cannot be made out except by reliance on the fact of the agreement's original unlawful execution, an event which, because of limitations, cannot itself be made the subject of an unfair labor practice complaint, we think that permitting resort to the principle that Sec. 10(b) is not a rule of evidence, in order to convert what is otherwise legal into something illegal, would vitiate the policies underlying that section. These policies are to bar litigation over past events, "after records have been destroyed, witnesses have gone elsewhere, and recollections of the events in question have become dim and confused," H.R. Rep. No. 245, 80th Cong., 1st Sess., p. 40 [fn. omitted] and of course to stabilize existing bargaining relationships.

However, the logic of *Bryan* cannot be extended to support the General Counsel's argument here. In *R. J. Smith*, supra, the Board rejected this precise contention. In holding that the policies behind Section 10(b) did not support an irrebuttable presumption favorable to the General Counsel and did not foreclose inquiry into events that preceded the 6-month limitations period and that might have a bearing on the current status of the bargaining relationship, the Board contrasted construction prehire agreements with collective-bargaining agreements in other industries (191 NLRB at 694–695):

> We find, further, that there is no merit in the exception based on *Local Lodge No. 1424 International Association of Machinists (Bryan Mfg. Co.) v. NLRB*, 362 U.S. 411 (1960), that Respondent was precluded by Section 10(b) from asserting that the October 1968 contract was executed at a time when the Union did not enjoy majority support. It is true that, in the normal case, an employer-respondent in an 8(a)(5) case may not go behind the 10(b) period to show that a contract, apparently regular and continuing on its face, was executed at a time when the union was not the majority representative. The reason for this rule is that a contract, regular on its face, carries with it an irrebuttable presumption—absent, perhaps, unusual circumstances—of continuing majority status of the union. Thus, since the contract standing alone carries with it a continued requirement of union recognition, to go behind the 10(b) period to show that when the contract was executed the union failed to represent a majority runs directly counter to the teachings of *Bryan*.
>
> Such is not the case with an 8(f) agreement. As previously described, an 8(f) agreement, because of its prehire nature, need not be made with a majority union to be legal. For this reason, there is no basis, either in logic or in policy, to extend to the union which is party to such a contract an irrebuttable presumption of majority status. Indeed, we conclude that any such presumption would be irreconcilable with the final proviso to Section 8(f). It is, of course, necessary sometimes to go behind the 10(b) period to see what kind of contract is involved in a particular case—just as it might be necessary to take an employer's operations for an entire year, including 6 months behind the 10(b) period—to see whether it is engaged in commerce and within the Board's jurisdictional standards. However, once that is accomplished and it is determined the particular contract under scrutiny is validated by Section 8(f) rather than by Section 9(c)(e) [sic]—one to which no irrebuttable presumption of majority can be attached —that is the end of the pre-10(b) inquiry. No actual "defense" in such a situation is predicated on pre-10(b) events.

There is nothing in the foregoing analysis quoted from *R. J. Smith* which suggests that the analysis is any less applicable to bargaining relationships originating in prehire agreements which antedate the enactment of Section 8(f) than it is to 8(f) relationships inaugurated by postenactment agreements. The General Counsel nevertheless attempts to avoid *R. J. Smith*'s rejection of Section 10(b)'s relevance by suggesting that Congress intended only to give Section 8(f) prospective application to contractual relationships inaugurated after its effective date. From this watershed date, parties initiating construction prehire bargaining relationships can invoke Section 8(f) to immunize themselves from attack without resort to Section 10(b). But conversely, in the General Counsel's view, pre-1959 prehire agreements would have remained vulnerable to attack under Sections 8(a)(2) and 8(b)(1)(A) through the present time were it not for Section 10(b). In essence, with respect to pre-1959 relationships, the argument seems to be grounded in parity: Given the bar erected *defensively* by Section 10(b) against 8(a)(2) and 8(b)(1)(A) charges, the Board should likewise invoke Section 10(b) *offensively* to give the General Counsel the benefit of a presumption that the relationship is based on the union's majority status.

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[16] See, e.g., *Barrington Plaza & Tragniew*, 185 NLRB 962 (1970), enf. denied on other grounds 470 F.2d 669 (9th Cir. 1972).

We think that this argument is wholly unpersuasive for two reasons. First, we have been shown nothing in the legislative history to suggest that Congress intended to create a dichotomy between pre-1959 prehire agreements, which supposedly remain potentially vulnerable, and post-1959 agreements, which do not. Congress declared that the Board's invalidation of prehire agreements in the construction industry had "given rise to serious problems" and that Section 8(f) "endeavors to resolve certain most urgent problems . . . ."[17] It would be incongruous to conclude that notwithstanding the strong desire of Congress to promote labor relations stability by protecting widespread and established bargaining practices, Congress left a number of these practices open to challenge.

Secondly, to the extent that the then-existing law of Section 10(b) may have shaped the thinking of the 86th Congress, it would not support the major premise of the General Counsel's parity argument. Prior to the Supreme Court's 1960 decision in *Bryan*, the Board had embraced a "continuing violation" theory with regard to collective-bargaining agreements entered into with minority unions. Accordingly, at the time Section 8(f) was enacted, Section 10(b) was not available defensively to insulate the agreements from prosecution. In short, prehire agreements remained unlawful regardless of the limitations period.[18] Thus, as a matter of logic, without Section 10(b) to protect construction prehire agreements, there is no reason that the 86th Congress would have expected the Board to apply the policies underlying Section 10(b) so as to preclude an employer from proving that a union did not enjoy majority support when establishing a collective-bargaining relationship more than 6 months earlier.[19]

We conclude that Congress gave Section 8(a)(2) immunity to all nonmajority bargaining relationships in the construction industry, not just those established after or within 6 months of the enactment of Section 8(f). We further conclude that the rationale of *R. J. Smith* regarding Section 10(b) remains valid, notwithstanding our criticism and rejection of other aspects of that opinion in *Deklewa*. Nothing in *Bryan* precludes inquiry into the establishment of construction industry bargaining relationships outside the 10(b) period. Going back to the beginning of the parties' relationship here simply seeks to determine the majority or nonmajority based nature of the current relationship and does not involve a determination that any conduct was unlawful, either within or outside the 10(b) period.

Any reliance on *Barrington Plaza & Tragniew*, 185 NLRB 962 (1970), enf. denied on other grounds 470 F.2d 669 (9th Cir. 1972), and similar nonconstruction cases such as *Forbidden City Restaurant*, 265 NLRB 409 (1982), enf. denied 736 F.2d 1295 (9th Cir. 1984), and *Jim Kelly's Tahoe Nugget*, 227 NLRB 357 (1976), enfd. 584 F.2d 293 (9th Cir. 1978), cert. denied 442 U.S. 921 (1979), is therefore misplaced. In those decisions the Board held that an employer may not defend against a refusal-to-bargain charge by asserting that the initial recognition, occurring outside the 10(b) period, was unlawful. None of those cases involved a construction industry employer, and the legal principles set forth in them are inapplicable in a construction industry context because Section 8(f) is an exception to the 8(a)(2) ban on recognizing and reaching agreement with a nonmajority union.

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[17] S. Rep., 1 Leg. Hist. 423-424; H. Rep., 1 Leg. Hist. 777.

[18] E.g., *Guy F. Atkinson Co.*, 90 NLRB 143 (1950), enfd. denied on other grounds 195 F.2d 114 (9th Cir. 1952).

[19] That the Supreme Court subsequently rejected the "continuing violation" theory in *Bryan* does not alter the significance which we assign to the pre-*Bryan* view of Sec. 10(b). As the Court has stated, in interpreting a statute in the legal context in which it was enacted, what counts sometimes is not what the correct state of the law (as in the case when the Supreme Court authoritatively construes it) may be, but what the Congress itself perceived the state of the law to be at the time of enactment. *Brown v. GSA*, 425 U.S. 820, 828 (1976); *Cannon v. University of Chicago*, 441 U.S. 677, 711 (1979); *Merrill Lynch, Pierce, Fenner & Smith v. Curran*, 456 U.S. 353, 378 (1982). Although we acknowledge that the Court in *Bryan* relied upon the clear intent of the 80th Congress in 1947 for its interpretation of Sec. 10(b), this does not mean that the 86th Congress must have acted with the view of its predecessor, rather than with the then current Board view in mind.

Moreover, if Congress believed that Sec. 10(b) immunized all but those minority-based contracts executed in the 6 months preceding the enactment of Sec. 8(f), it presumably would have expressly provided retroactive immunity to those otherwise vulnerable contracts lest its enactment have failed to address the very problem Congress perceived. For instance, Congress did expressly legalize through Sec. 8(f) other specific construction industry contractual practices whose maintenance and enforcement would have been subject to an unfair labor practice charge even if the *Bryan* interpretation of the 10(b) limitations period had applied. E.g., Sec. 8(f)(2) legalized a shorter posthiring waiting period prior to the imposition of membership requirements under a union-security agreement in the construction industry.

Finally, we concede that the evidentiary problems in ascertaining how longstanding relationships began may occasionally be significant. Nevertheless such determinations clearly will not involve as many factual variables as were necessary to be litigated under the conversion doctrine. In any event, whatever evidentiary problems may exist do not persuade us, in light of the factors fully analyzed in *Deklewa*, that there is sufficient reason to substitute a presumption that bargaining relationships beginning before the enactment of Section 8(f) were based on the union's majority status, or that it is not proper to require the party asserting the 9(a) relationship to prove it by the means set forth in *Deklewa* and its progeny. In this regard, we note that here the Respondent indicates the availability of oral and documentary evidence which it asserts will demonstrate that the General Counsel cannot prove that the Union has 9(a) status.

In view of the above, we shall remand this case to the administrative law judge for further consideration in light of *Deklewa*, including, if necessary, reopening the record to obtain more evidence on the collective-bargaining representative status of the Union.

Accordingly, IT IS ORDERED that the motion to dismiss is denied and this proceeding is remanded to the administrative law judge for further action consistent with the above.

IT IS FURTHER ORDERED that the administrative law judge shall prepare and serve on the parties a Supplemental Decision containing such resolutions, findings, conclusions, and recommendations as found necessary consistent with this remand. Following service of the Supplemental Decision on the parties, the provisions of Section 102.46 of the Board's Rules and Regulations shall be applicable.

Purolator Products, Inc. and its successor Purolator Products, Inc., Division of Facet Enterprises, Inc. *and* United Paperworkers International Union, AFL-CIO, CLC. Case 11-CA-12446

July 21, 1988

DECISION AND ORDER

BY MEMBERS JOHANSON, BABSON, AND CRACRAFT

Upon a charge filed by the Union on July 21, 1987, the General Counsel for the National Labor Relations Board issued a complaint on December 10, 1987, against the Respondent, alleging that it has violated Section 8(a)(5) and (1) of the National Labor Relations Act.

The complaint alleges that on January 23, 1987, Supervisor Leonard Barber solicited an employee to circulate and obtain other employees' signatures on a petition to decertify the Union; that in mid-March 1987, Barber instructed an employee to provide false information in the event of an inquiry concerning the origins of the petition to decertify the Union; and that also in mid-March, Barber solicited an employee to refuse to cooperate with a Board agent during an investigation concerning the origins of a petition to decertify the Union. The complaint alleges that by these acts the Respondent has violated Section 8(a)(1) of the Act. The complaint further alleges that on February 2, 1987, the Respondent violated Section 8(a)(5) and (1) of the Act by withdrawing recognition from the Union as the exclusive collective-bargaining representative of unit employees, based on a decertification petition that had been obtained through the unlawful assistance of the Respondent, and by refusing to bargain in good faith with the Union since that date.

On December 16, 1987, the Respondent filed its answer admitting in part and denying in part the allegations in the complaint, and raising affirmative defenses. As an affirmative defense, the Respondent contends that the complaint is barred by prior litigation in consolidated Cases 11-CA-12071, 11-CA-12084, 11-CA-12117, and 11-CA-12288 (collectively Case 11-CA-12071 et al.) and that the complaint should be dismissed.[1]

On December 22, 1987, the Respondent filed a Motion for Summary Judgment and a brief in support thereof and in opposition to the General Counsel's motion to remand with exhibits attached, renewing its contention that the complaint was barred by the prior litigation of the issue of withdrawal of recognition in Case 11-CA-12071 et al. The Respondent also contends that in the prior litigation the General Counsel specifically disavowed the theory of withdrawal of recognition, which she now attempts to resurrect.

On January 6, 1988, the Board issued an order transferring the proceeding to the Board and a Notice to Show Cause why the motion should not be granted. The General Counsel filed a response, alleging that the facts in the instant case were unknown to the General Counsel and the Charging Party and could not have been readily discovered by either party prior to the May 18 and 19, 1987 trial of Case 11-CA-12071 et al.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

Ruling on the Motion for Summary Judgment

The undisputed facts show that a petition to decertify the Union was circulated among the Respondent's employees during December 1986 and January 1987. On February 17, 1987, the Union filed a charge in Case 11-CA-12288 alleging, inter alia, that the Respondent had unlawfully withdrawn recognition from the Union on February 2, 1987. On April 30, 1987, the General Counsel issued a consolidated complaint which consolidated Case 11-CA-12288 with Cases 11-CA-12071, 11-CA-12084, and 11-CA-12117 and which alleged, inter alia, that "[o]n or about February 2, 1987, [Respondent] unlawfully withdrew recognition from the Union." On May 18, 1987, at the start of the hearing in Case 11-CA-12071 et al., the General Counsel stipulated that she did not "contend that the Respondent unlawfully assisted or encouraged the [decertification] petition with respect to this proceeding." The General Counsel further stipulated that "[t]he only issue concerning the withdrawal of recognition" allegation of the complaint "is whether Respondent was entitled to rely on the petition in light of the other unfair labor practices" alleged.

On July 21, 1987, the Union filed the charge in the instant proceeding (Case 11-CA-12446), alleging that the Respondent unlawfully assisted or encouraged employees in circulating the decertification petition. In a letter dated July 24, 1987, the Respondent requested dismissal of the charge, citing *Jefferson Chemical Co.*, 200 NLRB 992 (1972).[2] On August 25, 1987, the Regional Direc-

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[1] On December 14, 1987, the General Counsel filed a motion to remand proceedings to the administrative law judge to reopen record, consolidate cases, and conduct hearing in Case 11-CA-12071 et al. In that motion the General Counsel sought to consolidate the instant case with Case 11-CA-12071 et al.

[2] In *Jefferson Chemical Co.*, the Board adopted the judge's grant of the respondent's Motion for Summary Judgment and dismissal of a com-

Continued

289 NLRB No. 99

tor, citing *Jefferson Chemical Co.*, refused to issue a complaint, asserting that the evidence presented, in whole or in part, was known or could have been known to the General Counsel at the time Case 11-CA-12071 et al. was being litigated. The Union appealed the Regional Director's refusal to issue a complaint, and the appeal was sustained. Thereafter, the Regional Director issued the complaint at issue here. As stated above, the instant complaint alleges that the Respondent violated Section 8(a)(1) by certain statements made to employees in January and March 1987 and that the Respondent violated Section 8(a)(5) by withdrawing recognition from the Union on February 2, 1987.

In its Motion for Summary Judgment, the Respondent contends that *Jefferson Chemical Co.* bars the General Counsel from relitigating the issue of the Respondent's withdrawal of recognition from the Union. In her motion opposing summary judgment, the General Counsel asserts:

> During the course of the investigation in Case No. 11-CA-12446, evidence was presented which conclusively demonstrated that during the 10(b) period, admitted supervisor Leonard Barber had asked an employee to sign the decertification petition, directed her to get other employees to sign the petition and instructed the employee to deliberately falsify information if anyone from the Union or the Board asked about his involvement with such petition.

The General Counsel contends that during the investigation of Case 11-CA-12288 the Regional Director was only aware that an employee had signed the petition and had asked others to do the same; and that, while not compelled to do so, the Regional Director unsuccessfully attempted to contact the employee. Thus, the General Counsel argues that the evidence of "supervisory taint" was unknown to both the General Counsel and the Charging Party and could not have been readily discovered by either party prior to the May 18 and 19, 1987 trial of Case 11-CA-12071 et al. The General Counsel further argues that the evidence in the instant case, if credited, would establish that the Respondent urged an employee to mislead the Union and the Board if inquiries were made about the supervisor's involvement with the petition. The General Counsel contends that because the Respondent played an active part in suppressing the evidence, it can not equitably or legally argue for its exclusion.

Relying on *Jefferson Chemical Co.*, supra, we conclude that the Respondent is entitled to summary judgment as a matter of law. The uncontroverted facts establish that on February 17, 1987, the Union filed a charge in Case 11-CA-12288, alleging that the Respondent withdrew recognition from the Union in violation of Section 8(a)(5); that the General Counsel investigated that charge and issued a complaint containing an unlawful withdrawal of recognition allegation; and that at the May 18, 1987 hearing the General Counsel specifically declined to pursue any contention that the Respondent unlawfully assisted or encouraged the decertification petition that formed the basis for the withdrawal of recognition. Nevertheless, the General Counsel now seeks in the instant complaint to relitigate the withdrawal-of-recognition issue relying on the theory she previously disavowed and on events occurring prior to the May 18, 1987 hearing. Under *Jefferson Chemical*, "such multiple litigation of issues which should have been presented in the initial proceeding" is not permitted.[3]

We therefore conclude that the instant complaint is based on events which took place prior to the May 18, 1987 hearing in Case 11-CA-12071 et al. and which were, or should have been, known to the General Counsel by virtue of her investigation of the charge in Case 11-CA-12288. Accordingly, the complaint must be dismissed on the authority of *Jefferson Chemical Co.*

ORDER

It is ordered that the Respondent's Motion for Summary Judgment be granted and the complaint is dismissed.

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plaint, which alleged that the Respondent had engaged in surface bargaining in violation of Sec. 8(a)(5) of the Act. The judge found that the complaint was based on events that were, or should have been, known to the General Counsel through the investigation of a broad refusal-to-bargain allegation in a prior charge. The Board held that the General Counsel is dutybound to investigate all matters that are encompassed by the charge and to proceed appropriately thereafter. The Board stated that "multiple litigation of issues which should have been presented in the initial proceeding constitutes a waste of resources and an abuse of our processes . . . ." 200 NLRB at 992 fn. 3.

[3] We note that, as stated above, the Regional Director initially refused to issue a complaint on the basis of the instant charge specifically because the evidence presented was known or could have been known to the General Counsel at the time Case 11-CA-12071 et al. was litigated.

Member Cracraft additionally notes that the General Counsel has not shown by any admissible evidence that this case would fall outside the scope of *Jefferson Chemical Co.* As set forth in Rule 56(e) of the Federal Rules of Civil Procedure, the General Counsel must rely on more than the bare allegation that the evidence in the instant case was unknown to the General Counsel and was not readily discoverable prior to the hearing in Case 11-CA-12071 et al. Thus, in Member Cracraft's view, the General Counsel's failure to attach a supporting affidavit or exhibit to the motion opposing summary judgment precludes finding a genuine issue as to any material fact.

Purolator Products, Inc. and its successor Purolator Products, Inc., Division of Facet Enterprises, Inc. *and* Dennis J. Roberts *and* United Paperworkers International Union, AFL-CIO, CLC. Cases 11-CA-12071, 11-CA-12084, 11-CA-12117, and 11-CA-12288

July 21, 1988

DECISION AND ORDER

BY MEMBERS JOHANSEN, BABSON, AND CRACRAFT

On September 18, 1987, Administrative Law Judge Lawrence W. Cullen issued the attached decision.[1] The General Counsel filed exceptions[2] and a supporting brief, and the Respondent filed exceptions, a supporting brief, and an answering brief.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings,[3] and conclusions and to adopt the recommended Order.[4]

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge and orders that the Respondent, Purolator Products, Inc. and its successor Purolator Products, Inc., Division of Facet Enterprises, Inc., Fayetteville, North Carolina, its officers, agents, successors, and assigns, shall take the action set forth in the Order, except that the attached notice is substituted for that of the administrative law judge.

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

WE WILL NOT unilaterally implement a disciplinary procedure in connection with the wearing of employee identification badges.

WE WILL NOT deny you union representation during investigatory interviews when the Union is the designated collective-bargaining representative of the employees.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL rescind any disciplinary actions taken pursuant to the unlawful unilaterally instituted disciplinary policy in connection with the wearing of identification badges and WE WILL make whole any employee disciplined under such policy for any loss of pay or benefits, plus interest.

WE WILL remove from our records and files any reference to such disciplinary actions and notify the affected employees in writing of this and that

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[1] In his decision, the judge found, inter alia, that the Respondent did not violate Sec. 8(a)(5) by its withdrawal of recognition from the Union in February 1987. The General Counsel has filed a motion to remand this proceeding to the judge, to reopen the record, to consolidate Case 11-CA-12446 with the instant cases, and to conduct a second hearing on the issue of whether the Respondent violated Sec. 8(a)(5) of the Act when it withdrew recognition from the Union in February 1987. The complaint in Case 11-CA-12446 alleges that the Respondent unlawfully assisted or encouraged employees in circulating a decertification petition in violation of Sec. 8(a)(1) and unlawfully withdrew recognition from the Union, based on the "tainted" decertification petition, in violation of Sec. 8(a)(5).

In *Purolator Products*, 289 NLRB 984 (1988), the Board has granted the Respondent's Motion for Summary Judgment in Case 11-CA-12446 and dismissed the complaint on the authority of *Jefferson Chemical Co.*, 200 NLRB 992 (1972), which prohibits the multiple litigation of issues that should have been presented in the initial proceeding.

As in Case 11-CA-12446, the General Counsel asserts here that evidence concerning the impropriety of the Respondent's withdrawal of recognition was revealed by the investigation of the charge in Case 11-CA-12446, which occurred after the close of the hearing in the instant cases. That investigation allegedly disclosed that the decertification petition may have been tainted by supervisory involvement and assistance. The investigation also allegedly disclosed evidence that the Respondent urged an employee to mislead the Union and the Board if inquiries were made about the supervisor's involvement with the petition. The General Counsel further asserts that the evidence in Case 11-CA-12446 was not known to the General Counsel nor could it have reasonably been expected to have been known by the General Counsel at the time of the litigation of the instant cases. Lastly, the General Counsel argues that, in view of the Respondent's conduct, it cannot legitimately argue unfair prejudice by any delay in the litigation of the "supervisory taint" issue. In light of our ruling on the Respondent's Motion for Summary Judgment in Case 11-CA-12446, we deny the General Counsel's motion to remand this proceeding and to reopen the record.

[2] The General Counsel seeks, inter alia, a visitatorial clause authorizing the Board, for compliance purposes, to obtain discovery from the Respondent under the Federal Rules of Civil Procedure subject to the supervision of the United States court of appeals enforcing this Order. Under the circumstances of this case, we find it unnecessary to include such an order. See *Cherokee Marine Terminal*, 287 NLRB 1080 (1988).

[3] The Respondent has excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

[4] Although the judge ordered that the Respondent rescind any disciplinary actions taken pursuant to the disciplinary policy regarding the wearing of identification badges found unlawful and that the Respondent remove from its files any reference to such disciplinary actions, the judge failed to include these provisions in the notice. We will therefore attach a new notice that includes these provisions.

289 NLRB No. 124

the aforesaid unlawful discipline will not be used as a basis for future personnel actions against them.

PUROLATOR PRODUCTS, INC. AND ITS SUCCESSOR PUROLATOR PRODUCTS, INC., DIVISION OF FACET ENTERPRISES, INC

Paris Favors, Esq., for the General Counsel.
Charles P. Roberts, III and *James M. Miles, Esqs. (Haynsworth, Baldwin, Miles Johnson, Greaves and Edwards, P.A.)*, of Greenville, South Carolina, for the Respondent.

DECISION

STATEMENT OF THE CASE

LAWRENCE W. CULLEN, Administrative Law Judge. This case was heard before me on 18 and 19 May 1987 at Fayetteville, North Carolina, pursuant to a consolidated complaint filed by the Regional Director for Region 11 of the National Labor Relations Board (the Board) on 30 April 1987. The complaint alleges the commission of violations of Section 8(a)(1), (3), and (5) of the National Labor Relations Act (the Act) by Respondent Purolator Products, Inc. and its successor Purolator Products, Inc., Division of Facet Enterprises, Inc. (the Respondent or the Employer) and is based on charges filed by the United Paperworkers International Union, AFL-CIO, CLC (the Union). Respondent, by its answer filed on 8 May 1987, has denied the commission of any violations of the Act.

After due consideration of the evidence and testimony presented at the hearing including the demeanor of the witnesses and the briefs filed by the General Counsel and counsel for the Respondent, I make the following

FINDINGS OF FACT

I. JURISDICTION—THE BUSINESS OF RESPONDENT

The complaint alleges, Respondent admits, and I find that about late January 1987, Facet Enterprises, Inc. purchased the business of Purolator Products, Inc., located at Fayetteville, North Carolina, and since that time has been engaged in the same business operations, at the same locations, manufacturing and selling the same products to substantially the same customers, and has as a majority of its employees individuals who were previously employees of Purolator Products and that it has continued the employing entity and is a successor of Purolator Products, Inc. Respondent is now, and has been at all times material, a Delaware corporation with a plant located at Fayetteville, North Carolina, where it is engaged in the manufacture and distribution of automotive air, gas, and oil filters. During the past 12 months, a representative period, Respondent received at its Fayetteville, North Carolina plant goods and raw materials valued in excess of $50,000 directly from points outside the State of North Carolina, and Respondent is now, and has been at all times material, an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

II. THE LABOR ORGANIZATION[1]

The complaint alleges, Respondent admits, and I find that the Union is, and has been at all times material, a labor organization within the meaning of Section 2(5) of the Act.

III. THE ALLEGED UNFAIR LABOR PRACTICES[2]

The consolidated complaint sets out several alleged violations of the Act by Respondent as follows:

A. An alleged threat of plant closure in January 1986.[3]

B. The alleged unlawful discharge of employee Minnie Blount.

C. The alleged unlawful demotion of employee Willie Lowery.

D. An alleged refusal of representation requested by employee Dennis J. Roberts during an investigatory interview.

E. The alleged unlawful unilateral imposition of a policy of discipline by Respondent in connection with its cross-training program and with the wearing of employee identification badges.

F. The alleged unlawful withdrawal of recognition of the Union by Respondent in February 1987.

A. *The Alleged Threat to Close the Plant*

Former employee Dennis J. Roberts testified that at a monthly communication meeting held on 16 January 1986 conducted by his supervisor, Wayne Wilson, he (Roberts) was asked by Wilson what he knew about unions because Roberts was from the North. Roberts testified that he replied that a black employee named John Jones who had been discharged 2 or 3 days before for sleeping on the job would not have been discharged if there was a union. Roberts testified that Wilson then stated that Respondent could fire whomever it wanted. Roberts testified further on direct examination that Wilson, in response to an employee question, stated that the Union would cause the Fayetteville plant to close, and that two other Purolator plants in Rahway, New

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[1] The Union was certified by the Board in May 1984 following an election held in March 1980. The Respondent refused to bargain with the Union and the Board issued a bargaining Order in November 1984 that was enforced by the Court of Appeals for the Fourth Circuit in November 1985. *Purolator Products*, 270 NLRB 694, 702 (1984), enfd. 121 LRRM 2120 (4th Cir. 1985). The following employees constitute a unit appropriate for the purpose of collective bargaining within the meaning of Sec. 9(b) of the Act:

> All production and maintenance employees employed at the Employer's Fayetteville, North Carolina plant, including warehouse distribution center employees, truck drivers, time keepers, roving inspectors and floor inspectors assigned to the quality control department, excluding all office clerical employees, materials planners, production schedulers, laboratory technicians, print clerks, layout and gauge inspectors, receiving clerks, guards and supervisors as defined in the Act.

[2] The following includes a composite of the testimony of the witnesses at the hearing.

[3] All dates are in 1986 unless otherwise specified.

Jersey, and in Pennsylvania had closed because of high union wages. On cross-examination after review of his earlier affidavit given to the General Counsel, Roberts testified that Wilson had said "they closed Rahway because the Union wages were high and [the] Fayetteville plant could do it cheaper" but that as a result of the Union coming into the Fayetteville plant, "the price—the filters would jump sky high and they wouldn't be—we wouldn't have the competition." In addition to Wilson, Roberts testified that a forklift driver named Emma and Chet Kinsey, an employee who had transferred from the Respondent's Rahway, New Jersey plant were also present.

Respondent called Supervisor Wayne Wilson who testified that Roberts had previously worked for him at a time when Wilson was a third-shift supervisor in components, but that he (Wilson) had transferred to the second shift in September 1985. Wilson testified he did not participate in any third-shift communication meetings after his September 1985 transfer and specifically denied having participated in a third-shift communications meeting in January 1986. Wilson acknowledged that he had conducted a communications meeting in August 1985 during which Roberts spoke about unions saying that there were good and bad points about unions and discussed a problem he had previously had with a union. Wilson's testimony concerning his transfer to the second shift was corroborated by Bobby Pate, a third-shift assistant supervisor (MSA), who testified that Wilson was his (Pate's) supervisor until Wilson transferred to the second shift in September and that Wison had not been in any third-shift meetings thereafter. Pate denied that he or Wilson had ever said that the Rahway, New Jersey plant had been closed as a result of the Union. Additionally, Wilson's employment records were introduced, which set out his transfer to the second shift in September 1985. Respondent also introduced the employment records of Chet Kinsey showing that he had transferred from the third to second shift in August 1985, and of Emma McLauren showing she had transferred from the third shift to first shift in August 1985 and had quit her employment in September 1985. Additionally, Respondent's employee relations manager, Jim Clark, testified that he had researched the employee records of several months around the January 1986 period, but could find no record of a termination of an employee for sleeping on the job.

In addition to the occurrence of the alleged January incident, the date became a matter of controversy at the hearing, and Respondent amended its answer to allege an affirmative 10(b) defense when Roberts placed the date of the meeting on 16 January 1986 in view of the filing of the charge on 16 July 1986. In an effort to bolster his testimony Roberts testifed that he had made notes of the alleged 16 January 1986 communications meeting on a calendar in his home. Roberts was asked to produce the calendar and did so with the month of January missing and testified that his child had torn up the page for the month of January. Respondent also introduced the formal outlines for its monthly communications meetings for the months of August 1985 to January 1986. Only the outline topic for the month of October 1985 concerned the growth of the Fayetteville facility and the closure of other Purolator plants.

Analysis

My review of the demeanor and the testimony of Roberts, who had been discharged by Respondent, convinces me that he was not a reliable witness. At the outset his testimony was riddled with rancor and accusations against the Company and members of its management characterized by unresponsive tirades after questions were posed to him. He characterized one supervisor as the "hitman" for another referring to discipline and on another occasion in reference to an inquiry concerning a date, he launched into a completely unresponsive tirade. Moreover, I found the testimony of Roberts filled with inconsistencies as shown by his placement of individual employees at the alleged meeting of 16 January, who were clearly on another shift and in one case had terminated employment several months before this date. Moreover, regarding the date of 16 January placed on this meeting, which would place the meeting exactly within the 6-month 10(b) period because the charge was filed on 16 July, I found his assertion that he relied on a calendar at home and his subsequent explanation for the missing month of January to be unconvincing.

I thus find that the Respondent has affirmatively shown that the alleged meeting did not occur within the 10(b) period and that this allegation should be accordingly dismissed. Assuming arguendo, that the charge was filed within the 10(b) period, I find that the General Counsel has failed to make a prima facie case, as I do not find Roberts' testimony to be credible as a result of his demeanor and inconsistencies. Assuming that a prima facie case was established, I find that Respondent has rebutted it by a preponderance of the evidence.

B. *The Discharge of Minnie Blount*

Minnie Blount was an 8-year employee who had previously been assigned as one of two routine inspectors on Respondent's oil filter line and had been rated as satisfactory on that line. As the oil filter line became more automated, only one routine inspector was required on the oil line. Blount was transferred to the air filter line and had been assigned as the routine inspector for that line for a period of 9 to 10 months before her termination.

On the air filter line the filters are manufactured and baked in an oven in a mold. After they have been pulled from the oven, they are broken out of the mold by an employee designated as a "mold puller" who removes the filters from the mold and places them on the conveyor belt where they pass by the routine inspector. There is only one inspector on the air filter line, in this case Minnie Blount, on line 5. The routine inspector's job is to check for defective filters and place them aside. There are several types of defects, some of which are correctible: specifically, "feathers" and "flashes" consist of extra plastisol attached to the filter, which are corrected by the inspector's by clearing them off with a metal wire. It is the job of the routine inspector to ensure that no defective filters go past her without being set aside and/or corrected or in the case of feathers and flashes because the next step in the process is the packing of the filters into boxes for shipment to customers. In the event that the feathers and flashes are too many for the routine inspector to clean while the line is moving, she is to set them aside for cleaning at a later time either by herself or by other employees who may assist her in this. She is also responsible for segregating the filters taken off the line by the type of defect and making an hourly count and total of the defects on a form utilized to keep management apprised whether there is a mechanical problem contributing to a number of defective filters. Additionally, the Respondent utilizes a floor inspector whose job it is to select samples of filters that have already been packed into boxes for shipment, and to inspect these packed filters to ensure the integrity of the overall process that the Respondent is not shipping defective filters to its customers. The routine inspector (Blount) was assigned to air filter line 5 and was a part of the quality control section, and reported to Supervisor Barry O'Quinn who had responsibilities throughout the entire plant. However, the line Blount worked on was under the immediate supervision of Line Supervisor James Bryant.

The General Counsel's case relies on a showing of general animus by Respondent against the Union and against its employees' support of the Union, as a result of unfair labor practices found to have been committed by Respondent in early 1980 before an election campaign and the Respondent's subsequent refusal to bargain, after the results of the election until the Board's Order in 1984 as enforced by the circuit court of appeals in 1985. Following the enforcement of the Board's Order in November 1985, the Union requested and received information from Respondent for purposes of bargaining and the first bargaining session was scheduled to begin on 30 January 1986.

On 27 January Blount received a routine 6-month review and received a rating of "unsatisfactory" for quality of work as a result of a warning and suspension she had received in November 1986, for not cleaning her workplace as directed by Assistant Supervisor Billy Autry. She had also received a warning in November 1985.

On 11 November 1985 she received a written warning signed by the supervisor, Barry O'Quinn, for poor job performance for failing to keep up with the standard line speed of 20 filters a minute causing filters to be stacked all over the mold pullers table and a consequent backup of filters on the line and off stacking filters that should have been cleaned of feathers and sent off for packing. On the warning, which was signed by Blount, O'Quinn stated, "Further incidents of this kind could result in more severe disciplinary action including termination." On 18 November 1985, Blount received another written warning and a 3-day suspension for failing to turn in a line scrap report for 2 hours. O'Quinn noted on this written warning and suspension document, which was also signed by Blount, that Blount was frequently turning in scrap reports without dates or the line number and that she had "been counseled concerning her paperwork on several occasions." In this document O'Quinn also recommended that Blount be demoted. Blount had previously received a written warning on 18 October 1985 for her failure on 17 October 1985 to follow the instructions of MSA Billy Autry to clean the pack section before going to another section of the operation. Blount had also received a written warning on 23 October 1985 for poor job performance for her failure on 22 October 1985 to keep up with the standard line speed of 20 filters a minute and for allowing an excessive amount of defective filters to pass her inspection and be packed out requiring that three pallets of filters be reworked.

As a result of being rated satisfactory in all other areas she received an overall rating of satisfactory on 27 January. Blount testified that at her evaluation interview on 27 January she was told by her supervisor, O'Quinn, that she was doing a good job and that she told him of the excessive line speed of the filters coming to her for inspection and of the excessive number of feathers and flashes, which were too numerous for her to handle, and told O'Quinn to tell the management to slow down the line. According to Blount, O'Quinn told her not to worry about it and that he (O'Quinn) had no control over the line. Blount testified further that O'Quinn remarked that she was not wearing her union button as the other inspectors were and that she told him she had lost her button but that she was supporting the Union and that O'Quinn's face became red and he then told her to go back to work. According to Blount when she reported to work on 29 January the line was running excessively fast, and there were an inordinate amount of filters causing her to stack filters all over the place as she was unable to remove the flashes and feathers. She attempted to have O'Quinn slow down the line but he did not do so, and as a result, her workplace was stacked with defective filters and others continued on down the line for packing. O'Quinn told her just to worry about the "real bad" filters. When Blount returned to work the next day she was told by O'Quinn to come to the office and was terminated for poor job performance on 30 January, which was also the day that the first bargaining session was set to begin.

The General Counsel contends that the Respondent's union animus is demonstrated by its past unfair labor practices, including threats of plant closure and discharges in 1980 and its refusal to bargain since 1984. The General Counsel further contends that Blount was rated as satisfactory overall on 27 January. It was not until Blount's support of the Union was disclosed by her to O'Quinn on 27 January that she was summarily discharged 3 days later by Respondent to make a point of the futility of union representation on the beginning day of negotiations after the elapse of 6 years following the election.

The Respondent presents a different picture of what occurred in this case. It produced several witnesses who testified concerning Blount's performance on her job. Mike Hargis, the mold puller who worked alongside Blount, testified that he complained to management on at least two occasions concerning Blount's inability to keep up with the filters coming down the line, which he attributed at least in part to her constant snacking on food, which she brought in a shopping bag, and her continual application of lip treatments. James Bryant, the line supervisor, testified that on numerous occasions Blount was unable to keep up with the line speed, which was 20 filters per minute, and he was required to shut down the line as much as an hour early in order for other employees to clean the filters and reinspect those that had been inspected by Blount. Bryant testified that he had received complaints from other employees including Hargis, the mold puller, who was required to stack filters all over his own work area as a result of Blount's inability to inspect the filters and from the packers who had initially pulled defective filters, but whose job was only to pack and not to inspect. The packers had complained to him that it was up to Blount to inspect the filters. Bryant had on several occasions been required to reinspect all the filters previously inspected by Blount. Elizabeth Carpenter, the floor inspector, also testified that Blount had an excessive amount of defective filters. Specifically, she testified that on 29 January she initially inspected one of the packed boxes of filters at the end of Blount's line and found several defective filters and told Blount about it. Blount asked Carpenter why she had brought it to her attention. Further inspection of other boxes by Carpenter at that time disclosed other defective filters. When Carpenter repeated this to Blount, Blount attempted to place the blame on Billy Autry, the assistant supervisor, who had cleared feathers and flashes from some of the filters placed aside by Blount. However, Carpenter noted in her memo of that evening that the defective filters she found did not bear wire scratches indicating that they had not been cleaned at all, as the wire used to clean the filters leaves scratch marks. John William (Billy) Autry also testified that he had been required on a number of occasions to reinspect whole pallets of filters inspected by Blount. Carpenter rejected several pallets of filters inspected by Blount on the evening of 29 January and Bryant and Autry reinspected them finding numerous defective filters. Pursuant to this Bryant wrote a lengthy memorandum concerning Blount's deficiencies as an inspector and summarizing that the Company had been very lucky to date in servicing its customers given her inadequacies as an inspector. It was thus determined by O'Quinn and other members of management to terminate Blount. Personnel Supervisors James Knox and Donna Ogg both testified that Blount had been offered a demotion to another job in the past in view of her problems as an inspector but declined to take a demotion. Blount denied that she had been offered a demotion but this was refuted by the notation of this recommendation on the written warning issued to her in November by O'Quinn as well as by the testimony of Knox and Ogg, which testimony I credit. At the time of the hearing O'Quinn was no longer employed by Respondent and was not called to testify.

I find that the General Counsel has failed to make a prima facie case of a violation of Section 8(a)(3) of the Act by Respondent's discharge of Blount. Initially, the unfair labor practices referred to by the General Counsel are remote in time, and the discrimination and threats occurred 6 years before Blount's termination. Moreover, Blount's participation in union activities by her own account by the wearing of a button at time when the Respondent had already begun to prepare to bargain with the Union, pursuant to the Board and court Order were slight and no different from other inspectors who also wore buttons. As Respondent points out in its brief, there is no indication in the record that Blount was aggressive in her support of the Union or regarded as a threat by Respondent. *Burlington Industries*, 257 NLRB 712, 727-728 (1981); *New York Delicatessen*, 275 NLRB 959, 966 (1985). I thus find that the General Counsel has proven no more than a suspicion of an unlawful termination, by reason of the timing of Blount's discharge shortly after her disclosure of support for the Union and on the eve of the commencement of bargaining, but has failed to prove that her union activities were a motivating factor in her discharge by Respondent.

Assuming arguendo that the General Counsel has made a prima facie case of an 8(a)(3) violation of the Act by the Respondent's discharge of Blount, I find that Respondent has fully rebutted it by the preponderance of the evidence, which I find overwhelmingly demonstrated that Blount's inadequate job performance was the reason for her discharge. I credit each of Respondent's witnesses as supported by documentation in this regard and find that Blount would have been discharged even in the absence of her engagement in concerted union activities. *Wright Line*, 251 NLRB 1083 (1981), enfd. 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982); *Roure Bertrand Dupont*, 271 NLRB 443 (1984); and *NLRB v. Transportation Management Corp.*, 462 U.S. 393 (1983).

C. *The Demotion of Willie Lowery*

Lowery is a long-term employee who had been employed as a maintenance mechanic by Respondent for its manufacturing lines. In December 1976 Lowery's trousers became entangled in moving machinery, and he sustained severe damage to his knee. In the intervening years he has had seven knee operations and has been told his knee will steadily deteriorate and will eventually have to be rebuilt. During the years he has also sustained a number of other accidents entailing lost time. As a result of his various injuries he has been absent from work 27 percent of the time since his initial injury in 1976, and in 1986 had missed work 17 percent of the time from the beginning of the year until 30 March when he was demoted. Lowery was named as a member of the bargaining committee on behalf of the Union in December 1985 and has long been known as an active union supporter. In early 1986 Lowery's leg gave out on him and he reinjured himself.

The General Counsel contends that Lowery's demotion by Respondent was a result of his support for the Union contending that his absences were not occasioned by other than legitimate work injuries and that he had been highly rated as a mechanic in the past.

The Respondent called Roy Wilson Jr., Lowery's supervisor, who testified that he had repeatedly urged that Lowery be replaced by another mechanic because of his absences from the job making Wilson short handed for mechanics, given his limited budgeted number of mechanics and requiring other employees to cover Lowery's responsibilities necessitating overtime and leading to employee complaints. Additionally Human Resources Director Jim Clark testified that in response to the complaints made to him by Lowery's supervisor, Wilson, he reviewed all of Lowery's attendance records and determined that he had been absent 27 percent of the time since his original knee injury, 17 percent of the time in 1987 and, only recently, Lowery's knee had given out for no apparent reason, Clark determined that Lowery should be demoted in order to cover the mechanic's responsibilities adequately and to ensure for Lowery's safety that Lowery not engage in this type of work, which requires climbing scaffolds, working on moving line machinery, crawling in and around it, and bending and stooping. I credit the testimony of Wilson and Clark. Respondent presented evidence of prior instances where other employees were discharged or demoted as a result of physical conditions precluding their regular attendance and/or their ability to perform the full range of their duties.

I find the General Counsel has failed to make a prima facie case of a violation of the Act by Respondent's demotion of Lowery. I find no relationship between Lowery's concerted activity and his demotion has been established. Rather, I find that the evidence presented by the parties discloses only that Lowery was demoted for sound business reasons concerning his inability to be available for work as a mechanic, and Respondent's legitimate concern for his safety and that of others. I observed Lowery and he appeared to me to be rather frail and unsteady on his feet. I find that his demotion to a sitting job was not the result of discrimination but was consistent with Respondent's past practice of demoting or discharging employees who are unable to be available for work or to perform the full range of duties of their job. I note also that Lowery was told there are other jobs that he may bid on but has declined to do so. I thus find, assuming arguendo, that the General Counsel proved a prima facie case, that it has been rebutted by Respondent by a preponderance of the evidence. *Wright Line*; *Roure Bertrand Dupont*; and *NLRB v. Transportation Management Corp.*, supra.

D. *The Alleged Denial of Representation to Dennis Roberts*

Former employee Dennis Roberts testified that on 24 April 1986 he was working on his machine along with his coworker Marie Tyner and that his supervisor, Robert Tomek, failed to arrive at 5 a.m. to relieve Tyner and Roberts for their break. Roberts had a restroom emergency and left the machine telling Tyner that she could run the machine by herself. When he returned the machine was shut down and Tyner told him that he was "in trouble" and that Tomek wanted to see him at 7 a.m. (after the end of the shift). Roberts testified that before going to see Tomek, he stopped by and saw union bargaining committee head Lee Kirkland who told him to ask for union representation. Roberts testified that when he arrived at Tomek's office, two other supervisors, Tony Martin and Terry Alright, were also in the office and heard what transpired. Roberts told Tomek he wanted union representation and Tomek told him "you're not going to get it" and then asked him (Roberts) why he had shut the machine off. Roberts replied that Tyner had shut the machine off whereupon Tomek said, "We'll see about this," and, according to the testimony of Roberts, "stormed" out to see Tyner. Roberts watched Tomek talking to Tyner briefly and then left and went home. About 10 a.m. Roberts was awakened by his wife, who told him the Company (Personnel Administrator James Knox) wanted him to come to the office because he was being terminated. On his arrival Roberts was told he was being terminated for placing bad wire on the machine. Tomek testified that the restroom incident had occurred on 20 April, the night before the termination incident, and that when he (Tomek) had seen Tyner standing by the machine that had been shut off, Tomek inquired where Roberts was and why the machine had been turned off because he was not substantially late to relieve them. Tomek testified Tyner told him that Roberts had to go to the restroom and that he (Tomek) then did nothing more about it because he perceived this to be an essential reason for leaving which the employer must accept even if it means lost productivity. Tomek denied that he had any discussion of the restroom incident with Roberts or any meeting in his office where Roberts requested union representation or he (Tomek) made any inquiry of Roberts concerning the matter. Tomek's testimony was corroborated in part by Supervisor Tony Martin who denied that he was present at a meeting between Tomek and Roberts.

Tomek further testified that the following night he ordered Roberts to replace a damaged blade on his machine and that Roberts did not follow his previous instructions about how to replace the blade and that it was consequently shattered when the machine was started. Tomek testified that this had happened previously and he therefore said nothing to Roberts but went up to his office and prepared a suspension recommendation for Roberts based on his job performance. At shift change Tomek presented the recommendation to Supervisor George Hyde who told Tomek that this was the second incident for Roberts who had been suspended previously for poor performance and that this would accordingly mean Roberts should be terminated. Tomek and Hyde then reviewed this with Personnel Administrator Knox because all terminations must be reviewed by personnel before implementation, and it was agreed that Roberts should be terminated, whereupon Knox placed the call to Roberts' home because Roberts had left at 7 a.m.

Knox and Tomek testified that when Roberts arrived he requested union representation but was told by Knox that he was not entitled to it because Respondent was informing him of a decision, which had already been made, to discharge him. Hyde testified that the restroom incident was considered in making the termination decision, although no mention of it appears in the termination notice.

The General Counsel contends that a violation should be found in the restroom incident, by the crediting of Roberts' testimony and also in the termination interview because there was some discussion of the reasons for termination. Respondent contends that Roberts' testimony should not be credited and that the termination incident was not an investigatory meeting.

It is well settled that in a union setting, employees who are called to participate in an investigatory interview where they have reasonable cause to believe they may be subject to discipline are entitled to union representation on their request. See *NLRB v. J. Weingarten*, 420 U.S. 251 (1975). However, no such representation is afforded employees if they are merely being informed of a decision that has already been made *Lucky Stores*, 275 NLRB 1438, 1441 (1985).

I credit the testimony of Roberts concerning his request for representation made of Tomek on his entering the office and that Tomek refused this request. Although I have previously discredited Roberts as an unreliable witness, I find his testimony in this instance to be specific and credible, particularly in view of Supervisor Hyde's testimony that the restroom incident was considered in making the decision to terminate Roberts. I find it likely that Roberts shouted to Tomek (as he did on the stand) that he wanted union representation and that Tomek in a kneejerk reaction denied him representation and then asked Roberts why he had shut down the machine. I thus find that Respondent violated Section 8(a)(1) of the Act by the refusal of Assistant Supervisor Tomek to honor Roberts' request for union representation during an investigatory interview, which Roberts had reasonable cause to believe could lead to disciplinary action against him.

Regarding the termination incident, I note as pointed out by Respondent that this was not originally alleged as a violation in the complaint. I also find that this was not an investigatory interview that would entitle Roberts to union representation and thus, Respondent's refusal to grant such representation was not violative of the Act.

E. *The Alleged Unilateral Imposition of Discipline in August 1986 by Respondent in Connection with Cross-Training and the Wearing of Identification Badges*

It is undisputed that Respondent has long had a cross-training program requiring employees to train on other jobs and that it has required the wearing of identification badges. However, the General Counsel contends that in August 1986 it initiated a program of discipline in connection with each of these two matters, and did so unilaterally without first bargaining these changes with the Union. The record, however, contains no testimony or evidence that the Respondent initiated a disciplinary program in connection with cross-training in August 1986, except for the testimony of employee Margie Owens who stated that she willingly engaged in cross-training and worked in other areas and that employees just did it.

Owens testified further that she had been wearing her ID badge, "[m]aybe, not quite a year. I don't know," and she had been told by her supervisor that if she did not have her badge she would "be wrote up" or "[w]e would get points," but that "it wouldn't go in your files," and that "[h]e just explained that it's best, you know, safer that we wore them." Additionally the General Counsel called Jim Clark, Respondent's director of human resources, who testified that there was a series of communications concerning the wearing of identification badges, that some written material was distributed to the supervisors concerning a procedure initiated by the loss prevention council, a safety-related committee, to offer better security within the facility but that he did not believe it was announced verbally. Clark testified that he believed that the standard disciplinary procedure program of counseling, written warning, suspension, and discharge referring to Respondent's rules for failure to wear safety equipment was utilized in wearing ID badges. Clark testified further that there was no announcement in August concerning discipline in connection with the cross-training program and that employees who fail to perform have always been subject to discipline and that the announcement of discipline for failure to engage in cross-training had been made to employees before August and before his own employment with Respondent, which dates back to December 1985. In September 1987 the Local leadership of the Union filed a charge with the NLRB based on these alleged unilateral changes. At a negotiating meeting in October and on four subsequent occasions, Respondent offered to bargain concerning these matters and to delete them if necessary, but the Union refused to discuss them, instead relying on its unfair labor practice charge to resolve them.

I find that the evidence submitted by the General Counsel is insufficient to prove that the Respondent initiated a change in August 1987, by the imposition of discipline in accordance with cross-training. There was no direct testimony about how such a change was implemented or by whom it was implemented, nor was there any indirect evidence of such change. The testimony of Clark supports a finding that a disciplinary program was instituted in the August timeframe in connection with the wearing of identification badges. Additionally, the testimony of Owens shows that the employees were informed of some form of discipline in this program. I find that the General Counsel has thus established a prima facie case of a violation of Section 8(a)(5) and (1) of the Act by the unilateral implementation of a disciplinary procedure in wearing identification badges. I find that the Respondent has failed to rebut this prima facie case by the preponderance of the evidence because it is clear that such discipline was not covered by its safety regulations about wearing protective clothing and equipment. I also do not find that the violation is a mere technical violation as argued by Respondent. Nor do I find that the violation was remedied by the Respondent's offer to withdraw the disciplinary procedure in the wearing of identification badges.

F. *The Withdrawal of Recognition*

It is undisputed that in December 1986 the employees circulated a petition signed by 434 out of a bargaining unit of 761 employees declaring that the employees no longer wished to be represented by the Union and that the Respondent withdrew recognition from the Union in February 1987, assertedly on the basis of a good-faith doubt based on objective considerations. There is no allegation that the Respondent engaged in surface bargaining nor was there any evidence of supervisory taint of the petition. The General Counsel, however, alleges that the

Respondent violated Section 8(a)(5) and (1) of the Act by its withdrawal of recognition because the petition was not circulated in an atmosphere free of unfair labor practices, relying on all the allegations discussed above. I find, however, that in view of my finding of only the two violations of the Act by Respondent, as set forth above, this allegation of the complaint should also be dismissed because I find that these violations were not sufficient to significantly contribute to the loss of majority. One violation occurred in April, another in August, 8 and 4 months, respectively, before the circulation of the petition in December and was remote in time. Moreover, in the overall context of the relationship of the parties, I do not deem these violations to have been significant enough to have caused the loss of majority particularly in view of Respondent's five offers to the Union to bargain concerning the unilateral change, all of which were rejected by the Union and the denial of union representation to a single employee by a low-level supervisor. I find that the recent case of *Johns-Manville Sales Corp.*, 282 NLRB 182, 183 (1986), is controlling because in that case the Board found that the employer had violated Section 8(a)(5) and (1) of the Act by unilaterally changing its layoff policy and unlawfully laying off three employees for 12 weeks. In that case the Board stated:

> [W]e do not view that Respondent's July violation as having been of such a character so as to preclude the Respondent from asserting a good-faith doubt of the Union's majority status some 8 months later in March 1983. As we do not view lightly the Respondent's unlawful unilateral change in July, we do note that this conduct directly affected only three employees who may otherwise have remained working during the layoff absent the Respondent's unlawful unilateral action. Furthermore, the Respondent advanced a reasonable business justification for wishing to retain the junior maintenance employees during the period of the layoff. Moreover, the Respondent continued to meet and bargain with the Union for almost 8 months thereafter. In these circumstances, we cannot conclude that the Respondent's unlawful conduct in July caused the massive disaffection from the Union evident in the employee petition or that it had such a lingering effect so as to taint the Respondent's reliance on that petition as the basis for a good-faith doubt of the Union's majority status.

I thus find that the Respondent did not violate the Act by its withdrawal of recognition from the Union in February 1986.

CONCLUSIONS OF LAW

1. The Respondent, Purolator Products, Inc. and its successor Purolator Products, Inc., Division of Facet Enterprises, Inc., is an employer within the meaning of Section 2(6) and (7) of the Act.

2. United Paperworkers International Union, AFL–CIO, CLC is a labor organization within the meaning of Section 2(5) of the Act.

3. The Respondent did not violate the Act by reason of its termination of Minnie Blount or its demotion of Willie Lowery.

4. The Respondent did not violate the Act by its alleged threat of plant closure.

5. The Respondent violated the Act by denying Dennis Roberts union represenation during an investigatory interview concerning his shutdown of a machine but no violation occurred concerning the discharge meeting.

6. The Respondent violated the Act by its unilateral imposition of a disciplinary procedure concerning the wearing of employee identification badges, but did not violate the Act concerning disciplinary procedure regarding its cross-training.

7. The Respondent did not violate the Act by its withdrawal of recognition from the Union in February 1987, based on objective considerations of a lack of majority of employees' support.

8. The above unfair labor practice affects commerce within the meaning of Section 2(6) and (7) of the Act.

THE REMEDY

The Respondent shall be ordered to cease and desist from engaging in any violation of the Act and to remedy its unfair labor practice by withdrawing the disciplinary procedure in connection with the wearing of identification badges with the employees and to rescind any discipline it may have subsequently imposed on its employees pursuant to the policy and make them whole for any losses incurred as prescribed in *F. W. Woolworth Co.*, 90 NLRB 289 (1980), with interest as calculated in *New Horizons for the Retarded*, 283 NLRB 1173 (1987). See generally *Isis Plumbing Co.*, 134 NLRB 716 (1962), and to post the appropriate notice. In view of my finding that the Respondent did not violate Section 8(a)(5) and (1) of the Act by its withdrawal of recognition from the Union, I am not including a bargaining order in the recommended remedy. I also do not find that the General Counsel has demonstrated the necessity for a visitatorial clause.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[4]

ORDER

The Respondent, Purolator Products, Inc. and its successor Purolator Products, Inc., Division of Facet Enterprises, Inc., Fayetteville, North Carolina, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Denying employees union representation on their request during investigatory interviews.

(b) Unilaterally imposing a disciplinary procedure on its employees concerning the wearing of employee identification badges without first having bargained and reached agreement with the employees collective-bargaining representative.

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[4] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

(c) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Rescind any disciplinary actions taken pursuant to the unlawful unilaterally instituted disciplinary policy in connection with the wearing of identification badges and make whole any employee disciplined under such policy for any loss of pay or benefits, with interest in the manner set out in the remedy section of this decision for any loss they may have incurred as a result thereof.

(b) Remove from their files, and ask the Employer to remove from the Employer's files, any reference to the unlawful discharges and notify the employees in writing that it has done so and that it will not use the discharges against them in any way.

(c) Preserve and, on request, make available to the Board or its agents for examination and copying, all payroll records, social security payment records, timecards, personnel records and reports, and all other records necessary to analyze the amount of backpay due under the terms of this Order.

(d) Post at its Fayetteville, North Carolina facility copies of the attached notice marked "Appendix."[5] Copies of the notice, on forms provided by the Regional Director for Region 11, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material.

(e) Notify the Regional Director in writing within 20 days from the date of this Order what steps the Respondent has taken to comply.

IT IS FURTHER RECOMMENDED that the complaint be dismissed insofar as it alleges unfair labor practices not specifically found.

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[5] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

Contract Cleaning Maintenance, Inc. *and* **Arthur Vasquez.** Cases 13-CA-25063 and 3-CA-25145

July 21, 1988

DECISION AND ORDER

By Chairman Stephens and Members Johansen and Babson

On April 13, 1987, Administrative Law Judge Nancy M. Sherman issued the attached decision. The Respondent filed exceptions and a supporting brief.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and brief and has decided to affirm the judge's rulings, findings,[1] and conclusions, as modified, and to adopt the recommended Order[2] as modified and set out in full below.

We agree with the judge that the Respondent violated Section 8(a)(1) of the Act by giving its employees the impression of surveillance. We further agree with the judge that the Respondent violated Section 8(a)(3) and (1) by demoting and discharging employee Arthur Vasquez and by discharging employee Avdo Hukic.

The Respondent excepts to the judge's conclusion that it unlawfully refused to hire four employees of Chemco Corporation (Chemco) when it replaced Chemco as the maintenance contractor at the United Parcel Service (UPS) Northbrook, Illinois facility on May 24, 1985. The Respondent had retained all former Chemco employees when it took over maintenance operations at four other UPS facilities a month earlier. For the reasons set forth below, we find merit in the Respondent's exceptions.

The judge's conclusion of unlawful retaliatory motivation turns on her finding that the General Counsel made a "*prima facie* showing that Respondent refused to hire the Northbrook employees at least partly because Respondent feared that they would participate in the Union's pressures, including a threatened strike, in an effort to obtain a higher contractual wage rate than Respondent wanted to pay." Earlier in her opinion the judge characterized these union-related considerations as "about the same" as those that had led to the aforementioned unlawful conduct against employees Vasquez and Hukic. We disagree.

The union-related considerations were not "about the same" for the Northbrook employees as for Vasquez and Hukic. Those two discriminatees had been outspoken complainants about the Respondent's wage reduction plans and proponents of strike action, especially during union meetings of May 13 and 20, 1985. On the other hand, one of four Northbrook employees was not a union member, and there is no evidence that any of the three members held union office or that these four employees engaged in any union activity other than attending the May 13 union meeting, at which the new collective-bargaining agreement between Chemco and the Union was announced. In particular, there is no evidence that any Northbrook employee attended the May 20 union meeting at which former Chemco employees already in the Respondent's employ discussed strike action. Since, as found and emphasized by the judge, the Respondent's officials knew what transpired at these meetings, they knew that the Northbrook employees were not engaging in the same union activities as Vasquez and Hukic and had not yet indicated any predilection to strike in an effort to resist wage reductions by the Respondent. Even in the May 21-24 communications with the Respondent about the Northbrook employees' hiring prospects, there is no evidence of any wage or other contract demands by those employees. Consistent with this absence of significant union activity by Northbrook employees, there is no evidence that Vice President and Sales Manager Jack Sullivan or any other agent of the Respondent expressed any union animus in dealing with the Northbrook employees.

Furthermore, there is uncontroverted evidence supporting the Respondent's assertion that it did not hire the Northbrook Chemco employees because of difficulties it had experienced with former Chemco employees at the four UPS facilities it had begun servicing in the beginning of May. Although the Respondent unlawfully discharged Vasquez and Hukic, it also took the following actions, none of which have been alleged to be unlawful: termi-

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[1] The Respondent has excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

In accordance with our decision in *New Horizons for the Retarded*, 283 NLRB 1178 (1987), interest on and after January 1, 1987, shall be computed at the "short-term Federal rate" for the underpayment of taxes as set out in the 1986 amendment to 26 U.S.C. § 6621. Interest on amounts accrued prior to January 1, 1987 (the effective date of the 1986 amendment to 26 U.S.C. § 6621), shall be computed in accordance with *Florida Steel Corp.*, 231 NLRB 651 (1977).

[2] The judge's recommended Order includes a visitatorial clause authorizing the Board, for compliance purposes, to obtain discovery from the Respondent under the Federal Rules of Civil Procedure under the supervision of the United States Court of Appeals enforcing the Order. Under the circumstances of this case, we find it unnecessary to include such a clause in the Order.

289 NLRB No. 131

nated two former Chemco employees at the Addison facility for leaving work early and punching another employee's timecard; issued warning notices for poor work performance and subsequently terminated three former Chemco employees at the Bedford Park facility; and expressed dissatisfaction with the quality of work performed at its other UPS locations. Furthermore, it had received reports of deficiencies in its service from UPS.

Based on the foregoing, we find that the evidence is insufficient to establish that the Respondent unlawfully refused to hire the four Northbrook employees. Accordingly, we will dismiss the complaint allegation regarding this action.

ORDER

The National Labor Relations Board orders that the Respondent, Contract Cleaning Maintenance, Inc., Chicago, Illinois, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Giving its employees the impression of surveillance over their union activity.

(b) Discouraging membership in General Service Employees Union, Local No. 73, Service Employees International Union, or any other labor organization by discriminatorily demoting or discharging employees.

(c) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Offer Arthur Vasquez reinstatement to the job from which he was unlawfully demoted and later unlawfully discharged, or, if such a job no longer exists, to a substantially equivalent job, without prejudice to his seniority or other rights or privileges previously enjoyed.

(b) Offer Avdo Hukic reinstatement to his former job from which he was unlawfully discharged or, if that job no longer exists, to a substantially equivalent position, without prejudice to his seniority or any other rights or privileges previously enjoyed, and make him whole for any loss of earnings and other benefits suffered as a result of the discrimination against him, in the manner set forth in the remedy section of the decision.

(c) Make Vasquez and Hukic whole for any loss of earnings or other benefits suffered as a result of the unlawful discrimination against them, in the manner set forth in the remedy portion of the judge's decision.

(d) Remove from its files any reference to the unlawful demotion and discharges (including, without limitation, the warning notices bearing Vasquez' name and dated May 15 and 21, 1985; and the warning notices bearing Hukic's name and dated May 7 and 9, 1985), and notify the employees in writing that this has been done and that the personnel action in question will not be used against them in any way.

(e) Preserve and, on request, make available to the Board or its agents for examination and copying, all payroll records, social security payment records, timecards, personnel records and reports, and all other records necessary to analyze the amount of backpay due under the terms of this Order.

(f) If possible, post at the Jefferson Avenue and Franklin Park facilities of United Parcel Service copies in English, Spanish, Polish, and Serbo-Croatian of the attached notice marked "Appendix."[3] If such posting is possible, copies of the notice, on forms provided by the Regional Director for Region 13, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. If such posting is not possible, the Respondent shall mail to each employee who works for the Respondent at these facilities, or starts work there within 60 days after the first notice is mailed, a signed copy of the notice in that employee's native language.

(g) Notify the Regional Director for Region 13 in writing within 20 days from the date of this Order what steps the Respondent has taken to comply.

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[3] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

WE WILL NOT give employees the impression of surveillance over their union activity.

WE WILL NOT discourage membership in General Service Employees Union, Local No. 73, Service Employees International Union, or any other union, by demoting or discharging employees.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL offer to reinstate Arthur Vasquez to the job from which he was unlawfully demoted and later unlawfully discharged and to reinstate Avdo Hukic to the job from which he was unlawfully discharged, or, if such jobs no longer exist, to substantially equivalent jobs, without prejudice to their seniority or other rights and privileges previously enjoyed.

WE WILL remove from our files any reference to the unlawful discrimination against Vasquez and Hukic and notify them that this has been done and that this personnel action will not be held against them in any way.

WE WILL make Vasquez and Hukic whole for any loss of earnings and other benefits resulting from our unlawful discrimination against them, less any net interim earnings, plus interest.

CONTRACT CLEANING MAINTENANCE, INC.

Douchan Pouritch, Esq., for the General Counsel.
Gary S. Laser, Esq. and *David Lee, Esq.*, of Chicago, Illinois, for the Respondent.

DECISION

STATEMENT OF THE CASE

NANCY M. SHERMAN, Administrative Law Judge. These consolidated cases were heard before me in Chicago, Illinois, on 17 through 20 November 1986. The charge in Case 12-CA-25063 was filed on 15 May 1985, and the original complaint in that case was issued on 24 June 1985. The charge in Case 13-CA-25145 (as corrected at hearing) was filed on 19 June 1985. A consolidated complaint in both cases was filed on 18 June and amended on 27 June and 18 November 1986.[1] The complaint in its final form alleges that Respondent Contract Cleaning Maintenance, Inc. (counsel were assisted by two senior law students, Elizabeth Grapentine and Christing Naylor) violated Section 8(a)(1) of the National Labor Relations Act (the Act) by creating an impression among employees that their union activities were under surveillance and by threatening an employee with discharge because of his union activities. The complaint further alleges that Respondent violated Section 8(a)(1) and (3) of the Act by demoting and then discharging employee Arthur Vasquez; by discharging employee Avdo Hukic; and by refusing to hire employees Radmila Marsenic, Johnnie King, Francisco Flores, and Josef Skocz; all in order to discourage membership in General Service Employees Union, Local No. 73, Service Employees International Union (the Union).

On the entire record,[2] including the demeanor of the witnesses, and after due consideration of the briefs filed by the General Counsel and Respondent, I make the following

FINDINGS OF FACT

I. JURISDICTION

Respondent is an Illinois corporation, with an office and place of business in Chicago, Illinois. Respondent has at all times material been engaged in the operation of a janitorial service facility. During the calendar year 1985, a representative year, Respondent, in the course and conduct of such business operations, provided services within Illinois valued in excess of $50,000 for United Parcel Service (UPS). UPS is a business enterprise directly engaged in interstate commerce. The Board has repeatedly exercised jurisdiction over UPS's operations for reasons other than its indirect outflow or indirect inflow.[3] I find that, as Respondent admits, it is engaged in commerce within the meaning of the Act. I further find that assertion of jurisdiction over Respondent's operations will effectuate the policies of the Act. *Siemons Mailing Service*, 122 NLRB 81, 85 (1958).

The Union is a labor organization within the meaning of the Act.

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[1] Over Respondent's objection, a motion for leave to amend the complaint in additional respects was granted on 20 November 1986. The February 1987 posthearing brief of counsel for the General Counsel states that he "withdraws" this amendment, and that in December 1986 Respondent's counsel was notified of the General Counsel's intention in his brief to "withdraw" this amendment. No objection to such "withdrawal" has been advanced in Respondent's posthearing brief, which does not discuss the "withdrawn" allegations. I take the foregoing statements by the General Counsel as constituting a motion for leave to amend the complaint by withdrawing the allegations added by the 20 November 1986 amendment. The motion is granted. See Sec. 102.17 of the Board's Rules and Regulations.

[2] Although all of G.C. Exhs. 10 and 10a are physically in the exhibit folder, only part of them were offered and received into evidence. Although the brief of the General Counsel relies on certain portions that were not received, I have disregarded them in making my findings and conclusions.

[3] See, e.g., *United Parcel Service*, 274 NLRB 667, 669–670 (1985), remanded on other grounds sub nom. *Garcia v. NLRB*, 785 F.2d 807 (9th Cir. 1986); *United Parcel Service*, 268 NLRB 1097 (1984); *United Parcel Service*, 263 NLRB 616 (1982); *United Parcel Service*, 261 NLRB 1012, 1013 (1982), enfd. in part, vacated, and remanded in part 706 F.2d 972 (3d Cir. 1983), employer's petition for cert. denied 464 U.S. 960 (1983), the Board's petition for cert. granted, judgment vacated, and case remanded 464 U.S. 979 (1983); *United Parcel Service*, 260 NLRB 11 (1982); *United Parcel Service*, 252 NLRB 1015, 1017 (1980), enfd. 677 F.2d 421 (6th Cir. 1982).

II. THE ALLEGED UNFAIR LABOR PRACTICES

A. *Background*

1. Respondent's labor relations history

Respondent's president, Howard Boltz, founded Respondent's business 34 years ago at the suggestion of a business agent of the Union. Respondent had a bargaining agreement with the Union (the first labor organization with which Respondent ever had a bargaining agreement) for 25 years. Respondent had a bargaining agreement with a temporary "off-shoot" of the Union, and has had bargaining agreements covering all its Government jobs in Chicago, Illinois, and in Washington, D.C. When Respondent first acquired a contract to clean UPS's Franklin Park operation (one of those involved here) about 1978, Respondent applied to its employees at that location Respondent's existing bargaining agreement with the Union; this was the first time that any unionized cleaning firm had performed cleaning work for UPS. Respondent has been a party to at least 30 union bargaining agreements. Apart from the charges in the instant case, no unfair labor practice charges have ever been filed against Respondent.

2. Respondent's takeover of certain UPS operations other than Northbrook

Between 1977 (at the latest) and May 1984, a company called Admiral Maintenance performed the cleaning work at five UPS locations in the metropolitan Chicago area—namely, Franklin Park, Bedford Park, Addison, Jefferson, and Northbrook. Between 1 May 1984 and late April 1985, such cleaning work was performed by Chemco Corporation.[4] The Chemco employees who worked at these locations were covered by a collective-bargaining agreement with the Union, effective by its terms between April 1984 and 30 April 1985.

About the spring of 1985,[5] Respondent submitted bids for all five of these locations. On 19 April, UPS advised Chemco that its cleaning contract was being terminated for all of these locations except Northbrook. About 20 April, UPS advised Respondent that Chemco was being terminated because UPS was dissatisfied with the quality of Chemco's cleaning, and that Respondent was being awarded the cleaning contracts at these four locations. Like Chemco's cleaning contracts covering the UPS facilities, Respondent's cleaning contracts covering such facilities permitted UPS to cancel the contract on 7 days' notice. Respondent took over the cleaning work for the Jefferson location on 28 April; for the Bedford Park location on 29 April; and for the Franklin Park and Addison locations on 1 May.

UPS is a "union company," which regards it as necessary or advisable for its cleaning contractor to enter into a union contract regarding employees who work at UPS locations, and to work in harmony with the existing work force. Before signing these cleaning contracts, UPS had told Respondent that it had to work in harmony with the Union. When Respondent learned that it was taking over these four locations, it so notified the Union by telephone, and further told the Union that Respondent was going to keep the same standards that the Union had in its bargaining agreement with Chemco, except that there would be no more lead persons. Respondent hired all the former Chemco employees who had been working at these four facilities. Further, except that Respondent did not pay a premium for a lead person, Respondent maintained the standards that had been observed under Chemco, including seniority, sick days, and (initially) a pay rate of $12.46 an hour. Respondent never received from UPS any evaluation of any individual's work under Chemco or under Respondent.

B. *Events Before 13 May 1985*

1. Vasquez

A few days before Respondent took over the Franklin Park facility, it was inspected by Frank Corona (Respondent's operations manager), Jack Sullivan (Respondent's vice president and sales manager), and Raymond Palmowski (Respondent's project manager), all of them admittedly supervisors within the meaning of the Act.[6] UPS' maintenance supervisor at that site, between early 1985 and June 1986, was Michael Forti, who had also been UPS' maintenance supervisor at Northbrook for a few months when alleged discriminatee Arthur Vasquez was working there. Chemco's then cleaning crew at the Franklin Park facility consisted of Vasquez, Eddie Steele, Ursula Malinowski, and a nonunit employee whom the record identifies as "Christina." Toward the end of the cleaning employees' shift, about 6:30 a.m., Forti introduced Corona, Sullivan, and Palmowski to cleaning employees Vasquez and Steele. Palmowski said, "If you do good work, we'll keep you. If not, we fire you." Forti said that Vasquez and Steele were "probably two of our better workers," that there had never been any problems with them, and that every time Forti went to either of them with a complaint or a question, they were cooperative and attentive to the problem. Then Forti, Respondent's management representatives, Vasquez, and Steele discussed what supplies were need, where they were kept, and what was to be done to solve consistent problems that had cropped up. Later that evening, Palmowski asked Steele what the employees' current wages were and appeared surprised at the answer. Palmowski said that if the Chemco employees at Franklin Park wanted to work for Respondent, they would have to come down that afternoon and fill out an application. They did so. All three unit employees were taken over by Respondent.

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[4] This is the spelling used in the transcript of testimony and in the briefs. One of the exhibits suggests that the correct spelling is "KIMCO."

[5] All dates hereafter are 1985 unless otherwise stated.

[6] About August 1985, Palmowski was discharged by Respondent, at least allegedly for poor work. During his discharge interview, he became "very mad." Corona testified that he believed Palmowski is the type of person who would be generally truthful if called to testify under oath, but that Corona would be concerned about Palmowski's veracity if called to testify in the instant proceeding, because Palmowski was very upset when Respondent terminated him. I reject the General Counsel's contention that Palmowski's failure to testify calls for an adverse inference against Respondent.

My findings regarding Forti's remarks are based on a composite of credible parts of the testimony of Vasquez, who is the charging party and was called by the General Counsel, and Forti, who was called by Respondent. Sullivan (admittedly a supervisor) and Steele were also called by Respondent, but were not asked about this conversation. Corona, an admitted supervisor called by Respondent, denied being present in the Franklin Park facility on 27 April 1985 (the date that Vasquez attached to this conversation). Corona, however, testified that he and Palmowski visited the Franklin Park facility on 30 April, before Respondent took it over, and that Corona then talked to Vasquez and Steele; nor did Corona deny that Forti made the remarks that Vasquez attributed to him. Forti testified that his remarks about Vasquez and Steele were based on the fact that they came to work and were cooperative, and that Forti had no way of knowing how well Vasquez performed his particular function. Moreover, Forti testified that overall, he had been dissatisfied with Chemco's work. There is no evidence, however, that Forti drew these limitations to Respondent's attention.

2. Hukic

One of the Chemco employees whom Respondent took over at the Jefferson facility was Avdo Hukic, who had been performing cleaning work at the UPS facilities since 1977. During most of this period, he had been a group leader. Hukic had been a member of the Union since 1977, but had never been president, vice president, or member of the grievance committee, or anything else except a member.

On 24 April 1985, while Chemco was still performing the cleaning work, Corona and Raymond Palmowski conducted a "walk-through" inspection at Jefferson. Corona testified that during this inspection he concluded that the floors (which at that time were being cleaned by Hukic) were scuffed and dingy and had a lot of black marks on them, and that "Right offhand" Corona could not recall noticing any other deficiencies.[7] At the conclusion of this "walk-through," Corona and Palmowski advised all the Chemco employees at that location that under Respondent everything would be basically the same, except that Respondent was going to select its own lead person. In Palmowski's presence, Corona told Hukic to fill out an application for employment with Respondent. Hukic did so on the following day, 25 April.

That evening, Palmowski walked into the Jefferson facility, noticed that employee Frank Sloan was not working that night, and asked Hukic why. Hukic said that Sloan was taking a "personal day." Palmowski said, "How come?" Hukic said that "the contract" gave everyone one "personal day" a year. Palmowski, who was "mad," said that Respondent was going to change "everything," and that Respondent "has got its own people who they are going to pay $3 or $4 an hour. Hukic said that the employees had a union contract. Palmowski said that Respondent was going to change unions, too. He told Hukic to come to the office the next day, 26 April. Hukic did come to the office on the next day and asked Palmowski what he wanted. Palmowski said that after Respondent took over the cleaning contract Hukic would no longer be a lead man, that he would have to clean furniture, and that Sloan would be cleaning floors. Hukic, who had been cleaning floors, said that because he had more seniority than Sloan, the contract prohibited Palmowski from thus compelling Hukic to switch jobs with Sloan. Palmowski said that he did not care about "your contract." Then, Hukic turned to Corona and said that Hukic had been cleaning floors for 8 years, that he had more seniority than Sloan, that Palmowski was requiring them to switch jobs, and that cleaning furniture gave Hukic a headache.[8] Corona said, "We can't have an employee like you are. You should quit. You made too much money by Chemco."

After Respondent took over the Jefferson contract on 28 April, Hukic was required to clean furniture and to wash walls; he testified that Respondent required him to perform more work than Chemco had required. He credibly testified that on the nights of 6–7 and 7–8 May, he did the dusting, the spray wiping, and the glass cleaning as well as he had on previous occasions. About midnight between 8 and 9 May, and not long after Palmowski had entered the Jefferson facility, he gave Hukic an envelope. Hukic asked what it was. Palmowski said, "Open the envelope and read it. Tomorrow you get another one." Hukic asked him how he knew what was going to happen tomorrow. Palmowski said, "I know," and left. The envelope contained "Warning Notice #1," dated 8 May 1985 and signed by Palmowski. The notice stated as the reason:

> POOR PERFORMANCE OF WORK.
>
> 1. As per walk thru with UPS manager, Russell Strickland on this date (AM), the following chores were not done acceptably: dusting, spray wiping and glass cleaning.[9]

My findings regarding this Hukic-Palmowski conversation are based on Hukic's uncontradicted testimony. Palmowski did not testify (see above fn. 6). Respondent contends that Hukic is unworthy of belief because the warning notice is allegedly corroborated by Strickland's testimony that after a walk-through at Jefferson, he told Palmowski that the quality of work was not acceptable, that Respondent had a problem, and that Palmowski was "to take care of it." Strickland, however, testified that during his May 1985 "walk-through" he checked not only the desks, telephones, and wastepaper baskets (all of which Hukic was supposed to clean), but also the floors (which Sloan was supposed to clean); and that Strickland did not name any individuals whose work was unacceptable; nor is there any evidence that he specified to Palmowski which tasks were being unacceptably performed. Nevertheless, Sloan received no warnings before Hukic's discharge, on 20 May, and Corona testified that Sloan's work was satisfactory during the first 2 weeks of May 1985. Moreover, although Corona testified that before he approved the 8 May warning notice, Palmowski said that he wanted to give Hukic a warning notice because Palmowski had had a walk-through with Strickland, Strickland was not sure whether this walk-through preceded or followed 8 May. Hukic impressed me as an honest witness, and I accept his testimony about this 9 May conversation.

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[7] Russell Strickland, who in 1985 was UPS maintenance supervisor at Jefferson, credibly testified that in March 1985 he concluded that the floors had not been buffed nor swept and damp-mopped after buffing. On 1 March 1985 he sent a memorandum so stating to UPS District Manager Edward Strempek. There is no evidence, however, or claim that Strickland ever so advised Respondent, or that Respondent saw this memorandum at any material time.

[8] Hukic testified that he developed headaches from the constant bending, and then standing, which were required by cleaning furniture. There is no evidence, however, that he gave this explanation to Palmowski.

[9] The warning contains no rhetorical par. 2.

Shortly before Hukic was scheduled to begin work on 9 May, Palmowski approached him and gave him "Warning Notice #2." This notice, dated 9 May, gives as the reason, "NOT COMPLETING WORK AS DIRECTED: Rooms 101, 102, 103, 104 downstairs not cleaned at all."[10] Palmowski said, "A lot of people cry on my name. You are going to cry, too." Hukic replied that he never cried, and would get some help from somebody. Then, and still before the scheduled start of his shift, he went to the office of UPS feeder manager Chuck Dwyer, who worked the same hours as Hukic and whose area of responsibility included all the rooms downstairs. Hukic asked Dwyer whether he had seen Hukic clean the downstairs rooms every day. Dwyer said yes, and asked what had happened. Showing him the warning letter, Hukic said that Supervisor Palmowski had given it to Hukic and had said that he did not clean rooms 101–104, all of which are in the downstairs area. Dwyer said that this was not true, and that Hukic had in fact cleaned them. Hukic asked whether Dwyer would be Hukic's witness, if needed. Dwyer said, "Any time." Dwyer credibly testified that Hukic had cleaned the rooms in question, to Dwyer's satisfaction, on 7 and 8 May and every other night. Dwyer, however, has never had any building maintenance responsibility and never made any comments to Respondent about Hukic's work on the shift in question. Moreover, although on 19 April UPS District Maintenance Manager Strempek had terminated Chemco's contract because Chemco's cleaning service failed to meet UPS standards, Dwyer testified that he would have been surprised if he had been advised in April 1985 that Chemco's housekeeping work was so inadequate that UPS decided to change contractors.

Corona testified that before Palmowski issued the warning notice dated 9 May and received by Hukic that same day, Corona approved the notice. He further testified that Palmowski said that UPS had had an audit that stated that "this work was not done. It was deficient . . . Hukic was supposed to correct the problem but, then when [Palmowski] went back to see if the problem was corrected, it wasn't."[11] Further, Corona testified that to assist him in approving the warning, he used a document received in evidence as Respondent's Exhibit 1. Corona initially testified that he received this document from Palmowski on the morning of 8 May; he later testified that "if I would have seen [the document] it would have had to be around May 9th; I don't recall . . . I couldn't really say when I had seen it"; thereafter he testified that he "had a memory of" receiving it on 8 May; then testified that he received it on 9 or 8 May; and eventually testified (while having before him both R. Exh. 1 dated 8 May and the writeup dated 9 May) to having received Respondent's Exhibit 1 on the morning of 9 May. This exhibit consists of a printed form of the kind ordinarily used by UPS to memorialize an audit of cleaning work, with certain handwritten entries, including the date of 8 May. Corona was not asked to explain how he interpreted the entries on this exhibit; and as to the period covered by the exhibit, I can conceive of no interpretation that would support the statement, on the 9 May warning slip, that these four rooms were not cleaned at all.[12] For these and demeanor reasons, I do not credit Corona's testimony that in approving the 9 May warning he used Respondent's Exhibit 1. Also, because of the discrepancies between that document and the assertions on the 9 May warning to Hukic, I find that Palmowski did not in good faith base that warning on that exhibit. Accordingly, I find it unnecessary to determine whether Respondent's Exhibit 1 is authentic.[13]

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[10] Unlike "Warning Notice No. 1," this second warning notice did not mention Strickland, who credibly testified that during the first 2 weeks of May, he made only one "walk-through" the exact date of which he could not recall. Moreover, he testified that he could not recall whether, during this "walk-through," he had specifically mentioned these particular rooms.

[11] As discussed below, a purported audit of the Jefferson facility was received in evidence as R. Exh. 1. Hukic credibly testified that he had never seen it before. This testimony aside, he was not asked whether Palmowski's alleged representations to Corona were true.

[12] Corona and two UPS supervisors testified that a check mark indicates that an inspected operation was acceptable and an "X" indicates that it was not. If interpreted in accordance with this system, R. Exh. 1 would show that a total of about five cleaning operations in rooms 101 and 103 were acceptably performed; three of these were operations for which Hukic was responsible. Some items under each of the four rooms are marked with an "X," which means either that the service in question was not performed at all or that it was not performed acceptably.

[13] UPS routinely provides the cleaning contractor with copies of all audits. In accordance with UPS' normal business practice, it discarded in January 1986 its file copies of all audits made in 1985; there is no evidence that Respondent, which received in June 1985 the original Board complaint regarding Hukic, ever asked UPS for any file copy of R. Exh. 1.

During the investigation of the instant charges, which regarding employee Peter Lysiak were dismissed by the Regional Office, Respondent provided the Regional Office with a UPS audit that was referred to in a warning notice specifying Respondent's claimed reason for his termination. Corona testified that during the Regional Office's investigation of the charges, he never specified that Hukic was fired because of a bad audit, and never told the General Counsel that Corona had had R. Exh. 1 in his possession between May 1985 and early July 1985, when he gave it to Respondent's counsel. Corona testified, in effect, that Respondent failed to provide R. Exh. 1 during the investigation because it was not mentioned in Hukic's warnings (although, as previously noted, Corona testified that he used the exhibit to assist him in approving the 9 May warning). UPS' investigation showed that R. Exh. 1 was not written by any of the UPS personnel whose jobs during this period included the preparation of audits. Moreover, a first-page entry apparently purporting to show on the exhibit a performance rating of 25 percent regarding the material covered by the exhibit could not have been prepared in accordance with UPS' practice in ascertaining such a percentage; UPS' system shows a performance rating of about 45 percent. This "performance-rating" notation is made in colored ink, although the "X's" and check-marks were on the document when it was photocopied and Forti testified that Respondent's management usually waited a few minutes while UPS made copies of an audit.

C. *Alleged Interference, Restraint, and Coercion; the Alleged Unlawful Demotion of Vasquez*

When Respondent took over the janitorial work at the UPS Franklin Park facility on 1 May, the janitorial employees, all of whom had worked there for Chemco, consisted of Vasquez, Steele, Malinowski, and Jose Fuentes. In addition to performing janitorial work, until 13 May Vasquez acted as group leader, a position he had also held under Chemco. His duties as such consisted of ordering and keeping up stock and what he described as "supervising" the rest of the employees; Respondent concedes that at no material time was he a supervisor within the meaning of the Act. Chemco had paid him a group-leader premium of 25 cents an hour; Respondent paid him and other group leaders the same as other unit employees.[14]

Steele testified that in his opinion, Vasquez' buffing was unacceptable because it missed spots. Steele further testified that on an unspecified date before 13 May, he told Palmowski that Steele and Malinowski were doing all the work, that Vasquez was not helping them, and that the workload was almost too much for Steele and Malinowski. Steele was not asked whether Palmowski replied; Palmowski and Malinowski did not testify (see above fn. 6). I do not credit the testimony of Steele summarized in this paragraph. Such testimony is difficult to reconcile with his further testimony that he did not complain about Vasquez to Chemco, regarded it as "fair" that Vasquez was a group leader (at a premium rate) under Chemco, and had no resentment at all against him, even though Vasquez was allegedly not doing any work, allegedly performed poor-quality work, and was junior to (and much younger than) Steele. Moreover, Steele at other points in his testimony admitted that Vasquez cleaned the dispatch building and the Fullerton building, and buffed in the Rose building (where Steele spent all of his working day). Furthermore, it is uncontradicted that when changing the work schedule of other members of the Franklin Park cleaning crew on 13 May (see above), Palmowski gave Steele the additional duties of group leader without changing his janitorial duties at all.

About 13 May 1985 Howard Boltz, Respondent's president, received from the Union a telegram requesting a meeting on 15 May to negotiate a contract for Respondent's cleaning employees at UPS. The telegram stated, inter alia, "We are determined to protect [our members'] wages, working conditions and fringe benefits." As previously noted, Respondent was then paying such employees the $12.46 hourly rate set forth in the Union's expired contract with Chemco. Boltz testified to the belief that the prevailing rate for such work in the area was $8.20. Respondent's contract with UPS called for a specified fixed monthly payment from UPS to Respondent.

On 13 May, alleged discriminatee Arthur Vasquez telephoned the group leaders at the various UPS buildings and told them that Respondent's UPS employees were to meet at 8:30 or 9 a.m. that day at the union hall to discuss their contract situation with their union representative. This meeting was attended by 18 or 20 employees, including all 4 of the employees who were then working for Chemco at Northbrook, and whom (the complaint alleges) Respondent discriminatorily refused on 24 May to hire for the Northbrook location, taken over by Respondent on 27 May (see below). During this meeting, Union Representative Edward Radik announced that Chemco had signed a 2-year contract calling for a wage increase of 68 cents an hour. Vasquez said that Respondent's employees "couldn't hesitate too much longer, working without a contract," and that the employees needed to have a contract signed "soon." Also at this meeting, alleged discriminatee Avdo Hukic expressed concern at the fact that Respondent's employees were working without a contract, and further complained about the two warning letters that he had received. Further, employees Jan Guzik and Franciszka Guzik complained about warnings that Respondent had given them on 1 May. Among those who attended this meeting was employee Steele, who testimonially denied telling anyone in management what happened there.

Operations Manager Corona testified that he did not recall any persons telling him about this meeting, and that he found out about it when Respondent received the Union's 13 May mailgram seeking a bargaining meeting. Corona further testified to having read and then signed a document that he described as an "affidavit," and that concludes with the language, "I have read the statement . . . I fully understand its contents, and I certify that it is true and correct to the best of my knowledge . . . . Subscribed and sworn to before me . . . this 30th day of May, 1985. Robert Bell, Board agent, National Labor Relations Board," with the signature of Bell, admittedly the Board agent who investigated this case. This document states, inter alia:

> From about May 13 employees told us that they were having a union meeting. We had written several employees up, Avdo and the Guziks. Employees wanted to know whether there would have been a contract, whether the union would have a contract with us.

Over Respondent's timely objection, this material was received into the record to establish the truth of the contents.[15]

After, but on the same day as the 13 May meeting, Vasquez reported to work at 10 p.m., his usual hour. About 11:30 p.m., while Vasquez was performing his work, employee Steele came up to him and told him that Palmowski wanted to see him in the office. Then, Steele led him to the office, where Palmowski was waiting. Palmowski told Steele to fetch the rest of the cleaning crew. After Steele had left the room, Palmowski remarked to Vasquez, "You like to play dumb games . . . I tried calling you last night and let the phone ring for a half hour and you didn't answer.[16] How is your Com-

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[14] I discuss below part II,H,1,a, the basis for my finding that until 13 May 1985 Vasquez continued to act as group leader under Respondent.

[15] See *Croley Coal Corp.*, 280 NLRB 899 (1986); *United Beef Co.*, 277 NLRB 1014 (1985).

[16] Palmowski had telephoned Vasquez late in the evening of Sunday, 12 May, to ask him for the home telephone number of another Franklin

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munist party doing? I hear you're a Communist leader." Vasquez, who has never been a member of a Communist party and had never discussed politics with Palmowski, said that Vasquez did not know what Palmowski was talking about. Palmowski said, "Well, I hear everything that goes down in the Union . . . . How did the Guziks and Avdo like their reprimands?"

At this point, the rest of the cleaning crew, including Steele, came into the office. Then, Palmowski alleged to Vasquez that the floors had not been buffed in over a week. Vasquez said that he was following a written schedule calling for him to buff the offices twice a week.[17] Palmowski went on to say that Vasquez was no longer the crew's group leader, that Steele would be the group leader from now on, and that the crew should go to Steele with any problems. Further, Palmowski transferred to Malinowski some of the duties that had previously been performed by Fuentes, and transferred to Vasquez some of the duties that had previously been performed by Malinowski. In addition, Palmowski instructed Vasquez to do the buffing of the offices on a nightly basis. Also, Palmowski instructed Fuentes to buff the upstairs floors on a nightly basis.[18] No changes were made in Steele's janitorial duties.

My findings regarding Palmowski's remarks to Vasquez, although they were alone in the office, are based on Vasquez' uncontradicted testimony. Palmowski did not testify (see above at fn. 6). Corona corroborated Vasquez' testimony that on the following day, 14 May, he told Corona that Palmowski had called Vasquez a Communist because he had attended a union meeting on 13 May, and that if Palmowski could not address him in a "business manner," he would prefer that Palmowski not talk to him at all. Moreover, Corona testified that he told Palmowski about Vasquez' telephone call. Further, Steele testified that after he became leadman, but before Vasquez' discharge on 21 May, Palmowski remarked to Steele that Palmowski had heard that Vasquez had told Corona that Palmowski had called Vasquez a Communist. Because of Steele's and Corona's testimony in this respect, and demeanor considerations, I credit Vasquez' testimony about what Palmowski told him privately, notwithstanding Respondent's contention that such testimony should be discredited because Steele testified that the group-leader change was announced to the employees while they were in the lunchroom.

D. *The Allegedly Unlawful Discharge of Hukic*

During a bargaining session on 15 May, the Union asked Respondent to sign an agreement that increased direct wages by $1 an hour, to $13.46, and was otherwise identical to the Union's expired contract with Chemco. As previously noted, Company President Boltz believed that the prevailing wage in the area for such work was $8.20 an hour. He told Union Representative Radik that Respondent was not willing to pay any more than that. Corona credibly testified at one point that during this 15 May bargaining session, Radik stated that during the 13 May union meeting Hukic, among others, had protested some writeups he had received. Corona, however, elsewhere testified that Radik did not name the employees who attended the meeting or who there complained about their writeups, and that Corona did not know whether Hukic had spoken out at the union meeting. On the following day, 16 May, Corona telephoned Radik that the wages in the Union's proposed contract were too high. Radik said that he had to have an answer by the next day, 17 May. Corona said that on that day Respondent would notify Radik whether it would go along with the Union's proposal.

Corona testified that the decision to discharge Hukic was made by himself and Palmowski, and was made on Thursday, 16 May, or Friday, 17 May. Corona further testified that he based his decision on a report from Palmowski that Hukic's "work hasn't improved since the job class—since he was changed and the work wasn't getting done properly." There is no evidence that Hukic had been criticized for his work since receiving the warning notice, dated 9 May, which was allegedly, but not in fact, based on Respondent's Exhibit 1.

By telegram dated 17 May, Boltz advised the Union that its proposed contract was "unacceptable." He testified that by that time he was fearful of a strike. By mailgram sent that same day to all the unit employees, Corona stated that Respondent "does not recognize the Union . . . at your job location. If you choose to continue employment with us you must be appraised [sic] of our company's wages and working conditions that become effective Sunday May 19, 1985. Contact our office Saturday by phoning . . . for this information."[19] Among the employees to whom Corona sent this 17 May mailgram was Hukic, whom Corona and Palmowski allegedly decided on 16 or 17 May to discharge. Corona testified that on 17 May, he and Palmowski asked employee Maria Zawartka, who at that time was working for Respondent at another location, whether she "wanted that job" and that she said, "Yes." Zawartka, who at the time of the hearing still worked for Respondent, did not testify. Corona testified that Zawartka had

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Park employee whom Palmowski wanted to work at the Addison location.

[17] As previously noted, this conference took place on 13 May, a Monday. Under Vasquez' buffing schedule, the upstairs offices would not have been buffed since Thursday, 9 May, and the downstairs offices would not have been buffed since Wednesday, 8 May.

[18] My findings in these two sentences are based on Vasquez' undenied testimony. Vasquez described the building where he and Fuentes performed these duties as the "main building." Vasquez' other testimony indicates that he habitually refers to the Fullerton building as the "main building." Steele's testimony refers to the Rose building as the "main building." Both men testified that the building they respectively described as the "main building" was not the building equipped with an alarm system.

[19] Corona testified that Respondent did not consult with an attorney before drafting and sending this letter, and that Respondent thereafter continued to bargain with the Union. Neither the charges nor the complaint contains an 8(a)(5) allegation. For this reason, and because the propriety of Respondent's bargaining with the Union was not litigated before me, I reject the General Counsel's contention (Br. at 11) that union animus and a discriminatory motive are shown by "Respondent's withdrawal of recognition," and the fact that the employees' wage cut was effected unilaterally.

to be trained for Hukic's job, and that 19-20 May was the earliest shift during which she could be trained.

On 18 May, Hukic received his copy of the 17 May mailgram to employees. Thereafter, on 18 or 19 May, he telephoned Respondent's office and spoke to President Boltz. After identifying himself, Hukic asked what the telegram meant. Boltz said that from then on, Respondent was going to pay Hukic $8.20 an hour, rather than the $12.46 he had been receiving. Hukic said, "We've got a contract with union. You can't destroy union." Boltz said, "Yes, I can"; and asked whether Hukic was still coming to work. Hukic said that he thought so. Boltz said that the conversation was being tape recorded. Hukic said that he did not care. He went on to say that on the following Monday, 20 May, he was going to talk to the Union, and, if necessary, to the Labor Department and "Washington, D.C." Boltz said that this was a good idea.[20]

On Sunday evening, 19 May, Palmowski drove Zawartka to the Jefferson Avenue facility. That evening, both Sloan and Hukic were working there. Palmowski told Hukic, "As of tonight, [Zawartka] is going to work with you. You have to teach her tonight, show her how and what she has to do." Further, Palmowski made certain representations to Hukic about how much Boltz allegedly had paid for recording on Saturday the telephone calls made in response to the mailgrams.[21] In accordance with Palmowski's instructions, Hukic showed her the work. Although teaching new employees had been among Hukic's duties as group leader, he was no longer a group leader. Zawartka is Polish-speaking. Palmowski speaks Polish and knew that Hukic, although ethnically Yugoslavian, is able to speak Polish. The record fails to show whether Sloan can speak Polish.

The shift worked by Hukic, Sloan, and Zawartka ended at 6:30 a.m. on 20 May. About 8:30 or 9 that same morning, about 15 people, including Hukic and Vasquez, attended another union meeting. The employees showed to the union representatives the 17 May mailgrams that the employees had received. The union representatives expressed surprise at the mailgrams, of which these representatives had not been informed. The employees also told the Union about the 30-percent cut in their wages. Radik said that the employees could strike if they wanted to, but that they should wait until the Union sent out strike notices to Respondent, the UPS, and the Teamsters Union. Meanwhile, Radik said, the employees should go to work. Vasquez expressed the view that a strike would be the employees' only choice in the matter. Steele, who attended this meeting, testified that he never told anyone in management what happened there. The record fails to show whether Zawartka attended.

Corona testified that between 10 and 11 a.m. on 20 May, Steele, Hukic, and several other employees telephoned Corona's secretary (who noted these calls on a memo pad) that they were going to come to work and that the Union had told them to come to work if they wanted to keep their jobs. On 20 or (more likely) 21 May, Respondent received from the Union a mailgram, dated 20 May and bearing the hour of 2:14 p.m. eastern standard time (that is, 1:14 p.m. central standard time and 2:14 p.m. central daylight time), which stated, "Since you refuse to recognize the existing contract . . . we are hereby notifying you of impending strike action."[22] Corona testified that on 20 May, at an hour that he was not asked to give, he asked Zawartka what she thought of the job, and again asked her whether she wanted it; and that she again said yes. Corona further testified that, thereafter, on a date and at an hour he was not asked to give, he told Palmowski to terminate Hukic. Shortly after 4 p.m. on 20 May, Palmowski telephoned Hukic and, without giving him a reason, told him that he was fired. Thereafter, Zawartka performed Hukic's job at an initial rate of $5 an hour.

Corona testified that he visited the Jefferson facility on at least two occasions after Respondent took it over on 28 April 1985, and that he observed deficiencies in the cleaning of both the floors and the furniture, which were the respective responsibilities of Sloan and Hukic before Hukic's discharge. The record fails to show whether these visits were made before or after Hukic's discharge.

E. *The Allegedly Unlawful Discharge of Vasquez*

1. Sequence of events

About 2 a.m. on Friday, 17 May, Palmowski handed Vasquez an envelope and said, "Welcome to the Company." The envelope contained a "Warning Notice #1 dated 15 May, signed by Palmowski and stating that a copy had been sent to Corona. The warning stated, in part, "Poor peformance of work, especially buffing. You have five days to bring your work up to the degree of cleanliness expected by UPS . . . . You spend too much time driving electric cart." On an undisclosed date before 13 May, UPS Maintenance Manager Forti had complained to Palmowski that Vasquez was using an electric cart that was needed by UPS personnel to do their own work. On 1 May, however, Corona had seen Vasquez use an electric cart to move supplies for Respondent. Moreover, on undisclosed dates before 17 May, Vasquez had used the electric cart to drive Palmowski to his car in the parking lot. Nonetheless, before Palmowski gave Vasquez this document, nobody from Respondent, UPS, or Chemco had ever told him not to use the electric cart, which he had been using to shuttle supplies between the buildings and to haul garbage.[23]

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[20] My findings in this paragraph are based on a composite of credible parts of the testimony of Hukic and Boltz. Boltz testified that this telephone conversation was initiated by him. He further testified that apart from initially stating (in response to Boltz' alleged inquiry) that Hukic had not received the mailgram, Hukic said nothing at all; Boltz specifically denied that Hukic said he would check with the Union. Because the telegram did not specify the employees' future wage rate, and because Hukic has a limited command of English (which is not his native language), I regard his version of the conversation as more probable than Boltz' version. Further, because Boltz admittedly never advised Hukic that the tapes of this conversation had been erased by reuse, Hukic had every reason to believe, when he testified, that the tape would impeach any misstatements by him regarding the conversation. Moreover, Hukic's demeanor impressed me more favorably than did Boltz'. Accordingly, I credit Hukic.

[21] It is unclear whether the $100 figure given by Palmowski referred to $100 per call, $100 for the calls made to or by Boltz (about 3), or $100 for all the calls made by any management personnel (14 at most).

[22] My finding that Respondent likely did not receive this mailgram until 21 May is based on Boltz' testimony that it was on this date that he began calling the Union to ask, "What does it mean, what do you want to do, we are always ready to sit down and talk." Moreover, Corona at one point testified that this mailgram arrived in the morning mail on 21 May (see below, part II,E,2,c).

About 5:30 or 6 a.m., Forti came into his office. Vasquez asked him if there was a problem in the building. Forti said that there had been a few problems, but nothing particularly serious.[24] Vasquez showed him the written warning and asked whether Forti thought Vasquez was doing a good job. Forti said that although he himself had no problems with Vasquez' work performance, Forti did not really know whether Vasquez was doing a good job individually, because UPS audits covered the entire building or a sampling of the entire building, and covered the service and not the individual. Forti went on to say that Vasquez was obviously having a serious problem if his employer had gone to the extent of writing him a warning letter; and that when Forti got to that point with one of his own employees, that employee was in a serious situation and should at least try to work it out with his supervisor. Forti further said that he had heard (from a source he did not give, so far as the record shows) that Respondent was trying to build a case against Vasquez to terminate him; and expressed the opinion that the warning notice was "their start of building their case."[25] Regarding the electric cart matter, Forti said that UPS had been advised, for insurance reasons, not to permit outside "vendors" to use equipment such as electric carts, and that the electric cart had to be kept on a battery charger when UPS personnel were not using it so that the cart would be usable when they needed it again. Forti suggested that Vasquez use one of the UPS' pushcarts instead.

Vasquez worked two more shifts for Respondent (17-18 and 20-21 May), during which Corona visited the Franklin Park facility at least once. He testified that during the visits, he noticed that "basically, [Vasquez'] buffing was down." During the visits, Vasquez ignored Corona's "hello" and walked on. On previous occasions, Vasquez had been "real friendly" or, at least, had said hello. Corona testified that to him, Vasquez' conduct in this respect showed "a definite attitude change." When asked whether Corona had a conversation with Palmowski after 15 May about Vasquez' work, Corona testified, "I know we were discussing it. I can't remember anything specific, what he was saying, but I knew he was talking about an attitude change and that the work wasn't really up to par, you know, for the job itself."

Early in the morning of Saturday, 18 May, Vasquez received a telephone call from Company President Boltz, who asked him whether he had received a copy of the 17 May mailgram. When Vasquez said no, Boltz told him that the conversation was being recorded, and then read him the mailgram, which (as previously noted) states that Respondent "does not recognize the Union" and, in effect, that Respondent was changing the employees' wages. Then, Boltz said that if Vasquez wanted to work for Respondent, he would have to work under Respondent's conditions. Boltz asked him whether he was scheduled to start his workweek on Sunday or Monday night. Vasquez said that he was scheduled to start on Monday, 20 May. Boltz said that Vasquez had as late as Monday afternoon to contact Respondent and let it know whether he was coming to work under these conditions. Vasquez said that he had no remarks to make until he spoke to his union business representative. Boltz testified that during this conversation, Vasquez was somewhat surly and gruff.[26]

As previously noted, at a union meeting attended by Vasquez and Steele on the morning of 20 May, Vasquez advocated a strike for a new contract, and union representative Radik said that strike notices would be sent out. Also on 20 May, Respondent received Vasquez' initial charge, alleging discrimination against him since about 13 May.[27] Boltz testified that receipt of this charge was quite a shock to him. On the evening of 20 May, a Monday, Vasquez reported to work at his usual hour of 10 p.m. This was Vasquez' first scheduled shift after his conversation with Boltz. Vasquez testified that an hour or two after the shift began, Palmowski told him to return to his regular buffing schedule, which was buffing the upstairs offices on Tuesdays and Thursdays and the downstairs offices on Mondays and Wednesdays.[28] After Vasquez had acknowledged these instructions, Palmowski walked out the door.[29]

About 2 or 2:30 a.m., while Vasquez was working upstairs in the dispatch building, Steele entered that building and called him. Vasquez came down the stairs and sat down. Steele asked him to cut some corners on his regular work and buff the floors upstairs. Vasquez said that he was already cutting as many corners as he could to perform all of his regular work assignment. He said that if Steele wanted him to, he would stop performing his regular work and buff the upstairs floors for Steele. Steele said that he would get these floors buffed by employee Fuentes, whose regular job consisted of the buffing in question[30] and whatever else Steele wanted him to do. It is undisputed that Steele did in fact have Fuentes perform the work that Steele had asked Vasquez to do.

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[23] Steele testified that "every time I would look up . . . I would see" Vasquez riding the electric cart. Steele further testified that concerning his alleged complaint to Palmowski before 13 May about a heavy workload, Steele told Palmowski that Vasquez "was just riding around, he was doing more talking and riding and we were doing the work." I do not accept this testimony, for the reasons set forth concerning Steele's general testimony about his alleged complaints regarding Vasquez (see above, part II,C).

[24] This finding is based on Forti's testimony that he had "probably" received "a few" complaints and that he relayed them to Palmowski, and on Vasquez' testimony that Forti did not say that the Franklin Park audits showed the work there was bad and needed improvement.

[25] My finding in this sentence is based on Vasquez' testimony. When asked whether Forti had told him that Forti thought Respondent was doing something wrong in writing Vasquez up, Forti replied, "Not that I can remember." This testimony aside, Forti was not asked about the remarks referred to in the sentence to which this footnote is attached.

[26] My findings regarding the Vasquez-Boltz conversation are based on a composite of credible parts of their testimony. Boltz testified at one point that as of 21 May, he did not know that Vasquez had threatened to go to the Union about the cut in his wages. Boltz, however, elsewhere testified that during this 18 May conversation, "I believe" or "I think" that Vasquez said he would check with the Union and see what it advised him to do. Moreover, a portion of Boltz' prehearing statement (received without objection for purposes of impeachment or corroboration) states that Vasquez "said he would check with his union. 'I don't know what I'm going to do until I talk with the Union.'" Furthermore, because Boltz admittedly never told Vasquez that the tapes of this conversation had been erased through reuse, Vasquez, when he testified as the first witness, had every reason to believe that these tapes would impeach any misstatements by him about this conversation, including his testimony that he said he would speak to the Union.

[27] The receipt was signed by Corona's wife, who works as a secretary in the same suite of offices as her husband and Boltz.

[28] Vasquez testified that this assignment was in the "main building" (see above, fn. 18).

[29] My findings regarding the Palmowski-Vasquez conversation are based on Vasquez' uncontradicted testimony, which I credit for the reasons stated below part II,E,2,a. Palmowski did not testify (see above, fn. 6).

My findings in the foregoing paragraph are based on a composite of credible parts of Vasquez' and Steele's testimony. Steele testified that he told Vasquez to buff only in front of the "bosses' office," an 8-minute job, to which Vasquez replied that he would do it if he had time; and that Steele did not say he would have Fuentes do the job. For demeanor and other reasons discussed below, part II,E,2, I do not credit the foregoing testimony by Steele. I do not accept the contention in Respondent's brief that Steele's version of this conversation should be accepted because Vasquez initially testified (although he withdrew this testimony on cross-examination) that the conversation took place in the Rose building. I am unable to perceive why he should believe that this latter testimony (and not his corrected testimony) would add credence to his testimony that at that time he had 2-1/2 or 3 hours' work to do in the Rose building, as well as 1-1/2 hours of work to do in the dispatch building.[31]

As previously noted, on 20 May or in the morning of 21 May, Respondent received a telegram from the Union "notifying you of impending strike action." Corona testified that Respondent thereupon advised UPS of the "impending strike" and that UPS directed Respondent, if there was a strike, to use a particular door. He went on to testify that on 21 May he or Sullivan called all the employees to ascertain whether they were coming to work that night or were going to strike, and that all employees reached by management said they were coming in. About 3:30 p.m. on 21 May, Corona telephoned Vasquez, said that Corona had heard that "you" were supposed to go on strike today, and asked whether Vasquez was going to work. Vasquez said that he had not heard anything about it, and planned to be at work as scheduled. Corona asked him to use the side entrance if it were still open when he arrived.[32]

About 15 or 20 minutes later, Vasquez received a telephone call from Boltz. Boltz said that he had received some complaints that the floor had not been buffed. Vasquez said that Palmowski had told him to follow the schedule of buffing the upstairs on Tuesdays and Thursdays and the downstairs on Mondays and Wednesdays. Boltz said that this was "aside from the point," and that he was "still going to have to terminate your employment."[33] Boltz testified that after receiving the Union's "impending strike action" telegram, he tried three times on 21 and 22 May to call the Union about "what does it mean, what do you want to do, we are always ready to sit down and talk"; but that he received no response.

Vasquez had started to work under Admiral as a janitor at a UPS facility, and was taken over by Chemco when it took over the UPS cleaning. While employed by these two firms, he had never received any disciplinary actions, such as warnings or suspensions. On 14 April 1986, almost a year after Respondent discharged him, he was reemployed by Admiral at $5 an hour (that is, $10,400 a year for 52 weeks of 40 hours each). By the time of the hearing in November 1986 he was receiving $23,000 a year as a field supervisor.

2. Reasons for credibility findings; Respondent's evidence regarding the events on the day of Vasquez' discharge

a. As previously noted, Vasquez testified that at 10 or 11 p.m. on Monday, 20 May, Palmowski told him to return to his former schedule of buffing the upstairs offices on Tuesdays and Thursdays and the downstairs offices on Mondays and Wednesdays. Steele testified without objection or limitation that about 10:30 or 11 that same evening, Palmowski told Steele that Palmowski had told Vasquez that he had to buff upstairs, and told Steele to "make sure that he does it" (cf. cases cited below at fn. 39). Palmowski did not testify (above at fn. 6).

Steele went on to testify that later during that shift, he told Vasquez that "the upstairs hallway near the bosses' office, had to be buffed," a job that (according to Steele) would take 5 to 8 minutes and that Fuentes in fact performed before the shift ended. Moreover, Steele went on to testify that Palmowski telephoned Steele at home on the morning of 21 May to find out whether Vasquez "buff[ed], like I told him," and "got mad" when Steele said that the job had been done by Fuentes. I think it unlikely that Palmowski would have been so concerned at having a 5- to 8-minute job performed by Vasquez (or any other particular employee), that Palmowski would have told Vasquez to perform it, then told his leadman to see that Vasquez did it, then telephoned the leadman at home to find out whether Vasquez did it, and got "mad" when advised that someone else had done it. Moreover, there is no evidence that when asking Vasquez to perform the buffing job on 21 May, Steele made any claim that he was relaying instructions from Palmowski. Accordingly, and for demeanor reasons, I credit Vasquez' testimony that the job Steele asked him to perform on 20 May was buffing the upstairs floors, and discredit Steele's testimony that the job consisted merely of buffing in front of the "bosses' office." For similar reasons, I do not credit Steele's testimony that on 20 May, Palmowski told Steele to make sure that Vasquez obeyed

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[30] Regarding which building was involved, see above, fns. 18 and 28.

[31] My ultimate determination in this case is in no way affected by whether Vasquez was in fact too busy, or sincerely believed he was too busy, to perform the task Steele asked him to do.

[32] Regarding the date and substance of this conversation, my findings in this paragraph are based on Vasquez' and Corona's mutually corroborative testimony. As to its hour, my finding is based on Vasquez' testimony. I do not accept Corona's testimony that the conversation occurred about 10 or 11 a.m. As discussed below, part II,E,2,c, Corona's recollection of the sequence of events on that day was confused in the extreme.

[33] My findings regarding to the substance of this conversation are based on Vasquez' testimony. For reasons discussed below, part II,E,2,d, I do not accept Boltz' somewhat different version.

Palmowski's instructions that "he had to buff upstairs," and that on the morning of 21 May, Palmowski reproached Steele by telephone because he had not seen to it that Vasquez buffed in front of the manager's office. Further, because of my finding regarding what Steele asked Vasquez to do, and for demeanor reasons, I credit Vasquez' testimony about what Palmowski told him on 20 May.

Finally, because of my finding that Vasquez otherwise gave an accurate account of his conversation with Steele on 20 May, because Steele admitted that Fuentes in fact performed the work Steele asked Vasquez to do, and for demeanor reasons, I credit Vasquez over Steele regarding their 21 May conversation (to the extent that their testimony differs), including Vasquez' testimony that Steele said he would have Fuentes perform such work. I do not agree with Respondent that Vasquez' testimony in this respect is impeached by his failure to tell this to Boltz when he told Vasquez, during the discharge conversation, that the floor had not been buffed. Vasquez obviously thought that Boltz was referring to Vasquez' failure to buff the offices, which Palmowski had removed from his work schedule for the preceding shift, rather than Vasquez' failure to perform the buffing job that Steele told him Fuentes would perform, which Fuentes did perform, and which was on Fuentes' regular work schedule.

b. On 21 May, Steele left the Franklin Park facility at 6:30 a.m. and drove home, where he arrived at 7 or 7:15 a.m. He testified that later that morning, on his home telephone, he had a conversation with Palmowski that Steele initially timed about 8 a.m. and later timed as occurring at an hour that enabled him to reach Respondent's office, a 10-minute drive from his home, by 8:30 or 9 a.m. Steele testified that during this conversation, Palmowski asked him whether Vasquez had performed the work that Steele had told him to perform, Steele said no, and Palmowski told him to come down to the office to write Vasquez up. Although at certain points Steele expressed some uncertainty about who initiated this call, he mostly testified that Palmowski called him, testimony that leaves unexplained how Palmowski acquired the alleged suspicion that the work in question had been performed by an employee other than Vasquez.[34] On direct examination, Steele testified that he remained at home between his arrival at 7 or 7:15 a.m. and his conversation with Palmowski on Steele's home telephone. On cross-examination, however, he testified that between about 7:45 a.m. and this telephone conversation, which at certain points in his testimony he timed as about 8 a.m., he drove his wife to her job in the Loop (Chicago's central business district), a round trip of 8 or 9 miles on an expressway in rush-hour traffic.

Steele testified that in Respondent's office on 21 May, and sometime between 8:30 and 9:45 a.m., he related to Palmowski the incident (earlier that morning) when Steele had asked Vasquez to perform an additional buffing operation; and drafted, signed, and gave to Palmowski the following "Warning Notice #2" to Vasquez, dated 21 May and stating, "You were advised that the buffing must be done in front of managers [sic] office (long corridor) and you did not do this work." Steele testified that during this conversation in Respondent's office, he told Palmowski that Vasquez "refused" to perform the work; and that during Steele's telephone conversation earlier that morning, he told Palmowski that Vasquez "wouldn't do it." I do not credit Steele's testimony in these respects because no such averment is included either in the "Warning Notice #2" or in Steele's testimonial account of his conversation with Vasquez.

c. Corona testified that on the morning of 21 May, he was told (1) that about 10:30 or 11 p.m. on 20 May, Palmowski had told Vasquez to do "some buffing of the second floor of the UPS area";[35] (2) that about 3 hours later, Steele had "also" told Vasquez about "buffing this area upstairs on the second floor landing;" and (3) either that "he didn't do it" or that he "refused to do it."[36] When asked who told Corona this, he testified, "I either learned it from Eddie Steele when he came in for the writeup or I learned it from [Palmowski] when he came in *earlier*" (emphasis supplied). Steele did not testify to conversing at the office that morning with anyone but Palmowski. Steele testified that before leaving the office that morning, he gave the signed writeup to Palmowski; that when Steele left the office, "I suppose [the writeup was on somebody's desk or in the hands of Mr. Palmowski;" that Steele did not know, when he left the office, whether Corona was there; and that Steele probably left about 9:30 or 9:45 a.m. Corona testified that he did not reach the office until about 10 a.m. on 21 May, and that he found warning notice 2 on his desk when he arrived.[37] He did not testify that he conversed with Palmowski before reaching the office that morning. Moreover, Corona initially testified that he and Boltz were in Boltz' office when Corona first learned of the Vasquez incident, and further testified that Boltz did not come into the office that day until after Corona's arrival about 10 a.m. On direct examination, Corona initially testified that on his initially receiving a report in Boltz' presence about the Vasquez incident, he relayed the report to Boltz, who said that Vasquez "can't really do this" and immediately tried to telephone him. On the following day, but still on direct examination, Corona testified that he saw the warning notice 2 about 10 a.m. on 21 May;

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[34] Steele testified that during this telephone conversation, Palmowski said "to meet him down to the office, that he would be down there about 8:30 or 9 o'clock." Although such testimony strongly implies that Palmowski was not telephoning from Respondent's Chicago office, and although Palmowski's job required him to visit the various locations where Respondent performed cleaning work, Steele was not asked to explain how, if he initiated the call, he knew where to reach Palmowski by telephone. Respondent's office doors are not unlocked until 8:30 a.m. at the earliest.

[35] The only direct evidence regarding what Palmowski told Vasquez that day is Vasquez' credible testimony that Palmowksi told him to return to his former schedule, which required less buffing. According to Steele's discredited testimony, Palmowski told him that Palmowski had told Vasquez "that he had to buff upstairs."

[36] As previously noted, the warning notice #2 refers to "buffing in front of managers office (long corridor)," and states that Vasquez "did not do this work." See also below at fn. 38.

[37] In contending that Corona varied in his testimony about the hour of the day when he first saw this document, the General Counsel misreads the portions of the testimony on which he relies.

that he then proceeded to do his normal work; that "sometime that morning, I went into [Boltz'] office and discussed" that warning notice; that "Through our discussion of this writeup and what happened, he decided to fire Vasquez"; and that Boltz thereupon tried to telephone him. On cross-examination, Corona initially reiterated that he and Boltz discussed the writeup. He testified, however, "I told him [Vasquez] refused to work; whether or not I mentioned to [Boltz] that Vasquez was written up, that I don't know";[38] and that Corona did not recall whether Boltz said he was going to fire Vasquez. Although Corona testified that Boltz knew about the strike notice before trying to telephone Vasquez, and testified at one point that Corona's alleged discussion with Boltz about Vasquez began before Respondent at least allegedly received the Union's strike notice in the mail on 21 May after 10 a.m., other portions of Corona's testimony about this alleged discussion make no reference to any break during which Boltz learned of the strike notice, and Corona allegedly called Vasquez to ascertain if he was nonetheless coming to work that day (see above at fn. 32). Corona further testified that after Boltz' alleged unsuccessful effort (in Corona's presence) to telephone Vasquez, Boltz wrote Palmowski a note telling him to fire Vasquez that night if Boltz had not yet reached him. Corona testified that his alleged conversation or conversations with Boltz about Vasquez on 21 May occurred in the morning of that day.

Respondent's counsel did not ask Boltz to testify about the decision to discharge Vasquez, and the record contains very little testimony from Boltz about this matter. No evidence contradicts Vasquez' testimony that Boltz discharged him by telephone shortly after 3:30 p.m. on 21 May, more than 3 hours after the alleged Corona-Boltz conversation testified to by Corona.[39] A prehearing statement by Boltz about Vasquez' discharge (see below part II,E,2d) avers that 5 minutes elapsed between certain representations to Boltz by Palmowski, which allegedly triggered Boltz' discharge decision, and the telephone call when Boltz discharged Vasquez. Neither Boltz' very skimpy testimony about Vasquez' discharge, nor the portions of Boltz' statement received into evidence, aver that before discharging Vasquez, Boltz consulted Corona, saw the alleged writeup about Vasquez allegedly prepared on 21 May,[40] unsuccessfully tried to telephone him, or wrote a note to Palmowski (who according to Boltz' statement had talked with Boltz only 5 minutes before Boltz reached Vasquez) telling Palmowski to discharge Vasquez; nor does Respondent contend that the unreceived portions of that statement contain any such averments.

d. Regarding Vasquez' 21 May 1985 discharge, a portion of Boltz' statement to Board investigator Bell on 30 May 1985, which portion was received in evidence without objection or limitation, states:

> On May 21, I got a call from a woman who runs Franklin Park for UPS. She complained that the buffing had not been done two nights in a row. Our contract calls for daily buffing. Around that time, Raymond [Palmowski] came into the office. He told me that he had told Steele to tell Vasquez that he had to buff Monday night. I thought to myself, Vasquez thinks the Union can protect him, and he's going to ruin me with UPS. I thought he's not doing the work because he wanted Admiral to get the contract again [see *supra* Part II E 1]. Five minutes after talking to Raymond I called Vasquez and fired him. I told him he had to do the work. He said Raymond told me to go back to the old work schedule. I said, "What old schedule?" I took it as an excuse and fired him.

Regarding the "call from a woman who runs Franklin Park for UPS," Boltz testified that the call was from a woman whose voice he did not recognize and who did not say she was calling about Franklin Park. Boltz went on to testify that he received this call in the morning, and that "later in the day," when he learned where the buffing had not been done, he "took it for granted" she had called from Franklin Park. At that time, UPS' only female maintenance supervisor worked in UPS' Addison facility. Boltz testified that he "asked around and nobody knew" who this woman was; and that between the June 1985 issuance of the complaint regarding Vasquez (about 6 weeks after he filed his initial charge) and Palmowski's discharge about August 1985, Boltz "never did get to ask [him] if he had left a message for someone to call. I never got to that." Regarding the Tuesday complaint from Boltz' caller that buffing had been omitted for 2 days in a row (that is, Sunday night and Monday night), I note Vasquez' uncontradicted testimony that on the preceding Saturday, 18 May, he told Boltz that Vasquez was not scheduled to work on Sunday night. Corona's testimony about his alleged discussions with Boltz on 21 May before Vasquez' discharge does not refer to any suspicion that Vasquez' motive for his alleged nonperformance of work was a desire for Admiral to get the contract again.

Regarding the material quoted from Boltz' prehearing statement beginning with the words "Around that time," Boltz testified, "This is inaccurately constructed here. This is not the sequence of events. This is what it says, but it is not what happened." He gave no other version of these events. Boltz testified that he had been unable to read Board agent Bell's handwriting and, in effect, that Boltz signed the statement in reliance on Bell's reading the statement to him. I do not credit Boltz' testimony in this respect, for demeanor reasons, because he admittedly made and initialed some changes in the statement (including a scratch out between the words "What" and "old"), and because I believe it unlikely that a man with Boltz' 31 years of experience as Respondent's president would sign a document that he could not read.[41] In any event, I infer that any reading by Bell to Boltz of his statement was in fact accurate. See *F.T.C v. Owens-Corning Fiberglas Corp.*, 626 F.2d 966, 975 (D.C. Cir. 1980).

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[38] As discussed below, the writeup did not state that Vasquez had refused to do any work. Nor is there any evidence that Vasquez had in fact done so. R. Br. at 21 reads Corona's testimony as attributing to Boltz the statement that Vasquez "refused to do any work."

[39] At one point, Corona testified without objection that at 3 or 4 p.m. on 21 May Boltz told him, in effect, that Boltz had fired Vasquez by telephone in the afternoon of 21 May (see Tr. 398, 441). See *American Rubber Products Corp. v. NLRB*, 214 F.2d 47, 52-53 (7th Cir. 1954); *Alvin J. Bart & Co.*, 236 NLRB 242, 243 (1978), enf. denied 598 F.2d 1267 (2d Cir. 1979); *Today's Man*, 263 NLRB 332 (1982).

[40] Boltz' reference at Tr. 251 to "a complaint written up by Steele" describes Boltz' actions and mental processes after Vasquez' discharge.

Because of the foregoing peculiarities in Boltz' statement and testimony about Vasquez' discharge, and for demeanor reasons, I credit Vasquez' testimony about the telephone conversation when he was discharged, and discredit Boltz' version except to the extent that it is corroborated by Vasquez.

F. *The Allegedly Unlawful Refusal to Hire Radmila Marsenic, Johnnie King, Francisco Flores, and Josef Skocz*

Although the four UPS cleaning contracts that Respondent took over between 29 April and 1 May had been bid for in a bid that included all five of Chemco's UPS locations, Chemco retained its cleaning contract at UPS' Northbrook facility until 24 May. As previously noted, Chemco and the Union executed on an undisclosed date before 13 May a bargaining agreement that covered Chemco's Northbrook employees, among others; and that increased their wages to $13.14 an hour. The execution of this agreement was announced at the union meeting following which Palmowski had said that he heard "everything that goes down in the Union."

About mid-May 1985, Sullivan (Respondent's vice president and sales manager) and Palmowski came over to look at UPS's Northbrook location. When they were asked by Gerhard Lingner, UPS' plant maintenance manager at that location, why they wanted to look over the building, they replied that they were looking into the possibility of taking over the cleaning contract from Chemco. Lingner, who had known Sullivan for several years, asked whether, if Respondent got the contract, Respondent would consider taking over the existing Chemco crew. Sullivan said that Respondent was not sure about it, and had been talking about it. He asked why Lingner was interested. Lingner said that he was getting good work and his job was made very easy by the existing crew.[42]

On 20 May, Sullivan learned that Respondent had obtained the Northbrook contract; like the contracts that UPS had previously had with Chemco and Respondent, the Northbrook contract could be canceled by UPS on 7 days' notice. On the following day, Lingner asked Sullivan whether Respondent was going to hire the Chemco crew. Sullivan said that he did not know, and would let Lingner know later in the week. About 22 May, alleged discriminatee Radmila Marsenic, a Northbrook employee who was the leader of Chemco's Northbrook crew, told Lingner that the crew would like to continue to work at Northbrook and would like to talk to the new contractor. Lingner said that he would make an appointment with the new contractor to meet with the crew.

Boltz testified that on 21 and 22 May, he "diligently attempted" to reach the Union by telephone to find out what was meant by the 20 May "impending strike" telegram, "what do you want to do, we are always ready to sit down and talk"; and that he received "no response." On 23 May, Lingner telephoned Sullivan that the employees were interested in staying on under the new contractor, and that they had asked Lingner to call Respondent and find out if it would come out for a meeting. Sullivan said yes, and that "we" would be out on the following day, 24 May. Lingner said that the crewmembers were good workers and asked Sullivan if he would take the crew over. Sullivan said, "We're not sure about that, but we will talk to them about it."[43] Thereafter, Lingner told Marsenic that he had made an appointment for the crew to meet with Sullivan on Friday, 24 May at 6:30 a.m., the time of day when their shift ended.

When the employees' shift ended at 6:30 a.m. on Friday, 24 May, nobody from Respondent had yet arrived at the facility. The cleaning crew gathered in the cafeteria. Marsenic went to Lingner's office and asked if he could telephone Respondent to find out if anyone from Respondent was going to come to Northbrook that morning. Then, she rejoined the others in the cafeteria. A little later, Lingner came to the cafeteria, told the employees that some Northbrook representatives were coming, and stated that they wanted to talk to Marsenic. Marsenic went to Lingner's office and picked up the telephone. Sullivan, who was on the other end, asked what she wanted. Marsenic said that Lingner had already told him that the employees wanted to talk to him, and he was supposed to be there at 6:30 a.m. He said that he would be there in 40 minutes.[44]

Sullivan and Palmowski arrived at Lingner's office a little before 7:30 a.m.[45] Lingner said that the Chemco cleaning crew was waiting in the cafeteria and wanted to talk to Sullivan. Sullivan said that Respondent had decided to hire new people, and that he had nothing to talk to the employees about. Lingner said that the employees had been waiting for Sullivan for a couple of hours, and asked him to at least talk to them. Sullivan said that he would.

Then, Lingner took Sullivan and Palmowski into the cafeteria and introduced them to the employees, all four of whom were still waiting there. The crew asked Marsenic to serve as spokesman. Marsenic told Sullivan that the employees would like to have the address and telephone number of the new company they were going to work for; would like to have a "company regulation book"; would like to know what their hourly wages, their vacations, and their benefits were going to be; and would like to know "what union we are going to be."[46] Sullivan got up and became red in the face. He said that Respondent was not going to hire the Chemco crew, but was going to start the building with a brand new crew. Marsenic asked him why he was there if he did not want to hire them. He said that "I have my own people," that he wanted to start the building with a fresh crew, and that there was nothing he could do about it. He further said that he did not know what this new crew would be paid. He told the employees to leave their names and telephone numbers, suggested that they take a vacation if they had one coming, and said that Respondent would call them if it had anything for them. After he left, Marsenic translated Sullivan's remarks into Polish for Skocz, whose command of English is very limited.

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[41] On the stand, Boltz appeared to have genuine difficulty in reading Bell's handwriting. Boltz, however, testified, that he usually reads with reading glasses, that he had left his reading glasses at the office, that he "can struggle without them," and that he can read "somewhat" without reading glasses if he holds the document far enough away from him. Bell's handwriting is not very good, but neither is it strikingly bad.

[42] My finding in this sentence is based on Lingner's testimony. Sullivan's version was, "they are not doing a bad job."

[43] My findings regarding this conversation are based on a composite of credible parts of Lingner's and Sullivan's testimony. My finding regarding the date of this conversation is based on the testimony of Sullivan who, concerning this matter, appeared to have a recollection superior to Lingner's. For the reasons discussed below, I do not accept Sullivan's testimony that he said he would be at the Northbrook location at 6 a.m. on 24 May if he had anything to talk to the employees about; and that if he was not there, this meant that he had nothing to talk to them about.

[44] My findings as to this call are based on Marsenic's testimony. For demeanor reasons, and for the other reasons discussed below, I do not accept Sullivan's testimony that he had no telephone conversations that day with anyone before coming to the Northbrook facility.

[45] This finding is based on Marsenic's testimony. Because she was waiting to see Sullivan after having completed a full shift, I regard her memory concerning this matter as more reliable than Sullivan's (8 a.m.) or Lingner's (7 a.m.).

My findings in the foregoing paragraph are based on a composite of credible parts of the testimony of Sullivan, Marsenic, King, and (through an interpreter) Skocz. Palmowski did not testify (see above at fn. 6), and Flores (whose native language is Spanish, but who understands English) could not be found. For demeanor reasons and notwithstanding Sullivan's denial, I credit the testimony of Marsenic and Skocz that Marsenic asked what union the employees were "going to be"; such an inquiry would appear to be natural in view of the employees' experience with unions (see above at fn. 46).[47] Respondent does not claim that these witnesses' prehearing affidavits failed to refer to such an inquiry. I do not credit Marsenic's testimony, however, that when she asked, "What union are we going to be," Sullivan replied in terms, "I am not going to be no union"; or King's testimony that she asked Sullivan whether Respondent was going to recognize "the union" and he said no. I so find because these alleged remarks were not referred to in these employees' respective prehearing affidavits, although Marsenic testified that she told the Board investigator about the statement she attributed to Sullivan.

All four of the employees with whom Respondent began operations at Northbrook were paid $5 an hour. Lingner testified that the quality of their work was roughly comparable to that of the Chemco employees. Although one of the four Chemco employees at Northbrook may have filled out a written application for employment by Respondent, Respondent never hired any of them. All four of them had attended the 13 May union meeting. At least three of them (Marsenic, King, and Skocz) were union members; but Marsenic and King were not officers or members of the grievance committee, and there is no evidence that such a position was held by Skocz, who testified through a Polish-English interpreter. Boltz testified that if Respondent had acquired the Northbrook contract on 1 May 1985, Respondent would have hired the former Chemco employees. Corona testified that in early May 1985, Sales Manager Sullivan told him that Respondent had not obtained the Northbrook contract with the other UPS contracts because "right now they were happy with the people that were doing Northbrook, and they just didn't want to make a change." Sullivan testified that when Respondent acquired the cleaning contracts at Jefferson Street, Bedford Park, Franklin Park, and Addison (which four contracts Respondent began to perform on various dates between 29 April and 1 May 1985), UPS told him that one reason why Respondent was not then obtaining the Northbrook contract was that UPS was "not all that upset with" the cleaning there. Corona testified that Steele was named leadman at Franklin Park on 13 May partly because Lingner, UPS plant maintenance manager at Northbrook, had spoken highly of Steele's work there.

Boltz testified that prior union meetings or a possible strike threat had no bearing on his decision not to hire the Chemco employees at Northbrook, and denied that antiunion animus of any kind entered into that decision. He testified that Respondent did not hire Chemco's personnel at Northbrook on 24 May because Respondent had had problems with what he regarded as an unreasonably high proportion of the Chemco employees. At the four UPS facilities that Respondent took over on or before 1 May 1985, Respondent hired a total of 12 employees, not including Vasquez or Hukic. Before starting to work at Northbrook, Respondent had had problems with 5 of these 12. More specifically, about 9 May Respondent terminated two Addison employees because one of them had left early and the other had punched him out for breaks and at the regular quitting hour. Further, on 1 May Respondent issued warning notices to two Bedford Park employees for poor work; one of these employees thereafter worked poorly and only intermittently, and the other punched out early on 2 May and failed to call in for the rest of the month.[48] On 1 and 9 May, a third Bedford Park employee received warning notices.[49] Further, Corona testified that as of 21 May 1985 he was not satisfied with the quality of work being performed at the other locations previously serviced by Chemco,[50] that Palmowski had reported that such work was not "up to standards" there, that Palmowski and Sullivan had told Corona during this period that UPS was not happy with the work at these locations (although company witness Sullivan was not asked about this matter), that UPS' building maintenance supervisor at Addison had pointed out deficiencies in the cleaning of that building, and that other, unnamed UPS personnel had told him that the quality of the work was not up to par. Corona further testified (without corroboration from Boltz) that before Boltz decided not to take over Chemco's employees at Northbrook, the two of them discussed the different problems and the quality of work at different locations and the problems with some of the people.

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[46] Of the Northbrook employees, at least three (Marsenic, Skocz, and King) had worked for Admiral, which had bargained with a sister local of the Union.

[47] It is unclear whether Skocz was basing his testimony on what he heard Sullivan say in English or on Marsenic's interpretation to him in Polish. Even assuming that the latter was the sole basis for his testimony in this respect, under Fed.R.Evid. 801(d)(1)(B), such testimony would be probative to establish what Sullivan said. Nor did Respondent object to the receipt of his testimony for this purpose; cf. above at fn. 32.

[48] Both of them were discharged on 31 May, after Respondent's refusal to hire Chemco's Northbrook employees.

[49] He was discharged on 3 June, after Respondent refused to hire Chemco's Northbrook employees.

[50] As of that date, only 9 of the 14 former Chemco employees were still actively working for Respondent. Hukic and Vasquez, however, had been discharged as recently as 20 and 21 May, respectively.

Corona testified that the decision not to hire the Chemco employees at Northbrook was made "probably the week of the 23rd" of May, a Thursday. There is no evidence that Sullivan was responsible for the selection of employees to be hired at Northbrook. He was not asked who told him about the decision not to take over the Chemco employees there. Although neither was he asked in terms when he learned about this decision, his testimony, if unreservedly accepted, shows that he learned about it between his 23 May telephone conversation with Lingner (when, according to both men, Sullivan said that Respondent had not yet decided whether to take over the Chemco employees) and the time when Sullivan would have had to start for the Northbrook facility to reach it by 6 a.m. on 24 May (see above at fn. 43). Boltz testified that he may have told Sullivan about this decision on the night of Wednesday, 22 May, but "more than likely" told him about it at an undisclosed hour on 23 May. Contrary to Sullivan and Boltz, I find that Sullivan was advised of this decision after his telephone conversation with Marsenic a little after 6:30 a.m. on 24 May (when, according to her credited testimony, he told her that in 40 minutes he would be at Northbrook to talk to the employees), although before the hour when he would have had to start for Northbrook in order to reach it a little before 7:30 a.m. on 24 May. I do not credit Sullivan's denial that he had this telephone call with Marsenic, or his related testimony that on 23 May he told Lingner that if Sullivan did not show up by 6 a.m. on 24 May, he had nothing to talk to the employees about. The credited evidence shows that the employees waited for Sullivan for about an hour after the end of their shift; Sullivan testified, in effect, that they waited for an hour and a half. They would not likely have waited this long if the message testified to by Sullivan had been given them by Lingner, as he likely would have done if he had in fact been so advised. Further, I do not believe that they would have waited so long without making, during this period, some contact with Respondent.

Because of Sullivan's 23 May undertaking to come out to Northbrook to talk to the employees at 6 a.m. on 24 May, I think it likely that he would have been promptly informed of the hiring decision. If that decision had been reached by the end of the business day on 23 May, he would almost certainly have been so informed on that day as a matter of business routine. Further, in order to avoid an unnecessarily early rising on 24 May, Sullivan likely took steps to ascertain before his bedtime on 23 May whether the hiring decision had been made. As of 6:30 a.m. on 24 May, however, he clearly had not been told about it. I find that Respondent's decision not to hire the four Chemco employees at Northbrook was reached no earlier than the night of 23-24 May, and was probably made between 6:30 and 6:50 a.m. on 24 May.

G. *Aftermath*

On an undisclosed date in June 1985, Respondent began to negotiate with the Union regarding all five UPS locations. By 1 August 1985, an agreement had been reached on wages. A complete agreement was executed on 1 November 1985 calling for a wage scale retroactive to 1 August 1985. The contract called for hourly rates of $8.20 to Jefferson employees and $4.25 to $5.50 to employees at the other four UPS locations. At that time, all of Respondent's employees at UPS became union members.

Thereafter, on undisclosed dates before 19 November 1986, Respondent agreed with the Union to extend the August 1985 contract to locations where Respondent was performing cleaning for two other firms. Corona denied that any of the decisions to fire, discipline, or not to hire former Chemco employees were made because of their union membership or activities or because they attended a union meeting. He went on to deny taking any action against Vasquez because he may have attended a union meeting.[51]

H. *Analysis and Conclusions*

1. The alleged discrimination

a. *Vasquez' alleged demotion and Hukic's discharge*

The record shows that Company President Boltz does not oppose unions in principle, and has for many years recognized and contracted with this Union and other labor organizations at a number of Respondent's locations. Further, the instant charges are the only charges ever filed against Respondent during its 34 years of existence.

When Respondent took over the UPS cleaning contracts at Jefferson, Bedford Park, Franklin Park, and Addison, Respondent's ability to retain and profit by the cleaning contracts was diminished by the Union's representative status, which limited Respondent's right to cut the wage scale established by Chemco's expired union contract and which Respondent continued for several weeks to pay at least some of the employees at UPS.[52] Although Respondent's ability to show a profit while continuing to pay this wage scale (which Boltz believed to be about 50 percent higher than prevailing rates for such work in the area) was limited by the size of the fixed-sum monthly payments from UPS, the Union could be reasonably expected to (as it did) resist efforts by Respondent to cut this wage scale. These problems were aggravated by UPS' injunction to Respondent to work in harmony with the Union (an injunction that UPS might deem violated should the Union strike Respondent) and by UPS' right to terminate Respondent's cleaning contracts on 7 days' notice. Cf. *NLRB v. Erie Resistor Corp.*, 373 U.S. 221, 229 fn. 8 (1963).

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[51] R. Br. at 2-3 seems to suggest that I take judicial notice of Administrative Law Judge William A. Gershuny's action on 12 February 1987 in dismissing on the record, and immediately after the General Counsel had rested, the complaint in Case 13-CB-10989, *Service Employees Local 73*. The complaint in that case alleged, inter alia, that the Union violated Sec. 8(b)(1)(A) of the Act by failing, for arbitrary and capricious reasons, to process the grievances of all the employees alleged as discriminatees in the case before me. The underlying charges in the CB case were filed by Vasquez on 19 June 1985 and 23 May 1986. I perceive nothing in Judge Gershuny's ruling, which is relevant to the instant case.

[52] Cf. *NLRB v. Katz*, 369 U.S. 736, 743 (1962); *NLRB v. Burns Security Services*, 406 U.S. 272, 292-296 (1972).

On the very day after Respondent learned that it was being awarded these contracts, and before actually beginning to perform them, Respondent's management evinced their anxiety to relieve Respondent of the pressures that the Union's status could be expected to impose. Thus, on 24 April, while Chemco was still performing the cleaning work at Jefferson under the still-effective union contract, Project Manager Palmowski became "mad" on learning that an employee's absence was warranted by the contractual "personal-day" provisions. Palmowski said that Respondent was going to change "everything" and to replace the incumbent employees at UPS with employees who worked for Respondent elsewhere and who would be paid $3 or $4 an hour. When employee Hukic said that the employees had a union contract, Palmowski said that Respondent was going to change unions, too. On the following day, when Hukic told Palmowski that the union contract prohibited a job change that Palmowski wanted to (and later did) impose on Hukic, Palmowski said that he did not care about "your contract," and Corona said that Hukic had made too much money under Chemco and should quit.

After Hukic had thus relied on, and Palmowski and Corona had deprecated the Union and its contract, Corona had thereupon encouraged Hukic to quit, and 10 days after Respondent had taken over the cleaning contract at Jefferson, Palmowski gave Hukic a written reprimand, ostensibly for poor work ascertained during a walk-through by UPS Manager Strickland, which may not have preceded issuance of the warning notice. The bona fides of this reprimand are rendered questionable not only by Respondent's failure to issue a similar warning notice to Sloan, whose work was equally implicated by Strickland's comments to Palmowski, but also by Palmowski's statement, when giving Hukic the 8 May warning slip, that he would get another one the next day. The suspicion that Palmowski's prescience thus cast on the bona fides of the warning slip that Hukic did get the next day is confirmed by the demonstrated falsity of Corona's claim that he and Palmowksi based this warning on Respondent's Exhibit 1, the purported audit report. I conclude that Palmowski issued both of these warning notices because of Hukic's open espousal of the Union and to provide a paper basis for subsequent personnel action against Hukic should such action prove advantageous to Respondent.

Thereafter, on 13 May, a telegram from the Union advised Respondent that the Union was indeed going to seek a contract that called for the existing, at least supposedly, above-standard wage scale. Further, by 11:30 p.m. that day (as shown by Palmowski's comments to Vasquez), Respondent learned about the union meeting that morning. Palmowski's comments unequivocally establish his knowledge that Vasquez and Hukic had attended that meeting, and that Hukic had there complained about his reprimands. I infer from such comments to Vasquez ("How is your Communist party doing, I hear you're a Communist leader," with the explanation "I hear everything that goes down in the Union") that Palmowski also knew that during that meeting, Vasquez had said that the employees could not hesitate too much longer, working without a contract; that he had played a part in organizing that meeting; and that Hukic had also expressed concern there about working without a contract.

Immediately after the foregoing discussion, Palmowski reproached Vasquez for failing to buff the floors often enough, ignored (so far as the record shows) Vasquez' assertion that he had been following the employees' work schedule, removed him as group leader, and gave the job to Steele instead. Because Palmowski took this action immediately after calling Vasquez a Communist for his part in the union meeting earlier that day, I find that the General Counsel has shown, at least prima facie, that Respondent demoted Vasquez because of his union activity.

Two days later, during the 15 May bargaining conference, Respondent learned that, far from being willing to agree to a wage cut, the Union was seeking a contract with a wage increase. Credible portions of Corona's suspiciously vacillating testimony about when and how much he learned regarding Hukic's union activity establish that, at least by the end of this conference, Corona knew that Hukic had attended the 13 May meeting and had there complained about his reprimands. Moreover, as previously noted, Palmowski had said on 13 May concerning that meeting, where Hukic expressed concern about working without a contract, that Palmowski knew Hukic had complained at that meeting about his reprimands and that Palmowski heard "everything that goes down in the Union." On 18 May, Hukic complained to Company President Boltz that Respondent's proposed pay cut breached the union contract and "You can't destroy union." When Boltz replied that he could indeed destroy it, Hukic said that on 20 May he was going to talk to the Union. On 19 May, when both Hukic and Sloan were on duty, Palmowski selected Hukic to train Zawartka and reminded Hukic that Boltz had tape recorded the telephone conversation during which Hukic had asserted that his pay cut was contrary to the union contract and he was going to complain about it to the Union on 20 May.

True to his word, Hukic went to the 20 May union meeting, during which the Union said that it was about to send out strike notices; as previously noted, Palmowski had said on 13 May that he heard "everything that goes down in the Union." Later that same day, 20 May, Hukic and several other employees advised Respondent that they were going to come to work and that the Union had told them to come to work if they wanted to keep their jobs. Shortly after 4 p.m. that day, Palmowski discharged Hukic without giving him a reason.

The foregoing sequence of events strongly suggests that Hukic was discharged because of his favorable comments in late April about the Union and its contract, his 13 May action in attending a union meeting and there expressing concern about working without a contract, his action on 18 or 19 May in telling Boltz that a union contract forbade Respondent's projected wage cut and on 20 May Hukic would speak to the Union about it, and Hukic's 20 May action in attending a union meeting at which the Union stated that it was sending out strike notices. I do not accept Corona's testimony that the decision to discharge Hukic was made as early as 16 or 17 May. Between 16 May and Hukic's discharge on 20 May, Corona included Hukic among the employees who were sent a mailgram on 17 May telling them to telephone Respondent's office if they wanted to keep their jobs. Moreover, on 18 May, the day before Hukic began his last shift of work for Respondent, Boltz asked him whether he was still coming to work, told him that his pay was being cut, and went to the trouble and expense of recording this conversation; indeed, according to Boltz, he initiated this conversation and (apart from reading Hukic the mailgram) limited his remarks to asking whether Hukic was still coming to work for Respondent.

Corona testified that the decision to discharge Hukic was made by Corona and Palmowski, and that this decision was based on Palmowski's report to Corona that "His work hasn't improved since the job class—since he was changed and the work wasn't getting done properly."[53] As previously found, however, Respondent's claim that it was initially dissatisfied with Hukic's work is impeached by its action on 8 and 9 May, when, in giving him warnings for alleged poor work, Respondent resorted to a demonstrated sham basis. Moreover, there is no evidence that after 9 May, any member of management reproved Hukic for poor work or for any other reason.[54] On the contrary, on 17 May Corona sent him a mailgram telling him to call Respondent's office if he wanted to keep his job, and on 18 May Boltz (according to his testimony) telephoned Hukic to find out whether he would continue to work for Respondent.

For the foregoing reasons, I find that the General Counsel has made a prima facie showing that Hukic was discharged at least partly because of his protected union activity.

Accordingly, the burden is on Respondent to prove by a preponderance of the evidence that Vasquez would still have been demoted, and Hukic would still have been discharged, even absent their union activity.[55] As to Hukic Respondent's efforts to exaggerate any work deficiencies he may have had by giving him warnings allegedly for poor work, but with a demonstrated sham basis, preclude any finding that on the preponderance of the evidence, Respondent regarded his work as sufficiently poor to call for his discharge irrespective of his union activity. Although Palmowski's remarks when demoting Vasquez suggest that his failure to buff floors often enough may have entered into the decision to demote him, Palmowski ignored Vasquez' assertion that he was following the work schedule, and the record fails preponderantly to show that any such deficiency would have led to his demotion irrespective of his union activity. Indeed, Respondent makes no such contention. Rather, Respondent contends that while in its employ, Vasquez was never a group leader. In support of this contention, Respondent relies on Corona's testimony that because Chemco was terminated for poor work and "that is a direct reflection on the janitors and the group leaders," Respondent decided not to accept any of Chemco's group leaders in that capacity (although it did hire all of Chemco's janitors, including group leaders, at the first four UPS locations), and at the outset not to have any group leaders. However, company witness Steele corroborated Vasquez' uncontradicted testimony that when making Steele a group leader 12 days after Respondent took over the Franklin Park operation, Palmowski told Vasquez that he was "no longer" group leader, and that Steele was the group leader "from now on." Nor did Corona contradict Vasquez' testimony that on 14 May, Corona told Vasquez that Corona would arrange to provide that evening some supplies that Vasquez had previously requested, pursuant to his duties, as a group leader, to order such supplies. I find that before 13 May 1985, Vasquez was a group leader for Respondent.

For the foregoing reasons, I find that Respondent violated Section 8(a)(3) and (1) of the Act by demoting Vasquez and discharging Hukic.

b. *Vasquez' discharge*

Although Corona gave suspiciously vacillating testimony regarding when he found out about the 13 May union meeting and the identity and conduct of those present, he admittedly learned about Vasquez' attendance when, on 14 May, he complained to Corona that Palmowski had called Vasquez a Communist for attending a union meeting. Three days later, and four days after Palmowski had demoted Vasquez from group leader because of his union activity, Palmowski gave him a warning notice that stated, inter alia, that he was spending too much time driving the electric cart. Because nobody from Respondent, UPS, or Chemco had ever before told Vasquez not to use the electric cart, which he had been using to shuttle supplies (on one occasion, in Corona's presence) and haul garbage, and because Vasquez had also been using the electric cart to transport Palmowski to his car in the parking lot, I conclude that Palmowski issued this warning notice at least partly in further retaliation for Vasquez' union activity, and in order to provide a paper basis for subsequent personnel action against him should such action prove advantageous to Respondent.

On the following day, 18 May, Boltz asked Vasquez whether he was willing to work for Respondent under the conditions described in Respondent's 17 May mailgram. Boltz at certain points in his testimony attempted to conceal the portions of Vasquez' reply, which gave Boltz reason to fear that Vasquez might join the "impending strike." Boltz' prehearing statement, however, and other portions of his testimony corroborate Vasquez' credible testimony that he replied he had no remarks to make until he spoke to his union representative. Moreover, on 20 May, at a union meeting where the union representative had announced that strike notices would be sent out, Vasquez advocated a strike for a new contract; as previously noted, Palmowski said that he heard "everything that goes down in the Union." Further, on that same day, Boltz was admittedly "shocked" by receiving Vasquez' initial charge.[56]

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[53] Similarly, R. Br. at 25 asserts that Respondent "fired Hukic for poor work that did not improve." See also below at fn. 59.

[54] Strickland's adverse report to Respondent about the quality of the Jefferson cleaning work may have been made a few days after 9 May. As previously indicated, however, this report did not name Hukic; it was equally applicable to Sloan, and Sloan was not reprimanded before Hukic's discharge.

[55] *NLRB v. Transportation Management Co.*, 462 U.S. 393, 398–404 (1983); *NLRB v. Del Rey Tortilleria*, 787 F.2d 1118, 1123 (7th Cir. 1986); *NLRB v. Bliss and Laughlin Steel Co.*, 754 F.2d 229, 234 (7th Cir. 1985); *Vought Corp.*, 273 NLRB 1290, 1292–1293 (1984), enfd. 788 F.2d 1378 (8th Cir. 1986); *Schurpack, Inc.*, 283 NLRB 188 fn. 1 (1987).

On the following day, Boltz telephoned Vasquez that Boltz had received some complaints that the floor had not been buffed. Vasquez truthfully said that Palmowski had told him to follow the schedule of buffing the upstairs on Tuesdays and Thursdays and the downstairs on Mondays and Wednesdays. Boltz said that this was "aside from the point," and that he was going to have to discharge Vasquez anyway.

Even standing alone, this sequence of events strongly points to the conclusion that Vasquez was discharged at least partly because during the union meetings of 13 and 20 May, he advocated a strike; because, on 18 May, he told President Boltz that Vasquez would not commit himself to work under Respondent's unilaterally imposed working conditions until he had checked with the Union; and because he had filed the charges in the instant case. Moreover, this conclusion is reinforced by the incoherence in Respondent's explanations for his discharge and in management's accounts of how the discharge decision was reached.

Respondent's brief at 25 asserts that Respondent fired Vasquez "for poor work and failure to obey an order." This assertion, however, elides the assertion in Boltz' prehearing statement, which is Boltz' only explanation for the discharge, that he discharged Vasquez because certain alleged reports to Boltz led him to believe that Vasquez was failing to do the work because he wanted Admiral to get the contract again. Nor was this motivation testified to by any other member of management or supported by any other substantial evidence.[57] The sincerity of Boltz' stated motivation is further undermined by those portions of his statement that attribute his alleged conclusion to a telephoned complaint that could not have related to Vasquez' Franklin Park location. Boltz' statement and his testimony contain no reference to any belief that Vasquez performed poor work or to any knowledge before Vasquez' discharge of any warning issued to him for that or any other reason; nor does his statement or testimony refer to any contact with Corona about Vasquez. Although Corona testified that he and Boltz discussed Vasquez on the day he was discharged, Corona did not testify that he showed Boltz Palmowski's 17 May written warning to Vasquez, which referred to his work as well as his use of the electric cart, or testify in terms that he told Boltz that Vasquez performed poor work. It is true that Boltz' statement at least implies that he received and acted on a report that Vasquez had failed or refused to comply with buffing instructions, that Corona testified to receiving reports that Vasquez had failed or refused to comply with buffing instructions, and that Corona further gave at least implied testimony that he had discussed these alleged reports with Boltz before he fired Vasquez. Boltz' statement, however, avers that the report he received was given by Palmowski personally and involved instructions given by Steele at Palmowski's behest. On the other hand, Corona testified that the report he received involved instructions to Vasquez from Palmowski and then Steele, and (at certain points) that Corona discussed with Boltz the writeup (signed by Palmowski and Steele), which Boltz' statement does not claim that he saw at any material time, and regarding Respondent's evidence about its alleged 21 May preparation is very fishy indeed (see above, part II,E,2,a–c). Finally, as previously found, Vasquez did not in fact fail or refuse to comply with either Palmowski's or Steele's instructions regarding buffing.

Because of the foregoing, I find that the General Counsel has made a prima facie showing that Vasquez was discharged at least partly because of his union activity. Further, I find that Respondent has failed to show by a preponderance of the evidence that Vasquez would have been discharged absent his union activity (see above at fn. 55). In this connection, I note that Palmowski and Corona were personally acquainted with the male UPS manager at Franklin Park, and that by the testimony of both Vasquez and Steele, Vasquez did not refuse to comply with any buffing instructions by Steele, and the work involved was performed by Fuentes. Accordingly, I find that by discharging Vasquez, Respondent violated Section 8(a)(3) and (1) of the Act.

c. *The four Northbrook employees*

As previously noted, no later than 21 May Respondent received a mailgram from the Union threatening strike action to require Respondent to observe the Union's bargaining agreement with Chemco, including the above-standard wage scale. Further, by the end of that day, Respondent had unlawfully demoted and then discharged Franklin Park employee Vasquez, who had urged the employees to strike for a new contract, and Jefferson employee Hukic, who had early and repeatedly invoked the union contract when Respondent took personnel action (including wage cuts), which he disliked. Meanwhile, about 20 May, Respondent was advised that it had obtained the cleaning contract at UPS Northbrook facility. By that time, these employees were covered by a contract with the Union that set a wage scale of $13.14 an hour, 68 cents an hour higher than the wage scale set by the union bargaining agreement when Respondent had taken over the other four facilities. Further, by the time Respondent learned it was receiving the Northbrook cleaning contract, Respondent had reduced the wage scale of the unit employees at the other four UPS locations to $8.20 an hour. Moreover, all four of the Northbrook employees had attended the 13 May union meeting, at which the new Chemco contract was announced and which was followed by Palmowski's remark that he heard "everything that goes down in the Union." Also, on 21 and 22 May Boltz was making diligent and futile attempts to find out from the Union the implications of its "impending strike" telegram. In short, the union-related considerations, presented when Respondent refused on 24 May to hire the four Northbrook employees, were about the same as the union-related considerations that had led to Vasquez' unlawful demotion on 13 May and to Hukic's and Vasquez' unlawful discharge on 20 May and 21 May respectively.[58]

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[56] The complaint does not allege that Vasquez' discharge violated Sec. 8(a)(4). The General Counsel's opening statement, however, averred that Vasquez was discharged partly because he filed charges with the Board against Respondent.

[57] In fact, the only evidence regarding this matter shows that Vasquez worked for Admiral for an undisclosed period before May 1984; and resumed work for it, almost a year after Respondent discharged him, at $5 an hour, about 40 percent of his Chemco wages, about 60 percent of his wage scale when Respondent discharged him, and about the same as the wage scale under Respondent's union contract. At the time of the hearing, Respondent was still performing all five of the UPS contracts here at issue.

Moreover, not only did Boltz concede that Respondent would have hired all four of the Chemco employees at Northbrook if Respondent had taken over the Northbrook location on 1 May, but also the considerations that led to Respondent's action in taking over about 1 May all the Chemco employees who worked at the other four locations were present with even greater force at Northbrook on 24 May. Thus, UPS had advised Respondent in early May that the reason the Northbrook contract had not been included with the four contracts at locations where UPS had been dissatisfied with the quality of Chemco's services was that "right now [UPS was] happy with the people that were doing Northbrook," and because UPS was "not all that upset with the cleaning there." As late as 13 May, Respondent promoted Franklin Park employee Steele to group leader because Lingner, the UPS plant maintenance manager at Northbrook, had spoken highly of Steele's work there. Further, in mid-May and before Respondent obtained the Northbrook contract, and also on the day before Respondent advised the four Chemco employees at Northbrook on 24 May that Respondent was not going to rehire them Lingner, whose recommendation regarding Steele had been accepted on 13 May, told Respondent that Lingner thought the Chemco crewmembers were doing good work and should be retained.

Finally, Corona testified, and Respondent's brief at 33–34 avers, that Respondent refused to hire the Chemco's Northbrook employees partly because of the "difficulties that we had with" Hukic and Vasquez. As found above, however, these "difficulties" consisted largely of their union activity. Cf. *Crown Cork & Seal Co.*, 255 NLRB 14, 40–42 (1981), enfd. 691 F.2d 506 (9th Cir. 1982); *Birch Run Welding & Fabricating v. NLRB*, 761 F.2d 1175, 1180 (6th Cir. 1985), and cases cited.[59]

For the foregoing reasons, I find that the General Counsel has made a prima facie showing that Respondent refused to hire the Northbrook employees at least partly because Respondent feared that they would participate in the Union's pressures, including a threatened strike, in an effort to obtain a higher contractual wage rate than Respondent wanted to pay. Further, Respondent has failed to discharge its burden (see above at fn. 55) of showing by a preponderance of the evidence that for lawful reasons, it would have refused to hire them anyway. As previously noted, Respondent contends that it refused to hire the Chemco employees at Northbrook because of Respondent's "difficulties" with the former Chemco employees at the other four locations. Respondent, however, did not reach its decision regarding the Northbrook employees until the morning of Friday, 24 May, although an early decision would protect Respondent from the possibility of being hurried in obtaining a new work force. Respondent knew by 20 May that it would be taking over the Northbrook contract on Monday, 27 May, and (except for Respondent's "difficulties" with Vasquez and Hukic owing to their union activity) Respondent's "difficulties" with the former Chemco employees had substantially manifested themselves by 9 May, 4 days before Respondent promoted Steele partly because UPS had commended him for his Northbrook work under Chemco.[60]

For the foregoing reasons, I find that Respondent violated Section 8(a)(3) and (1) of the Act by refusing to hire Marsenic, King, Flores, and Skocz.

2. The alleged independent 8(a)(1) violations

Paragraph V(a) of the complaint in its final form alleges that on or about 13 May 1985, at the UPS Franklin Park facility, Respondent through Palmowski violated Section 8(a)(1) of the Act by creating an impression among its employees that their union activities were under surveillance. The credible evidence shows that on 13 May (about 15 hours after a union meeting held that day), and at the Franklin Park facility, Palmowski told Vasquez, "I hear everything that goes down in the

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[58] "[E]vidence of contemporaneous unfair labor practices is highly relevant in establishing motive under Section 8(a)(3)." *NLRB v. Sure-Tan, Inc.*, 672 F.2d 592, 600 (7th Cir. 1982), rehearing denied 677 F.2d 584 (7th Cir. 1982), affirmed in relevant part and remanded in part 467 U.S. 883 (1984), decision on remand 277 NLRB 302 (1985). R. Br. cites only the court of appeals opinion.

[59] Indeed, concerning this argument, R. Br. at 34 goes on to state that Hukic "griped." So far as the record shows, Hukic's only griping consisted of complaints about his unlawfully motivated writeups, and complaints that Respondent was not planning to adhere to perceived requirements in the Union's expired bargaining agreement with Chemco. Plainly, Hukic could not lawfully be discharged for "griping," at a union meeting, about the unlawful writeups; see *Vought*, above, 273 NLRB at 1295 fn. 13. The record evidence is insufficient to show either whether Respondent was under an obligation to adhere at Hukic's Jefferson location to the wages and working conditions generated by the Chemco contract (which is not in the record) or whether Hukic's discharge for such "griping" would be unlawful on the ground that the real source of such griping was Respondent's announced intention not to comply with such an obligation. Cf. *Burns*, above, 406 U.S. 272; *NLRB v. City Disposal Systems*, 465 U.S. 822 (1984), decision on remand 766 F.2d 969 (6th Cir. 1985). Respondent's reliance on such "griping" in justification of Hukic's discharge and the refusal to hire the Northbrook employees constitutes some further evidence that such action was unlawfully motivated.

[60] Because Respondent has failed preponderantly to show that it would in any event have refused to hire Chemco's Northbrook employees because of its difficulties with other former Chemco employees (except Vasquez and Hukic), Respondent's citation to *Inland Container Corp.*, 267 NLRB 1187 (1983), is beside the point. When later reversing this decision (*Inland Container Corp.*, 275 NLRB 378 (1985)), the Board does not appear to have withdrawn from the legal propositions set forth in its 1983 decision. Respondent brief would have shown better form by citations to the history of this case. In addition to the *Inland Container Corp.*, decisions already cited, see 273 NLRB 1856 (1985), and 274 NLRB 887 (1985).

Union"; implied, as was in fact the case, that Vasquez had played a leading role concerning that meeting; and further implied, as was in fact the case, that at that meeting, Hukic and the Guziks had complained about their reprimands. I find that Respondent thereby violated Section 8(a)(1) in the manner alleged. *NLRB v. Gold Standard Enterprises*, 679 F.2d 673, 676–677 (7th Cir. 1982); *Tomco Carburetor Co.*, 275 NLRB 1, 4–5 (1985); *Union National Bank*, 276 NLRB 84 (1985); *Eagle Headers*, 273 NLRB 1486, 1490 (1985). No different result is suggested by *NLRB v. Pilgrim Foods*, 591 F.2d 110, 113–114 (1st Cir. 1978), cited by Respondent; by calling Vasquez a Communist for his part in this meeting, Palmowski displayed extreme displeasure at it.

Paragraph V(b) of the complaint in its final form alleges that on or about 14 May 1985, at the Franklin Park facility, Respondent through Palmowski violated Section 8(a)(1) of the Act by impliedly threatening "an employees" with discharge because of his union activities.[61] The General Counsel's posthearing brief does not discuss this allegation, nor do I see anything in the record to support it. That paragraph will be dismissed.

CONCLUSIONS OF LAW

1. Respondent is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

2. The Union is a labor organization within the meaning of Section 2(5) of the Act.

3. Respondent has violated Section 8(a)(1) of the Act by giving employees the impression of surveillance.

4. Respondent has violated Section 8(a)(3) and (1) of the Act by demoting and discharging Arthur Vasquez; by discharging Avdo Hukic; and by refusing to hire Radmila Marsenic, Johnnie King, Francisco Flores, and Josef Skocz.

5. The unfair labor practices set forth in Conclusions of Law 3 and 4 affect commerce within the meaning of Section 2(6) and (7) of the Act.

6. Respondent has not violated the Act by making an implied threat of discharge for union activities.

THE REMEDY

Having found that Respondent has engaged in certain unfair labor practices, I shall recommend that Respondent be required to cease and desist therefrom, and from like or related conduct, and to take certain affirmative action in order to effectuate the policies of the Act.

As Respondent discharged employee Avdo Hukic in violation of the Act, Respondent will be required to offer him immediate reinstatement to the job of which he was unlawfully deprived or, if such a job no longer exists, a substantially equivalent job. As Respondent unlawfully demoted and thereafter unlawfully discharged Arthur Vasquez, Respondent will be required to offer him reinstatement (1) to the job from which he was unlawfully demoted, and (2) to the job from which he was unlawfully discharged; or, if such job or jobs no longer exist, to a substantially equivalent job or jobs. Such offers of reinstatement to Hukic and Vasquez shall be without prejudice to their seniority or other rights and privileges previously enjoyed. Further, Respondent will be required to offer to employ Marsenic, King, Flores, and Skocz in the jobs for which Respondent unlawfully refused to hire them, or, if such jobs no longer exist, substantially equivalent jobs, without prejudice to the seniority or other rights and privileges they would have enjoyed if they had been hired by Respondent effective 27 May 1985. In addition, Respondent will be required to make all six of these employees whole for any loss of pay they may have suffered by reason of the discrimination against them, less net interim earnings, to be computed in the mannner prescribed in *F. W. Woolworth Co.*, 90 NLRB 289 (1950), with interest as called for in *Florida Steel Corp.*, 231 NLRB 651 (1977).[62] Also, Respondent will be required to remove from its files any reference to the unlawful demotion, the unlawful discharge, and the unlawful refusals to hire, and to notify the discriminatees that this has been done and that evidence of such unlawful actions will not be used as a basis for future personnel actions against them. Regarding Hukic, this expunction order will include, without limitation, the warning notices issued to him on 7 and 9 May 1985, in view of my finding that they were issued because of his union activity and in order to provide a paper basis for subsequent personnel action against him. Regarding Vasquez, this expunction order will include, without limitation, the warning notice dated 15 May 1985 and given to him on 17 May 1985, and the warning notice bearing his name and dated 21 May 1985, in view of my finding that the 15 May notice was issued at least partly for the same reasons as the Hukic warnings and the warning notice dated 21 May (which Vasquez never received) was prepared as part of Respondent's efforts to conceal the unlawful motivation for his discharge. *Alert Medical Transport*, 276 NLRB 631 (1985).

In addition, Respondent will be required to make appropriate notices available to its employees. The record indicates that the employees involved in this case seldom, if ever, go to Respondent's office in Chicago. Moreover, the record fails to show whether the UPS facilities where the employees do work have employee bulletin boards on which Respondent can post notices without the consent of UPS. If Respondent has such bulletin boards, or if UPS consents to posting on bulletin boards controlled by it, Respondent will be required to post notices at the UPS locations where the unfair labor practices occurred. Otherwise, Respondent will be required to mail notices to the employees who work for it at such locations during what would otherwise be the posting period. The record shows that some of Respondent's employees speak Polish, Spanish, or Serbo-Croatian as a native language, and have limited or no knowledge of English. Accordingly, notices will be required in all four of these languages.

The General Counsel contends that the gross backpay of the four employees (Marsenic, King, Flores, and

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[61] The corresponding portion of the original complaint reads "an employee."

[62] See generally *Isis Plumbing Co.*, 138 NLRB 716 (1962), enf. denied on other grounds 322 F.2d 913 (9th Cir. 1963); *NLRB v. Central Illinois Public Service Co.*, 324 F.2d 916, 919–920 (7th Cir. 1963).

Skocz), whom Respondent unlawfully refused to hire at the Northbrook facility, should not be based on the $5 hourly wage scale of the employees who were in fact hired for those jobs. The General Counsel at least principally contends that the Northbrook employees constituted an accretion to a unit consisting of Respondent's employees at the other four UPS facilities, and that, therefore, the gross backpay of the four Northbrook discriminatees should be calculated at the rate the other employees in the unit were in fact paid, or (under the obligations imposed by Sec. 8(a)(5)) should have been paid when Respondent began to perform the Northbrook cleaning contract on 27 May 1985. As an alternative or supplemental argument, the General Counsel seems to be contending that Respondent is a successor to Chemco regarding Northbrook and, perhaps, regarding all five facilities, and that, therefore, the gross backpay of the Northbrook employees should be calculated at the $12.46 rate they were receiving under Chemco.[63] Because neither the unit nor the successorship issue was fully litigated before me, the merits of the General Counsel's claims in these respects will be deferred to the compliance stage. I note that as of 1 August 1985, the hourly rate for the Northbrook employees, and for the employees at Franklin Park (where Vasquez had worked), was fixed by the union bargaining agreement at $4.25 to $5.50, depending on length of service (see Tr. 155–157). I further note that the complaint contains no 8(a)(5) allegations.

The General Counsel's request for a visitatorial clause will be granted because litigation of the General Counsel's successorship contention would likely require evidence from Chemco and litigation of his unit contention may present some complexity. *Hilton Inn North*, 279 NLRB 45 (1986); but see *E. B. Manning & Son, Inc.*, 281 NLRB 1124 (1986).

[Recommended Order omitted from publication.]

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[63] See *State Distributing Co.*, 282 NLRB 1048 (1987). The General Counsel, however, stated at the hearing that Vasquez' and Hukic's gross backpay should be calculated at the $8.20 rate they were actually receiving when they were discharged. Further, neither at the hearing nor in the General Counsel's brief does he seek a backpay remedy for Vasquez based on his demotion from his group leader's job, for which Chemco paid a premium but Respondent did not.

Westcroft Realty Corp. *and* **Ali Ahmed and Local 32E, Service Employees International Union, AFL-CIO.** Cases 2-CA-22327 and 2-CA-22403

July 21, 1988

DECISION AND ORDER

BY CHAIRMAN STEPHENS AND MEMBERS JOHANSEN AND CRACRAFT

On March 17, 1988, Administrative Law Judge Raymond P. Green issued the attached decision. The General Counsel filed exceptions and a supporting brief.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and brief and has decided to affirm the judge's rulings, findings,[1] and conclusions[2] and to adopt the recommended Order.

ORDER

The recommended Order of the administrative law judge is adopted and the complaint is dismissed.

Gary A. Carlson, Esq., for the General Counsel.
Michael B. Doyle, Esq., for the Respondent.

DECISION

STATEMENT OF THE CASE

RAYMOND P. GREEN, Administrative Law Judge. This case was heard by me on 14 December 1987. The charge and amended charge in Case 2-CA-22327 were filed by Ali Ahmed on 8 July and 24 August 1987. The charge in Case 2-CA-22403 was filed by Ahmed on 24 August 1987. Thereafter a consolidated complaint was issued by the Regional Director for Region 2 of the National Labor Relations Board on 30 September 1987. In substance the complaint alleges:

(1) That the Respondent and Local 32E, Service Employees International Union, AFL-CIO (Local 32E) have maintained a collective-bargaining agreement, the most recent of which runs from 15 September 1986 to 14 September 1989, which covered certain of Respondent's employees, including Ali Ahmed.

(2) That the Respondent has not provided Ahmed with the benefits provided by the aforesaid contract because Ahmed was not a member of the Union.

(3) That on or about 22 May 1987 Ahmed joined the Union after which, on 10 June 1987, the Respondent discharged him because he joined the Union.

In addition to denying the allegations of the complaint, the Respondent asserts that these cases should be dismissed because a settlement was executed between it, Ahmed, and the Union.

Based on the record as a whole, including my observation of the demeanor of the witness, and after considering the briefs filed, make the following

FINDINGS AND CONCLUSIONS

I. JURISDICTION

The Respondent is a corporation engaged in the business of managing and renting real estate, including apartment buildings, in New York State. It was stipulated that annually the Respondent has gross revenues in excess of $500,000 and that it purchases goods and supplies from directly outside the State of New York valued in excess of $2000. I therefore find that the Respondent is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act. *Mandel Management Co.*, 229 NLRB 1121 (1977).

I also find that Local 32E is a labor organization within the meaning of Section 2(5) of the Act.

II. OPERATIVE FACTS

The apartment buildings involved in this case (called Skyview) are located at 5700, 5800, and 5900 Arlington Avenue, Riverdale, New York. Together, this complex has 1306 apartments and the Respondent has about 50 employees working at these sites, including 18 porters. In addition to the three apartment buildings, there is also a separate recreation facility located across the street at 5701 Arlington Avenue. Prior to September 1987, there was a swimming pool, a cafeteria, meeting rooms, locker rooms, and a sauna located at this separate building. After the poll closed in September 1987, the building has been undergoing a complete renovation and is currently closed.

Skyview was originally owned and managed by Carol Management, which in 1985 sold property to Coronet Properties. Westcroft Realty Corp., in turn, took over the management functions from Carol on 15 August 1986.

For many years certain of the employees working at Skyview have been represented by Local 32E and the evidence indicates that when the Respondent Westcroft took over from Carol, it retained the services of Carol's employees and supervisors. Among those retained was Sali Rexhepi, the director of maintenance, who had been employed at Skyview for 11 years. The Respondent also entered into a contract with Local 32E for the historical bargaining unit. This contract, which runs from 15 Sep-

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[1] The General Counsel has excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

[2] In affirming the judge's finding that Charging Party Ahmed's job was not included in the bargaining unit, we do not rely on what the judge referred to as the "plain language" of the collective-bargaining agreement because we find the contract to be ambiguous on this question. Rather, we agree with the judge's reliance on the conduct of the contracting parties as demonstrating a mutual intent to exclude Ahmed's position from the bargaining unit.

289 NLRB No. 133

tember 1986 to 14 September 1989, covers superintendents, assistant superintendents, utility groundsmen, handymen, doormen, and porters. By the contract's specific terms, in both the first paragraph and Schedule A, it covers the foregoing classifications of employees at 5700, 5800, and 5900 Arlington Avenue. It does *not* purport to cover any employees at 5701 Arlington Avenue and clearly was not intended to do so.

Ali Ahmed was first hired in January 1984 as a porter to work at 5701 Arlington Avenue (i.e., the recreation facility). He has never been paid the wages and benefits set forth in any agreement with Local 32E.

After Ahmed had worked for a while, he learned from employees in the other buildings that they had a union. He states that at some point in 1986, he told Rexhepi that he wanted to join the Union, but the latter said he could not and changed the subject. According to Ahmed, on an occasion in May 1987 he was told by Rexhepi that he was not in the Union and was not entitled to sick pay. (Ahmed had made an inquiry through another employee about sick pay.)

On 12 March 1987 the Respondent entered into a contract with Iowa Sports Management, which agreed to manage the recreation facility at 5701 Arlington Avenue from 23 May 1987 to 12 September 1987. As part of the agreement, Iowa contracted to furnish its own staff, including one to two porters. Rexhepi testified that he told Ahmed, in early May that Iowa was taking over his job and that he should look for employment elsewhere. Ahmed denies receiving such notice.

According to Ahmed, some of the other employees convinced him to join the Union in May 1987. He states that on 22 May he went with two other porters and met with John Pinto, a union representative. Ahmed, at this meeting, signed a dues-checkoff authorization card for Local 32E and paid an initiation fee.

Ahmed testified that on 10 June 1987 he handed the checkoff authorization card to Rexhepi, not having shown the card to anyone in management before. Ahmed testified:

> I showed [Sali Rexhepi] the card and then he looked, he read. I told him that I joined the union and this is the card. So he looked and then he said: "Ali, you're fired. You're fired because you joined the union."
>
> I told him: "Mr. Sali, okay, I have three kids, you know. I don't want the union, just let me stay."
>
> He said: "No, its too late. You did this behind my back."

Rexhepi testified that because of a delay Iowa did not come in to operate the recreation facility until 10 June. He states that on this date, he called Ahmed into his office and told him that because Iowa was taking over, his job was eliminated. Rexhepi testified that:

> He turned around and he says: "Mr. Sali, please, can you help me, because I have kids and I'm in a union?" the first time I hear he's in a union.
>
> . . . .
>
> I says: "Ali, got nothing open, job open for you and there's nothing I can do. Please, if you're in a union, you know the time I hire you, job is non-union job. But if you in a union, go back to the union and I hope they help you, they find a job for you."[1]

Later, on 10 June, Ahmed told Pinto of Local 32E that he had been discharged. He states that Pinto said not to worry, that he should register for unemployment benefits and come back in several days to see what was happening.

According to Ahmed, he went back to see Pinto on 17 June On this occasion Pinto told him that the union contract did not cover the building where Ahmed worked. Pinto also told Ahmed that he would try to get him another job.

On 8 July Ahmed filed this charge with Region 2 of the NLRB. Thereafter, on 29 July, the Union asked for an "informal hearing" with the employer to discuss the dismissal of Ahmed. On 5 August, by memo to the Board agent investigating the case, William Archer, on behalf of the Respondent, stated that it would be willing to arbitrate grievance with Local 32E a relating to the discharge of Ahmed. As a result, the Region deferred further proceedings in the case.

On 6 August 1987 a meeting was held at the Union's office. This was attended by Ahmed, Pinto, and Rexhepi. As far as I can determine, the discharge of Ahmed was discussed and there also were discussions whether Ahmed was in the Union. (According to Archer, when he asked Pinto, the latter said, "Well yes and no.") At the conclusion of the discussion, the Company offered to settle the case by giving Ahmed 2 weeks' severance pay plus a favorable letter of reference. Pinto, in turn, urged Ahmed to accept the offer and Ahmed agreed. Accordingly, on 6 August, the following document was executed by Ahmed, Pinto, and Arden:

STIPULATION

5701 Arlington Ave
RE: *Recreational Area*

IT IS HEREBY STIPULATED, CONSENTED TO AND AGREED BY AND BETWEEN THE UNDERSIGNED AS FOLLOWS:

1. THAT THE EMPLOYMENT OF THE EMPLOYEE, *Ali Ahmed* NOW EMPLOYED AT *5701 Arlington-Recreation* AS PORTER OF THE SAID BUILDING BY THE UNDERSIGNED, SHALL TERMINATE ON *6–110–87.*
2. THAT *Ali Ahmed* SHALL RECEIVE FROM THE EMPLOYER THE TOTAL SUM OF *$663.00, which covers the following:*

A-$________	Severance Pay.
B-$________	Vacation Pay.
C-$________	Sick Pay.
D-$663.00	Miscellaneous.

3. THE SUM OF *$663.00* IS LESS THE CUSTOMARY DEDUCTIONS ON SEVERANCE PAY, VACATION PAY, SICK PAY & MISCELLANEOUS.

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[1] Both Rexhepi and Ahmed speak English as a second language.

4. THE ABOVE SETTLEMENT IS PAYMENT IN FULL FOR ANY AND ALL MONIES DUE HIM.
5. THAT THE EMPLOYER SHALL SIMULTANEOUSLY WITH THE EXECUTION OF THIS STIPULATION MAKE OUT ONE (1) CHECK IN THE SUM OF *$663.00* LESS CUSTOMARY DEDUCTIONS. THIS CHECK IS TO BE PAYABLE TO THE ORDER OF THE EMPLOYEE *(Ali Ahmed).*
6. THAT THE UNION SHALL DELIVER THE CHECK TO THE EMPLOYEE.
7. THAT THE ACCEPTANCE OF THIS CHECK IS SUBJECT TO COLLECTION.
8. THE NECESSARY KEYS AND UNIFORMS MUST RETURNED TO THE EMPLOYER BY THE EMPLOYEE.[2]

III. ANALYSIS

The General Counsel contends that the Respondent violated Section 8(a)(1), (2), and (3) of the Act by not giving Ahmed the wages and other benefits of the Local 32E contract because he was not a member of the Union.[3]

There is no question but that Ahmed has not been paid the wages and other contractual benefits since the beginning of his employment in 1984. The evidence shows however, that this was not because Ahmed was not a member of the Union, but rather because his position was not encompassed within the bargaining unit. Thus, the contract explicitly covers only certain categories of employees (including porter), employed at 5700, 5800, and 5900 Arlington Avenue. It does not cover any employee at the separate recreation facility located at 5701 Arlington Avenue. That Ahmed's job was not included in the bargaining unit is not merely evidenced by the plain language of the contract, but also by the conduct of the contracting parties in not treating him as part of the bargaining unit for the 3 years that he was employed. Indeed, after Ahmed had been discharged and sought to file a grievance, the Union's representative, Pinto, indicated to him that there might be a problem because the collective-bargaining agreement did not cover the building in which Ahmed worked.[4]

In light of the above, I conclude that the contract did not cover Ahmed's position of employment and therefore the Respondent's failure to pay him the contractual benefits neither violated the Act nor breached the contract.

The contention that Ahmed was discharged because he joined Local 32E rests on what took place on 10 June 1987. Ahmed's version was that about 3 weeks after he joined Local 32E he finally presented his dues-checkoff authorization card to Rexhepi, who fired him on the spot "because you joined the Union."

Rexhepi's more plausible version was that, having contracted with Iowa to manage and staff the recreation facility, he told Ahmed in early May 1987 to look for another job and that on the day that Iowa took over (10 June), he told Ahmed that his services no longer were needed. According to the credited testimony of Rexhepi, after telling Ahmed of his discharge, Ahmed pleaded for his job, saying he was in the Union.

In crediting Rexhepi, I note, in addition to his demeanor, the fact that his version is consistent with other objective evidence in this case, particularly that the contract with Iowa provides for the latter to hire its own porters and that the conversation with Ahmed took place on the day that Iowa commenced operations at the recreation building. Moreover, I note the complete lack of evidence pointing to animus against Local 32E or any other union on the part of the Employer. While it is true that the Respondent only recently took over the management of Skyview, the evidence shows that it hired the predecessor's unionized employees and readily entered into a contract with Local 32E covering about 50 employees at the three buildings. Further, Rexhepi, the director of maintenance, had been continuously employed at Skyview for 11 years, during which time the Union had been the bargaining representative. In this regard, there is no evidence of any animus by Rexhepi toward the Union. I therefore find it implausible that in a situation in which Rexhepi for 11 years had supervised and dealt with about 50 union employees, he would preemptively discharge a single employee who presented him with a union dues-checkoff authorization card.

In short I credit the account given by Rexhepi and conclude that Ahmed was not discharged because he joined Local 32E.[5]

CONCLUSIONS OF LAW

1. Westcroft Realty Corp. is an employer engaged in interstate commerce within the meaning of Section 2(2), (6), and (7) of the Act.

2. Local 32E, Service Employees International Union, AFL-CIO is a labor organization within the meaning of Section 2(5) of the Act.

3. The Respondent has not violated the Act as alleged in the consolidated complaint.

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[2] In accordance with the settlement, Ahmed did receive a check, which he cashed.

[3] The General Counsel relies on such cases as *F & C Transfer Co.*, 277 NLRB 591 (1985); *Kaufman DeDell Printing*, 251 NLRB 78, 79-80 (1980); *Narragansett Restaurant*, 243 NLRB 125, 128-130 (1979); *Schorr Stern Food Corp.*, 227 NLRB 1650 (1977); *D. J. Eshom Meat Co.*, 208 NLRB 41, 43-44 (1973).

[4] The issue here is what, in fact, was the contract bargaining unit and not what the Board would decide, in a representation case, an appropriate bargaining unit should be.

The fact that the Company agreed to arbitrate Ahmed's discharge after the unfair labor practice charge was filed is not viewed by me as an admission that Ahmed's job was part of the contractual bargaining unit. Such a commitment was made as an expedient to have the processing of the unfair labor practice charge deferred.

[5] Having reached this conclusion on the merits, I do not feel that it is necessary for me to decide whether the settlement made on 6 August 1987 should be deferred. In this regard, I note that there are similarities and distinctions from the facts in *Independent Stave Co.*, 287 NLRB 740 (1987). That case discussed some of the criteria the Board would consider when deciding whether to defer to a privately negotiated settlement.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[6]

ORDER

It is recommended that the consolidated complaint be dismissed.

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[6] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

Aztec Bus Lines, Inc. ***and*** **San Diego AFL–CIO Bus Drivers Local Division 1309 of the Amalgamated Transit Union.** Cases 21–CA–19497, 21–CA–19542, 21–CA–20162, 21–CA–20182, 21–CA–20214, 21–CA–20405, and 21–CA–20536

July 22, 1988

DECISION AND ORDER

BY CHAIRMAN STEPHENS AND MEMBERS
BABSON AND CRACRAFT

On September 30, 1982, Administrative Law Judge Michael D. Stevenson issued the attached decision. The Respondent and the Charging Party filed exceptions, supporting briefs, and answering briefs.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings, and conclusions only to the extent consistent with this Decision and Order.

A. *The 8(a)(1) Allegations*

We agree with the judge's finding that the Respondent violated Section 8(a)(1) of the Act by the statements of the Respondent's president, Augustus Zemba, to employee Frank Patton in October 1980 and by the statements of the Respondent's director of safety and training, Flo Ybarra, at a meeting of nonstriking employees in January 1981. We also agree with the judge that Zemba violated Section 8(a)(1) by his November 1980 comments to Thomas Reynolds concerning the *Labor Law Journal* article about misconduct by strikers. According to Reynolds' credited testimony, Zemba falsely threatened—citing the article as authority—that any employee who was on the picket line at the time any other employee engaged in misconduct would be ineligible to return to work. An employer cannot lawfully make such a threat regardless of whether it invites the employees who hear it to consult attorneys or whether those employees have themselves been reading articles on the general subject of picket line misconduct.

We do not, however, adopt his finding of a violation in Zemba's statement to Reynolds in February 1981 that the former was disappointed that Donald Randall and employee Jan Corona, president of the Union in 1979 and 1980, and chief shop steward, respectively, were still in positions of authority with the Union. The remark occurred during a conversation when Reynolds joined Zemba and Ellen Harrison, the Respondent's comptroller, who were having coffee at a local restaurant, and did not include any threats of reprisals. Inasmuch as the comment was made in the course of an otherwise noncoercive conversation, we find that in light of all the circumstances we cannot agree with the judge that Zemba's February remark reasonably tended to restrain, coerce, or interfere with rights guaranteed by the Act.[1] Accordingly, we shall dismiss this allegation.

B. *The 8(a)(5) Allegations*

In section III,C,2, of his decision the judge rejected the contention that the Respondent engaged in bad-faith bargaining prior to the onset of the strike. We agree.[2]

The judge also found in section III,D, that on April 3, 1981, the parties agreed on a contract and that the Respondent thereafter unlawfully refused to execute that agreement and that the Respondent violated Section 8(a)(5) by bad-faith and surface bargaining subsequent to commencement of the strike. We disagree with these conclusions and reverse for the reasons set forth below.[3]

As discussed by the judge, the collective-bargaining agreement between the Union and the Respondent expired on June 30, 1980. Negotiations for a new contract had begun on June 12, but were unsuccessful, and the Union struck on August 23, 1980. During the strike there was a hiatus in the parties' bargaining sessions following the Respondent's proposal of November 6, 1980. After an exchange of correspondence, Union President Moore wrote to the Federal mediator on February 23, 1981,[4] asking that a meeting with the Respondent be arranged in order to present a union counterproposal. The parties met on March 12.

Prior to the March 12 meeting, the Respondent's attorney and chief negotiator, Josiah Neeper, sent a letter to Union Counsel Richard Prochazka, who had been designated as the Union's new chief negotiator in Moore's letter. Neeper's letter noted that the original purpose of the meeting had been the Respondent's receipt of a new counterproposal from the Union, but went on to state that in "preparing for the meeting, the Respondent finds that its position has changed since the time of its last

289 NLRB No. 125

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[1] See *Haynes Motor Lines*, 273 NLRB 1851 (1985).

[2] We need not decide here whether the proposal by the Respondent of a clause diminishing the Union's role in the grievance procedure is evidence of bad faith, because we agree with the judge that the Respondent did not insist to impasse on the proposal.

[3] We adopt the judge's finding that the Respondent violated Sec. 8(a)(5) of the Act by making a unilateral change in its health benefit plan. We shall amend the Order, however, to provide make-whole relief for any losses employees may have suffered as a result of the change in plans.

[4] All dates hereafter are 1981 unless noted otherwise.

proposal because of changed circumstances. Its changed position will be reflected in its response to the Union's proposal."

At the March 12 meeting Neeper referred to the "changed circumstances" mentioned in the letter and stated that at a subsequent meeting the Respondent would present proposals in response to the "changed circumstances."[5] The Union then tendered a proposal that made certain changes in the Respondent's November 6 proposal, rejected the union-security subclause that would have exempted nonstriking employees from the requirement of joining the Union, and accepted the grievance-and-arbitration article contained in the Respondent's November 6 proposal. Neeper asked some questions about certain sections of the Union's counterproposal and again stated that the Respondent would be making a new proposal based on changed circumstances.

At the next meeting held on March 26, Neeper presented the Respondent's counterproposal, which included most of the provisions in the Respondent's proposal of November 6, certain modifications to that proposal in response to matters raised by the Union on March 12, and the Respondent's previously promised response to "changed circumstances." The Respondent's March 26 proposal included section 9.7, which provided that employees who had been off work for more than 3 months would be required to take a physical examination from the Respondent's physician; section 9.8, which required employees who had been off work more than 30 days to be requalified on all equipment for which they had been qualified before being off work; section 9.9, which provided that employees who had been off work more than 3 months must provide a current Department of Motor Vehicles printout of their driving record; and section 17.8, which obligated the Respondent to bear the cost of any required physical examination of employees. In addition, the March 26 proposal stipulated that provisions regarding resolution of the strike and reinstatement of the strikers would be negotiated. Neeper identified sections 9.7 through 9.9 and the provision for negotiation of a strike settlement as the Respondent's response to its perception of changed circumstances. The Respondent informed the Union that, based on the recommendations of an industrywide group, it had substantially instituted the procedures in sections 9.7, 9.8, and 9.9 in October or November 1980 and described the justification for the particular subsections. It is undisputed that Neeper informed the Union that the provisions were to apply to returning strikers, and the Union did not object. With respect to the anticipated negotiation of provisions relating to resolution of the strike and the return to work of the strikers, Neeper—according to testimony specifically credited by the judge—told the Union that the Respondent expected to propose specific language and anticipated that the Union would make demands in the area as part of a final agreement. The judge found that one of the union representatives "nodded" in understanding of what was said, if not in agreement with it.

The parties' next meeting was on April 2. The Union first proposed modifications to sections 9.7, 9.8, and 9.9, which were rejected by the Respondent. Union negotiator Prochazka then wrote out modifications of sections 9.7 and 9.9, which the Respondent accepted. After discussion of the notice-of-termination section of the November 6 proposal, Neeper again referred to specific proposals that the Respondent desired to offer and mentioned that the Respondent expected to receive proposals from the Union regarding strike resolution and striker return.

The parties then broke for lunch prior to the scheduled afternoon session. During the lunchbreak the union representatives met with International Vice President Yelkey; in consequence, Prochazka called Neeper to cancel that afternoon's session, stating that "the International is unhappy with what we've done. They don't want us to meet with you this afternoon." Neeper and Prochazka then arranged for a meeting to be held on April 9.

Meanwhile, the union negotiators conferred during the afternoon of April 2, and called a general membership meeting for the following day. At that meeting, the membership voted both to return to work and to accept the Respondent's proposal as it was explained to them by the bargaining team. The Union then sent the Respondent two letters that had been prepared prior to the membership meeting. One letter purported to make an unconditional offer to return to work, and the other purported to be an acceptance of the Company's contract offer of April 2.[6]

As noted above, the judge found that the parties reached agreement on a collective-bargaining agreement and that the Respondent thereafter violated Section 8(a)(5) by declining to execute it. We disagree. In our view, the record does not support a finding that agreement was reached on strike resolution and striker return. First, the Union's letter of April 3 clearly demonstrates that the Union was accepting not all, but rather only a part of the Respondent's offer. Thus, the record shows that the Union knew—and acknowledged—that the Respondent intended that provisions pertaining to strike resolution and striker return be included in any final agreement. But the Union's letter, after purporting to accept the Respondent's proposal, states that the Union viewed striker return and strike resolution provisions as issues "separate and apart" from a collective-bargaining agreement, although the Union would be willing to discuss those subjects independently of a collective-bargaining agreement. Thus, the Union's purported "acceptance" really amounted to a counteroffer, which the Respondent of course was not obligated to accept. Indeed, given the Union's acknowledgment that it knew that the Respondent meant to include strike resolution and striker return provisions as part of any final agreement, we conclude that the Union, or at least the Union's attorney, could not in fact have held a good-faith belief that the parties had reached a complete agreement along the rather different terms embodied in the Union's letter.[7] Hence, we find it clear from the evidence that there was in fact no meeting of the minds between the parties. Certainly, the Union was free to make an unconditional offer to return to work and end the strike, and to have the Board resolve any issues regarding the return of the strikers. But it was not entitled to insist also that the other remaining portions of the Respondent's proposal constituted the entire, complete, and enforceable collective-bargaining agreement between the parties, in light of the Respondent's clear statements to the contrary.

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[5] The changed circumstances referred to picket line misconduct by strikers that might disqualify them from reinstatement, the fact that a large number of replacement drivers had been hired who might wish to retain their jobs after the strike (resulting in an insufficient amount of work for both the replacements and the returning strikers), and the possibility that the replacement drivers might object to a union-security provision that would subject them to union discipline.

[6] The letters are set forth in full in the judge's decision.

The judge further concluded that the Respondent refused to offer bargaining proposals regarding matters of strike resolution and striker return and that, even if such a proposal was made, it was unlawful, citing *Georgia Kraft Co.*,[8] and *Fitzgerald Mills Corp.*,[9] respectively. In our view, the former finding is contrary to the judge's own crediting, which we affirm, of Neeper's testimony that the Respondent intended to make proposals regarding strike resolution and the return to work of strikers, and that the Respondent expected also to receive proposals on these issues from the Union. Further, the judge's reliance on *Georgia Kraft* is misplaced. In that case the Board stated:

> Contrary to the Administrative Law Judge, however, a review of the record plainly reflects that the issue of striker discipline was not, on December 3, presented by Respondent as a bargainable proposal, nor was it put forth on that date as a *quid pro quo* for agreement on a contract. Thus, it was unnecessary for the Administrative Law Judge to speculate as to what Henson's stipulated testimony "suggests," nor is it "obvious" that the issue of striker reinstatement was a bargainable "proposal" on December 3. Kelly was initially examined on this subject, as an adverse witness called by the General Counsel:
>
> Q. Whose idea was it, Mr. Kelly, to give Mr. Henson . . . a list of strikers to be fired?
>
> A. Mine.
>
> Q. Do you want to explain for us any reason that you had for doing it at that time as opposed to any other?
>
> A. No, no, just that we had the meeting scheduled with Mr. Henson that particular day, and we thought—I thought we should advise them about the situation with these employees. [Id. at 909.]

Here, by contrast, the Respondent clearly put forth the issues of striker return and strike settlement as matters that it intended should be resolved as part of a final overall agreement. Nor did the Respondent bargain to impassse here. Indeed, the judge seems to have overlooked the factual setting—and its effect—that it was the *Union* which broke off in the middle of negotiations and, before their scheduled resumption, counteroffered with an acceptance of part of the Respondent's proposal and attempted to assert that that part constituted the entire agreement between the parties.

The judge's alternative finding that if the Respondent made any proposal regarding strike resolution and striker return that proposal was unlawful, is in our view simply erroneous and appears to be based, so far as the record shows, solely on conjecture. In this regard, we conclude that *Fitzgerald Mills Corp.* is inapposite here. In that case, the respondent's attorney insisted that *before any* contract could be negotiated, the union would have to agree to the respondent's proposal with respect to the strikers. Thus, respondent there conditioned any bargaining on the union's prior agreement to a specific nonmandatory proposal. It is clear from the discussion above of the relevant facts that a similar situation did not occur in the instant case. Indeed, there is nothing unlawful in the suggestion made by the Respondent, in the course of the negotiations, that those strikers accused of misconduct, together with their union representative, meet with the Respondent regarding those allegations, that the parties negotiate with respect to those individuals, and in those instances where the parties could not reach agreement, that they attempt to arrange some sort of expedited or abbreviated arbitration procedure.[10]

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[7] For the purposes of our discussion, the same result obtains whether one views the Respondent as proposing only a single integrated agreement, or a separate agreement covering strike resolution and striker return issues, which would be resolved concurrently as part of a package. Either view is consistent with the judge's finding, based on credibility determinations, which we adopt, that Neeper told the Union on March 26 and again on April 2 that there were specific proposals that the Respondent desired to make, and anticipated that the Union would also make demands "as part of a final agreement." However, these same factual findings are not compatible with a conclusion that the parties in fact reached agreement.

[8] 258 NLRB 908 (1981). Subsequent to the judge's decision here, the Board in *Clear Pine Mouldings*, 268 NLRB 1044 (1984), overruled *Georgia Kraft* on the standards for striker misconduct. (See discussion, infra, under striker reinstatement issues, sec. 3, misconduct.)

[9] 133 NLRB 877 (1961), enfd. 313 F.2d 260 (2d Cir. 1963), cert. denied 375 U.S. 834 (1963).

Unlike the judge, we conclude that the situation here is strikingly similar to that presented in *Nordstrom, Inc.*, 229 NLRB 601 (1977). The Board's summary there is similarly appropriate here: "The issue here, succinctly, is whether one party to collective-bargaining negotiations can effectively conclude negotiations by agreeing only to those demands of the other party which constitute mandatory subjects of bargaining." (279 NLRB at 601) The Board answered the question in the negative. Although it is true that a party may not lawfully insist on inclusion of nonmandatory proposals—a course that we have found the Respondent did not pursue in the instant case—we believe that the judge's decision here, like the General Counsel's case in *Nordstrom*, goes well beyond that proposition. Thus, to say as here that the proponent of a proposal addressing reinstatement and backpay of former strikers cannot lawfully insist on its inclusion in the final agreement means only that and no more. "It does not mean that once, out of necessity, the nonmandatory proposal is removed from the table, the proponent of the nonmandatory subject is not permitted to alter those proposals which are mandatory in light of the removal of the nonmandatory subject." *Nordstrom*, supra at 601. In sum, contrary to the judge, we agree with the Respondent that *Nordstrom* compels the conclusion in the instant case that the Union was not free to disregard or eliminate portions of the Respondent's March 26 offer and, by accepting the remaining Respondent proposals, assert that it had established a complete and binding collective-bargaining agreement that the Respondent was required to execute. Accordingly, we reverse and dismiss those portions of the complaint allegations.

The judge also concluded that the Respondent engaged in bad-faith and surface bargaining after the commencement of the strike. He based that conclusion on his finding, which we have reversed above, that the Respondent unlawfully refused to execute a contract and insisted on nonmandatory subjects; the 8(a)(1) findings discussed above; and his assessment that the Respondent's proposals with respect to resolving strike issues would be "predictably unacceptable" to the Union. The judge provided no basis for his assessment that the striker return and strike resolution proposals were "predictably unacceptable" apart from his findings in support of the refusal to sign an agreed-on contract allegation. The Board has recently reaffirmed its standards for the review of contract proposals in *Reichhold Chemicals*, 288 NLRB 69 (1988). Although the Board will not make purely subjective assessments of bargaining proposals, it will "continue to examine proposals when appropriate and consider whether, on the basis of objective factors, a demand is clearly designed to frustrate agreement on a collective-bargaining contract." Ibid. In view of the factual and legal analysis underlying our reversal of the judge with respect to the refusal-to-sign-a-contract allegation, we find that the striker return and strike resolution proposals clearly do not support a finding of bad-faith bargaining under the *Reichhold Chemicals* test. Finally, we do not consider the 8(a)(1) violations found above to be a sufficient ground on which to base a finding that the Respondent engaged in bad-faith or surface bargaining.[11] The judge in his discussion of the prestrike allegations concluded there was no evidence that Zemba's statements regarding the Union or misconduct by individuals were calculated to disrupt the negotiations or that they did so. Contrary to the judge, we believe that the same is true of Zemba's and Ybarra's statements with respect to the allegations of bad faith in the poststrike bargaining.

Accordingly, for all the foregoing reasons, we dismiss the allegations of bad-faith and surface bargaining in the poststrike negotiations.

C. *Striker Reinstatement Issues*

1. The physical examination and testing requirements

The judge concluded that the strikers listed in "Appendix A" of his decision did not receive a valid offer of reinstatement, premising this conclusion primarily on his finding that the Respondent unlawfully insisted that the returning strikers submit to physical examinations, take tests to requalify as drivers, submit printouts of Department of Motor Vehicles records (which would show any traffic violations), and fill out employment applications. The judge's principal theory for finding a violation was that these conditions amounted to treating the strikers as new employees. If this were so, i.e., if these were conditions not imposed on nonstriking employees, then, under the authorities relied on by the judge, the Respondent would be guilty both of engaging in disparate treatment that penalized employees for striking and of imposing a condition that renders the offer of reinstatement suspect. The Respondent would thereby have violated Section 8(a)(3) and (1) of the Act. *Standard Materials*, 237 NLRB 1136 (1978), enfd. mem. 604 F.2d 449 (5th Cir. 1979); *St. Cloud Foundry & Machine Co.*, 130 NLRB 911, 919 (1961); *NLRB v. Robinson Freight Lines*, 251 F.2d 639, 641–642 (6th Cir. 1958).

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[10] We do not suggest that the Respondent was entitled to insist to impasse on those proposals; since we conclude that the Respondent here did not insist to impasse, we need not reach that issue.

[11] The judge dismissed complaint allegations that statements attributed to Tom Ingersol violated Sec. 8(a)(1) of the Act. As no exceptions were filed to that finding, we do not consider those allegations.

The judge also concluded that the Respondent violated Section 8(a)(5) and (1) of the Act by unilaterally implementing the physical examination and testing requirements in October or November 1980, and he reasoned that this was an additional basis for finding that the Respondent had not made valid offers of reinstatement to the strikers.[12]

For the reasons set forth below, we do not agree that, under the circumstances here, the conditions contained in the reinstatement offers violated Section 8(a)(3) of the Act, or that the Respondent had imposed the physical examination and testing requirements unilaterally, that it, therefore, violated Section 8(a)(5) and (1) of the Act, and that including these requirements as a condition to reinstatement invalidated the offers.[13]

The judge's 8(a)(3) and (1) finding is in conflict with his finding that, since October or November 1980, the Respondent had been "using substantially the same procedures" as those outlined in its proposals for sections 9.7, 9.8, and 9.9 of the new collective-bargaining agreement, i.e., requirements that any employee who has been off work for more than 3 months take a physical examination at the Respondent's expense prior to returning to duty and provide a current Department of Motor Vehicles printout of his or her driving record, and that any employee who has been off work for more than 30 days take tests to be requalified on equipment for which he or she was qualified prior to the time off. Because these requirements on their face do not apply only to strikers and because the judge found (with adequate support in the record) that they had in fact been implemented in the fall of 1980, when the Respondent was operating with replacements or nonstriking employees, we cannot agree that the Respondent's attempt to impose them on the returning strikers (all of whom had been off work for more than 3 months) amounted to treating the strikers as if they were new employees.

With respect to the supposed requirement that the strikers fill out complete new job applications, we do not find that the testimony of two employees whom the judge credited is sufficient to carry the General Counsel's burden of showing that the Respondent was treating the strikers as new employees. The Respondent's comptroller, Ellen Harrison, testified without contradiction that in reviewing the Respondent's personnel files in the fall of 1980 she discovered that the files needed updating as to such matters as current addresses, records of on-the-job injuries, and identity of persons to notify in case of emergency. She also testified that in order to secure such information from the returning strikers after the Union made the unconditional offer to return on their behalf, she asked them to fill out certain parts of job application forms in order to make sure all personnel information was current. The judge relied on the testimony of two returning strikers, Mary Mason and Jose Tovar, in concluding that the strikers were required to fill out applications as if they were new employees. But Tovar's testimony was vague—he recalled being told to fill out some forms—"but I don't recall what they were"—and he recalls filling out "the questions"—none of which he described. According to Mason's testimony, the strikers were specifically instructed by Harrison that they did *not* need to fill out the entire application form, although Flo Ybarra, the Respondent's director of safety and training, later told them to fill out the entire forms. We cannot conclude, on the basis of all the evidence, including the testimony credited by the judge, that the conflicting instructions as to the application forms amounted to an effort to treat the strikers as new employees, especially in view of the fact that Harrison was the one in charge of processing the returning strikers and was Ybarra's superior.

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[12] This allegation was not included in the complaint, but counsel for the General Counsel argued in his posthearing brief that the matter had actually been litigated and the judge so found. For the reasons set forth below, we do not agree with the judge that a finding may be made on this allegation.

[13] Nor do we agree with the judge that the Respondent's reference in the offers to strikers who "may be entitled to reinstatement" implied the existence of conditions other than those that we find, infra, were lawfully imposed. Although the offers of reinstatement were therefore valid ones, we agree with the judge that the Respondent failed in its obligation to offer immediate reinstatement to the strikers on their unconditional offer to return to work. Accordingly, we shall provide that the Respondent make whole the srikers listed in App. A of the judge's decision for any loss of earnings and other benefits resulting from the delay in offering them reinstatement.

This case is therefore unlike the authorities on which the judge relied, in which the evidence showed that strikers were treated in a way that only new employees were treated.[14] The issue here of new conditions applied to strikers resembles instead the physical examination issue in *Lone Star Industries*, 279 NLRB 550 (1986), affd. in part and vacated in part 813 F.2d 472 (D.C. Cir. 1987), in which the Board found that the employer did *not* violate Section 8(a)(3) of the Act by imposing a physical examination requirement on returning strikers since the policy applied to all employees. The Board acknowledged that the employer had not yet administered it to all the replacements and early returning strikers, but it concluded that delays and imperfections in accomplishing the full-scale implementation did not mandate a finding that the employer was requiring the examination only of strikers.

Of course, if it is shown that an ostensibly across-the-board policy in fact discriminates against strikers in a significant way and the employer has no counterbalancing substantial business justification, we will find a violation of Section 8(a)(3) under the theory of *NLRB v. Great Dane Trailers*, 388 U.S. 26, 34 (1967). Thus, in *Lone Star*, the Board found a violation in the employer's new policy of totally eliminating seniority as a basis for assigning work, including overtime. The policy economically injured the strikers, nearly all whom had longer time on the job than any of the replacement employees, and the respondent failed to put on any business justification defense at all for the policy. Under those circumstances, an inference of antiunion motive was permissible. Here, however, the General Counsel has not adduced evidence showing that the conditions in question would significantly disadvantage strikers in comparison with replacements or nonstrikers, and given the evidence of nondiscriminatory business purposes served by the requirements—considerations of safety and completeness of personnel information—we cannot conclude that the balance under *Great Dane* is properly struck so as to permit an inference of discriminatory motive.[15]

We further find, contrary to the judge, that the Respondent did not violate Section 8(a)(5) and (1) of the Act by unilaterally implementing the physical examination and testing requirements in October and November 1980 and imposing these conditions on the strikers following their unconditional offer to return. As noted above at footnote 12, this allegation was not included in the complaint, but the judge, in response to the General Counsel's posthearing brief, found that the matter had been fully litigated. This conclusion does not adequately acknowledge the Respondent's argument that the General Counsel's allegation that the Respondent unlawfully refused to execute the agreement purportedly reached on April 3, 1981, including the conditions contained in sections 9.7, 9.8, and 9.9, conflicts with a theory that these conditions were unilaterally implemented. Moreover, the Respondent presented evidence regarding its application of the conditions to employees as early as the fall of 1980 to rebut the General Counsel's theory that these same conditions were applied discriminatorily to returning strikers. We can assume that, had the Respondent known of the unilateral change allegation, it would have presented its defense differently. Therefore, the Respondent did not receive adequate notice of a material issue, and the parties did not fully and fairly litigate the unilateral change allegation. *Castaways Hotel*, 284 NLRB 612 (1987). Accord: *Collateral Control Corp.*, 288 NLRB 308 (1988). See also *Electrical Workers IBEW Local 1186 (Pacific Electrical)*, 264 NLRB 712 fn. 3 (1982), enfd. mem. 113 LRRM 3816 (9th Cir. 1983).

2. The resignations

We adopt the judge's determination that strikers Carr, Dredden, and Marks resigned their employment; that Banning, Conyer, Doty, Ozgundez, Planje, and Reid did not; and that the Respondent is, therefore, not entitled to deny the latter six employees reinstatement on that ground. We also agree with the judge's conclusion that Umphreys resigned. Contrary to the judge, however, we, therefore, conclude that the Respondent was not obligated to offer her reinstatement, and accordingly find it unnecessary to pass on his findings with respect to her alleged misconduct.

3. The misconduct issues

In considering the circumstances involved with respect to the individual strikers denied reinstatement, the judge properly relied on current Board law at the time of his decision. Thus, in assessing particular types or instances of misconduct, he relied largely on the tests and standards set forth in such cases as *Coronet Casuals*, 207 NLRB 304 (1973); *W. C. McQuaide, Inc.*, 220 NLRB 593 (1975); *A. Duie Pyle, Inc.*, 263 NLRB 744 (1982); *Georgia Kraft Co.*, 258 NLRB 908 (1981); and *MP Industries*, 227 NLRB 1709 (1977).

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[14] *Craw & Son*, 244 NLRB 241, 242 (1979); *Standard Materials*, supra; *NLRB v. Robinson Freight Lines*, supra.

[15] The judge's factual findings confirm the Respondent's account that the requirements for testing, medical examinations, and provision of Department of Motor Vehicles printouts were instituted around the time that the safety representatative of the United Bus Owners Association visited the Respondent and made recommendations concerning changes in procedures at least 5 months before the strike ended. In addition, the Union apparently regarded the new procedures as acceptable as general conditions of employment, apart from the question of striker return, because (with the exception of the personnel file updates) they were included in the contract that the Union insisted represented the parties' entire agreement. For reasons set out below, however, we do not find that the Union had agreed to them when first implemented or that it had agreed to them if they were not part of a bargaining agreement that the Respondent would be willing to execute.

On February 22, 1984, in *Clear Pine Mouldings*, 268 NLRB 1044, the Board reevaluated the appropriate standard for determining the reinstatement rights of employees who engaged in strike-related misconduct. In so doing, the Board adopted the standard formulated by the United States Court of Appeals for the Third Circuit in *NLRB v. W. C. McQuaide, Inc.*, 552 F.2d 519, 527 (1977), and overruled prior Board decisions for the extent they were inconsistent. In *Clear Pine*, the Board announced that it would apply the following test for determining whether strike misconduct directed at fellow employees justifies an employer's refusal to reinstate a striker: "whether the misconduct is such that, under the circumstances existing, it may reasonably tend to coerce or intimidate employees in the exercise of rights protected under the Act." (*Clear Pine* at 1046.) The Board also stated that it would apply an analogous standard to the assessment of strikers' verbal and nonverbal conduct directed against persons who do not enjoy the protection of Section 7 of the Act. Id. at 1046 fn. 14 (plurality opinion). Id. at 1048 (concurring opinion). Thus, misconduct aimed at managers or other nonemployees may also be grounds for denying reinstatement.

The plurality in *Clear Pine* further rejected the prior practice in cases involving unfair labor practice strikes of balancing the severity of the employer's unfair labor practices (that may have provoked the strike) against the gravity of the striker misconduct.[16] In the instant case, the judge utilized this balancing test in assessing whether the conduct of certain individuals warranted a denial of reinstatement because of his earlier conclusion that the Respondent had bargained in bad faith following the commencement of the strike and that the strikers had thus become unfair labor practice strikers. As set forth above, we have dismissed the main allegations of bad-faith bargaining subsequent to the commencement of the strike, and the violations that we have found came to the strikers' notice only after they had engaged in the misconduct for which they were denied reinstatement. Accordingly, the balancing test referred to above would not be appropriate here.

Were we simply to apply the stricter *Clear Pine* standard to each contested refusal to reinstate on the ground of strike misconduct, we would find as disqualifying misconduct some types of behavior that the judge believed he could not so find under Board law as it then stood. We cannot resolve the issues simply on that basis, however, because we must also consider the Union's argument, made in its exceptions, that the judge did not correctly analyze the evidence supporting the Union's claim that a comparison of the Respondent's treatment of nonstrikers or replacements who engaged in misconduct with the Respondent's treatment of strikers shows a clear pattern of disparate treatment based on participation in the strike. Although an employer does not violate the Act by refusing to reinstate strikers who have engaged in serious misconduct, it is not free to apply a double standard. It may not knowingly tolerate behavior by nonstrikers or replacements that is at least as serious as, or more serious than, conduct of strikers that the employer is relying on to deny reinstatement to jobs. *Garrett Railroad Car & Equipment v. NLRB*, 683 F.2d 731, 740 (3d Cir. 1982) (applying the principle but upholding the refusal to reinstate because employer lacked knowledge of nonstriker involvement in misconduct). The Union contends that the Respondent applied such a double standard here and that, as a result, none of the denials of reinstatement is lawful. We agree in part. As our analysis of the evidence below reveals, we find that some of the nonstrikers engaged in misconduct that was at least as serious as some of the striker misconduct; yet, the Respondent did not even suspend those nonstrikers for the actions in question, let alone discharge them. The refusals to reinstate strikers for conduct of comparable or lesser seriousness are discriminatory and therefore violate Section 8(a)(3) and (1) of the Act. We are persuaded, however, that some of the strikers engaged in conduct that was more serious in its totality than the nonstriker conduct at issue. Those refusals to reinstate are not unlawful because they do not represent disparate treatment of comparable cases.

Before detailing the evidence concerning nonstriker misconduct, we should preliminarily note testimony by the Respondent's president, Zemba, and its comptroller, Harrison, regarding the Respondent's method for compiling and reviewing information on which to base decisions whether to deny reinstatement on the basis of strike misconduct. Logs were kept by the Respondent's dispatchers and by security guards employed by

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[16] Member Babson agrees with the plurality opinion in *Clear Pine* with respect to its rejection of such a balancing test. Id. at 1047 and fns. 24 and 25. Nevertheless, he would consider immediate provocation in judging whether a particular action amounts to misconduct that would justify denying reinstatement.

Rogers Police Patrol who were working under contract for the Respondent. Harrison reviewed these logs and transferred what she regarded as relevant information into a card index with each striker separately listed. She orally conveyed information from the logs to Zemba (who directly reviewed only selected passages). Based on that information and on direct observation of some strike events, Zemba, Harrison, and the Respondent's counsel made the decisions regarding whom to reinstate.

The logs were not in fact limited to descriptions of striker misconduct. The guards and dispatchers had also recorded some observations of nonstriker misconduct, but Zemba's response to a question whether he ever reviewed the logs' reports of misconduct by striker replacements was "not particularly"; and although Harrison had reviewed the logs in their entirety, she did not indicate that the accounts of nonstriker misconduct were included in her report to Zemba about picket line events relevant to reinstatement decisions.

According to the security police log, on October 24, 1980, nonstriking employee David Smart responded to a female picketer's hitting the side of his car with a sign by stopping his car, getting out, grabbing her by the neck and hair, punching her down to the ground, and then hitting her head against the pavement. (This incident was confirmed at trial by the testimony of the victim, Linda McQueen, who testified that she had swatted the car with her picket sign because it would have hit the picketers had they not stepped quickly back.) According to the dispatch log for September 27, 1980, nonstriking employee George Reese was reported to have responded to the throwing of eggs at his car by making a U-turn, returning to the bus lot driveway, and threatening the picketers with a knife.[17] Finally, an incident on October 5, 1980, concerning nonstriking employee James Lombardi was not only mentioned in the logs but also specifically came to the Respondent's attention because, as the dispatcher, Tom Ingersoll, recorded, the police came to arrest Lombardi for "three counts of assault with a deadly weapon (his van)" and Ingersoll left to go down to jail and bail Lombardi out.[18] The evidence at the hearing shows that Lombardi exited from the bus lot, swerved his van toward the picketers, drove down the street, turned around, came back at a very fast speed, and veered toward the picketers again, barely missing them as he went past.

Zemba was questioned about whether these or any other nonstriker had been disciplined for such misconduct, and although he testified that his supervisors had advised employees not to drive too fast going into or out of the bus lot, he had no definite knowledge of any specific disciplinary measures. Both he and Harrison testified that Smart had been discharged at some time after the beating incident, but they produced no evidence, either testimonial or documentary, that the discharge had anything to do with that incident. Harrison testified that she had been upset by Smart's conduct in that incident and that Transit Coordinator Schultz might have "spoken to" Smart. Harrison and Zemba both testified that Lombardi had been given a disciplinary warning. Zemba, however, conceded that when such warnings were memorialized they were placed in the Respondent's personnel files. Although the Respondent's counsel indicated he would produce evidence of such warnings if it existed, no such evidence was ever proffered. No witness tesified to any investigation by the Respondent of the report concerning Reese's alleged brandishing of the knife.[19]

As noted above, we do not agree with the Union that this evidence of disparate treatment is grounds for finding that *all* the refusals to reinstate strikers were unlawful. Certainly the Smart and Lombardi incidents were serious, because they represented, in the former case, a direct physical assault on another person and, in the latter, conduct that came perilously and deliberately close to vehicular assault on several people.[20] But it is also the case that some of the strikers not only engaged in assaultive conduct but also engaged in other kinds of misconduct as well, in some cases repeatedly.

Thus, strikers Wallace Leonard, Alan Shelton, Phil Burkhart, Patricia Fowler, Steve Ondrechon, and Agnes Pangilinan either swung at other people with sticks or thrust the sticks at others' faces, and in addition engaged in other acts of misconduct detailed by the judge. (In Pangilinan's case, the stick was jabbed at the driver of a bus while it was in motion; in Ondrechon's case the stick had been sharpened at the end.) Strikers Don Lilly, John Kipple, Valerie Mendoza, and Linda Peckron threw liquids or lighted cigarettes through bus or car windows into the faces of nonstrikers who were driving vehicles at the time and, in addition, engaged in other acts of misconduct.[21] Bob Baker participated in much of Lilly's misconduct, including a dangerous incident in which the two drove their motorcycles on either side of a bus whose driver was taking a driving test in order to harass the driver while he was driving down the highway.

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[17] No testimony about this reported incident was given at the hearing below. Reese appeared as a witness but was asked only about an incident in which he stopped his car and responded to a picketer's threatening remark by showing the picketer a tire iron he was carrying in the front seat of his car. There is, therefore, no credible evidence that Reese actually brandished the knife; but the report was in logs compiled and reviewed by the Respondent's agents and, as noted below, there is no evidence that Reese's supervisors even questioned him about the incident.

[18] The record indicates that the Respondent's transit coordinator, David Schultz, put up the $300 for Lombardi's bail, and that this was treated as a loan that Lombardi was expected ultimately to repay to the Respondent.

[19] In considering the disparate treatment issue, we are not relying on testimony that another nonstriking employee, Orville Swadner, sprayed ammonia into the face of at least one picketer. Charges were brought against Swadner for that incident, and his uncontradicted testimony is that he was acquitted on grounds of self-defense.

[20] We recognize that both Smart's and Lombardi's actions were provoked by striker misconduct, but the reactions so exceeded the provocations that these incidents cannot be discounted as self-defense or otherwise justifiable responses. Certainly given the standards the Respondent was applying to the strikers, it is apparent that had these men been strikers the Respondent would have deemed the incidents to be grounds for denying reinstatement.

Striker Barbara McPheron was a prime actor in an incident that the judge aptly described as "one of the most serious and dangerous acts of misconduct in the entire strike"—throwing eggs through a car window at the head of the Respondent's dispatcher while he was driving along a road with his family at a speed of 25–30 miles an hour. A collision with the car ahead of him was barely avoided. Striker Connie Murphy was found by the judge to have engaged in "extensive and significant misconduct," which included egg throwing at moving vehicles so as to impair the drivers' vision, blocking a bus with her van and then, when required by police to move her van, backing it away in a manner so as to come close to running down Zemba and (together with striker Michael Kirkpatrick) engaging in a car chase after a car carrying Zemba, Harrison, and another person and following up that chase the next day with a threat: "We didn't get you that time; we'll get you next time."

Striker Brenda Meyers threw a rock at the head of a nonstriker in addition to damaging vehicles and making threats of violence. Striker Norman Amador, during a fray with two nonstrikers, attempted to choke a female nonstriker while she was trying to radio from her bus for help. The judge found that Amador was one of "the most active strikers . . . committing acts of misconduct," which also included throwing eggs at vehicles, rocking vehicles, and making threats of violence. Striker Michael Kirkpatrick, in addition to participating in the car chase with Murphy, noted above, used a slingshot to launch marbles at the head of the Respondent's transit coordinator, Schultz, and also threw rocks on more than one occasion. Finally the assaultive conduct of striker Roy Stoker, whom the judge correctly described as "guilty of perhaps more major violent incidents than any other striker," amply warrants a finding that he was not entitled to reinstatement. In sum, the totality of the misconduct engaged in by each of the foregoing 17 strikers was such that their cases are not comparable to those of the nonstrikers discussed above whom the Respondent failed to discipline.

In the case of the other strikers, however, even though we would find that many could properly have been denied reinstatement had the Respondent been acting evenhandedly with respect to all employees on both sides of the strike, we cannot conclude that the Respondent can lawfully deny them reinstatement in the face of its failure to discipline Smart or Lombardi or to make thorough inquiries into apparent misconduct by other nonstrikers.

CONCLUSIONS OF LAW

1. The Respondent is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

2. The Union is a labor organization within the meaning of Section 2(5) of the Act.

3. All coach operators, maintenance employees, and student drivers constitute an appropriate unit for the purposes of collective bargaining within the meaning of Section 9(b) of the Act.

4. Since 1976 the Union has been and continues to be the representative for purposes of collective bargaining of the employees in the above-described unit.

5. By unilaterally changing employees' health and accident insurance plan, without notification to or affording an opportunity to bargain with the Union, the Respondent has engaged in unfair labor practices within the meaning of Sections 8(a)(5) and (1) and 2(6) and (7) of the Act.

6. By telling an employee that the Respondent would not negotiate with the Union unless certain union leaders were replaced and picketers stopped harassing the Respondent's employees, by advising an employee that anyone picketing at the time an act of misconduct occurred would not be returned to work after the strike was terminated, and by telling employees that the Union was "finished" and that returning strikers would be offered only part-time jobs, the Respondent has engaged in unfair labor practices within the meaning of Section 8(a)(1) and Section 2(6) and (7) of the Act.

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[21] Lilly threw a hot liquid on the driver; his other numerous acts of misconduct included blocking vehicles, threats of violence, rocking Zemba's car, spitting on a nonstriker, damaging a bus, and participating with striker Baker in the highway incident described below. Peckron threw a hot liquid on a driver and also slammed a car door on a nonstriker's leg, threw eggs and a rock at vehicles, and blocked vehicles. Mendoza threw lighted cigarettes through windows at drivers while the vehicles were in motion and, in addition, made physical threats and vandalized parked cars.

7. Strikers Dana Banning, Darryl Conyer, Thomas Doty, Suhley Ozgundez, Abraham Planje, and Cheryl Reid did not resign their employment from the Respondent and the Respondent was not entitled to refuse to offer them reinstatement on that ground following the termination of the strike.

8. Strikers Leslie Carr, Bert Dredden, Gerald Marks, and Jean Umphreys resigned their employment with the Respondent and are thus not entitled to an offer of reinstatement.

9. The following strikers are not entitled to offers of reinstatement because of their strike misconduct:

Norman Amador
Robert Baker
Patricia Fowler
Wallace Leonard
Donald Lilly
Connie Murphy
Stephen Ondrechon
Linda Peckron
Roy Stoker
Barbara McPheron
Phil Burkhart
John Kipple
Michael Kirkpatrick
Valerie Mendoza
Brenda Myers
Agnes Pangilinan
Alan Shelton

10. By failing and refusing to reinstate the following strikers the Respondent has violated Section 8(a)(1) and (3) of the Act:

Angel Huezo
Ray Lindemann
Linda McQueen
Janel Bock
James Fenderson
Kieron Moore
Ronald Norman
Thomas Reynolds
Susan Silvestri
Steven Tom
Karen Balding
Suhley Ozgundez
Dana Banning
Abraham Planje
Donna Bozick
Cheryl Reid
John Chasteen
Karen Sloane
Darryl Conyer
Hubert Robinson
Thomas Doty
George Sprague
Glen Klock
Michael Doering
Colleen Jellison
Inez Camacho
Lester Wallace
Stanley Wright
Harline George
Phillip Mulligan
Marian Osborne
Julia Richard
Brad Steckmesser
Vasco Walter
Clark Adams
Nancy Alferos
Fred Franz
Donna Friege
Eula Boothe
Joe Mountain
Jan Corona
Frank Patton
Michael Smith
Hernando Suanico
Dale Fox
Stuart Grossman
Judy Tolwitzke

11. By failing timely to reinstate the strikers listed in Appendix A of the judge's decision, the Respondent has violated Section 8(a)(1) and (3) of the Act.

12. The Respondent has not otherwise violated Section 8(a)(5) of the Act and has not committed other independent violations of Section 8(a)(1) of the Act.

THE REMEDY

Having found that the Respondent has engaged in unfair labor practices in violation of Section 8(a)(1) and (3) of the Act, we shall order it to cease and desist therefrom and to take certain affirmative action designed to effectuate the policies of the Act, including the posting of an appropriate notice to employees. Inasmuch as the Respondent unlawfully refused to reinstate strikers following their unconditional offer to return to work following the strike,[22] we shall order the Respondent to offer these employees immediate and full reinstatement to their former jobs or, if those jobs no longer exist, to substantially equivalent jobs, without prejudice to their seniority or other rights and privileges. The Respondent shall further be ordered to make these employees (and the employees listed in App. A of the judge's decision) whole for any loss of earnings and other benefits they may have suffered as a result of the discrimination against them by payment to them of the amount they would have earned from April 4, 1981,[23] until the date of the Respondent's offer of reinstatement, less net interim earnings, in accordance with *F. W. Woolworth Co.*, 90 NLRB 289 (1950), to which shall be added interest, to be computed in the manner described in *New Horizons for the Retarded.*[24] We shall further order the Respondent to remove from its files any reference to its unlawful refusal to reinstate these employees. Additionally, we shall order the Respondent to make whole all its employees for any losses they may have suffered as a result of the unilateral change in health benefits plans.

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[22] Some of the strikers were employed by the Respondent primarily or exclusively as schoolbus drivers. The record shows the State of California revised its licensing requirements for driving schoolbuses about June 1980, shortly before the onset of the strike. The evidence further indicates that some striking drivers were not in compliance with the new state requirements and/or lacked renewal certificates even under the old regulations, and that the Respondent notified the Union of these needs. We shall leave to the compliance stage of this proceeding the determination of which, if any, striking drivers were so affected, and the periods of time that the drivers were unavailable to work because of failure to meet these requirements. See *Standard Materials*, 237 NLRB 1136, 1146 fn. 23 (1978).

[23] The judge recommended that backpay be computed as of April 4, 1981, the day following the delivery by messenger of the letter containing the strikers' unconditional offer to return to work. He relied on several separate grounds for using this date and thus not extending to the Respondent the 5-day grace period normally accorded employers for the reinstatement of unfair labor practice strikers. See *Drug Package Co.*, 228 NLRB 108, 113–114 (1977). We have reversed the judge in his classification of the strike as an unfair labor practice strike, and we have further reversed his finding that the Respondent attached unlawful conditions to its response to the strikers' unconditional offer to return. Nonetheless, we agree that April 4 is the proper date for commencement of the backpay period for the strikers covered by our Order, who were not shown to have been permanently replaced. Even allowing for the fact that an employer does not generally incur backpay liability for not *immediately* firing a temporary replacement in order to reinstate an economic striker who has offered to return, there is no reason to give the benefit of any "grace period" to an employer which, like the Respondent, (1) made no positive response at all until April 21, more than 2 weeks after the strikers' offer to return, and (2) who, in the case of strikers discussed in secs. C,2, and C,3, of our decision, unlawfully denied reinstatement. See *Carpenter Sprinkler Corp.*, 238 NLRB 974, 976 (1978), enf. denied in part on other grounds 605 F.2d 60, 68 (2d Cir. 1979) (no grace period appropriate for employer who "unduly delays" in accepting or who "rejects" an unfair labor practice striker's unconditional offer to return).

Finally, we note that the judge recommended a broad cease-and-desist provision ordering the Respondent to cease from violating the Act "in any other manner." Inasmuch as we have reversed certain of the judge's findings that the Respondent violated the Act in various respects, we further find that the broad order is not warranted in the circumstances of this case. Accordingly, we shall issue our usual cease-and-desist order requiring the Respondent to refrain from violating the Act in "any like or related" manner.

ORDER

The National Labor Relations Board orders that the Respondent, Aztec Bus Lines, Inc., San Diego, California, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Unilaterally changing employees' health and accident insurance plan, without notification to or affording an opportunity to bargain with the Union.

(b) Telling employees that the Respondent would not negotiate with the Union unless certain union leaders were replaced and picketers stopped harassing the Respondent's employees, advising employees that anyone picketing at the time an act of misconduct occurred would not be returned to work after the strike was terminated, and telling employees that the Union was "finished" and that returning strikers would be offered only part-time jobs.

(c) Refusing to offer reinstatement to strikers Dana Banning, Darryl Conyer, Thomas Doty, Suhley Ozgundez, Abraham Planje, and Cheryl Reid on grounds that they resigned their employment from the Respondent.

(d) Refusing to offer reinstatement to strikers Karen Balding, Donna Bozick, John Chasteen, Dale Fox, Stuart Grossman, Glen Klock, Karen Sloane, Michael Smith, and Hernando Suanico on grounds of asserted misconduct during the strike, or strikers Clark Adams, Nancy Alferos, Eula Boothe, Jan Corona, Fred Franz, Donna Friege, Joe Mountain, Frank Patton, Hubert Robinson, George Sprague, Judy Tolwitzke, Michael Doering, Angel Huezo, Colleen Jellison, Ray Lindemann, Linda McQueen, Lester Wallace, Janel Bock, Inez Camacho, James Fenderson, Harline George, Kieron Moore, Phillip Mulligan, Ronald Norman, Marian Osborne, Thomas Reynolds, Julia Richard, Susan Silvestri, Brad Steckmesser, Steven Tom, Vasco Walter, and Stanley Wright on grounds of misconduct during the strike.

(e) Failing timely to offer reinstatement to the strikers listed in Appendix A of the judge's decision.

(f) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Offer the strikers listed in subparagraphs 1(c) and (a), above, immediate and full reinstatement to their former jobs or, if those jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority or any other rights or privileges previously enjoyed, and make them whole for any loss of earnings and other benefits suffered as a result of the discrimination against them, in the manner set forth in the remedy section of the decision.

(b) Make whole the strikers listed in Appendix A of the judge's decision in the manner set forth in the remedy section of the decision.

(c) Remove from its files any reference to the refusal to reinstate these former strikers, and notify them in writing that this has been done and that the refusal of reinstatement will not be used as a basis for future personnel actions against them.

(d) On request, bargain with the Union as to the selection of an insurance carrier for an employee health and accident insurance plan and, if an understanding is reached, embody the understanding in a signed agreement.

(e) Make whole all employees for any losses they may have suffered as a result of the unilateral change in health benefit plans.

(f) Preserve and, on request, make available to the Board or its agents for examination and copying, all payroll records, social security payment records, timecards, personnel records and reports, and all other records necessary to analyze the amount of backpay due under the terms of this Order.

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[24] In accordance with our decision in *New Horizons for the Retarded*, 283 NLRB 1173 (1987), interest on and after January 1, 1987, shall be computed at the "short-term Federal rate" for the underpayment of taxes as set out in the 1986 amendment to 26 U.S.C. § 6621. Interest on amounts accrued prior to January 1, 1987 (the effective date of the 1986 amendment to 26 U.S.C. § 6621), shall be computed in accordance with *Florida Steel Corp.*, 231 NLRB 651 (1977).

(g) Post at its places of business in and around San Diego and Chula Vista, California, copies of the attached notice marked "Appendix C."[25] Copies of the notice, on forms provided by the Regional Director for Region 21, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material.

(h) Notify the Regional Director in writing within 20 days from the date of this Order what steps the Respondent has taken to comply.

IT IS FURTHER ORDERED that all allegations of the complaint not found above are dismissed.

APPENDIX C

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

WE WILL NOT unilaterally change employees' health and accident insurance plan, without notification to or affording an opportunity to bargain with the Union.

WE WILL NOT tell employees that we will not negotiate with the Union unless certain union leaders are replaced or unless picketers stop harassing other employees, WE WILL NOT advise employees that anyone picketing at the time an act of misconduct occurs will not be returned to work after the strike ends, and WE WILL NOT tell employees that the Union is "finished" and that returning strikers will be offered only part-time jobs.

WE WILL NOT refuse to offer reinstatement to strikers Dana Banning, Darryl Conyer, Thomas Doty, Suhley Ozgundez, Abraham Planje, and Cheryl Reid on grounds that they resigned their employment.

WE WILL NOT refuse to offer reinstatement to strikers Karen Balding, Donna Bozick, John Chasteen, Dale Fox, Stuart Grossman, Glen Klock, Karen Sloane, Michael Smith, Hernando Suanico, Clark Adams, Nancy Alferos, Eula Boothe, Jan Corona, Fred Franz, Donna Friege, Joe Mountain, Frank Patton, Hubert Robinson, George Sprague, Judy Tolwitzke, Michael Doering, Angel Huezo, Colleen Jellison, Ray Lindemann, Linda McQueen, Lester Wallace, Janel Bock, Inez Camacho, James Fenderson, Harline George, Kieron Moore, Phillip Mulligan, Ronald Norman, Marian Osborne, Thomas Reynolds, Julia Richard, Susan Silvestri, Brad Steckmesser, Steven Tom, Vasco Walter, and Stanley Wright.

WE WILL NOT fail to timely offer reinstatement to the following strikers:

Balch, Elsie
Beazley, Robert
Chavez, Karen
Clarin, Benjamin
Cordua, Harney
Edwards, Janet
Esbri, Mario
George, Ivy
Gress, Phillip
Harvey, David
Horn, Adelia
McConnell, James
Macklin, Diane
Mason, Mary
Morgan, Jo Ann
Nekoui, Atta
Piper, Donald
Pyatt, Wendell
Rowe, Claude
Rudat, Christine
Rudy, Shirley
Schwartz, Michael
Sims, Doris
Slack, Paul
Stewart, Lena
Thirtle, Cheri
Tovar, Jose
Young, Marian

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL offer strikers Karen Balding, Dana Banning, Donna Bozick, John Chasteen, Darryl Conyer, Thomas Doty, Dale Fox, Stuart Grossman, Glen Klock, Suhley Ozgundez, Abraham Planje, Cheryl Reid, Karen Sloane, Michael Smith, Hernando Suanico, Clark Adams, Nancy Alferos, Eula Boothe, Jan Corona, Fred Franz, Donna Friege, Joe Mountain, Frank Patton, Hubert Robinson, George Sprague, Judy Tolwitzke, Michael Doering, Angel Huezo, Colleen Jellison, Ray Lindemann, Linda McQueen, Lester Wallace, Janel Bock, Inez Camacho, James Fenderson, Harline George, Kieron Moore, Phillip Mulligan, Ronald Norman, Marian Osborne, Thomas Reynolds, Julia Richard, Susan Silvestri, Brad Steckmesser, Steven Tom, Vasco Walter, and Stanley Wright immediate and full reinstatement to their former jobs or, if those jobs no longer exist, to substantially equivalent jobs, without prejudice to their seniority or other rights and privileges, and make them whole for any loss of earnings and other benefits they may have suffered by reason of our discrimination against them and WE WILL make whole employees for any losses they suffered as a result of our unilateral change in health benefit plans and WE WILL make whole the following strikers for our failure to timely offer them reinstatement:

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[25] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

Balch, Elsie
Beazley, Robert
Chavez, Karen
Clarin, Benjamin
Cordua, Harney
Edwards, Janet
Esbri, Mario
George, Ivy
Gress, Phillip
Harvey, David
Horn, Adelia
McConnell, James
Macklin, Diane
Mason, Mary
Morgan, Jo Ann
Nekoui, Atta
Piper, Donald
Pyatt, Wendell
Rowe, Claude
Rudat, Christine
Rudy, Shirley
Schwartz, Michael
Sims, Doris
Slack, Paul
Stewart, Lena
Thirtle, Cheri
Tovar, Jose
Young, Marian

WE WILL notify those former strikers named above that we have removed from our files any reference to our refusal to reinstate them, and that that refusal to reinstate will not be used against them in any way.

WE WILL, on request, bargain with the Union as to the selection of an insurance carrier for an employee health and accident insurance plan and, if an understanding is reached, embody the understanding in a signed agreement.

AZTEC BUS LINES, INC.

Robert R. Petering, Esq., for the General Counsel.

David B. Geerdes and *Robert A. Levy, Esqs. (Gray, Cary, Ames & Freye)*, of San Diego, California, for the Respondent.

Richard D. Prochazka and *Linda Madden Ford, Esqs. (Domnitz, Prochazka and Levine)*, of San Diego, California, for the Charging Party.

DECISION

STATEMENT OF THE CASE

MICHAEL D. STEVENSON, Administrative Law Judge. This case was tried before me at San Diego, California, on 43 trial days between October 5, 1981, and February 22, 1982,[1] pursuant to a fourth order consolidating cases, fourth consolidated amended complaint, and notice of hearing issued by the Regional Director for the National Labor Relations Board for Region 21, on September 16, 1981, and that is based on charges filed by San Diego AFL-CIO Bus Drivers Local Division 1309 of the Amalgamated Transit Union (the Union) on September 2 (Case 21-CA-19497); September 11 (Case 21-CA-19542); April 24, 1981 (amended charge Case 21-CA-20162); April 16, 1981 (Case 21-CA-20182); June 23, 1981 (amended charge 21-CA-20214); June 30, 1981 (Case 21-CA-20405); and August 10, 1981 (Case 21-CA-20536). The complaint alleges that Aztec Bus Lines, Inc. (Respondent) has engaged in certain violations of Section 8(a)(1), (3), and (5) of the National Labor Relations Act (the Act).

Issues[2]

Did Respondent violate the Act by (a) unilaterally changing its health and accident insurance plan covering unit employees; (b) negotiating with the Union both prior to and after commencement of the strike on a new collective-bargaining agreement in bad faith; (c) reaching agreement with the Union on a new collective-bargaining agreement, but thereafter failing and refusing to execute the agreement; (d) refusing without good reason to reinstate unconditionally strikers who had made an unconditional offer to return to work, to their former, or substantially equivalent, positions of employment; and/or (e) committing the above and other actions, the result of which was to interfere with, restrain, and coerce employees in the exercise of the rights guaranteed them by Section 7 of the Act.

All parties were given full opportunity to participate, to introduce relevant evidence, to examine and cross-examine witnesses, to argue orally, and to file briefs. Briefs, which have been carefully considered, were filed on behalf of the General Counsel, the Charging Party, and Respondent.[3]

On the entire record of the case, and from my observation of the witnesses and their demeanor, I make the following

FINDINGS OF FACT

I. RESPONDENT'S BUSINESS

Respondent admits that it is a California corporation that operates a transit, school, and charter bus and transportation business with its main facility located in San Diego, California. It further admits that during the past year, in the course and conduct of its business that its gross revenues exceeded $500,000, and that annually it purchases and receives goods and products valued in excess of $50,000 from suppliers located within the State of California, each of which, in turn, purchase those same goods and products directly from suppliers located outside the State of California. Accordingly it admits, and I find, that it is an employer engaged in commerce and in a business affecting commerce within the meaning of Section 2(2), (6), and (7) of the Act.

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[1] All dates refer to 1980 unless otherwise indicated.

[2] The General Counsel's brief was received by the Division of Judges on June 3, 1982, 2 days late. From markings on the envelope, it was clear that the United States Post Office had misdelivered the brief to another agency. I find that the brief was timely and will give it due consideration.

[3] Two additional issues raised at hearing concern Respondent's motion for a continuance and motion of Respondent's employee, Gerald W. (Bill) Hokstad, a nonstriker, to intervene in the proceedings, on behalf of himself and other nonstrikers. As to the former issue, I denied the motion after extensive argument. As to the latter, I first denied, then later granted the motion of Hokstad to intervene. The General Counsel took a special appeal and the Board reversed me. Hokstad then filed a motion asking for reconsideration. The Board again denied the motion on October 27, 1981, on the grounds that Hokstad lacked standing to intervene and that his petition lacked merit. (ALJ Exhs. 1-5.) I will not further discuss these issues in this case as they present no matters for me to decide.

II. THE LABOR ORGANIZATION INVOLVED

Respondent admits, and I find, that San Diego AFL-CIO Bus Drivers Local Division 1309 of the Amalgamated Transit Union is a labor organization within the meaning of Section 2(5) of the Act.

III. THE ALLEGED UNFAIR LABOR PRACTICES[4]

A. *Background*

In September 1979, Augustus C. Zemba purchased the stock of Respondent corporation on an installment sales contract basis. Currently the president of Respondent, Zemba, is a central figure in this case. To better understand the complex issues raised, I begin with some brief background on both Zemba and Respondent before September 1979.

At the time of hearing, Zemba was 46 years of age. His prior employment was in the field of transportation and in various business positions with different California school districts. In his prior jobs, Zemba had limited experience with unions involving negotiating contracts, but not with processing grievances to arbitration.

Before Zemba took over, Respondent was owned by Leonard Zlotoff, who even after the sale continued as a director of Respondent and to whom Zemba was making regular payments pursuant to the contract of sale. Zlotoff still owns the real property on which Respondent's bus yard is located and leases the premises to Zemba. Another party owns Respondent's accounting office that is located near the bus yard. This too is leased to Respondent. Zlotoff and members of his family also retain interests in some or all Respondent's rolling stock.

Aztec Bus Lines, Inc. has existed as a business entity at least since 1972 and possibly before that. In late 1976, the Union won an election to represent Respondent's busdrivers and mechanics and was later certified as the employees' collective-bargaining representative. In July 1978, the Union and Respondent, by its then-owner, Zlotoff, negotiated and executed a collective-bargaining agreement, which was effective from May 24, 1978, to June 30. (G.C. Exh. 2.)

Within a day or two after Zemba assumed control of Respondent, he met with Donald Randall, then president of the Local Union and lead negotiator for the prior collective-bargaining agreement between Respondent and the Union. Zemba assured Randall that he was aware of the existing collective-bargaining agreement and would honor it. Zemba did, however, request some time to become familiar with Respondent before starting detailed discussions with the Union.

Early on, however, controversy erupted between Zemba and union officials. Some of this controversy concerned the processing of several grievances that had been filed before Zemba became president of Respondent. Zemba was aware of the grievances before he purchased Respondent. These grievances related to discipline for accidents caused by alleged driver negligence and other matters relating to working conditions. Other grievances were filed after Zemba took over. In general, Zemba took a hard line on the entire grievance procedure. For example, Zemba testified that on the very first day he took over, he decided that Chief Shop Steward Jan Corona would no longer have free access to company personnel files as she had had under the prior ownership. Rather, Zemba ordered that she had to request any employee files in writing, then the subject employee had to give his/her consent, then Corona had to review the file in the presence of office personnel.[5]

Besides instituting new procedures for the gathering of information relating to the filing of new grievances, Zemba also refused to accept the decisions on old grievances decided adversely to Respondent. For example, on October 11, 1979, the Union obtained from a U.S. district judge, an order for confirmation of an arbitrator's award reinstating employee Phillip Mulligan, an alleged discriminatee in this case.[6] Zemba also refused to obey the order of the district judge and on November 1, 1979, the Union demanded in writing that Mulligan be reinstated pending appeal to the court of appeals. (C.P. Exh. 2.) On November 8, 1979, Zemba wrote back denying the Union's request and stating in part that "my decision is that I will not sit by and wait until Mr. Mulligan either injures or kills someone." (C.P. Exh. 3.) As a result of Zemba's refusal to obey the district judge's order, the Union, on January 23, obtained an order finding Respondent guilty of civil contempt, fining it $500 a day starting from January 23, and further awarding it attorney fees and costs. (C.P. Exh. 4.)

The union was also forced on December 7, 1979, to file a petition to compel arbitration in U.S. district court. (C.P. Exh. 5.) This matter involved eight separate grievances that Zemba refused to process.[7] On April 1, the court entered an order in favor of the Union and against Respondent directing that the matters be arbitrated. (C.P. Exh. 6.)

On December 26, 1979, the Union filed still another action in U.S. district court: complaint for specific performance of an agreement to arbitrate. (C.P. Exh. 7.) This dispute arose over a grievance filed by the Union as a result of Zemba's breach of the collective-bargaining agreement for failing to arbitrate the eight grievances referred to above. Once again, Respondent lost. On June 10, the U.S. district judge entered an order that Respondent arbitrate the particular matter giving rise to the complaint and a derivative issue, i.e., the Union's claim for attorney's fees. The Union was awarded all costs excluding attorney's fees. (C.P. Exh. 8.) On June 8, 1981, an arbitrator issued his "Award" finding that Respondent acted in bad faith by refusing to submit the eight grievances to arbitration; the arbitrator also directed that the Union be made whole for the expenses caused by Respondent's refusal to arbitrate including attorney fees. (C.P. Exh. 9.)

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[4] In reciting the facts and deciding the issues of this case, I will be mindful of the Board's criticism of an administrative law judge for drafting an inordinately long decision in a case similar to the present case. *Harowe Servo Controls*, 250 NLRB 958, 959 (1980). There, the hearing lasted 46 hearing days and the printed decision extended from p. 967 to p. 1126.

[5] In late January, the Union and Respondent entered into an informal settlement agreement with respect to the alleged burdens on the shop steward's right to discover and obtain information from company files to process grievances. (C.P. Exh. 11.)

[6] The filing of the petition occurred prior to Zemba's purchase of Respondent.

[7] In response to my question, Zemba attempted to explain his position on the eight grievances. In effect, he claimed that the grievants had failed to follow proper procedures in filing the grievances. (R. Tr. 6654-6657.)

I will return to the question of grievances and arbitration in resolving the question of Respondent's alleged bad faith in negotiating a new contract. Specifically, the question of "past practice" in employee discipline and the extent to which Zemba was bound by his predecessor's disciplinary decisions became an important point during negotiations. So too was the question of advisory versus binding arbitration. In order to continue the general background of the case, I turn briefly to other major events.

The parties dispute whether a current collective-bargaining agreement exists between them. All agree, however, that a prior agreement expired on June 30. It is further undisputed that the first formal bargaining sessions between the parties occurred on June 12. There followed a series of bargaining sessions in which the parties were unable to reach agreement. The General Counsel contends that Respondent did not neogitate in good faith during these sessions. On August 23, a strike began and lasted until April 3, 1981, when pickets were removed and the Union allegedly made an unconditional offer to return to work. During the strike, Respondent claims that it refused to take back only those strikers who either were guilty of serious misconduct or had resigned there positions and abanadoned the strike. The Union claims that several nonstrikers were guilty of serious misconduct that the Respondent either never punished or, in some cases, even condoned. All these matters and others remain to be decided below. I turn now to the first substantive dispute between the parties.

B. *The Alleged Unilateral Change in the Employees' Health and Accident Insurance Plan*[8]

1. The facts

Prior to Zemba's arrival, Respondent's employees were insured for health and accident medical expenses through Employer's Mutual Liability Insurance Company of Wausau, Wisconsin (Wausau).

The Wausau plan had been in effect for about a year beginning in February or March 1979, before coverage was canceled. (R. Tr. 250.) Prior to Wausau, Zlotoff and his general manager, Nickelson, had another carrier. When the change to Wausau occurred, the Union approved, based on the fact that the benefits stayed the same, even though the Union desired greater benefits in the future. (R. Tr. 245–246, 248–249.) A brochure distributed to employees is contained in the record. (G.C. Exh. 43.) According to Zemba, in October or November 1979, he was notified by Wausau representatives that Wausau was no longer interested in insuring Respondent's employees. Zemba testified that Wausau's attitude was based on late premium payments, a high rate of disputed claims, and a too small enrollment. The group insurance policy covered not only Aztec employees, but employees of two other companies. Zemba allegedly had several meetings with a Wausau representative, but he nevertheless received written notice of cancellation in December 1979, effective in February or March. After unsuccessfully attempting to obtain coverage from other insurance companies—the names of which Zemba could not recall—he finally obtained a group plan from Pacific Guardian. Another company named Dataramics and an individual named Ava Nawrey acted as cobrokers putting Respondent together with Pacific Guardian. Under this plan, employee claimants submit claims to a third company called San Diego Medical Foundation whose sole function is administration of the claims.[9]

According to Zemba, he told Randall, president of the Union, in November or December of the pending cancellation by Wausau. At this meeting and later meetings prior to the effective date of the new insurance coverage, Randall's attitude was allegedly one of studied indifference. According to Zemba, Randall did not care what company handled the insurance as long as there were no "take-aways." Supposedly, this attitude was also reflected by Gordon Hall, another union officer, who told Zemba, simply, "it's your company." Moreover, according to Zemba, Randall at one point looked through the then-current agreement and found support for Zemba's unilateral move in that the agreement covered only level of coverage, but not the carrier.

To ensure that the new plan equaled the old plan, according to Zemba, two things were done. First, the attorney for Dataramics reviewed the then-current agreement with Wausau to ascertain the level of coverage. Then, clause 1.6 was added to the new health benefit plan:

> It is the intent of this Plan to provide coverage equal to or superior to benefits under the immediately previous plan or policy. This plan shall be interpreted and construed with that intent in mind, and shall be deemed to provide at least the level of

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[8] All parties recognize that credibility resolutions in this case as in most will be critical. I will find for all major witnesses that portions of testimony will be discredited. Nothing is more common than to believe some but not all of what a witness says. *Edwards Transportation Co.*, 187 NLRB 3, 3–4 (1970), enfd. 437 F.2d 502 (5th Cir. 1971). In deciding who is telling the truth in a given instance, I will attempt to state the factors on which I rely. Some witnesses have financial interests beyond that which is apparent. For example, there are some civil lawsuits in progress involving witnesses in this case both as plaintiffs and defendants and concerns matters that are the subject of my inquiry here. Further, I will look to the specificity of testimony as a legitimate factor in deciding credibility. *Teamsters Local 959 (Northland Maintenance)*, 248 NLRB 693 at fn. 2 (1980). Of course, I will look to the demeanor of the witness and a host of other factors not all that will apply in every instance. Where applicable, these factors influencing credibility will be pointed out.

[9] To further complicate the arrangement, I note that Zemba and Harrison are trustees of a trust administered through Security Pacific Bank, acting as administrator. Claims of $5000 or less are paid out of the trust assets, but over $5000 are paid by Pacific Guardian. Respondent makes payments into the trust on a regular basis. The plan also covers Palisade Wholesale and Viewland Construction, two companies formerly insured by Wausau with Respondent. Zlotoff, former owner of Respondent, is an officer of Palisade and Robert Zlotoff, his brother, is an officer of Viewland.

> benefits provided in the prior plan or policy. [R. Exh. 47.]

Not surprisingly, union representatives give a substantially different version of events on this topic. Randall, for example, testified that the first knowledge of Zemba's change was at a meeting in March, when Zemba stated that he was looking for a new insurance company. Dataramics was mentioned. Randall told Zemba to let him know so he could get the change approved as required by the contract.[10]

The next notice to the Union that a change in Respondent's health benefit plan was made occurred early in negotiations when someone on Respondent's side stated there was a new health plan.[11] To this, Randall replied that we may have another one before negotiations are over with, because the Union had proposed different plans.

Randall's account is contradicted to a certain extent by the testimony of Jan Corona, the chief shop steward and alleged discriminatee. She testified that in October or November 1979, she attended an informal meeting with Zemba in the union offices. Randall and possibly Hall were there for the Union. At this time, she recalls Zemba saying that he was looking into other insurance companies and he would get back to them on that point. Corona continued that although this subject did not come up again in her presence until negotiations began, she did obtain additional information in the first or second week of May. At this time she heard two drivers talking about a new company health plan and she interrupted them, asking for additional information. When told there was in fact a new plan, the witness went to the office where she talked with a clerical employee named Cheryl, who handled employee insurance matters. Cheryl confirmed the change in plan and gave the witness some forms to fill out and a medical identification card. Corona also received at this time a summary of benefits under the plan. (G.C. Exh. 59.) This notice reads in part:

> Following is a summary of the benefits as they were under the prior Insurance Co. and as they will continue to be.

Corona never saw this notice posted at Respondent and, according to a statement of Respondent's attorney, neither Zemba nor Harrison was familiar with it. (R. Tr. 616.) The document was undated but was apparently prepared subsequent to March. Corona went on to testify that the notice was never distributed to employees through their message drops.

During negotiations, the subject of health insurance came up again. Zemba, Harrison, and Schultz were examining union proposals when they saw a page on health and welfare. Zemba stated that it was not necessary to negotiate this part of the package as he had new insurance that was adequate.[12] Randall then asked Corona whether the Respondent had a new insurance plan and Corona confirmed it and showed Randall her card. Zemba stated that the change had been made in March. Later in a private conversation between Randall and Corona, the former scolded Corona for not notifying him about the new insurance plan. She stated that she had only found out about it in early May.[13]

Randall was asked about two meetings with members on July 3 and on August 18 wherein Respondent's proposals were discussed. According to Randall, the majority of members previously had indicated a desire for a Kaiser medical plan (HMO). However, the Union's initial proposal submitted on June 23, contains no reference to a Kaiser medical plan. (R. Tr. 7253-7254.) Moreover, in addressing members on July 30, Randall testified that he told members there were no improvements in the health and welfare. (R. Tr. 239-240.) Then he stated that the Union did not know about the new plan at that time. (R. Tr. 240.) As of the Union's ratification meeting on August 18, according to Randall, the Union thought that the Wausau plan was still in effect. (R. Tr. 240.) This, despite the fact that during an early negotiating session, someone in management stated to Randall that Respondent had a new carrier. (R. Tr. 24.) Although Randall never asked who the new carrier was (R. Tr. 242) nor ever requested a copy of the new plan (R. Tr. 251), he believed Corona had asked someone who the new carrier was. (R. Tr. 242.) Someone at the ratification meeting told employees that there had been a change in carriers, but Randall does not think it was he. (R. Tr. 242.) Randall also testified that he believes at the August 18 ratification meeting, Corona told the membership there had been a change in membership. (R. Exh. 242-243.)

2. Analysis and conclusions

There is obvious conflict in the testimony between the witnesses referred to above, and even within the testimony of a single witness, Randall. Before resolving these conflicts to the extent possible, I begin with relevant principles of law.

Unilateral changes of "wages, hours and terms and conditions of employment" by an employer obligated to bargain with the representative of its employees in an appropriate unit violates Section 8(a)(5) of the Act.[14] As of

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[10] On the final page of G.C. Exh. 2, the prior contract, there is a letter of agreement regarding "Health and Life Insurance." This agreement states in part "that whatever Health and Insurance plan is *agreed to*, that the Company will pay premium for three (3) months for an employee who is incapable of working due to illness." (Emphasis added.) This choice of language indicates to me that the parties intended for the Union to have an opportunity to bargain on the carrier as well as the benefit levels.

[11] Randall could not recall the name of the alleged speaker, nor the exact date, and he did not record the comment on his personal notes. However, the first formal bargaining session occurred on June 12.

[12] This statement of Zemba's is inconsistent with his claim that the Union had prior knowledge of the change in health and accident insurance.

[13] Although Corona never testified to the exact date that these conversations occurred, it was between June 12, the first negotiating session, and August 18, the ratification meeting of union members. It appears to have been toward the beginning of this period, probably on June 23, when a first meeting was held to discuss the union proposal tendered to Respondent on June 12.

[14] *Master Slack Corp.*, 230 NLRB 1054 (1977), enfd. 618 F.2d 6 (6th Cir. 1980); *Amsterdam Printing & Litho Corp.*, 223 NLRB 370 (1976); and *NLRB v. Katz*, 369 U.S. 736 (1962).

March, Respondent was an employer obligated to bargain with the Union. This is so because Respondent was a successor employer. Although Respondent had no obligation to assume the predecessor's labor agreement, Zemba voluntarily agreed to do so.[15]

The next question is whether the implementation of a health insurance plan is a mandatory subject of bargaining. I find that it is.[16] In this respect, I find that the carrier of a health benefit plan is as much of a "component" of a health and welfare plan as are the levels of coverage.[17] It is no more than common sense that a union's interest in a health and welfare plan would extend to the carrier's identity. With this knowledge, the Union is able to investigate the carrier's financial condition and reputation for prompt and fair payment of claims.

The General Counsel contends (Br. 8) that "Where an employer unilaterally, without notice to, or bargaining with the union, changes insurance plans, it violates [the Act] even if the benefits under the new plan are identical to those in the old plan." For this proposition of law, the General Counsel cites "*Clear Pine Moldings, Inc.*, 238 NLRB 69 (1978)." First, the case does not stand for that principle at all. In *Clear Pine Mouldings, Inc. v. NLRB*, 632 F.2d 721, 729–730 (7th Cir. 1980), enforcing the Board's decision cited by the General Counsel, the court specifically stated there was no showing that the new plan unilaterally instituted by the employer was identical to the old plan. Had there been such a showing, the court stated, it may well have followed a precedent found in *Connecticut Light & Power Co. v. NLRB*, 476 F.2d 1079 (2d Cir. 1973), where the court excused an employer who changed plans, where the evidence showed that the plans were identical.[18]

In this case, I find no convincing evidence that the two plans were identical in coverage. I am aware that clause 1.6 of the new health plan (quoted above) states (R. Exh. 47) the intent of the new plan is to equal the coverage of the old plan. However, Harrison testified that due to Wausau's refusal to cooperate, she and Zemba were never able to get a copy of the detailed medical plan. (R. Tr. 2419.) Thus, she relied on pamphlets generally describing the level of benefits under Wausau, "but not in total detail for the legal language of the certificate." (R. Tr. 2419.) Because a copy of the Wausau plan was never offered nor received into evidence, a meaningful comparison cannot be made. Moreover, I find Harrison's testimony that the plans were identical is self-serving, conclusionary, and without apparent legal basis. Harrison's further testimony that an attorney for the cobroker, Dataramics, who never testified, nor was even fully identified, gave Respondent assurances that the plans were identical is entitled to little or no weight. Even the apparent impression of Randall and other union officers that the plans were identical is not convincing.

In addition to the paucity of evidence to show the identical nature of the plans, there is other evidence to show that the plans were not identical in significant details:[19]

(1) Wausau administered its own claims, but under the Pacific Guardian-San Diego Medical Foundation a third party administered claims.[20]

(2) The new plan was, in part, a self-insurance plan, which would raise issues of viability under the best of circumstances, but particularly with new corporate management.

(3) Under the old policy, an employee's coverage terminates on the last day of the month in which employment terminates; under the new plan, coverage ceased on the date the employee's active employment terminated.[21]

In sum, I find that the General Counsel has proven a prima facie case of a violation of Section 8(a)(5). That is, even where the new plan is identical to the old plan, which is not true in the present case, an employer is not free to change carriers, without notice to the certified bargaining representative and an opportunity to bargain on the issue.[22] Now I must decide whether the Union here received timely notices and, if so, whether the Union demanded bargaining on the issue, unless the demand would have been futile.

All agree that the new plan began in March. I cannot credit Zemba's testimony that prior to this effective date of the new plan, he was repeatedly assured by Randall and other union officers that they had no interest other than to see there were no "take-aways." (Even if Zemba's testimony were credited, I find that the changes in the two plans as described above were "take-aways." Accordingly, even under Respondent's theory of credibility, I would construe Randall's statements as a demand for bargaining because the new plan was changing the status quo on a substantive basis.)

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[15] *NLRB v. Burns Security Services*, 406 U.S. 272 (1972).

[16] *Law Enforcement Officers Local 40B (South Jersey Detective)*, 260 NLRB 419 fn. 8 (1982); *La Mousse, Inc.*, 259 NLRB 37 fn. 1 (1981).

[17] Cf. *Golconda Corp. v. NLRB.*, 474 F.2d 49 (6th Cir. 1973).

[18] In *Connecticut Light & Power Co. v. NLRB*, id., the court refused to enforce the Board's Order, 196 NLRB 967 (1972). Of course, I am bound by the Board's decision and it is on the basis of this authority that I find, even where the level of benefits stay the same, the Employer is required to bargain with the Union as to the identity of the carrier. Furthermore, even the Second Circuit, in *Connecticut Light & Power Co.*, leaves open the possibility that at least in some cases, an employer must bargain over the identity of the carrier:

> Our holding as stated above, however, should not be construed to mean that in all cases may the selection of a carrier be divorced from the elements of employee health insurance that traditionally have been held to be mandatory subjects of bargaining. [476 F.2d at 1083.]

Accordingly, for the reasons I state in the text, I find that the facts in the instant case may be distinguished from the court's decision in *Connecticut Light & Power Co. v. NLRB.*

[19] At hearing, the General Counsel disavowed any reliance on a theory involving a change of benefit levels or of any detrimental impact on employees as a result of coverage being reduced. He stated, "it's our understanding . . . the levels of benefits, did in fact remain the same." (R. Tr. 2423–2424.) In his Br. 9, the General Counsel retreats from the above statement and contends there were differences in the two plans.

[20] Indeed, Harrison admitted that at first there had been some employee complaints relative to slow payments by the San Diego Medical Foundations. (R. Tr. 2728.)

[21] Thus on September 5, Zemba sent a memo to all striking employees that read as follows:

> Date: September 5, 1980
> Memo to: All Striking Employees
> From: A. C. Zemba [s] A. C. Zemba 9/5/80
> Subject: Insurance Coverage
>
> This notice is to inform you that our insurance plan states, that eligibility of an employee will terminate on the day the employee's active employment terminates and to be eligible must be regularly scheduled to work at least twenty five (25) hours per week for Drivers and thirty two (32) hours per week for Maintenance employees.
>
> As you have not been on the job since August 22, 1980, we have notified our Insurance Company to that effect.
>
> cc: Joe Neeper, Atty.
> Don Randall, Union
>
> [G.C. Exh. 45.]

[22] See also *Wisconsin Southern Gas Co.*, 173 NLRB 480 (1968); *Wabana, Inc.*, 146 NLRB 1162 (1964).

Another factor that makes it unlikely that Zemba was receiving the indifferent response that he described was the series of court battles raging between Respondent and the Union at approximately the same time. Zemba's stubborn refusal to follow the rules of grievance and arbitration would have caused the Union to be guarded in its relationship with him. In this respect, I agree with Respondent (Br. 654–655) where it adverts to a prior change in carrier before Zemba assumed control of the Company. In that case, the Union apparently did not object because the benefits stayed the same.[23]

In this case it was not proven that benefits stayed the same; further, other differences were apparent. Moreover, the Union was not enjoying the same cordial relationship with Zemba as it enjoyed with Zlotoff. Accordingly, I must reject Respondent's contention that these prior events enhanced Zemba's credibility on this issue.

To reject Zemba's testimony is not to find Randall's testimony a model of clarity or even believable in and of itself. However, looking to the testimony of Randall and Corona, I find that Zemba did tell union officials in October or November that he was looking into other insurance companies and that he would get back to the Union on that point. There is no credible evidence of any further notice to the Union prior to March when the fait accompli occurred.[24] Subsequently Corona found out in May that the change had already occurred. I find that notice to her, even inadvertent notice, was notice to the Union since she was chief shop steward. However, the violation of the Act occurred on or about March 1, and the Union's reaction subsequently, although not easily ascertainable because of the contradictory nature of Randall's testimony, is also not relevant.

The union negotiators were under a mandate for Kaiser (HMO) once negotiations began in June. However, Zemba had just changed carriers as of March and was assuring union officials that no benefit levels had changed. I do not find any clear and unmistakable waiver under the circumstances, since the Union was faced with several other matters to be negotiated and the health insurance was no longer an immediate concern.[25] In addition, there is evidence to suggest that Kaiser was not even available as of the summer. In sum, I find that as of May, when Corona discovered the change in insurance plans, it would have been futile for the Union to demand bargaining on the matter, and may well have damaged their bargaining position on the other issues waiting resolution.[26]

Respondent also contends (Br. 655) that the then current agreement contained no provision limiting its right to make the unilateral change in issue. This argument lacks merit: the issue is always whether the current agreement contains language clearly and unmistakably waiving the Union's right to bargain on a proposed unilateral change.[27] If the contract is silent on the matter, as it essentially is here, then it is the Act and Board law that imposes the prohibition.

For all the reasons stated above, I find that by making a unilateral change in its health benefit plan as of March 1, Respondent violated Section 8(a)(5) of the Act.[28]

C. *The Alleged Bad-Faith Bargaining (Prestrike)*[29]

1. The facts

Prior to the strike of August 23, the parties to this case participated in approximately 15 bargaining sessions. There was some variance in bargaining representatives on both sides, but generally Respondent was represented by Zemba as lead negotiator, Harrison, Schultz, and Thomas Ingersoll.[30] Toward the end of the negotiating period, a man named Puffer replaced Zemba as lead negotiator. Puffer, a management labor consultant, was never called as a witness.

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[23] However, even past failure to assert a statutory right does not estop subsequent assertion of that right. *Rockwell International Corp.*, 260 NLRB 1346 fn. 6 (1982).

[24] Zemba and Harrison were both under the mistaken impression that they had every right to change carriers without consultation or bargaining with the Union. Under these circumstances, it is more likely that timely notice was never sent nor ever received by the Union. Moreover, I do not believe that the notice given to Corona (G.C. Exh. 59) was ever posted.

[25] *Allied Mills, Inc.*, 218 NLRB 281 (1975); *Universal Security Instrument*, 250 NLRB 661 (1980).

[26] See *Merrill & Ring, Inc.*, 262 NLRB 392 (1982); *Carpenter Sprinkler Corp.*, 238 NLRB 974, 983 (1978), enfd. 605 F.2d 60 (2d Cir. 1979). I have read *Citizens National Bank of Willmar*, 245 NLRB 389 (1979), which at first reading could be described as supporting Respondent's position here. However, the union in that case never attempted to excuse its failure to demand bargaining on the grounds of futility nor was the issue even raised. Accordingly, I distinguish *Citizens National Bank of Willmar* from the instant case and find it does not apply.

[27] *Rockwell International Corp.*, 260 NLRB 1346 (1982).

[28] In its brief (Br. 10), the General Counsel anticipates an issue never raised at hearing relating to the 10(b) period. I see no bona fide issue on that point. However, to preclude the issue from being raised, I specifically find that the first notice to the Union of the change in health plans occurred in May when Corona inadvertently discovered the change that was effective on March 1. Case 21–CA–19497 was filed on September 2, well within the 10(b) period.

[29] On the second day of hearing, the question arose whether the General Counsel was claiming bad-faith bargaining both before and after the strike begin on August 23. The General Counsel stated:

> The subsequent negotiations are not alleged as being bad faith bargaining [sic] is because we have alleged that there was an agreement reached, and therefore, if the company has an obligation to sign that agreement, that erases the effect of any bad faith bargaining that occurred getting to that agreement. [R. Tr. 19.]

The General Counsel went on to urge that this alternative theory, though not then pleaded in the complaint, was that if an agreement had not been reached in April 1981, then it was due to Respondent's additional bad-faith bargaining. After discussion of the mechanics of setting forth this alternative theory, the General Counsel finally decided to amend the complaint: Original par. 11 of the fourth consolidated amended complaint became 11a and the General Counsel added 11b:

> During the period of time from November 6, through April 9, 1981, Respondent did engage in surface and bad-faith bargaining, including, but not limited to, making proposals calculated to be unacceptable to the Union and failing to make a reasonable effort to compromise differences. [R. Tr. 205–207, 212.]

The motion to amend was granted over Respondent's objection.

[30] The supervisory status of Ingersoll is in issue due to certain statements he is alleged to have made in early 1981, concerning Respondent's strategy during the bargaining sessions. I will address this issue below.

The Union was usually represented by Randall, Gordon Hall, Gene Napier, and Corona.[31] Later in the negotiations, the union team was joined by Charles Yelkey, an International vice president of the Union. He then became lead negotiator. Although a major figure here and in the events leading up to and during the strike, Yelkey was never called as a witness.

I turn now to the events of the individual bargaining sessions.

a. *June 12*

The first negotiating session was held in the union office. Previously, the Union had held one or more meetings with members to get a sense of what the membership wanted in the new contract. After these meetings, the union proposals were prepared and tendered to Respondent's negotiators at this meeting. (G.C. Exh. 3.) Zemba had nothing for the Union at this time, but did state that he did not want to be responsible for past practices of prior management and previous grievances.

b. *June 23*

Pursuant to agreement reached at the last meeting, the parties met again on June 23 at the office of the Federal Mediation and Conciliation Service.[32] At this meeting, the parties reviewed the Union's proposals with the union negotiators, explaining their reasons for the changes they wanted. Zemba again reiterated his desire not to be bound by past practices of prior management. Without completing review of the Union's proposals, the parties agreed to meet again on June 25.

c. *June 25*[33]

Zemba tendered to the Union his proposal for "Management Rights."[34] Later at that meeting, Zemba tendered other proposals relative to grievances, arbitration, leaves of absences, and reaching an agreement.[35] More employer proposals were promised for the next meeting. Some desultory conversation between the parties also occurred, such as Randall's observations that the management rights had very broad subcontracting language and that under this proposal one driver could be paid more than another driver. To this latter comment, Zemba voiced agreement. Once again Zemba raised the subject of "past practice" and asked the Union for a side letter on this subject, to the effect that he would not be bound. Zemba also talked about 13 prior accidents at Respondent and the fact that he desired to be consistent on discipline.

During the session, Zemba accused Randall of bargaining in bad faith. Randall denied the charge and no further details appear of record. This meeting concluded when Randall gave Zemba a copy of a letter to extend the contract on a day-to-day basis. Zemba promised to bring the letter back for the next meeting on Friday. He saw no problem with it. Zemba also requested a meeting on Saturday for one-half day.

d. *June 27*

Zemba began by stating that he would not sign the day-to-day letter, but would continue to bargain in good faith. When asked by Randall what would happen on June 30 when the contract expired, Zemba stated he would be there to negotiate.

After a union caucus, the parties reached agreement on certain items taken from the Union's and Employer's proposals. Then Randall reached Yelkey by telephone to inform him what Zemba had said relative to the day-to-day letter. After talking to Yelkey, Randall asked Zemba to talk to Yelkey at the latter's request. Zemba agreed and told Yelkey that he would continue on the same criteria that he was presently going. Then Randall asked Zemba to restate his verbal assurances to continue the contract on a day-to-day basis in front of the Federal mediator. Zemba refused on the grounds that the mediator present was not the mediator assigned to the case.

e. *June 30*

Notwithstanding Respondent's position on the day-to-day letter expressed at the prior meeting, Zemba tendered an agreement to the Union extending the old contract on a day-to-day basis and executed same. (G.C. Exh. 7.) In addition to this agreement, Respondent also tendered a 64-page document entitled "Aztec Bus Lines, Company Proposal to San Diego Bus Drivers Union,

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[31] Unless otherwise specified, the negotiators for both sides will be as indicated above. At this meeting Corona was not present.

[32] All subsequent meetings were held at this location unless otherwise indicated.

[33] Ingersoll did not attend this meeting.

[34] This proposal reads as follows:

> AZTEC BUS LINES
>
> MANAGEMENT RIGHTS
>
> The Company retains and shall continue to have the complete and exclusive right and power to manage its operations and direct its working force, except as expressly limited by specific obligations of the Company set forth in this Agreement. Among such retained rights and powers are included the following: to hire; to promote, demote, transfer, layoff, and recall; to assign and reassign to duties, hours of work and shifts; to compensate employees in excess of minimum hourly wage rates; to maintain good order and efficiency; to discharge, suspend, and discipline employees; to establish rules and regulations not in conflict with the Agreement governing the conduct of employees on Company time or Company property; to determine the type and quality of service in the functions of transportation methods, processes, and means of transportation service, including trips, routes and schedules of service, and of administration and sales; to determine the size and composition of the working force; to locate work within the site; to discontinue all or any part of its operations; to transfer to other locations and there to perform all or any part of its operations; to subcontract any part of its operations; to determine whether to purchase or lease equipment and service; to lease, sell, or otherwise dispose of or permit the use by others of all or any part of its facility and equipment.
>
> All matters not specifically enumerated in this Agreement are reserved to the employer and may not be a subject of meeting and negotiation, grievances or restriction on the right of the company to manage the company and direct it's [sic] employees and operations. [G.C. Exh. 4.]

[35] The proposals were never offered or received into evidence.

Local 1309." (G.C. Exh. 6.)[36] Zemba presented still a third document to the Union at this time, a "Letter of Understanding" to the effect that Respondent would not be bound by past practices. (G.C. Exh. 5.) Zemba stated that he did not wish to be bound by past stupidity, hence, the side letter. Zemba also stated that Respondent's negotiators had not had adequate time to review the union proposals.

Before the meeting ended, Randall reviewed Zemba's proposals and rejected the sections on grievance and arbitration, medical leave, maternity leave, leave of absence for union business, sick leave, and seniority determination. In rejecting these provisions, Randall sometimes stated "no" without elaboration and sometimes made comments. He also questioned several other provisions that were contained in the proposal as well as others that the Union considered important but were omitted.

f. *July 2*

Zemba began this meeting by stating that he wanted only employees who were loyal to the Company, but since he had purchased the Company in September 1979, he had noted that employees were loyal to the Union and not to the Company. Zemba also stated that Respondent had been losing money and that the union proposal was large, expensive, and late. Zemba concluded his preliminary remarks by stating he was turning over negotiations to Harrison. Zemba added, however, that any agreement she made was tentative only, subject to approval by Zemba. At this point, the parties resumed substantive negotiations concerning affirmative action, arbitration, and other matters, but no agreement was reached.

g. *July 3*

In Zemba's absence, Harrison led negotiations for Respondent. Respondent made a concession on the assigned successor and heir's clause agreeing to the language of the prior contract. The Company made further concessions. It agreed to language that nothing in an employee's record regarding discipline could be used after 1 year had expired. It also agreed to language from the prior contract regarding shift differential for the mechanics, and there was apparent agreement relative to pay for jury duty. Finally, Harrison stated that Zemba was holding on the grievance procedure, but would consider removing the word "advisory" from the arbitration proposal.

h. *July 7*

The parties discussed sick leave, vacation pay, the charter board (i.e., those drivers assigned to bus charters), and how to define part-time employees. Zemba stated there was a 4-hour guarantee that had not been included in the Company's proposals. Management rights were again discussed. Zemba concluded by stating although there was movement by the Union on noneconomic issues, the Company wanted movement on economic issues.

i. *July 11*[37]

Discussion began with past practice and Zemba stated that in order to manage the Company, he could not be bound by this. Accordingly, Zemba wanted a side letter of agreement that he would not be bound. Then Zemba announced that he was retaining the services of Tom Puffer, a management labor consultant. The session concluded with a review of the contract for the benefit of Yelkey and there was a brief discussion of benefits for mechanics. No agreement was reached on any subject.

Harrison returned to the session in the afternoon of July 11. She testified that Yelkey stated in her presence that he had been in Las Vegas and that Randall had no authority to make decisions in his absence. Zemba confirmed this conversation and he further stated that, prior to this time, no one on Respondent's side was aware of Randall's lack of authority. To be more specific, Yelkey told Harrison that nothing could have been accomplished in his absence. I credit the testimony of Harrison and Zemba on this point.[38]

j. *July 14*[39]

The Union had previously requested a list of people in the various categories in maintenance. This list was tendered by Zemba. Then both sides went through the contract and agreement was reached on certain items. Randall, however, could not recall what these items were.

k. *July 21*[40]

At this meeting, Yelkey presented Respondent with a handwritten proposal on grievance-and-arbitration procedures as a counterproposal to the Company's proposal. The Employer's representatives objected to the counterproposal claiming it was too wide open. After a company caucus, the Respondent's representatives asked Yelkey what the intent of the language was. Yelkey replied that he wished to make the grievance-and-arbitration procedure less one-sided. Then Yelkey withdrew the proposal.

Both sides went through various other articles of the proposals, but no agreements were reached. Later that day, the Company asked that the Federal mediator be present for the next meeting.

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[36] At Br. 13-15, the General Counsel has quoted selectively from G.C. Exh. 6, quoting sec. A, "Management Rights, Article V, Grievance Procedure, and Article VI, Advisory Arbitration." Although these sections are relevant within the scheme of the present issue, I will consider them within the context of the entire document and the entire document within the context of all the evidence.

[37] At this session, Harrison was absent from the morning session only. The union team was joined by Charles Yelkey, International vice president of the Union.

[38] Yelkey was never called as a witness and I find the failure of the Charging Party to call its International vice president on this and other matters or to explain his absence raises and adverse inference. *Martin Luther King Sr. Nursing Center*, 231 NLRB 15 (1977); *Earle Industries*, 260 NLRB 1128 (1982); but see *Wayne Construction*, 259 NLRB 571 (1981). Randall did not testify about the conversation between Yelkey and Harrison, but it is not clear he would have heard it or, if he heard it, he would have recalled it. He had virtually no independent recollection save what was on his notes and this exchange was not contained therein.

[39] Harrison was absent from this session. Yelkey was present for this session and succeeding sessions except where indicated.

[40] Harrison and Napier were absent from this session.

l. *July 22*[41]

Both sides went through their proposals for the benefit of the mediators. Respondent stressed that past practice was out and that management will manage. Those employees that produce can stay, and those that do not, go. The mediators then met with both sides privately. No agreement was reached on any provision.

m. *July 24*[42]

First, the parties exchanged some language for certain items and proposals. Then, after the Company held a caucus, it informed the Union that it had sent for Puffer. A short time later, Puffer arrived and stated that he was presenting a settlement offer and not a final offer on behalf of Respondent. (G.C. Exh. 8.) Puffer then stated that he was giving 24-hour notice to cancel the day-to-day letter and that everything was open for negotiation. Randall further stated that Respondent would give certain guarantees on retroactivity back to the expiration date of the contract, if it was accepted by a certain date. Although Puffer asked that the settlement offer be presented to the membership for ratification, Randall did not do this.

n. *August 5*[43]

At this meeting, the Union presented its counterproposals (G.C. Exh. 9), prepared in response to the July 24 settlement offer. The Union had rejected Respondent's settlement offer and Respondent rejected the Union's counterproposal. Puffer stated that the retroactivity part of the settlement offer for pay was withdrawn, and the Company would attempt to operate under the present contract.

Both sides agree that the mediator then asked if the Union desired a final offer from the Company. Randall testified to Yelkey's alleged response: "There was a lot of questions to be asked first."

According to Respondent's evidence, the two sides were dealing with the mediator in separate rooms. The mediator told Zemba and Harrison that the Union was asking for a final offer. At the mediator's request, both sides reassembled in the same room. Yelkey then stated:

> Gus, I'm not asking for a first final. I'm not asking for a second final, third or fourth final. I am asking for your final, final, final.

As Yelkey, a large man, made this statement, he banged his hand on the table for emphasis. Harrison's account of Yelkey's statement was corroborated by Zemba. I credit Harrison and Zemba here. Again, I note that Yelkey was never called as a witness and Harrison's recollection of the bargaining session seemed to be better than Randall's. It also seems to me unlikely that the mediator would not press Yelkey to ask the questions that needed to be asked if Yelkey had made the statement attributed to him by Randall. Yet Randall's narrative stops exactly at that point. In any event, as Puffer thanked the Union for the time they put in, the meeting ended.[44]

o. *August 12*

In response to Yelkey's request made at the prior meeting, Puffer presented Respondent's final offer to the Union. (G.C. Exh. 10.) Puffer stated the offer was on the table until Sunday, August 16, at midnight. Yelkey stated that it had to be reviewed and presented to the membership. The following day, company representatives met only with Randall to answer the Union's question about the offer.[45]

p. *Union ratification meetings*

The last formal bargaining session was on August 12; on August 18, about 90–110 union members met to consider Respondent's final offer. Randall addressed the assembly on behalf of the union leadership. He compared the pending offer to the previous contract and found the former lacking. Specifically, Randall told the members they would not have job security because due to the wording of the management-rights clause and the wording of the grievance-and-arbitration clause, they would be unable to grieve, discipline, or discharge. Randall also told members that under Respondent's pending offer they would have fewer sick and vacation days, no jury duty pay, and no provisions for doubletime on holidays nor for over-the-road charter pay. These were all benefits that employees currently had. Finally, Randall told members that the money or economic package was okay and the Union could live with it. Members of the Union's executive board addressed the members and unanimously recommended that the Company's offer be rejected. The membership did vote to reject and subsequently voted overwhelmingly to strike. The following day Randall called the Federal mediator and informed him of the strike vote and a strike deadline.

At 12:01 a.m. on August 23, the Union went on strike. On August 25, Zemba sent a letter to Randall, which the latter received. It reads as follows:

> Mr. Donald R. Randall, President
> San Diego Bus Driver Union, Local 1309
> AFL–CIO
> Amalgamated Transit Union
> 7851 Mission Center Court, Suite 115
> San Diego, CA 92108
>
> Dear Mr. Randall:

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[41] Napier was absent. Federal Mediators Taylor and Brown were present.

[42] Napier was absent.

[43] Puffer was present here and at future sessions unless otherwise indicated.

[44] Another reason I believe Harrison and Zemba on this point relates to the union ratification meeting on August 18. Of all the Union's objections to the offer, there was no claim that management was trying to terminate bargaining by submitting a premature final offer. It is probable that Yelkey asked for a final offer because he was under pressure from members who were impatient working under a day-to-day extension of the contract.

[45] What occurred at this meeting does not appear of record.

> Since you went on strike 12:01 AM August 23, 1980, we are obviously at an impasse. Since we have said impasse be advised that we plan to institute our last best offer on September 1, 1980.
>
> If you wish to discuss the implementation of said last best offer please advise the Federal Mediator who will arrange for a meeting and we will be happy to do so.
>
> Sincerely,
> /s/ A.C. Zemba
> President
>
> cc: John Taylor, Federal Mediator
> [G.C. Exh. 11.]

2. Analysis and conclusions

The General Counsel's theory of prestrike bad-faith bargaining is based on two primary contentions (Br. 23–25): (a) that Respondent bargained to impasse on a nonmandatory subject of bargaining: to wit, the Union's statutory right to file grievances with management on behalf of bargaining unit employees; and (b) that Respondent's position on management rights and arbitration, prior to August 12 when Respondent changed its position in part, was designed to permit management to make unilateral changes in employee basic rights and protected activities without recourse. Before considering these contentions further, I turn briefly to the relevant legal principles for guidance.

In *Chevron Chemical Co.*, 261 NLRB 44, 45 (1982), the Board stated that:

> Determining whether parties have complied with the duty to bargain in good faith usually requires examination of their motive or state of mind during the bargaining process, and is generally based on circumstantial evidence, since a charged party is unlikely to admit overtly having acted with bad intent. Hence, in determining whether the duty to bargain in good faith has been breached, particularly in the context of a "surface bargaining" allegation, we look to whether the parties' conduct evidence a real desire to reach an agreement—a determination made by examination of the record as a whole, including the course of negotiations as well as contract proposals. . . .[46]

At 46, the Board continued:

> [I]t must be remembered that Section 8(d) does not "compel either party to agree to a proposal or require the making of a concession . . . ." Thus, the Board does not, "either directly or indirectly, compel concessions or otherwise sit in judgment upon the substantive terms of collective bargaining agreements." *N.L.R.B.* v. *American National Insurance Co.*, 343 U.S. 395, 404 (1952). On the other hand, as stated by the Supreme Court, "[T]he Board has been afforded flexiibility to determine . . . whether a party's conduct at the bargaining table evidences a real desire to come into agreement . . . . And specifically we do not mean to question in any way the Board's powers to determine the latter question, drawing inferences from the conduct of the parties as a whole." *N.L.R.B.* v. *Insurance Agents' International Union, AFL–CIO* [*Prudential Insurance Co.*], 361 U.S. 477, 498 (1960). The Board does, of course, with court sanction, consider the content of bargaining proposals as part of its review when making a determination as to the good faith of parties negotiating a contract.

In its brief at 529–534, Respondent cites several cases for the proposition that when evaluating the totality of an employer's conduct, the Board has found it relevant to examine the conduct of the union as well.[47] It is unnecessary in this case to decide to what extent, if any, the Union's conduct might immunize otherwise unlawful conduct of Respondent.[48] The Union's conduct here does not indicate bad faith at the bargaining table nor in the negotiating process. I reject Respondent's claim (Br. 545) that the Union acted in bad faith during negotiations by ignoring the contents of company proposals, by making misrepresentations to union membership, by recommending rejection of the Company's final offer, and by recommending a strike because of personal dislikes for Zemba. These claims are completely unsupported by the record. In sum, I decide the question of good and bad faith of Respondent by looking to the totality of its conduct alone.

As noted above, "totality of conduct" includes both conduct at and away from the bargaining tables[49] and content of bargaining proposals. Looking to Respondent's conduct first, I note Respondent's practice beginning in October 1979 of failing to process grievances and arbitration in accord with past practice. I need not repeat the Union's various favorable court decisions that I have related above. Next, I note Zemba's occasional disparagement of the Union, its officers, and its members during negotiations. For example, on June 25, Zemba accused Randall of negotiating in bad faith. There is no evidence in the record to support this accusation. Also, on July 2, Zemba stated that his employees were more loyal to the Union than to the Company and he wanted only employees who were loyal to the Company. Then Zemba attacked Corona, a member of the Union's negotiating team, who was present. He called her a "troublemaker" and accused her of being the cause of much of the problems between Zemba and his employees. On

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[46] See also *M. & R. Trucking Co.*, 178 NLRB 167 (1969), enfd. in part 434 F.2d 689 (5th Cir. 1970).

[47] See, e.g., *Times Publishing Co.*, 72 NLRB 676, 683 (1947); *Roadhome Construction Corp.*, 170 NLRB 668, 672 (1968); *State Farm Auto Insurance*, 195 NLRB 871 (1972).

[48] There appears to be tension between the Board's general holding that the "clean hands doctrine of equity does not operate against a Charging Party." See *Marines Memorial Club*, 261 NLRB 1357 fn. 2 (1982), and the cases cited in fn. 47, above. Moreover, there is some reason to believe that the cases cited in fn. 47, above, are no longer good law. In *NLRB v. Hiatt Electric*, mem. 685 F.2d 444 (9th Cir. 1982), the court stated its present view, "even if the Union had engaged in an unfair labor practice [failure to bargain in good faith], its conduct would not be a defense to a charge of unfair bargaining against the Company . . . ."

[49] *NLRB v. Insurance Agents*, 361 U.S. 477 (1960); *NLRB v. American National Insurance Co.*, 343 U.S. 395 (1952).

July 14, Zemba again attacked Corona, accusing her of being a "troublemaker" and of filing grievances that were not really true.[50]

Of course, not all Respondent's conduct during negotiations was negative. Prior to the strike, Respondent participated in 15 bargaining sessions with the Union, the first of which was at the union office and the rest of which were at the Federal Mediation and Conciliation Service. Some agreement was reached on certain matters and Respondent made several concessions on matters of interest. For example, Respondent first refused, then agreed to sign, the day-to-day letter extending the contract. In addition, on July 14, Respondent had furnished certain information to the Union as requested. Representatives of Respondent met with the Union to answer questions relative to its final offer.[51]

I turn next to the content of the bargaining proposals since, as noted above, the Board may examine these proposals as part of its review of all the circumstances in evaluating an employer's good faith.[52] I review these with the understanding that the Act does not command the parties to agree—it explicitly states they need not. But the right not to agree or concede, or to refuse a particular proposal or make a concession, may not be utilized as a "cloak . . . to conceal a purposeful strategy to make bargaining futile or fail."[53]

In looking at Respondent's final proposal (G.C. Exh. 10), I note that Respondent modified its "Management Rights" clause so that it read in pertinent part,

> Among such retained rights and powers are included the following:
>
> . . . to discharge, suspend, and discipline employees for just cause . . . [p. 4].

The addition of the "for just cause" standard was a significant concession by Respondent based on its previously announced position. It becomes more significant when considered with a second modification of the arbitration clause (art. VII):

> The decision of the Chairman [Arbitrator] within the limits herein prescribed shall be final and binding on all parties to the dispute. [Par. 7.7, pp. 18–19.]

Here again, Respondent had previously contended that arbitration should be "advisory" only, and this change is a significant concession.[54]

The General Counsel recognizes these concessions, but also points out (Br. 21) that Respondent also offered language in the clause on grievance procedure (art. VI) that continued to restrict the Union's right to file a grievance on behalf of an employee or employees. More specifically, the language at issue reads as follows:

> The right of the Union to submit a grievance is limited to provisions delineating rights of the Union which are not appropriate topics for a grievance by an individual bargaining unit member . . . .

There appears little question that this language in Respondent's final offer would, if implemented, unlawfully restrict the Union's role in the filing of grievances.[55]

Looking finally to what was perhaps Respondent's most adamant position, "past practice," note that the parties do not address this in the briefs as it relates to the issue at hand. At 559 of its brief, Respondent opines that there was little or no dispute between the testimony of Randall and Zemba on this subject. Both agreed that Zemba repeatedly objected to it and that he did not want to be bound by his predecessor's past practices. The evidence does not reflect that Respondent retreated from this position in submitting its final proposal.

In reviewing all the evidence relating to this difficult issue, I find that although the matter is not free from doubt, the General Counsel has not proven by a preponderance of the evidence that Respondent bargained in bad faith. I find that this case reflects hard bargaining on both sides.[56]

Although Zemba's attacks on the Union and Corona cannot be condoned, there is no evidence that such attacks were calculated to disrupt the negotiations or that they did so. Corona was not an active member of the Union's team and Randall and Yelkey did not testify, nor does the other evidence so indicate that such attacks prevented the negotiations from going forward. Moreover, Zemba was replaced by Puffer as the Respondent's lead negotiator toward the latter half of the negotiations. I also note the positive factors of the negotiations as reviewed above

As to the bargaining proposals, I am impressed by the 11th hour modifications made by the Respondent in its final proposal. These changes seem to me consistent with Respondent's desire to reach an agreement.[57] Although I agree with the General Counsel that Respondent's attempt to curtail the role of the Union in the grievance article bespeaks of bad-faith bargaining.[58] The General

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[50] These attacks on Corona because she presented grievances pursuant to the collective-bargaining agreement are themselves violations of Sec. 8(a)(1) of the Act. See *Cooper-Jarrett, Inc.*, 260 NLRB 1123 (1982). However, because they are not alleged in the complaint, nor urged as violations in the briefs, I consider Zemba's statements only as factors in determining whether Respondent bargained in good faith.

[51] Compare *Borg-Warner Corp.*, 198 NLRB 726 (1972).

[52] *NLRB v. Pacific Grinding Wheel Co.*, 572 F.2d 1343, 1348 (9th Cir. 1978).

[53] *NLRB v. Herman Sausage Co.*, 275 F.2d 229, 232 (5th Cir. 1960).

[54] According to the record, Zemba was considering this change in position as early as July 3.

[55] See *Latrobe Steel Co.*, 244 NLRB 528, 533 (1979), enfd. 630 F.2d 171 (3d Cir. 1980).

[56] See *Chevron Chemical Co.*, 261 NLRB 44 (1982).

[57] In reviewing all the evidence on a good-faith bargaining issue, I weigh Respondent's latter actions more heavily than earlier actions. As the Supreme Court has stated, "An employer is not required to lead with his best offer; he is free to bargain." *NLRB v. Katz*, 369 U.S. 736, 745 (1962). Based on this authority, I reject any claim by the General Counsel (Br. 24–25) that even though modified later, Respondent's management rights and advisory arbitration proposals as originally constituted are evidence of Respondent's bad faith.

[58] Adhering to an untenable legal position during the course of negotiations is inconsistent with the obligation to bargain in good faith. *NLRB v. Mar-Len Cabinets*, 659 F.2d 995 (9th Cir. 1981).

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Counsel forgets a key factor that, on balance, saves the day for Respondent.

I have found as a matter of credibility that it was Yelkey on behalf of the Union who demanded Respondent's final offer. But for this condition, and the subsequent strike, there is every reason to believe, in light of two other significant modifications, that Respondent would have modified its position with respect to the Union's role in the filing of grievances if bargaining had continued.

My conclusion that Respondent has not bargained in bad faith is not affected by Zemba's purported declaration of an impasse on August 25 (G.C. Exh. 11). Here the Union made no effort to test the finality of the Union's position before going out on strike. Under the circumstances present here, the Respondent was justified in believing that the Union was not interested in any further negotiations. Use of words like "impasse" by the parties even relating to overall issues do not necessarily imply that future bargaining would be futile, and are not necessarily binding legal conclusions.[59] Indeed, subsequent to the strike, bargaining did occur here. In sum, merely because Zemba purported to declare an impasse, I do not find that the objective evidence supports that conclusion.

The facts of the instant case should be compared to those in *Shipbuilders v. NLRB*, 320 F.2d 615 (3d Cir. 1963), cert. denied 375 U.S. 984 (1964). The employer in the above-cited case offered a proposal that would have restricted the Union's role in the prosecution of grievances to those complaints which had been signed by individual employees. The Board's decision in this case[60] found several aspects of Respondent's behavior to have been unlawful, but also found that the totality of Respondent's conduct did not show guilt of bad-faith bargaining.[61] The court never specifically reviewed this aspect of the Board's ruling. However, the court did uphold the Board's position in finding certain violations of Section 8(a)(5) of the Act by the Employer. Some of the court's statements are helpful to the present case. For example, the court stated:

> Non-mandatory subjects [of bargaining] may lawfully be included in collective-bargaining contracts if the parties agree.

Thus, the mere proposal of the grievance-and-arbitration system is not unlawful. The court also held that modification of the grievance system in that case, very similar to that proposed here, was a nonmandatory subject of bargaining. Finally, the court held that insistance on a nonmandatory sbject of bargaining was a per se violation of the duty to bargain. Again, this finding is not inconsistent with an overall finding of good-faith bargaining—such as made by the Board and such as I have made here. I note further that Respondent is charged with bad-faith bargaining by insisting to impasse on a nonmandatory subject of bargaining. However, I have found that Respondent did not insist to impasse on a nonmandatory subject of bargaining.

D. *The Alleged Unlawful Refusal to Execute a Collective-Bargaining Agreement and Alleged Bad-Faith Bargaining (Postcommencement of Strike)*[62]

1. The facts

As noted above, the strike began at 12:01 a.m., on August 23. According to Randall, there were two to three subsequent negotiating sessions called by the Federal mediator. Because Randall had no notes to refresh his recollection—it is not clear if he or anyone else took notes—Randall was somewhat vague. The first meeting occurred in late September or October and only strike-related events were discussed. Then in November, another meeting was held. At this meeting, Puffer on behalf of Respondent, presented a proposal to the Union (G.C. Exh. 12). This proposal raised questions regarding the Company's position on grievances. The Company also made another change that was not subject to interpretation. Respondent proposed that only employees hired after the effective date of the agreement would have to become union members as a condition of employment. A current employee not in the Union on the effective date of the agreement was given the option to join the Union. Randall testified to Puffer's explanation for this change: because of the activities of the strikers, the nonstrikers would never want to work with them or want to be part of their union any longer.

On December 23, the Union sent a letter to Puffer asking him to clarify Respondent's position as to whether it concedes "the arbitrability of grievances dealing with discipline and discharge or not." (G.C. Exh. 14.)[63] In response to this letter, Puffer called Prochazka to say that the letter was being referred to Josiah Neeper, Respondent's attorney.[64] Subsequently, Neeper called Prochazka to say that he would be responding in writing to the December 23 letter.

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[59] *Pillowtex Corp.*, 241 NLRB 40, 46 fn. 11 (1979).

[60] 136 NLRB 1500 (1962).

[61] See earlier decision in the same case at 133 NLRB 1347 (1961).

[62] On October 22, Respondent, by its attorney, Josiah Neeper, entered into an informal settlement of Cases 21-CA-19497 and 21-CA-19542. The agreement contains the standard nonadmission clause and reads in pertinent part as follows:

NOTICE TO EMPLOYEES

WE WILL NOT refuse to bargain collectively in good faith with the SAN DIEGO AFL-CIO BUS DRIVERS LOCAL DIVISION 1309 OF THE AMALGAMATED TRANSIT UNION in the following appropriate unit:

All employees of the Employer; excluding all office clerical employees, professional employees, guards, watchmen and supervisors as defined in the Act.

WE WILL NOT unilaterally, without giving the Union an opportunity to bargain, change our health insurance plan.

WE WILL NOT threaten to deprive our employees of their right to Union representation because they engaged in a strike, or other protected concerted activities.

WE WILL immediately bargain collectively in good faith with the Union as the exclusive bargaining representative of our employees in the above bargaining unit and if an agreement is reached will embody such agreement in a written, signed contract.

WE WILL make whole, with interest, any employee who suffered any losses as a result of our unilateral adoption of the new health plan.

WE WILL, upon an unconditional offer to return to work, offer all of our employees who went on strike on or after August 23, 1980, immediate and full reinstatement to their former positions, dismissing, if necessary, any person hired on or after that date.

AZTEC BUS LINES, INC.
[Employer]
[G.C. Exh. 13]

On January 7, 1981, Neeper wrote to Prochazka stating in part that subsequent to the effective date of a new agreement, discipline and discharge would be subject to arbitration under the "just cause" standard. (G.C. Exh. 15.)

On February 23, 1981, David Moore, president of the Union, wrote to the Federal mediator asking that a meeting with Respondent be arranged for the purpose of presenting a union counterproposal. The letter also represented that from that time forward, the Union would be represented by counsel, Prochazka. (G.C. Exh. 16.) A meeting for March 12, 1981, at 2 p.m. was scheduled for the office of the Federal mediator. That morning of March 12, Prochazka received a letter from Neeper. It reads as follows:

> Richard D. Prochazka, Esq.
> Domnitz & Prochazka
> 3061 Fourth Avenue
> San Diego, CA 92103
>
> Re: *Aztec Bus Lines*
>
> Dear Mr. Prochazka:
>
> Aztec Bus Lines will be meeting with Local 1309 tomorrow at FMCS at 2:00 P.M. for the purpose of further bargaining.
>
> The purpose of the meeting originally was for the Employer to receive a new proposal from the Union. In preparing for the meeting the Employer finds that its position has changed since the time of its last proposal because of changed circumstances. Its changed position will be reflected in its response to the Union's proposal.
>
> Very truly yours,
>
> /s/ Josiah L. Neeper
> For GRAY, CARY, AMES & FRYE
>
> cc: Ms. Ellen Harrison
> Mr. Thomas R. Puffer
>
> [G.C. Exh. 17.]

In his testimony, Neeper explained that by "changed circumstances," he referred to picket line misconduct of strikers that might disqualify them from returning to work on termination of the strike. He also meant that a large number of replacement drivers had been hired and they might wish to retain their jobs after the strike, so there might not be enough work for them and the returning strikers. Finally, Neeper meant that the replacement drivers might be required by a union-security provision to join the Union, thereby subjecting themselves to union discipline.

At this meeting, March 12, 1981, the union representatives were Prochazka, David Moore, by then president of the Local, and Ed Reed, then vice president. Representing the Employer was Neeper, who stated he would be the spokesman for the Company, Puffer, and Harrison. Federal Mediator Taylor was also present.

Neeper began by acknowledging that the original purpose of the meeting had been to receive the union proposal. However, Neeper then referred to the "changed circumstances" as mentioned in the letter and stated that at a subsequent meeting, Respondent would be presenting proposals consistent with the "changed circumstances." At this point, the Union tendered a proposal, dated February 20, 1981, which Prochazka had not participated in preparing (G.C. Exh. 18). In this proposal, the Union made certain minor changes in the Company's November 6 proposal (G.C. Exh. 12), rejected the union-security subclause that would have exempted nonstriking employees from becoming members of the Union, and essentially accepted the proposed grievance-and-arbitration article of the General Counsel's Exhibit 12. On many articles, the Union proposed that language from the old contract (G.C. Exh. 2) be used in the new.

After receiving the Union's proposal, the Company's team caucused to review the contents thereof; on returning, Neeper had a few questions about certain sections. Neeper again stated that the Company would be making a counterproposal based on changed circumstances. After another short caucus, Neeper stated that the present members of the Company's team would constitute its negotiating committee for the foreseeable future and Neeper specifically stated that Zemba would not be participating.

Neeper and Prochazka arranged for another meeting, which was held on March 26, 1981, and further agreed that the Federal mediator would not attend any further meetings. Subsequent meetings were held at the mediator's office, however. Present for the Union at this meeting were Prochazka, Moore, Reed, and two other union officials named King and Pedegrew. The Company was represented by Neeper, Harrison, and Puffer. Neeper presented the Company's proposal, dated March 26, 1981. (G.C. Exh. 19.)

Among other provisions of the General Counsel's Exhibit 19 were "Sections 9.7, 9.8, 9.9, and 17.8 per attachment. Strike resolution and striker return provisions to be negotiated." According to Neeper, only these sections were a response to the "changed circumstances" referred to in the General Counsel's Exhibit 17. All other provisions were added as a result of union concern or questions expressed at the prior meeting. These sections read as follows:

> 9.7
>
> When time off exceeds three months, at the expense of the company, before an employee resumes normal duties, the company will require a physical examination by the company physician in accordance with 391.1(a) of the Federal Motor Carriers

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[63] This letter was drafted by Attorney Richard D. Prochazka, a witness at hearing, and cocounsel for the Charging Party Union during the hearing.

[64] Like Prochazka, Neeper testified at the hearing on the subject of poststrike negotiations. He is a law partner of Respondent's counsel at hearing.

> Safety Regulations, and 82.7 of Calif. Highway Patrol Manual. The employee must pass this physical in order to resume work;
>
> 9.8
>
> When time off exceeds thirty (30) days, before an employee resumes normal duties he/she must requalify on all types of equipment for which he/she was qualified prior to time off. Requalification requirements will conform with the qualification requirements set forth in company training schedules. Requalification will be done according to the availability of instructors and the company work load.
>
> 9.9
>
> When time off exceeds three (3) months, before an employee resumes normal duties he/she must submit a current updated Dept. of Motor Vehicles print out.
>
> The foregoing requirements can be found covered in detail, in the Driver's Manual.
>
> 17.8
>
> The Company shall bear the entire cost of any DOT renewal physical or any other examination required by company to which any employee is required to submit, in accordance with 391.1(a) of the Federal Motor Carriers Manual, and 82.7 of the Calif. Highway Patrol Manual. These examinations are to be performed by the company physician.

According to Prochazka, the Union caucused after receiving the Company's proposal. Both sides agree that after the caucus, a discussion ensued, but there are certain conflicts as to what was said.

a. *As to sections 9.7, 9.8, and 9.9*

These proposals were newly mentioned by the Company. Prochazka testified that Neeper stated that the U.S. Department of Transportation (DOT) required them to be put in. Neeper testified that the purpose of the sections as related to him by company officials was, as to section 9.7, the result of a recommendation by the Company's medical expert as a way to keep the Company's workman's compensation and accident insurance costs down; as to section 9.8, to ensure that an individual off the job for any extended period had not lost necessary driving skills; as to section 9.9, to preclude employees with bad driving or criminal records. All these reasons were communicated in substance to the Union. In light of other testimony by Harrison and Flo Ybarra, a supervisory employee of Aztec that, pursuant to recommendations of consultants employed by an industry trade group, Respondent had been using substantially the same procedures in sections 9.7, 9.8, and 9.9 since October or November, I find that someone on Respondent's side told the Union that the DOT required these changes. This is not to discredit Neeper necessarily, as his additional rationale may well have also been related to union officials. All agree that the Company intended these provisions to apply to returning strikers and Neeper so stated to the Union. As to whether Neeper also added, "[W]e're sure the Union will have counterproposals in that regard," as testified to by Prochazka, I do not believe that an experienced labor negotiator would have made such a remark and I find that he did not. Not only was it impolitic, but inconsistent with the stated purpose of the proposals.

b. *As to the reference after section 9.9 to a driver's manual*

All agree that Prochazka asked about the manual. He recalls Neeper deferring to Harrison who answered that the manual did not then exist, but was being worked on with the nonstriking drivers. When it was ready, the Union would receive a copy. Harrison denied making any such statements to Prochazka, testifying that she answered the latter's inquiry by replying that certain supervisory personnel were working on it, such as Schultz, herself, and others. Neeper also recalls that either he or Harrison answered the question posed by stating that supervisory personnel were working on the manual. I credit the testimony of Neeper and Harrison here as it makes no sense that replacement drivers, many of whom were of short tenure, would be working on a driver's manual, nor do I believe that Neeper would have acquiesced in such an imprudent statement, at least not without further clarification.

c. *As to the striker return and strike resolution provisions*

Prochazka made little or no reference to this subject as a topic of conversation. Neeper testified that in his experience in a strike situation while the Company continues to operate, the Union commonly has substantial contract demands with respect to taking strikers back and resolving the strike, as an aspect of reaching agreement. As to the specific language in question, Neeper testified that he stated the Company anticipates that the Union will make demands in this area and the Company expects to do the same as part of a final agreement. Then, either Randall or Prochazka nodded in understanding of what was said, if not agreement with it. Harrison's account of this conversation generally corroborated Neeper's; moreover, Harrison's notes (R. Br. 50, last page) reads:

> Neeper . . . further states the intent for strike return and other provisions that he has presented are to be neg. Other words bet N and Pr exchanged on lawyer level.

In light of the above circumstances, I credit Neeper's account of this conversation and find that the matter was indeed discussed as indicated above. I further believe Prochazka would have made inquiry about a matter of critical importance to the Union whose members had been on strike since August 23.

On April 2, 1981, the parties met and the Union presented its proposed modifications of sections 9.7, 9.8, and 9.9 (G.C. Exh. 20); Respondent caucused and Neeper informed the union representatives that the proposed modifications were rejected. Then Prochazka wrote out modifications of sections 9.7 and 9.9 that Neeper accepted.

(G.C. Exhs. 21, 22.) This was signified by Prochazka's notation "OK 4/2/81" on the lower right corner of each document. The Company refused to change its position as section 9.8.

Next, the Union caucused and, on return, referred to their November 6 proposal (G.C. Exh. 12). On page 23 of that document, section 19.2, "Notice of Termination," the document read:

> If either the Union or the Company desires to change or terminate this Agreement on [June 30, 1983, is written in; Prochazka testified that his copy was blank as to the date]. . . . If the parties have failed to reach a settlement by [June 30, 1983 again is written in; Prochazka's copy was blank] . . . .

Prochazka asked Neeper what date should be inserted into the two blanks. Neeper responded, "the date of contract termination," without reference to a specific date.

Again there is a conflict between the testimony of the lawyers. Neeper, supported by Harrison, stated he referred to specific proposals that the Company desired to receive from the Union and desired to make on its own with respect to striker return and striker resolution. I again credit this testimony for the reasons previously stated regarding conflicts in testimony between Prochazka and Neeper.

The parties broke for lunch with the intention of reassembling for an afternoon session. During lunch the union representatives met with Yelkey to discuss negotiations. Later Prochazka called Neeper and canceled the afternoon session, stating, "The International is unhappy with what we've done. They don't want us to met [sic] with you this afternoon." The two lawyers then agreed on another meeting for April 9, 1981, at 8:30 a.m., and Neeper confirmed this date with Puffer and Harrison.

Meanwhile, the union team spent the afternoon of April 2 conferring with Yelkey. After this, a meeting of the general membership was called for the evening of April 3, 1981. At this meeting, Prochazka and the union team presented to the membership the Aztec proposal of November 6, as modified by subsequent negotiations. After discussion, the membership took two votes. First, the membership voted to offer to return to work; second, the membership voted to accept the proposal as it was explained by the bargaining team. In anticipation of the vote results, two letters had been prepared prior to the meeting. One of these letters purported to make an unconditional offer to return to work, and the other purported to accept Respondent's offer. (G.C. Exhs. 23, 24.) Only the second need be recited here and it reads as follows:

> SAN DIEGO BUS DRIVER UNION
> A.F.L.-C.I.O.
> Amalgamated Transit Union
> 7851 Mission Center Court, Suite 115
> San Diego, CA 92120
>
> Attention: Gus Zemba
>
> Re: Acceptance of your Collective Bargaining Offer of April 2, 1981
>
> Dear Mr. Zemba:
>
> Without waiving any rights which Local 1309 or its members may have under the National Labor Relations Act and under National Labor Relations Board Case Nos. 21-CA-19497, 21-CA-19542, and 21-CA-20033, Local 1309 hereby accepts your proposal for a written Collective Bargaining Agreement as that proposal was made November 6, 1980, restated on March 26, 1981 and subsequently modified on April 2, 1981.
>
> Local 1309 views strike resolution and striker return provisions as issues separate and apart from the provisions of a Collective Bargaining Agreement. We are satisfied with the way those issues have been resolved by the National Labor Relations Board. If, however, you desire to meet to discuss those subjects independent from the terms of the Collective Bargaining Agreement, representatives of Local 1309 are prepared to do so.
>
> In that regard you will note that by separate letter you are receiving an unconditional offer to return to work. That offer is not conditioned on your response to this letter.
>
> Very truly yours,
> /s/ David H. Moore, President
> Local Division 1309
>
> DHM: chs
> opeiu: 139 afl-cio, clc [G.C. Exh. 24.]

On April 6, 1981, David Geerdes, an attorney for Respondent, sent a letter to Prochazka acknowledging receipt of the Union's April 3 letter referred to above. The final paragraph of Geerdes' letter reads:

> There is currently scheduled a negotiating session for Thursday, April 9, 1981 at 8:30 A.M. We would appreciate being provided at that time with a complete copy, ready for signature, of the agreement which Local 1309 has purportedly accepted. [G.C. Exh. 25.]

On the same date, Geerdes sent a letter to the Union requesting the names of all Aztec employees who the Union contends were still on strike. (G.C. Exh. 26.) This letter was answered on April 7 by a letter from the Union to Geerdes with the names of approximately 114 employees who were "presently engaged in the Aztec strike." On April 8, 1981, Prochazka caused delivery of a document that the Union contended was the contract that they had accepted (G.C. Exh. 28). Through inadvertence, a side letter regarding past practice was omitted, but was provided to Geerdes at the meeting on April 9. (G.C. Exh. 28a.)[85]

On April 9, 1981, the Union and Respondent negotiating teams headed by Prochazka and Neeper respectively conferred at the office of the Federal mediator. After receiving the missing side agreement on past practice, the

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[85] In this side letter, the Union basically accepted Zemba's position that he would not be bound by past practices of prior management except to the extent specifically set forth in the basic agreement.

Company took the position that there had been no agreement reached previously because the matters of strike resolution and striker return had not been resolved. Neeper also indicated that although he had not had a full opportunity to review the proffered contract, he did note that the blanks in section 19.2 on page 63 of the November 6 Aztec proposal had been filled in.

The Union's position was that the matter of strike resolution and striker return were resolved by the Union's letter offering to return to work unconditionally and by charges already filed with the NLRB by that time. That is, the Union desired the Board to decide which employee would return to work. As to the insertion of the dates, Prochazka admitted doing this, saying the dates coincided with the printed dates in section 19.1 as to the date of termination, June 30. Prochazka did indicate a willingness to listen to company proposals with respect to striker return and striker resolution, but the Union still thought the NLRB was the proper body to resolve those issues. To the extent the Union might entertain proposals on the two strike issues, its position was that any agreement reached would be separate and distinct from the purported agreement.

Neeper refused to sign the proposed collective-bargaining agreement, but indicated that at a future meeting the Company would have proposals to make with respect to the two strike issues. The parties ended the meeting agreeing to meet again at the same place on April 14.

The parties met again on April 14, 1981, with Harrison and Puffer arriving late. At this time, Neeper handed Prochazka a one-page document purporting to summarize each side's position. The document reads as follows:

> Presentation of
> AZTEC BUS LINES of
> April 14, 1981
>
> ABL made a proposal on March 26, 1981. Part of that proposal was
>
> > Strike resolution and striker return provisions to be negotiated.
>
> The Union has since informed us that the Union claims that a collective bargaining agreement now exists between ABL and the Union. The Union has further informed us that any proposals by ABL relating to strike resolution or striker return as contemplated by the employer when it made such proposal would not be mandatory subjects of bargaining and would unlawfully interfere with consummating the collective bargaining agreement.
>
> ABL disputes both assertions by the Union, and finds that the Union's position places the employer in a difficult if not impossible position as to further negotiations as it contemplated.
>
> ABL made proposals relating to employees who had been away from active work for the company for prolonged periods of time. These proposals related to such things as notice, print-out, physical examination to meet physical requirements, requalification and what work individuals would be brought back to and when.
>
> The company indicated that such provisions would apply to strikers as well as others, but that striker return in a group would present special problems so calling for special discussion.
>
> All this was heard by the Union without objection.
>
> Also the employer had in mind the matter of resolving amicably who was entitled to return to work and who was not. Reasons for not being entitled to return to work would include resignation, abandonment of the strike for other employment, lack of physical or other qualification, conduct by individuals constituting cause to prohibit their return to work, among others.
>
> The employer is willing and desirous of bargaining to agreement on these matters as it originally, and obviously, contemplated.
>
> If the Union is willing to bargain on these matters similarly, then the Employer is willing to consider Union proposals in the areas. The Employer would be willing to proceed to make proposals in all those areas originally contemplated by it on March 26. Those areas it has pointed out here, would appear to be those most pressing. [G.C. Exh. 29.]

After reviewing this document, Prochazka reiterated union policy, that it would bargain over strike issues only with the understanding that any agreement would be separate and apart from the basic agreement. After a caucus, Neeper furnished a written proposal to the Union that suggested a series of meetings to consider groups of strikers from the Union's list of April 7, 1981, and possible agreement on which of the strikers was eligible to return to work. (G.C. Exh. 30.)

The Union rejected this proposal, since it again contended the NLRB should decide who is eligible to return to work. The Company then caucused again and returned with another proposal asking that the Union make available each returning striker to company representatives so the Company could properly investigate that person's eligibility to return to work. (G.C. Exh. 31.) To this proposal, the Union countered with one of its own. As to each returning striker, the Company would submit written requests for information and the Company would make replies it considered appropriate. (G.C. Exh. 32.) After some additional dialogue, in which Neeper again refused to sign the agreement, and said there were no mechanical or clerical errors other than those indicated at the last meeting, the meeting ended.

No further bargaining sessions were scheduled nor held. However, some subsequent correspondence is relevant. On April 14, an Aztec attorney asked the Union for certain employment information about the strikers who desired to return to work. (G.C. Exh. 33.) On April 21, Respondent offered in writing to reinstate 28 striking employees on condition that they comply with company requirements dealing with physical examinations, job requalification examinations, and motor vehicle driving records. (G.C. Exh. 34.) These requirements were taken from sections 9.7, 9.8, and 9.9 of the contract documents. (G.C. Exh. 34.)[66]

2. Analysis and conclusions (alleged unlawful refusal to execute the contract)

The first question to be resolved is whether Respondent reached agreement with the Union and unlawfully refused to execute the contract. I begin with basic principles which are not subject to dispute. In *Pacific Coast Metal Trades Council (Foss Shipyard)*, 260 NLRB 1117 (1982), Administrative Law Judge Pollack, in a Board-approved decision, stated the following:

> Section 8(d) of the Act explicitly requires the execution of a written contract incorporating any agreement reached if requested by either party. *H. F. Heinz Co.* v. *N.L.R.B.*, 311 U.S. 514, 523 (1941); *Retail Clerks International Association, and Retail Store Employees Local 322, Jack Gray and Glen Conyers their agents (Roswil, Inc., d/b/a Ramey Supermarkets)*, 226 NLRB 80, 87 (1976). However, neither party is required to sign a bargaining agreement containing terms not previously agreed upon. The General Counsel must show not only that an agreement was reached, but that the document which Respondents have refused to execute accurately reflected that contract. *Oil Chemical and Atomic Workers International Union and its Local 7-507 (Capitol Packaging Company)*, 212 NLRB 98, 108 (1974).

When an oral agreement is reached as to the terms of a collective-bargaining contract, each party is obligated, at the request of the other, to execute that contract when reduced to writing, and failure or refusal to do so constitutes an unfair labor practice. *Oil Workers Local 7-507 (Capitol Packaging)*, 212 NLRB 98, 107-108 (1974). But where there is no meeting of the minds as to essential terms of an agreement that may be traced to ambiguity for which neither party is to blame, there is in effect no contract which the parties can be directed to execute. Id. at 107-108, quoting from Restatement, *Contracts*, § 501 (1932).

In this case, the issue turns on a fair construction of the language, "Strike resolution and striker return provisions to be negotiated," which was first proposed by the Company on March 26, 1981.[67] In its brief at 570-574 and 600-605, Respondent seems to recognize this issue as central to the basic question as to whether Respondent reached agreement with the Union.

All agree that the issues of striker discipline and strike resolution not only were not resolved, but were barely discussed. The General Counsel and the Charging Party contend that the Union desired the issue to be left to the Board as a result of charges filed on April 9, 1981 (G.C. Exh. 1e, original charge in Case 21-CA-20162), 1 day after the General Counsel's Exhibit 28 was tendered to the Company for execution. Respondent desired the issue to be settled by negotiations before a final proposal was agreed to.

I find for the reasons stated below, that on April 3, 1981, the Union and the Respondent reached agreement on all substantive issues. In support of this conclusion, I begin with the case of *Georgia Kraft Co.*, 258 NLRB 908 (1981). In that case, the Board reversed the administrative law judge's finding that no agreement had been reached between the employer and the union because the union did not intend to accept the respondent's "proposal" on striker discipline even though the judge assumed that "proposal as to striker discipline was part and parcel of the ongoing contract negotiations." Contrary to the judge, the Board held that the issue of striker discipline was not presented by the respondent as a bargainable proposal nor was it put forth as a quid pro quo for agreement on a contract.

I find in this case that Respondent never proferred as a bargainable proposal the issues of striker discipline nor strike resolution. Respondent anticipates this holding in its brief at 590 and attempts to refute it by reciting Neeper's rationale given at hearing. Although I recognize the reasons given by Neeper for desiring the Union to make the first substantive proposals,[68] neither party can force the other to be the first to make substantive proposals. Indeed, if Respondent had succeeded, it might well be arguing that the Union had waived the right to make the argument it makes in its brief, i.e., that the strike issues were for the Board to determine. A party's subjective notion of the most efficient and convenient method of bargaining for that party cannot determine whether a contract has been reached. Indeed, it is hard to see how this concept is relevant at all.

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[66] Certain other correspondence was exchanged between April 23 and 27, 1981, dealing with notice to returning employees or preservation of legal theories. (G.C. Exhs. 35, 36, and 37.)

[67] I agree with the General Cousnel that inclusion of the date, "June 30, 1983," into two blank spaces is of little or no significance in this case. First, I find that Neeper, in effect, agreed on that date by telling Prochazka that the date to be inserted should be the date of contract termination. Even without this agreement, I look to sec. 19.1, p. 63, of G.C. Exh. 12 (Aztec proposal of November 6):

Effective Date & Expiration

> This agreement and all letters of understanding (covering this agreement period) shall be in force and effect from (Date of ratification by the Union) through June 30, 1983 subject to 19.2. I next compare Sec. 19.1 with Sec. 19.2 which reads as follows:

19.2 Notice of Termination

> If either the Union or the Company desires to change or terminate this Agreement on June 30, 1983 written notice by registered mail must be given to the other party not later than sixty days prior to the termination date, date of postmark to govern. If such notice is given the parties shall meet as necssary for the purpose of negotiating or any proposed amendments or modifications. If the parties have failed to reach a settlement by June 30, 1983 or any subsequent expiration date, this Agreement shall continue in full force and effect, subject to termination by either party upon two weeks prior written notice. Upon the expiration of any such notice period the Union shall have the right to strike and the Company shall have the right to lock out, and this Agreement and all rights and claims hereunder shall thereupon be of no further force or effect.
>
> AZTEC BUS LINES
> A. C. ZEMBA, President
>
> AMALGAMATED TRANSIT UNION
> Donald R. Randall, President

From this comparison, I find that the Union was merely making explicit what was implicit from Sec. 19.1. In any event, minor discrepancies as to dates are not substantive differences that will preclude a finding that an agreement has been reached. *Trojan Steel Corp.*, 222 NLRB 478, 483 (1976), enfd. 551 F.2d 308 (4th Cir. 1977).

[68] Neeper's reasons are as follows: so as not to take a final position and eliminate flexibility or movement in position; (2) bargaining goes better if the Union takes a position and the Company responds; (3) so that the Company did not give away anything in the subject area where the Union generally makes the initial demands.

Another helpful case is *Fitzgerald Mills Corp.*, 133 NLRB 877 (1961), enfd. 313 F.2d 260 (2d Cir. 1963), cert. denied 375 U.S. 834 (1963). There, the employer's attorney insisted that before any contract could be negotiated, the union would have to agree to the respondent's proposal with respect to strikers. The proposal would have required the union to waive the reinstatement rights of the strikers and was tantamount to insistence that the union abandon its unfair labor practice charges in order to finalize a bargaining agreement. In holding that a union cannot waive the reinstatement rights of its members, the Board held that such a demand constituted bad-faith bargaining, an issue I will discuss further below. Unlike *Fitzgernld Mills*, where there was no claim that the parties had in fact reached agreement, there is such a claim here. Accordingly, because Respondent never presented a valid bargainable proposal and because, if a bargainable proposal was presented, it was an unlawful attempt to coerce the Union into abandoning its right to petition the Board, I find that Respondent violated Section 8(a)(5) of the Act on April 9, 1981, and thereafter, when it failed and refused to execute the agreed-upon contract.[69]

Finally, I note that the Charging Party and Respondent discuss the instant issue in terms of whether the Respondent insisted to impasse on a nonmandatory subject of bargaining. In light of the analysis above, it is not essential to consider this dispute in that context. However, certain elements are beyond contention. I agree with the Charging Party (Br. 22-23) that any attempt to require a union to waive its members' right to reinstatement, or to waive the Union's right to the Board's processes, is an unlawful subject of bargaining. I further agree that an employer may not bargain to impasse over an illegal subject.[70] In this case, the Respondent's position is even weaker than it might appear at first blush, for not only did Respondent bargain to impasse over an unlawful subject, but it furthermore insisted to impasse that the Union make the first substantive proposals, after Respondent merely put the subject on the table. I have reviewed the cases cited by Respondent and find they are neither relevant nor helpful to its position.

3. Analysis and conclusions

Alleged bad-faith bargaining after strike began: As noted in footnote 29, supra, the General Counsel amended the complaint at the hearing to allege bad-faith and surface bargaining from November 6 through April 9, 1981. An allegation of bad-faith surface bargaining is neither negated nor mooted by the fact that the parties have reached an agreement, as I have found above.[71] However, I note as factors supporting the allegations of bad-faith bargaining, the refusal of Respondent, on April 9, 1981, to execute a contract embodying the agreement reached with the Union.[72]

In further analysis of this issue, I turn now to the evidence regarding Thomas Ingersoll. Ingersoll was a member of Respondent's prestrike negotiating team, although not an active participant. The General Counsel and the Union contend that in January and February 1981 Ingersoll was a statutory supervisor or otherwise an agent of Respondent. It is important to resolve the issue regarding the employment status of Ingersoll, because of certain remarks he is alleged to have made during the time in question.

Dewey Bandy had been a student worker with San Diego Transit Systems during January and February 1981. Bandy and Ingersoll worked together, making time checks on buses, reviewing bus routes, and monitoring compliance of Respondent with the contract it had at this time to supply public transit services to a section of San Diego County. According to Bandy, the two engaged in several conversations over the weeks they worked together. In five of these covnersations Ingersoll made remarks damaging to Respondent in this case.

In February 1981, the witness and Ingersoll were having a general conversation in a local coffeeshop. Ingersoll stated to Bandy that no way would the strikers come back. The Company had structured its contract negotiations so as to prevent the Union from reaching agreement with the Company. The open-shop provision was something the Union could never accept and it had been put into negotiations specifically to keep the Union from negotiating a settlement. For the same reason, the Company had proposed splitting itself into three components: charter, transit, and schoolbus. Other proposals were also made for the same purpose.

A second conversation occurred in February 1981, at a local restaurant, where the witness had lunch with Ingersoll. There, Ingersoll stated the Company felt it needed to get rid of the Union to operate the Company efficiently. Then Ingersoll restated his earlier remarks that no strikers would be taken back and that the Company had structured its negotiations to prevent the Union from reaching agreement. Finally, Ingersoll again referred to the open-shop proposal and the change in the Company's structure into three divisions—both of these remarks in the same context as before.

In early March 1981, the witness and Ingersoll were driving to a nearby suburb where the third conversation occurred. At this time, Ingersoll said that negotiations with the Union had fallen through in 1980. When this occurred, the Company made a decision to get rid of the Union and go with the employees it had. Ingersoll concluded his remarks by saying that the Union should have accepted the Company's offer back then, "because there's sure as hell no way they're going to come back now."

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[69] *Georgia Kraft Co.*, supra. See also *Trojan Steel Corp.*, 222 NLRB 478 (1976).

[70] *NLRB v. Borg-Warner*, 356 U.S. 342 (1958), Harlan, J. concurring at 360.

[71] *Carpenters Local 1780*, 244 NLRB 277, 280 (1979); *San Isabel Electrical Services*, 225 NLRB 1073, 1079 (1976).

[72] See *NLRB v. National Shoes*, 208 F.2d 688, 692 (2d Cir. 1953); *Trojan Steel Co.*, supra at 483-484.

The fourth conversation also occurred in March 1981, this time at San Diego County Operations Center where Ingersoll had gone to pick up some schedules and transfers. While there he met Bandy who sought to confirm a rumor he had heard that negotiations with the Union had resumed. Ingersoll answered that Bandy was correct, but then added, "But there's no way that any of those strikers are going to be coming back."

Finally, in late March 1981, at a bus monitoring point called Parkway Plaza, Ingersoll again talked to the witness. This was after a nonunion Aztec driver had expressed concern about his job tenure in light of rumors that the Company was again negotiating with the Union. Ingersoll took Bandy aside and said that the Company had assured the nonunion drivers that neither the Union nor any of the strikers were coming back.

Ingersoll testified at the hearing and denied making the above statements. In rebuttal, the General Counsel called another student employee named Jerry Kehoe. He could recall a certain conversation with Ingersoll relative to the strike and negotiations and with the exception of Ingersoll's statement about the Company being divided into three segments, could recall no other specifics of the conversation. Kehoe had very limited value as a corroborating witness. On balance, however, the credibility issue is not difficult. I find that Ingersoll made all statements attributed to him by Bandy. The latter was a disinterested witness with no motive to fabricate. Also, the remarks of Ingersoll are consistent with other evidence regarding similar statements to be recited below.

A closer question concerns the employment status of Ingersoll between January and March 1981. During this period, Ingersoll held a position as traffic coordinator, and sometimes referred to himself as transit supervisor. As of July 1981, Ingersoll became Chula Vista's traffic coordinator. In this role, Ingersoll was an admitted statutory supervisor responsible for operations of Aztec's transit operations in Chula Vista, a suburb of San Diego.

Ingersoll was hired as director of maintenance, also an admitted supervisor. This job ended in June about the time negotiations with the Union started. Between June and January 1981, Ingersoll described his job as doing everything under the sun: night dispatcher, running errands, and assorted odd jobs that needed to be done, including guard duty. This job ended in January 1981, when Ingersoll became transit coordinator. In this position, Ingersoll reported to Schultz, director of operations. Ingersoll's duties were to check bus schedules, make time checks of busdrivers' performance, review bus routes, and all this was done on San Diego County transit operations. When a driver was late on his route, Ingersoll would sometimes request an explanation. This would be reported to Schultz on a daily basis, usually by written notes. Ingersoll was paid a salary, slightly more than he received as director of maintenance, and worked up to 60 hours per week. Ingersoll denied that he had power to hire, fire, or discipline employees. Nor did he make recommendations to Schultz. He merely reported the facts of a given incident to Schultz and, where discipline might be indicated, Schultz usually made his own investigation.

In assessing whether supervisory status exists[73] the specific job title of the employee is not in itself controlling. Here, Ingersoll's title was "transit coordinator." He occasionally described himself as "transit supervisor."[74] Supervisory power exists only if the power is exercised with independent judgment on behalf of management and not in a routine or clerical manner.[75] The mere fact that Ingersoll's wages had been raised to a higher level does not suffice to establish supervisory status.[76] In this case, I cannot find that Ingersoll possessed supervisory powers himself nor could he effectively recommend[77] to Schultz or anyone else that certain action be undertaken. I must conclude that during the relevant period of time, the evidence presented does not show Ingersoll to have been a statutory supervisor.[78] His duties consisted of making routine time and schedule checks and submitting reports to Schultz. I see no evidence of independent judgment. These duties were much like those that Bandy was performing. Surely, it could not be argued that Bandy, as a student intern, was performing work equivalent to that of an Aztec supervisor.

Having decided that Ingersoll was not a statutory supervisor at the time in question, I must also decide whether the statements he made could be imputed to Respondent on any other theory. An employee's actions (or statements) may be imputed to his company regardless of supervisory status where the company places an employee in a position that reasonably fosters the appearance and belief that he acts (or speaks) for management.[79] In this case, the statements in question were made not to an employee of Aztec, but to Bandy, a third party. Accordingly, it does not appear that the many Board decisions holding an employer responsible for statements of nonsupervisory employees apply to this case.[80] But for the fact that the statements in question were made to a nonemployee, I would find Ingersoll to be an agent of management on this record.[81]

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[73] Sec. 2(11) of the Act defined "supervisor" as follows:

> The term "supervisor" means any individual having authority, in the interest of the employer, to hire, transfer, suspend, lay off, recall, promote, discharge, assign, reward, or discipline other employees, or responsibly to direct them, or to adjust their grievances, or effectively to recommend such action, if in connection with the foregoing the exercise of such authority is not of a merely routine or clerical nature, but requires the use of independent judgment.

[74] It is the actual duties and authority of the employee, not his formal title that is important. *NLRB v. Quincy Steel Casting Co.*, 200 F.2d 293, 296 (1st Cir. 1952).

[75] *Hydro Conduit Corp.*, 254 NLRB 433 (1981).

[76] *Victory Electric Corp. Assn.*, 230 NLRB 1201, 1202 (1977).

[77] To satisfy the statutory requirement that the power of recommendation be "effective," there must be a showing that recommendations would have been in fact followed. *A. Barton Hepburn Hospital*, 238 NLRB 95, 96 (1978). No such showing was made here.

[78] At the hearing, much was made of Ingersoll's duties as a night dispatcher, a position he held prior to the period in question. His duties there, as those in direct issue, were essentially routine in nature. See *Spector Freight Systems*, 216 NLRB 551, 554 (1975). Of course, I also question the relevancy of Ingersoll's prior status as a dispatcher.

[79] *NLRB v. Berger Transfer & Storage Co.*, 678 F.2d 679 (7th Cir. 1982).

[80] See, e.g., *River Manor Health Related Facility*, 224 NLRB 227, 235 (1976), enfd. 562 F.2d 38 (2d Cir. 1977); *Wm. Chalson Co.*, 252 NLRB 25 (1980); *Jules V. Lane, D.D.S., P.C.*, 262 NLRB 118 (1982).

Notwithstanding the fact that the statements of Ingersoll cannot be imputed to Respondent, I nevertheless find that Respondent was guilty of bad-faith bargaining and surface bargaining. In making this finding, I rely on the refusal of Respondent to execute a contract, after agreeing to terms, and the position of Respondent taken during poststrike bargaining that not only would the Union have to agree to terms on strike resolution and striker return, thereby waiving their right to file charges with the Board, but the Union would also be required to make the first substantive proposal on the strike issues. To these findings that I have made above, I also note that Respondent's proposals on resolving strike issues were designed and calculated to be unacceptable to the Union. The tendering of predictably unacceptable proposals by one party to another in contract negotiations is strong evidence of surface bargaining.[82]

Finally, I also rely on certain findings made below wherein Respondent is found to have violated Section 8(a)(1) of the Act by having made certain statements to employees. For all the reasons stated, I find that Respondent has violated Section 8(a)(5) of the Act by bad-faith and surface bargaining subsequent to commencement of the strike.

E. *The Alleged Violations of Section 8(a)(1) of the Act*

The General Counsel has alleged in the complaint that during the course of the strike, Zemba and Flo Ybarra, a statutory supervisor, made certain statements to strikers that violated Section 8(a)(1) of the Act. Both Zemba and Ybarra have denied making the remarks attributed to them.

Any statement of an employer or its agent to employees that interferes with, restrains, or coerces employees in the exercise of their Section 7 rights violates Section 8(a)(1) of the Act. A finding that a violation has occurred is not determined by intent or actual effect; rather, the test is whether the particular conduct in question has a tendency to interfere with the free exercise of employee rights.[83] With this standard in mind, I turn to the particular statements alleged.

(1) Striker Frank Patton testified that on October 14, he was in a restaurant with Zemba and Dave Schultz in the morning hours. At this time, Zemba was upset due to strike violence that was occurring. I find that, as Patton testified, Zemba stated he would not negotiate with the Union as long as Corona, Yelkey, and Randall were leading the Union. Later in the same conversation, Zemba also stated he would not negotiate with the Union until everyone on the picket line stopped harassing Respondent's employees.

In finding that Zemba made the statements, I note that although Schultz was called to testify about other matters, he was never asked to deny the Patton conversations. Moreover, as Respondent recognizes in its brief at 608–609, there was intense personal animosity between Zemba and the union officials. I have cited an example above, where Zemba attacked and disparaged Corona at a bargaining session before the strike started. Finally, I find that Patton was a credible witness. While he was a picket captain during part of the strike, he did not provoke in management the intense hostility that other strikers did. The sharing of a coffebreak on October 14 between Patton and Zemba and Schultz is an example of this.

Under Board law, an employer has no right to coerce employees in the selection of their collective-bargaining representatives.[84] Randall, Yelkey, and Corona were all on the Union's negotiating team and were not subject to removal by Zemba. In addition, an employer's duty to negotiate during a strike is not suspended. Even where picket line misconduct is occurring, an employer may not stop negotiating with the union. The appropriate remedy is to file charges with the Board[85] or to seek other administrative or legal remedies.[86]

(2) I also believe Tom Reynolds, a striker, who testified that in February 1981, at the same restaurant referred to above, Zemba stated that he was disappointed that Randall and Corona were still in positions of authority with the Union. Zemba denied the statements in issue and was supported in part by Harrison, who was also present. However, I cannot credit these denials. The pattern of attacks on union leadership expressed to union rank and file is striking.[87] Also, I find that Reynolds was a credible witness on this point.[88]

I find that the statements referred to above in (1) and (2) made to strikers in the course of a long and bitter strike were designed and intended to coerce employees in the selection of their collective-bargaining representatives and therefore violated Section 8(a)(1) of the Act.

(3) Reynolds also testified to a conversation in December with Zemba at Respondent's place of business. At this time, Zemba showed Reynolds a copy of an article in the Labor Law Journal (G.C. Exh. 68) dealing with reinstatement rights of strikers. Then giving Reynolds

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[81] Thus, Ingersoll attended the contract negotiations as a member of Respondent's team; during the strike, he had several conversations with strikers that could be construed as emanating from a management figure; on April 23, 1981, at an arbitration hearing, Ingersoll described his position with the Company as transit supervisor and, along with Zemba, purported to represent Respondent at the hearing.

[82] *Gulf States Mfg. Inc.*, 230 NLRB 558, 569 (1977).

[83] *Bell Burglar Alarms*, 245 NLRB 990 (1979).

[84] Cf. *Racine Die Casting Co.*, 192 NLRB 529 (1971); *Native Textiles*, 246 NLRB 228, 229 (1979).

[85] In fact, Respondent did this and the Union agreed to an informal settlement of these charges. (See G.C. Br. 37 fn. 23.)

[86] The only case that suggests an employer may suspend negotiations with a striking union where the strike is characterized by extreme violence and vandalism is *Kohler Co.*, 128 NLRB 1062 (1960), modified sub nom. *Auto Workers Local 833 v. NLRB*, 300 F.2d 699 (D.C. Cir. 1962), cert. denied 370 U.S. 911 (1962). Assuming without finding that the strike here was characterized by extreme violence and vandalism, the *Kohler* case is of dubious vitality. In the opinion of one authority, R. Gorman, *Basic Text on Labor Law, Unionization & Collective Bargaining*, 438 (1976), Kohler has been superceded by two Supreme Court decisions, *Drake Bakeries v. Bakery Workers Local 50*, 370 U.S. 254 (1962), and *NLRB v. Katz*, 369 U.S. 736 (1962). Accordingly, *Kohler* does not help Respondent in this case.

[87] In addition to detesting Corona because of her union office, Zemba also apparently objected strongly to Corona's sexual preference, a subject he also addressed in this conversation with Reynolds.

[88] See *Cooper-Jarrett, Inc.*, 260 NLRB 1123 (1982).

the impression that he was basing his statement on the article, Zemba stated that anyone on the picket line when misconduct occurred or when he and Harrison were called names would not be returned to work when the strike was over.

I find that this statement was made and violated Section 8(a)(1) of the Act. It was an erroneous statement of the law relative to reinstatement of strikers and it was also designed to coerce employees in the course of their protected activities.[89] Attempting to make all pickets responsible for the misconduct of one or few would effectively tend to break the strike, where any misconduct had or might occur.

(4) The final allegation relates to a statement allegedly made to employees by Flo Ybarra, director of safety and training at the relevant time. According to Robert DeEstrada, employed by Respondent in January 1981 as a school busdriver, Ybarra held a meeting for nonstriking employees in early February. At this meeting ostensibly called to discuss employee parking and a coming employee party, Ybarra stated that the Union was finished and that the strikers would be given only part-time work when they returned from the strike. This was in response to a question from an employee concerned about his job tenure if the strike were to be settled.

Ybarra denied making the statement in question, but I find that she did make the statement. DeEstrada worked for Respondent only a short time after this meeting. Although he was not involved in the passions of the protracted strike, he was fired by Ybarra because of an accident that DeEstrada had with an Aztec schoolbus. Despite this possible motive to fabricate, I believed him. Moreover, Ybarra did not here or elsewhere in her testimony impress me as a credible witness. In discussing the return of the strikers referred to in paragraph 22(a) of the fourth consolidated amended complaint below, I will return to the question of Ybarra's credibility. It suffices to say for now that I cannot credit her denial.[90] I discredit Ybarra even though she was generally corroborated by two nonstriking drivers, Michael Comfort and Ellen Huffman. The former testified he could not recall Ybarra's making the comments in question. The latter testified that Ybarra did not make the statement at issue. In light of all evidence in this case, and specifically that relating to Ybarra's credibility, I credit DeEstrada here.

Having found that Ybarra made the statement in question, I also find that the statement violated Section 8(a)(1) of the Act.[91] The remark was clearly coercive. By suggesting that the Union was no longer capable of representing members of the unit, Ybarra interfered with the free exercise of employee rights. In addition, to suggest that strikers would come back only as part-time employees also tended to undermine the status of the Union.

In conclusion of this section, I note that Respondent raises two general defenses to the charges discussed. First, at 605-606 of its brief, Respondent contends that the statements in issue are only isolated on minor events. Even if this claim were accurate, which it is not because the statements were significant violations of the Act, the defense of de minimis has fallen into disrepute and it no longer appears to have vitality under Board law.[92]

Similarly without merit is Respondent's claim (Br. 606-608) that the statements in question were protected under Section 8(c) of the Act. I have found the statements to be threats of reprisals for protected activity or otherwise calculated to undermine the status of the Union. Accordingly, they are not protected under Board law.[93]

F. *The Alleged Unlawful Refusal to Reinstate the Strikers Unconditionally (Nonmisconduct)*

1. Facts

As mentioned briefly above, on April 3, 1981, the Union sent a second letter to Respondent. It reads as follows:

> San Diego Bus Driver Union
> A.F.L.-C.I.O.
>
> April 3, 1981
> DELIVERED BY MESSENGER
> Aztec Bus Lines, Inc.
> 4437 Twain Avenue
> San Diego, California 92120
> Attention: Gus Zemba
> Re: Unconditional Offer to Return to Work by Strikers
>
> Dear Mr. Zemba:
>
> In accordance with the provisions of the National Labor Relations Act, Case No. 21-CA-20033, and the Settlement Agreement in Case Nos. 21-CA-19497 and 21-CA-19542, Local 1309 as the agent of and on behalf of the striking employees of Aztec Bus Lines hereby unconditionally offers, on behalf of all striking employees, to return to work effective 8:00 P.M. April 3, 1981.
>
> All of the employees represented by Local 1309 who are presently engaged in a strike against Aztec are ready, willing, and able to return to work on April 3, 1981 at 8:00 P. M. and hereby offer themselves for the same.
>
> In the event that you have any difficulty contacting any employees to recall them to work either because telephones are busy or because phones have

---

[89] *Passavant Memorial Hospital*, 237 NLRB 138 (1978).

[90] Toward the end of the case, a witness named Karen Boyd testified. She was a busdriver instructor for an Aztec competitor, and sometime after July 1981, contacted Ybarra relative to references for five Aztec strikers who had applied for employment at the competitor. Ybarra told her that the employees were troublemakers and to leave them and forget them. The witness hired the employees anyway and at a luncheon in December 1981, Ybarra expressed surprise to the witness that she had hired the Aztec employees. Ybarra denied these remarks. However, the witness knew her for 3 years, was a friend and neighbor, and had absolutely no reason to fabricate. I credit Boyd's account and find, based on this example and other evidence, that Ybarra's credibility is not high.

[91] Cf. *Laredo Coca Cola Bottling Co.*, 241 NLRB 167, 177 (1979).

[92] See *Holladay Park Hospital*, 262 NLRB 278 and cases cited at fn. 2 (1982).

[93] *Vincent et Vincent of Allentown Mall*, 259 NLRB 1025 (1982).

> been disconnected because of the strike, or for any other reason, please contact this office; and we will aid you in communicating with all such employees.
>
> We make this offer because a number of employees no longer have telephone service as a result of the current economic situation and it is our desire to facilitate the return of all employees to active employment status as expeditiously as possible.
>
> Very truly yours,
> /s/ David H. Moore, President
> Local Division 1309
>
> DHM: chs
> opeiu: 139 afl-cio,clc
>
> CC: California Unemployment Insurance
> Appeals Board
> Mr. Roberto Chavarry
>
> [G.C. Exh. 23.]

This letter was answered by Respondent on April 6, 1981, when it wrote to the Union to ask for an immediate list of those "employees represented by Local 1309 who are *presently engaged* in a strike." (G.C. Exh. 26.) One day later, the Union sent to Respondent a list of employees presently engaged in the Aztec strike. (G.C. Exh. 27.) On April 21, 1981, Respondent sent another letter in this sequence to the Union. It reads as follows:

GRAY, CARY, AMES & FRYE
Attorneys at Law

> *HAND DELIVERED*
>
> April 21, 1981
>
> Richard D. Prochazka, Esq.
> Domnitz & Prochazka
> 3061 Fourth Avenue
> San Diego, CA 92103
>
> Re: *Aztec Bus Lines, Inc.*
>
> Dear Mr. Prochazka:
>
> Attached is a list of persons who may be entitled to reinstatement if they choose to comply with existing requirements as to notice, providing printouts, meeting physical examination requirements, and meeting requalification requirements. You and they know, and have known, of these requirements. Please permit them to come forward and satisfy these requirements if they really want to get on work lists. If you are unwilling to so instruct them, then notify us of such position, so that we can inform them directly.
>
> You have failed to provice us with information to reflect whether or not any of them had abandoned the strike. We continue to seek that information by all means legitimately available to us. Unless there is some reason we should not ask them about employment during the strike, we will do so. If you wish to have a union representative present, we will arrange for such.
>
> Sincerely yours,
> /s/ David B. Geerdes
> For
> Gray, Cary, Ames & Frye
>
> DBG:jd
>
> cc: Mr. David H. Moore
> Mr. Roberto G. Chavarry
> Mr. A. C. Zemba
>
> [G.C. Exh. 34.]

Attached to this letter was a list of names that I have included as "Appendix A" to this opinion. The names are identical to those alleged in the complaint at paragraph 22(a).

Continuing with the unceasing torrent of letters, exchanged by the parties, I note next a letter from Respondent to the Union. The letter contained a proposed notice, later replaced by a revised notice, which corrected a typographical error. The original letter and revised notice read as follows:

GRAY, CARY, AMES & FRYE
Attorneys at Law

> *HAND DELIVERED*
>
> April 23, 1981
>
> Richard D. Prochazka, Esq.
> Domnitz, Prochazka & Levine
> 3061 Fourth Avenue
> San Diego, CA 92103
>
> Re: Aztec Bus Lines and Local Division 1309
>
> Dear Mr. Prochazka:
>
> Aztec proposes to send the attached notice to the individuals on the list previously provided to you. If you object to Aztec doing so, please inform us immediately and we will consider your objection. We intend to have the notices in the mall [sic] on April 27.
>
> The specific conditions mentioned in the notice were proposed to the Union as being applicable to returning strikers and the Union agreed.
>
> No collective bargaining agreement exists for reasons given at the bargaining table.
>
> Your question with respect to work list is answered by the body of the notice.
>
> Sincerely yours,
> /s/ David B. Geerdes
> For
> GRAY, CARY, AMES & FRYE
>
> DBG:jd
>
> Encl.
>
> cc: Mr. A. .C. Zemba
> Mr. Roberto G. Chavar;ry
> Mr. David H. Moore

NOTICE

> You are hereby notified that you may return to work under existing terms and conditions which include providing a print-out, satisfying physical examination requirements, and requalification requirements.

> Please inform us of your intentions by ______.
> [G.C. Exhs. 35, 37.]

The letter above was answered by the Union on the following day. In relevant part,[94] the Union's letter reads as follows:

> DOMNITZ, PROCHAZKA AND LEVINE
> A PROFESSIONAL CORPORATION
>
> April 24, 1981
> PACIFIC MESSENGER
> David B. Geerdes, Esquire
> Gray, Cary, Ames and Frye
> 2100 Union Bank Building
> 525 "B" Street
> San Diego, CA 92101
> Re: Aztec Bus Lines and Local Division 1309
>
> Dear Mr. Geerdes:
>
> In response to your letter of April 23, 1981, please be advised that it remains Local 1309's position that all striking employees are absolutely and unqualifiedly entitled to reinstatement without any need to meet any of the conditions referred to in your notice. We will therefore be arguing to the labor board that your conduct is in furtherance of that continuing unfair labor practice. Without waiving our position in that regard, we obviously have no control over what Aztec does or does not do.
>
> You assert in your letter that the conditions mentioned in your notice were agreed to by the Union. Those conditions were agreed to by the Union as a provision to be included within the collective bargaining agreement. At no time did we agree that they were applicable to the returning strikers.
>
> Local 1309, pursuant to the provisions to which you allude, as exclusive bargaining agent for all striking employees, hereby requests that pursuant to the terms of our collective bargaining agreement, that the Company obtain whatever Department of Motor Vehicle print outs it deems appropriate. In so doing, we are not agreeing that obtaining the print outs is a condition of reinstatement of striking employees, but simply to facilitate the return to work of all striking employees.
>
> Very truly yours,
> /s/ Richard D. Prochazka
> RDP:lk
> cc: Local Division 1309
> Roberto Chavarry
> [G.C. Exh. 36.]

On April 27, 1981, a group of several returning strikers accompanied by Union President Moore and Chief Shop Steward Corona reported for work at Aztec. One of those in this group was Mary Mason, a witness at the hearing. She was given an employment application by Harrison and told to fill it out in part (R. Tr. 62). Later, Ybarra told her to fill it out totally. Mason, an Aztec employee since 1972, was then told to get a physical examination from Dr. Carey, the Company's physician, to get a DMV printout of her driving record, and to take an open-book test. Mason did as she was told. Two weeks later she was called back to Aztec and told by Harrison that Dr. Carey found a medical problem with Mason's back that disqualified her from returning to work as a busdriver. (G.C. Exh. 51.) Shortly thereafter, Mason was examined by her own physician who found her qualified to return to work. (G.C. Exh. 52.) Prior to her examination by Dr. Carey, Mason had a current medical examiner's certificate dated May 15 and valid for 2 years. (G.C. Exh. 50.) Ybarra told her she still needed to be examined by Dr. Carey because she had been off work for longer than 6 weeks. Ultimately, Mason returned to work in September 1982.

Another returning striker in this initial group was Jose Tovar. While undergoing all the rigors as described by Mason, he was also required to take a driving test, which he did. Subsequently, Tovar was told by Ybarra that he had failed the driving test. The next day, he retook the test with a different driver and he was told that he had failed again. In two subsequent days, each time with a different driver, Tovar took another driving test and each time was told that he failed. All the drivers assigned to grade Tovar were nonstriking employees. When Tovar complained of this to Harrison, he was subsequently taken back and worked as a schoolbus driver until school recessed for the summer. Tovar asked Ingersoll whether Tovar could work as a replacement driver on Aztec's transit routes during the summer. Ingersoll denied the request, saying that he did not have time to requalify him. In September 1981, Tovar was called back to work at Aztec.[95]

Another returning striker who testified was Philip Gress. Prior to the strike he had been a schoolbus driver and driver-trainer. After returning to work in April 1981, he was laid off for the entire summer. Normally he would have worked at least part of the summer as a trainer. When recalled in September 1981, Gress did not return as he felt he was under too much stress. As examples of this, he related how on two occasions he found live rounds of ammunition in his mailbox at work. Another example was a remark made by Hokstad to him shortly after Gress returned to work. "You got a lot of balls wearing a union pin in here." Then Hokstad remarked that this is a nonunion shop and further stated to some of the other nonstriking drivers, "Let's go find where he parked his car." Other similar incidents were also described.[96]

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[94] I have omitted one sentence of the Union's letter as it deals with the typographical error referred to above.

[95] Although Tovar returned to work in September 1981, he did not participate in a "shake-up," i.e., a bidding procedure on bus routes based on strict driver seniority held on July 22, 1981. Ybarra testified that she had left messages on two occasions with Tovar's sister, the phone contact listed in Tovar's records. The record is unclear why Tovar did not receive the message nor does the record show exactly how Tovar was prejudiced; however, I will recommend to the Board that the latter issue at least be resolved at compliance.

[96] At the hearing, I noted and remarked for the record that the witness seemed to be a mild-mannered individual. (Tr. 10,364.) Some of the

Continued

Another returning striker who testified was Marian Young. Apparently, she was not part of the April 27 group referred to above, but returned to work later. Like Gress, she found live rounds of ammunition in her work mailbox.[97] She also had an argument with a nonstriking male driver over a route assignment. In December 1981, she and two other returning strikers, Shirley Rudy and Diane Macklin, were in a training class to qualify as transit drivers. Suddenly Kitty O'Brien, who had replaced Ybarra as the training supervisor, said the training class would be discontinued and she did not know when it would resume. As a result, Young was not permitted to bid at a December 1981 shakeup. According to the witness, certain transit drivers with less seniority were permitted to bid on and receive transit routes while she continued as a schoolbus driver.

O'Brien testified that Young's training was interrupted due to an increase in O'Brien's responsibilities when some strikers returned in December 1981. After this problem was taken care of, Aztec no longer needed any additional transit drivers at that time and the class was not resumed.

The final witness from the nonmisconduct strikers was Wendell Pyatt, who had been a part-time employee before the strike. He apparently returned to work for the first time in September, just before school began. Like those who had returned from the strike earlier, he was required to undergo a physical examination and obtain a DMV report. Harrison showed him two letters that had earlier been sent to him at a wrong address, apparently a prior address. His W-2 statement for 1980 had been sent to the correct address.

On cross-examination, the witness testified that he had been notified by Corona to report for work at Aztec. He could not report at this time, because he was going to school. He then called Schultz, who promised to send him a letter which he never received. He called Schultz back two additional times, but he was not there.[98]

2. Analysis and conclusion

I begin by finding that the Union's letter of April 3, 1981 (G.C. Exh. 23), recited above, was an unconditional offer to return to work.[99] On receipt of this letter, the burden was on the Employer to offer reinstatement to employees for whom positions were available.[100] In this case, Respondent has never claimed that employees were not taken back because permanent replacements were hired. Thus, it is important to understand that the status of the strikers was that of employees during the strike. The strikers were entitled to immediate reinstatement once their unconditional offer was received by Respondent[101] and this status continued until the employee obtained other regular and substantially equivalent employment.[102]

The question next becomes whether Aztec's response was consistent with the immediate reinstatement requirements of the law. Clearly, Respondent has fallen short by "two and a half country miles."[103] I will find below that the 5-day delay period does not apply here; therefore, the strikers were entitled to reinstatement not later than April 4, 1981. Yet, Respondent did not even reply to the Union's offer until April 21, 1981. (G.C. Exh. 34.)[104] The content of the reply like the inordinate time to receive it also fell far short.

In its letter of April 21, 1981, Respondent referred to a list of strikers "who *may be entitled* to reinstatement if they choose to comply with existing requirements as to notice, providing print-outs, meeting physical examination requirements, and meeting requalification requirements." (Emphasis added.) Thus, even those strikers who comply with all existing requirements as listed, including one not explicitly stated, i.e., the completion of a job application form, received only a limited promise from the Employer. That is, the strikers *may be* entitled to reinstatement. To me, this conveys the notion that the employer reserves the right to add other conditions later or to reject returning strikers for unstated reasons. Accordingly, I find that Respondent's entire procedure for reinstating the returning strikers listed in paragraph 22(a) of the complaint, Appendix A to this decision, did not comport with Board law and that Respondent's backpay obligation continues to run.[105]

Starting with the employment application, I note the case of *NLRB v. Robinson Freight Lines*, 251 F.2d 639 (6th Cir. 1958). There, an employer required returning strikers to fill out new employment applications allegedly pursuant to instructions from the Interstate Commerce Commission. The strikers refused to sign the applications and the court enforced the Board's Order finding that they had never been offered unconditional reinstatement. The court also held that in light of all surrounding circumstances, the strikers had reason to believe that their status as old employees, together with their seniority

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harassment from the nonstriking drivers was not reported to management, and Gress may have been the only returning driver who did not continue working for Respondent. Because there is no evidence to suggest that Gress was singled out for special harassment, I leave to compliance the question whether he willfully failed to mitigate damages by not returning to Respondent in September 1981.

[97] When these events were reported to Zemba, he prepared and distributed to employees, a memo threatening to fire any persons responsible for harassment against returning strikers. During the hearing, the name of a person surfaced as possibly the responsible culprit. The individual named was questioned by management and denied the charge. No disciplinary action was taken.

[98] The record does not show how long the witness was prevented from returning to work because he was attending school. Nor does the record show what arrangements were to be reflected in the letter Schultz promised to send, but which the witness never received. These are all matters for compliance.

[99] See *Denzil S. Alkire, a sole proprietorship*, 259 NLRB 1323 (1982); *NLRB v. W. C. McQuaide, Inc.*, 552 F.2d 519, 529 (3d Cir. 1977); *NLRB v. Brown & Root, Inc.*, 203 F.2d 139 (8th Cir. 1953).

[100] *Woodlawn Hospital*, 233 NLRB 782, 792 (1977), revd. in part and vacated in part 596 F.2d 1330 (7th Cir. 1979).

[101] *Scalera Bus Service*, 210 NLRB 63 (1974).

[102] *NLRB v. Fleetwood Trailer Co.*, 389 U.S. 375, 380–388 (1967).

[103] *Doe v. Renfrow*, 631 F.2d 91, 93 (7th Cir. 1980).

[104] I exclude Respondent's letter of April 6, 1981 (G.C. Exh. 26), because this letter only requested additional information and did not make a substantive reply to the Union's letter of April 3.

[105] *Standard Materials*, 237 NLRB 1136 (1978), affd. 604 F.2d 449 (5th Cir. 1979). In that case, the Board held that conditioning strikers' reinstatement on submitting new employment applications and successfully completing physical examinations does not constitue a valid offer of reinstatement. See also *Pace Motor Lines*, 260 NLRB 1395 (1982).

status, would be affected by the applications and their refusals to sign were justified.

In this case all returning strikers apparently completed the new applications.[106] This fact makes it no less onerous as the strikers had no choice under the circumstances. I reject Respondent's claim that it was merely attempting to update their personnel files. All surrounding circumstances indicate to me that Respondent intended to affect the status of the strikers as current employees. The use of physical examinations was also used by Respondent in an unlawful and discriminatory manner. The Board has held that the imposition of such requirements treats the discriminatee as an applicant for employment and, thus, renders an offer of employment suspect.[107] The taking of driving or open-book tests, and obtaining of DMV records are similarly improper prior conditions to the immediate reinstatement of strikers.

In this case, it is claimed that the Union agreed to these requirements. (G.C. Exh. 35.) There is no credible evidence that the Union waived the rights of its members—assuming that it had the power to do so. On the other hand, the Union admitted that it had agreed to the conditions for inclusion in the new collective-bargaining agreement. (G.C. Exh. 36.) On March 26, 1981, Neeper first presented the Company's proposal containing sections 9.7, 9.8, 9.9, and 17.8. Although Neeper stated that the Company intended these provisions to apply to returning strikers, the Union never agreed to this. The Union always took the position that strikers should return in accord with Board law.

Respondent further contends that the conditions imposed by Respondent on the returning strikers were required by DOT regulations and were simply matters of administrative convenience inconsequential at worst. As to the latter argument, the cases cited above, if not common sense, show that the conditions imposed by Respondent were substantial burdens on returning strikers. Moreover, strikers such as Young, Rudy, and Macklin have not had their seniority treated with proper deference under the facts of the case.

Respondent's claim that it was merely following DOT rules and regulations is similarly without merit. In this respect, I quote from Respondent's brief at 496:

> These [medical examinations, etc.] were standards applied to all employees working at Aztec at that time. As such, they were not conditions of the reinstatement offer. These requirements applied to all employees and were based upon valid business reasons and requirements of law. They were put into effect substantially, before any offers of reinstatement to the strikers were made.

The General Counsel argues (at Br. 49 fn. 41) that the circumstances of Respondent's change in policy to require physical examinations and testing is a unilateral change in violation of Section 8(a)(5) of the Act. The General Counsel concedes that the alleged violation was not in the complaint, but asks either to permit amendment of the complaint or to make a finding on the evidence adduced. I choose the latter procedure. I find that the matter was fully litigated and that the subject matter of the alleged violation is closely related to the allegations of the complaint.[108] I further find that the section of Respondent's brief quoted above puts the matter in sharp focus.

Both Ybarra and Harrison testified that the conditions in issue were implemented by the Company in October or November. There is no evidence of notice to or bargaining with the Union with respect to these matters. Ybarra in particular testified that she was advised by a representative of a bus transportation trade association to implement the changes based on what the representative said were recent DOT rules and regulations.

Assuming without finding that these regulations apply to Respondent, a primarily intrastate carrier, they are of no help to Respondent's case. First, the regulations specifically address only the medical examination issue leaving the employment application and open-book and driving tests without any basis at all. (G.C. Exhs. 64, a, b, c, and d.) As to the medical tests, both Mason and Tovar had valid medical certificates when they were ordered to take another physical as a condition of reinstatement. Thus, as to them, section 391.45 is specifically not applicable.[109] However, Ybarra testified that as to them and others who may be similarly situated, Respondent relies on section 391.1 (G.C. Exh. 64b)[110] by which Respondent sought to make more stringent regulations than those specifically authorized. Of course, no administrative regulation is valid authority to make unilateral changes where there was a duty to give notice to the Union and an opportunity to bargain.[111] Because this did not occur there, I find that in October or November, when the policies in question were implemented, Respondent violated Section 8(a)(5) of the Act.[112] Because of this violation, Respondent's claim that conditions imposed on returning strikers were imposed on all employees where applicable, without discrimination, has a hollow ring to it.

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[106] Any returning strikers who failed to comply with Respondent's unlawful conditions could be faced at compliance with an allegation from Respondent that they failed to mitigate damages.

[107] *Craw & Son*, 244 NLRB 241 (1979), affd. in relevant part 565 F.2d 1267 (3d Cir. 1977).

[108] *H. C. Thomson, Inc.*, 230 NLRB 808, 811 (1977).

[109] Sec. 391.45 reads as follows:

> Persons who must be medically examined and certified.
>
> Except as provided in Sec. 391.67, the following persons must be medically examined and certified in accordance with Section 391.43 as physically qualified to drive a motor vehicle:
>
> (a) Any person who has not been medically examined and certified as physically qualified to drive a motor vehicle:
>
> (b) Any driver who has not been medically examined and certified as qualified to drive a motor vehicle during the preceding 24 months; and
>
> (c) Any driver whose ability to perform his normal duties has been impaired by a physical or mental injury or disease. [G.C. Exh. 64a.]

[110] This section reads as follows:

> Sec. 391.1 Scope of the rules in this part; additional qualifications; duties of carrier-drivers.
>
> (a) The rules in this part establish minimum qualifications for persons who drive motor vehicles as, for, or on behalf of motor carriers. The rules in this part also establish minimum duties of motor carriers with respect to the qualifications of their drivers.
>
> (b) The rules in this part, and in other parts of this sub-chapter, do not prevent a motor carrier from imposing more stringent or additional qualifications, requirements, examinations, or certificates than are imposed by those rules.
>
> (c) A motor carrier who employs himself as a driver must comply with both the rules in this part that apply to motor carriers and the rules in this part that apply to drivers. [G.C. Exh. 64b.]

[111] *NLRB v. Robinson Freight Lines*, 251 F.2d 639 (6th Cir. 1958).

But Respondent's attempted defense must fail, not only because it was implemented in an unlawful manner, but also because it is otherwise without merit. It has been shown above that the regulations of an administrative agency cannot be interpreted to defeat the rights of returning strikers to immediate reinstatement. To hold otherwise would effectively undercut the protected status of a lawful strike and the protected status of strikers as continuing employees.[113]

In sum, I find that the employees listed in "Appendix A" never received an unconditional offer to return to work. The conditions imposed on them were unlawful and without a legal basis. Because the offer of reinstatement tendered by the Employer was conditional, backpay was not tolled. Moreover, the failure of Respondent to reinstate the strikers listed in "Appendix A" properly violates Section 8(a)(1) and (3) of the Act.[114] Finally, I find that the usual 5-day delay before backpay is to begin would not apply in this case, because the Employer attached unlawful conditions to the return of the strikers. Accordingly, backpay will commence as of the unconditional offer to return to work. Because the letter of April 3, 1981, was delivered by messenger on that day, backpay will commence as of April 4, 1981.[115]

G. *The Alleged Unlawful Refusal to Reinstate the Strikers Unconditionally (Alleged Resignations and Misconduct)*

1. Preliminary observations and facts

After receiving the Union's unconditional offer to return to work, Respondent refused to reinstate approximately 10 strikers who allegedly resigned or otherwise abandoned employment during the term of the strike. Respondent also refused to reinstate approximately 62 strikers because the strikers participated in various unprotected acts of strike misconduct either on the picket line, or in some cases, away from the picket line. In either case, it is claimed by Respondent that because the misconduct was committed within the context of the strike, the various strikers are not entitled under the law to reinstatement. Because the facts vary as to each striker, it will be necessary, with a few exceptions, to consider each striker separately. The only exception will be in those few cases in which two individuals are alleged to have been together constantly on the picket line so that the evidence of one will almost always apply to the other.

As reflected above, the strike here began at 12:01 a.m. on August 23. It was perhaps not the longest, nor the most violent and bitter, labor dispute in American history, but the evidence in this case reflecting on the conduct of the strike can only be characterized as appalling. Without in any way attempting to minimize nor condone the unlawful labor practices committed by the Employer, the behavior of some pickets was outrageous. I will find below various acts of misconduct including physical assaults, spitting on cars or persons, the throwing of eggs or other objects at vehicles or persons, threats of great physical harm, a continuous barrage of the most vile obscenities and sexual innuendoes imaginable directed primarily at Harrison and Zemba, and other acts of petty harassment such as the opening of bus emergency doors and the repeated blocking of buses and other vehicles.

To be sure, the misconduct that occurred was not limited to the strikers. Nonstriking employees also committed various acts of misconduct against strikers including physical assaults, spraying of ammonia or other liquid, use of obscenities and racial epithets, occasional egg throwing, use of weapons such as tire irons, crowbars, or knives to threaten strikers and most commonly, speeding into or out of the Aztec yard in such a manner as to threaten or, in a few cases, to actually hit a striker or a member of a striker's family. The Union has raised the issue of condonation, because virtually none of the nonstriker misconduct was punished by company management. In some cases, this misconduct was unknown to management, but the lack of knowledge raises the additional issue of whether management deliberately intended to remain ignorant. In one case, Schultz, then Aztec's second highest ranking official, used his own funds to bail out of jail a nonstriker who had been arrested and charged with a serious offense against a striker. As the issue of misconduct itself, the issue of condonation will have to be carefully considered and weighed for its effect on the case of individual strikers. Also relevant for the same purpose is the effect of the Employer's unfair labor practices found in other sections of this opinion.[116]

I find now and will support below with detailed analysis that the nonstriker misconduct was substantially less than that committed by strikers. In addition, in all or most cases of nonstriker misconduct, there was some element of direct and immediate provocation by strikers that caused the nonstrikers to believe that self-defense was required. In many cases, the purported self-defense was an overreaction to the perceived threat. Nowhere was this more true than in the cases of nonstriker vehicles speeding into or out of the yard. For those persons, either management or nonstrikers, blocked from entering or leaving the yard by a mass of pickets, some unpleasant episodes were likely to occur.

Considering the length of the strike and its violent character, it is truly amazing that no serious injuries resulted. Serious property damage, particularly to cars and buses did occur, however. Police were frequently called to the picket line for one reason or another and occasional arrests were made. These arrests in turn led in some cases to convictions that I will consider where applicable. Various persons have civil lawsuits in progress and I will also detail these as factors to be weighed in judging credibility.

---

[112] The fact that a strike was in progress does not affect Respondent's duty to give notice and an opportunity to bargain on the proposed changes. In this case, there is reason to believe that the changes in policy were designed to disparage and undermine the Union. *Flowers Baking Co.*, 169 NLRB 738 (1968), enfd. 418 F.2d 244 (5th Cir. 1969).

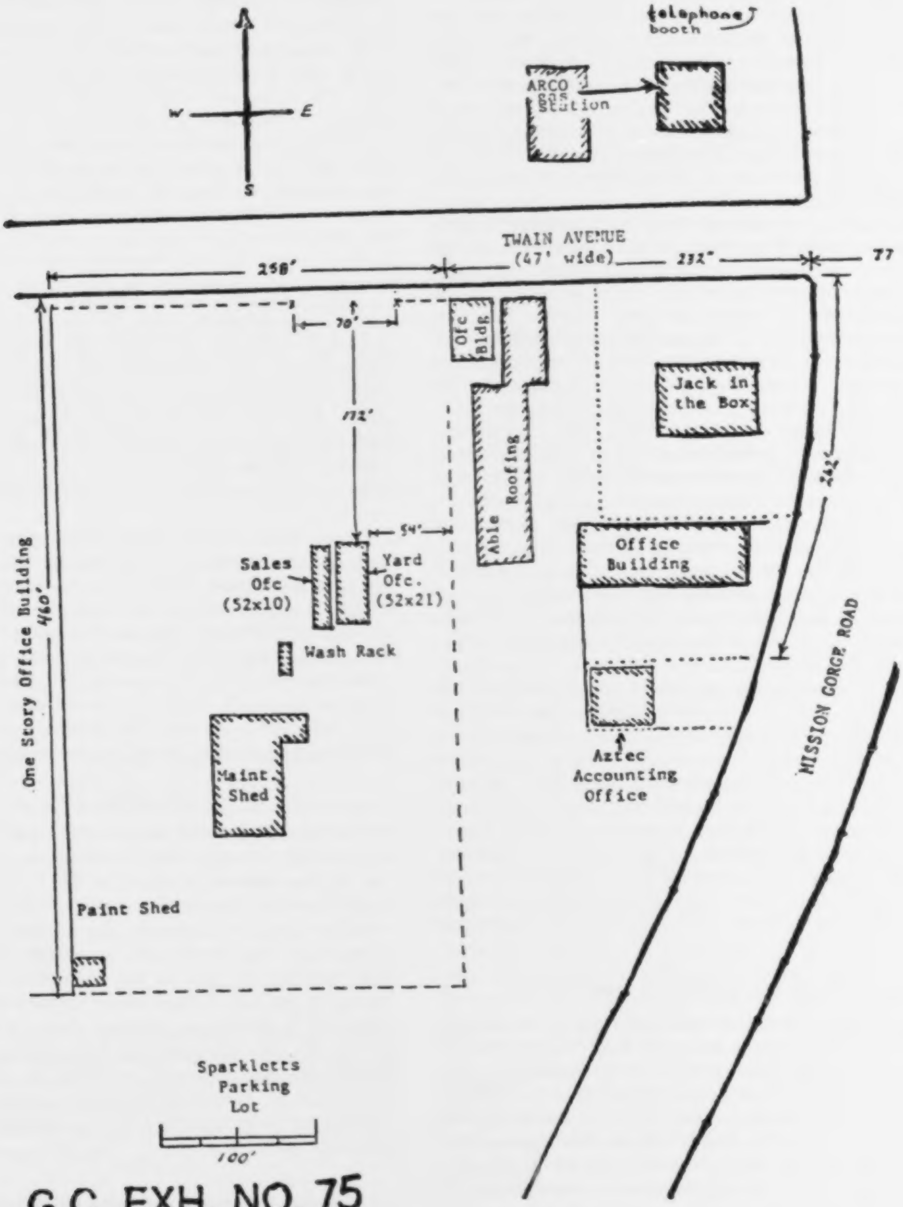
[113] *NLRB v. Fleetwood Trailer Co.*, 389 U.S. 375 (1967).

[114] *Sure-Tan, Inc.*, 234 NLRB 1187 (1978), enfd. as modified 672 F.2d 592 (7th Cir. 1982).

[115] *Teamsters Local 574*, 259 NLRB 344 fn. 2 (1981).

[116] *K & K Transportation Corp.*, 262 NLRB 1481 (1982).

Most of the picket line activities in issue here occurred at Respondent's bus yard on Twain Avenue in San Diego. To better understand the geography, I note a sketch of the area prepared by the parties to the case. (See diagram A below.) Some additional picket line activity occurred in a downtown area of Chula Vista, a suburb of San Diego served by Respondent's transit division and at the Chula Vista bus yard.


N
W
E
S
telephone booth
ARCO gas station
TWAIN AVENUE
(47' wide)
258'
232'
77
70'
172'
54'
Ofc Bldg
Able Roofing
Jack in the Box
242'
Office Building
Sales Ofc (52x10)
Yard Ofc. (52x21)
Wash Rack
Maint. Shed
Aztec Accounting Office
MISSION GORGE ROAD
One Story Office Building
460'
Paint Shed
Sparkletts Parking Lot
100'

G.C. EXH. NO. 75

(Diagram A)

When the strike started, it was early on a Saturday morning. Yelkey was on the picket line as were a number of pickets, well in excess of 100. Thereafter, the number of pickets varied until mid-December when in observance of Union Solidarity Day, another episode of mass picketing occurred. After this, the number of pickets declined gradually.

During the course of the strike, Harrison repeatedly encouraged nonstrikers to submit written reports to management of strike-related incidents. Harrison's pleas met with mixed success: she submitted no written incident reports because she was too busy with other matters. Harrison described several incidents of serious misconduct that she either observed or was the victim of. As to other incidents of misconduct, some witnesses at hearing prepared and submitted the reports and some did not. In many cases, oral reports of the incident were conveyed to Harrison, Zemba, or Schultz.

From time to time during the strike, meetings of company management were held. At these meetings, various incidents of misconduct together with the alleged perpetrators were discussed. After the Union submitted its unconditional offer to return to work, Zemba, Harrison, and legal counsel met to discuss individual strikers. The final decision as to which strikers should be offered reinstatement was a collective decision. Reviewed at that time were the personal knowledge of Zemba and Harrison based on their own observations and experiences, their knowledge of events based on the oral reports of nonstrikers or other members of management, and their knowledge based on various written reports. In addition to the incident reports referred to above, Zemba and Harrison reviewed logs prepared by the private security guards (R. Br. 57, 58) and logs kept by Aztec dispatchers (R. Br. 71) who were normally the first persons to whom an incident of misconduct would be reported. In addition to all the above, Harrison had devised during the strike a card index file (G.C. Exhs. 65a–ooo) as a means of collecting and summarizing reports of misconduct on individual strikers. The information collected and the meetings held were inexact and subject to some discrepancies. However, on balance, I am satisfied that when coupled with the testimony of the witnesses at hearing, the process was adequate to prove not only those who were guilty of serious misconduct during the strike but also those who were not. Before turning to consider the case of those charged with misconduct, I begin with the smaller group of those who are alleged to have resigned or otherwise abandoned their employment during the strike.

2. Analysis and conclusions (resignations)

In determining whether strikers resigned from their jobs during a strike such as to preclude them from reinstatement at its conclusion, the Board requires the party challenging the employee status of a striker to "affirmatively show by objective evidence" that the striker has abandoned an interest in his struck job. See *Harowe Servo Controls*, 250 NLRB 958, 964 (1980). Neither an employee's acceptance of other employment nor his resignation in order to accept other employment will automatically establish an intent to abandon a striker's original job. "The nature of the evidence which may rebut the presumption will be determined on a case-by-case basis." Ibid, quoting from *Pacific Tile & Porcelain Co.*, 137 NLRB 1358, 1359–1360 (1962). And see *Coca-Cola Bottling Co.*, 232 NLRB 794 (1977).

Although resignations in order to accept other jobs during a strike do not automatically eliminate a striker from being considered for reinstatement, where the resignations are voluntary and neither coerced nor caused by an employer's misconduct, the employer may rely on such resignations and conduct his business affairs accordingly. See *Beverage-Air Co.*, 185 NLRB 168, 170 (1970); *P. B. R. Co.*, 216 NLRB 602 (1975); and *Mississippi Steel Corp.*, 169 NLRB 647, 663 (1968).

Although not all strikers who allegedly resigned in this case did so to accept other employment, the above cases are nevertheless helpful to the instant analysis. I turn now to the individual strikers.

a. *Dana Banning*

Zemba did not know Banning, but believed he was denied reinstatement due to his resignation. Banning picketed regularly for about the first 2 weeks of the strike. Following this period, Banning picketed weekends only until November, when he secured other employment. Between November and January 1981, Banning picketed only once a month. After February, Banning resumed picketing about once a week. At no time did Banning ever tell anyone that he was resigning his employment at Aztec.

In its brief at 437, Respondent argues that Banning was denied reinstatement because he had resigned. Then, apparently because there is no evidence to support this claim, Respondent discusses only the alleged strike misconduct of Banning. Because this evidence, such as it is, was never relied on by Respondent as a basis for refusing reinstatement, it is irrelevant to this proceeding and I decline to discuss it. I will, however, note that it is trivial and inadequate to preclude reinstatement. I find that Banning is entitled to reinstatement and backpay.

b. *Leslie Carr*

This person did not testify at the hearing.[117] However, Schultz, his supervisor, testified that prior to September 15, he received a call from Carr who stated that he would not be returning to Aztec. Schultz inquired as to whether Carr was going to take a job as a police officer, a job Carr had previously expressed some interest in. Carr said no, but that he had something else that he was trying to get into. Either before or after this call, Schultz received a telephone request from a school district asking for an employment reference on Carr. Carr's phone call was reported to Harrison and subsequently conveyed to Zemba. During the course of the strike, there is no evidence that Carr picketed or even appeared near any picket line.

---

[117] Because there was no explanation for his absence, I draw an adverse inference from Carr's failure to testify. However, I would decide his case in favor of Respondent even without the adverse inference.

I find that during the course of the strike, Carr resigned and is not entitled to reinstatement or backpay.

c. *Darryl Conyer*

According to Zemba, several weeks after the strike began, Conyer called him and said that he was going to New Jersey to look for painting work and would not be coming back. Conyer allegedly apologized for his misconduct on the picket line. Conyer admitted the call, but denied saying that he would not be back or apologizing for strike misconduct. Conyer testified that he specifically told Zemba the trip was temporary and that he would be back. Conyer also testified that Zemba stated, "plan to be gone for at least 7 months. That's how long the strike is going to last." Zemba denied saying this and also denied Conyer's testimony that in March 1981, after the latter's return, he talked to Zemba who stated that Conyer would be permitted to return to work.

Conyer was 22 years of age and prior to the strike had been the coach of Respondent's baseball team. I cannot believe that he told Zemba he was leaving San Diego for good nor that he apologized for strike misconduct. Conyer had relatives in New Jersey, but he had no way of knowing whether he would be able to find work there. When he was unable to find work there, he left the State about Thanksgiving time and went to Texas where he remained until January 1981. Then he returned to San Diego where he resumed picketing and collecting strike benefits from the Union. I believe Conyer's testimony that Zemba told him he would be able to return to work.

In its brief at 438–446, Respondent seems to rest its case on Conyer's alleged misconduct. Yet, Respondent also states flatly (Br. 438), "Conyer was denied reinstatement because he abandoned interest in employment at Aztec.[118] I find that the record does not reflect that Conyer abandoned his position[119] and that he is entitled to reinstatement and backpay.

d. *Thomas Doty*

This individual had originally gone on strike, then decided to cross the picket line and return to work. According to Harrison, on September 12, Doty hand-delivered the following letter to her at the Aztec accounting office:

> 9-12-80
>
> Aztec Bus Lines
> 4437 Twain Ave.
> San Diego Cal.
>
> To Management
>
> The strike at Aztec Buslines is having, has put mental and physical affect on my body. I can not preform my work as a driver at the best of my ability while this strike is going on.
>
> This letter is to inform you why I didn't show for work on 9-11-80.
>
> Until there is a decision or ruling on this strike whether the Union is in or out I can not mentally and physically work for Aztec Bus Lines.
>
> /s/ Thomas Doty
> [G.C. Exh. 76.]

Although he denied so stating, I find that when Doty gave the letter to Harrison, he said he was quitting due to the strain of the strike. I also find that there was a brief discussion between Harrison and Doty as to the procedures for converting from a group health plan to an individual plan. A few hours later Doty returned with a woman who said she was his wife. She told Harrison that Doty had been under great strain but was not quitting. She demanded the letter back from Harrison, but the latter refused to return it. Doty later that day consulted with counsel for the Union and was advised to write Respondent a letter to clarify his intention. He then wrote a letter to Respondent that was received by them a few days later and reads as follows:

> 9-12-80
>
> Aztec Bus Lines
> 4437 Twain Ave.
> San Diego, Cal.
>
> To Management
>
> The letter that you received from Thomas G. Doty on 9-12-80 was not a letter of resignation.
>
> /s/ Thomas G. Doty
> [G.C. Exh. 77.]

After September 12, Doty never rejoined the picket line but made occasional visits there for social purposes. He also obtained a part-time job. When he returned to work, he resigned from the Union to avoid discipline for crossing the picket line. After September 12, Doty withdrew his resignation and paid his union dues out of the strike benefit of $50 per week. The balance was returned to the Union as a contribution to a general welfare fund.

"Where a striker has directly communicated to the [struck] employer his intention to quit . . . there must be some showing of reservation or qualification or continued interest before the Board will ignore that stated intention."[120] Here, I find sufficient showing of reservation in the letter handed to Harrison on September 12. Doty was leaving only until there was a decision or ruling on whether the Union is in or out. Of course, it could be reasonably argued that the letter on the whole was an ambiguous expression of Doty's intent. It is clear, however, the letter on its face did not manifest a clear intention to quit permanently. Subsequent events, although not determinative, are at least a factor to be considered. Doty's return within a few hours with his wife to disavow any intention to resign is consistent with my finding that he did not resign. Sending the second letter after consultation with counsel is entitled to less weight, but like Doty's withdrawal of his resignation from the Union, these are factors supporting my conclusion.

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[118] Because there is no valid issue over Conyer's alleged misconduct, I decline to summarize or evaluate it.

[119] Compare *Belt Supermarket*, 260 NLRB 118 (1982).

[120] *Foote & Davies, Inc.*, 262 NLRB 238 fn. 4 (1982).

In the alternative, I find that even if the first letter, when construed with Doty's statements to Harrison at the time of delivery, is deemed to be sufficient to manifest an intent to resign, I nevertheless conclude that the attempted resignation was ineffective. I must conclude that Doty was so affected by the stress and pressure of the strike, particularly after deciding to cross the picket line and return to work, that his decision to resign was not the product of an unfettered will, and that the decision cannot be found to have been voluntary.[121] Accordingly, I find that Doty is entitled to reinstatement and backpay.

e. *Bert Dredden*

When the strike started, Dredden was on a layoff status. On the first day of school, September 10, Dredden routinely reported for work and was assigned a schoolbus route. He worked that day and the following day failed to appear, leaving the schoolchildren on his route at least temporarily unattended. He never reported for work thereafter and never communicated with anyone in management about his intentions. Dredden never picketed either before or after his single day of work and never received strike benefits from the Union. Neither did he formally resign from the Union, but he stopped paying union dues in June. According to Dredden's testimony, he did visit the picket line from time to time. No other witness supports this claim. He also testified that a striker, John Kipple, convinced him not to report to work after the first day.

Under normal conditions, an employee who returns to work for 1 day after a layoff and never returns without any explanation would clearly have quit his job. In this case, a strike was in progress. Yet, there is no credible evidence that Dredden supported the strike: no picketing, no union dues, no strike benefits, and no statements to union officials nor to company officials expressing Dredden's intention to support the strike. In light of this evidence, or lack thereof, Dredden's self-serving testimony that he visited the picket line about once a week—even if I were to credit it—is not enough. I find that he abandoned his employment and he is not entitled to reinstatement or backpay.[122]

f. *Gerald Marks*

Zemba testified that about 1 week after the strike started, Marks called him on the telephone and stated that he was resigning in order to work at Sundance, a competitor of Aztec. About 1 month later, Zemba was talking to an official of Sundance when Marks got on the line and stated he was happy working for Sundance.

Marks never testified in the proceeding so I rely in part on an adverse inference to find for Respondent. Even without the adverse inference, I credit Zemba's testimony and find that Marks resigned and is not entitled to reinstatement and backpay.

g. *Suhley Ozgundez*

Prior to the strike, Ozgundez was serving a disciplinary suspension as a result of an accident with a bus. Although on suspension in the summer, he agreed with Schultz to return in September. The witness produced a note from Schultz dated July 10, saying that the witness could bid, in an August 25 shakeup, in order based on his existing seniority. (G.C. Exh. 79.) On or about August 20 Ozgundez did bid on a route and even took a dry run with another driver to familiarize himself with his assigned route. Due to the strike beginning on August 23, he did not actually start his run. Once the strike started, Ozgundez picketed sporadically because he was attending school and because he obtained another job at the San Diego Unified School District. He did not return to a job at a bank, as he had quit there in anticipation of returning to Aztec. Each month of the strike, the witness paid his union dues; on the single occasion, he received strike benefits from the Union, he returned the check to the Union as an offset against his union dues.

There is little doubt here that Ozgundez did not resign or otherwise abandon his employment. In reliance on the note of Schultz, Ozgundez quit his job at a bank, and attempted to bid on a new bus route. But for the intervening strike, he would have begun his new job. There is no direct evidence that Ozgundez resigned. The mere fact that he took another job during the strike is not sufficient to rebut his continued status as an employee.[123] I recommend that Ozgundez be reinstated with backpay.

h. *Abraham Planje*

Respondent contends that Planje resigned. In its brief at 446–447, Respondent discusses some alleged misconduct that is trivial and irrelevant to the issue of resignation. According to Zemba, he and Harrison were having lunch at a nearby Jack-in-the-Box Restaurant. Planje came up to them and stated he resigned because he was then working for a cement truck delivery company. Planje also allegedly apologized for his picket line misconduct.

Planje denied this testimony of Zemba. I credit Planje and find that he is entitled to reinstatement and backpay. I note that Zemba could not specify the date of the alleged conversation and Harrison never testified on the matter after Planje's denial. In conclusion, I note that during the course of the hearing, Planje was reinstated by Respondent. I find that Planje is entitled to reinstatement and backpay.

i. *Cheryl Reid*

According to Zemba, although he could not recall Reid, he believed that she had resigned. Reid went on strike and picketed for about the first 3 weeks. Reid then stopped picketing and did nothing until April 1981, when she took a job with a tour company. Reid continued to work there until January 1982. At this time she was offered and accepted reinstatement with Respondent.

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[121] Not only does the wording of the letter, G.C. Exh. 76, support this conclusion, but also Doty's continuing change of position and virtual inability to articulate clearly just what he wanted.

[122] See *Smith Alarm Systems*, 209 NLRB 835 (1974).

[123] In fact, even where a striker formally resigns to take another job, this does not preclude reinstatement unless there is also unequivocal evidence of intent to sever permanently the striker's employment relationship. See *Harowe Servo Controls*, 250 NRLB 958, 964 (1980).

I find that Reid is entitled to reinstatement and backpay. Though she stopped picketing after 3 weeks, she continued to pay union dues and, in a sense, received strike benefits as well. On receipt of the $50 per week check from the Union, she endorsed it and handed it back to the Union for use in the general welfare fund. In addition, she occasionally attended union meetings as well. I find insufficient evidence to show any resignation.

j. *Jean Umphreys*

Umphreys resigned from Aztec in the third week of September 1980. In a position paper submitted to the General Counsel on or about September 4, 1981, Respondent through its attorneys, said this about Umphreys:

> On October 3, 1980, Ms. Umphreys contacted the Employer and voluntarily resigned. Prior to that time, Ms. Umphreys was not observed to have engaged in strike activity. Thus she was not a striker and did not have a right to unconditionally offer to return to work on April 3, 1981. Therefore, the Employer was under no obligation to offer Ms. Umphreys reinstatement. [G.C. Exh. 78, p. 13, par. 33.]

All the above is fairly curious and puzzling because at the hearing, Zemba spent much time detailing Umphreys' alleged misconduct. Then, just to be sure what Respondent's position was, I asked Zemba the following question:

> Q. Did her resignation, alleged resignation, play any role in the failure to reinstate her?
> A. No.

In light of the ambiguity raised above, I cannot fairly determine the reason Umphreys was denied reinstatement. Accordingly, I must resolve the ambiguity against Respondent as the one responsible for creating it and order Umphreys reinstated with backpay.

Alternatively, I consider her case on the merits. If she was denied reinstatement because she resigned as Respondent contends in part in its brief, but Zemba denied at hearing, then the evidence is as follows. According to Zemba, in September, he received a phone call from Umphreys, who stated she and another person were leaving the State to secure employment. Umphreys also apologized for misconduct on the picket line. Sometime later, Zemba was contacted by the Steak & Ale Company, in Texas. According to Harrison, she received information in early October that Umphreys was leaving for Indiana. (R. Exh. 49A.) According to Umphreys, she denied any calls to Zemba. She did stop picketing in mid-September, because she was upset over an injury to a dog owned by a picket. Umphreys did admit leaving for Texas in early October, but could not find a job and returned to San Diego in mid-December. While in Texas, she denied applying for work at the Steak & Ale restaurant.

When Umphreys left for Texas, she moved out of her rental premises. She got to Texas by hitchhiking; then returned by air, using money sent to her by her family. She is 24 years of age. Before leaving for Texas, Umphreys never applied for, nor received $50 per week in union strike benefits. She did pay her union dues until taking a withdrawal card just before leaving California. Her only income was $52 per week unemployment compensation, received from the State of California. When she returned from Texas, Umphreys never rejoined the picket line.

I find sufficient evidence to show that Umphreys resigned from Aztec before leaving for Texas. In her affidavit to an agent of the NLRB, she stated, "I am not denying but I do not recall calling Aztec and telling someone that I had resigned." Although there is a discrepancy between the note indicating departure for Indiana and Zemba's testimony, I find Umphreys did call and state she was resigning. Taking Umphreys' testimony alone, all inferences indicate a permanent move to Texas, even though it lasted only 2 months.[124] Assuming a person can rescind a resignation by reestablishing support for the Union and the strike, there is no evidence that Umphreys did this.

If Umphreys was denied reinstatement due to her misconduct on the picket line, as Zemba testified, and as Respondent argues, in part in its brief, but denied in its position paper, then the evidence is as follows.[125] Nonstriker employees Hoffman and Swick testified that Umphreys engaged in some minor blocking of vehicles. In addition, Hoffman testified that Umphreys called her a "bitch" and once followed her schoolbus while Umphreys was in a car with two other strikers. It was Zemba, however, who provided the most damaging testimony against Umphreys. According to him, she used a picket stick to make short poking motions toward him on several occasions without actually touching him. Zemba described threats to get him and his girlfriend. Harrison, Umphreys, and others also threatened to kill Zemba and members of his family on occasion. She shouted to Harrison and other female nonstrikers, "Is Zemba fucking all of you?" She also hit buses with a picket sign on 15–20 occasions.

Umphreys essentially denied all the accusations against her, but I credit the Respondent's witnesses. In evaluating this evidence, I will consider in mitigation, Respondent's unfair labor practices that I have found above and Respondent's condonation of certain acts by nonstrikers that I will recite below in the next section of this opinion. As a general rule, the use of epithets, vulgar words, profanity, or vulgar gestures does not deprive a striker of the protection of the Act.[126] Of greater moment is the following of the schoolbus and the threatening gestures toward Zemba with the picket sign. In both these incidents, the acts in question do not rise to the level to preclude reinstatement.[127] Similarly, the threats against

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[124] See *Belt Supermarket*, 260 NLRB 118 (1982).

[125] I find that Zemba had an honest belief that Umphreys engaged in serious strike misconduct. See *Rubin Bros. Footwear*, 99 NLRB 610, 611 (1951). However, I cannot tell for sure on this record why Umphreys was denied reinstatement.

[126] *NLRB v. W. C. McQuaide, Inc.*, 552 F.2d 519 (3d Cir. 1973).

[127] See *Gibraltar Sprocket Co.*, 241 NLRB 501 (1979); *Arrow Industries*, 245 NLRB 1376 (1979).

Zemba, while serious, appear to be classic mere "animal exuberance." Thus, under Board law and considering mitigation of the unfair labor practices and condonation, I would recommend that Umphreys be reinstated with backpay.

This concludes the discussion of those strikers who are alleged to have resigned. In its brief (Br. 458–460), Respondent also discusses the cases of Francis Lackey, Shirley Porter, and Margaret Jonas. However, these individuals, either at hearing or in the General Counsel's brief (Br. 57 fn. 49), have all been dismissed from the case and no findings about them will be made. Finally, striker Karen Sloan has been inadvertently listed by Respondent in the section of the brief with alleged resignations. I will consider her case with the alleged strike misconduct to which I now turn.

3. Analysis and conclusions[128]

a. *Strike misconduct*

Before analyzing the cases of the individual strikers, I note several preliminary matters. First, when evaluating strike misconduct, there is extensive conflict between the Board and the courts of appeals.[129] Where the conflict exists, I am bound to follow the Board decisions.[130]

Another conflict occurs from time to time between Respondent's statement of position (G.C. Exh. 78), dated September 4, 1981, and submitted to the General Counsel, and Respondent's evidence adduced at hearing. The General Counsel makes much of these conflicts (see, e.g., Br. 85 fn. 63) as indicating changes of position of impeachment. In general, I have assigned little weight to the letter. It was never intended to be evidence for either side. Particularly in a massive case like this, each side can be expected to change its position often. The General Counsel did it as late as the filing of its brief. See, e.g., brief 49 footnote 41 in order to add still another allegation. This does not impeach the General Counsel's case any more than Respondent's position letter damages its case. Of course, where the conflict makes a difference, as it does for Umphreys, above, it will be noted. Because Board law commands that the letter is admissible, I have obeyed despite my own feeling that the letter's slight probative value is outweighed by its prejudice to Respondent. It also seems to me in the nature of settlement negotiations and inadmissible for that reason. (See Fed.R.Evid. 408.)

I also note again that Respondent does not claim that any of the strikers have been permanently replaced. Accordingly, it is unnecessary to make a finding about the type of strike, either economic or unfair labor practice. However, because I have found that prior to the commencement of the strike, the Employer had not bargained in bad faith, the strike was economic at its inception. Following the commencement of the strike, Respondent did bargain in bad faith and committed other unfair labor practices.[131] Accordingly, when the Union made an unconditional offer to return to work on April 3, 1981, the strikers had become unfair labor practice strikers.[132]

Another preliminary matter concerns the burden of proof that each party has. This burden was succinctly stated by the administrative law judge in *Laredo Coca-Cola Bottling Co.*, 258 NLRB 491, 496 (1981):

> The Supreme Court has long recognized that actions taken against strikers are inherently destructive of Section 7 rights. *N.L.R.B.* v. *Great Dane Trailers, Inc.*, 388 U.S. 26 (1967). In all cases involving either the discharge of or the refusal to reinstate strikers for having engaged in alleged acts of misconduct, "the burden of proving discrimination is that of the General Counsel." *Rubin Bros. Footwear, Inc.*, 99 NLRB 610, 611 (1952). Accordingly, the General Counsel must first establish that an individual was in fact a striker and that an employer took some action against him for conduct while said individual engaged in the strike. At that point, the burden shifts to the Respondent which must prove that it entertained an honest belief that the striking employees have engaged in misconduct. Such constitutes an adequate defense to a charge of discrimination in refusing to reinstate strikers except where the General Counsel affirmatively establishes that the employees did not, in fact, engage in such misconduct or where the conduct in question was not "so flagrant or egregious as to require subordination of the employees' protected rights in order to vindicate the broader interest of society as a whole." *Dallas General Drivers, Warehousemen and Helpers, Local Union No. 745, International Brotherhood of*

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[128] In judging the credibility of the strikers, I have in most instances accepted the Respondent's version of events. Generally, the strikers denied committing the most serious acts of misconduct attributed to them and generally denied seeing or hearing other serious misconduct committed by other strikers. In the context of the evidence in this case, such denials were not usually convincing. On the other hand, regarding striker misconduct, in most instances Respondent's evidence was more persuasive for several reasons: (1) most of the misconduct ascribed to various strikers fell far short under Board law from precluding reinstatement. This fact leads to the inference that Respondent merely presented the evidence it had, without fabrication or mistake; (2) those strikers who were found to have committed serious acts of misconduct had live witnesses testify against them and submit themselves to cross-examination. In no case did I rely on dispatch or security officer logs or police reports alone to find against a striker; (3) the strikers were either known to management and nonstrikers or were identified from photographs. Thus, I was usually satisfied that misidentification was not a significant factor, particularly where multiple witnesses testified against a given striker. In sum, I have considered all evidence for each striker, including denials where applicable. However, because of the enormity of this case, it was not possible to detail conflicting testimony for each striker.

[129] See Haggard, *Picket Line & Strike Violence As Grounds For Discharge*, 18 Hous. L. Rev. 423 (1981); Erickson, *Forfeiture of Reinstatement Rights Through Strike Misconduct*, Lab. L.J. 602 (Oct. 1980) (G.C. Exh. 68).

[130] *Iowa Beef Packers, Inc.*, 144 NLRB 615, 616 (1963).

[131] In evaluating striker misconduct, I will give due consideration to the Respondent's conduct involving unfair labor practices. *Harowe Servo Controls*, supra, 250 NLRB at 1111. That is, the Board requires that I balance the nature of the employees' conduct against the Employer's unfair labor practices. *E. I. du Pont & Co.*, 263 NLRB 159 cases cited at fn. 3 (1982).

[132] *Gulf Envelope Co.*, 256 NLRB 320 (1981). See also *Tarlas Meat Co.*, 239 NLRB 1400 (1979). Because the strikers are unfair labor practice strikers, an employer's erroneous belief, however sincere, that a striker has engaged in misconduct does not constitute a defense to refusing to reinstate him if such misconduct did not, in fact, occur. *J. H. Rutter-Rex Mfg. Co.*, 158 NLRB 1414, 1418, 1448–1449 (1966).

> *Teamsters, Chauffeurs, Warehousemen and Helpers of America . . .* v. *N.L.R.B.*, 389 F.2d 553 (D.C. Cir. 1968); *Gold Kist, Inc.*, 245 NLRB 1095 (1979); *Birch Tree Number One, Incorporated, d/b/a Birch View Manor*, 243 NLRB 495 (1979); *Co-Con, Inc.*, 238 NLRB 283 (1978); *Rubin Bros., supra*. Once the General Counsel has established that the misconduct did not occur, the burden shifts to the respondent to rebut the denials. *Gold Kist, Inc., supra.*

In this case, I find that as to all the affected individuals that they were strikers and were refused reinstatement by the Employer for conduct while on strike. I also find, with a few exceptions as indicated below, that Respondent held an honest belief that the strikers engaged in misconduct. Then I will find as to a substantial number of strikers that either the employees did not engage in such misconduct or the conduct was not so flagrant as to warrant discharge.[133]

In conclusion of preliminary matters, I turn to the issue of condonation raised by the Union and examine it from two perspectives: (1) disparate treatment—as found above no nonstriker was ever disciplined for misconduct and there was no mechanism in place to collect and evaluate nonstriker misconduct. This posture is in stark contrast to that employed for striking employees;[134] and (2) condonation—this concept is explained in the case of *Union Trust Drill Co.*, 124 NLRB 1143 at 1155–1156 (1959):

> The Supreme Court has ruled that where a strike is characterized by unprotected activity, or even by illegal employee action, the employees take "the risk of termination of their employment." (*N.L.R.B.* v. *Fansteel Metallurgical Corporation*, 306 U.S. 240, 255), and the employer is "at liberty to treat them as having severed their relations with the Company." *N.L.R.B.* v. *Sands Manufacturing Company*, 306 U.S. 332, 344. By the same token, the employer is equally at liberty to disregard or waive the wrong, and to retain the offenders in his employ. It has never been suggested that the Act requires an employer to discharge an employee guilty of wrongful conduct, or that the Act itself terminates the relationship. The wrongful conduct merely permits the employer to take affirmative action to that end. Accordingly the courts and the Board have uniformly ruled that the only right accruing to an employer from unprotected strike conduct is the privilege or liberty to terminate the employment of the strikers because of their misconduct. *Stewart Die Casting Corporation* v. *N.L.R.B.*, 114 F.2d 849, 856 (C.A. 7), cert. denied 312 U.S. 680; *N.L.R.B.* v. *Aladdin Industries, Inc.*, 125 F.2d 377, 382 (C.A. 7) cert. denied 316 U.S. 706; *Hazel Atlas Glass Company* v. *N.L.R.B.*, 127 F.2d 109, 118 (C.A. 4); *N.L.R.B.* v. *Reed & Prince Manufacturing Company*, 118 F.2d 874, 886 (C.A. 1), cert. denied 313 U.S. 595; *N.L.R.B.* v. *Alabama Marble Co.*, 185 F.2d 1022 (C.A. 5).
>
> . . . .
>
> Though "condonation may not lightly be presumed from mere silence or equivocal statements, . . . [if it] clearly appears from some positive act by an employer indicating forgiveness and an intention of treating the guilty employees as if their misconduct had not occurred," then condonation has been established. *N.L.R.B.* v. *Marshall Car Wheel and Foundry Co.*, 218 F.2d 409 (C.A. 5).

To illustrate better the behavior of some of Respondent's nonstriking employees, I note the following major incidents of misconduct:

(1) On October 24, Dave Smart drove his car toward the yard exit at a rapid rate of speed, almost hitting a striking picket. Linda McQueen kicked Smart's car. He exited the car, grabbed her by the neck and shoulders, and threw her down to the ground. McQueen hit her head, became dizzy, and was later taken to the hospital. At the hospital, McQueen was released after it was determined she was unhurt.

(2) On or about October 5, James Lombardi was arrested for deliberately attempting to run down pickets on the picket line. This occurred after someone threw eggs at Lombardi's car. Schultz later bailed him out of jail.

(3) Neil Sunard and other nonstrikers sprayed ammonia into the face of pickets Valerie Mendoza and others.

Other similar incidents involved the brandishing of tire irons, crowbars, or knives by nonstrikers. At brief 63, the Union describes incidents involving employees who originally were on strike, but returned to work before the strike was over. The acts of these persons are trivial, but it is true they were unpunished. In this case, the primary issue is whether discharge of strikers is justified. Under Board law, very few, if any, of the acts committed by nonstrikers would be grounds for discharge and, then, only if there was no direct provocation or if the acts were not impulsive and isolated.

The Union further contends (Br. 65) that under the facts and circumstances of this case, only strikers guilty of a physical assault should even warrant attention. Of course, I cannot agree. I am required to consider each striker individually in light of surrounding circumstances including the severity and frequency of the misconduct at issue, and the acts of Respondent as reflected above.[135] I begin with an incident that occurred in the early evening of August 23, when the strike was less than 24 hours old.

b. *The Hokstad incident*

Prior to the strike, Hokstad had taken a strident antiunion, antistrike position and clearly stated his intention not to strike. On occasion, his conversations seemed to be unduly provacative. Examples will be stated in discussions of individual strikers. On August 23, he was returning to the Aztec yard from an assignment about 7 p.m. A large number of pickets were on the line. Prior to making his turn from Twain into the yard, Hokstad had notified the dispatcher by radio that he was coming in. One of the pickets there was Brenda Leonard, wife of striker Walt Leonard. She had been on the line the entire day with her two children, one an infant, the other a young boy. The day was unusually warm and the baby had been crying due to the discomfort of the moment.

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[133] Frequently at hearing the General Counsel used the expression, "industrial capital punishment," to dramatize the severity of job loss for strike misconduct. In reviewing the facts of each striker and the applicable Board and court precedents, I will be mindful of this expression.

[134] See *Upland Freight Lines*, 209 NLRB 165 (1974), enfd. 527 F.2d 766 (9th Cir. 1976); and *Keller Mfg. Co.*, 237 NLRB 712, 713 fn. 7 (1978).

[135] *Gibraltar Sprocket Co.*, 241 NLRB 501 (1979).

As Hokstad turned into the yard, there is some conflict about his speed. Because the strikers were engaging in mass picketing and had every intention of blocking the bus as long as possible even if Hokstad were moving too fast for conditions, the strikers had to assume part blame for what happened. In any event, several pickets, including Walt Leonard and Shelton, hit the bus with their picket signs and the bus struck Brenda Leonard in the bedlam. At the time of hearing, Brenda Leonard was separated from her husband and she never testified. However, all evidence indicates that she was only slightly injured, if at all. Later she was taken to a nearby hospital, treated, and released.

Meanwhile, after Brenda Leonard was struck, several of the strikers literally went berserk. Harlene George, Walt Leonard, and Alan Shelton charged into the Aztec yard. The other pickets screamed that Zemba was a murderer and made continuous threats and epithets directed to him, Schultz, and Hokstad, who were all nearby, standing well inside the Aztec yard. Both Leonard and Shelton had picket sticks in their hands having stripped off the signs after the accident happened. They threatened Zemba with them and screamed that he was responsible for the death of Brenda Leonard. Both men swung their sticks at Zemba, missing him by inches.

While this was going on, Harlene George also rushed up to Zemba, making the same accusations indicated above and threatening to kill Zemba. Unlike the two men, George had nothing in her hands. However, she did strike Zemba with her fists, beating him several times around the neck and chest. Like Brenda Leonard, Zemba was only slightly injured, if at all, from this attack. George had to be pulled away from Zemba by a union official named Arellano, who never testified. Shelton also never testified.[136]

The above incident has led to a spate of lawsuits and countersuits involving the principals referred to above and the Union as well. I will provide additional details surrounding this incident in discussion of the individual strikers. As to Leonard and Shelton, there is sufficient evidence in the record regarding other incidents as well as the present matter to make an informed judgment. However, as to George, her fate will rise and fall on this incident because essentially she left the picket line shortly after the incident. I will begin the discussion of the individual strikers with George below, but first one additional incident that merits special attention.

c. *Union Solidarity Day, December 23*

On this day, the strikers appeared on the line en masse. They were joined by representatives of other unions, who appeared to show support for the strikers. Also represented was the local media, including a well-known San Diego television reporter. This reporter, Jim Gordon, was a witness at the hearing and unlike most other witnesses was a neutral.[137] Gordon presented an edited videotape (C.P. Exh. 26) that showed the pickets and certain union officials in attendance. I have also examined some photographs (C.P. Exhs. 23a, b, and c) that as the videotape reflects scenes taken at the Twain Avenue yard on the day in question.

The essential misconduct complained of on this day concerned mass picketing causing a blockage of Zemba's car for about 30–45 minutes in the morning until the police arrived and escorted Zemba out of the yard. Zemba testified that as he drove up to the line, he asked the pickets to let him go through as he had an appointment. They refused.

After reviewing this incident, I have decided to disregard it entirely and not consider any striker's alleged participation in it as a factor in the refusal to reinstate. In reaching this conclusion, I note the testimony of Gordon, who testified that Zemba had at least two opportunities to leave before the police arrived, but failed to drive out. During the time that Zemba's car was blocked, two or three Aztec buses were allowed to go through with no problem. Of course, it might not be surpising that strikers would single out Zemba for more harsh treatment. Yet in addition to Gordon's testimony, I rely on my analysis of human nature. Give the presence of the media, including television cameramen and photographers, would the pickets have wanted to embarrass high-ranking union officials by performing an unlawful act. I think not. I believe the pickets would have been on their best behavior at this point. On the other hand, Zemba did have an interest in putting the Union in a bad light and when I consider the totality of the circumstances, I cannot credit his testimony about what happened on this day. I turn next to the individual strikers.

4. The individual strikers

a. *Harlene "Sam" George*

According to Zemba, George was denied reinstatement because of her attack on him.[138] On the evening this happened, George was a picket captain whose responsibility in part was to prevent disorderly picket lines. Standing about 5 feet 3-1/2 inches, and weighing 110 pounds, George was 38 years old when she testified. Before going to work for Aztec, George had earned a registered nurse's degree and worked in pediatrics and in a hospital emergency room for several years. On August 22, George worked a shift as a busdriver from noon to about 9 p.m. Then, when the strike started, she joined about 100 other strikers. By the time Hokstad was driving his bus into the yard, George had not slept for almost 36 hours. When the incident occurred, George was in a nearby phone booth making a telephone call when another striker ran up and shouted that someone had been hit by a bus. George ran to the line and saw Brenda Leonard with a blanket thrown over her. When she did not see either the child or the infant, she "freaked out . . . went crazy" (witness' terms), because she assumed that "Zemba had let someone hurt the baby." George testified that she could not remember what happened after this but, after the incident, union officials told her to take some time off and, on October 1, she became inactive on the picket line.

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[136] During the hearing, Shelton wrote a letter to counsel for the Union saying that he was living in Colorado and was unable to get to San Diego for the hearing due to financial reasons.

[137] Gordon was a member of a union himself. However, this fact did not affect his testimony. Moreover, because he had covered the Aztec labor dispute from the beginning, he related incidents how both management and the Union had attempted to exploit the media for their own gain. He understood this as a necessary ingredient of any labor dispute and as part of his job. Essentially, he remained unaffected by this.

[138] It is unclear whether Zemba also considered George's status as a picket captain and shop steward as factors in denying her reinstatement. However, the Board has held that union officials may not be singled out for greater discipline due to their status. Cf. *South Central Bell Telephone*, 254 NLRB 315, 316–317 (1981). Generally the courts of appeals have not agreed with the Board on this issue. As to other strikers who were picket captains or shop stewards, I have not relied on their status in reaching my decisions as to do so is contrary to Board law and because the evidence did not clearly show that Zemba relied on this fact in reaching his decision.

In analyzing this case, I reject any suggestion that this incident was staged by pickets as a pretext to make an attack on Zemba. The incident involving Brenda Leonard was an accident for which the Union and Hokstad must each share the blame.[139] This does not end the inquiry on George, however. In part, her actions were the result of hysteria caused by lack of sleep and the warm temperatures, and the animal exuberance of the strike. I find further that George, Leonard, and Shelton were not acting in concert pursuant to some prearranged plan; rather, each was acting spontaneously and individually in confronting Zemba.[140]

In evaluating this evidence, I note first that this incident occurred at the inception of the strike when the emotions of the participants were at a high pitch.[141] This isolated incident of misconduct is in stark contrast to other strikers such as Leonard and Shelton, who were guilty of repeated misconduct. In addition, the striking of Zemba was impulsive and of minor consequence.[142] The impulsive nature of the act is shown by George's training and experience as a nurse that under normal circumstances would have instinctively caused her to attend to Brenda Leonard, the ostensibly injured person. Instead, she attacked Zemba, not even the driver of the bus involved in the accident.

This is a close case. George is responsible for her lack of control caused in part by her lack of sleep. Zemba could well have been injured, but he was not. Accordingly, based on the totality of the evidence, I find that George is entitled to reinstatement and backpay.

b. *Walt Leonard*

In contrast to George, the misconduct of Leonard was serious, continuous, and deliberate. I begin with his actions during the Hokstad incident that need not be restated here. Hoffman, a female nonstriker, testified that when she drove through the line on one occasion, Leonard unzipped his trousers, pointed to his private parts, and stated, "This is for you, Sweetie. We're going to give this to you one of these nights when you're not watching." Leonard also made threats against Zemba and Hokstad and their families. The circumstances of these threats made on August 23 indicated they were to be taken seriously.[143] Also on August 23, Schultz observed Leonard deliberately break a taillight of a bus parked on the lot, using his picket stick. On two occasions, Leonard spit on Reese, a nonstriking employee, as he drove into the yard in his bus. Reese and another nonstriker named Swick were repeatedly threatened by Leonard, who frequently brandished a picket sign in a threatening manner.

Leonard's use of verbal taunts directed toward Zemba and Harrison was extensive and indefensible. Leonard called Zemba "a fucking Jew"[144] and a "cock-sucker." To Harrison, Leonard asked, "is Zemba eating you, how do you enjoy Zemba's cock"; "another night for a good fuck, Ellen." "Is Gus that good."[145] Finally, Leonard admitted at hearing that he threw eggs at buses (he told a Board agent he threw none) at cars on two occasions and at persons on two occasions.

By any standard, the totality of Leonard's conduct renders him unfit for reinstatement and backpay and I will so recommend to the Board.

c. *Alan Shelton*

This person did not testify and I will evaluate the evidence against him accordingly. I begin by reviewing Shelton's actions on August 23 as reflected above. In addition, on October 7, Shelton spit on Mitch Cohee, a nonstriker, as he walked across the picket line.[146] Ingersoll observed Shelton, along with another striker named Kipple, jump on a gate at the Aztec yard and knock it down.[147] On another occasion, Shelton followed

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[139] *Associated Grocers of New England*, 227 NLRB 1200 (1976), enf. granted in part, denied in part, and remanded in part 562 F.2d 1333 (1st Cir. 1977).

[140] Thus, as a general rule, each striker was responsible for his own misconduct and not for the misconduct of others. *NLRB v. Sea-Land Service*, 356 F.2d 955, 966 (1st Cir. 1966), cert. denied 385 U.S. 900 (1966); *Coronet Casuals*, 207 NLRB 304, 305 (1973).

[141] *Kayser-Roth Hosiery Co. v. NLRB*, 447 F.2d 396, 400 (6th Cir. 1971).

[142] Cf. *Star Meat Co.*, 237 NLRB 908 (1978); *E-Systems, Inc.*, 244 NLRB 231 fn. 1 (1979).

[143] See *Hedstrom Co.*, 235 NLRB 1198 (1978).

[144] The use of racial and religious epithets are factors in evaluating a striker's fitness to return to work. *Old Town Shoe Co.*, 91 NLRB 240, 273–274 (1950).

[145] Picket line language of this type is offensive, defamatory, and opprobrious. *Ben Pekin Corp.*, 181 NLRB 1025, 1028 (1970). However, the speech does not automatically lose the protection of the Act. Here it is at least a factor in the totality of the striker's conduct. Although the case of *NLRB v. Longview Furniture Co.*, 206 F.2d 274, 276 (4th Cir. 1953), is in point, the court refused to enforce the Board's Order and therefore I am bound to disregard it.

[146] Spitting directly on a person is serious misconduct because of the likelihood of a violent response. Cf. *Carither's Stores*, 262 NLRB 1381 (1982). Here this was no isolated impulsive act, but part of a pattern of general violent activity.

[147] Although no estimate of damage was given, I consider this serious property damage. *Giddings & Lewis*, 240 NLRB 441 (1979); *NLRB v. Trumbull Asphalt Co.*, 327 F.2d 841 (8th Cir. 1964).

Schultz, who was driving a nonstriker home after work. When Schultz first saw Shelton, it was after the nonstriker had been dropped off at an intersection, and Schultz saw Shelton in his car, carefully following (perhaps stalking) the nonstriker to see where he lived. Schultz went back and picked up the nonstriker again; then drove around until Shelton was lost.[148] On another occasion, Schultz drove Hokstad's car through the picket line while Hokstad left the yard by a different route. Shelton stated, "Why didn't you have him come through here, then we could beat his ass." Schultz heard Shelton ask Whitey Swadner, a nonstriker, to come across the street so he could kick his "ass" and settle the strike right there. I find that based on the totality of Shelton's misconduct, he is not entitled to reinstatement and backpay.

d. *Clark Adams*

This striker engaged in occasional blocking of vehicles for short periods of time. On several occasions, he opened emergency doors of buses as a tactic to harass nonstrikers. On the first night of the strike, Adams called Zemba an "asshole." Schultz observed the witness directing bus traffic into Twain where it was unsafe.

The above incidents are all trivial in nature. No damage occurred to any property. Given the violent nature of the strike, it was unlikely that any nonstriking driver would rely on traffic signals from a picket. Finally, there was a report that Adams threw coffee on someone, but Adams denied it and I cannot credit the report. Accordingly, I find that Adams is entitled to reinstatement and backpay.

e. *Nancy Alferos*

Alferos called nonstriker Claybough a "fat fucking bitch." Alferos also kicked and hit buses but there is no evidence that damage resulted. On several occasions, nonstrikers Bevers and Swick were temporarily blocked for brief periods of time.[149] Some of the testimony at hearing relates to the alleged activities of Alferos' husband. Because there is no basis to conclude that Alferos is responsible for the acts of her husband, I decline to consider this evidence.

Finally, Zemba testified that on several occasions, Alferos followed him on foot to the Jack-in-the-Box Restaurant and called him names such as "son of a bitch." Like the other incidents, this, too is a minor incident. Based on the totality of her conduct, I find that Alferos is entitled to reinstatement and backpay.[150]

f. *Norman Amador*

The record on this striker indicates that he is one of the most active strikers on the line committing acts of misconduct. To begin, he threw an egg at and hit the car of Kitty O'Brien, a nonstriker. She made a citzen's arrest and pressed charges. About 2-3 days later, Amador told her if she continued to press charges, her husband would be collecting widow's benefits.[151] I regard both the throwing of the egg and subsequent threat as serious misconduct. The threat was given currency by Amador's propensity for violent behavior. In a similar vein, Amador told Hokstad that if he did not stop working, he would get his lights punched out as Stoker had done. A few days prior to this remark, Hokstad had been physically assaulted by Stoker. When a friend of Hokstad's came to Aztec to apply for work, Amador jumped on his bumper and began to rock the car. Hokstad's friend decided not to apply for work at Aztec.

Nonstriker Swick related how Amador challenged him to a fight and threatened to "kick his ass." Nonstriker Reese testified to a barrage of eggs thrown at his moving automobile and causing some minor dents and paint damage. A female striker named Hewin was followed by Amador and another striker in a truck after work. Hewin pulled over after a short drive and Amador pulled in front of her, got out of the truck, and began to approach her vehicle. She then sped away.

Zemba was referred to repeatedly by Amador as "fuckbrain" and was asked whether he was "laying Ellen [Harrison] in the office." Amador asked Schultz whether "he liked sucking Zemba's cock"; he referred to Schultz as a "stupid mother-fucker."

Finally, in Chula Vista, during an altercation between nonstrikers Orville Swadner and Maureen Fortner on one side (the latter did not testify) and Amador and Roy Stoker, on the other side, I find that Amador grabbed Fortner around the neck and attempted to choke her while she was attempting to call over her bus radio for assistance.

Based on the totality of Amador's conduct, I find that he is not entitled to reinstatement or to backpay.

g. *Bob Baker and Don Lilly*[152]

Known to the other strikers as "Frick and Frack," these two were virtually inseparable during the strike and before. With a few exceptions, the evidence as to one will apply to the other. On several occasions, Lilly walked across the hood of vehicles attempting to enter the yard. These were owned by nonstrikers and a customer of Aztec. Lilly also threw hot liquid, either coffee or soup through a bus window opened by another striker, hitting nonstriker Swick. Baker threw a football at Swick's car on one occasion. Baker and Lilly both owned motorcycles. While new employee Michael Comfort was taking a driving test on a bus, they followed him and interfered with the operation of his vehicle.[153] Baker threatened to rape the wife of nonstriker Jacobson because the latter was crossing the picket line. This was after Baker and Lilly had followed Comfort and Jacobson for about 8 miles. After this episode, Baker and Lilly were arrested by police and charged with "terrorism." Following dismissal of the charges in court, Baker said to Comfort, "Your time is coming mother-fucker."

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[148] Under Board law, the mere following of Schultz and the nonstriker is not considered serious. *Gibralter Sprocket Co.*, 241 NLRB 501 (1979). In this case, however, there were other factors that made the following more serious. For example, during this period of time, the homes of some nonstrikers were being vandalized.

[149] This temporary blocking is not serious conduct under Board law. *Owen Joist Corp.*, 248 NLRB 589 (1980).

[150] On cross-examination, Alferos admitted throwing eggs at buses about six times as the buses were entering or leaving the yard. Although not appearing to be serious under Board law anyway, I decline to consider this evidence, because it does not appear she was denied reinstatement in whole or in part for this misconduct.

[151] The case was ultimately dismissed in court because, according to O'Brien, the judge felt a lot of people were throwing eggs and Amador should not be singled out.

[152] Unlike Baker, Lilly did not appear at the hearing to testify. I will consider his absence from the case as raising an adverse inference against him.

Zemba and Schultz were also chased by Baker and Lilly on motorcycles. This occurred on the second or third day of the strike, continuing for several miles, with Baker and Lilly following closely behind. Zemba finally had to go through a red light to lose them. In addition, several times, Baker and Lilly rocked Zemba's car as he was attempting to leave the yard. Both strikers made countless serious threats to harm Zemba and members of his family.

According to nonstriker Mitch Cohee, Baker and Lilly both spit on him as he walked through the line on October 7.[154]

Based on the totality of the evidence above, I find that neither Baker nor Lilly is entitled to reinstatement and backpay.

h. *Karen Balding*

During the course of the strike, Balding called Zemba names such as "Baldy," "Asshole," and "idiot." She referred to Harrison on several occasions, while on the picket line, as "Zemba's mistress." In addition to this misconduct, Balding participated in some hitting of vehicles, but there is no evidence that damage was caused. Finally, Balding participated with others in the picket line in blocking of buses and vehicles for short periods of time. Based on the totality of the evidence above, which I can only characterize as patently trivial, Balding is entitled to reinstatement and backpay.

i. *Janel Bock*

Some of Bock's actions on the picket line were petty and trivial. She opened emergency doors on buses, and stood in front of nonstriker Clayough's bus while shouting, "hit me, you bitch and see what happens." As buses came through the line, she would frequently whack them with her picket sign, but causing no damage. To Zemba, she threatened, "your life is short, you are not going to be around any more." She told Kitty O'Brien that she had better know where her kids are.[155] These threats were unaccompanied by any gestures or movement that would provide additional emphasis.

Other acts of Bock were more serious. For example, on one occasion, she threatened to get Zemba's camera and smash it into his face. On another occasion, she caused some minor damage by throwing rocks at the car of nonstriker Swick while he was stopped for a light. This caused slight nicks in his car.[156] Bock also broke the handle of a truck owned by nonstriker Reese, although this damage seemed to be inadvertent.

Bock was 28 years old and described herself as a clown on the picket line. After she testified, Hokstad met her in the hallway of the Federal building and advised her as a friend that if she returned to work at Aztec, she might be in danger. This warning was based on Hokstad's perception of the mood of the nonstrikers who were angry at the strikers for their violent strike activities.

To the extent that Bock's activities present a close case, I am persuaded by Respondent's unfair labor practices and condonation of nonstriker activities that she is entitled to reinstatement and backpay and I so recommend.

j. *Ella "Jeannie" Boothe*

Prior to the strike, Boothe was involved in a bitter arbitration over discipline imposed as a result of an accident. At one point during this procedure, Zemba referred to Boothe as a "killer behind the wheel." Despite the opportunity provided by the strike to settle old scores, this did not occur. Some of the evidence relating to Booth concerns the alleged acts of her "husband." However, I find no reason to consider this evidence as there is no basis for attributing his acts to Boothe.[157]

After the August 23 Hokstad incident, Boothe threatened to kill Zemba or have her husband beat him up. These comments were made in the excitement of that moment and were not serious. To Harrison, Boothe made several comments of a suggestive nature, such as whether she was Zemba's mistress or asking was Zemba good. Finally, Boothe participated in blocking vehicles on 8 to 10 occasions for brief periods of time.

Based on the totality of the evidence above, Boothe is entitled to reinstatement and backpay.

k. *Donna Bozick*

Like the last witness, Bozick's spouse appeared on the picket line from time to time and allegedly committed certain acts of misconduct. I do not consider them, as there is no basis for attributing them to Bozick.

Bozick was on the picket line only until December 6, when she left due to medical problems, and did not return. Harrison was not aware of any misconduct and was uncertain why she had not been reinstated. Similarly, Zemba could not recall any reports of misconduct about her.

In disregarding the evidence attributed to her husband, I find virtually no misconduct attributable to her. I find that Zemba could not have held an honest belief that she had committed serious misconduct. She is clearly entitled to reinstatement and backpay.

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[153] When pulled over by a California Highway Patrol officer, riding on the bus to monitor Comfort's test, Lilly disobeyed the officer's order and sped away. Baker stayed and told the officer that he wanted to discuss the strike with a female passenger also riding on the bus.

[154] Later at the Jack-in-the-Box Restaurant, Cohee had a fist fight with Baker and Lilly. I disregard this incident entirely as it appears that Cohee was at least partly responsible for it.

[155] This statement is ambiguous and does not represent a clear threat.

[156] See *MP Industries*, 227 NLRB 1709, 1716 (1977). Although this conduct is not condoned, it is not serious enough to warrant discharge.

[157] Whenever a spouse of a striker is referred to, these spouses are either nonemployees or past employees unless otherwise stated. In this case, Boothe stated she had lived with a man for a long period of time but was not formally married to him.

l. *Phil Burkhart*

This striker was 22 years old at the hearing. He engaged in serious acts of misconduct during the course of the strike. In September, Harrison and a secretary named Cheryl Foti were walking through the line and Burkhart swung his picket sign at them, missing them by inches.[158] Then Burkhart said, "Oops, I almost didn't miss." Burkhart followed nonstriker Swick home on one occasion at night and threatened "to beat his ass." Another nonstriker named Whitehead was leaving the yard on one occasion on his motorcycle. Someone hit him in the back with two eggs. Then as he stopped for a light about one-half block away, Burkhart came running toward him.[159]

Burkhart made extensive, repeated, and serious threats to Zemba. He told Zemba that he was Corona's son and intended to kill him for her. On 50 to 60 occasions, Burkhart threatened to go to Zemba's home and kill everyone there.[160] In addition, Burkhart frequently blocked Zemba by walking in tight circles and delaying him for several minutes. Burkhart also made several remarks to Zemba about Harrison such as, "are you getting into Ellen." Finally, Burkhart threw eggs at buses and other vehicles about 10 to 15 times.

On the basis of all the evidence, I conclude that Burkhart is not entitled to reinstatement and backpay.

m. *Inez Camacho*

Much of the evidence involving this striker concerned his dog, which because of its notoriety was brought into the hearing room. The dog stood 2-1/2 to 3 feet tall and weighed between 60–70 pounds. Comacho frequently took the unleashed dog to the picket line and would threaten to have the dog attack Zemba. Once in Zemba's presence, he told the dog to go "piss" on Zemba. There is no credible evidence the dog actually attacked anyone or obeyed any other ill-advised command. In the hearing, the dog was friendly and playful even though the room was warm and filled with strange people. Besides using the dog in the manner indicated, Comacho engaged in blocking of vehicles for brief periods and hitting of buses without causing damage as they entered the yard.

Nonstriker Hoffman testified that Comacho was out jogging once while she sat in a parked bus. He ran onto the bus and told her that he would not hurt her or throw rocks at the bus, because it was she. It is hard to believe that assurances against misconduct itself constitutes misconduct. Another nonstriker, Hokstad, also testified. Once Comacho said to him as he was about to begin a bus run for the day, "You're at work and your wife is at home alone and you'd better think about that." On another occasion, Hokstad was coming to work climbing the back fence thereby avoiding the pickets. He was confronted by Comacho and his dog. Comacho stated if you come back over the back fence, he would "kick his ass."

None of this misconduct including the threat to Hokstad is serious enough to bar reinstatement. I recommend that he be reinstated with backpay.

n. *John Chasteen*

As the last striker was accused of misconduct involving his dog around the picket line, this striker occasionally used one or more hand puppets on the line. Using the puppets, Chasteen frequently threatened Zemba by saying, "You will be dead, I'll kill you." Chasteen also used a puppet to call Zemba names such as "asshole" and "motherfucker," and to ask, "What was Ellen like." Like Zemba, Schultz was also threatened when Chasteen, through the puppet said, "Sooner or later, we'll get you." The use of the puppet in the manner described above detracted from the seriousness of the conduct and seemed to me more for the amusement of the other pickets than any other purpose.

Another incident involved nonstriker Whitehead who was followed in his bus by two cars containing strikers. When the cars passed him, they slowed down, impeding his progress. Chasteen was in one of these cars and a man named Barker was in another. This former striker, Barker, decided at some point to cross the picket line and return to work, when Zemba either knew or should have known of his misconduct involving Whitehead's bus. It is unnecessary to evaluate Chasteen's misconduct with regard to the bus; because Zemba took Barker back, he condoned the misconduct.[161]

Based on my review of all the evidence regarding Chasteen, including some minor blocking of vehicles, I conclude he is entitled to reinstatement and backpay.

o. *Jan Corona*

As has been noted earlier, this striker was chief shop steward, and was the highest ranking union official employed at Aztec. In accord with my understanding of Board law, I am not to weigh in aggravation of her misconduct, the fact of her union status.[162] Accordingly, I do not consider this fact.[163]

I also must disregard for different reasons, the testimony of nonstriker Dugent, who testified that Corona, wearing a blond wig, struck and broke his headlight, by swinging a picket sign as he drove through the picket line. Because there is no evidence that Corona ever wore a blond wig to the picket line, I do not find the testimony of Dugent to be reliable.

Also, to place Corona's misconduct in proper context, I do consider evidence involving Corona prior to the strike, such as a bitter personal attack by Zemba against her during a bargaining session. In addition, Zemba attempted to restrict Corona's access to Aztec personnel files and administrative offices, thereby obstructing the Union's right to gather information for the processing and filing of grievances.[164] From other remarks Zemba made to Reynolds and Patton about her, it appears that Zemba's hostility in large part was directed at Corona's life style and sexual preferences.[165] Keeping all this in mind, I turn to review Corona's activities.

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[158] The picket signs were attached to fairly good-sized pieces of wood. (See G.C. Exhs. 62 and 63.) Although there is conflict about the exact size, it suffices to say that a person swinging a picket stick at another which just misses would cause great fear in the putative target.

[159] Whitehead then pulled around the corner and offered to fight Burkhardt. I do not condone this, but still find some misconduct by Burkhart in the incident that I must consider.

[160] Zemba's address was in the telephone directory and a matter of common knowledge.

[161] *Retail Store Union v. NLRB*, 466 F.2d 380, 385–386 (D.C. Cir. 1972).

[162] *Hammermill Paper Co.*, 252 NLRB 1236 (1980), enfd. 658 F.2d 155 (3d Cir. 1981). Cf. *Szewczuga v. NLRB*, 686 F.2d 962 (D.C. Cir. 1982).

[163] In this case, Corona was the only Aztec striker to be on salary from the Union during the strike as opposed to merely receiving strike benefits. She received $6.25 per hour for 40 hours or more per week. In my opinion, this fact would not change the rule that her status as a union official should not be considered by me.

To begin, there is little question that Corona made no serious effort to control the misconduct on the line. The Union kept a running log of day-to-day activities. Despite numerous incidents of picket misconduct, there is no evidence that any incident was recorded or of union discipline of any picket. Corona frequently gave oral instructions regarding forbidden conduct. For example, she told strikers not to throw eggs. However, the strikers ignored her orders with impunity, particularly since the picket captains appointed by her were not recording or otherwise not reporting incidents of misconduct and, in some cases, were committing multiple acts of misconduct themselves. On occasion, she ordered an intoxicated striker to leave the line and the person left. However, this type of control occurred infrequently. I make these findings above, in case higher authority finds that I erred in disregarding Corona's union status.

At the very beginning of the strike, Corona and Yelkey prevented a mechanic from coming to work. However, the mechanic never testified and the credible evidence does not show that unlawful means were used to deter the mechanic from entering the yard. On another occasion, Corona told Zemba that she was coming over to his house to picket. This never occurred, even though she publicized Zemba's address on the line. Because the address was public and no misconduct was threatened, I fail to see how this was misconduct at all.[166]

Another nonstriker named O'Brien testified that a small child threw eggs at her car and then got into Corona's vehicle. I cannot credit this testimony because I do not believe the child was Corona's—her children were much older. Even if the child got into Corona's vehicle, this is an inadequate basis to impute this misconduct to Corona.

Based on the totality of all the evidence regarding this striker summarized above, including Respondent's provocation, I must conclude that Corona is entitled to reinstatement and backpay.

p. *Michael Doering*

On the first night of the strike, Doering called to Zemba to come out so Doering could beat his "ass." This was followed later by several threats regarding Zemba's family such as, "You won't have your family to return to" and "Your family has been taken care of." After George's attack on Zemba, Doering stated, "We'll get you for sure next time."

This striker was one of the most active egg throwers on the picket line. He threw an egg at a moving schoolbus in October and Schultz subsequently testified against him in local court for committing this act. There Doering was convicted of malicious mischief.[167] Similarly, Doering stood in front of Hokstad's bus as it was exiting from the yard and threw several eggs at the windshield. Doering told the Board agent in an affidavit that he had not thrown any eggs. For this reason, and because Doering was exceptionally evasive in his testimony, I found his credibility to be very low. Although the throwing of eggs at moving vehicles seems to me an inherently dangerous activity, the Board takes a more tolerant attitude toward this activity.[168] I am, of course, bound by Board law. However, I will at least consider these episodes as factors in reaching my ultimate decision on the totality of the evidence.[169]

Doering made a number of comments to people that were calculated to lead to violence. He told the husband of a nonstriking female employee as the two rode out of the yard that the husband had a sexual disease. Doering referred to Zemba as a "fucking Jew." He asked Zemba, "How was Ellen to lay" and referred to Zemba and Harrison as they crossed the line as "cock-suckers." On one occasion, Doering refused to stop blocking the Aztec yard entrance until he was physically pushed back by police. As buses entered or exited the yard, Doering frequently struck the bus and in some cases the windshield with his picket stick. However, there is no evidence that any damage was done.

Finally, on at least two occasions, Doering called O'Brien, a nonstriker at work, and the first time stated, "We know where you live and we're going to get you." The second time, Doering muttered obscenities. Based on the totality of the evidence regarding Doering's misconduct, I conclude he is not entitled to reinstatement and backpay.[170]

q. *James Fenderson*

On the second day of the strike, Fenderson asked Zemba to come out so Fenderson could "whip his ass."

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[164] According to Zemba, Corona made several remarks shortly after the strike began, such as that it was her turn to get him for his statements about her at the bargaining table. Although I find she made these remarks, she never used a gesture or other action to give credence to her threat. Under the circumstances, I do not regard her remarks as serious misconduct.

[165] As an example of Zemba's hostility to Corona, he testified that she had some connection to the Mexican underworld in Tijuana. There was no credible evidence whatsoever to support this conclusion.

[166] I make no finding about whether such picketing would have violated state law, because it never occurred.

[167] Doering testified this conviction was reversed on appeal.

[168] *MP Industries*, 227 NLRB 1709 (1977).

[169] It was represented at the hearing that throwing objects at a schoolbus is a violation of California state law, whether the bus is occupied or not occupied with children. Even if true, it does not appear that state law woud supercede the Board's rulings regarding the throwing of eggs at vehicles, including schoolbuses.

[170] Some of the evidence regarding this striker concerned articles written by him that were critical of Aztec and that were published in a small newspaper during the strike. At the hearing, Doering invoked the fifth amendment in response to certain questions about his activities on the picket line. None of the incidents referred to in this footnote was a factor in my decision regarding his reinstatement.

The same remark was made to a nonstriker named Swick. Once when Zemba was leaving the yard, he said to Zemba, "Stop your car and get out, I'm going to take care of you." On a few occasions, Fenderson also opened emergency doors of buses and slapped at buses with his sign as they went through the line. No damage resulted.

At the hearing, Fenderson was most notable for his testimony regarding an altercation between strikers Stoker and Amador and nonstrikers Swadner and Fortner in Chula Vista. His evidence on that subject will be summarized in a discussion of Stoker's case, below. Despite the fact that Stoker was his friend, Fenderson did not involve himself in the incident.

At the time of the strike, Fenderson had a grievance pending against Aztec. Although I cannot find that the grievance was the cause of his failure to be reinstated, I do find based on the totality of the evidence that his misconduct was trivial. Accordingly, I find that he should be reinstated with backpay.

r. *Patricia Fowler*

In December, Fowler had an operation on her leg and was forced to use crutches in order to move about. All or most of the evidence against her is for a period of time prior to December. When the strike started, she was a picket captain on the 4 p.m. to midnight shift, and again, I do not consider that fact in aggravation.

In her role as picket captain, Fowler played a central role in not only committing acts of misconduct herself, but also encouraging others to do the same. Once Gordon Hall, a union officer, dropped off eggs to the picket line and Fowler shouted, with delight, "Our ammunition has arrived." In fact, she threw an egg at Cohee's van, but apparently she missed. In Chula Vista, Fowler asked nonstriker Claybough to fight her, "one on one." As nonstriker Hewin was attempting to drive her vehicle out of the yard after work, Fowler stood in front of the vehicle to block it, while striker Linda Peckron spit through the open window into the face of Hewin. Under the circumstances, I impute Peckron's conduct to Fowler.

In a similar incident, where Fowler acted as part of a team of errant strikers, she tried to open the door of nonstriker Swick's vehicle, thereby distracting him. Then strikers Peckron and Lilly threw hot liquid on him through an open window. On another occasion, Fowler opened the door of a bus being driven by nonstriker Law, and Peckron threw an egg into it. Due to this pattern, I find in all these incidents that she has responsibility for them as she was acting in concert with the other strikers. As a driver walked through the picket line, Fowler swung her sign at him, but missed.

Zemba and Harrison were the targets of repeated threats and sexual comments as they went into and left the yard. Zemba was told 20 to 30 times, "You will be dead by September"; "you are going to be killed," "your family is going to be killed," and similar such statements. Fowler said to Harrison on many occasions, "You are dead meat." As to sexual comments, Fowler asked Zemba, "Does Ellen [Harrison] give good head?" "Are you eating Ellen?" Then to Harrison, Folwer asked repeatedly, "Did you get hired because of what you have between your legs?"

Fowler was a member of a group of female pickets who frequently changed sexual slogans on the line—directed to Harrison who was either attempting to cross the line or somewhere nearby. These slogans, some with Lesbian content were repeated over and over and over. An example, "Come out, Ellen, we've got something for you," or "She's Connie's meat."[171]

Unlike other strikers who blocked vehicles for brief periods, Fowler blocked vehicles for extended periods, such as 15 to 20 and sometimes 30 minutes. On two occasions, she had to be moved by police force before a vehicle could move. She admitted blocking nonstriker Swadner for 25 minutes one night.

Fowler worked double picket shifts on most days for no extra money. In light of her extensive misconduct, it is not surprising that she became involved in direct confrontations with nonstrikers. Dugent, for example, threatened her with a crowbar after someone hit his car with an egg. I have considered all such evidence as well as evidence of Fowler's misconduct and conclude on the basis of the totality of the evidence, that she is not entitled to reinstatement nor backpay.

s. *Dale Fox*

This striker was perhaps the most credible striker at the hearing. While on strike, he received his final paycheck and determined that he had been overpaid in vacation pay. He returned the $200 overpayment and, at hearing, produced a $200 canceled check to prove it. Married, with four children, the witness is a candidate for the ministry and youth director at a local Baptist church.

His alleged "misconduct" consisted of a few calls to the Aztec office during the strike to engage management in a conversation about the issues in the strike. Another time, Zemba walked through the line and the witness shouted, "I know where you're going, Zemba's going to pee . . ." In another telephone call to Zemba, after the incident with Brenda Leonard, Fox called Zemba a "murderer" and said Zemba would die for that.

On the basis of the totality of the evidence, Fox is clearly entitled to reinstatement and backpay. If what Fox did was misconduct, it is so trivial as to deserve little time and effort.

t. *Fred Franz*

Within the first 3 weeks of the strike Franz spit on a car driven by nonstriker O'Brien. This act is considerably different than spitting on an individual and much less severe.[172] In late September, Franz apparently mistook a female customer of Aztec for a new job applicant. As she crossed the picket line, Franz shouted, "You cocksuckers are taking our jobs away from us and we'll get you."[173] Franz frequently called Zemba a "prick" as he walked or drove through the line. Once he used this term and asked Zemba why he did not answer his phone at night. At this time Zemba was receiving a number of harassing phone calls at his home. Franz' comment does not show that he was making the calls and there is no other evidence on the matter.

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[171] I have reviewed the cases of *A. Duie Pyle, Inc.*, 263 NLRB 744 (1982), and *Georgia Kraft Co.*, 258 NLRB 908 (1981). In those cases, the Board has stated its policy regarding threats and verbal taunts of a sexual and obscene nature, finding them generally to be insufficiently serious to deny reinstatement. These cases do not apply to Fowler and other strikers such as Jellison and Lindemann. (1) In most or all the affected strikers, there was additional misconduct committed; (2) where the threats and sexual statements were made, the statements were repeated, blatant, and flagrant and not to be confused with mere name-calling; and (3) the comments seem to me calculated to provoke violence on the part of the targets. See *Carither's Stores*, 262 NLRB 1381 (1982).

Franz also made comments to Zemba of a sexual nature, but these were primarily suggestive rather than patent obscenities. He asked Zemba, for example, "Are you making all the women happy?" Franz was arrested by the San Diego Police Department and later convicted of the "crime" of blocking the sidewalk. He was sentenced to time served (about 15 hours in jail). Franz also engaged in some limited blocking of vehicles and other petty harassment.

In mid-October, Franz, age 57 years old, suffered a heart attack and essentially left the picket line permanently. I consider his ill-advised name calling a relic of his former career in the Navy from which he is now retired. None of his activities are serious enough to preclude his reinstatement and I recommend that he be put back to work with backpay.[174]

u. *Donna Friege*

Some of the evidence presented here related to the activities of Friege's husband, an active duty Navy man. I do not consider any of his activities relevant to the question of whether Friege should return to work.

Like her husband, Freige, herself, was connected to the Navy Reserve in an active duty capacity during at least part of the strike. Among other acts she committed was "giving the finger" to nonstriker Hoffman as she drove her bus past Friege. Friege also told two nonstrikers, Hoffman and Whitton, that they would get them. To Zemba, she stated that her husband would get him. She asked Zemba whether he was keeping "Ellen [Harrison] and Flo [Ybarra]" happy.

In the first 2 weeks of the strike, Friege hit O'Brien's bus with a large picket sign, but there is no indication of damage occurring. Freige also engaged in petty acts such as opening emergency doors, and giving unsafe signals to buses as they exited from the yard.

Perhaps the highlight of Friege's testimony was her account of a picket line brawl involving herself, her husband, and a nonstriker named Jacobson, who never testified. Friege's colorful testimony involved pinching, slapping, stepping on glasses and breaking them, and stealing keys from the car of one of the participants. As the police who arrived on the scene, heard each side's account, and left without arresting anyone while shaking their heads, I decline to detail Friege's account and apportion blame. It appears each side was partly responsible. I can find nothing in the incident to affect Friege's reinstatement. Indeed, in considering the totality of Friege's conduct, I must conclude that she is entitled to reinstatement and backpay.

v. *Stuart Grossman*

When the strike started, Grossman was on vacation and he did not return to work during the strike. Zemba was vague as to him, thinking he may have possibly resigned.

Grossman engaged in some limited blocking of vehicles and hit buses occasionally as they went by the picket line. I question Zemba's good-faith belief that Grossman was guilty of serious misconduct. He is clearly entitled to reinstatement and backpay on this record.

w. *Angel Huezo*

This striker did not testify at the hearing. A single witness, Zemba, provided the basis for failing to reinstate Huezo. Although Huezo engaged in some blocking of vehicles, there were two primary acts described by Zemba. During the second week of the strike, Zemba observed Huezo with an object in his hand running alongside a highway coach bus as it pulled into the yard. After the bus parked, Zemba noticed a long scratch mark on the side of the bus, about 2-feet long, which had not been there before. The other major incident was a threat that Huezo stated to Zemba, to get Zemba's son. Huenzo knew Zemba's son, as both had attended the same suburban San Diego high school together.

Although the cost of repairing the damage to the bus was not stated, the deliberate and malicious act that Huezo committed is serious misconduct.[175] In addition, the threat against Zemba's son, who was known to Huezo, is serious. I find, based on the totality of the evidence, that Huezo is not entitled to reinstatement and backpay.[176]

x. *Colleen Jellison*

This witness was another member of a group of female strikers who repeatedly chanted sexual slurs directed to Harrison: "Come out . . . we have something for you . . . it won't hurt . . . it's better than Zemba's cock." In addition, Jellison directed comments toward Harrison such as, she wants to get into Ellen, Ellen is her "meat," and referring to Ellen as a "cocksucker." Jellison also told Ellen, "Zemba is screwing other women, aren't you jealous." These remarks were usually directed to Zemba and Harrison as they crossed the picket line and were frequent. About six times, Jellison turned her posterior to Zemba, and stated, "Kiss my ass."

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[172] See *Associated Grocers of New England*, 227 NLRB 1200, 1207 (1977), enf. granted in part, denied in part, and remanded in part 563 F.2d 1333 (1st Cir. 1977).

[173] Franz and another striker named Lindemann were accused of frequently referring to Zemba, nonstrikers, or others, as "cocksuckers." In what I consider to be patently frivolous testimony, they both testified they were really using the term "copsucker" or some other nonsense variation of the word in question.

[174] I offer no opinion as to Franz' current physical condition or capacity to return to work. I leave these matters for compliance.

[175] Compare *Coronet Casuals*, 207 NLRB 304, 307 (1973).

[176] In further support of my conclusion, I draw an adverse inference from Huezo's failure to testify without explanation.

Jellison called Schultz a "fucking liar" and threatened to get him. In addition, Jellison engaged in blocking of vehicles for up to 15 minutes, hit buses as they went through the line, and tried to open doors to buses.

This 29-year-old striker was the former roommate of striker George whose case was considered above. Although mere foul and vile language is not generally disqualifying, in this case, I hold that the repeated and repulsive nature of the remarks directed to Harrison, together with the blocking and other petty acts of harassment, make Jellison unfit for reinstatement and backpay. I will so recommend to the Board.

y. *John Kipple*

In early September, Schultz was attempting to enter the Aztec yard when he was blocked by Kipple and others for 20–25 minutes. Several other persons were blocked by Kipple as well, Swick for example. In addition, Kipple either threatened to kick Swick's "ass" or invited him out of his car to fight with Kipple. As Ingersoll was attempting to drive through the line, Kipple and another striker pounded on the fender of Ingersoll's car and dented it. In concert with Shelton, Kipple broke a gate in the Aztec fence. In mid-December, Kipple committed still another act of vandalism by breaking a bus windshield wiper off. On another occasion, Ingersoll was attempting to go through the line to work with his car window open. Kipple threw a cup of beer in Ingersoll's face.

In addition to vandalism, Kipple made vile and repulsive remarks on the line. To Harrison, he asked, four or five times, "Do you like sucking Zemba's cock"; "How do you like sleeping with the boss."[177]

Kipple was 35 years old at the time of the hearing. A college graduate, he was then a graduate student of the University of California at San Diego. During the strike he threw eggs at buses 20 to 30 times, explaining that, in his opinion, this activity was harmless and an appropriate release of tension and energy. In his statements to a Board agent prior to the hearing, Kipple refused to answer certain questions about the throwing of eggs while denying he hit vehicles with his picket sign. At hearing, he admitted hitting vehicles with his sign on two occasions.

Zemba also had several encounters with Kipple. Once Zemba was jogging about 2-3/4 miles from his home in La Jolla. Kipple pulled up in a car and yelled, "you son of a bitch, we'll get you." Other threats were directed to Zemba on three or four occasions. Another striker named Ondrechen confronted Zemba with the pointed end of his picket sign and Kipple told Ondrechen to shove it into Zemba's face. Finally, Kipple enjoyed walking close behind Zemba as the latter walked to the Jack-in-the-Box Restaurant. On one occasion, Kipple pushed ahead of Zemba in line, but never ordered food.

Based on a totality of the above evidence, I find without any doubt whatsoever, that Kipple is not entitled to reinstatement or to backpay.

z. *Michael Kirkpatrick*

During the strike this striker engaged in a number of unusual activities; for example, he took a hand-held spotlight and shined it into the Aztec yard at night. When the police ordered him to disconnect it, he complied. In addition, Kirkpatrick climbed the roof of an adjoining building and used a slingshot to shoot marbles[178] into the Aztec yard. One almost hit Schultz. Other marbles were thrown at Zemba by Kirkpatrick. He also threw rocks into the yard that hit an Aztec building. (R. Exh. 70.) These are serious acts of misconduct, because even though no injury or damage resulted, the activity was inherently dangerous.[179] Other times, Kirkpatrick was seen on the roof with fieldglasses observing the yard.

Kirkpatrick engaged in other provocative behavior. For example, at the Jack-in-the-Box Restaurant, he would, on occasion, sit in an adjacent booth to where Zemba and other Aztec managers were seated. Then Kirkpatrick placed a hot cup of coffee on the ledge separating the two booths and slowly began to push the coffee cup toward Zemba.[180]

On two separate occasions, Kirkpatrick followed nonstrikers home. Driving in his personal car, Kirkpatrick followed Swick to his home during the first week of the strike. Another time, Kirkpatrick was in a van driven by striker Connie Murphy. They followed Zemba, Harrison, and another person for about 7 miles. At times, the van followed closely behind Zemba's car.

I find this striker to have engaged in repeated acts of serious misconduct. Based on the totality of the evidence, he is not entitled to reinstatement and backpay.

aa. *Glen Klock*

Neither Zemba nor Harrison knew very much about this striker. Nonstriker Claybough testified he hit her bus with a sign. Picketing in Chula Vista, Klock was once hit by a bus mirror when he could not get out of the way of a speeding bus. He was not seriously injured.

Not only is there virtually no misconduct at all, not to mention serious misconduct, I find also no basis for even a good-faith belief that Klock engaged in strike misconduct.[181] He is clearly entitled to reinstatement and backpay.

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[177] When Harrison was asked to testify to the remarks of Kipple, she became distraught and was unable to continue for a time. I took a brief recess for her to compose herself. When she returned, she finally gave the relevant testimony. I watched her closely. She trembled with fear and embarrassment and wept on the witness stand as she recounted the remarks of Kipple and another striker, Lindemann. Harrison had a prior background as an administrator for a fine arts museum and before that she worked as a comptroller for 6 years for a manufacturing plant. I cannot conclude that she was an unusually fragile person. I do conclude that she was deeply affected by the language directed at her and Zemba, in her presence. She was verbally assaulted by the remarks and there was emotional injury.

[178] The marbles were about 1 inch in diameter and weighed about 1.5 ounces. (R. Exh. 68.)

[179] *Alcan Aluminum Corp.*, 214 NLRB 236, 248 (1974); *Ohio Power Co.*, 216 NLRB 348, 349–350, 354 (1975).

[180] Kirkpatrick admitted doing this and when I asked him why, he stated so that he would have more room to read his newspaper. When asked why he climbed up on the roof, Kirkpatrick answered that he wished to ask a workman some questions. I found this striker's credibility to be fairly low.

[181] Respondent contends that "reports" show that Klock intentionally laid down in front of a bus. This claim cannot be credited as no reliable evidence was presented to support it.

bb. *Ray Lindemann*

This striker repeatedly made comments to Harrison of a sexual nature such as, referring to her sucking Zemba's cock and "be sure and enjoy Zemba's cock."[182] Zemba reiterated Harrison's testimony and told of his own experiences with Lindemann's remarks. When Zemba returned on foot from the restaurant, Lindemann blocked the sidewalk, forcing Zemba to walk out in the street to get around him. At this time, Lindemann yelled, "Zemba you idiot, why didn't you try and go through me." In addition to this, Lindemann blocked buses for brief periods of time and struck buses, causing no damage. To nonstriker Hoffman, Lindemann leaned out of his car at a nearby restaurant and stated, "I'm going to get you, you'll get yours." Then he gave her the finger.

Essentially, this case presents the issue whether Lindemann's repeated sexual remarks to Harrison and Zemba will preclude his reinstatement.[183] This is not to discount the other matters described but they are trivial in nature. There is evidence to suggest that Lindemann harbored a personal grudge against Harrison and was attempting to settle old scores.[184] In any event, based on a totality of the credited evidence involving this striker, I find he should not be reinstated or receive backpay.

cc. *Barbara McPheron*

This striker was 31 years old and sister of another striker named Valerie Mendoza, whose case will be considered below. I find that she committed one of the most serious and dangerous acts of misconduct in the entire strike. About 1 or 2 weeks into the strike, Ingersoll was driving a van to work, with a number of nonstrikers in it, including his wife and daughter, then also working at Aztec. Proceeding along Mission Gorge Road in San Diego, Ingersoll was driving about 25–30 miles per hour with the side window on the driver's side open. Coming up on his left-hand side was a car owned by McPheron, who was riding as a passenger and driven by a former Aztec employee named Ruth Drake, who never testified at the hearing.[185] As Drake pulled alongside of Ingersoll's van, McPheron threw two eggs at him, hitting him on the side of the face with one and hitting inside of the van with the other. As Ingersoll's car was hit, he almost collided with the car in front of him. He heard laughter from McPheron as Drake turned left a few moments later.[186] I find that this act was extremely serious, and frought with potential for injury or even worse.[187] Moreover, I find that this act was not impulsive, but a planned attack by McPheron.

McPheron was also a member of a group of female pickets who repeatedly chanted sexual slogans at Harrison as previously indicated. She also told Harrison that "you would like a licking better than a fuck," or that you would like me better than Gus, or "Why don't you try me." These kind of remarks were also directed to other female nonstrikers. To Zemba, she engaged in name calling and bending over toward Zemba, telling him to kiss her "ass." Finally, McPheron also engaged in other conduct such as brief blocking, striking of buses with the picket signs, and opening emergency doors of buses. Based on the totality of the evidence regarding her conduct, I find that she is not entitled to reinstatement and backpay.

dd. *Linda McQueen*

This striker was still another member of the female chanters. She distinguished herself, in Zemba's mind, by exceeding even the low standards of sexual language set by some of the other strikers. I give credence to Zemba's testimony regarding her activities, because prior to the strike, McQueen had suffered an injury that precluded her employment as a busdriver. Rather than have McQueen receive workmen's compensation, Zemba assigned her a job in the office where she stayed for several weeks, doing dispatching and other office work. Zemba and Harrison knew her well.

To Zemba and Harrison, McQueen referred to eating Ellen's "pussy, finger fucking, Ellen is licking Zemba, and was Zemba fucking all the women." Nonstriking female employees Bevers, White, and Foti were asked by McQueen whether Zemba was "fucking" them. McQueen also bent over on occasion, telling Zemba to kiss her "ass."

Nonstriker Swick testified that McQueen threw rocks at his car, but no damage was indicated. Similarly, there was no apparent damage as she kicked the car of nonstriker Simard. On three or four occasions, she threw eggs at buses, but missed. On several occasions, McQueen threatened Zemba: on the first night of the strike, she stated that she would see that Zemba got killed. In addition, Zemba's family would be killed and so would he.

On several occasions, as Zemba walked to the Jack-in-the-Box Restaurant, she followed behind him on foot, calling him a "motherfucker" or yelling threats at him.

In evaluating the conduct of this witness, I consider her altercation with nonstriker Dave Smart, who threw her to the ground during an incident on the picket line.[188] McQueen provided some additional details on this incident. As Smart was driving through the line, McQueen "kind of kicked" the side of Smart's car. Then, after the incident, she was taken to Kaiser Hospital where she was found to be unhurt and received no treatment. As a result of this incident, McQueen claims that she developed paranoia, so that she could not go any place where men were. McQueen canceled her counseling sessions, however, and worked out the problem with a friend and through self-analysis. I do not believe any of this, about the alleged aftereffects of the Smart incident, not only because McQueen's testimony is contrary to common sense, but also because of her misconduct and provocation that I have summarized above. In looking to the totality of the evidence concerning her misconduct, I find that she is not entitled to reinstatement and backpay.

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[182] As Harrison was testifying to these matters, Lindemann entered the hearing room. I cannot adequately describe the witness' reaction: she recoiled with loathing and revulsion; she wept and asked that he be barred from the hearing room. The General Counsel objected to this and I denied the witness' request. After a recess, the witness returned and, while not completely composed, was able to continue.

[183] I have decided to discredit the testimony of nonstriker Langley, who testified that Lindemann threw coffee on him. In an admission against interest, Franz testified that he did this. I have not considered this misconduct against Franz because he also testified that this incident was an accident and I believed him. I am also discounting the testimony of nonstriker Reese who described a man on the line who looked like Lindemann with a rifle in his possession. This evidence was not reliable.

[184] He testified that before Harrison arrived, the Company operated informally as a close working group. Then she established complicated procedures which, after her arrival, caused communication problems.

[185] Similarly, Respondent never called any other witnesses who were passengers in Ingersoll's van.

[186] McPheron admitted throwing two eggs at Ingersoll's van, but denied hitting him in the face and denied that his vehicle was moving when she threw the eggs. I do not believe her version of events for a moment. She alluded in her testimony to an argument between Ingersoll and Drake that occurred a short time before the incident in question: in this argument, Ingersoll allegedly said to Drake, "Shut up, you fucking cunt; I take that back, you don't even have a cunt." With this as a background, McPheron denied stalking Ingersoll and claimed to have seen his van simply by accident. I reject this aspect of her testimony as well.

[187] *Indian Head Co.*, 239 NLRB 495, 498 (1978).

ee. *Valerie Mendoza*

In addition to being related to striker McPheron above, this striker was living during the strike with striker Roy Stoker, whose case will be considered below. While her case will rise or fall on her own actions, some of her misconduct was in concert with Stoker. For example, in late August, O'Brien was leaving the yard in her car to go home. In the car was O'Brien's husband and Hokstad and his wife. While driving on Mission Gorge Road, about 9:30 p.m., Stoker and Mendoza jumped from behind a parked car and threw eggs at O'Brien's car. Two eggs hit the windshield. Another incident concerned Claybough who was driving a bus in Chula Vista while being followed by a car containing Mendoza and Stoker.

At other times, Mendoza acted on her own. For example, in early January, Mendoza was seen by nonstrikers Comfort and King throwing rocks at employee cars parked inside the lot. She did this for 5-6 minutes and hit three cars, including a new Toyota pickup truck. As a result, she caused several paint chips and dents in the vehicles. Hokstad was involved in a major altercation with Stoker that did not include Mendoza. However, on two separate occasions, she threw lighted cigarettes through the window of Hokstad's vehicle as he attempted to drive through the line. One of these times, Hokstad momentarily lost control of his bus. While Hokstad was distracted with the cigarette, Mendoza also reached through the window and smashed a flash cube attachment on his camera. To Hancock, Mendoza asked who in the Company she was "fucking." Mendoza also threatened to kick the "ass" of Hancock and two other female office employees. As Hoffman's husband drove through the line in a new truck, Mendoza spit on the truck.

In December or January, Zemba complained to police that Mendoza was trespassing on Aztec property, and she was arrested. The next day, Mendoza bumped Zemba on the street with her shoulder and said, "Oh, I'm sorry, are you going to have me arrested?" When Harrison was nearby, Mendoza asked Zemba how he liked to "fuck Ellen." Another time in late August, Mendoza told Zemba, "You are fucking all the women and that's why you are able to keep them instead of having them leave the company." In addition to this, Mendoza participated in the blocking of buses for brief periods, opening schoolbus emergency doors and other such petty acts.

In evaluating the evidence against Mendoza, I also consider an incident where she was sprayed in the face with ammonia by nonstriker Neil Simmard. However, this incident does not redeem Mendoza from the consequence of her serious repeated acts of misconduct. I find that she is not entitled to reinstatement and backpay.

ff. *Roy Stoker*

This striker was guilty of perhaps more major violent incidents than any other striker. First, he committed two physical assaults on nonstrikers. A day or so after the incident with Brenda Leonard, Hokstad drove up to the picket line with a friend who testified at the hearing and corroborated Hokstad's testimony. Stoker walked over to the car in which Hokstad was sitting and hit him in the face with a half fist or straight arm. This caused a cut and abrasions on Hokstad's face and caused his glasses to fly into the back seat.[189] In another incident, this time in Chula Vista, Swadner and Fortner were sitting in a bus listening to the tape-recording of a speech made by a company official. Stoker came up to the side of the bus and put his hand through, saying, "I'm going to take that fucking tape recorder and jam it up your fucking ass." At this time, Swadner slammed the window on Stoker's hand. Stoker then ran to the front of the bus, entered it, and while Fortner and two passengers watched, he struck Swadner in the jaw and knocked him down. Then Stoker beat on Swadner's head and kicked him in his back and ribs. Stoker then left the area quickly while Swadner called the police.[190] When the matter reached court, Stoker was convicted by a jury of another charge and Swadner's charge was dropped. These two incidents are extremely serious misconduct that would justify failure to reinstate,[191] but there is much more.

The other charge of which Stoker was convicted was malicious mischief committed on September 18, when Stoker broke the back window on Claybough's bus with his picket sign. He was sentenced to 1-year probation, $175 fine, and restitution. After his arrest, Stoker said to Claybough, "Why don't you have me arrested again and I'll pay you a personal visit at your home." This threat was taken seriously. During the strike, Claybough's adult daughter and sometimes the daughter's husband rode with Claybough on her bus route for 8 hours a day every day. Prior to this, Stoker had boarded a transit bus in Chula Vista that Claybough was driving and told passengers they did not have good sense to ride with a "fat-assed" lady that could not get behind the steering wheel.

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[188] I also consider the fact that McQueen is a defendant in a civil suit brought against her by nonstriker named Churning, who did not testify in the instant case. The cause of action is based on the alleged blocking of Churning's bus in the middle of the street.

[189] This misconduct is by itself sufficient for discharge. *Kane-Miller Corp.*, 259 NLRB 1075 (1982).

[190] Swadner and Hokstad are both suing Stoker separately as a result of these incidents.

[191] *Giddings & Lewis, Inc.*, 240 NLRB 441 (1979); *W. C. McQuaide*, 220 NLRB 593, 594 (1975), enfd. as to this point 552 F.2d 519 (3d Cir. 1977).

It is unnecessary to restate Stoker's misconduct described with Mendoza above. However, Stoker, by himself, threw a football at O'Brien's windshield of her bus, but this did no damage. A few minutes after the strike began, Stoker and another person were seen kicking in the right side of a nonstriker's car by a witness named Golding. The car belonged to Golding's father-in-law and the fender was badly damaged.

Zemba too had personal experiences with Stoker. Once, he observed Stoker throw a bag of grease against a windshield of a bus. When Zemba walked to the Jack-in-the-Box Restaurant, Stoker followed saying, "You're not going to return; we'll get you."

The evidence against Stoker is so overwhelming and so clear and convincing that I hardly need to say that he is not entitled to reinstatement or backpay.

gg. *Kiernon (Gene) Moore*

The primary accusation against this striker concerns the alleged placing of black plaster of Paris containers containing copper tubing tire puncture devices in the path of buses in Chula Vista.[192] Both Zemba and Claybough testified on this subject: in late August, Zemba testified that he observed Moore, Ondrechen, and Pangilinan in Chula Vista at Broadway and H Streets. He observed the three persons placing the tubing under the tire of a bus. Before he could retrieve it, the three strikers took it away. Claybough testified that in the first month or so of the strike, she saw Moore leaning over a gutter with something in his hand. In the gutter was a piece of copper tubing. Claybough also once asked Moore to stop taking pictures of her and he answered, "I want to see what you look like after you're dead."

I cannot credit the testimony of Zemba and Claybough on this matter. The latter's testimony seems highly suspect. She never attempted to retrieve the device, merely leaving it in the gutter. Moore's mere proximity to the device does not show he placed it there. Similarly, I am unable to understand how three strikers could be placing the device in the curb as described by Zemba. Unlike Ondrechen and Pangilinan who have substantial other misconduct, Moore has no other serious misconduct against him that I am able to credit.

Moore did make occasional threats to Zemba at the Twain Avenue location such as "I'll get you for this," and, "You won't live too much longer." Later, Moore made a remark to Zemba that a lynch mob would get him. Moore also engaged in occasional brief blocking of vehicles and hitting of buses with fists and picket signs. Based on the totality of the credited testimony involving Moore, I conclude that he is entitled to reinstatement and backpay.

hh. *Joe Mountain*

Hoffman testified that during the strike she was blocked in by Mountain driving for another company. The incident happened at a local school where both drivers were picking up schoolchildren. Mountain was in front of Hoffman who could not back up because this is prohibited by law in a school zone. I credit Mountain's explanation that Hoffman's estimate of the time of 15 minutes was exaggerated and, in any event, Mountain could not pull up because of the presence of children crossing in front of his bus.

Zemba testified that on one occasion he asked Mountain to stop challenging nonstrikers to fight and that Mountain responded, "Go to hell." Then he challenged Zemba to a fight. Mountain also referred to Zemba as a "bastard," and said, "We're going to wreck you." No drivers testified who had supposedly been challenged to fight.[193] Mountain also engaged in the brief blocking of buses and, on one occasion, hit a bus as it entered the yard, but caused no damage. This and all other conduct attributed to Mountain was minor in nature. Based on the totality of the conduct attributed to him, I conclude that he is entitled to reinstatement and backpay.

ii. *Phillip Mulligan*

Prior to the strike, Mulligan was involved in a bitter arbitration dispute with Zemba that ultimately went into litigation. Perhaps because Mulligan was a college student during all or part of the strike, there is little evidence of any misconduct.

Zemba described two threats made to him by Mulligan. On the second or third day of the strike, Mulligan told Zemba that he would push Zemba underneath a bus at the picket line. In October or November, Mulligan threatened to run Zemba down if he saw Zemba on the street. O'Brien, too, was told by Mulligan many times, "You'll be sorry, we'll get you." In addition to this, Mulligan was seen opening schoolbus doors on several occasions and briefly blocking vehicles, including using the picket sign to block Zemba's view. Once he followed Zemba to a nearby restaurant on foot.

Based on the totality of the evidence against Mulligan, I conclude he is entitled to reinstatement and backpay.

jj. *Connie Murphy*

Beginning shortly after the strike began and continuing thereafter, this striker engaged in extensive and significant misconduct. Moreover, as will be demonstrated below, she was one of the least credible witnesses to be presented by either side.

When the strike began, some of the buses were still out. One of these late-arriving buses was driven by

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[192] Two other serious matters were implicated at hearing, one relied on by Respondent as part of the basis for discharge and one apparently not relied on. The first concerns an alleged assault against Mrs. Barba, wife of a nonstriker. Neither Mr. nor Mrs. Barba testified, and based on the only first-hand evidence presented at hearing, i.e., from Moore, I find that the evidence of the alleged assault is too tenuous and unreliable to consider. The second matter concerns alleged child molestation charges against Moore. Because this matter was not apparently relied on by Respondent, I do not evaluate the evidence, although I note that the evidence appears slim and lacking in merit to say the least. In both instances, I will disregard the evidence as it is unconvincing. I will base my decision on the other evidence of record.

[193] Mountain did describe an incident with Hokstad whom he challenged to a fight. This was after Hokstad blew a loud airhorn at Mountain and other pickets who had not had a full opportunity to clear a path for Hokstad's bus.

Cheryl Anderson, who never testified at the hearing. She left her bus on Twain Street in such a way as to obstruct traffic, especially due to the darkness. Then someone disabled the bus by pressing a certain switch that precluded the bus from starting in the normal way. When a nonstriker went out to the street to retrieve the bus, she could not start it and a mechanic was summoned. However, the mechanic would not start the bus because he was required to go to the rear of the bus, lift the cover to the engine compartment, and reset the switch. He could not do this because Murphy had driven her van flush up against the rear of the bus so the compartment door could not be opened. When Murphy could not be found to move her van, the police were called. Only when the police threatened to tow the van, did she emerge from the crowd of strikers and drive her van away. As she backed away, she almost struck Zemba, who was standing nearby. The incident lasted in excess of 30 minutes in the first hours of the strike.[194]

On August 26, Murphy threw eggs at a bus driven by O'Brien as it left the yard. The eggs struck the windshield and side of the bus and caused O'Brien's vision to be obstructed.[195]

Along with striker Kirkpatrick, Murphy, driving her van, followed Zemba, Harrison, and another person in a long chase. The next day Murphy said to Zemba, "We didn't get you that time, we'll get you next time."[196]

Harrison was a continual victim of Murphy's misconduct. Murphy made harassing calls to Harrison at home, saying that Harrison was "dead meat," and that "we are going to get you." The next day, Murphy asked her how she liked the phone calls. Murphy was also the leader of the female strikers who repeatedly chanted sexual slogans toward Harrison. These women referred to Harrison as "Connie's meat." Murphy shouted, "I'll show you how to make love, you're mine." References were made to Harrison's "cunt" and her "big ass." Murphy asked, "Are you enjoying Zemba's cock."

Finally, Murphy also blocked vehicles, gave Zemba the finger, and hit buses as they came through the line.[197]

Based on a totality of the evidence regarding Murphy, I find she is not entitled to reinstatement or backpay.

kk. *Brenda Myers*

This striker was seen by Schultz and Swick with a can opener-type instrument scratching it along the side of a bus, causing serious damage. As Hokstad was driving a bus into the yard, Myers threw eggs at and hit his front window, thereby obstructing his vision.[198] On another occasion, Swick was a passenger in a car leaving the yard, when Myers threw a rock at his head. He blocked the rock with his arm and the rock hit him there. This incident happened a few weeks after Swick had caused the arrest of Myers for scratching the side of a bus with a can opener. On that night, Swick was afraid to drive his car through the picket line due to the threats of the remaining pickets so he was forced to lay down in the back seat of a police car in order to get through the line.

As Ybarra was going through the line in a vehicle with her three daughters, ages 16 and 12-year-old twins, Myers shouted, "You're dead, you're through."

Myers was another member of a female group of pickets who constantly chanted sexual slogans directed to Harrison.[199] To Schultz, Myers said, "You ought to try women sometime, you wouldn't take it out on us then." A combination of threats and sexual comments were directed to the female office staff. To Cheryl Foti, Myers asked, "Is Zemba getting into you." Myers also said she would not make it through the line. To Bevers, Myers threatened to whip her "ass." Myers told Zemba that he and his family would be killed. As Zemba walked to the restaurant, Myers followed him by foot saying, "Look who's behind you, why are you walking so fast." Myers told Harrison that she would get her "ass."

In evaluating the totality of Myers' conduct, I am mindful of the threats made to her by nonstriker Reese, to beat the "shit" out of her. I am also mindful that Swadner sprayed her with ammonia although in a later trial for this conduct, Swadner was found not guilty. Finally, I note that Reese brandished a crowbar in her presence. Despite these incidents, which I find Myers provoked in whole or in part, I must conclude that her conduct is such that she is not entitled to reinstatement or to backpay.

ll. *Ron Norman*

This witness did not testify at hearing; however, an adverse inference is not drawn because the Union introduced evidence that his absence was due to a medical condition.[200] I similarly do not consider as evidence the fact that Norman is a defendant in a court suit brought by nonstriker Churning for alleged extended blocking of Churning's bus. The latter never testified and there is no other credible evidence on the point.

Schultz testified that once at a bus checkpoint, Norman said he ought to leave when buses did because there would not be anyone there to protect him. Norman threatened Zemba's life and promised to get him. Norman also engaged in brief blocking, opening of emergency doors, and striking of buses as they entered or exited the yard. No damage resulted.

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[194] In her affidavit to the Board agent, Murphy stated she had parked her van at all times to allow access to the rear compartment. In her testimony at hearing, she admitted having to back up before the mechanic could reset the switch.

[195] I disregard O'Brien's additional testimony about the alleged children of Murphy also throwing eggs. There is inadequate proof that the children were Murphy's or that they were acting under her direction and control.

[196] At hearing, Murphy admitted the incident following Zemba and the others for about 2 miles and stated she did it out of curiosity. In her statement to the Board agent, Murphy refused to answer any questions about this incident.

[197] In her affidavit to the Board agent, Murphy denied throwing eggs, but at the hearing, she admitted throwing a single egg at O'Brien's bus. Murphy also denied in her statement opening bus emergency doors, but at hearing admitted this activity on one occasion. Her rationale stated at hearing for pulling her van up flush behind the bus was to prevent accidents and not to obstruct movement of the bus. This testimony is totally incredible.

[198] While denying this incident, Myers did admit to throwing eggs at vehicles four times and on two occasions, bringing her own eggs to the picket line, a dozen each time. In her affidavit to the Board agent, she denied throwing eggs at all.

[199] Myers admitted saying to Harrison, "Did you get a raise by getting a rise."

[200] C.P. Exh. 28.

Based on the totality of the evidence against Norman, I conclude he is entitled to reinstatement and to backpay as none of his acts were serious misconduct.[201]

mm. *Steve Ondrechen*

This striker used abusive language toward Zemba, calling him a "cocksucker" and saying "fuck you" or "mother-fucker." On one occasion, these epithets were accompanied by action. Zemba was in his car attempting to leave the yard. Ondrechen took the sharpened end of his picket stick and poked it through the open car window, about 3-12 inches from Zemba's face. This continued for 15-20 seconds while Ondrechen yelled, "You Jew-bastard, I'm going to kill you."[202] Although Zemba was not Jewish, Ondrechen frequently referred to him as "mother-fucking Jew," a "Jew bastard," or "dirty Jew."

To Harrison, Ondrechen asked, "How do you like Zemba's cock." He also called her a "fucking whore." Claybough was told by Ondrechen that her life was not worth a plugged nickel and that she better watch her step.

Based on the totality of the evidence against this striker, I must conclude that he is not entitled to reinstatement and backpay.[203]

nn. *Marian "Susie" Osborne*

This striker committed various acts of misconduct that are not sufficient to preclude reinstatement. Nonstriker Huffman was told by Osborne that she would get her. Claybough was told by Osborne that she knew someone who would get her. Osborne also directed threats to Zemba such as, "Be careful where you go, you don't have too long to live." These and similar types of remarks were made to Zemba as Osborne and another striker followed him to the Jack-in-the-Box Restaurant.

In addition to these threats, Osborne engaged in name calling and sexual innuendoes. However, it is significant that Harrison, the usual target of these comments, was not sure who Osborne was or why she was not reinstated. Zemba, however, did recall Osborne. He was asked, "How do you like that whore," "How was Ellen to screw." Other female office employees were called "whore," and asked who in the office they were sleeping with. Osborne called Ellen Hoffman, a nonstriker, a "bitch" and asked her if she was still walking the street at night to make more money.

In addition to the usual brief blocking, Osborne blocked a bus for up to 20 minutes, according to Swick. However, this extended blocking was an isolated act. The threats were not accompanied by any overt act. After the single incident with Claybough referred to above, she was arrested, but never formally charged. The name-calling and sexual insults seem to me of a far lesser provocation than referred to with others such as Jellison and McQueen. Based on the totality of the evidence against Osborne, I find that she is entitled to reinstatement and backpay.

oo. *Agnes Pangilinan*

This striker was seen by Zemba, Schultz, Swick, and Harrison throwing nails on the driveway leading to the Aztec yard. (R. Exh. 60.)[204] Schultz described the nails as 1-1/2 inches long. No tires were damaged because company officials were able to pick up the nails shortly after Pangilinan threw them.[205] In addition to this rather convincing evidence of serious misconduct, there is still more evidence of other serious transgressions. About 2 months into the strike, Ellen Hoffman saw Pangilinan place a round plaster of Paris device with a spike sticking out of it in the Aztec driveway just before a bus entered. The bus ran over the object but the tire was not punctured. As described above, Zemba also observed this striker and two others in Chula Vista placing a similar object in a curb next to the tire of an Aztec bus.

Pangilinan also threatened Hoffman by forcing her picket stick into the window of a bus 3 inches from Hoffman's face, almost hitting the witness, and saying she hoped that Hoffman killed herself. Comfort described this striker as opening emergency doors on two occasions and Hewin described a threat to her as she was driving her bus from the Aztec yard. Pangilinan said, "You're going to die."

Pangilinan's denial of this misconduct was unconvincing. Unlike many of the other female strikers, she was small, only 5 feet 1 inch tall, and her speech was distinctive as she was born in Guam. There was no mistaking Pangilinan and the evidence against her was overwhelming. Based on the totality of the evidence against her, I find that she is not entitled to reinstatement and backpay.

pp. *Frank Patton*

A picket captain until October 13,[206] when he went into the hospital, Patton was accused of sundry acts of misconduct. In September, Zemba had Patton arrested for trespass. Patton told Schultz well into the strike that the trouble on the line would change from the night to the mornings. This statement seemed more like the conveying of information and not like a threat, particularly because Patton was not predicting anything in particular either from the pickets or from him, personally.

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[201] I leave to compliance the question of whether Norman is physically capable of performing his work and, if not, the determining of when he became disabled.

[202] Although either Harrison or Schultz was with Zemba at the time, neither testified to this incident, even though Zemba said at the time to those in the car to be sure and remember this. On Br. 136 fn. 80 the General Counsel notes this fact. I credit Zemba's testimony over Ondrechen's denial because even though I cannot account for the lack of corroborating testimony, it is not likely that anyone would fabricate an incident like this. Moreover, Zemba testified on this point with a credibility that made me believe him.

[203] In reaching this conclusion, I do not rely on Zemba's testimony that Ondrechen was one of three placing sharpened copper tubing near a bus tire in Chula Vista.

[204] Indeed, Zemba observed her committing these acts a total of three times.

[205] The Board has consistently held that the scattering of nails by a striking employee at the gates of a struck facility constitutes misconduct sufficient to warrant discharge. See *Giddings & Lewis, Inc.*, 240 NLRB 441 (1979); *Moore Business Forms*, 224 NLRB 393, 398 (1976), enfd. in part 574 F.2d 835 (5th Cir. 1978).

[206] Again, I do not consider Patton's status as an aggravating factor.

Dugent testified that Patton said he would get him. When Dugent attempted to report this remark to the police, the police would not accept the complaint. According to Hokstad, Patton said to him early in the strike, "We're going to put you in the hospital—your teeth will be wired shut for months." Hokstad testified to another alleged conversation with Patton, this at Disneyland, prior to the strike. Patton allegedly said that Hokstad might make it across the picket line once, but he would never make it through twice.

Patton denied the substance of these two conversations with Hokstad and I credit these denials and find the remarks were never made. At the hearing, Patton impressed me as a particularly calm and mature witness, not given to picket line rhetoric. He stands accused of relatively little misconduct which corroborates my impression at the hearing. Hokstad, on the other hand, was on occasion, a needlessly provocative antiunion employee, himself not free from misconduct. I simply do not believe this aspect of his testimony. Clearly, without Hokstad's testimony, there is no basis at all not to reinstate Patton. Even were I to credit Hokstad, I would still recommend that Patton be reinstated under Board law as the threats were not accompanied by any overt action and I would rely on Respondent's unfair labor practices and condonation, if this were a close case. It is not, and Patton should be reinstated with backpay.

qq. *Linda Peckron*

Peckron was one of the most vicious and violent strikers and was guilty of extensive serious misconduct. A major problem is where to begin. Kathy Hewin provided a telling episode as she drove up to the line in her car after work. It was a warm day and her window was down. Peckron approached her car and spit in her face.[207] This act was not an isolated act of impulsive misconduct. Witness what occurred next. As Hewin wiped the spit from her face, a cup holder from her car flew out of the window. She opened the door to retrieve it, putting her leg to the ground. Then Peckron, who stood 5 feet 8 inches tall and weighed between 250 and 300 pounds, began pushing against the door with Hewin's leg caught between the door and the frame of the car. Finally after several moments, Peckron released the pressure and allowed Hewin to get her leg back in the car and leave. Hewin's leg was bruised but she was not seriously injured.[208]

Peckron was also guilty of extensive egg throwing. Schultz saw her throw an egg inside a bus as it pulled through the line. A bus driven by Comfort was hit two times with eggs thrown by Peckron. Peckron also hit the windsheild of a bus driven by Cohee with an egg. A nonstriker named Estrada testified that Peckron threw an egg at his car after he had finished work. About 9 p.m. one night, Peckron and Fowler threw eggs at Harrison's car, hitting in on its trunk. Hewin, too, described how Peckron threw an egg and hit the windshield of her car as she went through the line. Peckron testified that she brought eggs to the line 5–10 times, about one dozen each time. Sometimes she also would pitch in to buy the eggs. Then the eggs would be kept in the car closest to the line. In addition to throwing eggs, Peckron threw a rock at the back of Hokstad's car as he drove through the line. No damage was done to the window, however.

Peckron also made the usual threats to get Zemba and his family and to do Ellen in. There was some sexual innuendo, but not explicit. For example, on several occasions, she asked Harrison if Zemba was good in bed. She engaged in extensive blocking of vehicles and opening of emergency doors.

Perhaps the most astounding circumstance of Peckeron's case, apart from the misconduct committed by her, is the fact that in early December, Peckron was named a picket captain. She replaced Fowler at this time and continued in this position for about 2 months. When named a picket captain, her proclivity for violent behavior must have been known to the Union. In any event, in evaluating her conduct, I have not considered her status as a picket captain in making my recommendation.

Based on the totality of the evidence against her, I find that Peckron is not entitled to reinstatement or to backpay.[209]

rr. *Tom Reynolds*

About Labor Day, Reynolds became a relief picket captain replacing Patton on one of the shifts. Again, I do not consider this fact. During the time on the picket line, Reynolds engaged in a variety of misconduct. He followed a bus driven by Hoffman to a golf course where she picked up pasengers. Then he left. Along with Kipple, Reynolds beat on Ingersoll's car as he drove through the line. This caused some minor dents in the fender. Once, as Cohee was driving through the line, Reynolds spit on a window of his van.

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[207] I have indicated my view earlier that spitting directly in a person's face is a serious provocative act that frequently generates a violent response. Cf. *Sea View Industries*, 127 NLRB 1402, 1430–1431, 1437 (1960).

[208] Two of Peckron's fellow strikers, Balding and Tom, and other witnesses for the Company, e.g., Ybarra and Swick, all testified to this incident. Not surprisingly, I do not believe Peckron's denials of this incident at all.

[209] Peckron testified to some instances of misconduct by nonstrikers, one of whom was a person named Dugent, who threatened pickets with a crowbar once. Witness this amazing testimony from Peckron, herself, which I credit:

> Q. [Mr. Geerdes] Had there been any contact between Mr. Dugent and the pickets prior to him arriving on the picket line with his crowbar?
>
> A. I'm sure when he came in that night that people were hollering and yelling at him. He was one that couldn't take that a whole lot. He got real fired up real quick.
>
> Q. Do you remember specifically what occurred when he came in that night.
>
> A. I don't remember specifically that night exactly what had been said, but Dugent was one that we liked to catch, because he did react. He reacted real violently, really funny. You know these were pretty hilarious to watch. [R. Tr. 7895.]

The witness went on to say that it was basically the same type of thing with nonstriker Reese. (R. Tr. 7896.) Thus, Peckron here is relating the scheme of the strikers to find nonstrikers with the least self-control and provoke them into violence. Because of this strategy of the strikers, I have not given great weight to the conduct of the nonstrikers.

Zemba's experience with Reynolds regarding misconduct consisted of an isolated incident in December or January 1981, where Reynolds deliberately bumped Zemba as the latter walked near the line. Zemba was not injured at all. Reynolds also used a hand-held spotlight to shine into the Aztec yard.[210]

According to Smeltzer, a nonstriker, he saw Reynolds throw eggs on two occasions. Reynolds denied this, but admitted delivering eggs to the picket line on two occasions, two dozen each time. The eggs were brought for people to throw. When he saw people with eggs, he made sure that he looked elsewhere. I credit Reynolds' denial that he never threw eggs himself. In Smeltzer's testimony he was less than certain on one of the two occasions cited. However, Reynolds' candid testimony regarding the bringing of the eggs to the line and aiding and abetting this activity makes it unlikely that he would fabricate denials of the throwing itself. I believe his testimony on this point.

Of course this leaves the bumping incident that I find was a minor and isolated incident. I have considered Reynolds' activities with the eggs and the other matters referred to above. I have not yet mentioned several instances of blocking for brief periods. Zemba seems to consider Reynolds a different breed from the repeated violence demonstrated by some other strikers. Zemba occasionally engaged Reynolds in conversation at the Jack-in-the-Box Restaurant. Moreover, the minor damage to Ingersoll's car and the spitting incident do not justify discharge. Based on a totality of the circumstances regarding Reynolds, I conclude that he is entitled to reinstatement and backpay.

ss. *Julia Richard and Susan Silvestri*

Like Baker and Lilly, these two strikers were so often together, it makes good sense to consider them together. Nonstriker Hoffman testified that both women called her "cocksucker" and blocked her from entering the Aztec yard. On one occasion, Richard swung her sign like a baseball bat and hit Hoffman's headlight, but did not damage it. Silverstri threw a rock at a bus driven by Hoffman but caused no damage.

A female nonstriker named Bevers testified that both strikers said they knew where they could find her. Both also threatened to kick Hancock's "ass." In September, Silvestri hit the door of a truck driven by Reese and, for this act, she was cited by the police. The driver's door was dented. Harrison described Richard and Silvestri following her to the restaurant, one on each side, and one said, "Oh, we don't want her anyway. She's Connie's [Murphy's] meat." On another occasion, the two women followed her, wondering out loud, "I wonder what she would do. Do you think we should try her." Once Silvestri said to Harrison, "You would like a licking better than a fuck."

Although Zemba could not place Richard, he did recall Silvestri following him on foot about 12 times. She said, "Ellen is dead meat." Silvestri also threatened to kill Zemba and his family on several occasions. Once Silvestri said to Zemba, "Hey, mother-fucker, where's your lover at. You won't be seeing her, because we've gotten rid of her." Silvestri also bent over and told Zemba to kiss her "ass" about 12 separate occasions.

Richard and Silvestri were roommates during the time of the strike. They usually were on the line at the same time, because only Richard had a car. Both women engaged in repeated blocking and striking of vehicles as they came through the line.

Despite the similarity in many respects of their conduct, it is clear that Silvestri was engaged in the more egregious conduct. As to Richard, I find without question she is entitled to reinstatement and backpay. It is a much closer question regarding Silvestri. However, on balance, I find that her threats were not accompanied by overt actions and the repeated sexual statements were on a more innocuous scale, as compared to statements made by other strikers. For this reason, I recommend that Silvestri be reinstated and awarded backpay as well.

tt. *Hubert Robinson*

In September, this striker threatened to kick Zemba's "ass" as the latter drove through the picket line. Robinson called Comfort a "fucker," or "mixed-breed mother-fucker" on several occasions.

In October, Robinson was sued with other strikers by nonstriker Churning, who at the time of hearing was no longer working for Respondent. Apparently outraged by what he considered a baseless lawsuit, Robinson made several remarks to Zemba suggesting Zemba was responsible for the lawsuit. For example, shortly after he received service of process, Robinson said to Zemba, as he drove through the line, "I thought you were my friend, now I'm being accused of this. What goes around comes around." Robinson went on to accuse Zemba of having been kicked out of Philadelphia, a reference Zemba could not explain. A few days later Zemba was walking past the picket line and Robinson again alluded to the Churning suit by saying that he was not going to forget about it and that Zemba should remember what Zemba said before. On another occasion, Robinson invited Zemba to exit his car so Robinson could "whip his ass."

A nonstriker named Estrada testified that Robinson threw eggs at his car. I cannot credit this testimony, however. Robinson denied the allegation and I believe his testimony. Moreover, the level of Robinson's activities on the line does not corroborate Estrada's testimony. That is, Robinson engaged in few incidents, all which were minor. His statement, to Zemba, "what goes around," etc., is too ambiguous to be characterized as a threat. The threat to fight Zemba is nothing more than a trivial rough incident.

Robinson was 50 years old and before coming to San Diego had retired from the fire department in an eastern city. I found him to be mature and mostly truthful in his testimony, but with a slight tendency to get excited about events on the picket line. In reviewing the totality of the evidence regarding his case, I find that he is entitled to reinstatement and backpay.

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[210] I do not credit the testimony of Zemba that Reynolds was using a radio device to jam communications between the buses and Aztec dispatcher. I find no credible factual basis for Zemba's conclusion.

uu. *Karen Sloane*

Neither Zemba nor Harrison knew Sloan nor why she was not reinstated.[211] After reviewing the evidence pertaining to Sloane, I am as much in the dark as anyone. Other than Sloane herself, the only witness to give substantive testimony regarding Sloane was Swick. His testimony on this striker was not impressive. He testified that Sloane blocked buses, engaged in verbal harassment of drivers (no details were given), and hit a bus with her picket sign on two occasions. I cannot credit this testimony. Sloan testified and denied even this extremely slight misconduct. She also testified that she was on the picket line only the first 3 weeks. Thereafter, she stopped picketing because, as a single parent of two children, she was unable to afford a babysitter.

I find here that Zemba could not have held an honest belief that this striker engaged in serious misconduct. Accordingly, she is clearly entitled to reinstatement and backpay.

vv. *Michael Smith*

There is at least a scintilla of evidence regarding this striker to support the decision not to reinstate. When Smith returned from an assignment, the strike had already started. Smith told Zemba "to shove the bus up his ass" and then he gave Zemba the finger. Smith also told Zemba to go to hell. In addition to these remarks, Smith hit a bus with a sign on two occasions, and blocked buses and Zemba's car for brief periods on several more occasions.

Based on the totality of the evidence regarding this witness, I find that he is entitled to reinstatement and backpay.[212]

ww. *George Sprague*

When the strike started, Sprague was on disability status where he remained until November. Notwithstanding his status, he also joined the strike from the beginning.

Sprague called nonstriker Golding names such as "scab" and "jerk" and stated that he would get Golding. Both Swick and Zemba observed Sprague blocking buses and other vehicles on several occasions for brief periods of time. Both witnesses also saw Sprague hitting buses with picket signs. No damage was indicated.

Respondent describes two incidents (Br. 323–324) that it characterizes as provoked by Sprague. The first involving an altercation with a nonstriker named Jacobson was not provoked by Sprague, but rather is an example of unpunished misconduct by a nonstriker. The second incident involves Sprague, on a motorcycle, following a van of nonstrikers. There is no evidence that Zemba even knew of this incident much less relied on it as a basis for not reinstating Sprague. In any event, it is not serious enough by itself nor when coupled with all other misconduct to deny Sprague reinstatement. I find that he is entitled to reinstatement and to backpay.

xx. *Brad Steckmesser*

Zemba stated that Steckmesser was blocking vehicles generally. Harrison described an incident that occurred in September where Steckmesser swung a picket sign at her, missed, and stated, "We might not always miss." Steckmesser spit on a car driven through the line by Swadner and twisted the side mirror of his car.

Swinging the sign at Harrison, even for a deliberate miss, and spitting on Swadner's car are serious matters, but not serious enough to deny Steckmesser reinstatement. He is distinguished because his unusual sounding name is mentioned so few times in this long case, especially when compared to some other strikers. I have considered the totality of the evidence relating to Steckmesser and recommend that he be reinstated and awarded backpay.

yy. *Hernando Suanico*

This striker did not testify at the hearing. Neither Zemba nor Harrison had firsthand knowledge nor even secondhand knowledge of this striker's activities. Nonstriker Claybough testified that Suanico threatened her life in an incident in Chula Vista also involving Stoker and Ondrechen. Unlike the latter two strikers about whom there is substantial evidence of misconduct, this is the only matter affecting Suanico. Accordingly, I do not credit Claybough on this point. Moreover, even if I were to credit her, this single, impulsive incident would not be sufficient to deny reinstatement and backpay to Suanico. I find he is entitled to reinstatement and backpay.

zz. *Judy Tolwitzke*

In mid-September Zemba met Tolwitzke at the office of San Diego City Schools where the following exchange occurred: Tolwitzke said, "Hi, Gus, we're going to do you in." Zemba responded, "Are you threatening me," and she replied, "We'll take care of you." On two occasions, Zemba heard her tell nonstriking drivers, "We'll get you. You won't be here tomorrow." This striker also engaged in brief blocking of buses on about six occasions.

The threats, if they can be so construed, referred to above, were not accompanied by any overt act and impress me as no more than pure verbiage. The first exchange between Zemba and Tolwitzke is not made more serious because it occurred away from the picket line. Based on the totality of the evidence concerning this strike, I find that Tolwitzke is entitled to reinstatement and backpay.

aaa. *Steve Tom*

On October 6, Tom told Hokstad that he was a "dead man" and that Tom was going to get him and his car. This was after an altercation with other strikers that did not directly involve Tom. According to Zemba, Swick, and Comfort, Tom engaged in the blocking of buses and other vehicles for brief periods of time. Zemba also saw Tom striking buses with his picket sign a few times. Harrison saw Tom present only in a group of pickets who were committing acts of misconduct such as throwing eggs. She also testified that on October 2, the police were attempting to clear pickets away from the Aztec yard, and Tom argued with the police and resisted them. There was no evidence he was arrested or charged with a crime.

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[211] Even counsel for Respondent seems confused. He briefs Sloane's case under the heading, "Evidence as to strikers who abandoned interest in employment at Aztec." (Br. IV, 447.)

[212] According to representations made by the lawyers at hearing, Smith was reinstated in early January 1982, worked for only a few days, then quit, stating he wanted another job. I leave to compliance the verification of these statements and of course the computation of backpay due and owing to Smith. The backpay may have been tolled in mid-January 1982, if Smith's departure was uncoerced.

Contrary to his affidavit to a Board agent in which he had denied throwing eggs, Tom testified at hearing that he threw two eggs at buses. One of these missed its target and the other hit the back of the bus as it was entering the yard.

I have earlier indicated my view that throwing eggs at moving buses is serious misconduct, especially where the windshield is hit. I have also stated the Board does not share that view particularly where, as here, there is no other serious misconduct. Because I am bound by Board decisions, I recommend that Tom be reinstated with backpay.

bbb. *Lester Wallace*[213]

Shortly after the strike began, Wallace was attempting to let the air out of the tires on the bus left on the street by Anderson (this is the bus immobilized by Murphy's van). He was stopped by Schultz. Later that evening, after the incident with Brenda Leonard, Wallace called Hokstad on the telephone at the Aztec yard and stated, "You're a dead man. I'm over at your house right now and I'm going to rape and kill your wife." On receiving this call, Hokstad immediately called the police and asked them to check his home. Given conditions on the picket line at that time, I regard this telephone call as extremely serious misconduct.[214] When Hokstad left the yard about 9 p.m., he called his brother and asked him to pick him up at the back fence, which Hokstad climbed over. He was afraid to cross the picket line in his car.

Swick testified that Wallace came to his home on one occasion within the first 3 weeks of the strike. When Swick opened the front door and saw who it was, he immediately slammed the door. Wallace drove by the home on one other occasion and called Bill Jones, Swick's roommate, a "mother-fucker" and "worthless son-of-a-bitch." Swick also described several incidents of blocking buses and hitting buses with picket signs as they drove through the line. On several occasions, Wallace threatened to kick his "ass."

Wallace directed several threats to Zemba. One night, Zemba was leaving work for the day in his car. Wallace said, "If you are going home, forget it, they're dead." The substance of this threat was repeated three times. Other times Wallace said to Zemba, "You're a dead man; we know where you live and we are going to get your family." Wallace also called Zemba a "mother-fucker" on several occasions.

Ingersoll described Wallace's habit of blocking buses by standing directly in front of them.

Based on the totality of the evidence concerning this striker, I find that he is not entitled to reinstatement and backpay.

ccc. *Vasco W. "Bill" Walter Jr.*

As Zemba drove through the line, Walter usually handed him a passage from the Bible, as he noted that Zemba would be killed and was going to hell. In fact, Walter was a Sunday school teacher and was affiliated with a religious organization. Although Walter described himself as completely nonviolent, I believe Zemba when he testified to Walter blocking his car, and about four or five times rocking it as Zemba attempted to drive through the line. Walter was the only striker, male or female, who wore a brief bathing suit on the picket line. Given his size, there was no mistaking him.[215]

Walter called Dugent a "son-of-a-bitch" and threw four or five eggs at a bus entering the yard. On two other occasions, Walter threw eggs at buses entering the yard as well.

O'Brien described several incidents of blocking buses and Ybarra observed Walter opening schoolbus emergency doors.[216]

In evaluating the conduct of this witness, I note some conflict between his asserted beliefs and his behavior at the picket line. In addition, Walter was less than completely candid in his testimony.[217] And yet, Walter not only refused at hearing to repeat the obscenities he heard on the picket line for the hearing, he also complained to Corona about this activity and threatened to quit the strike if the obscentities did not stop.[218] Based on the totality of evidence regarding this striker, I conclude that he is entitled to reinstatement and backpay.

ddd. *Stanley Wright*

At the time of the hearing this witness was 65 years of age.[219] The evidence of misconduct is slight to say the

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[213] I have disregarded and will not credit the testimony of nonstriker Whitehead regarding the alleged actions of Wallace. Not only did Wallace deny the act in question, but Whitehead's testimony as to the identity of the culprit was not convincing. (R. Tr. 1280.)

[214] Thus, George had physically assaulted Zemba; Leonard and Shelton had approached Zemba in a threatening manner. The other pickets were virtually berserk with hatred and anger toward Hokstad and Zemba. In sum, these surrounding circumstances were tantamount to an overt act that gave the threat currency. Although I find that it would warrant discharge by itself, the only issue here is whether the totality of the misconduct warrants discharge.

[215] The witness stood 5 feet 10 inches and weighed 242 pounds. He wore the bathing suit because of the heat.

[216] I do not credit Harrison's testimony that Walter was telling Aztec customers that the yard was closed and then dircting them to competitors. He denied doing this and there is no credible evidence to support Harrison, who was merely repeating reports heard from others.

[217] For example, after denying that he threw eggs, Walter admitted having eggs in his possession on the picket line. But he said that his wife used them for cooking. Given the context of this strike, his testimony is incredible.

[218] Moreover, as Walter was asked at the hearing about various obscene expressions used during the strike, he winced as he heard the words.

[219] Wright supposedly suffers from impaired hearing. Although he does have a hearing aid, he does not usually wear it. During his testimony, he was questioned by the lawyers in their normal tone of voice. Wright had no trouble hearing and responding. All this came up as the

Continued

least. First, he was present when Reynolds bumped into Zemba. His presence at the time is of no consequence whatsoever and I decline to even afford it minimal weight.[220] Moreover, Reynolds himself was ordered reinstated. Wright also suggested to Zemba that the paint shed would burn easily. Wright also stated, "You better be careful, that could blow up or catch fire and destroy all the buses." Assuming without finding that these statements are threats, they clearly are not serious threats under Board law. Moreover, Zemba had relocated all combustible materials sometime after the strike started. Accordingly, Wright's experience in the paint shop was of no great moment in putting his statements in context.

Finally, Zemba testified there was one other matter relating to Wright, but he could not recall it. Naturally, I disregard entirely this other incident.

Based on the totality of the evidence regarding this striker, I conclude he is entitled to reinstatement and backpay.[221]

CONCLUSIONS OF LAW

1. The Respondent is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

2. The Union is a labor organization within the meaning of Section 2(5) of the Act and was at all material times, and continues to be, the exclusive representative of Respondent's employees in the appropriate unit set forth below for the purpose of collective bargaining within the meaning of Section 9(a) of the Act.

3. All employees in the following classifications—coach operators, maintenance, and student drivers—constitute an appropriate unit for the purposes of collective bargaining within the meaning of Section 9(b) of the Act.

4. By unilaterally changing employees' health and accident insurance plan, without timely notice to the Union and without affording the Union an opportunity to bargain, Respondent violated Section 8(a)(5) of the Act.

5. By failing and refusing to execute the contract on the Union's request, after agreement had been reached on all substantive proposals, Respondent violate Section 8(a)(5) of the Act.

6. By failing and refusing since March 26, 1981, to bargain in good faith with the Union, more specifically, by engaging in surface bargaining during the period indicated, Respondent has violated Section 8(a)(5) of the Act.

7. Respondent, through Zemba in paragraphs (a) through (c) below, and through Ybarra in paragraph (d), violated Section 8(a)(1) of the Act:

(a) By coercing employees in the selection of their collective-bargaining representative.

(b) By making verbal comments to employees disparaging to certain of the union leaders.

(c) By making to employees erroneous statements of labor law designed to coerce employees in the course of their protected activities.

(d) By making statements that effectively disparaged the Union and coerced employees in the selection of their collective-bargaining representative.

8. By failing and refusing since April 4, 1981, to reinstate all strikers listed on "Appendix A" to this opinion unconditionally, and by requiring these same returning strikers as a condition of reinstatement to complete employment applications, to undergo and pass medical examinations as determined solely by Respondent or its physician agents; to undergo and pass open book tests and driving tests as determined solely by Respondent or its agents; and by requiring employees to provide Respondent with copies of the employees' State Department of Motor Vehicle (DMV) driving records, Respondent has violated Section 8(a)(1) and (3) of the Act. In addition, by unilaterally implementing the conditions listed above as terms and conditions of employment, Respondent has, since October or November, violated Section 8(a)(5) of the Act.

9. By failing and refusing, since April 4, 1981, to reinstate the strikers listed below who contrary to Respondent's claim never resigned or otherwise abandoned their employment, Respondent violated Section 8(a)(1) and (5) of the Act: Dana Banning, Darryl Conyer, Thomas Doty, Suhley Ozgundez, Abraham Planje, Cheryl Reid, and Jean Umphreys.

10. By failing and refusing since April 4, 1981, to reinstate the strikers listed in "Appendix B" to this opinion, Respondent has violated Section 8(a)(1) and (3) of the Act.

11. The aforesaid unfair labor practices affect commerce within the meaning of Section 2(6) and (7) of the Act.

12. Respondent did not violate the Act by refusing to reinstate the following:

Norman Amador
Robert Baker
Phil Burkhart
Leslie Carr
Michael Doering
Bertram Dredden
Patricia Fowler
Angel Huezo
Colleen Jellison
John Kipple
Michael Kirkpatrick
Wallace Leonard
Raymond Lindemann
Gerald Marks
Barbara McPheron
Linda McQueen
Valerie Mendoza
Connie Murphy
Brenda Myers
Stephen Ondrechen
Agnes Pangilinan
Linda Peckron
Alan Shelton
Roy Stoker

Respondent considered taking Wright back during the hearing. First, the Company took the position that he could come back only if he wore a hearing aid at work doing his usual job as a body paint man. Wright's job calls for little or no driving of buses. When the Company's initial position proved to be a problem, they further modified their position and agreed to take Wright back even without his hearing aid. Because I will recommend that Wright be reinstated with backpay, I will leave to compliance the task of sorting out Wright's backpay and just when it was tolled, if at all.

[220] Respondent seems to concede that this incident was part of the reason for not reinstating Wright. (Br. 422-423.)

[221] Much of Wright's testimony was taken up not with explaining or denying the misconduct charges against him—that part of his testimony was short, given to evidence presented by Respondent. Rather, Wright described his experience with the Company's doctors attempting to get medical approval to return to work. As part of the recommended Remedy in this case, Wright and other strikers who were reinstated will have to be made whole for their out-of-pocket expenses incurred in complying with Respondent's unlawful conditions before returning to work. Further details of this "Make Whole" remedy will follow below.

Donald Lilly
Lester Wallace

3. Other than as reflected above, Respondent has committed no other unfair labor practices.

THE REMEDY

It having been found that the Respondent has engaged in unfair labor practices in violation of Section 8(a)(1) and (5) of the Act, it will be recommended that the Respondent cease and desist therefrom and take certain affirmative action designed to effectuate the policies of the Act.

It having been found that Respondent unlawfully refused to bargain collectively with the Union as to the selection of an insurance carrier for an employee health and accident insurance plan and, further, as to the selection and implementation of certain conditions precedent to the hiring of new employees, I will recommend that Respondent be ordered to bargain collectively, on request, with the Union as to these matters and, if an agreement is reached, embody the agreement in a signed agreement.

It having been further found that Respondent unlawfully refused to execute and to sign a contract reached with the Union, it will be recommended that, on request from the Union, Respondent be ordered to execute and to sign the contract.

It having been further found that Respondent has bargained in bad faith with the Union by engaging in surface bargaining, it is recommended that Respondent be ordered to bargain in good faith with the Union with the specific intent of reaching agreement, if possible.

It having further been found that Respondent through its agents and supervisors made certain statements to employees that coerced the employees in the exercise of the rights guaranteed to the employees by Section 7 of the Act, it is recommended that Respondent be ordered to cease and desist from the actions.

It having been further found that Respondent has, since April 4, 1981, unlawfully refused to reinstate unconditionally the strikers listed on "Appendices A and B" to this opinion, plus other strikers, Dana Banning, Darryl Conyer, Thomas Doty, Suhley Ozgundez, Abraham Planje, Cheryl Reid, and Jean Umphreys, it is recommended that Respondent be ordered to reinstate all the employees immediately to their former jobs, or, if those jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority or other rights and privileges[222] and make them whole for any and all losses of earnings caused by Respondent's unlawful discharges. All the employees who are entitled to reinstatement shall be made whole for any loss of earnings they may have suffered by reason of the discriminatory failure to reinstate them. Further, in order to fully remedy Respondent's refusal to execute the collective-bargaining agreement, Respondent shall make whole all employees covered by the aforesaid collective-bargaining agreement for the loss of any benefits that would have accrued to them under the contract had Respondent executed the same within a reasonable time after the Union's request for Respondent's signature, computed in the manner set forth in *Ogle Protection Service*, 183 NLRB 682 (1970).[223] In addition, all employees listed in "Appendix A" and those affected employees listed in "Appendix B" and paragraph 9 of the conclusions of law, who were offered reinstatement only if they complied with Respondent's unlawful conditions are entitled to be made whole for any out-of-pocket expenses incurred by the employees as a direct result of attempting to comply with the unlawful conditions. These potential expenses include, but are not limited to, costs of additional medical examinations or medical tests which would not otherwise have been taken, transportation expenses, child-care expenses, and similar expenses.[224] All backpay in this case shall be computed in accordance with *F. W. Woolworth Co.*, 90 NLRB 289 (1950), with interest as provided in *Florida Steel Corp.*, 231 NLRB 651 (1977).[225]

With respect to the proper remedy, the Union contends (Br. 69–74) that it is entitled to litigation expenses including attorney's fees. Much of the Union's argument is based on authority of *J. P. Stevens & Co. v. NLRB*, 668 F.2d 767 (4th Cir. 1981).[226] This judgment of the court of appeals in *J. P. Stevens* was recently vacated by order of the U.S. Supreme Court, 458 U.S. 1118 (1982), and remanded for further consideration in light of *Summit Valley Industries v. Carpenters Local 112*, 110 LRRM 2441 (1982). In *Summit Valley*, the U.S. Supreme Court affirmed the decision of the Ninth Circuit Court of Appeals that attorney's fees incurred in prior proceedings before the Board may not be recovered pursuant to Section 303 of the Labor Management Relations Act, 29 U.S.C. § 187. Thus, the decision to vacate the remedy in *J. P. Stevens* seems to suggest that the Supreme Court did not favor the remedy proposed by the Board in that case. It is unnecessary to speculate further on the applicability of *J. P. Stevens* to the instant case. There are other Board precedents to review which are helpful to resolving the issue at bar. In *Kane-Miller Corp.*, 259 NLRB 1075 fn. 3 (1982), a case involving discharge of strikers for alleged picket line misconduct, the Board denied the charging party's request for attorney's fees, bargaining expenses, and other costs incurred. As authority, the Board cited *Wellington Hall Nursing Home*, 257 NLRB 791 fn. 2 (1981), and cases cited therein. In *Wellington*, the Board stated that such remedies (as those requested by the Union here) are appropriate only when a respondent raises defenses so insubstantial as to be patently frivolous or in other exceptional circumstances not present here.[227] In the instant case, Respondent has prevailed with respect to bad-faith bargaining prior to the strike and with respect to a substantial number of strikers. On all other charges, I have found against Respondent. However, even on those issues where Respondent's evidence has lacked merit, I cannot find that Respondent's position was patently frivolous. Put differently, Respondent's defense was debatable on all issues.[228]

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[222] It is specifically recommended that Respondent be ordered to hold within a reasonable time after this decision becomes final, a "shake-up" for the purpose of having the returning strikers bid on desired routes in accordance with their seniority.

[223] Any contributions owing to the Union's employee benefit funds shall be computed in the manner set forth in *Merryweather Optical Co.*, 240 NLRB 1213 (1979). See also *World's Best Janitorial Services*, 263 NLRB No. 65 (Aug. 16, 1982) (not reported in Board volume).

[224] Nothing in this remedy shall be construed as prohibiting Respondent from requesting returning strikers to update personal data such as addresses, or from requiring a medical examination at Respondent's expense where a bona fide reason exists for said examination. Where a dispute exists as to whether a returning striker should be required to undergo a physical examination, it is recommended that the parties be ordered to resolve their difference through good-faith collective bargaining.

[225] See generally *Isis Plumbing Co.*, 138 NLRB 716 (1962).

[226] See analysis of this decision published at 109 Analysis 17 (Feb. 1, 1982).

The Union has presented substantial evidence reflecting Respondent's proclivity to refuse to follow proper grievance-and-arbitration procedures, to refuse to accept the arbitrator's award, and even to refuse to obey the order of a Federal district court. Yet, the Union cannot rest its case on this evidence, as persuasive as it may be to establish Respondent's animus. Whether Respondent had animus toward the Union is not the issue. Under Board law, I must look primarily to Respondent's defenses in this case, and only secondarily to what has occurred in other proceedings. Perhaps in these other proceedings, Respondent is entitled to litigation expenses. If so, surely a double recovery would not be warranted. If not, perhaps the conduct was not serious enough to deserve that remedy. I can say, however, in this case, based on all relevant facts and circumstances, I recommend that the Union not be awarded attorney's fees and other litigation expenses.

On the other hand, based also on the evidence of record here, I will recommend to the Board that a broad remedial order is warranted.[229]

[Recommended Order omitted from publication.]

APPENDIX A

Balch, Elsie
Beazley, Robert
Chavez, Karen
Clarin, Benjamin
Cordua, Harney
Edwards, Janet
Esbri, Mario
George, Ivy
Gress, Phillip
Harvey, David
Horn, Adelia
McConnell, James
Macklin, Diane
Mason, Mary
Morgan, Jo Ann
Nekoui, Atta
Piper, Donald
Pyatt, Wendell
Rowe, Claude
Rudat, Christine
Rudy, Shirley
Schwartz, Michael
Sims, Doris
Slack, Paul
Stewart, Lena
Thirtle, Cheri
Tovar, Jose
Young, Marian

APPENDIX B

Adams, Clark
Alferos, Nancy
Balding, Karen
Bock, Janel
Boothe, Eula
Bozick, Donna
Camacho, Inez
Chasteen, John
Corona, Janice
Fenderson, James
Fox, Dale
Franz, Fred
Friege, Donna
George, Harline
Grossman, Stuart
Klock, Glen
Moore, Kiernon
Mountain, Joe
Mulligan, Phillip
Norman, Ronald
Osborne, Marian
Patton, Frank
Reynolds, Thomas
Richard, Julia
Robinson, Hubert
Silvestri, Susan
Sloane, Karen
Smith, Michael
Sprague, George
Steckmesser, Brad
Suanico, Hernando
Tolwitzke, Judith
Tom, Steven
Walter, Vasco W. "Bill," Jr.
Wright, Stanley

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[227] See also *Marriott Corp.*, 258 NLRB 755 fn. 1 (1981); *Carbonex Coal Co.*, 262 NLRB 1123 (1982).

[228] Two other points should be made. First, even for those few strikers where there was virtually no evidence to support a charge of picket line misconduct and I found that Respondent could not have entertained an honest belief that these persons engaged in picket line misconduct, even here I do not find Respondent's defense to be frivolous. I find instead that these strikers were caught up by an honest mistake with the others due to the large number of persons involved. The reinstatement and backpay remedy about them as well as for the others, where closer issues were presented, will suffice. Second, It would be inequitable in this case to award litigation expenses to the Union, even if warranted, because of the Union's studied indifference to the repeated almost daily misconduct occurring on the picket line. Cf. *Marines Memorial Club*, 261 NLRB 940 (1982).

[229] *Hickmott Foods*, 242 NLRB 1357 (1979).

Master Iron Craft Corp. ***and*** **Shopmen's Local Union No. 455, International Association of Bridge, Structural & Ornamental Iron Workers, AFL–CIO and Steel, Metals, Alloys and Hardware Fabricators and Warehousemen, Local 810, affiliated with International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, AFL–CIO,[1] Party to the Contract.** Cases 29–CA–4853 and 29–CA–6899

July 22, 1988

SUPPLEMENTAL DECISION AND ORDER

BY CHAIRMAN JOHANSEN AND MEMBERS BABSON AND CRACRAFT

On June 30, 1987, Administrative Law Judge James F. Morton issued the attached supplemental decision. The Respondent filed exceptions and a supporting brief, the General Counsel filed exceptions and a supporting brief, and the Respondent filed a brief in response to the General Counsel's exceptions.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the supplemental decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings,[2] and conclusions only to the extent consistent with this Supplemental Decision and Order.

The Respondent's employees, represented by Local 455, went on strike July 1, 1975. In January 1976, when the Respondent unlawfully refused to bargain, the strike was converted into an unfair labor practice strike.[3] In August 1978, the Union made an unconditional offer to return to work. In 1980, the Board found that the Respondent violated Section 8(a)(3) by failing to reinstate fully unfair labor practice strikers.[4] Subsequently, the Regional Director issued the instant backpay specification.

The judge found, inter alia, that no discriminatee for whom the General Counsel sought backpay pursuant to the make-whole order in *Kuno*, supra, was entitled to reimbursement for fringe benefits lost as a result of participation in the strike. The judge also found that Moshe Waldman, a striker who was never offered reinstatement, was not entitled to reimbursement for out-of-pocket medical expenses. Additionally, the judge found that Robert Scott, a striker who returned individually to the Respondent's employ before August 9, 1978, was not entitled to receive any back wages pursuant to the make-whole order in *Kuno*, supra. For the reasons set forth below, we disagree with the judge.

1. It is well settled that the "finding of an unfair labor practice . . . is presumptive proof that some back pay is owed by the [Respondent]."[5] The burden is on the General Counsel to prove the gross amount of backpay due.[6] The burden then shifts to the Respondent to establish facts that negate or mitigate its liability.[7]

In analyzing the General Counsel's backpay claims for discriminatees Anthony Ariano, Vincent Cangemi, Guido Pagan, Robert Scott, Ben Braver, and Moshe Waldman, the judge acknowledged that the collective-bargaining agreement effective just prior to the 1975 strike provided unit employees various fringe benefits. He also found that the Respondent had not provided these contractual benefits at least since 1976. The judge mistakenly stated that the Regional Director's amended backpay specification sought to make the discriminatees whole by requiring the Respondent to contribute to Local 455's Welfare, Pension, and Annuity Funds at rates that Local 455 established in subsequent contracts with other employers during the backpay period. The judge then reasoned that requiring the Respondent to make such contributions would compel the Respondent to grant concessions to Local 455 that had not been achieved in negotiations, contrary to Section 8(d) of the Act.

The Regional Director's amended backpay specification does not seek to impose on the Respondent any terms in Local 455's subsequent collective-bargaining agreements with other employers; rather, the amended backpay specification uses a formula

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[1] On November 1, 1987, the Teamsters International Union was readmitted to the AFL–CIO. Accordingly, the caption has been amended to reflect that change.

[2] We affirm the judge's finding that the Respondent is obligated to reimburse employees for unlawfully withheld dues and fees. The judge, however, inadvertently suggested that the reimbursement of dues and fees in this case is warranted by the Order in *Independent Assn. of Steel Fabricators*, 231 NLRB 264 (1977), remanded in pertinent part 582 F.2d 135 (2d Cir. 1978), cert. denied 439 U.S. 1130 (1979). Such reimbursement was ordered in *Independent Assn. of Steel Fabricators*, 252 NLRB 922 (1980), enfd. sub nom. *NLRB v. Koenig Iron Works*, 681 F.2d 130 (2d Cir. 1982).

We find it unnecessary to rely on the judge's analysis and findings in secs. 4 and 7 of the supplemental decision concerning wage claims on behalf of discriminatees Ariano and Cangemi because those claims were abandoned in the amended backpay specification.

We affirm the judge's finding that the Respondent must reimburse discriminatees Waldman and Braver $16,847.08 and $43,400.04, respectively, for their net earnings lost.

The judge inadvertently miscited *Independent Assn. of Steel Fabricators* in sec. 8, part a, pars. 3 and 5. The correct citations are 231 NLRB 264 (1977) and 231 NLRB at 272.

[3] *Kuno Steel Products Corp.*, 252 NLRB 904, 906 (1980), enfd. sub nom. *NLRB v. Koenig Iron Works*, 681 F.2d 130 (2d Cir. 1982). Master Iron Craft Corp. was one of the respondents in *Kuno*.

[4] Ibid.

[5] *NLRB v. Mastro Plastics Corp.*, 354 F.2d 170, 178 (2d Cir. 1965), cert. denied 384 U.S. 972 (1966).

[6] *NLRB v. Brown & Root, Inc.*, 311 F.2d 447, 454 (8th Cir. 1963).

[7] Ibid.

289 NLRB No. 130

based on continuing the terms of the parties' expired agreement. As the Respondent never bargained to impasse with Local 455[8] before unlawfully recognizing Teamsters Local 810,[9] the Respondent was obligated to continue giving effect to its expired contract with Local 455.[10] Thus, the General Counsel has met her burden of proving the gross amounts of backpay due. The Respondent, on the other hand, has not established any facts to negate or mitigate its liability.

Specifically, the judge denied all claims set forth in the amended backpay specification for vacation pay, overtime, and contributions to the Welfare, Pension, and Annuity Funds.[11] We will, therefore, order the Respondent to make the discriminatees whole by paying them the respective amounts set forth in the amended backpay specification for vacations and overtime and by making the contributions to the Local 455 Welfare Fund,[12] Pension Fund, and Annuity Fund on their behalf in the respective amounts set forth in the amended backpay specification.

2. The General Counsel has excepted to the judge's failure to include in the make-whole remedy reimbursement to Moshe Waldman, a striker who was never offered reinstatement, for out-of-pocket medical expenses incurred during the backpay period.[13] The amended backpay specification, to the extent supported by the documents the General Counsel introduced during the hearing, claimed $295.50 for Waldman's medical bills. As stated above, the judge summarily dismissed all fringe benefit claims, including medical expenses, for all discriminatees because he found that the fringe benefits provided as a substitute, the Teamsters Local 810 package, were substantially equivalent to the Local 455 fringe benefits. As Waldman was not reinstated in any respect, there can be no question of a setoff based on the Teamsters package for him during the backpay period.

It is customary to include reimbursement of out-of-pocket medical expenses in make-whole remedies for fringe benefits lost.[14] Because the Respondent has established no facts that would negate or mitigate its liability, we will order the Respondent to reimburse Waldman $295.50 for the documented out-of-pocket medical expenses during the backpay period.

3. The backpay specification also claimed that $840.28 in back wages is owed to Robert Scott on the theory that he should have been earning $7.84 per hour at the beginning of the backpay period, instead of the $7.30 per hour he actually earned. Before the strike, Scott earned $7.20 per hour as a mechanic; on his return to work November 19, 1976, he was paid $7.05 per hour as a mechanic. The measure of back wages due used in the backpay specification was the pay rate Scott earned before the strike, $7.20, plus increases granted similarly situated employees, less the rates he actually earned, multiplied by his hours worked.[15]

The judge rejected the claim for Scott because he found that pay rates set and increases granted before July 1, 1978, were not discriminatory and did not constitute continuing violations of the Act. This proceeding, however, is not an unfair labor practice proceeding. The unfair labor practice has already been found and affirmed by a court of appeals. *Kuno Steel Products Corp.*, 252 NLRB 904 (1980), enfd. sub nom. *NLRB v. Koenig Iron Works*, 681 F.2d 130 (2d Cir. 1982). The judge apparently misunderstood the *Kuno* order. The Board specifically found that the Respondent violated Section 8(a)(3) by not fully reinstating strikers who individually returned to work before August 9, 1978, but ordered that, under the circumstances, the Respondent's backpay liability would run only from 6 months before the instant charges were filed.[16] Manifestly, the Board contemplated the use of Scott's prestrike pay rate and increases of similarly situated employees granted before the backpay period to determine the amount of back wages due. Accordingly, we will order the Respondent to make whole Robert Scott by paying him $840.28, as claimed on his behalf in the backpay specification.

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[8] Although the Second Circuit in *NLRB v. Independent Assn. of Steel Fabricators*, 582 F.2d 135 (2d Cir. 1978), found an impasse in bargaining between Local 455 and the multiemployer association of which the Respondent had been a member, the Respondent under the circumstances was not relieved thereby of its obligation to bargain with Local 455 as an individual employer.

[9] *Independent Assn. of Steel Fabricators*, 252 NLRB 922, 923 (1980), enfd. sub nom. *NLRB v. Koenig Iron Works*, 681 F.2d 130 (2d Cir. 1982).

[10] See *NLRB v. Katz*, 369 U.S. 736 (1962); *Taft Broadcasting Co.*, 163 NLRB 475 (1967).

[11] Although the judge found that the benefits package available to unit employees during the backpay period, the Teamsters Local 810 package, was substantially equivalent to the Iron Workers Local 455 benefits package provided pursuant to the expired contract, the evidence demonstrates that the benefits were not comparable for the employees at issue. Further, the Teamsters Local 810 package was not even available to discriminatees Braver and Waldman, the strikers who were not offered reinstatement.

[12] The Respondent asserts that a discriminatee is made whole when he is reimbursed for the cost of premiums incurred in obtaining substitute health insurance coverage and for his out-of-pocket medical expenses to the extent that those expenses would have been reimbursed through the Local 455 Welfare Fund. In order to be made whole, however, a discriminatee must be restored to the position he would have occupied had the discrimination not occurred. This includes not only reimbursement of the discriminatee's premiums and medical expenses, but also requires the Respondent to contribute to the Welfare Fund according to the expired contract's terms so that the discriminatee's future interests in the fund will be ensured. "[T]he diversion of contributions from the union funds undercut[s] the ability of those funds to provide for future needs." *Stone Boat Yard v. NLRB*, 715 F.2d 441, 446 (9th Cir. 1983).

Hassett Maintenance Corp., 260 NLRB 1211 (1982), a cryptic decision on which the Respondent relies, focused on what it characterized as the double insurance costs that would result from requiring the employer (which had provided other coverage) in that case to make conributions to the welfare fund. Hassett did not address restoring the full range of an employee's interests in the welfare fund. The *Hassett* decision did not reconcile its limited remedial order with pre-*Hassett* precedent requiring employer contributions to union welfare funds on employees' behalf, see, e.g., *Kraft Plumbing & Heating*, 252 NLRB 891 (1980), affd. mem. 661 F.2d 940 (9th Cir. 1981), as does precedent decided after *Hassett*. See *Stone Boat Yard*, 264 NLRB 981 (1983), which the Ninth Circuit enforced. The court rejected the double-coverage/punitive claim: the "employer cannot complain of the extra cost of improperly created, substitute fringe benefits . . . . The company is merely required to repay what it has unlawfully withheld." *Stone Boat Yard v. NLRB*, 715 F.2d 441, 446 (9th Cir. 1983).

[13] The judge also rejected the claims for reimbursement of medical expenses asserted on behalf of Braver, Ariano, Cangemi, and Pagan. The General Counsel did not except.

Although the General Counsel's exceptions regarding Waldman's medical expenses do not fully comply with Sec. 102.46(b) of the Board's Rules and Regulations, we have decided to consider the claim as it is clear what portion of the judge's supplemental decision the General Counsel contends is erroneous. See, e.g., *Fiber Industries*, 267 NLRB 840 fn. 2 (1983); *Giddings & Lewis, Inc.*, 240 NLRB 441 fn. 2 (1979).

[14] See, e.g., *RMC Constructors*, 266 NLRB 1064 (1982).

[15] The calculation, computed quarterly, was adjusted for overtime.

ORDER

The National Labor Relations Board orders the Respondent, Master Iron Craft Corp., Plainview, New York, its officers, agents, successors, and assigns, to make whole the employees named below by paying them the amounts of backpay set forth opposite their names, plus interest in the manner prescribed in *New Horizons for the Retarded*,[17] less tax withholdings required by Federal and state law, and by paying to the Welfare Fund, Pension Fund, and Annuity Fund of Shopmen's Local Union No. 455, International Association of Bridge, Structural & Ornamental Iron Workers, AFL-CIO, the respective amounts on their behalf set forth opposite their names, plus interest in the manner prescribed in *Merryweather Optical Co.*[18]

Name	*Backpay*	*Medical Expenses*	*Welfare Fund*	*Pension Fund*	*Annuity Fund*
B. Braver	$43,400.04	0	$ 3,472.03	$ 4,340.04	$ 868.01
M. Waldman	16,847.08	$295.50	4,062.97	5,078.71	1,015.74
A. Ariano	4,881.50	0	10,424.48	13,030.60	2,606.12
V. Cangemi	8,673.00	0	8,878.00	11,097.50	2,219.50
G. Pagan	4,267.85	0	9,475.08	11,845.10	2,369.02
R. Scott	1,494.60	0	900.08	1,125.10	225.02

It is further ordered that the Respondent shall pay to the employees named below the dues and fees unlawfully deducted from their wages, in the amounts shown opposite their names, with interest in the manner prescribed in *New Horizons for the Retarded*, supra.

Name	*Dues & Fees*
A. Ariano	$1,1066
A. Amico	5346
E. Amico	2686
S. Amico	3366
J. Auld	2686
J. Belkin	2826
A. Calandra	1,0506
G. Calandra	6046
V. Cangemi	8846
D. Dworkin	4226
C. Finazzo	4786
C. Huntly	3646
T. LaHache	136
C. Luick	2126
D. Marchese	1146
R. Mason	5966
M. Mendicino	2546
G. Pagan	1,0846
J. Pisano	2266
R. Reynolds	5486
R. Scott	3526
S. Stradtmore	1286
J. Vogtle	116

Beatrice Kornbluh, Esq., for the General Counsel.

Stanley Israel, Esq. (Kliegman, Goldstein, Israel & Cooper), of New York, New York, for Master Iron Craft Corp.

Susan Martin, Esq. (Sipser, Weinstock, Harper, Dorn & Leibowitz), of New York, New York, for Shopmen's Local Union No. 455, International Association of Bridge, Structural & Ornamental Iron Workers, AFL-CIO.

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[16] 252 NLRB at 906 fn. 5.

[17] 283 NLRB 1173 (1987). Interest will be computed at the "short-term Federal rate" for the underpayment of taxes as set out in the 1986 amendment to 26 U.S.C. § 6621.

[18] 240 NLRB 1213 (1979).

SUPPLEMENTAL DECISION

Statement of the Case

James F. Morton, Administrative Law Judge. The General Counsel has issued a backpay specification which, as amended, seeks reimbursement from Master Iron Craft Corp. (Respondent) for dues and fees unlawfully deducted from the wages of its employees and backpay from it for six of seven of its employees whom the Board ordered it to reinstate as Respondent had discriminatorily failed to do. Respondent's amended answer seeks reconsideration of the dues/fees reimbursement remedy and it contests the backpay formula used in the amended specification on the ground that the Board, in the underlying case, has already directed the use of a different formula.

I heard this case, and five related cases, in New York City at intervals beginning September 1984 and ending October 1986. On the entire record in this case, including my observation of the witnesses, and after due consideration of the briefs filed by the General Counsel and Respondent, I make the following

Findings of Fact

I. GENERAL BACKGROUND

In 1975, Respondent was one of many companies in the iron and steel business in the New York City metropolitan area that had contracts with Shopmen's Local Union No. 455, International Association of Bridge, Structural and Ornamental Iron Workers, AFL-CIO (Local 455). Local 455's contract with Respondent covered Respondent's production and maintenance employees and expired on 30 June 1975. Contracts that Local 455 had with other employers also expired on that date. On 1 July 1975 Local 455 called a strike against Respondent and against other companies who had not reached agreement with Local 455 on a renewal agreement.

On 28 January 1976, notwithstanding that Local 455 was the incumbent representative of Respondent's production and maintenance employees, Respondent recognized Steel, Metal, Alloys and Hardware Fabricators and Warehousemen, Local 810, affiliated with International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, AFL-CIO (Local 810) as the bargaining representative for those same employees and signed a contract with Local 810. The Board found, inter alia, in *Independent Assn. of Steel Fabricators*, 231 NLRB 264, 274-275 (1977), that Respondent had violated Section 8(a)(1) and (2) of the Act by its unlawful recognition of Local 810. To remedy the violation, the Board's order required Respondent to reimburse all former and present employees for all moneys unlawfully extracted from them for initiation fees, dues, and assessments under that contract, with interest thereon at the rate of 6 percent per annum. That portion of the Board's order was enforced by the U.S. Court of Appeals for the Second Circuit. 582 F.2d 135 (1978). The court refused to enforce the Board's order insofar as it had required Respondent (and other companies) to reinstate alleged unfair labor practice strikers and remanded to the Board the question whether Respondent was obligated to bargain with Local 455.

On remand of the bargaining order issue, the Board's supplemental order directed Respondent to bargain with Local 455. See *Independent Assn.*, 252 NLRB 922 (1980). That order was enforced by the court. As a result, bargaining began between Local 455 and Respondent in August 1982 and concluded with an agreement effective 1 July 1983.

When the court in 1978, as noted above, refused to order reinstatement of striking employees, Local 455 applied to Respondent on 9 August 1978 unconditionally for the reinstatement of the employees still on strike. Five of the original seven had previously returned to work. When Respondent declined to offer reinstatement to the remaining two, Local 455, on 2 January 1979, filed a new unfair labor practice charge against Respondent. That matter was consolidated with others and ultimately the Board issued a decision thereon. See *Kuno Steel Products Corp.*, 252 NLRB 904 (1980). There, the Board held that the five striking employees, who had returned to Respondent's employ before 9 August 1978, had not been fully reinstated and that Respondent thereby violated Section 8(a)(1) and (3) of the Act; Respondent separately violated that section by having refused to offer reinstatement to the two employess who had not returned by 9 August 1978. The court enforced the Board's order thereon.

Recently, Local 455 was supplanted as bargaining representative of Respondent's employees when the Board, in a representation proceeding, certified Local 810 Teamsters as their exclusive bargaining agent.

II. THE CLAIM FOR REIMBURSEMENT OF DUES AND FEES

The amended specification in this case sets forth a schedule of the dues and fees claimed. Respondent, in its answer, does not question the accuracy of that claim. Instead, Respondent has urged that equitable considerations based on more recent developments in representation cases involving Respondent before the Board warrant reconsideration of the Board's remedial order. That is a matter that Respondent may pursue before the Board but I am bound by the Board order as it is.[1]

III. THE BACKPAY CLAIMS, IN GENERAL

In the remedial order in *Kuno*, supra, the Board directed Respondent to offer Anthony Ariano, Ben Braver, Vincent Cangemi, Guido Pagan, Robert Scott, Morris Waldman, and Enrico Amico immediate and full reinstatement to their former positions and to make them whole in the manner set forth in the remedy section of the administrative law judge's decision. Five of these seven had returned to work for Respondnet prior to 9 August 1978. The other two, Braver and Waldman, have never returned.

Respecting the backpay due the five who returned, footnote 5 of *Kuno* reads:

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[1] Cf. *Jaydon, Inc.*, 273 NLRB 1594 (1985).

> The General Counsel presented evidence establishing a *prima facie* case, which [Respondent has] not adequately rebutted, that economic and unfair labor practice strikers individually returned to work prior to August 9, [1978] and were not fully reinstated to conditions current at the time the strike began. Since an individual employee may make an unconditional offer to return to work, each individual employee who was reinstated pursuant to an unconditional offer was entitled to full reinstatement to the status quo which he occupied at the time he went on strike. *Laidlaw Corp.*, 171 NLRB 1366, 1381-82 (1968), enfd. 414 F.2d 99 (7th Cir. 1969), cert. denied 397 U.S. 920 (1970). Accordingly, in light of [Respondent's] failure to rebut the General Counsel's *prima facie* case, we find [its] conduct in this regard to be violative of Section 8(a)(3) of the Act.
>
> We agree with the Administrative Law Judge's recommendation that determination whether the total wages and benefits package these employees have received since returning to work is substantially equivalent to the wages and benefits they received prior to the strike—and thus satisfies the full reinstatement requirement—should be considered in the compliance stage of this proceeding. Under the circumstances of this case, we hold that [Respondent's] backpay liability to any employee who returned to work before August 9 shall run only from 6 months prior to the filing of charges herein. [i.e., from 1 July 1978].

The contract between Local 455 and Respondent, which was in force just prior to the start of the strike, contained provisions requiring Respondent to make contributions on behalf of unit employees to a pension fund, a welfare fund, and an annuity fund, and provisions for vacation, holidays, sick leave, and other fringe benefits. Those provisions were not in effect at least since an impasse had been reached in 1976, as found by the court of appeals and were also not operative throughout the backpay period in this case.

The next several subsections of this decision deal with the five discriminates who had returned to Respondent's employ. As footnote 5 of *Kuno*, supra, indicates, they were found to have been reinstated, but not fully; any backpay due them to be computed beginning 1 July 1978.

A. *Anthony Ariano*

Ariano had been a foreman in Respondent's employ, earning $8.90 per hour, when he joined the Local 455 strike on 1 July 1975 with the other unit employees. He abandoned the strike on 17 November 1975 and returned to that same position at the same rate of pay. The Board, at footnote 5 of *Kuno*, supra, found that the the General Counsel had made a prima facie showing that he was not fully reinstated to his former position, apparently because he was no longer receiving various fringe benefits provided for in the Local 455 contract, which had expired on 1 July 1975, e.g., pension fund coverage. Also as set out in footnote 5 of *Kuno*, the period for purposes of determining whether any backpay is due him began not with his return in 1975, but rather on 1 July 1978, the date 6 months prior to the filing of the unfair labor practice charge. Obviously any discriminatory act antedating 1 July 1978 is time barred. What is essential to determine is the extent, if any, to which he was discriminated against on and after 1 July 1978.

The General Counsel contends that Ariano's pay rate on 1 July 1978 should have been $9.70 per hour instead of $9.50, his actual rate. That contention is based on a backpay formula devised by the General Counsel on the theory that Ariano did not earlier receive percentage wage increases equal to the average percentage wage increases given other unit employees. Ariano's pay rate was higher than the rate paid other employees. Thus, the increases he received, when stated as percentages, were of course lower than the percentages calculated for the lower rated employees. In any event, a pay rate set before the start of the limitations period, as defined in Section 10(b) of the Act, even were the rate discriminatorily set, does not constitute a continuing violation of the Act simply because it stays in effect into the so-called 10(b) period. Cf. *Machinists Local 1424 v. NLRB*, 362 U.S. 411 (1960).

During the backpay period, Ariano received a 40-cent-per-hour raise in the first quarter of 1979, a 35-cent-per-hour raise in the third quarter of that year, another 35-cent-per-hour raise in 1980, a 70-cent-per-hour raise the year after, and another 70-cent-per-hour raise in late 1982. All other unit employees received the same raises in 1979. The other discriminatees who had returned to Respondent's employ received the same raises in subsequent years. One of the replacement employees who had been hired before 1 July 1978 (Anthony Calandra) received the same increase Ariano did, for the years he worked for Respondent. Two other replacements were hired apparently later in 1979. One of these (Fuiazzo Camillo) got a 35-cent-per-hour raise in 1980, the same as Ariano's. The second (Robert Reynolds) had been hired at a lower wage rate. Apparently, to bring him up to scale, he was given a 60-cent-per-hour increase in 1980.

I am unable to find any discriminatory treatment of Ariano, during the backpay period, insofar as his job duties or wage rates are concerned. He continued to work as a foreman—the same position he held before the strike. He got virtually the same raises as all other employees and indeed, even when calculated in percentage terms, his raises were at times higher than those given to employees who were hired as striker replacements. I therefore conclude that Ariano had been fully reinstated as of the start of the period defined in *Kuno*, supra, respecting his duties and his rates of pay. The issue of whether he was discriminated against on and after 1 July 1978 concerning his fringe benefits is considered next.

In the amended specification, General Counsel contends that Respondent must pay Ariano $30,942.70 to make him whole for the value of fringe benefits he lost as a result of his having taken part in the strike. That figure includes contributions that, according to the General Counsel, should have been made by Respondent on Ariano's behalf to pension, welfare, and annuity funds in accordance with the provisions of contracts that Local 455 entered into during the backpay period with other companies to supersede the 1975 contract that Local 455 had with many employers, including Respondent.

That claim assumes that Respondent and Local 455, but for the discrimination, would have reached agreement on a renewal contract for the period 1 July 1978 to 1 July 1983 (i.e., the backpay period). Making such an assumption would dictate a result directly opposite that provided by the actual history of collective bargaining between Respondent and Local 455 and would in effect compel Respondent to grant concessions to Local 455 that it had not obtained in negotiations. Section 8(d) of the Act forbids the compelling of concessions. The simple fact is that Respondent had for many years unsuccessfully maintained that Local 455 was bound to a successor contract to the expired agreement. Local 455 never filed any unfair labor practice charge to allege that Respondent had unlawfully made unilateral changes in fringe benefits of its unit employees. If there is a presumption to be applied, based on the foregoing, it is that Local 455 ultimately assented to those changes when it reached agreement on a renewal contract in 1983. More importantly, were Ariano to receive the fringe benefits the General Counsel claims for him, he would receive materially different treatment from that given others in the same bargaining unit; perhaps the only reason being an unlawful one—that he took part in a strike in which the others did not.

Respondent has, as noted earlier, contended that footnote 5 in *Kuno*, supra, calls for a comparison of the fringe benefits package as it existed on 1 July 1978, with the package in effect on 1 July 1975. Relevant to the contention are the descriptive booklets, written analyses, and other materials it placed in evidence to show that it provided these employees and all other unit employees with comparable pension and hospitalization/medical benefits and other fringe benefits. In general, that documentary material indicates that Respondent has made available to all unit employees, including these four discriminatees, benefits of a pension plan, of a health and welfare plan, and other benefits (overtime pay, vacations, and holidays), that are readily comparable to those these discriminatees enjoyed as of 1 July 1975.

The evidence proffered by Respondent discloses that, during the backpay period, its nondiscriminatory benefit package was substantially similar to, or better than, the benefit package that was available to the four discriminatees as of 1 July 1975. The General Counsel has the burden of proving the gross backpay contention, i.e., of demonstrating that Respondent's benefits package during the backpay period was materially deficient.[2] The General Counsel has failed to show that Respondent has discriminated against Ariano or the other four employees regarding the benefits they received on or after 1 July 1978.

Based on the foregoing, I conclude that, as of and since 1 July 1978, Ariano has been fully reinstated with respect to his total wages and benefits package and, in particular, that he has not been discriminated against by Respondent since 1 July 1978 because he had taken part in a Local 455 strike action for a 4-month period in 1975.

B. *Guido Pagan*

Pagan had been employed by Respondent as a mechanic earning $6.70 per hour when he joined the Local 455 strike on 1 July 1975.[3] He abandoned the strike on 17 March 1976 and returned to work for Respondent. He was the second striking employee to return. On his reinstatement in 1976, he was assigned to the same position he held when the strike began and at the same rate.

According to the General Counsel's backpay formula, Pagan should have been receiving $7.30 per hour as of the start of the backpay period, 1 July 1978. He actually was receiving more, $7.55 per hour. The General Counsel makes no wage claim in his behalf, effectively conceding, and I find, that he has not been discriminated against by Respondent regarding his wage rates throughout his backpay period.

The value of the fringe benefits claimed for him by the General Counsel is $27,958.05. The factual and legal premises therefor are identical to those on which the fringe benefits claims of Ariano was presented and rejected above.

Based on the foregoing, I conclude that Pagan had been, on and since 1 July 1978, fully reinstated by Respondent and that no backpay is due him.

C. *Robert Scott*

Scott took part in this Local 455 strike on 1 July 1975, having left his job as a mechanic with Respondent at $7.20 per hour. He abandoned the strike on 19 November 1976 to return to Respondent's employ. He was reinstated as a mechanic but at 15 cents per hour less than he earned when the strike began. By the start of the backpay period, 1 July 1978, he was earning $7.30 per hour. He received a 40-cent-per-hour increase in the first quarter of 1979—the same amount all unit employees received or at least all unit employees named in the specification, including replacements. Scott left Respondent's employ on 27 June 1979—the end of his backpay period.

The General Counsel contends that, based on wage increases given similarly situated employees *before* the start of the backpay period, Scott should have been receiving $7.84 per hour as of 1 July 1978. As I observed before, the General Counsel is in effect alleging that, based on wage increases given at a time barred by Section 10(b) of the Act, Scott had been discriminatorily treated in having been given a wage rate of only $7.30 and that his being paid that rate each week after the start of the backpay period constitutes separate acts of continued discrimination. That contention is rejected for the reasons set forth above. See *Machinists Local 1424*, supra.

A fringe benefit claim of $2,904.52 is asserted for Scott based on the same consideration rejected earlier for Ariano's.

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[2] *Mastell Trailer Corp.*, 273 NLRB 1190 (1984).

[3] Although so classified he was on special assignment working outside the bargaining unit but at the same pay scale.

I find, based on the foregoing, that Scott had been, throughout his backpay period, fully reinstated by Respondent and consequently that no backpay is due him.

D. *Vincent Cangemi*

Cangemi worked as a finisher, earning $7.40 per hour, for Respondent when he joined the Local 455 strike on 1 July 1975. He left the picket line on 16 November 1977 and returned to work as a finisher at $7.75 per hour. By the start of the backpay period, he was earning $8 per hour. During the backpay period, he received the same increases Ariano received, as set forth in detail above. The General Counsel contends that, based on percentage wage increases, he should have been earning 6 cents an hour more than the $8 rate he was receiving as of 1 July 1978. That contention is substanially the same as the General Counsel submitted on behalf of Ariano and, for the same reasons set forth above, it also is rejected. The fringe benefits claim of $30,898.50 made on Cangemi's behalf is also rejected as it parallels the same type claim, considered and dismissed above, that was made for Ariano.

I thus conclude Cangemi had been fully reinstated by Respondent as of and since 1 July 1978.

E. *Enrico Amico*

Amico was one of the five discriminatees who had left the Local 455 picket line to return to work for Respondent. He left Respondent's employ before the start of the backpay period. Consqeuently, the General Counsel seeks no backpay for him.

F. *Claims of Ben Braver and Moshe Waldman*

In the underlying decision, the Board found that Respondent violated Section 8(a)(1) and (3) of the Act by having failed to honor Local 455's unconditional application, of 9 August 1978, on behalf of its striking employees to return to work. The Board ordered Respondent to remedy this violation by offering reinstatement to Moshe Waldman and Ben Braver and to make them whole for losses suffered by them from 9 August 1978. Respondent's offer of reinstatement of 21 July 1983 ended their backpay period. The General Counsel seeks backpay for them only until 1 April 1981 and 31 August 1981 for Braver and Waldman, respectively, as those are the dates they would have retired.

Respondent disputes the appropriateness of the formula used by the General Counsel to compute their gross backpay and raises other defenses, discussed further below. Waldman's claim is discussed next.

1. Moshe Waldman

According to the amended specification, Waldman would have been earning, based on wages of similarly situated employees, an hourly rate of $7.30 on 9 August 1978 for a 40-hour week and would have received specified raises during the remainder of his backpay period. Respondent contends that footnote 5 of *Kuno*, supra, dictates that the $6.70-per-hour rate he received at the start of the strike should be used throughout his backpay period. Respondent's contention is based on an erroneous construction of footnote 5, which obviously pertains to strikers who returned to Respondent's employ before 9 August 1978. Respondent does not otherwise contest the appropriateness of the formula used by the General Counsel or the computations made in applying it to Waldman.

Respondent's amended answer states that Waldman had "declined work with [Respondent] and elected not to return from a prior leave of absence."

Respondent was permitted to adduce testimony at the hearing relevant to this contention because it was unclear to me then when Waldman "declined work" or "elected not to return." A review of the testimony proffered discloses that Respondent seeks to establish that, prior to the start of the strike, Waldman had not returned to work from a leave of absence but had instead left Respondent's employ for permanent employment elsewhere. It is apparent that Respondent would have me find that, at the time the strike began and at all times thereafter, Waldman was not one of its employees. Such a finding would directly contravene the Board's holding, in the underlying decision, that Waldman was one of Respondent's employees whom Respondent had unlawfully failed to reinstate on and after 9 August 1978. I clearly have no authority to reverse the Board's earlier finding. In retrospect, it is clear that Respondent should have filed a motion for reconsideration with the Board to obtain leave to adduce testimony respecting this contention and that, without such leave, the testimony Respondent proffered regarding that contention should not be part of the record before me. Accordingly, I now strike such testimony from the record. This ruling has further support from findings in the earlier case. Thus, in *Independent Assn.*, supra at 272, it was found that Waldman had applied to Respondent for reinstatement in February 1976 for employment and that his application was rejected.

Respondent separately maintains that Waldman, throughout his backpay period, abandoned employment in the industry in which Respondent is engaged. Respondent, in support of that contention, profered a document signed by Waldman—his pension application dated 28 December 1981. In this application he inserted in longhand "7/1/75" in a blank on a typed form which stated, in effect, that Waldman understood that, to get retirement benefits from the Local 455 Pension Fund, he had to withdraw from any further employment in work regularly performed by Local 455 members and that he was "therefore withdrawing from such employment starting 7/1/75."

The insertion of the 1 July 1975 on an application filed in 1981 is confusing because Waldman obviously could not in 1981 be withdrawing from employment in 1975. Quite possibly, Waldman misunderstood the printed statement. Respondent is, in raising this contention, speculating that Waldman in 1981 intended to state that he had retired completely from Respondent's employ in 1975 and from employment in the industry then. There would be no need for any speculation by Respondent had it honored its legal obligation to offer reinstatement to Waldman after having received, on his behalf, Local 455's unconditional application to return to work from the strike. If anyone should benefit from the confusion, certainly the last one to do so is Respondent. More significantly, the findings in the earlier case *Independent Assn.*, supra at 282, disclosed that Waldman had not in 1975 retired from employment in the industry. I find no merit to Respondent's contention.

Waldman's claim also encompasses moneys based on Respondent's alleged obligation to make contributions, during his backpay period, to the various trust funds and to provide overtime compensations and other benefits, as provided for in agreements Local 455 had with other firms during Waldman's backpay period. For the reasons stated in the section dealing with the backpay claims of Ariano and of the other strikers who had returned to Respondent's employ, I find it is not appropriate to apply that formula to seek reimbursement for the fringe benefit claims advanced by the General Counsel in behalf of Waldman. It may be that certain of those claims, e.g., some medical bills, may have been reimbursable under fringe benefit programs provided by Respondent to unit employees. However, no such contention was ever submitted by the General Counsel and it is not appropriate for me to assume or to estimate such coverage. In that contention, compare *Garsart Construction Corp.*, 282 NLRB 1331 (1987). See also *Barkman Contracting*, 276 NLRB 1062 fn. 3 (1985).

I find that Waldman is to be awarded backpay for the net earnings lost plus interest but that the fringe benefits aspects of his claim lack merit.

2. Ben Braver

In the underlying case, the Board found that Respondent unlawfully failed to reinstate Braver on 9 August 1978. According to the amended backpay and argues that his employment status with it ended prior to 9 August 1978, the start of the backpay period under the Board's finding. In support of this contention, Respondent points to the fact that Braver, in 1977, applied for early retirement to the pension fund, which has been established pursuant to contracts Local 455 has had with various employers. Braver testified that he applied for this pension and received it because he had been unable to find interim employment. The record before me indicates an employee, who accepted an early retirement pension, could return to active employment but his pension payments would be suspended. It seems then that an employee may not have irrevocably abandoned his career by accepting an early retirement pension. At best, from Respondent's standpoint, the record is unclear whether Braver unequivocably abandoned his job before Local 455 sought his reinstatement on 9 August 1978. Any ambiguity must, of course, be construed against the party whose acts contributed to it. All Respondent had to do in 1978 was to honor Local 455's application and to offer Braver his job back. Had he permanently been retired then, he would have declined and we all would have had an unequivocal answer to the issue now posed by Respondent. Respondent did not choose to do so. Instead, by failing to offer him reinstatement, Respondent in effect elected to be liable for the gross wages he would have earned, less interim earnings, as set out in the amended specification.

Respecting the fringe benefits claimed for him, I find, for the reasons set forth above as to Waldman's claim for such benefits, that it must be denied.

On the basis of the foregoing findings of fact, the entire record in this case, and pursuant to Section 10(c) of the Act, I issue the following recommended[4]

ORDER

The Respondent, Master Iron Craft Corp., Plainview, New York, its officers, agents, successors, and assigns, shall pay (1) to the employees named below the sums listed alongside, with interest as provided for in the Board Order, as enforced:

Ben Braver	$43,400
Morris Waldman	$16,847

and (2) to the employees whose names are listed below the dues and fees unlawfully deducted from their wages, as shown alongside their names, with interest as earlier provided for:

A. Ariano	$1,106
A. Amico	534
E. Amico	268
S. Amico	336
J. Auld	268
J. Belkin	282
A. Calandra	1,050
G. Calandra	604
V. Cangemi	88
D. Dworkin	422
C. Finazzo	478
C. Huntly	364
T. LaHache	13
C. Luick	212
D. Marchese	114
R. Mason	596
M. Mendicino	254
G. Pagan	1,084
J. Pisano	226
R. Reynolds	548
R. Scott	352
S. Stradtmore	128
J. Vogtle	11

In all other respects, the backpay claims are dismissed.

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[4] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

International Union of Elevator Constructors, AFL-CIO, and Local Union 3, International Union of Elevator Constructors, AFL-CIO *and* Long Elevator and Machine Co., Inc. Case 14-CC-1878

July 28, 1988

DECISION AND ORDER

BY CHAIRMAN STEPHENS AND MEMBERS JOHANSEN AND BABSON

On March 30, 1987, Administrative Law Judge Hubuert E. Lott issued the attached decision. The Respondents filed exceptions and supporting briefs. The General Counsel filed cross-exceptions and a supporting brief.[1]

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings, and conclusions and to adopt the recommended Order.

We agree with the judge that the Respondent violated Section 8(b)(4)(ii)(A) by filing a grievance on behalf of employee Ritz that is predicated on a reading of article 14 of the collective-bargaining agreement that would convert it into a de facto hot cargo provision, in violation of Section 8(e). Although only one employee is involved in this case, the theory of Ritz' grievance would require neutral employer Long to permit all of its employees to refuse to work at the construction site because of the IBEW picket line, notwithstanding the existence of a reserve gate through which employees other than those of the primary employer, Soper, could enter. It is true that the picket line clauses found unlawful under Section 8(e) in *Bricklayers Local 2 (Gunnar I. Johnson)*, 224 NLRB 1021 (1976), enfd. 562 F.2d 775 (D.C. Cir. 1977), were phrased differently from the clause by which the Respondent sought here to immunize Ritz' refusal to work, but the essence is the same. Like the union in *Gunnar I. Johnson*, the Respondent seeks a construction of the clause that would require Long to acquiesce in a work stoppage by its employees in support of the IBEW's dispute with Soper—i.e., a construction that would involve Long in a dispute "not [its] own." *National Woodwork Mfrs. Assn. v. NLRB*, 386 U.S. 612, 626 (1967).[2] The Union clearly could not lawfully encourage employees of Long to walk out in support of the IBEW's dispute with Soper, and we see it as equally unlawful for the Union to ratify such employee action by seeking to compel, through the grievance-arbitration procedure, Long's acquiescence in an employee's work stoppage for such an objective.

Because we have concluded that the contract clause as construed by the Respondent would violate Section 8(e), we may properly find the pursuit of the grievance coercive, notwithstanding the Supreme Court's decision in *Bill Johnson's Restaurants v. NLRB*, 461 U.S. 731 (1983). Although holding that the Board could not enjoin, as an unfair labor practice, the lawsuit at issue in that case, the Court expressly noted that it was not dealing with a "suit that has an objective that is illegal under federal law." 461 U.S. at 737 fn. 5. See also *Teamsters Local 705 v. NLRB (Emery Air Freight)*, 820 F.2d 448 (D.C. Cir. 1987) (distinguishing between having an unlawful motive in bringing a lawsuit and seeking to enforce an unlawful contract provision).[3]

Finally, we do not agree with the Respondent that either *Newberry Energy Corp.*, 227 NLRB 436 (1976), or *Congoleum Industries*, 197 NLRB 534 (1972), requires dismissal of the complaint here. In those cases the Board held that the respondent employers violated either Section 8(a)(1) or both Section 8(a)(1) and (3) by discharging employees because, in order to honor a picket line set up by a union involved in a dispute with a different employer, the employees refused to come to work. In *Newberry* there was no evidence that a reserve gate system had been set up; the decision speaks of a single "access gate" at which the primary picket line was set up. 227 NLRB at 440. Thus, the effect on the business of the neutral was merely incidental to the honoring of the primary picket line. See *Electrical Workers IUE Local 761 (General Electric*

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[1] The General Counsel excepts to the judge's failure to include in the Order a visitatorial clause authorizing the Board, for compliance purposes, to obtain discovery from the Respondents under the Federal Rules of Civil Procedure under the supervision of the United States court of appeals enforcing the Order. In the circumstances of this case, we find it unnecessary to include such a clause.

[2] Our finding in this regard is not at odds with the judge's observation that the "General Counsel does not contend that the clause at issue (Article 14, Paragraph 2) is a violation of Section 8(e) of the Act." We understand this to mean that the General Counsel does not contend either that the clause is unambiguously unlawful on its face or that Long originally agreed with the Respondent on the unlawful significance that the Respondent now seeks to incorporate into the clause through the arbitral process. Thus, the provision may be entirely susceptible of a lawful meaning, but we agree with the judge and the General Counsel that, given the theory of the Respondent's grievance, the Respondent is seeking to enforce an unlawful provision.

[3] Member Babson agrees with his colleagues that the Respondent engaged in coercive conduct by pursuing the grievance seeking to enforce a contract clause which, as construed by the Respondent, would violate Sec. 8(e). In so doing, however, Member Babson finds it unnecessary to pass on any suggestion by his colleagues that the pursuit of a grievance cannot constitute coercion under Sec. 8(b)(4) absent a determination that the contract clause sought to be enforced through the grievance would violate the Act either on its face or as sought to be construed by the Union.

289 NLRB No. 132

Co.), 366 U.S. 667, 679–681 (1961), and cases there cited. In *Congoleum*, there was a reserved gate system, but the Board majority expressly noted that the issue whether the employees' refusal to enter the neutral gate might violate Section 8(b)(4) or Section 8(e) had not been alleged, litigated, or even argued. Thus, it concluded that the possible illegality of the employees' actions "cannot be determined here." 197 NLRB at 534 fn. 1. In the present case the issue is before us, and we find, for the reasons stated above, that the Respondent violated Section 8(b)(4)(ii)(A) by prosecuting a grievance aimed at immunizing a work stoppage by an employee of a neutral employer, notwithstanding the availability of a neutral gate.

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge and orders that the Respondents, International Union of Elevator Constructors, AFL–CIO, and Local Union 3, International Union of Elevator Constructors, AFL–CIO, their officers, agents, and representatives, shall take the action set forth in the Order.

Steven D. Smith, Esq., for the General Counsel.

Jeffrey E. Hartnett, Esq., of Clayton, Missouri, and *Francis J. Martorana, Esq. (O'Donoghue & O'Donoghue)*, of Washington, D.C., for the Respondent.

Fred M. Reichman, Esq., of St. Louis, Missouri, for the Charging Party.

DECISION

STATEMENT OF THE CASE

HUBUERT E. LOTT, Administrative Law Judge. This case was heard at St. Louis, Missouri, on 26 September 1986,[1] on an unfair labor practice charge filed on 10 July by Long Elevator and Machine Co., Inc. (the Charging Party or Long) against International Union of Elevator Constructors, AFL–CIO and Local Union 3, International Union of Elevator Constructors, AFL–CIO (Respondents or Unions) and on a complaint issued 23 July alleging violations of Section 8(b)(4)(ii)(A) of the Act.

The issue in this case is whether the Unions by filing a grievance on behalf of its member who was disciplined for refusing to enter a reserve neutral gate are attempting to illegally enforce the "picketing clause" in the collective-bargaining agreement.

The parties were afforded an opportunity to be heard, to call, to examine and cross-examine witnesses, and to introduce relevant evidence. Since the close of hearing, briefs have been received from the parties in this case.

On the entire record,[2] including my observation of the witnesses, and in consideration of the briefs submitted, I make the following

FINDINGS OF FACT

I. JURISDICTION

Charging Party Long, a corporation with an office and place of business in St. Louis, Missouri, is engaged in the business of installing and repairing elevators. During a 12-month period ending 30 June, the Charging Party, in the course and conduct of its business operations, purchased and received at various jobsites located within the State of Missouri products, goods, and materials valued in excess of $50,000 directly from points outside the State of Missouri.

Soper Electric Co. (Soper), a corporation with an office and place of business in St. Louis, Missouri, is engaged in business as an electrical contractor. During the 12-month period ending 30 June, Soper purchased and received at its jobsites located within the State of Missouri products, goods, and materials valued in excess of $50,000 directly from points outside the State of Missouri.

Mead-McClellan, Inc. (Mead-McClellan), a corporation with an office and place of business in St. Louis, Missouri, is engaged in business as a general contractor in the construction industry. During the 12-month period ending 30 June, Mead-McClellan purchased and received at its jobsites located within the State of Missouri goods and materials valued in excess of $50,000 directly from suppliers located outside the State of Missouri.

National Elevator Industry Inc. (NEII), at the times material, has been an organization composed of employers engaged in the elevator construction and repair industry, and which exist for the purpose, inter alia, of representing its employer-members in negotiating and administering collective-bargaining agreeemnts with various labor organizations, including Respondent International. At all times prior to September 1984, Long has been an employer-member of NEII.

Respondent admits and I find that Long, Soper, Mead-McClellan, and NEII are now and have been employers in commerce within the meaning of Section 2(2), (6), and (7) of the Act, and persons engaged in commerce or in an industry affecting commerce within the meaning of Section 8(b)(4) and Section 8(e) of the Act. It further admits and I find that the Unions and Local 1, International Brotherhood of Electrical Workers (IBEW) are labor oranizations within the meaning of Section 2(5) of the Act.

II. THE ALLEGED UNFAIR LABOR PRACTICES

In October 1985, Mead-McClellan, a general contractor, began a renovation project at the Monticello Apartments in St. Louis, Missouri. Mead-McClellan awarded work on this project to several subcontractors, but the two that are involved in this case are Long and Soper.

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[1] All dates herein refer to 1986 unless otherwise indicated.

[2] The General Counsel's motion to correct the record, which is unopposed, is granted.

The employees of Soper are represented by the Congress of Independent Unions (CIU), which is not affiliated with the AFL-CIO. The employees of Long are represented by the Unions who are jointly named as Respondents. Long has 17 employees in the St. Louis area who are covered by a collective-bargaining agreement effective from 9 July 1982 to 8 July 1987. The collective-bargaining agreement is actually between multiemployer bargaining association NEII and the International Union. Long was a member of NEII and, although they discontinued membership in the association 2 years ago, they are still bound by the terms of the agreement.

Soper employees began working at the Monticello Apartment project on 15 October 1985 and remained on the project until its completion on 15 May. On 6 January, Local 1 IBEW commenced picketing at the Monticello project. The IBEW engaged in lawful informational picketing concerning the wages and working conditions provided by Soper to its employees. This picketing took place from 6 January until the completion of the project on 15 May.

In anticipation of the picketing, Mead-McClellan established reserve gates on 4 January. The west gate was reserved for neutral employers. A sign was posted at this entrance, which read, "This entrance is for employees of the following contractors only." Eight subcontractors were listed by name, including Long. Suppliers were not mentioned. The east gate was reserved for Soper, although no sign was posted at this entrance. Two picket or snow fences were erected from the Monticello building to the sidewalk in front of the building. The first snow fence was erected to the west of the east or primary entrance. The second fence was erected to the east of the west or neutral gate. The IBEW pickets walked back and forth on the sidewalk between the fences that demarcated the east gate. There was no picketing of the west or neutral gate and no evidence was offered that either reserve gate was compromised by the general subcontractors or their suppliers.

Long began assigning employees to work at the Monticello jobsite on 15 January. On 21 January, Ray Ritz, a member of Local 3, and one of the employees assigned by Long to work at the jobsite, reported to the Company's office. Patrick Long, the Charging Party's vice president, had a conversation with Ritz concerning Ritz' refusal to enter the neutral gate or work on the project so long as a picket line existed on the site. Ritz told Long that his decision not to work behind a picket line was his personal decision and a matter of conscience. Long responded by suspending Ritz. On 25 January, Local 3 Business Representative, Schergen contacted Patrick Long and asked him whether the Company would reinstate Ritz if Ritz agreed to work at the Monticello project. Long agreed to reinstate Ritz and on 27 January he returned to work. The suspension lasted 3-1/2 days, during which time Long was unable to perform any services on the job, although no attempt was apparently made to seek a replacement of Ritz.

On 6 February, the Unions, on behalf of Ray Ritz, filed a grievance alleging that Long violated article 14 entitled "Strikes and Lockout," specifically paragraph 2, which reads:

> No strike will be called against the Employer by the Union unless the strike is approved by the International Office of the International Union of Elevator Constructors. Sufficient notice shall be given to the Employer before a strike shall become effective. Except in the case of contract service work as specified in Article IX of this agreement, work stoppages brought about by lawful picketing or strikers by building trades local unions affiliated with Building Trades Councils shall not constitute a strike within the meaning of this Article.

The Unions contend in their grievance that the above provision allowed Ritz to refuse work under the circumstances in this case without being disciplined by Long. The grievance is pending before the National Arbitration Committee, which is set forth in step 2 of the grievance procedure. Step 3 of the grievance procedure calls for binding arbitration.

III. ANALYSIS AND CONCLUSIONS

No one contends that IBEW was engaged in anything but lawful primary picketing of Soper. Furthermore, the General Counsel does not contend that the clause (art. 14, par. 2) is a violation of Section 8(e) of the Act. Nor does anyone claim exemption under the construction industry proviso to Section 8(e).

The General Counsel does contend that the object of the union grievance is unlawful and that by pursuing their grievance, the Unions are forcing Long to enter into a hot cargo clause in violation of Section 8(b)(4)(A). The General Counsel argues that if the Unions' position in support of their grievance is adopted, Long would be required to permit its employees to refuse to work whenever those employees refuse to enter a neutral reserve gate. He asserts that this would be true even though the picketing union could not lawfully induce such a work stoppage, citing *Bricklayers Local 2 (Gunnar I. Johnson)*, 224 NLRB 1021 (1976).

I agree with the General Counsel's argument and his interpretation of the *Bricklayers* case. In that case, although three of the picket line clauses were overly broad and therefore violative of Section 8(e), the Plumbers clause was very similar to the clause at issue here. The Board held in the *Bricklayers* case that construing the Plumbers picket line clause as permitting the employees to refuse to pass through a neutral reserve gate would have the same effect as permitting employees to respect a secondary picket line stationed at that gate. The arbitrator's interpretation in the *Bricklayers* case is the same as the Unions' position in this case. Both have an illegal object as their purpose and would only defeat the purpose of reserve gates. Moreover, for reasons stated above, deferral would not be appropriate.

Respondents attempt to distinguish between "lawfully permitted picket line" in the *Bricklayers* case and "lawful picket" in this case, but I see no distinction as far as the end result is concerned.

Respondents emphasize that they had nothing to do with Ray Ritz' decision not to work and that Ritz has a right protected by Section 7 of the Act to observe lawful picket lines. I agree that the Unions did not influence Ritz' decision, but I find that irrelevant in this case. The Board in the *Bricklayers* case answered Respondents' second argument by stating that the employees' response (in refusing to enter a neutral gate) does not comport with what has been traditionally deemed to be primary activity. The Board further stated that in cases like this it has never been held to be primary activity when employees refuse to work for their employer who is a neutral in the dispute because picketing of another employer is taking place nearby on the common situs.

Respondents also contend that Mead-McClellan failed to establish a proper reserve gate by neglecting to use the word "suppliers" on the neutral reserve gate sign and by failing to put any sign at the primary reserve gate. This, according to Respondents, had the effect of making the entire project subject to primary picketing. Thus, Ray Ritz was disciplined in violation of his contractual and Section 7 rights for observing a primary picket line. I find that although the neutral sign did not mention "suppliers" and there was no sign at the primary gate all the participants recognized the two-gate system. The IBEW pickets patrolled only the primary gate and did not picket the neutral gate. Likewise, there was no evidence that either gate was compromised by any contractor, subcontractor, or their suppliers. Therefore, I conclude that the reserve gate system established by Mead-McClellan was valid. *Electrical Workers IBEW Local 332 (Lockheed Missiles)*, 241 NLRB 674 (1979).

Furthermore, I find that Respondents never advanced this argument in support of their grievance. Respondents relied solely on their interpretation of article 14, paragraph 2 to justify Ray Ritz' action, which I find in violation of Section 8(b)(4)(ii)(A) of the Act.

Finally, Respondents contend that the General Counsel's complaint is premature because the instant grievance may be disposed of informally, which would obviate the necessity for arbitration. This argument is spurious because Long would be put in the position of settling a case in order to neutralize an illegal result. If Respondents believed this argument, they would simply withdraw their grievance. The Charging Party should not be put to the expense of arbitration where the object of the grievant is illegal. See *Teamsters Local 705 (Emery Air Freight)*, 278 NLRB 1303 (1986).

CONCLUSIONS OF LAW

1. Long Elevator and Machine Co., Inc., Sopher Electric Co., Mead-McClellan Inc., and the National Elevator Industry Inc. are engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

2. The Respondent Unions and Local 1 IBEW are labor organizations within the meaning of Section 2(5) of the Act.

3. By attempting to enforce a picket line clause in their contract that would, in effect, protect employees from discipline for refusing for refusing to enter a neutral reserve gate, Respondents have violated Section 8(b)(4)(ii)(A) of the Act.

4. By attempting to enforce, through the grievance procedure, a picket line clause in their contract, which Respondents interpret as protecting employees from discipline for refusing to pass through a neutral reserved gate because a primary picket line was stationed elsewhere on the common work situs, Respondents are attempting to force the Charging Party to enter into an agreement in violation of Section 8(e) of the Act.

The above unfair labor practies are unfair labor practices affecting commerce within the meaning of Section 2(6) and (7) of the Act.

REMEDY

Having found that the Respondents have engaged in certain unfair labor practices, I recommend that they be required to cease and desist therefrom and take certain affirmative action designed to effectuate the policies of the Act and that they post an appropriate notice.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[3]

ORDER

The Respondents, International Union of Elevators Constructors, AFL-CIO, and Local Union 3, International Union of Elevator Constructors, AFL-CIO, its officers, agents, and representatives, shall

1. Cease and desist from entering into, enforcing, or giving effect to picket line clauses in their contracts that result in permitting employees to refuse to pass through a netural gate under circumstances where there is a primary picket line stationed elsewhere on the jobsite or any other contract or agreement, express or implied, whereby employers agree to cease and refrain from handling, using, selling, transporting, or otherwise dealing in any of the products of any other employers, or from doing business with any other person in violation of Section 8(e) of the Act or agree that employees will not be required to, or will not be disciplined for failing to, perform services for another person, in violation of Section 8(e) of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Withdraw the Ray Ritz grievance, which is the bass for the violation of Section 8(b)(4)(ii)(A) of the Act.

(b) Post at its St. Louis, Missouri facility copies of the attached notice marked "Appendix."[4] Copies of the notice, on forms provided by the Regional Director for Region 14, after being signed by the Respondents' authorized representative, shall be posted by the Respondents immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to members are customarily posted. Reasonable steps shall be taken by the Respondents to ensure that the notices are not altered, defaced, or covered by any other material.

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[3] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

[4] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

(c) Sign and mail sufficient copies of the notices to the Regional Director for Region 14 for forwarding to Long, Soper, Mead-McClellan, and NEII.

(d) Notify the Regional Director in writing within 20 days from the date of this Order what steps the Respondent has taken to comply.

APPENDIX

NOTICE TO EMPLOYEES AND MEMBERS
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

WE WILL NOT enforce the picket line clause in our contract with Long Elevator and Machine Co., Inc. in such a way as to pemrit employees to refuse to pass through a neutral gate under circumstances where there is a lawful primary picket line stationed elsewhere on the jobsite.

WE WILL NOT force Long Elevator and Machine Co., Inc. to agree that employees will not be disciplined for refusing to pass through a neutral reserve gate where there is a lawful primary picket line stationed elsewhere on the jobsite.

WE WILL withdraw the Ray Ritz grievance because our position in support of his grievance violates the National Labor Relations Act.

INTERNATIONAL UNION OF ELEVATOR CONSTRUCTORS, AFL-CIO, AND LOCAL UNION 3, INTERNATIONAL UNION OF ELEVATOR CONSTRUCTORS, AFL-CIO

Cooke's Crating, Inc. ***and*** **International Brotherhood of Painters & Allied Trades, AFL-CIO.** Case 21-CA-25659

July 22, 1988

DECISION AND ORDER

BY CHAIRMAN STEPHENS AND MEMBERS JOHANSEN AND CRACRAFT

On April 6, 1988, Administrative Law Judge Jay R. Pollack issued the attached decision. The Respondent filed exceptions and a supporting brief. The Charging Party filed a brief in opposition to the Respondent's exceptions and in support of the judge's decision. The General Counsel filed a brief supporting the judge's decision.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings,[1] and conclusions and to adopt the recommended Order.

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge and orders that the Respondent, Cooke's Crating, Inc., Los Angeles, California, its officers, agents, successors, and assigns, shall take the action set forth in the Order.

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[1] The Respondent has excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

As the judge discredited the testimony of the Respondent's president and sole stockholder, Brian Cooke, based on his demeanor, we find it unnecessary to rely on the judge's additional finding, in fn. 8 of the attached decision, that an adverse inference should be drawn from the Respondent's failure to call Supervisors Heiman and Aguilar and dispatcher Drake to corroborate Cooke's testimony.

Jean C. Libby, Esq., for the General Counsel.

Wendy J. Barsh, Esq. (Wohlner, Kaplon, Phillips, Vogel, Shelley & Young), of Los Angeles, California, for the Union.

Neil O. Andrus, Esq. (Jeffer, Mangels & Butler), of Los Angeles, California, for the Respondent.

DECISION

STATEMENT OF THE CASE

JAY R. POLLACK, Administrative Law Judge. I heard this case in trial at Los Angeles, California, on February 9 and 10, 1988. Pursuant to a charge filed against Cooke's Crating, Inc. (Respondent) by International Brotherhood of Painters & Allied Trades, AFL-CIO (the Union) on August 21, 1987, the Regional Director for Region 21 of the National Labor Relations Board issued a complaint and notice of hearing against Respondent on October 29, 1987, alleging that Respondent committed certain violations of Section 8(a)(3) and (1) of the National Labor Relations Act, 29 U.S.C. § 151 et seq. (the Act). The complaint, as amended,[1] alleges in substance that Respondent unlawfully laid off employees Ell Clounch, Michael Milton, Robert Ott, and Daniel Williams for 1 day and unlawfully delayed a pay increase for employee Mark Jager in violation of Section 8(a)(3) and (1) of the Act. Further, the complaint alleges that Respondent independently violated Section 8(a)(1) through its president Bryan Cooke by unlawfully threatening employees, interrogating employees, and promising employees benefits in order to discourage its employees' union activities.

The parties have been afforded full opportunity to appear, to introduce relevant evidence, to examine and cross-examine witnesses, and to file briefs. On the entire record, from my observation of the demeanor of the witnesses, and having considered the posthearing briefs of the parties, I make the following

FINDINGS OF FACT AND CONCLUSIONS

I. JURISDICTION

At all times material, Respondent, a California corporation, has been engaged in the business of storing, crating, packing, shipping, and installing works of art. Respondent operates a facility located at 3124 East 11th Street, Los Angeles, California. During the 12 months prior to issuance of the complaint, Respondent sold and shipped goods and products valued in excess of $50,000 directly to customers located outside the State of California. Accordingly, Respondent admits, and I find, that it is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

The parties stipulated, and I find, that at all times material the Union has been a labor organization within the meaning of Section 2(5) of the Act.

II. THE ALLEGED UNFAIR LABOR PRACTICES

A. *Background and Issues*

During August 1987, Respondent's employees became interested in union representation. Daniel Williams, a crater for Respondent, contacted the Union. A meeting was set up with Bud Rymer, an organizer for the Union. By August 17, Williams had obtained signatures from 20 of Respondent's 22 production and maintenance employees authorizing the Union to represent them for purposes of collective bargaining. On August 18, Rymer met with Bryan Cooke, Respondent's president and sole stockholder, and presented the employee petition and a proposed collective-bargaining agreement. The instant case arises

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[1] On March 11, 1988, I granted the General Counsel's motion, joined by the other parties, to withdraw certain complaint allegations.

289 NLRB No. 140

out of Cooke's reaction to the petition and the Union's demands.

Within this factual framework, the General Counsel contends that Respondent violated Section 8(a)(1) of the Act by threatening employees, interrogating employees, and promising benefits as an immediate reaction to its employees' union activities. Further, the General Counsel alleges that Respondent violated Section 8(a)(3) and (1) of the Act by sending home four employees on the day after the Union's demands and withholding a pay increase previously granted to an employee in order to discourage its employees' union membership and activities. Respondent denies all such allegations.

B. *The Facts*

As mentioned earlier, Rymer met with Daniel Williams and several other employees on August 12. A petition authorizing the Union to represent Respondent's employees was drafted and signed by the employees. Williams took the petition home and had it typed. The typed petition was signed by Williams and circulated among employees on August 13. The petition was signed by 20 employees. At that time, Respondent employed 22 employees[2] plus 4 foremen whose unit placement was not litigated.

On August 18, Rymer took a copy of the signed petition and a proposed contract to Respondent's facility. Rymer and Damaris Rosado, his assistant, went to see Cooke at his office. Rymer introduced himself to Cooke and handed him a business card. Rymer said he wished to talk to Cooke about some problems concerning Cooke's employees. Rymer showed Cooke the employee petition and got Cooke to acknowledge that more than a majority of the employees had signed the petition. Rymer told Cooke that he wanted to set up a negotiation meeting and that he wanted a committee of employees to be included. Rymer gave Cooke a proposed collective-bargaining agreement. Rymer said he would give Cooke time to review the proposal before they met to negotiate. Cooke offered to meet on the morning of August 24 and Rymer agreed. Rymer and Rosado then left the facility.[3]

Shortly after Rymer's visit, Cooke went into the crating area and spoke to employees. Williams and Robert Fenwick, another crater, testified that Cooke spoke to employees Williams, Fenwick, Robert Ott, Rob Corning, and Michael Milton and asked if the employees wanted "to go Union." No one answered and Cooke said nobody is saying anything. Fenwick then answered that "Our names are all on the petition." Cooke told the employees that he had once helped the Teamsters Union organize a business where he had worked. That company, according to Cooke, went out of business because of the union. Cooke said he would not allow that to happen to his Company.

Cooke said that he was going to have to sell the business. According to Williams, Fenwick, Ott, and Milton, Cooke said that the Union would put him out of business and that he "wasn't going to die a slow death." Cooke then said that if the employees wanted the Union then he would have to tighten up the work force. He said that he would have to lay off some employees and that the remaining employees would have to work a 40-hour week.[4] Cooke told the employees that he would no longer give time off for their other pursuits and if an employee was late 3 days, the employee would be fired. Cooke said he would have to "hire a straw boss to make sure that the employees were working." Fenwich said that the employees needed a union to help them in obtaining raises and better benefits. Cooke answered that he would give benefits.

Williams asked Cooke if he had read the proposed contract and Cooke answered that he had. Fenwick told Cooke that it was "just a starting proposal" and that there would be negotiations to work out something that was fair to everyone. Williams told Cooke that the employees were not trying to put him out of business. Ott asked Cooke to try and meet the employees half way. Cooke answered that Ott took too long to finish a crate and that other employees did not like to work with Ott. Corning began discussing health benefits and Cooke answered that he had helped organize an employer for the Teamsters Union and had seen that company go out of business. Cooke said he would not let his company die a slow death. Milton mentioned time off and Cooke answered that if the Union came in there would not be any time off. Fenwick mentioned wages and Cooke responded that he had given Fenwick a Christmas bonus. Fenwick answered that he did not think the bonus was sufficient. The meeting ended with Cooke leaving and saying something to the effect that he would have to negotiate.[5]

Later that same day, Cooke spoke with employee Mark Jager. Jager had just recently been promised a wage increase and Cooke was surprised to see his name on the employee petition. According to Jager, Cooke asked him what he thought "about this Union thing." Jager answered that he would let the Union speak for him. Cooke said that the raise that Jager was expecting would be withdrawn. Jager answered "Okay." Respondent's payroll records reveal that Jager received the promised wage increase on August 27, retroactive to August 10. Thus, despite Cooke's statement to Jager, Jager's promised wage increase was not withdrawn or delayed.[6]

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[2] Not including office clerical employees and supervisors.

[3] The above conversation is based on the credited testimony of Rymer and Rosado. To the extent that Cooke's testimony differs, he is not credited. I found Cooke to be most willing to adapt his testimony to suit the perceived needs of his case. In general, I do not credit Cooke unless his testimony is corroborated by documentary or other credible evidence.

[4] Respondent's employees were musicians and artists. One advantage of employment with Respondent, frequently stressed by Cooke, was the flexibility of the work schedule that allowed the employees to pursue their artistic careers.

[5] The above conversation is based on the credited testimony of Fenwick and Williams, which was corroborated by Ott and Milton. Cooke's account of this conversation is credited only to the extent that it is consistent. Al Aguilar, an admitted supervisor, was present at the conversation but did not say anything. Aguilar was not called to corroborate Cooke's version of the conversation.

[6] Jager's testimony is credited. However, the documentary evidence reveals that Jager was incorrect about dates. I find that this does not affect his credibility. I have used the dates established by the payroll records.

On August 19, when Williams reported for work, he was met by Cooke. Cooke referred to a list of employees and told Williams that the other employees had seniority over Williams. Cooke told Williams that Respondent did not have enough work for Williams and sent Williams home. Williams worked the next day without incident. Williams credibly testified that during his employment with Respondent, employees had never before been sent home. Rather, work was found for employees to do. According to Williams, there was crating work to be done on August 19.

Ell Clounch, a crater, was told on August 19 by Al Aguilar, crating foreman,[7] that there was no work and that Clounch should talk to Cooke. Clounch asked Cooke if there was any work and Cooke answered that since the Union was coming in, Cooke was going to have to do things according to the union method, i.e., by seniority. Cooke said that Respondent had work for three craters and that Clounch was fourth in seniority. Clounch asked if there was trucking or any other kind of work he could do. Cooke answered that he had a list of all employees by department and Clounch would only be working as a crater. Clounch left but returned to work the next day. Prior to this incident Respondent did not assign work based on seniority nor did Respondent restrict employees to a particular department. On previous occasions when work was slow, usually in the summer, employees were asked to volunteer to take the next day off. However, employees had not been sent home after they had reported to work.

When Ott reported for work, he was told by Cooke that there was no work. Ott asked why there was no work since there had been work left over from the previous day. Cooke answered that there was only enough work for three or four craters. Ott said he did not understand and Cooke said he was assigning the work according to seniority. Cooke showed Ott a seniority list that had Ott's name near the bottom. Cooke concluded that there was no work for Ott and sent the employee home. Ott returned to work the next day.

When Milton reported on August 19, Cooke came up to Milton and said, "If we are going to run this place like a union, when there is no work we are going to send you home. There is no work for you today." Cooke showed Milton a seniority list and said he was going to send home Ott, Milton, and Williams. Milton said Cooke should have given him notice so that Milton could have arranged his schedule. Milton left the office but returned and filled out his timecard to show 15 minutes for reporting to work. Milton told Cooke that if Respondent was going to lay off anybody, Milton wanted to be the first laid off. Cooke answered that Milton was not the last to be hired. Milton returned to work the next day and worked on the same project that he worked on before this day off. Milton testified that before this incident, he had been asked on several occasions if he wished to take the next day off because work was slow but had never before been sent home after reporting for work.

When Fenwick reported for work on August 19, Ott, Clounch, Milton, and Williams had already been sent home. Fenwick went to see Cooke and said, "Bryan, I don't think you ought to be doing this; I don't think you ought to be laying people off; the Union will take you to court." Cooke answered, "This is what is in the contract, that layoffs are going to happen by seniority when there is no work." Fenwick answered that there was nothing in the proposed contract to that effect. Fenwick said the contract gave the employees a 40-hour week. Cooke answered that the contract was not signed. Fenwick said he thought that they should work out the matter in a friendly way. Cooke said he was still running the business and the conversation ended.

C. *Respondent's Defense*

Cooke testified that late on the evening of August 18, he was told by Carol Heiman, a supervisor, that there was no crating work and that nobody told the craters not to come in. Cooke testified that because of the excitement concerning the Union, he and Heiman had neglected to discuss scheduling. On the morning of August 19, Cooke obtained the crating files and discovered that he only had enough work to keep one employee busy in the crating department. Cooke looked at the trucking log and found that a number of jobs were canceled or postponed.[8] Cooke testified that while Respondent did not have a strict seniority system, he generally tried to have work for more senior employees and had the junior employees volunteer when days off were necessary.

Cooke testified that he told the employees of his experience with a company he helped organize for the Teamsters Union. That company eventually went out of business. Cooke denied threatening to close the business or promising any benefits to the employees. As stated earlier, I credit the employees' version of the conversation over Cooke's denials.

After consulting with an attorney, Cooke canceled the meeting scheduled for August 24 with Rymer. As mentioned earlier, Respondent granted Jager the promised wage increase as scheduled.

D. *Analysis and Conclusions*

1. The statements to employees

Based on the credited testimony of Williams and Fenwick, I find that Cooke unlawfully interrogated employees about the Union by coupling his questions with threats to sell the business and to impose harsher working conditions. *Carpenter Trucking*, 274 NLRB 300 (1985); *Sierra Hospital Foundation*, 274 NLRB 427 (1985).

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[7] The parties stipulated that Aguilar was a supervisor within the meaning of the Act.

[8] Respondent produced the trucking log which revealed that jobs had been postponed or canceled. The log did not reveal when the jobs were canceled.

Respondent did not produce any records from the crating department to dispute the testimony of the employees that there was crating work to be done on August 19.

Further, Heiman, Aguilar, and Paul Drake, dispatcher, were not called to testify. Respondent's failure to produce such documents and witnesses leads to an inference that such evidence would be harmful to its case. *Martin Luther King, Sr., Nursing Center*, 231 NLRB 15 fn. 1 (1977); *Musicians Local 47 (American Broadcasting)*, 255 NLRB 386, 390 (1981).

I further find the threats to sell the business and the threats of less favorable conditions and harsher working conditions violated Section 8(a)(1) of the Act. *Williamson Memorial Hospital*, 284 NLRB 37 (1987); *Continental Can Co.*, 282 NLRB 1363 (1987); *Brunswick Corp.*, 282 NLRB 794 (1987).

Although Jager eventually received his raise without suffering any monetary loss, I find that Cooke's statement withdrawing the raise unlawfully placed the onus of denying the raise on the Union. *Bay State Ambulance Rental*, 280 NLRB 1079 (1986); *Trover Clinic*, 280 NLRB 6 (1986). Further, on August 19, Cooke violated the Act by placing the onus of the 1-day layoffs on the Union. *Rood Industries*, 278 NLRB 160 (1986).

Respondent argues that Cooke's statements to the employees were permissible under Section 8(c) of the Act.[9] Cooke was simply giving his truthful opinion of the consequences of the proposed contract on his business.

The distinction between threat and prediction is not easily recognized. The United States Supreme Court in *NLRB v. Gissel Packing Co.*, 395 U.S. 575, 618 (1969), recognized the right of an employer to make a prediction about the precise effects he believes unionization will have on his company. In such a case, however, the prediction must be carefully phrased on the basis of objective fact to convey an employer's belief as to demonstrably probable consequences beyond his control. That test is applicable irrespective of the employer's sincerity.

Here, Cooke's expression of his belief that the Teamsters Union caused his former employer to go out of business is permissible under Section 8(c). However, Cooke's threats to impose harsher working conditions and to go out of business were not predictions based on objective facts. Rather, these were threats phrased in terms of Cooke's choice of action if the employees forced unionization on him. Accordingly, I find that Cooke's statements violated Section 8(a)(1) and were not privileged by Section 8(c) of the Act. See, e.g., *Crown Cork & Seal Co.*, 255 NLRB 14 (1981); *Bacchus Wine Cooperative*, 251 NLRB 1552 (1980).

2. The 1-day layoffs

In *Wright Line*, 251 NLRB 1083 (1980), enfd. 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982), the Board announced the following causation test in all cases alleging violations of Section 8(a)(3) or violations of Section 8(a)(1) turning on employer motivation. First, the General Counsel must make a prima facie showing sufficient to support the inference that protected conduct was a "motivating factor" in the employer's decision. On such a showing, the burden shifts to the employer to demonstrate that the same action would have taken place even in the absence of the protected conduct. The United States Supreme Court approved and adopted the Board's *Wright Line* test in *NLRB v. Transportation Management Corp.*, 462 U.S. 393, 399–403 (1983).

For the following reasons, I find that the General Counsel has made a prima facie showing that Respondent was motivated by a desire to discourage its employees' union activities. On receipt of the employee petition and the Union's demands, Cooke immediately questioned the employees and threatened to sell or close the business. Further, he threatened to tighten up working conditions, to impose less favorable and harsher conditions, and to lay off employees. Shortly thereafter, he questioned Jager and, receiving no response, informed Jager that the employee's raise had been withdrawn. Although informing employees of the alleged lack of work on August 19, Cooke's statements reveal his intent to dramatize the negative effects of unionization to the employees. Thus, on August 19, Cooke made good on his threats of the previous day to impose harsher conditions and to lay off employees. Finally, the credible testimony of five witnesses establishes that there was, in fact, crating work to be done that day.

The burden shifts to Respondent to establish that the four employees would not have worked on August 19, even in the absence of their protected activities. Respondent established that trucking work for August 19 was postponed or canceled. However, there is no evidence to establish that Respondent could not have followed its usual practice of asking for volunteers to take the day off.[10] More important, the credible evidence establishes that there was crating work to be done. Respondent failed to produce any records to corroborate Cooke's denials of the employees' testimony. Further, neither Heiman nor Aguilar was called to corroborate Cooke's testimony. Under the circumstances, I find Respondent's lack of a credible defense further buttresses the General Counsel's case. I, therefore, find that Respondent has not rebutted the General Counsel's prima facie case and that a violation of Section 8(a)(3) has been established.

CONCLUSIONS OF LAW

1. Respondent Cooke's Crating, Inc. is an employer engaged in commerce and a business affecting commerce within the meaning of Section 2(2), (6), and (7) of the Act.

2. The Union, International Brotherhood of Painters & Allied Trades, AFL–CIO, is a labor organization within the meaning of Section 2(5) of the Act.

3. Respondent has engaged in unfair labor practices in violation of Section 8(a)(3) and (1) of the Act by laying off employees Ell Clounch, Michael Milton, Robert Ott, and Daniel Williams on August 19, 1987, in order to discourage its employees' membership in the Union.

4. Respondent has engaged in unfair labor practices in violation of Section 8(a)(1) of the Act by coercively questioning employees about their union activities, threatening to sell or close its business, threatening to impose less favorable or harsher working conditions, telling employees that a previously granted wage increase

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[9] Sec. 8(c) provides:

> The expressing of any views, argument, or opinion or the dissemination thereof, whether in written, printed, graphic, or visual form, shall not constitute or be evidence of an unfair labor practice under any of the provisions of this Act . . . if such expression contains no threat of reprisal or force or promise of benefit.

[10] As noted earlier, Respondent failed to call any witnesses to corroborate Cooke's testimony that he did not learn of the cancellations until the morning of August 19. Cooke is not credited on this point.

was withdrawn because of the Union, and telling employees that the Union caused their layoff.

5. Except as specifically found above, Respondent did not violate the Act.

THE REMEDY

Having found that Respondent engaged in unfair labor practices, I shall recommend that it take certain affirmative action to effectuate the policies of the Act.

Respondent shall be ordered to make the four employees whole for any loss of earnings they may have suffered by reason of the 1-day layoffs, with interest computed in the manner set forth in *New Horizons for the Retarded*, 283 NLRB 1173 (1987). See generally *Isis Plumbing*, 138 NLRB 716 (1962).

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[11]

ORDER

The Respondent, Cooke's Crating, Inc., Los Angeles, California, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Discriminating against employees in regard to layoff in order to discourage membership in International Brotherhood of Painters & Allied Trades, AFL-CIO or any other labor organization.

(b) Coercively questioning employees about their union activities, threatening employees with closing or selling the business, threatening employees with less favorable or harsher working conditions, telling employees that wage increases were withdrawn because of the Union, telling employees that their layoffs were because of the Union or threatening any other form of retaliation for its employees' union activities.

(c) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Make whole all four employees laid off on August 19, 1987, for any loss of pay they may have suffered as a result of the unlawful layoff, in the manner set forth above, in the remedy section of this decision.

(b) Remove from its files any reference to the layoffs described above, and notify each of them that this has been done and that evidence of such unlawful layoff will not be used as a basis for future personnel actions.

(c) Preserve and make available to the Board or its agents all payroll and other records necessary to compute the backpay rights set forth in the remedy section of this decision.

(d) Post at its Los Angeles, California facility copies of the attached notice marked "Appendix."[12] Copies of the notice, on forms provided by the Regional Director for Region 21, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material.

(e) Notify the Regional Director in writing within 20 days from the date of this Order what steps the Respondent has taken to comply.

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

Section 7 of the Act gives employees these rights.

To organize

To form, join, or assist any union

To bargain collectively through representatives of their own choice

To act together for other mutual aid or protection

To choose not to engage in any of these protected concerted activities.

WE WILL NOT discriminate against employees regarding layoff to discourage membership in International Brotherhood of Painters & Allied Trades, AFL-CIO or any other labor organization.

WE WILL NOT coercively question employees about their union activities, threaten employees with closing or selling the business, threaten employees with less favorable or harsher working conditions, tell employees that wage increases were withdrawn because of the Union, tell employees that their layoffs were because of the Union, or threaten any other form of retaliation for our employees' union activities.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL make whole Daniel Williams, Ell Clounch, Michael Milton, and Robert Ott for any loss of pay they may have suffered as a result of the unlawful layoff of August 19, 1987, with interest.

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[11] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

[12] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

WE WILL remove from our files any reference to the layoffs described above, and WE WILL notify each of the four employees that this has been done and that evidence of such unlawful layoff will not be used as a basis for future personnel actions.

COOKE'S CRATING, INC.

Jilts, Inc. d/b/a Golden Years Rest Home *and* **District 1199, WV/KY/OH, National Union of Hospital and Health Care Employees, AFL-CIO.** Case 9-RC-15128

July 22, 1988

DECISION AND DIRECTION

BY CHAIRMAN STEPHENS AND MEMBERS BABSON AND CRACRAFT

The National Labor Relations Board, by a three-member panel, has considered determinative challenges and objections in an election held February 5, 1988, and the Regional Director's report recommending disposition of them. The election was conducted pursuant to a Stipulation and Agreement for Second (Rerun) Election. The tally of ballots shows 11 for and 7 against the Petitioner, with 4 challenged ballots. The challenged ballots are sufficient in number to affect the results of the election.

The Board has reviewed the record in light of the exceptions and brief and has adopted the Regional Director's findings[1] and recommendations.[2]

We agree with the Regional Director's conclusion that the Petitioner's organizer, David Freeland, did not violate the Board's rule governing conversations between a party representative and a prospective voter waiting to cast a ballot when he told an employee that the Employer was going to challenge her vote. See *Milchem, Inc.*, 170 NLRB 362 (1968). In so concluding, the Regional Director relied on the findings that the conversation between Freeland and the employee did not take place within the polling place or in the corridor leading to the polling area, the employee was not in line waiting to vote, the polls had not opened, and in any event, the conversation was brief.

The Employer, citing *Monroe Mfg., Co.*, 200 NLRB 62 (1972), contends that Freeland's brief remarks are objectionable under *Milchem*. We disagree. In *Monroe Mfg., Co.*, supra, the company's official approached the line of voters while the polls were opened and advised three employees waiting in line that they could go home as they were ineligible to vote because their names did not appear on the eligibility list. These voters then left the line. The Board adopted the judge's finding that the official's action violated the *Milchem* rule (even though his remarks concerning eligiblity were accurate) because his remarks to employees in line to vote while voting was taking place conveyed the impression that the Employer had some effective connection with, if not control over, the election. Thus, the Employer's comments in *Monroe Mfg.* could reasonably be interpreted as indicative of the Employer's authority to unilaterally dictate who could and could not vote. None of the factors relied on in *Monroe Mfg.* are present in the instant case. Here the conduct at issue occurred outside the polling area and before the polls opened. Further, the substance of Freeland's comments could not be interpreted as exhibiting control over or an official connection with the election process. In such circumstances, the *Milchem* rule does not apply.

DIRECTION

IT IS DIRECTED that the Regional Director for Region 9 shall, pursuant to the Board's Rules and Regulations, and within 14 days of the date of this Decision and Direction, open and count the ballots of Oga Combs, Grace Shepherd, Catherine Wireman, and Brenda Patton, and thereafter issue and serve on the parties a revised tally of ballots and the appropriate certification.

IT IS FURTHER DIRECTED that the above-entitled matter is remanded to the Regional Director for Region 9 for further processing consistent with this Decision and Direction.

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[1] In the absence of exceptions, we adopt pro forma the Regional Director's recommendation to overrule the challenges to the ballots of Oga Combs, Grace Shepherd, Catherine Wireman, and Brenda Patton; and to overrule the Employer's Objection 3.

[2] The Employer's exceptions, in our opinion, raise no material or substantial issues of fact or law that would warrant reversal of the Regional Director's recommendations or require a hearing.

Metro Foods, Inc. and Brice Bros., Inc. ***and*** **Freight Checkers, Clerical Employees and Helpers, Teamsters Local Union No. 856, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, AFL–CIO.** Cases 20–CA–20928 and 20–CA–20982

July 26, 1988

DECISION AND ORDER

BY CHAIRMAN STEPHENS AND MEMBERS JOHANSEN AND CRACRAFT

On September 30, 1987, Administrative Law Judge Earldean V. S. Robbins issued the attached decision. Respondent Metro Foods, Inc. (Respondent Metro) filed exceptions and a supporting brief, and the General Counsel filed an answering brief.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings,[1] and conclusions[2] and to adopt the recommended Order[3] as modified.[4]

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge as modified below and orders that the Respondents, Metro Foods, Inc. and Brice Bros., Inc., San Francisco, California, their officers, agents, successors, and assigns, shall take the action set forth in the Order as modified.

1. Substitute the following for paragraph 1(f).

"(f) In any other manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act."

2. Substitute the attached notice for that of the administrative law judge.

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

Section 7 of the Act gives employees these rights.

To organize

To form, join, or assist any union

To bargain collectively through representatives of their own choice

To act together for other mutual aid or protection

To choose not to engage in any of these protected concerted activities.

WE WILL NOT refuse to recognize and bargain with the Union as the exclusive representative of our employees in the appropriate unit with respect

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[1] Respondent Metro has excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

In sec. III,H, par. 6, of her decision, the judge found that Office Manager Lee's questioning of employee Danette Petersen on January 15, 1987, whether Petersen would go with Owner Leo Englert to Metro or stay with the Union was coercive and therefore violated Sec. 8(a)(1) and (3) of the Act. However, in par. 8 of her conclusions of law, the judge determined that the interrogation violated only Sec. 8(a)(1). The complaint alleged that Lee's questioning of Petersen violated only Sec. 8(a)(1). Accordingly, we correct the inadvertent error in sec. III,H, par. 6, of the judge's decision and find that the interrogation violated only Sec. 8(a)(1).

[2] In its exceptions, Respondent Metro argues that the facts in *Victor Valley Heating & Air Conditioning*, 267 NLRB 1292 (1983), where no alter ego relationship was found, present a stronger basis for making an alter ego finding than the facts in the instant case. We disagree. In *Victor Valley*, the husband and wife owners of a company had a collective-bargaining agreement with a union. The husband, as president and manager of the company, decided to terminate part of the company's operations because of unprofitability caused by competition from nonunion business. During the time of this decision, the husband and wife's son, with his parents' assistance and a large monetary gift from the son's grandmother, formed a company engaged in the same type of business being terminated by his parents. The parents' former secretary became the bookkeeper and secretary for the new company and the son hired his brother-in-law, a former employee of the son's parents, as his superintendent. The son bought equipment no longer needed by his parents because of their partly terminated operations, and the parents referred customers to their son.

The Board adopted the judge's decision finding that the parents' assistance to their son involved routine matters and did not include direction of employees, business management, or control of any daily operations. At the son's company, the brother-in-law alone was responsible for hiring, firing, and assigning work. At the parents' company, the husband was singularly in charge of labor matters. The parents also had no financial stake or ownership interest in their son's company and the son's company received no financial benefit from the parents' business. Although the husband was registered as his son's responsible managing officer, the registration was a mere paper transaction designed to qualify the new company for a state license. The registration did not give the husband any financial interest or ownership in the new company.

In the instant case, Leo Englert created Metro Foods, Inc. to benefit himself and to avoid his contractual obligations with the Union. We note that Englert had substantial ownership interests in both Brice Bros., Inc. and Metro Foods, Inc., was the dominant voice in labor relations matters at both companies, and openly espoused his desire to rid himself of the Union. Accordingly, we find that *Victor Valley* is clearly distinguishable from the instant matter and we adopt the judge's conclusion that Brice Bros., Inc. and Metro Foods, Inc. are alter egos.

[3] The General Counsel has requested that the order include a visitatorial clause. We find no need for such a remedial provision in the circumstances of this case. See *Cherokee Marine Terminal*, 287 NLRB 1080 (1988).

[4] In par. 4 of her Remedy, the judge recommended issuing a broad cease-and-desist order against the Respondents. In her Order, however, the judge issued a narrow cease-and-desist order. Because we agree with the judge that a broad order is appropriate under the circumstances of this case, we shall modify the Order and issue a new notice to employees.

289 NLRB No. 134

to wages, hours, working conditions, or other terms and conditions of employment of the employees, or refuse to honor the collective-bargaining agreement applicable to those employees, or fail to apply to such employees the terms and conditions of the agreement.

WE WILL NOT bypass the Union and bargain directly with our employees with regard to the terms and conditions of their continued employment.

WE WILL NOT refuse to furnish the Union with requested information regarding the alleged closure of our South San Francisco, California facility, and the alleged sale and disposition of certain of our assets, capital, and goodwill, and WE WILL NOT provide the Union with misleading inaccurate information in response to such requests.

WE WILL NOT discourage membership in the Union, or any other labor organization, by terminating our employees because they are represented by the Union or any other labor organization, or because they are covered under a collective-bargaining agreement, or by otherwise discriminating against our employees, in regard to hire, tenure, or employment, or other terms and conditions of employment.

WE WILL NOT coercively interrogate our employees about their union activities and sympathies.

WE WILL NOT in any other manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL recognize Freight Checkers, Clerical Employees and Helpers, Teamsters Local Union No. 856, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, AFL-CIO as the exclusive collective-bargaining representative of our employees in the appropriate unit described below and, on request, meet and bargain with the aforesaid Union concerning wages, hours, pension, and welfare benefits, and other terms and conditions of employment, and, if an understanding is reached, embody it in a signed document. The appropriate unit is:

> All employees covered by the collective bargaining agreement between the Union and the San Francisco Produce Association and the Terminal Dealers' Association, effective by its terms from February 1, 1986 to February 1, 1989.

WE WILL acknowledge that we are bound by the collective-bargaining agreement between the Union and the San Francisco Produce Association and the Terminal Dealers' Association effective by its terms from February 1, 1986, to February 1, 1989, andWE WILL abide by the terms of said agreement, both retroactively and prospectively.

WE WILL make our employees whole by paying retroactively the wage rates provided for in our collective-bargaining agreement with the Union and by paying all contractually required contributions to the various trust funds established by the collective-bargaining agreement and by reimbursing employees for any expenses they may have incurred because of our failure to make such required payments.

WE WILL offer each of the employees named below immediate and full reinstatement to his or her former job or, if that job no longer exists, to a substantially equivalent position, without prejudice to his or her seniority or any other rights or privileges previously enjoyed and WE WILL make him or her whole for any loss of earnings and other benefits resulting from his or her discharge, less any net interim earnings, plus interest.

Harry Barsanti
Danette Petersen
Lillian Fenech
Arturo Cadena
Cucu Franco
Liborio Leon
Oscar Canizales
John Ensey

Steve Mosunic
Willie Reyes
Franklin Tying
Arthur Meier
William Singleton
William Prieto
Robert Ikeda

WE WILL remove from our files any reference to the unlawful terminations and notify each of the employees in writing that this has been done and that the termination will not be used against them in any way.

METRO FOODS, INC. AND BRICE BROS., INC.

Nancy E. Watson, for the General Counsel.
Randolph C. Roeder (Littler, Mendelson, Fastiff & Tichy), of San Francisco, California, for the Respondents.

DECISION

STATEMENT OF THE CASE

EARLDEAN V. S. ROBBINS, Administrative Law Judge. This case was heard before me on 8 through 11 June 1987 in San Francisco, California. The initial charge in Case 20-CA-20928 was filed by Freight Checkers, Clerical Employees, and Helpers, Teamsters Local Union No. 856, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, AFL-CIO (the Union) and served on Metro Foods, Inc. and Brice Bros., Inc. (Metro, Brice, Brice Bros., or Respondents). On 22 January 1987 a first amended charge in Case 20-CA-20928 was filed by the Union and served on Respondents on 9 March 1987. The initial charge in Case 20-CA-20982 was filed by the Union and served on Respondents on 10 February 1987, and a first amended charge in the case was filed by the Union and served on

Respondents on 9 March 1987. The consolidated complaint, which issued on 13 April 1987 alleges that Respondents have violated Section 8(a)(1), (3), and (5) of the National Labor Relations Act (the Act).

The basic issues are:

1. Whether Metro and Brice are alter egos and a single employer within the meaning of the Act.

2. Alternatively, whether Metro is a successor to Brice obligated to recognize and bargain with the Union and, if so, whether it has failed in this obligation.

3. Whether Respondents unlawfully terminated certain named employees or, alternatively, if Respondents are not alter egos or a single employer, whether Metro Foods has unlawfully refused to hire those employees.

4. Whether Respondents have unlawfully refused to furnish the Union with certain requested information.

5. Whether Respondents have bypassed the Union and dealt directly with employees by soliciting employees to abandon the Union and enter into individual employment contracts.

On the entire record,[1] including my observation of the demeanor of the witnesses, and after due consideration of the briefs filed by the General Counsel and the Respondents, I make the following

Findings of Fact

I. JURISDICTION

At all times material until 31 January 1987, Brice Bros., Inc., a California corporation, with an office and place of business in south San Francisco, California (the Brice facility), has been engaged in the nonretail sale and distribution of produce. At all times material since 1 February 1987, Metro Foods, Inc., a California corporation, with an office and place of business in San Francisco, California (the Metro facility), has been engaged in the nonretail sale and distribution of produce. During the 12-month period ending 1 February 1987, Brice Bros., in the course and conduct of its business operations, sold and shipped from its south San Francisco, California facility products, goods, and materials valued in excess of $50,000 directly to enterprises located within the State of California, each of which is directly engaged in interstate commerce. Based on a projection of its operations since 1 February 1987, at which time it commenced its operations, Metro, in the course and conduct of its business operations, will annually sell and ship from its San Francisco, California facility products, goods, and materials valued in excess of $50,000 to enterprises located within the State of California, each of which is directly engaged in interstate commerce.

The complaint alleges, Respondents admit, and I find that Brice Bros., until 31 January 1987, and Metro Foods, since 1 February 1987, each has been an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

II. LABOR ORGANIZATION

The complaint alleges, Respondents admit, and I find that the Union is now, and has been at all times material, a labor organization within the meaning of Section 2(5) of the Act.

III. THE ALLEGED UNFAIR LABOR PRACTICES

A. *The Brice Operations*

Brice Bros. has been in business as a wholesale produce distributor operating out of the Golden Gate Produce Terminal in south San Francisco for more than 25 years. In 1978, Leo Englert and Frank Luporini each acquired a 50-percent interest in Brice Bros. At that time Brice Bros. was a member of a multiemployer bargaining group, bound by a collective-bargaining agreement with the Union. In 1980, 1983, and 1986, successively, 3-year contracts were entered into by the Association and the Union. At no time did Brice Bros. make an attempt to withdraw from the multiemployer bargaining unit, and there is no evidence that prior to the incidents involved Brice made any attempt to encourage its employees to abandon the Union.

Englert testified that at the time he and Luporini acquired Brice they anticipated that responsibility for Brice's operations would be divided. Englert would be responsible for the buying and selling of produce and Luporini would be responsible for labor and the warehouse. However, Englert admits this division of responsibility was never successful. According to him, Luporini did not carry out his responsibilities to Englert's satisfaction, and he admits that during the past 5 to 7 years he has made negative comments regarding Luporini to employees. Brice employees Danette Petersen, William Singleton, Harry Barsanti, Franklin Tying, and Gregory Thompson testified that Englert often made derogatory remarks about Luporini to employees and instructed them to ignore Luporini's orders. Tying testified that on a number of occasions Englert threatened to discharge him and other employees if they did not ignore Luporini's orders. According to them, Englert said he was the boss and that employees should only follow his instructions or that of Office Manager Beverly Lee or the Night Warehouse Supervisor Gregory Thompson. Englert did not deny giving such instructions. According to Thompson, Englert decided whether employees should work overtime. Singleton and Tying testified that Englert interviewed and hired them.[2] He also assigned Singleton the truck he was to drive. Further, there was a notation on the driver's schedule to see Englert regarding any changes.

The Brice facility was located in the Golden Gate Produce Terminal (the terminal). The terminal, located on 16.4 acres in south San Francisco, is comprised of 2 long buildings, 2 stories high, divided into approximately 72 stalls, and occupied by in excess of 20 produce wholesalers. The buildings are surrounded by docks on three sides with each stall having a door opening onto the dock. Some of the wholesalers are engaged in large volume operations requiring delivery to customers. Others are smaller operations that sell mainly out of their stalls in the terminal, referred to as selling "on the street." Although Brice did some limited selling "on the street," most of the products it sold were delivered directly to its customers.

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[1] At the conclusion of the hearing, I left the record open for the purpose of receiving a list of the Metro employee complement during its first month of operations by name, classification, hire date, and separation date where applicable. That list, marked as G.C. Exh. 34, is received into evidence.

[2] Tying testified that he asked Luporini if there were any job openings, and Luporini told him he would have to speak to Englert.

Brice, which occupied three stalls in the terminal with a total of 5400 square feet, operated much the same as all other large produce distributors in the market. It purchased produce from various brokers through a process of bargaining for the best price possible from a supplier. Englert was the person who negotiated prices with produce brokers for the purchase of produce and determined the price for which Brice would sell to its customers. Luporini did this only when Englert was on vacation or because of illness. Luporini did the purchasing of frozen produce and of "shorts"—items purchased at the last minute on the street because they were perishable or to fill in missing items on a particular order. Luporini was also responsible for selling "on the street." However, it is undisputed that Englert discouraged such selling. Luporini was also responsible for handling the donation of distressed goods to senior citizen groups. Additionally, he oversaw the repacking of delicate produce such as avocados, much of which he did himself.

As to sales, the general practice of large wholesale produce distributors, including Brice and Metro, is to solicit a commitment from a customer to purchase produce. Many large customers have a policy of seeking bids from three wholesale distributors during any one period of time. On a weekly basis, the distributor sets the price it will charge a customer for each item of produce. When the price is communicated to the customer, the customer decides what item it will purchase from the distributor. In general, a customer will continue to order from the same distributor if the price is competitive and the quality of the produce and the service is satisfactory. If any of these three factors does not meet the customer's requirement, the customer may switch to another distributor. However, if a customer finds a distributor satisfactory as to all three factors, then the customer may use the distributor as its prime supplier for years. Brice had a group of customers who purchased on a regular basis and some who purchased only sporadically.

In January 1986 Brice's employee complement consisted of four drivers, one utility man, six porters,[3] two salesmen, and two office employees. The porters worked principally at night, placing and rotating stock in the freezers and iceboxes, repacking produce, and loading the trucks for deliveries. They also sorted produce and repacked certain delicate items. Much of the repacking was done by Luporini. The drivers began work at 4 or 5 a.m. and made deliveries until the early afternoon. Each driver was assigned a regular route, which covered a particular geographical area. The utilityman worked both as a porter and a driver. The office employees were supervised by Beverly Lee, an admitted supervisor. The porters were supervised by Night Supervisor Greg Thompson.

Brice's customers placed their orders either by telephoning Brice or by responding to calls initiated by Englert or the Brice office personnel. Then invoices are prepared by Brice office personnel stating the items ordered, after which porters removed the required produce from the freezer and/or icebox and loaded it onto the truck. Once the truck was loaded, the driver delivered the produce to the customer. Identical or similar procedures are used by Metro and all wholesale distributors who deliver produce to customers.

B. *The Decision to Dissolve Brice, Sell the Brice Facility, and Distribute the Brice Assets*

According to Englert, he and Luporini began discussing the dissolution of Brice Bros. in 1986 because they were growing further and further apart, and Luporini wanted to retire. They considered the possibilities of Englert buying out Luporini, of Luporini buying out Englert, and then selling or dissolving the business. After unsuccessful attempts to settle on either of the other options, they decided to dissolve the business. The principal assets of Brice Bros. was the warehouse and, according to Englert, it took approximately a year to a year and a half to find a buyer for the warehouse. They did finally find a buyer who paid $525,000 for the warehouse. Negotiations for the sale of the warehouse was completed around the first week in October. Escrow closed around the end of November. The terms of the dissolution provide, inter alia, that, at his election, Englert would receive all trucks and equipment owned by Brice in consideration for his assumption of all financial obligations and liabilities pertaining to such trucks and equipment. It was further agreed that upon final liquidation Englert, or "his new corporation," would buy Brice's remaining inventory for a price of 10 cents per box above actual cost. The agreed-on figure that Englert paid for the inventory, according to him, was $98,000. The agreement further provided that Englert and Luporini receive equal interest in all other assets of Brice and share equally in all other Brice fixed and contingent liabilities.

C. *Rumors and Statements About the Closing of Brice*

Around October or November 1986,[4] rumors began circulating that Brice would be moving. Danette Petersen testified that around that time she asked Lee if Brice was moving. Lee said they were thinking about it, that she and Englert had looked at a warehouse that would have a lunchroom and a private office for Lee. Lee further said she would like for Petersen to go with them when they moved. Petersen asked if Englert was going to stay in the Union. Lee said no. Petersen said she had been in the Union 6 years and wanted to stay in because of the benefits she had.

Petersen also testified that, in November or December, she asked Luporini if Englert was going to stay in the Union. Luporini said he did not think so, but he did not know whether Englert could get away with it. During a later conversation, according to Petersen, she asked Luporini what he was going to do. Luporini said he was going to retire. During a third conversation, Petersen asked Luporini if he had heard of any job openings. Luporini said Englert might need someone at his new place. Petersen again asked if Englert was going to stay with the Union. Luporini said no. On another occasion, according to Petersen, she told Luporini she had applied for another job and asked what he thought about that. Luporini said he would not hesitate to take another job because Englert would only think of himself. In another conversation, Luporini told Petersen the place had been sold. Petersen also testified that, at the beginning of January, she asked Lee what her benefits would be if she moved with Lee. Lee said she did not know any of that yet.

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[3] It appears that this figure probably includes repackers.

[4] All dates in September through December will be in 1986 and in January through March will be in 1987.

Employee William Singleton testified that in September or October he began to hear rumors from customers that the Brice warehouse was for sale, and customers began to ask him what was going on. He told Englert customers were saying they had heard Brice was closing, and they should not buy from Brice. Englert said Brice was not closing, was not going to go out of business, and Singleton should not say anything to the customers other than that Brice was not closing. In early November, according to Singleton, Englert said a customer told him one of the drivers said Brice was closing, and he assumed it was Singleton. Singleton denied this. Englert said, "[I]n the future, if anybody asks you, we are not closing."

Singleton also testified that the week before Thanksgiving Englert called him into his office and told him he was going to move the Company to another location in the area, that he was going to sell the warehouse, and the new company he was going to open would be nonunion. Englert said he was going to take only a few of his key employees with him. He said Leonardo Cadena would be head driver and take care of the San Jose and south route. Cuco Franco would be head porter. William Reyes would be head of the prepared department, Steve Mosunic would be a porter, and Singleton would be a driver and salesman. Englert also said the company was going to be nonunion, that he would not be able to pay what the employees were being paid in the Union, but he was going to supply a benefits package as good or better than the Union's. He said he realized Singleton would not remain with him if he did not make as much money, so he was offering Singleton a job as a salesman in which he would make a 2-percent commission, have a car, an expense account, and a gas card. Englert said there would also be a salary involved, but he did not know yet what the salary would be. Englert said Singleton should talk to Arthur Meier, the head salesman for Brice, so that Meier could fill Singleton in on information. Englert said because that week was very busy, a holiday week, Singleton should wait until the following week to talk to Meier.

According to Singleton, Englert further said he was going to get rid of Luporini. He said the union wages were killing him, and he could not afford to pay union prices; that the health and welfare was way out of line. He said he was going to get rid of some of the deadwood like Harry Barsanti, that Barsanti had 5 weeks' vacation every year and Englert could not afford to pay that. Englert said Barsanti's health and welfare and pension programs were all paid up in the Union, but Brice still had to pay it and that bugged him; that he did not want to pay that money. He said he could not compete with other nonunion houses such as Gallei Produce, Ralph Foods, and B&C Produce; but by going nonunion he could compete. He further said that within 2 years the entire industry would be nonunion. Singleton also testified that, in one of their conversations, Englert asked him not to say anything to anyone because he was only taking his key employees, and he did not want everyone to know. He said he wanted to get rid of the deadwood.

Gregory Thompson testified that in June 1986 he asked Luporini if the rumors about Brice Bros. being sold were true. Luporini said yes, they were in the process of trying to sell the business, and that his wife wanted him to leave the produce business because he was not making any money. He said they were trying to sell the stalls and had received a bid, but Englert was holding out for another $50,000 in cash above the value of the stalls, so that he would have a nest egg to start a new company.

Thompson also testified that in mid-June Englert told him he was trying to get out of the produce market and away from the Union because he was not making any money. He said he would finally get the chance to make some money once he got Luporini out of the business. He said he would have to move out of the market and away from the Union if the Company was going to survive. Englert continued to mention that he was looking for another warehouse and, on one occasion in September, took Thompson to a warehouse in south San Francisco that he was considering purchasing. Englert said that was what he could have if they got away from the Union and out of the market.

D. *Notification to the Union and to Employees of the Closing of Brice and Negotiations with the Union with Respect Thereto*

On 2 October Englert sent a letter to Union Representative Robert Rosa, which states:

> This is notification to the International Brotherhood of Teamsters, Local 856, of the dissolution of Brice Bros. Inc. within 6 months. Please contact us so that we can meet and arrange the appropriate preparations.

At the time, Rosa was on extended sick leave so there was no response to this letter. On 30 December Peter Cooke, a management representative for Brice and the association of which Brice was a member, sent a mailgram to the Union, the body of which reads: "If you wish to meet with Brice Bros. prior to its being dissolved and closed on or before January 31 please contact me."

Rosa testified that he first became aware of the possibility that Brice Bros. might be closing when he returned from sick leave in mid-December and was given the October letter from Brice. According to Rosa, around the last week in December, he called Cooke, told him he had information that Brice Bros. was going to continue in business either under that name or a new name and would like to meet with Englert to ask some questions. Cooke agreed, and they scheduled a meeting for 12 January.

The meeting was held as scheduled. Present for the Employer were Luporini and Cooke. Present for the Union were Rosa and Union President Jack McLaughlin. Cooke said Englert had broken his foot and could not attend. Luporini said he was going to retire. According to Rosa, Cooke said Englert was going to go out of business. Rosa asked if they were planning to sell the equipment and accounts, and if they had notified the accounts that Brice was closing. Luporini said their attorney was going to work on a letter to be sent to all the accounts. Rosa asked if anyone from Brice was going to go with Englert. Cooke asked, "Go where?" Rosa inquired whether Lee was going to go with Englert. Cooke said no. Rosa then asked if Lee had any ownership interest in Brice. Luporini said no. Rosa said it was his understanding that Brice Bros. was going to continue in business either under that name or some other name, that and the Union had been told they were going to move into a warehouse in south San Francisco. Cooke said he had not heard anything about that, and that he had been assured that Englert was going out of business. Rosa said he wanted to meet with Englert because he was not satisfied with the answers he was getting. Cooke said he would contact Englert. Rosa said he wanted to talk about severance pay. Cooke mentioned either a $2000 or $4000 lump sum at that time. After some discussion Cooke proposed a $10,000 figure and said if they went to a $10,000 figure the Union would have to back off, and that the Union could disburse the money any way it wanted, but would have to agree not to pursue the matter further.

Later that day Cooke and Rosa spoke by telephone in an attempt to set up a meeting for 23 January. Rosa testified that he told Cooke he would be willing to talk about severance pay. He also testified that he said he suspected Englert was really continuing in business, and that Cooke should ask Englert. Neither Cooke nor Luporini testified.

On 15 January all Brice employees received the following notice with their paychecks:

> To our employees:
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> As per our union contract, you are hereby officially advised that Brice Bros. Inc., will ceased [sic] to exist and discontinue your employment on or about January 31, 1987.
>
> If you need assistance on extended medical coverage, please contact Joanne, at Local 856, 863-7607.

According to Rosa, prior to the 23 January meeting, he spoke with Union Attorney Marie Rangone regarding his doubts that Brice was really closing and asked her to give him some questions to use during the meeting. On 21 January Rangone sent a letter to Englert, the body of which states:

> This office represents Teamsters Local 856. With respect to the closure of your business, about which you notified the Union on or about October 2, 1986, the Union has received information that you are in fact intending to carry on the same or a similar business in another location at the produce market. However, at a meeting to discuss the impact of the alleged closure of the business last week, you did not appear, and your representative Mr. Cooke was unable to answer our questions about the likelihood of your continuing to operate the business. As you are aware, our contract is binding upon you in the event you extend your business to another location; moreover, we feel that you are not being forthright in bargaining with the Union with respect to closure, if in fact closure of the business is your real intent.
>
> Therefore, we have this date filed unfair labor practice charges with the National Labor Relations Board. Our initial demand is for all information about the future, if any, of Brice Bros.' current business, whether or not the business is to be carried on under the same name or in the same location, or not, as the case may be. Thank you for your prompt response.
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> The letter and the enclosed unfair labor practice charge were received by the Union on 22 January.

The meeting was held as scheduled on 23 January. Present were Rosa, Englert, Cooke, and Respondents' attorney, Randolph Roeder. According to Rosa, after they began discussing the closing of Brice Bros., he read a list of questions that had been dictated to him by Rangone. He first asked, "What stage of the dissolution are you in at the present time?" Englert said he was closing by the end of the month, but gave no further explanation. Rosa asked, "Have you sold the property? If so, to whom?" Englert said this was none of Rosa's business and refused to answer. Rosa asked, "Have you sold the goodwill of the company." Englert said he was working on it. Rosa asked, "Have you sold the business accounts, etc." Englert said he was trying to sell the accounts, the trucks, the office equipment, etc., but did not say to whom he was tryingto sell them. Rosa asked, "Are any of the officers of the corporation or anyone related to them going to continue in the business either under the name of Brice Bros. or any other name?" Englert said no, but gave no further explanation.

At this point, according to Rosa, either Roeder or Cooke asked for a caucus. Rosa left the office and, after 10 or 15 minutes, he was invited to return. Cooke explained that Roeder was there to handle the charges that had been filed against the Company, and Cooke would handle the closing of the Company and any severance pay issue. They then commenced discussing severance pay. Rosa made a demand of 1 week's pay for each year of service with the Employer. Cooke said that was unacceptable. Cooke said Brice could go as high as a $5000 lump sum, but the Union would have to agree to not pursue the matter any further; and, if the Union did agree to take the $5000 lump sum, the Union could disburse it anyway it saw fit. Rosa asked what Englert was going to do in the future. Englert either said it was none of Rosa's business or he was not sure. Rosa cannot remember which he said. No agreement was reached on the severance pay issue that day. Rosa said he had meetings in Honolulu the following week and when he returned they could meet to talk about severance pay and anything else necessary. He also said the contract would still be enforced. Rosa asked if they were going to pay all the employees their vacation, health and welfare, and pension. Englert said Lee was working on that. Rosa asked if Englert was going to take any of the employees with him. Englert said no. Thereafter, the Union made no further contact with Respondents.

Englert testified that after introductions Rosa asked why Roeder was there and remarked that Englert had brought in the heavy hitters. They then started talking about the closure of Brice Bros. Rosa asked to whom the business had been sold. Englert said they did not sell the business, they sold the warehouse. Rosa asked what they were going to do with the accounts. Englert said they were uncertain. Rosa asked what they were going to do with the equipment and the trucks. Englert said they are for sale and asked if Rosa knew anyone interested in purchasing the trucks. He also told him the office equipment was for sale. As to what his plans were, Englert said he was uncertain. They then began discussing severance pay. Rosa asked for $90,000. Cooke said no one in the produce industry had ever given severance pay and cited several examples. Rosa then reduced his demand to $50,000. Englert said that was totally unacceptable as Respondent was not making any money and did not have that type of money, that the sale of the building was going to pay debts. Englert then offered $2000 to $3000, which the Union could disburse any way it desired if they "could just clean all of the mess up and be done with everything." According to Englert, Rosa left very bitter and said, "I'll get you no matter where you go. I know what you're going to do, I know you are moving across the freeway." One of Respondents' representatives mentioned they would like to clear this matter up since Brice would be out of business in a few days. Rosa said he was going on a trip. No date was set for a future meeting, and there have been no further communications between Respondents and the Union.

E. *Englert's Decision to Commence Operations as Metro and the Decision as to Which Brice Employees Would Move to the Metro Facility*

Englert testified that as of 2 October he was uncertain about the future. Some of the options he was considering at that time was going to work for someone, taking a long vacation, acquiring a new partner, or buying into another business. He was also considering getting out of the Golden Gate produce terminal because the location was too open to the observation of the competition and the facilities there were too small and antiquated for the business. He further testified that, prior to finding the location at 1325 6th Street in San Francisco at the very end of January, he had not decided to start a new operation.

Yet, he admits that incorporation papers for Metro were filed with the State of California probably at least 3 weeks prior to 1 February. "Englert's newly formed corporation" was referred to in the Brice October Shareholders' Agreement and the Plan of Complete Liquidation and Dissolution of Brice Bros., Inc. Also Rosa testified that immediately after the conclusion of the 23 January meeting employee Lillian Fenech gave him an address of the warehouse in which Metro was located when it commenced operations, and told him someone from the telephone company had just called and said telephones would be installed at that address.

Further, Thompson testified that prior to the Christmas holidays he and Englert discussed on a continual basis which employees should be moved to the new company. Englert asked him to get together a crew that would form a foundation for the new warehouse. They discussed the people that Thompson thought should be on this crew—Cuco Franco (also known as Joaquin A. Laines), Willie Reyes, Arturo Cadena (also known as Leonardo), and Steve Mosunic. According to Thompson, as he mentioned the names that he wanted on his crew, Englert said he did not know whether Steve would be making the move. Thompson said Englert could not make the move without Thompson's support, and Thompson could not make the move without Steve Mosunic's support, that it was going to be a package deal with the five porters giving him support to make the move.

According to Thompson, Englert said he did not know, first of all, whether the new company would be able to afford Mosunic and, second, whether Mosunic was a "union man" or not. Englert said Cadena and Reyes were coming with him. He did not know whether Bill Singleton or Harry Barsanti would be. Thompson said, "Leo, how can you replace Harry, he's been driving in the Bay Area for 40 years." Englert said, "It's going to take me 15 to 20 years just to remember what he's forgotten about where stops are." They discussed Singleton and then being able to take care of the city route, handle the customers, and keep them busy. Englert said Franklin Tying would go whether he was paid $9 or $13.50 an hour. Thompson then mentioned the repacking crew, and Englert said they could find repackers anywhere. They also discussed the office staff. Englert said he definitely wanted to take Petersen to the new company, but he would not take Lillian Fenech.

On the day after the notices of termination were given to employees, according to Thompson, Englert told him Singleton and Barsanti had gone to the Union and they were out of the move, that they would not be coming over to the new company. Englert said Tying would come along but Singleton and Barsanti were definitely out because they had gone to see the Union. Thompson said it would be real bad to lose Barsanti. Englert said there was no way he was going to bring anyone who was a union man along to the new company. Thompson asked, "How are you going to stop this?" Englert said, "If I get to the new place and open the doors and the union shows up I'm just going to shut the doors."

Thompson further testified that later he asked Englert if he had made a decision on Mosunic. Englert said he did not know yet. Thompson said the crew was asking him about the wages and benefits at the new company. Englert said Thompson should tell them everything would stay the same. Thompson further testified that on the Wednesday before the move he asked Englert again what the situation was with pay and benefits. At that time, Englert told him the highest paid employee in the company would be making $500 a week with no medical benefits. Thompson said that would not cut it, that he had a family that he could not support on $500 a week. Englert said, "There is nothing I can do, I'm on a budget, my hands are tied, and that's what the highest paid people are going to be getting, $500 a week." Thompson asked whether this was gross or net. Englert said it was net. According to Thompson, he had been averaging between 15 and 20 hours a week overtime, which gave him a gross of a little over $1100 a week. He also had health and welfare and pension benefits under the union contract.

Petersen testified that on the day she received notice that Brice would be closing Lee asked if she had decided whether to go with them or stay with the Union. Petersen said she was going to try for a union job at the city of San Bruno and she would wait to hear about that. Lee said she was going to hire four girls in the office, that she did not know what Petersen's position would be nor what the salary or benefits would be, but she would like for Petersen to come with her and Englert.

Despite the definite plans to dissolve Brice Bros., the negotiations with the Union, and the notice to employees, Brice customers were never notified that the Company was being dissolved. Rather, according to several customers, they received assurances that the business was continuing despite the rumors. Thus, Linda Dionne, the buyer for the Santa Clara purchasing department, testified that, when she questioned Englert regarding the rumor she had heard about Brice closing Englert, assured her that Brice was not going out of business, that they were simply changing location and names because one of the partners had retired. Englert further assured her there would be no interruption in service and that she had no cause for concern.

Keiko Kovacs of Sky Chefs testified that around the end of January he heard that Friday would be the final day of business for Brice. Since he did not want to take the chance of not having a Saturday delivery, he decided to order from another source. When one of the office employees at Brice telephoned to inquire why he had not placed an order, he told her about the rumors he had heard. Shortly thereafter, Englert called and told him he was not going out of business, that he was just changing names and moving his location to downtown San Francisco. He said the deliveries would remain the same. Larry Brindley, who was then the buyer at the United Airlines Flight Kitchen at the San Francisco Airport, testified that 1 or 2 days before Brice closed Art Meier told him that as of Monday Brice was moving to a new location and becoming Metro Foods. Brindley asked if the price and delivery procedures would be the same, and Meier said yes.

However, during the last week in January, employees began to receive conflicting signals as to Respondents' intentions. Thus, Petersen testified that a few days before 31 January Lee telephoned her at home while she was on sick leave and asked her to clean out her desk because they were going to close up and sell everything. Petersen asked, "Are you going to be among the unemployed like me?" Lee said yes, she was going to go to Palm Springs for about 3 weeks, but Petersen should give her a call because Lee might have something for her later. Petersen asked who would pay all the bills and take care of the work. Lee said Luporini was going to do it and they were going to have a post office box. Petersen asked what was going to happen to all the billings and where was all the money going to go. Lee said they had opened a post office box for the mail.

Petersen further testified that when she returned to Brice Bros. on Friday, 30 January, to clean out her desk, she answered the telephone once. The caller identified himself and said he wanted to open a new account with Brice. Petersen put the customer on hold and told Lee "this customer wants to set up an account; I thought you were closing; why are they setting up a new account." Lee said the people that were taking over were going to keep all the customers. Then Englert took the call. Singleton testified that during the last week of January Englert was telling everyone that the trucks and the inventory had been sold to an unnamed company in San Jose.

Englert did not testify about any specific conversations with employees regarding the closing or moving of Brice Bros., the opening of Metro, or whether Brice Bros. employees would move with him to the new operation. However, he did testify that he asked certain Brice employees, that he felt were very efficient, worthwhile employees, to work for him in the new operation. According to him, he did not ask Harry Barsanti, Lillian Fenech, or Danette Petersen about working for him in a new business primarily because he wanted aggressive people to work for him. Further, according to him, their union sympathies had nothing to do with it as they were all in the Union when he spoke to them. Lee did not testify.

F. *The Move to the Metro Facility and the Commencement of the Metro Operations*

Metro occupies a 28,000-square-foot facility in San Francisco, about 14 miles from the old Brice facility and about 5 miles from its nearest competitor. It has three offices on one level as compared to four offices on two levels at the Brice facility. The telephone system is new and there is a FAX system connecting the facility with Englert's home, something that Brice never had. Initially, Metro had only one large icebox whereas Brice had two freezers and three iceboxes. According to Englert, this necessitated having to store some of the produce in Brice refrigerated trucks. A second box was obtained about 6 weeks after the move and a third one was in the process of being completed at the time of the hearing. Although the Brice boxes afforded multilevel storage, it appears that the Metro facility presently has more refrigerated storage area than did Brice. It also has more dock area.

The move to the Metro facility commenced on 30 January. Thompson testified that on Monday and Tuesday of the last week of January Englert told him that with the exception of three GMC trucks, all vehicles, forklifts, and everything in the warehouse that was not attached to the walls would have to be moved. On 30 January Englert put Thompson in charge of the move. According to Thompson, Englert said Thompson should load all the products into the trucks and transfer it from one warehouse to the other. However, it was not until that afternoon that Englert told Thompson they would be moving into a warehouse in the China Basin area, and it was not until midnight that he learned the name of the new company. At that time, according to Thompson, Englert telephoned and gave him specific instructions about what was being moved. Englert further instructed him to back the three GMC trucks against the side fence at the Brice facility so that on Monday morning when the Union came around they would see the black trucks backed in against the fence and think that Englert had actually gone out of business. Englert admits that the equipment used by Metro was the same equipment that had been at Brice Bros. This includes the trucks, one electric forklift, two manual pallet jacks, and a series of dock plates.[5] However, he denies he told Thompson to park the trucks in a manner that would deceive the Union. According to him, the trucks were always parked that way.

The trucks used by Metro are still registered in Brice's name.[6] Also, Metro continues to use gasoline credit cards that were issued to Brice. Further, at the time it commenced its operation, Metro had none of the licenses and health permits required for the operation of the business, and the only customers it had were former Brice customers. Metro continues to service these customers[7] except for those it lost because of unreliable deliveries. According to Englert, as of the time of this hearing it had retained only about 50 percent of Brice's customers. Metro has acquired some new customers, however, it is undisputed that it draws its customers from the same market as did Brice.

The payroll records show that of the nine employees hired by Metro on 1 February seven,[8] were former Brice Bros. employees.[9] During the first week of Metro's operation, 12 additional employees were hired, only 1 of whom had been formerly employed by Brice. It is undisputed that the Metro employees had essentially the same classification and job functions as those at Brice.

Drivers Cadena, Reyes, and Tying; porters Ensey and Franco; salesmen Meier and Ikeda; and Office Supervisor Lee began working for Metro on 1 February. Driver Tying began 2 or 3 days later. Of the 14 persons employed by Metro during its first week of operation who were not former Brice employees, only 2—a salesman and a porter—are still in Metro's employ. Three left during the first week of operation, two by the end of the second week, and three by the end of the month. One left at the end of March and one by mid-April. Of the four employees hired during Metro's second week of operation, two had left within 2 weeks, one had left by March, and one by mid-April. Of the 11 employees hired during the third week of operations, 1 lasted only 1 day, 4 had left by the end of the month, 2 by mid-March, 1 by the end of March, and 3 were still employed at the time of hearing. Of the two employees hired during the fourth week of operation, one had left by the end of the month and one within 2 weeks. Thus, Metro started with an employee complement of mine. Its employee complement was 18 during the first week of operations. There were 20 during the second week; 18 during the third week; and 22 during the fourth week.[10] Throughout this period, only eight of the employees were former Brice employees. By the time of the hearing, according to Ron Fong, Metro's total employee complement had stabilized at approximately 20, roughly the same number employed by Brice—including 4 drivers, 4 repackers, 4 porters, 3 salesmen, and 3 office clericals, Lee, Fong, and Englert.

As to supervision, Lee was employed by Metro on 1 February as office manager, the same position she held at Brice. However, it appears from the record that no other office employees were hired during Metro's first month of operation. Thompson, the night supervisor at Brice, decided not to move to Metro because of the drastic reduction in pay, and a night supervisor was not hired until 25 February when Steven Bazzini started work as night manager. Bazzini left on 14 March and Thompson commenced work as night supervisor on 16 March. According to him, he performed the same job functions at Metro as he had at Brice—overseeing the warehouse operations at night and supervising the porters. His authority over the porters was the same as it had been at Brice. Thompson also testified that he received no instructions to handle anything differently at Metro then at Brice. The only change in the ordering procedure was that the FAX machine was used to transmit information to Englert's home as to items, which needed to be purchased "on the street" so he could go directly to the Golden Gate Produce Terminal to make purchases without first coming to the Metro facility. At Brice, he had to come into the facility to obtain that information. Thompson further testified that although Metro had lost some of the Brice customers, as of March 16, Metro had only one customer who had not been a Brice customer. The forms used were the same except for the name on the headings in the month before Brice closed. According to Thompson, there were five porters and three repackers on his shift. When he worked at Metro, there were four porters and three repackers on his shift.

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[5] Dock plates are ramps.

[6] Englert testified that Luporini refused to sign the necessary papers to change the title because he did not want his wife to learn about it.

[7] Petersen testified that she called the Brice telephone number in early February and got a taped message in Englert's voice, which said, "Hello, this is Brice Brothers. If you'd like to leave your order or message, please leave it at the sound of the tone. Thank you."

[8] This number includes Franklin Tying who did not actually report for work until 2 or 3 days later. However, his name is carried on the payroll as of 1 February.

[9] According to the testimony of Peterson and Thompson, as of the end of January, Respondents' employee complement consisted of five drivers—Harry Barsanti, Arturo Cadena, Willie Reyes, Franklin Tying, and William Singleton; six porters and repackers—Cuco Franco (also known as Joaquin Laines) Liborio Leon (also known as Ballentine), Oscar Canizales, Steve Mosunic, William Prieto, and John Ensey; two salesmen—Arthur Meier and Robert Ikeda; and two office employees—Danette Petersen and Lillian Fenech.

[10] Fong testified that the employee complement during the first week was about 35 employees and remained at that level for about 6 weeks.

Englert testified that he devotes 100 percent of his time to the buying and selling of produce. Lee has total responsibility for the office and Ron Fong has total responsibility for labor matters at Metro. He also testified that he and Fong made the decision about which Brice employees would move over to Metro and that Fong made the decision about wage rates at Metro without any input from Englert. According to him, Fong was retained by Brice as a consultant to assist in the closing of Brice and it was in his position as consultant that he made the determination about wage rates. He admits, however, that he discussed the wage rates with Fong and had to approve them. He then testified that it was Fong's final decision about what the wage rate would be. When questioned further, he testified that he and Fong discussed a wage range but it was Fong's decision about what to do. He admits that he would demand an explanation from Fong if he paid wages outside a certain range. He also admits that he made the determination that employees would not receive benefits for the first 3 months. Further, Thompson testified that when he tried to negotiate an additional 50 cents an hour in pay to compensate for loss of benefits, Fong told him he would have to get approval from Englert.

Fong testified that his responsibilities at Metro have been fairly constant throughout his employ—he seeks job applicants from various sources, reviews the applications, and decides who to hire. He has hired approximately 50 employees and, according to him, the final decision is his. According to him, he comes into the warehouse almost every evening for a half hour to an hour "to look around, talk to people, and watch what's going on." He also functions as a sales representative.[11]

Fong first testified that he discussed general wage ranges with Englert. However, when pressed to testify specifically about that discussion, he testified that they had no discussion. According to him, he would decide on a wage rate and later tell Englert what it was. He admits that he did discuss with Englert a general wage increase he wanted to grant. He also admits that he and Englert agreed on a 2-percent commission for salesmen. He denies that, prior to 1 February, he spoke to any of the former Brice employees or that they were hired prior to 1 February. When questioned how these employees knew to report to work, he testified, "I grabbed one of the list and begged them to come in."

Fong also denied that he and Englert ever discussed what his job would be. According to him he was retained by Brice as a consultant principally to assist Brice in selling equipment. Later Englert asked if he would help with Metro. He agreed and worked as a consultant to Metro for about a month. After about a month, he put himself on the payroll. However, according to Fong, he and Englert never discussed in what way he was to help. Fong testified that he is a self-motivator, so at some point he decided in what way he could be helpful but never shared this decision with Englert. When questioned how he happened to start hiring employees for Metro, Fong testified that when he arrived at the Metro facility on Sunday morning, 1 February, it was totally disorganized. No one was working. No one was scheduled to report to work. So he got out a phone list and started to call everyone he knew with produce-related experience, including former Brice employees. When people came in to work, he had them sign in on a yellow pad. In some instances he discussed the wage rate with the employee and in other instances he did not. If a wage rate was discussed, he wrote it on the yellow pad next to the employee's name. According to him, he only told Englert what the wage rate was when it was time to do payroll.

Franklin Tying denies ever discussing wages with Fong. According to him, on the last day of Brice's operation, Englert asked him to start work for Metro the following day at $9 an hour. After some hesitation, Tying said he would; however, he did not report to work the following day, 1 February. Lee telephoned him and then connected him with Englert who asked why he had not reported to work. Englert asked him to start at 3 a.m. and said that at the end of his shift they would talk seriously about pay.[12] Then Lee got on the phone and gave him the address of the Metro facility and directions for getting there. He heard Englert say something in the background and then Lee said, "By the way, your pay will be $10."

Tying testified that he drove the same truck for Metro on the same route as he had for Brice. On the first day he reported to work, Englert introduced him to Fong and said Fong was Tying's new boss. According to Tying, Fong basically does the hiring. He does not direct employees in the warehouse. On the 5 a.m. shift on which Tying works, Englert directs employees.[13] He has never seen Fong tell drivers what to do insofar as their routes and schedules are concerned. This is done by Englert.

Thompson testified that Fong hired him at $12 an hour with no benefits. When he tried to negotiate an additional 50 cents an hour, Fong said he would have to get Englert's approval. Thompson also testified that although Fong makes out the weekly schedules for drivers and porters he does not actually direct employees in the warehouse.

G. *Conclusions Concerning Alter Ego Status*

The threshold question here is the relationship between Brice and Metro. The complaint alleges that Metro is a disguised continuance and alter ego of Brice or, in the alternative, that Metro is a successor to Brice. However, the General Counsel's primary theory is alter ego. The controlling law is well established. A determination whether two employers are alter egos, of necessity, must turn on the facts of the particular case. The factors to be considered are: (1) interrelation of operations; (2) common management; and (3) common ownership and centralized control of labor relations. Thus, the

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[11] This job differs from that of the regular salesmen in that Fong also makes collections and qualifies customers as to credit applications.

[12] Even though Tying's affidavit relates several telephone conversations during this 2-to-3 day period, no reference is made to a direct telephone conversation with Englert. However, Englert does not specifically deny this conversation.

[13] At the time of the hearing, Ensey was night manager.

Board has generally found alter ego status where the two enterprises have substantially identical management, business purpose, operation, equipment, customers, and supervision as well as ownership. *Crawford Door Sales Co.*, 226 NLRB 1144 (1976); *Denzil S. Alkire*, 259 NLRB 1323 (1982); *Advance Electric*, 268 NLRB 1001 (1984); *Mar-Kay Cartage*, 277 NLRB 1335 (1985); *Super Save*, 273 NLRB 20 (1984). No one factor is controlling and all need not be present. Complete identity in ownership is not a requisite, particularly when ownership resides in members of the same family. *Crawford Door Sales Co.*, supra. However, centralized control of labor relations is the most important single factor. *J. M. Tanaka Construction v. NLRB*, 675 F.2d 1029 (9th Cir. 1982). A further consideration is whether the new company was created "to evade responsibilities under the Act." *Fugazy Continental Corp.*, 265 NLRB 1301 (1982), enfd. 725 F.2d 1416 (D.C. Cir. 1984).

Here, it is clear that Metro has the same business purpose and mode of operation as did Brice. They both engaged in the wholesale distribution of produce in the same geographical area. They both made purchases in the same manner from the same pool of suppliers. Metro continued to use the Brice gasoline credit cards and Metro gas purchases are billed to Brice. In at least one instance, the bill was sent to Brice in care of Metro. For at least several months Metro did not have any of the licenses required by the local, state, and Federal governments. It is immaterial that Metro's facility is larger than, and in a different location from, the Brice facility. They are both warehouse facilities with refrigeration and freezer capacity. They use an identical mode of receiving produce, storing it, and preparing it for and delivering it to customers. Furthermore, this method of operation is not affected in any significant mannner by the fact that Metro is not located within the terminal. The only effect is that certain aspects of the operation, such as buying "shorts," are less convenient. Thus "shorts" are still purchased from within the terminal. The difference is now the purchase of "shorts" requires travel to the terminal. I therefore find that Metro and Brice had a substantially identical business purpose and mode of operation.

The record establishes that when Metro commenced operations it continued without hiatus to service the Brice customers. Indeed, the only customers Metro had were Brice customers. It was only later that Metro lost some of these customers because the quality of produce and the reliability of service were unsatisfactory. Further, it was several months before Metro acquired a new customer and, in obtaining this new customer and identifying potential customers, Metro draws from the same market as did Brice.

Accordingly, I find that Metro and Brice had substantial identical customers. It is undisputed that with the exception of refrigeration and freezer units,[14] Metro utilized the same equipment as had Brice, and because refrigeration and freezer capacity was inadequate for the inventory, some of the produce was stored initially in Brice trucks. Further, the titles and registration on the Brice trucks were not changed to reflect ownership by Metro and the registration of several vehicles was renewed in Brice's name.

Similarly, Brice and Metro had management and supervision, which, though somewhat different, had a substantial thread of commonality and the same person continued in control of labor relations. The record clearly establishes that Englert had dominant responsibility for the management, including labor relations, of Brice. He participated in multiemployer bargaining with the Union and handled labor relations matters with the Union. In fact, he admits to these responsibilities with Brice but claims that he assumed labor relations responsibilities there only because Luporini was not reliable and that at Metro he relinquished all such responsibilities to Ronald Fong.

This contention is not supported by the record. Englert admits he decided not to give employees benefits; it was also his decision to give salesmen 2-percent commission, and he admits he and Fong discussed a wage range prior to a determination of specific wage rates. Further, Respondents' reliance on the testimony of Englert and Fong is misplaced. I found both of them to be evasive, unreliable witnesses who attempted to tailor their testimony so as to downplay Englert's involvement in labor relations matters at Metro. Further, much of their testimony was inherently improbable. Thus, Englert testified that he only decided to open Metro in the last few days of January. Yet, he admits he had been looking for a new warehouse for at least 2 weeks before he had spoken to employees regarding working for his new company and had arranged for telephone installation to commence on 23 January. He testified he did not know the number of employees at Metro, but changed his testimony when asked to explain how he could work with a small complement of employees and not have some idea about the size of the employee complement.

I found Fong's testimony to be highly improbable. Thus, he testified that when Metro opened no employees were working and no employees had been hired. Yet Metro had produce valued at $98,000 in the warehouse and customers were expecting deliveries. I find it incredible that an experienced business person would have failed to hire some employees to handle this produce. I also find incredible Fong's testimony that Englert retained him as a consultant to Metro, yet they never discussed what Englert expected him to do; and his testimony that he had never been given authority by Englert to hire employees, that he was a self-motivator who had arrogated to himself such authority and who could set wages at whatever level he desired even though both he and Englert admitted that some parameters existed. I conclude that the only reason for such testimony was to shroud the truth that Englert had, and exercised, authority over such matters.

Based on the entire record and on my credibility findings, I find that Englert was the dominant voice in labor relations and other management matters at both Brice and Metro. In the circumstances, I find that the only difference in supervision and management between Brice and Metro was that Fong handled many personnel matters and made out the schedule for the drivers. Admittedly, Lee's function was the same. The record does not reveal the identity of a night supervisor until mid-March when Thompson was hired. I credit Thompson that his duties and responsibilities at Metro were the same as they had been at Brice. I found him to be an honest, straightforward witness who impressed me as endeavoring to tell the truth. In these circumstances, I find that Metro's management and supervision are substantially identical to that of Brice.

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[14] The Brice refrigeration and freezer units were attached to the walls and included in the sale of the Brice facility.

Respondent argues that Metro and Brice cannot be alter egos because the ownership is different, and because Englert and Luporini negotiated at arm's-length about the dissolution and distribution of assets of Brice. However, as noted above, complete identity in ownership is not a requisite. Further, in these circumstances it is immaterial that negotiations as to the distribution of assets may have been at arm's-length. As found above, Englert was half owner and the dominant force in Brice. He is sole owner and the dominant force in Metro. Thus, there is a substantial continuity in the control of Brice and Metro. Accordingly, I find the ownership of Brice and Metro to be substantially identical for purposes of determining alter ego status.

The remaining consideration is whether Metro was created for legitimate reasons or to evade responsibilities under the Act. Here, the record is clear that the sale of Brice was initially motivated, at least in part, by Luporini's desire to retire and Englert's desire to rid himself of Luporini. However, it is equally as clear that once Luporini's retirement became an imminent possibility, most critical decisions thereafter were heavily influenced by Englert's desire to rid himself of the Union. In this regard, I credit the employee witnesses that for several years Englert had spoken to employees of his desire to get rid of Luporini and the Union and to get out of the Terminal away from his competitors. I also credit Thompson as to his conversations with Englert. Thus in mid-June, Englert told him he was trying to get out of the produce market and away from the Union because he was not making money and would have to do so in order to survive. Englert also told Singleton the new company would be nonunion, that union wages, which he could not afford to pay, were killing him, and that the union health and welfare plan was way out of line. He further said he could not afford to pay the contractual vacation, health and welfare, and pension to Respondents' most senior employee nor could he compete with nonunion employers. This is all indicia of a motivation to evade responsibilities under the Act.

Buttressing this conclusion is the secrecy and deceit with which Englert effected the creation of Metro. Thus, prior to the 15 January notices, he only told a few select employees. He did not inform customers, despite certain indications of customer concern regarding rumors that Brice was closing. Furthermore, Englert and Cooke specifically told Union Representative Rosa that Brice was going out of business and Englert had no intentions of continuing in the business under another name. Also, Englert instructed Thompson to park certain trucks at the Brice facility so it would appear to the Union that Brice had actually gone out of business. In these circumstances, I find that one of the principal motivating factors in the decision to close Brice and open Metro was Englert's desire to evade responsibility under the Act to bargain with the Union and to honor Brice's collective-bargaining agreement. Based on the foregoing, I find that Brice and Metro are alter egos. *Mar-Kay Cartage*, supra.

H. *Conclusions Concerning Alleged Violations*

It is undisputed that Metro has never recognized the Union as the collective-bargaining representative of its employees and that it has, at all times, failed to pay wages and benefits required under Brice's collective-bargaining agreement. As I have found that Metro is the alter ego of Brice, it has at all times since 1 February 1987, when it commenced operations, been obligated to bargain with the Union as the collective-bargaining representative of its employees, and to abide by the collective-bargaining agreement between the Union and the San Francisco Produce Association and the Terminal Dealers' Association. Accordingly, I find that by failing to recognize and bargain with the Union and to honor the collective-bargaining agreement, Respondents have violated Section 8(a)(1) and (5) of the Act.

The complaint alleges that Respondents violated Section 8(a)(1) and (5) of the Act by refusing to furnish the Union requested information regarding the alleged closure of the Brice facility and the alleged sale and disposition of certain of Brice's assets, capital, and good will. It is undisputed that the Union requested and Respondents refused to furnish such information. Respondents argue that because of the Union's 3 months' delay in requesting the information, it is obvious that the purpose of the request was not to assist the Union in "effects" bargaining, but rather was sought to buttress the Union's claim that Brice was not really closing. Further, Respondents contend the questions asked were an attempt to bargain over the decision to close, which Respondents are not obligated to do. *First National Maintenance Corp. v. NLRB*, 452 U.S. 666 (1981). I disagree. It is well established that an employer's duty to bargain encompasses an obligation to provide information needed by the collective-bargaining representative of its employees for the proper performance of its duties. *NLRB v. Truitt Mfg. Co.*, 351 U.S. 149 (1956). Here, the information requested clearly related not to a decision to close, but rather to whether Brice was in fact closing or whether the business was continuing through a successor or alter ego. Such information is clearly relevant. *Hawg-N-Action, Inc.*, 268 NLRB 616 (1984).

I also reject Respondents argument that it had no obligation to furnish the requested information because the information sought related to the unfair labor practice charge. In support thereof, Respondents cite *American Oil Co.*, 171 NLRB 1180 (1968). I find that case inapposite. There, the union argued that the payroll records requested were needed in connection with the formulation of union demands in contract negotiations scheduled to commence 3 months later. The administrative Judge found, under the circumstances, that this reason was a pretext and that the union was seeking the information in connection with the pressing of the unfair labor practice proceedings. Accordingly the judge in finding the refusal to furnish the records was not unlawful, concluded (above a 1188): "There are ways to procure relevant evidence in the possession of an adverse party . . . but the '8(a)(5)-request' route is not one of them." Here, the information sought was requested both before and after the filing of this unfair labor practice charge. Further, in view of the "imminent" closing of the Brice facility,[15] the layoff of unit employees, the severance pay negotiations, and the information the Union had indicating that Englert was moving to a new facility, the Union's obvious need for the requested information was immediate. Accordingly, I find that by not furnishing the Union the information sought, and by furnishing misleading information to the Union regarding its intentions to open Metro, Respondents have violated Section 8(a)(1) and (5) of the Act.

In view of my crediting employee witnesses about their conversations with Englert, I find that Englert solicited them to abandon the Union and enter into individual employment contracts. I, therefore, find that Respondents bypassed the Union and dealt directly with unit employees in violation of Section 8(a)(1) and (5) of the Act.

As I have found that Metro is an alter ego of Brice created to evade Respondents' responsibilities under the Act, I also find that the Brice employees were terminated on 31 January because they were represented by the Union in an attempt by Respondents to evade their contractual and statutory obligations. Accordingly, I find that they were unlawfully terminated in violation of Section 8(a)(1) and (3) of the Act.

Further, based on the undenied testimony of Petersen, which I credit, I find that Lee's questioning of Petersen on 15 January whether she would go with them to the new facility or stay with the Union was coercive in that it required her to make her union sympathies known and to abandon the Union or be terminated. I, therefore, find that Respondents violated Section 8(a)(1) and (3) of the Act.

CONCLUSIONS OF LAW

1. Metro Foods, Inc. and Brice Bros., Inc. are employers engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

2. Freight Checkers, Clerical Employees and Helpers, Teamsters Local Union No. 856, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, AFL-CIO is a labor organization within the meaning of Section 2(5) of the Act.

3. Respondent Metro is the alter ego of Respondent Brice, established for the purpose of evading Respondents' responsibilities under the Act.

4. The following employees of Respondents constitute a unit appropriate for the purposes of collective bargaining within the meaning of Section 9(b) of the Act:

> All employees covered by the collective-bargaining agreement between the Union and the San Francisco Produce Association and the Terminal Dealers' Association, effective by its terms from 1 February 1986 to 1 February 1989.

5. At all times material the Union has been the exclusive collective-bargaining representative of the employees in the appropriate unit set forth above within the meaning of Section 9(a) of the Act.

6. Respondents violated Section 8(a)(5) and (1) of the Act by:

(a) Refusing to recognize and bargain with the Union as exclusive representative of its employees in the appropriate unit by refusing to honor the collective-bargaining agreement with respect to such employees, and failing to apply to such employees the terms and conditions of the agreement.

(b) Bypassing the Union and bargaining directly with the employees regarding the terms and conditions of their continued employment.

(c) Refusing to furnish the Union with requested information regarding the alleged closure of Respondents' south San Francisco, California facility, and the alleged sale and disposition of certain of Respondent Brice Bros., Inc.'s assets, capital, and good will, which information is necessary for, and relevant to, the Union's performance of its function as the exclusive collective-bargaining representative of the unit; and providing the Union with misleading or inaccurate information when responding to certain aspects of the Union's request for information.

7. Respondents violated Section 8(a)(1) and (3) of the Act by terminating the employees in the appropriate unit described above because they were represented by the Union and because they were covered by a collective-bargaining agreement.

8. Respondents violated Section 8(a)(1) of the Act by coercively interrogating an employee as to union activities and sympathies.

9. The above violations are unfair labor practices affecting commerce within the meaning of Section 2(6) and (7) of the Act.

THE REMEDY

Having found that Respondents have violated Section 8(a)(5), (3), and (1) of the Act, I shall order that Respondents cease and desist from engaging in the conduct found unlawful and take certain affirmative action designed to effectuate the policies of the Act.

Having found that Respondent Metro is the alter ego of Respondent Brice and has continued to operate its business, but has failed and refused to recognize the Union or to apply the terms of the collective-bargaining agreement between the Union and Brice, I shall recommend that Metro recognize and, on request, bargain with the Union as the exclusive representative of the employees in the appropriate unit; that Metro acknowledge that it is bound by the collective-bargaining agreement between the Union and the San Francisco Produce Association and the Terminal Dealers' Association, effective by its terms from 1 February 1986 to 1 February 1989; that it abide by the agreement; and that it make the employees in the appropriate unit whole by paying retroactively the wage rates provided for in its collective-bargaining agreement with the Union and by paying all contractually required contributions to the various trust funds established by the collective-bargaining agreement[16] and by reimbursing employees for any expenses they may have incurred because of Respondents' unlawful failure to make such required payments, as provided in *Kraft Plumbing & Heating*, 252 NLRB 891 fn. 1 (1980), enfd. 661 F.2d 940 (9th Cir. 1981).

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[15] The collective-bargaining agreement provides that it is binding on successors, assigns, etc.

Having found that Respondents unlawfully discharged their employees named below in violation of Section 8(a)(3) and (1) of the Act, I shall recommend that Respondents be ordered to offer each of them immediate and full reinstatement to his or her former job or, if that job no longer exists, to a substantially equivalent position, without prejudice to his or her seniority or any other right and privilege previously enjoyed, and make each of them whole for any loss of earnings he or she may have suffered by reason of the discrimination against them by payment to them of sums of money equal to that which they normally would have earned absent the discrimination, less net interim earnings during such period, computed on a quarterly basis in the manner established in *F. W. Woolworth Co.*, 90 NLRB 289 (1950), with interest computed as described in *Florida Steel Corp.*, 231 NLRB 651 (1977), and *New Horizons for the Retarded*, 283 NLRB 1183 (1987). See generally *Isis Plumbing & Co.*, 138 NLRB 716 (1962).

Harry Barsanti
Danette Petersen
Lillian Fenech
Arturo Cadena
Cucu Franco
Liborio Leon
Oscar Canizales
John Ensey
Steve Mosunic
Willie Reyes
Franklin Tying
Arthur Meier
William Singleton
William Prieto
Robert Ikeda

As the unfair labor practices committed by the Respondents are of a character striking at the very heart of the Act, I shall recommend that Respondents be ordered to cease and desist from infringing in any other manner on the rights guaranteed in Section 7 of the Act.

On these findings of fact and conclusions of law and on the entire record,[17] I issue the following recommended[18]

ORDER

The Respondents Metro Foods, Inc., and Brice Bros., Inc., San Francisco, California, their officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Refusing to recognize and bargain with the Union as the exclusive representative of its employees in the appropriate unit with respect to wages, hours, working conditions, or other terms and conditions of employment of those employees, refusing to honor the collective-bargaining agreement applicable to those employees, and failing to apply to such employees the terms and conditions of the agreement.

(b) Bypassing the Union and bargaining directly with the employees regarding the terms and conditions of their continued employment.

(c) Refusing to furnish the Union with requested information regarding the alleged closure of Respondents' south San Francisco, California facility, and the alleged sale and disposition of certain of Respondent Brice Bros., Inc.'s assets, capital, and good will, and providing the Union with misleading or inaccurate information in response to such requests.

(d) Discouraging membership in the Union, or any other labor organization, by terminating its employees because they are represented by the Union or any other labor organization, or because they are covered under a collective-bargaining agreement, or by otherwise discriminating against its employees in regard to hire, tenure of employment, or other terms and conditions of employment.

(e) Coercively interrogating their employees about their union activities and sympathies.

(f) In any like or related manner interfering with, restraining, or coercing employees in the exercise of their rights under Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Recognize Freight Checkers, Clerical Employees and Helpers, Teamsters Local Union No. 856, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America AFL-CIO as the exclusive collective-bargaining representative of its employees in the appropriate unit described below and, on request, meet and bargain with the aforesaid Union concerning wages, hours, pension, and welfare benefits, and other terms and conditions of employment; and, if an understanding is reached, embody it in a signed document. The appropriate unit is:

> All employees covered by the collective-bargaining agreement between the Union and the San Francisco Produce Association and the Terminal Dealers' Association, effective by its terms from 1 February 1986 to 1 February 1989.

(b) Acknowledge that it is found by the collective-bargaining agreement between the Union and the San Francisco Produce Association and the Terminal Dealers' Association effective by its terms from 1 February 1986 to

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[16] Because the provisions of employee benefit fund agreements are variable and complex, the Board does not provide for interest at a fixed rate on fund payments due as part of a "make-whole" remedy. We, therefore, leave to further proceedings the question of how much interest Respondents must pay into the benefit fund in order to satisfy our "make-whole" remedy. These additional amounts may be determined, depending on the circumstances of each case, by reference to provisions in the documents governing the fund at issue and, where there are no governing provisions, to evidence of any loss directly attributable to the unlawful action, which might include the loss of return on investment of the portion of funds withheld, additional administrative costs, etc., but not collateral losses. See *Merryweather Optical Co.*, 240 NLRB 1213, 1216 fn. 7 (1979).

[17] Certain errors in the transcript are noted and corrected.

[18] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

1 February 1989, and abide by the terms of agreement, both retroactively and prospectively.

(c) Make its employees whole by paying retroactively the wage rates provided for in its collective-bargaining agreement with the Union and by paying all contractually required contributions to the various trust funds established by the collective-bargaining agreement and by reimbursing employees for any expenses they may have incurred because of Respondents' unlawful failure to make such required payments.

(d) Offer each of the employees named below immediate and full reinstatement to his or her former job or, if that job no longer exists, to a substantially equivalent position, without prejudice to his or her seniority or any other right and privilege previously enjoyed, and make each of them whole for any loss of earnings he or she may have suffered by reason of the discrimination against them in the manner set forth in the remedy section.

Harry Barsanti
Danette Petersen
Lillian Fenech
Arturo Cadena
Cucu Franco
Liborio Leon
Oscar Canizales
John Ensey
Steve Mosunic
Willie Reyes
Franklin Tyng
Arthur Meier
William Singleton
William Prieto
Robert Ikeda

(d) Remove from its files any reference to the unlawful terminations and notify each of the employees in writing that this has been done and that the terminations will not be used against them in any way.

(e) Preserve and, on request, make available to the Board or its agents for examination and copying, all payroll records, social security payment records, timecards, personnel records and reports, and all other records necessary to analyze the amount of backpay due under the terms of this Order.

(f) Post at its facility in San Francisco, California, copies of the attached notice marked "Appendix."[19] Copies of the notice, on forms provided by the Regional Director for Region 20, after being signed by the Respondents' authorized representatives, shall be posted by Respondents immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by Respondents to ensure that the notices are not altered, defaced, or covered by any other material.

(g) Notify the Regional Director in writing within 20 days from the date of this Order, what steps have been taken to comply.

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[19] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

Washington Heights-West Harlem-Inwood Mental Health Council, Inc., d/b/a The Council's Center for Problems of Living *and* Local 1199, Hospital and Health Care Employees Union, RWDSU, AFL-CIO[1]

Local 1199, Hospital and Health Care Employees Union, RWDSU, AFL-CIO *and* Washington Heights-West Harlem-Inwood Mental Health Council, Inc., d/b/a The Council's Center for Problems of Living. Cases 2-CA-19596 and 2-CG-33 (formerly Case 2-CB-9688)

July 26, 1988

DECISION AND ORDER

BY CHAIRMAN STEPHENS AND MEMBERS BABSON AND CRACRAFT

On December 31, 1985, Administrative Law Judge Winifred D. Morio issued the attached decision. The Respondent Employer filed exceptions and a supporting brief, the General Counsel filed a brief in response and a brief in support of the judge's decision, and the Respondent Union filed a memorandum in support of the judge's decision.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings,[2] and conclusions[3] and to adopt the recommended Order.

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge and orders that the Respondent, Washington Heights-West Harlem-Inwood Mental Health Council, Inc., d/b/a The Council's Center for Problems of Living, New York, New York, its officers, agents, successors, and assigns, shall take the action set forth in the Order.

The recommended Order of the administrative law judge as to the Union is adopted and the complaint in Case 2-CG-33 is dismissed.

Carole Sobin, Esq. and *James Paulsen, Esq.*, for the General Counsel.

Richard J. Reibstein, Esq. and *Ina A. Plotsky, Esq. (Epstein, Becker, Borsody & Green, P.C.)*, of New York, New York, for Respondent Washington Heights.

Vicki Erenstein, Esq. (Sipser, Weinstock, Harper, Dorn & Leibowitz), of New York, New York, for Respondent Union.

DECISION

STATEMENT OF THE CASE

WINIFRED D. MORIO, Administrative Law Judge. These cases were tried on various dates during May, June, July, September, October, November, and December 1984 and January 1985 at New York, New York. The complaints were consolidated by order of the Regional Director for Region 2 on 24 January 1984. The complaint in Case 2-CA-19596, which was issued on 23 January 1984, alleges, in substance, that Washington Heights-West Harlem-Inwood Mental Health Council, Inc., d/b/a The Council's Center for Problems of Living (Employer/Center) discharged and, thereafter, refused to

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[1] The Respondent Union's name was changed after the commencement of these proceedings. The caption reflects the Union's name as represented in its memorandum filed with the Board February 25, 1986.

[2] The Respondent has excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

[3] The judge found, and we agree, that the September 29, 1982 strike was an unfair labor practice strike. The judge further found, applying the doctrine of *Mastro Plastics Corp. v. NLRB*, 350 U.S. 270 (1956), that the Respondent Union was excused, because of the nature of the strike, from the notice requirement of Sec. 8(g) of the Act. We agree. *Hospital Employees District 1199E (CHC Corp.)*, 229 NLRB 1010 (1977). Although the strike was delayed 1 day from the time originally specified by the Union, we find no basis for concluding that the resultant delay operated to remove the Union's strike from the *Mastro Plastics* rationale. Finally, the judge found that the Union, in fact, complied with the notice requirement of Sec. 8(g). Having adopted the judge's conclusion that the Union was excused from complying with the notice requirement of Sec. 8(g), we need not pass on the judge's finding of actual compliance.

The judge found that the Respondent Employer refused to meet with the Federal Mediation and Conciliation Service for mediation. The judge found this conduct provided another basis for releasing the Respondent Union from its obligation to comply with the notice requirements of Sec. 8(g). Because we adopt the judge's finding that the notice requirement of Sec. 8(g) was excused because the strike was an unfair labor practice strike, we need not pass on this finding regarding the failure to take part in mediation.

At fn. 53 of her decision, the judge relies on an alternative theory concerning the nature of the employees' activity on September 15, 1982, giving rise to the dispute underlying the strike. The judge analyzes this in light of *NLRB v. Burnup & Sims*, 379 U.S. 21 (1964). We do not rely on this alternative theory.

The Respondent Employer contends that the Regional Director's issuance of, and consolidation of, the complaints deprived it of due process. We have examined the record and have examined carefully the arguments on this matter. We are not persuaded that the substantive or procedural rights of any party were prejudiced by the conduct of this hearing. All parties had notice of the hearing, and of the issues, and had opportunity to present evidence and to cross-examine witnesses. The complaints in this case involved inconsistent theories, which were predicated largely on the same facts. The Regional Director's consolidation of these cases promoted administrative and judicial economy and efficiency.

The Respondent Employer's exception that the complaint in Case 2-CA-19596 is barred by Sec. 10(b) of the Act, insofar as the complaint is predicated on events beyond the 6-month period, is meritless. The predicate facts—the events of September 1982 (including the discharges)—are not remedied by our decision, but merely indicate the nature of the later (April 1983) conduct examined in the complaint.

In accordance with our decision in *New Horizons for the Retarded*, 283 NLRB 1173 (1987), interest on and after January 1, 1987, shall be computed at the "short-term Federal rate" for the underpayment of taxes as set out in the 1986 amendment to 26 U.S.C. § 6621. Interest on amounts accrued prior to January 1, 1987 (the effective date of the 1986 amendment to 26 U.S.C. § 6621), shall be computed in accordance with *Florida Steel Corp.*, 231 NLRB 651 (1977).

289 NLRB No. 145

reinstate its employees who had engaged in a strike on 29 September 1982, which strike was caused or prolonged by unfair labor practices committed by the Center when it discharged certain employees on 17 or 20 September 1982.[1] The complaint in Case 2-CG-33 alleges, in substance, that on or about 16 September 1982 District 1199, National Union of Hospital and Health Care Employees, RWDSU, AFL-CIO (Union) gave written notification to the Center and the Federal Mediation and Conciliation Service (FMCS) of its intention to strike and picket on 28 September 1982 at 9 a.m. However, according to the allegation in the complaint, the Union did not commence its strike and did not began its picketing until 29 September 1982 (1 day after the time stated in its written notification) and the Union failed to notify the Center 12 hours prior thereto of its intention to engage in such conduct. The complaint also alleges that, commencing in December 1982 and continuing thereafter, the Union engaged in intermittent picketing and it failed to give written notice to the Center and the FMCS 10 days prior thereto of its intention to engage in such conduct.[2] The Center filed an answer in which it denied that it had violated the Act, and in which it asserted several affirmative defenses, including a defense based on its position that the 11 employees who had been discharged were engaged in unprotected activity. The Union also filed an answer in which it denied that it had violated the Act, and in which it asserted as an affirmative defense that the strike was caused by the Center's unfair labor practices.

On the entire record, including my observation of the demeanor of the witnesses, and after consideration of the briefs filed by the parties, I make the following

FINDINGS OF FACT

I. JURISDICTION

The Center, a New York nonprofit membership corporation with its principal office and place of business in New York, New York, is, and has been at all times material, engaged in the operation of a community center providing medical and professional care services for the mentally disabled. Annually, the Center, in the course and conduct of its business operations, derives gross revenue in excess of $500,000 and receives reimbursements valued at in excess of $50,000 from the United States Government under Medicaid and other Federal programs. The parties admit, and I find, that the Center is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act and a health care institution within the meaning of Section 2(14) of the Act. The parties admit, and I find, that the Union is a labor organization within the meaning of Section 2(5) of the Act.

II. PRELIMINARY STATEMENT

These cases present an unusual situation, as noted by the Regional Director in the order he issued when he consolidated the cases. Thus, the Regional Director stated, "The Complaints referred to above are in large part mutually inconsistent because the resolution of the central unfair labor practices in both cases are dependent, to a great extent, on credibility resolutions which cannot be properly made at an administrative level." In Case 2-CA-19596 the General Counsel claimed that the Center violated the Act when it discharged and refused to reinstate 34 employees in April 1983 because those employees commenced a strike on 29 September 1982 to protest the unfair labor practices committed by the Center when it discharged 11 employees on 17 or 20 September 1982. The General Counsel also claimed that the Union gave proper notification as required by Section 8(g) of the Act before the strike began on 29 September 1982. However, it was also the position of this General Counsel that although the Center is a health care facility, the Union was not required to notify the Center prior to commencing the strike on 29 September 1982 because the notification requirements of Section 8(g) of the Act are not applicable when employees engage in a strike to protest the unfair labor practices committed by an employer.

However, in Case 2-CG-33 it was the position of the second General Counsel that the strike, which commenced on 29 September 1982, was an economic strike and the Union failed to comply with notification requirements of Section 8(g) of the Act, both with respect to the initial strike and picketing and with respect to the intermittent picketing that occurred after December 1982.

In addition to the confusion caused by these inconsistent positions, the record in this case was complicated by the introduction of testimony concerning the discharges of 11 employees by the Center on 17 or 20 September 1982. Those discharges were the subject of earlier complaints in Cases 2-CA-19132 and 2-CA-19140, which were issued by the Regional Director for Region 2 in January 1983. The issues raised by those complaints, including whether the discharges were violative of Section 8(a)(1) of the Act, were not litigated because the Center executed a settlement agreement that provided for payment of backpay, offers of reinstatement for the 11 employees, and the posting of a notice. During the negotiations for the settlement of Cases 2-CA-19132 and 2-CA-29140, the Union filed the charge in the instant case on 21 April 1983, in which it alleged that the Center had discharged 34 unfair labor practice strikers. The settlement agreement contained both a nonadmission clause and a reservation-of-rights clause. These clauses read as follows:

> 1. Reservation of Rights—The signing of this Agreement shall not preclude the introduction by any party of any evidence contained in Case Nos. 2-CA-19140 or 2-CA-19132 in any forum, in any other proceeding or investigation.

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[1] The complaint also stated that if the strike was not found to be an unfair labor practice strike then it was an economic strike, and the Union gave the proper notice.

[2] Motions were made during the hearing to amend the complaint in Case 2-CG-33 to include additional periods of time when the Union engaged in the intermittent picketing. The motion was granted.

> 2. The instant Settlement Agreement outlines only the unfair labor practice charges in Case Nos. 2-CA-19140 and 2-CA-19132 and does not settle any other case currently pending before the Regional Office, the Office of Appeals or the Office of the General Counsel or the Board nor does it constitute a waiver of any claim that any party may have.

Notwithstanding the execution of the settlement agreement, the complaint in Case 2-CA-19596, the instant case, referred to the complaints, which had issued about the discharge of the 11 employees, to the fact that the discharges were in violation of Section 8(a)(1) of the Act and to the settlement agreement entered into with respect to those discharges. As noted, the Center, in its answer to the complaint in the instant case, admitted that it had entered into a settlement agreement with respect to the discharges, but denied that the discharge of the 11 employees constituted an unfair labor practice. Counsel for the Center, in his opening statement, said that he would prove that the 11 employees were discharged for legitimate, nondiscriminatory reasons. However, during the hearing counsel for the Center did not call witnesses to testify concerning the discharge of the 11 employees but he did cross-examine, extensively, the witnesses produced by the General Counsel who testified with respect to those employees. In December 1984, several months after the hearing started, counsel for the Center made a motion to amend the answer with respect to two issues. Counsel, for the first time, contended that the settlement agreement precluded any litigation of matters relating to the discharge of the 11 employees in September 1982. Counsel also stated that some of the 34 employees who had been discharged in April 1983 had engaged in conduct which precluded them from being reinstated. Subsequently, counsel withdrew the contention relating to the alleged misconduct by some of the 34 discharged employees, although advised by the administrative law judge that it was proper to litigate the issue in the unfair labor practice proceeding and not in the backpay proceeding.[3]

III. WITNESSES—CASE 2-CA-19596

David White—union vice president
Edward Lane—union representative
Celeste Gordon—teacher therapist
Dora de la Torre—mental health worker
Olubayo Buchinji—social worker
Rose Ann Harris—special education therapist
Sandra Powell—receptionist
Irma Quitcon—social worker
Ernest Adams—staff psychologist
Carl Baptiste—psychiatric social worker
Azeeza Burston—registrar
Mercedes Colinet—clerk typist
Marie Font—mental health worker
Kamala Mottl—psychologist
Audrey Singleton—purchasing agent
Mary Pearl Taylor—employee
Mary Harviley—employee

IV. WITNESSES—CASE 2-CG-33

Dr. Clyde A. Pemberton—Center executive director
Dr. Ellis B. Charles—medical director
Dr. Mary Sitgraves—coordinator of child and adolescent services
Elizabeth Payne—coordinator of research and development
Norma Burgos—coordinator of continuing treatment program
Ana Perira—director transitional housing
Terrie Reid Payne—project coordinator of community residence and transitional housing
Pamela Pannell—assistant project coordinator for community resident programs
Alma Oglivie—mental health worker
Arthur Herron—business office clerk
Theodore Beasley—security
Lloyd Bowers—resident counsellor[4]

V. THE ALLEGED UNFAIR LABOR PRACTICES

A. *Background*

The Union has been the recognized collective-bargaining representative since 1974 for the registered nurses and the professional and technical employees employed by the Center. The most recent written collective-bargaining agreement between the parties covered the period from 1 January 1979 to 31 December 1980. During the period between the expiration of that contract and September 1982 there was no written agreement between the parties, although the parties did reach agreement about wages, and this agreement, apparently, was implemented. Negotiations for a new agreement were scheduled to commence on 16 September 1982.

B. *Events Prior to 15 September*

Commencing about June 1982,[5] the employees began to have discussions about what they perceived were problems at the Center. The employees drafted a petition to Dr. Clyde Pemberton, the executive director of the Center, about these problems, but the record does not reveal what happened to that petition. However, according to an employee, Olubayo Buchinji, during a staff meeting Dr. Pemberton did ask about the petition and he stated that employees would be discharged for circulating any petition that was critical of the Center. At another point during the summer months, William Hatcher, chairman of the board of the Center, urged the employees to abandon the Union and start their own in-house black union rather than continue their membership in a union that Hatcher considered to be a Jewish union. The employees reported these events to David White, a vice president of the Union, and he wrote to Pemberton and asked him to cease making these statements to the employees. Pemberton and Hatcher did not testify about these events.

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[3] Although counsel for the Center contended that the Regional Director did not investigate the allegations of misconduct by some employees, he failed to offer evidence to establish that the issue was raised or that, if raised, an investigation was not conducted.

[4] Bowers was called by the Employer as a witness, although he also testified for the Union on the issue of the intermittent picketing.

[5] All dates are in 1982, unless stated otherwise.

David White testified that beginning about July he met with the employees to discuss various problems they had, including the concern of the employees that Pemberton's failure to sign the prior collective-bargaining agreement could result in the termination of their medical benefits.[6] On 2 September, during a union meeting, the employees decided to engage in a series of demonstrations to protest these various grievances. The demonstrations were to be held from noon to 1 p.m. on the first day, from noon to 2 p.m. on the second day, and from noon to 3 p.m. on the third day. The employees also decided to send a 10-day strike notice. However, the strike notice was not sent and the demonstrations were not held between 2 and 15 September.

On 14 September Celeste Gordon, an employee and member of the union negotiating committee, and Irma Quitcon, an employee and union delegate, met with other employees to discuss mutual concerns and they decided that they needed to meet with a union official to discuss their lack of knowledge concerning the negotiations that were scheduled to begin. Gordon contacted White and asked him to meet with the employees, and White agreed to be at the Center at noon to meet with the employees. Management representatives, frequently, had permitted White and other union representatives to meet with employees and had permitted employees to hold union meetings on the premises. These meetings, generally, were held at noon or after 5 p.m. in room 153. According to undisputed testimony given by Quitcon, under a prior administration it had been necessary for employees to request permission, verbally, to use room 153 and permission had been granted if the room was not being used for other functions. Quitcon testified that sometime prior to the events in this case there had been a conflict between two sections of the Center about the use of the room and, thereafter, Dr. Sitgraves had stated that if a group wanted to use the room they would be required to post on the door of the room when the room would be occupied and if such a notice was not posted the room could be used by others. Quitcon did not state that Sitgraves, specifically, referred to the use of the room for union meetings but she, apparently, assumed that the statement included use of the room for such purposes. Quitcon did not state when she checked to see if the room was available, but she claimed that she did check and found that the only meeting scheduled for 15 September was the regular staff meeting in the morning. It is undisputed that no specific permission to use the room for a union meeting was given by any employer representative. It is unclear about when or how the employees became aware that a union meeting was scheduled for 15 September.

C. Events on 15 September

Wednesday, 15 September, was the day when regularly scheduled staff meetings were held and when employees received their paychecks. The staff meeting was held between 9 and 11 a.m. and was attended by members of the bargaining unit and representatives of management, including Pemberton. According to the employees who testified, at the end of the staff meeting an employee announced that the union meeting scheduled for noon would not be held until 2 p.m. It is unclear whether Pemberton was present when this announcement was made. Pemberton did not testify concerning this incident.

White testified that when he realized that he would be unable to be at the Center at noon he called the Center and explained the difficulty. An unidentified employee responded that it would not cause a problem, employees could rearrange their lunch schedules to be present for the meeting at 2 p.m. The record reveals that at that point the Center did not have specific hours for lunch periods or breaktimes, employees took their free periods whenever it was convenient for them to do so.[7] In addition, on alternate Wednesdays the employees were allowed an extra one-half hour to cash their paychecks and there was no set time when they had to use this free time. Gordon, Buchinji, Harris, and de la Torre, unit employees, testified that they used their lunch period to attend the meeting. Thus, Gordon testified that on 15 September, at some point after noon, she took a cab to a nearby bank to cash her check. After she cashed the check, which did not involve more than 15 to 20 minutes, she returned to the Center where she worked until 2 p.m. when she went to the union meeting. Gordon initially testified that she used her lunch hour to attend the meeting. On cross-examination, Gordon conceded that in a note she gave to Pemberton, after she received a disciplinary letter, she told him that she had been at lunch between 1:30 and 3 p.m. on 15 September. Gordon explained that she was entitled to take the 1-1/2 for lunch because she was allowed an hour for lunch and two 15-minute break periods. Buchinji testified that she went to the union meeting between 2 and 3 p.m. and she used her lunch period to attend the meeting, although she admitted that there was a notation in her appointment book that her lunch hour on that day was at 1 p.m. Harris testified that after she left the staff meeting she met with a coworker and discussed with her various problems about parents and family groups. The discussion lasted for about 1-1/2 hours, and she then returned to her own office where she continued to work. Harris claimed that she used her lunch hour to attend the meeting. De la Torre testified that after the staff meeting she cashed her check, and then saw clients until 2 p.m. when she attended the meeting. She admitted that she had a 2:30 p.m. but she claimed that she told the receptionist where she would be in the the patient arrived. This was not an unusual procedure at the Center. The patient did not arrive. De la Torre also claimed that she used her lunch period to the meeting.

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[6] There had been some rumors that benefits would cease if Pemberton did not sign some agreement.

[7] On 16 September Pemberton, by memo, advised all supervisory employees that they were "hereby directed to strictly adhere to assigning specific lunch periods to each staff person." In July 1983, supervisory employees were advised that commencing in August 1983 the official lunch hours would be between 12 and 2 p.m.

The union meeting was held at 2 p.m. in room 153 and it was chaired by White. The Center did not call witnesses with respect to this event. White and employees Celeste Gordon, Olubayo Buchinji, Roseanne Harris, and Dora de la Torre did testified and although their testimony varied in some respects they were in agreement about many of the details of the overall event. According to the testimony of the above-named individuals, the meeting began with a discussion about Pemberton's failure to sign the prior contract, the possibility of a loss of employee medical benefits, and the coming negotiations. At some point, the employees decided to ask Pemberton to attend the meeting to ascertain why he had not signed the contract, and White instructed Richard Villa, a union representative, to find Pemberton to ask him to attend the meeting. As Villa left the room, Pemberton entered through another door, asked White what he was doing there, told White to leave, and instructed the employees to return to work. White responded that it was a regular union meeting and that he would leave when the meeting was finished. According to Gordon and Quitcon, the employees attempted to tell Pemberton that they were on their lunch hour, but he refused to listen to them and left the room. Notwithstanding Pemberton's instructions, White claimed that he continued the meeting because he thought permission had been secured to hold the meeting. After Pemberton left, Dr. Charles, the medical director, entered the room, he had a notepad, and he appeared to be taking the names of those employees who were present. Subsequently, Pemberton returned and, according to the employees, they tried again to speak to him but he refused to talk, said the meeting was illegal and that he had a job action on his hands and he left the room. Charles returned and he made a list of the employees present in the room. There is no evidence that there was any discussion about a strike or demonstration during this meeting. According to White, as he was about to conclude the meeting, about 3 p.m., some employees entered the room and said that the timecards had been pulled. White, together with a large number of the employees, went to the second floor to speak with Pemberton about the timecards. Pemberton's office, as well as areas for patients, is on the second floor. White and the 10 employees were stopped in their efforts to see Pemberton by a security guard, and White explained that the employees wanted to speak to Pemberton about the missing timecards. The guard relayed the message but Pemberton refused to meet with anyone but White. White, however, refused to meet Pemberton without an employee being present. According to White, he refused to see Pemberton alone because union policy prohibited the union representatives from meeting with employer representatives without the presence of an employee delegate in order to avoid any claim of a "sell out" to management.

The record does not reveal the exact number of employees who went to the second floor after they discovered that their timecards were missing, although Celeste Gordon estimated that there were about 30 to 40 employees on the second floor. According to Gordon, she had no appointments scheduled for the afternoon of 15 September.[8] On direct examination, Gordon testified that after the union meeting she went to the second floor where she remained for only a few minutes. However, on cross-examination, Gordon admitted that she was on the second floor between 3 and 4 p.m.[9] Buchinji claimed that after the meeting she went to the second floor where she remained for about 10 minutes before she returned to her office to ask the receptionist whether a client, who was scheduled for a 3 p.m. appointment, had arrived. Buchinji was not sure whether it was before or after 3 p.m. when she questioned the receptionist about whether the patient had arrived. Buchinji admitted that when she was told that the patient had not arrived she returned to the second floor, where she remained between 3:15 and 5 p.m., except for two occasions when she left to check about whether the client had arrived. Harris claimed that after she attended the meeting she returned to her office where she worked until 4:30 p.m., her regular quitting time. Harris maintained that she did not go to the second floor and did not know that the timecards had been pulled until she went to clock out and found her card was not in the rack. She went and told her supervisor, Guerrero, about it and she signed a paper to indicate the time she left. De la Torre testified that after the meeting she went to her office, picked up charts, and returned them to the medical records section, which was on the second floor. She then returned to her office on the third floor where she saw Pemberton and Charles who said hello to her. De la Torre admitted that a patient who was scheduled for a 3 p.m. appointment had signed in the patient's logbook at 2:50 p.m., but she did not see that patient. De la Torre claimed that sometime after 3:30 p.m. she was told by a coworker that the timecards had been pulled and she went to the second floor to find out what had happened but she remained there only a few minutes and then she returned to work where she stayed until 5 p.m.

Some of the employees who testified claimed that the employees who assembled on the second floor were orderly when they arrived in the vicinity of Pemberton's office. However, the picture that emerged from the testimony of other employee witnesses and White was that the second floor was a scene of confusion and noise. Employees were milling about, chanting in unison that they wanted their timecards, and demanding to see Pemberton. This state of noise and confusion continued until about 4:45 p.m. when the police advised White and the employees that if they did not leave the premises they would be arrested. White then stood on a chair and directed the employees to leave because their dispute was not with the police but with the Center. The employees then left the premises. At some point, while the events described above were in progress, employer representatives decided to close the doors to the Center. According to White, he viewed the combined actions of the removal of the timecards and the closing of the Center as a lockout. He then instructed his office to send the 10-day strike notice.

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[8] Counsel for the Center attempted to establish that Gordon had failed to keep appointments scheduled that day by use of service rendered documents (SRD), which are reports of the employee's daily activities. However, the document was rejected because there were unexplained erasures, cross-outs, etc., on it.

[9] In a note that Gordon sent to Pemberton, dated 20 September, she objected to the amount of time Pemberton had docked from her pay but admitted that he was entitled to dock her for the time between 3 and 4 p.m.

D. *The Warnings—16 September*

When the employees arrived at work on 16 September, they found that their timecards were not in the rack but there was a notice that directed them to report to the second floor, which they did. When the employees arrived on the second floor they were not permitted to sign in but were told to remain until their names were called. About 9:30 a.m., Charles called the first employee, Lydia Thomas. When Thomas entered the room she was handed a letter, which stated that the employees had engaged in an illegal work stoppage on 15 September, had ignored a direct order to return to work, and that such action in the future might result in their termination, and they were docked for the hours between 2 p.m. and the close of their regular duty. When the other employees became aware of the contents of Thomas' letter, they demanded that Richard Villa accompany them to their meeting with Pemberton. Villa's efforts to attend the next meeting caused a confrontation between Pemberton and Villa, which almost resulted in a physical fight between the two men. After approximately a half-hour, Villa and Ida Newton, an employee and delegate, were allowed to be present when the employees received their disciplinary letters. Approximately 26 employees received these letters at 5-minute intervals and, apparently, each employee was asked to sign a receipt that they had received such a letter which, on advice of the union representative, they refused to do.

Celeste Gordon testified that while she waited for her letter she asked Charles on several occasions to allow her to leave the floor to attend to the children who were her responsibility and Charles refused to allow her to do so. About 10:30 a.m., Gordon was called into Pemberton's office, given a disciplinary letter, and told by Pemberton to leave the floor. Roseanne Harris claimed that she was called into Pemberton's office between 11 and 11:15 a.m., was given a disciplinary letter, and told by Pemberton to return to work. Dora de la Torre stated that she did not receive her letter until about noon. She did not testify that Pemberton told her to return to work but she did admit that she heard Charles about 10:30 a.m. tell employees to return to work, when they received their letters. According to Olubayo Buchinji, she was called to Pemberton's office about noon, where she received a disciplinary letter from Pemberton who asked her to sign it, which she refused to do. Buchinji did not recall that Pemberton told her to return to work. Thus, according to the combined testimony of these employee witnesses, the procedure involving the issuance of these letters commenced about 9:30 a.m. and continued at least until noon on 16 September and at some point during that time the employees were told to return to work when they received their letters.[10]

E. *Employees Draft Letter—16 September*

On 16 September, after they received the disciplinary letters, some employees drafted a letter of protest to Pemberton about the disciplinary letters that they had received. The only testimony concerning the drafting of this letter was given by Gordon, de la Torre, Buchinji, Harris, and White. According to their testimony, a number of employees went to the first floor of the Center and at some point between 11 a.m. and 2 p.m. they drafted the letter of protest. The record does not disclose the names or numbers of all the employees who engaged in this activity.

Gordon testified that after she received her letter of discipline she went to the nursery, which was her usual workplace. The children in the morning session apparently had been supervised by another employee while Gordon waited for her letter of discipline. It does not appear that there were children in the nursery when Gordon arrived because she testified that she spent some time putting toys away and arranging the room for the afternoon session. Gordon claimed that as she was doing this work Supervisor Orlando Guerrero passed by and observed her in the room. Guerrero did not testify. At some point, after 11 a.m., other employees came to the first floor, where the nursery is located, and they decided to draft a letter to Pemberton to protest the disciplinary letters they had received. Gordon joined the group who were drafting the letter and, according to her, the entire process took only a few minutes. She then went to lunch and later returned to the nursery for the afternoon session. Gordon could not recall who was present when the letter was drafted.

De la Torre claimed that after she received her letter of discipline, around noon, she went to the first floor where she observed that employees were drafting a letter to Pemberton. De la Torre admitted that she remained with the group who were drafting the letter for about 50 minutes. In her testimony, de la Torre claimed that the employees drafted the letter between 1 and 2 p.m. and at that time she was on her lunch hour. However, in an earlier unemployment hearing de la Torre stated that she took her lunch period on that day at 12:20 p.m. and she finished at 1 p.m.

Buchinji stated that after the employees received the disciplinary letters they decided to go to the first floor to discuss what they should do. When they arrived on the first floor, about 12:30 p.m., the employees decided to draft a letter of protest. Buchinji denied that she was involved in drafting the letter, although she admitted that she stayed on the first floor for about 20 minutes. Buchinji could not recall who drafted the letter or the name of any employee, other than Kamala Mottl, who was present when the letter was being drafted, although she stated that the employees who were present were the employees who had received the disciplinary letters that morning. Buchinji claimed that she saw Gordon in the nursery with one of the children while the employees were drafting the letter. She did not recall whether de la Torre, Harris, or Chris Sowley were present. According to Buchinji, she thought the drafting of the letter took about 20 minutes, after which she left and returned to work. Buchinji did not recall if she saw any patients between noon and 1 p.m. but she thought she took her lunch period between 1 and 2 p.m. on that day. Harris testified that after she received her letter of discipline, she returned to work where she assisted Randolph[11] to find the children. At about noon, she joined the employees who were preparing a letter to management and she remained with them for about 10 to 15 minutes. She did not recall Gordon, de la Torre, or Buchinji being in the vicinity when the letter was drafted. After about 10 to 15 minutes, she left, had lunch, and returned to work.

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[10] Although counsel for the Center attempted to establish, on cross-examination, that all employees had received their letters by 10:30 a.m., there was no credited testimony offered to support that contention.

According to White, when he came to the Center around noon on 16 September everything appeared to be normal and, in fact, he saw Pemberton and said hello, and Pemberton responded. White testified that he did observe that two employees, who he thought were Kamala Mottl and Chris Sowley, were engaged in writing a letter to Pemberton but he did not observe that any other employees were with them at the time. White testified that although he had "misgivings" about the letter writing, he did not express these feelings to the employees. The evidence fails to reveal that the employees who engaged in this letter writing were noisy, disruptive, or interfered with patient care.

F. *Negotiations—16 September*

The first negotiation meeting was scheduled for 16 September and, notwithstanding the events of 15 and 16 September, the meeting was held as scheduled at 3 p.m. in room 271 at the Center. An attendance sheet was signed at the start of the meeting, and an examination of that document establishes that the Center was represented by Pemberton, Charles, Sitgraves, and other Center representatives, including Geven Wise, Rosemari Mealy,[12] Thurmon, Myers, and Halif Braithwaite. The Union was represented by White, Villa, two other unidentified union representatives, and employees, Gordon, Newton, Adams, Quitcon, Bowers, and Baptiste. White presented the Union's proposals to Pemberton.[13] However, before the parties discussed the proposals, White requested Pemberton to sign the collective-bargaining agreement, which Pemberton had failed to do, for the period from January 1981 to June 1982. Pemberton refused to discuss that issue on the ground that it was not a proper subject for the present negotiations. White then requested that Pemberton sign an interim agreement in order to allow employees to continue to receive their benefits. There was some discussion about Pemberton's belief that there was some collusion between union representatives and representatives of the fund over the continued payment of benefits. At some point, White asked whether the events of 15 and 16 September could be discussed and Pemberton refused to discuss the matter, contending that the warning letters that had been issued were the result of actions by the board members of the Center and were not a proper subject for the negotiations. The parties then discussed the various union proposals, including the term of the contract, the wages, vacation periods, daycare for children of employees, etc. There was no agreement reached on any issue. Pemberton testified that prior to the meeting he had decided that he would listen to the Union's proposal and not make any specific proposals of his own. At the conclusion of the meeting, White proposed that the parties engage in round-the-clock negotiations, a suggestion rejected by Pemberton because he believed that the Union had delayed the start of the negotiations. The witnesses for the Center claimed that the Union set the date of 22 September for the next meeting and they agreed. The Union's witnesses claim that it was the Center's representatives who set the date and they accepted. In any case, the next meeting was scheduled for 22 September.

As the meeting was about to conclude, Pemberton received notification that the Union had sent the Center a telegram about the start of a strike. The next day the Center received the telegram, which stated that the Union would commence its strike on 28 September 1982 at 9 a.m. This was the only written notification that the Center received.

G. *The First Discharges—17 September*

Employees worked their usual schedules on 17 September. However, at 5 p.m., when employees went to punch out, some 13 employees discovered that their timecards were not in the rack. These employees went to the second floor where they received letters of termination from Pemberton, Charles, or other managerial representatives. The employees refused to accept these letters because they had not received their paychecks. These letters then were rescinded, but on 20 September when Mary Austen, Olubayo Buchinji, Dora de la Torre, Ingrid del Rosario, Lillian Font, Celeste Gordon, Beverly Gould, Rose Ann Harris, Kamala Mottl, Christopher Sowley, and Lydia Thomas arrived at work they received letters of termination.[14] The letter the employees received stated the following:

> Following your signing into work on September 16, 1982 and your receipt of a warning letter, you were specifically instructed to return to your work station. This you refused to do. Indeed the substantial time which elapsed until you reported to your work station, leads to the determination that you again participated in a work stoppage, that of the a.m. of September 16, 1982.

Other than the statement contained in the letter of termination, employees were not told specifically on 20 September the reason for their discharge. White testified that when he went to the Center on 20 September he asked Pemberton why the 11 employees had been discharged and Pemberton replied that he had discharged those employees who had engaged in work stoppages on two occasions, i.e., on 15 September and on 16 September. The record discloses that the 11 employees who were discharged were on the list prepared by Charles at the union meeting on 15 September.[15] However, the record fails to reveal the basis on which the Center determined that these 11 employees had engaged in a work stoppage on 16 September or when that alleged stoppage had occurred on 16 September.

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[11] Randolph is the daughter-in-law of Hatcher, the head of the Center.

[12] This name appears in the record with different spellings, but the attendance sheet was signed as noted above.

[13] There was some conflict between Pemberton and Charles over who chaired the meeting and who was the main speaker for the Union. However, it appears that it was White who had the main role for the Union.

[14] It is not clear from the record why the number of discharged employees changed from 13 to 11 between 17 and 20 September.

During the hearing, the parties entered into a stipulation with respect to the reason for the discharge of the 11 employees. The stipulation, in pertinent part, states, "The discharges were in part based upon the warnings which were previously issued to those employees on 16 September 1982, as described above in paragraph 2."[16]

H. *The Union Meetings—20 and 21 September*

After the discharge of the 11 employees, a union meeting was held at a nearby church. The meeting, which was attended by a substantial number of the bargaining unit employees, was chaired by White and it focused on the discharge of the 11 employees. Although there were some variations in the testimony given by Gordon, Harris, de la Torre, Buchinji, and White, the one fact about which they agreed was that the employees decided to engage in a strike rather than a demonstration and that the discharge of the 11 employees was the reason for this decision.[17] It appears that at this meeting the employees decided that the strike would commence on 28 September.

A second union meeting was held on 21 September, also in the church. At this meeting an employee, Ida Newton, reminded the employees that 29 September was a payday and if they struck on 28 September they might not receive their paychecks. The employees decided to change the day the strike would commence from 28 September to 29 September. It is undisputed that the Union did not give written notification to the Center or FMCS about this change of dates.

I. *The Negotiations—22 September*

The second negotiation meeting was held, as scheduled, on 22 September in room 271 at the Center. The Center was represented by Pemberton, Charles, Sitgraves, Braithwaite, Mealey, Ansari, and Myers. The Union was represented by White, Adams, Baptiste, Gordon, Bowers, Quitcon, and Newton. Pemberton, Charles, and Sitgraves testified about this event for the Center. White, Adams, Baptiste, Gordon, and Quitcon testified for the Union about the meeting. The meeting lasted for 2 hours. According to Pemberton, the meeting began with a discussion of whether the Center would sign the 1981–1982 contract or an interim agreement and he advised the union representatives again that those issues were not proper subject matters for discussion. He also advised the union representatives that the Center was prepared to continue the employee benefits and he then began to discuss the Union's proposals. He stated that the Center would not agree to the inclusion of a hiring hall clause, but would consider hiring individuals referred by the Union. Pemberton testified that at this meeting he agreed to the concept of a daycare program, to the Union's proposal on severance pay, and he made a counteroffer with respect to the Union's wage proposal. At some point, according to Pemberton, White apologized for what had occurred on 15 September and stated that if he had known that permission to use the room had not been obtained he would have dismissed the meeting. White indicated that if Pemberton had approached him in a less hostile manner he would have ended the meeting, but Pemberton's actions in front of the members had placed White in a difficult position. White then asked Pemberton to reconsider the actions taken by management over the events of 15 and 16 September and Pemberton responded that the decisions made because of those events were decisions by the board, he could not overrule them but he would relay any proposal that White wanted to make about the matter to the board. The union representatives then caucused and when they returned White offered to put in writing his apology about the events of 15 September and he asked when the next meeting could be held. Initially, according to Pemberton, Adams proposed 24 September for the next meeting, but that date was rejected by both Pemberton and White.[18] Adams then proposed 27 September, which White, after checking a black appointment book, rejected.[19] Adams then asked whether 29 September was an acceptable date and, at that point, Quitcon whispered something to Adams. According to Pemberton, he heard the word "strike" mentioned by Quitcon but he did not hear the rest of the conversation. White then said that the Union had given the 10-day strike notice and they were free to strike at the expiration of the 10 days within a 72-hour period. White also said that if the Union did not strike in the 72 hours it would be necessary to give a new notice but that would not pose a problem. Both parties agreed to meet on 29 September. Pemberton denied that either White or any other union representative stated when the strike would occur. He also denied that any union representative used the words, "hit the street."

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[15] The parties entered into a stipulation with respect to the names on the list prepared by Charles.

[16] Although counsel for the Center signed this stipulation, he did so subject to his objection about the introduction of any testimony or evidence pertaining to the termination of the 11 employees in mid-September 1982.

[17] In a telegram sent by White to Pemberton, on 5 October 1982, he stated that the reinstatement of the discharged employees "would open the way to negotiate all issues." Union literature issued after the strike started also referred to the discharges as the reason for the strike.

[18] On 24 September, White did write a letter to Pemberton in which he stated that had he been aware that permission to use the room had not been secured he would not have continued the meeting, and he requested Pemberton to reinstate the "discharged employees because such an action would be a great step toward coming to an understanding between the administration and the Union."

[19] Pemberton, subsequently, testified that the discussion about possible dates occurred among the union representatives, and the Center's representatives were not party to those discussions. He also stated that he did not object to any date.

The testimony given by Sitgraves and Charles about this meeting was substantially the same as the testimony given by Pemberton. Both denied that any union representative stated that the strike would begin on 29 September. Sitgraves recalled that after the union representatives caucused, White said that the Union was free to strike within 72 hours of the 10-day strike notice. According to Charles, after White proposed the date of 29 September there was some "agitation" on the Union's side of the table, someone passed a note to White and White said he knew what he was doing, and they could meet 29 September.

White's testimony about the events on 22 September was similar in many respects to Pemberton's testimony. According to White, Pemberton agreed to the Union's proposal on severance pay and agreed to the concept of a daycare program. White claimed that he asked Pemberton to reconsider the discharge of the employees and Pemberton agreed to discuss the matter with the board members. White explained that he did not know the meeting on 15 September was unauthorized, if he had known he would not have held it. According to White, when the union members heard this statement, they became upset and he asked for a caucus. White went outside with the members and they told him that they had engaged the room as they had in the past and there was no reason why White should apologize to Pemberton. White told the members that if he had to apologize to get the discharged employees reinstated, he would do it. The employees also were upset that White had agreed to meet on 29 September because that was the day the strike was to begin. White told the employees that they had to meet in order to avoid a strike. White testified that when the union members returned to the meeting, he told the Center's representatives that "we have a marriage, that we are here and we are going to stay here." White also claimed that he told the Center's representatives, "If we have not settled the issues that exist between us by the 29th, when the 29th comes we're going to find ourselves on the street." White testified that he did not explain why the date of the strike was changed to 29 September.

Celeste Gordon testified, initially, that after the union members caucused they returned to the meeting and it was at this point that White said that he was unaware that the union delegate had not secured permission to use the room on 15 September and he apologized for the disturbance. White then said that the Center and the Union had to learn to live together, that it was like a marriage, the parties had to work out the details and if they could not work it out, "then we were going to walk on the 29th—we were going to strike Wednesday." On cross-examination, Gordon stated after White apologized for the events of 15 September, the Center's representatives said that the next negotiation meeting should be on 29 September and then the union members caucused to discuss the date suggested by the Center.

According to Irma Quitcon, when the union members returned to the meeting after their caucus, White said that the Center and the union had a marriage, they had to work together, he was willing to work 24 hours a day until the following week and that if within that week they had not reached agreement the Union would strike the following Wednesday. Quitcon claimed that it was the Center's representatives who set 29 September as the next day for negotiations and that when the union members caucused, they discussed whether they could meet because the strike was set for that date and White told them they had to meet with the Center's representatives for negotiations, notwithstanding the possibility of the strike. Quitcon did not recall White looking at a black notebook and she denied that White set the dates for the next meeting or that she conferred with Adams about the dates.

Adams testified that after the parties discussed the Union's proposals, White apologized for the confrontation on 15 September. Adams also claimed that the Center's representatives proposed 29 September for the next negotiation meeting. The union members asked White to caucus because they wanted to express their displeasure to him about his apology. During the caucus, White told the members that he would do anything to get the employees rehired. The group then discussed why White had agreed to meet on 29 September when the strike was set to start on that day and White responded that nothing could interfere with the negotiations. The members then returned to the room and White told the Center's representatives that the Union was not going away. He said they did not want to walk on 29 September, but they would do so if they had to. Adams recalled that White did look at an appointment book but he denied that White conferred with him or Quitcon about the date for the next negotiation session.[20]

Carl Baptiste claimed that at this meeting on 22 September the parties discussed the Union's proposals, and then White spoke about the employees who had been discharged and apologized for the events of 15 September. Baptiste testified that the union members were upset by White's apology and asked for a caucus. During the caucus, White explained that he would do anything he had to do to get the discharged employees reinstated. The union representatives then returned to the meeting and White repeated that he would do everything possible to get the employees rehired. White then told the Center's representatives that the Center and the Union were like a married couple; they had to sit down to iron out their difficulties. At this point, according to Baptiste, White stated that if they worked out their difficulties it would not be necessary to "walk" but if no agreement was reached the Union would have no other choice other than to be on strike on 29 September. Baptiste also testified that it was the Center's representatives who proposed 29 September as the next day for the negotiations.

As noted, Lloyd Bowers was an employee-member of the negotiating team and a representative of the Union at the meeting on 22 September. Bowers was called, initially, as a witness by the Center. Bowers was not asked to testify about what happened at the meeting on 22 September. However, he was asked when he first learned that the Union was going to strike on 29 September. Bowers responded that he secured that information from other employees in the late afternoon on 28 September.[21]

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[20] In the affidavit given by Adams in the investigation, Adams stated that he did not recall whether the parties set a date for the next meeting at the meeting of 22 September.

J. *Strike Preparations—22 to 27 September*

Although Charles claimed that he held individual meetings with coordinators[22] between 22 and 28 September, he did not testify about the details of those meetings. Terri Reid Payne, a project coordinator, testified that on 22 September she attended a regularly scheduled junior management meeting, chaired by Charles, during which there was a general discussion about what coordinators would do in the event of a strike. This meeting was attended by Sitgraves, Braithwaite, and coordinators Norma Burgos, Rose Fabian, Gil Calcano, Lavernne Crumpler, and Marvin Sessions. On direct examination, Payne testified that those present at the meeting discussed who would be available to work in the event of a strike. On cross-examination, Payne claimed the coordinators were told by Charles to bring information about their units to the meeting on 22 September, at some point before the meeting, but she was confused about when or where the coordinators were given these instructions. She also recalled, on cross-examination, that at this meeting Braithwaite stated that the Center would provide transportation for those who wanted to work.

According to testimony given by Sitgraves, on 22 September she attended a regularly scheduled coordinators meeting, which was chaired by Charles. During the meeting, she discussed how her unit would operate if a strike occurred, and the number of staff members who would be available. Sitgraves claimed that she was not given any particular assignment for which she was to be responsible in the event that there was a strike. Someone did mention at this meeting that a notice had been received and that the strike was to commence on 28 September.

Norma Burgos, coordinator of the adult day treatment program, testified that about a week prior to the strike[23] a special meeting was called to decide what arrangements needed to be made in the event of a strike. The meeting was held in the conference room at the Center and Pemberton, Charles, Ana Perira, Thurman Myers, Elizabeth Payne, Marvin Sessions, and Wade were present. Burgos stated others also may have been present at the meeting.[24] The discussion centered around what coverage would be needed in each unit in the event of a strike, who would be available, and what food would be needed. However, according to Burgos, the specific date that the strike was to commence was not mentioned, although because of the strike notice it was anticipated that it would be 28 September.

It was Pemberton's testimony that he held two meetings with members of senior management to discuss preparations for the strike. The first meeting was held on 24 September and the second meeting was held on 27 September. The first meeting was held in room 271, the conference room at the Center, and was attended by Charles, Braithwaite, Elizabeth Payne, acting administrator, and Ana Perira, director of transitional housing. Although Pemberton claimed that copies of a strike plan were distributed at this meeting, other witnesses who testified about the meeting did not refer to that fact and Charles, who was asked about such a plan, denied that a written strike plan was reviewed at the meeting on 24 September and denied that copies of such a plan were made available to those present at the meeting.[25] Pemberton also claimed that at this meeting he designated Braithwaite as strike plan coordinator and he directed the others to refer any questions to Braithwaite and he instructed Braithwaite to secure the names and phone numbers of those employees who would not be on strike. Braithwaite was not called to testify. It was Pemberton's testimony that at this meeting he announced that the strike would commence on 28 September, that staff leaves would be canceled, and that the staff would be required to start work at 8:30 a.m. rather than 9 a.m., the usual starting time.

The most significant change that Pemberton claimed he announced at this meeting concerned the adult day treatment program, which was normally located at the Center. Pemberton testified that he directed that the program be transferred from the Center to the Hudson Hotel and he advised those present that Perira would be in charge of the program. He claimed that he instructed Perira to arrange for the transfer of medical records and medication for the clients to the hotel and he told her to secure a catering service to provide food for the clients at the hotel. According to Charles, the adult day treatment program is a clinical program, normally under the direction of Norma Burgos, who was located at the Center. Burgos was not present at this meeting, allegedly because she was sick on that day. However, it does not appear from this record, that she was advised about the transfer of this program, nor does it appear that others on her staff were at the meeting or advised of the transfer. Perira was in charge of the transitional program and in that capacity she was responsible for the housing program, which, according to Charles, was not a clinical program. Perira, in her capacity as head of the transitional program, prior to the events in this case, spent part of her time at the Hudson Hotel.

The second meeting, Pemberton testified, was held in his office on 27 September. Present at this meeting were Charles, Braithwaite, and Elizabeth Payne. During the meeting, Braithwaite advised Pemberton that he had not completed the list of employees' names and phone numbers and Pemberton instructed him to finish the process. There was some discussion about the possibility of moving some units from the fourth to the first floor of the Center and about having all phones ring on the first floor. Pemberton directed Braithwaite to contact the phone company to make the necessary arrangements.

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[21] Bowers returned to work after being on strike for several months.

[22] Coordinators are considered members of junior management.

[23] This would be about 22 September.

[24] On cross-examination, Burgos recalled that Braithwaite was present at the meeting and she thought that he was designated strike coordinator.

[25] Charles did testify that prior to the meeting on 24 September he personally reviewed a strike plan, which he had in his files and which had been prepared for an earlier strike.

Charles' recollection of these meetings differed in some respects from the testimony given by Pemberton. Charles testified that the meeting held on 24 September was a joint meeting with senior management members, Pemberton, Braithwaite, Sitgraves, Mealy, Perira, and Guerrero, and coordinators Myers, Burgos, and Dr. Jiminez in attendance. Pemberton chaired the meeting and he announced that the meeting was being held because of the strike that was scheduled to begin on 28 September. However, as noted, Charles did not recall any mention about a strike plan. Pemberton announced at the outset that staff members would have to be assigned to different posts to ensure that the Center would continue to operate. The group decided that children in the child care program would enter the building through the basement to avoid potential danger and that it would be the responsibility of senior staff to supervise the classrooms. In addition, the group agreed that the adult day treatment program and the staff responsible for it would be transferred to the Hudson Hotel, and catering services would be contacted to provide food at the hotel for the clients. There were also discussions about where pickup points should be located for nonstriking employees.

Charles did not recall a meeting held in Pemberton's office, which was attended by only Pemberton, Charles, Braithwaite, and Payne. However, he did recall a meeting on 27 September that was held in the conference room and was attended by the same people who had been at the meeting on 24 September. At this meeting, individuals reported on their progress with respect to the duties that had been assigned to them at the earlier meeting. Braithwaite reported about the employee list that he was preparing, Guerrero explained about his contacts with various ambulette services, and Sitgraves discussed her investigation into the availability of catering services.

It was Sitgraves' testimony that she attended a meeting that took place on 24 September at which Pemberton, Charles, and coordinators Sessions, Myers, Mealy, and Guerrero were present. During this meeting, Sitgraves discussed how her unit would operate, about the management of Guerrero's unit, which she supervised, and about contacting parents to assure them that the daycare program would be in operation. During this meeting, those present were told that the strike was expected to commence on 28 September. Sitgraves did not testify that during this meeting plans were made to transfer the adult daycare program to the Hudson Hotel, nor did she testify that Pemberton discussed a strike plan or reviewed such a plan with those who were present. Sitgraves claimed that at this meeting she was given the assignment of contacting catering services to provide food for the staff who would be transferred to the hotel. However, she did not contact catering services because she claimed that she was not given information beyond the meeting of 24 September "as to a strike being more imminent and our needing to have food brought in for that day, so I didn't contact them."[26]

Ana Perira testified that she attended a meeting on 24 September at which Pemberton, Charles, Braithwaite, and Elizabeth Payne were present and during which Pemberton told the group that there would be a strike the following week. At the meeting, Pemberton decided that the adult day treatment program would be transferred from the Center to the Hudson Hotel and be under her supervision. She was instructed to arrange for the transfer to the hotel of the records and medication for those patients in the program and told also to make arrangements for food to be delivered to the hotel for the patients. Perira testified that Pemberton instructed that these changes be completed by 28 September but she was not told during the meeting when the strike would start.

Elizabeth Payne, who was acting administrator at the time of these events,[27] testified that she was unaware of any specific preparations or plans that were made for the strike before it started. Payne stated that on the Tuesday before the strike started, at a regularly scheduled management meeting, there was a general discussion based on what had happened in an earlier strike, that supervisors would be responsible for the duties of employees who were on strike. She was also present on the next day for part of a regularly scheduled meeting for coordinators during which there was a general discussion about what had happened in an earlier strike. Payne denied that she attended any meeting where Pemberton appointed Braithwaite as strike plan coordinator or where he requested Braithwaite to make a list of the names and telephone numbers of nonstriking employees. Payne also denied that she was present at any meeting before the strike started at which Pemberton reviewed a written strike plan or distributed copies of such a plan. In fact, according to Payne, if such plans were distributed it would have been her job, as acting administrator, to make the distribution. In response to a question whether there was a written strike plan, Payne replied, "To the best of my recollection there was something from a previous strike, but I don't recall anything from this strike and I wasn't present at the first strike." Payne also testified that there had been no discussion at any meeting at which she was present, before the strike started, about the transfer of the day treatment program to the Hudson Hotel or about the need to secure a catering service. It was Payne's testimony that the first meeting that she attended where plans for the strike were discussed occurred 1 week after the strike started.

According to Perira, after Pemberton's instructions to her about the transfer of the adult treatment program, she had a meeting with Terri Payne, project coordinator, and Marla Delgado and Pam Pannell, assistant project coordinators, on 27 September. Perira claimed that during this meeting she discussed with Payne, Delgado, and Pannell the transfer of the adult day treatment program to the Hudson Hotel and she instructed Payne and Delgado to call those clients in the Supportive Living Program to tell them to report to the hotel, rather than to the Center, on the following day. Perira also told the staff to make certain that medications of those patients who were to be transferred were current and that there was sufficient medication. According to Perira, she directed Payne to arrange for food to be at the hotel for the clients and to have files and chairs transferred to the hotel and to rearrange staff schedules to provide sufficient daytime coverage.

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[26] Sitgraves testified that she was not convinced in her mind that there was going to be a strike.

[27] Payne was not employed by the Center at the time of the hearing. It appears that she had been discharged.

Payne testified that on 27 September, about 2 p.m., she attended a meeting with Perira, Delgado, and Pannell during which Perira advised them that the adult treatment program was to be transferred to the Hudson Hotel. During the meeting, Perira told Payne to instruct Delgado and Pannell concerning their duties in the event a strike occurred and told her also "to look into food preparation for the day treatment program that was going to be moved to the Hudson residence." At this meeting, Payne then instructed Delgado and Pannell to change their schedules and to begin work the following day at 9 a.m., rather than noon, to contact clients and tell them to go to the Hudson Hotel, to check clients' medications to determine if they were current, and to arrange to have chairs transferred to the hotel.[28] Payne admitted that she "did not take any steps in terms of the food preparation."

According to Pannell, on 27 September at a meeting with Perira, Payne, and Delgado,[29] she was told to contact clients to tell them to report to the Hudson Hotel the following day. She also was instructed to transfer clients' files and chairs to the hotel and, after the meeting, she had a member of the staff make the transfer of the files and chairs and she called about 15 clients and told them that because a strike was expected the adult day treatment program was being transferred to the hotel on the following day.

K. *Pemberton and FMCS—27 September*

On either 17 or 24 September, but after the strike notice had been sent, Herbert Robinson, a commissioner with the FMCS, went to the Center and attempted to meet with Pemberton. However, Pemberton refused to meet with the mediator, according to Pemberton, because it was his opinion that Robinson had not helped when the Center requested his assistance to resolve an issue about a wage dispute that existed between the parties. On 22 September, Robinson forwarded telegrams to both the Center and the Union requesting their presence at a meeting with the mediator on 27 September at 11 a.m. On 24 September, Pemberton responded that he could not attend because he had a prior commitment and because the notice had not allowed him sufficient time to appear. In fact, although Pemberton claimed that he was away from the premises at some point in that day, the record reveals that he was at the Center for at least some period of time during the morning of 27 September and after 1:30 p.m. in the afternoon. Pemberton did not suggest that the parties meet with the mediators at another time on that day or any other day. According to Pemberton, he had decided not to meet with the mediators because he did not believe there then existed a need for mediation. The union representatives, apparently, unaware that Pemberton had refused to come to the meeting, were present for the meeting at the mediators' office on 27 September.

L. *The Center—The Hudson Hotel*

At the time of the events in the instant case, the Center operated a transitional housing program, which appears to have been funded by the Office of Mental Health of the City of New York. The purpose of the program was to prepare individuals who had been institutionalized in mental institutions for some time for a return to living in the community. The program was divided into two major parts, under one part, the Supervised Living Program, clients who came directly from the institutions were housed at the Hudson Hotel and were under 24 hours' direct supervision by staff members of the Center. As the clients progressed they were transferred to the second part, the Supportive Living Program, where the time of direct supervision by the staff was reduced to 8 hours a day and where the clients resided in apartments or with their families at various locations in the community.[30]

Patients in both programs reported to the Center for the adult day treatment program, which was under the direction of Norma Burgos and which occurred between 9 a.m. and 3:30 p.m. After the completion of the program, the clients in the 24-hour supervised program returned to the Hudson Hotel, which was their residence, while those in the 8-hour supervised program returned to apartments in the community.

The record establishes that prior to 28 September, the Center had for some time operated a number of programs at the Hudson Hotel. In July 1982, the Center received certification from the State to operate a community resident program at the hotel and since about that time negotiations had been in progress between the Center and the city for the Center to assume the entire management and operation of the hotel to commence on 28 September. Perira testified that in anticipation of the Center's assumption of responsibility for the operation of the hotel, sometime prior to 28 September, she had hired a manager, security guard, secretary, and handyman.

Pemberton testified that on 20 September he spoke with a Donald Powell[31] about the possibility of employment with the Center. According to Pemberton, Powell was notified on 20 September that "he was to come aboard as an employee of the Center effective Tuesday, the 28th."[32] When asked why Powell was hired, Pemberton stated the following:

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[28] Payne testified that she directed Delgado and Pannell to check the clients' medication with Dr. Ford because he was present at the Center on Mondays.

[29] Delgado did not testify.

[30] It appears that some clients in this program were tenants in apartments in the hotel.

[31] Pemberton had worked with Powell at the Bronx Psychiatric Center.

[32] Pemberton claimed that he spoke to Powell again on 24 September but he did not disclose the details of that conversation, other than to indicate that it concerned Powell's employment with the Center.

> Mr. Powell was being hired along with about six other employees of the Bronx Psychiatric Center to provide coverage to the Adult Day Treatment and Transitional Housing Programs. To escort patients from the apartment program, the Supportive Living Program, to the Hudson Hotel in the event that there was difficulty in the patients getting from apartments to the Hudson Hotel.

On 27 September, Pemberton introduced Powell to Perira and told Perira that Powell would be coordinating the new staff to be hired from the Bronx Psychiatric Center and that he should be at the Hudson Hotel the following day. Pemberton advised Powell that he would report to Perira who was the director of the unit. Perira indicated that Pemberton told her in this conversation on 27 September that Powell was hired to assist her with the community residence program during the strike.

M. *Events of 28 September*

Perira testified that beginning about the time when the Center began operating the residency program at the Hudson Hotel, in July, it was her custom to stop at the hotel before she went to the Center and in anticipation of the takeover of the management of the hotel she had been in the habit of arriving early at the hotel. On 28 September, she arrived at the hotel at 8:15 a.m. and she observed Pemberton's car outside the hotel. It is unclear from the record whether Perira had expected Pemberton to be at the hotel. When she went upstairs she met Pemberton who introduced her "to a group of fellows who had come from Bronx State who were going to assist me in carrying out the—maintaining the community resident program." Perira claimed that at the time she observed staff members directing clients to the north wing of the hotel. These clients, who Perira claimed had been advised to either stay at the hotel or to come to the hotel on 28 September for the treatment program, included not only those in the Supervised Living Program but also those clients who were in the Supportive Living Program.[33] Perira claimed that about 9:15 a.m. on 28 September she received a phone call and as a result of that call she told the staff that the clients could return to the Center because there was not going to be a strike. The adult day treatment program was then conducted at the Center on both 28 and 29 September.[34] Perira returned to the Center after 9:15 a.m. and began to make arrangements for the transfer of the management of the hotel from the existing operators to the Center.

Pannello, who was a member of Perira's staff, also recalled that she saw clients from the adult day treatment program who were in the Supportive Living Program at the hotel on the morning of 28 September, but she also could not recall the name of any client. Terri Reid Payne claimed that when she went to the Center on the morning of 28 September, around 9 a.m., she saw no evidence of a strike and she called the hotel, spoke to Perira, and told her that it did not appear that there was going to be a strike. Payne remained at the Center.

Pemberton claimed that on 28 September, about 7:30 a.m., he went to the Center, drove around the Center, and then went to his office where he remained for about 45 minutes. He then left the Center and proceeded to the Hudson Hotel where he met Powell and three or four other new employees. He awaited the arrival of Perira and when she arrived he introduced her to the new employees. Pemberton testified that during the time that he was at the hotel he did observe clients but only those clients who were residents of the hotel.

Although as noted Perira and Pannell testified that on the morning of 28 September they saw clients at the hotel who were in the Supportive Living Program and who, therefore, normally would not be at the hotel, they admitted that they could not recall the names of any of these individuals. Their testimony about this issue is in conflict with that of Charles. Charles, in response to a question whether patients in the adult treatment program who were not residents of the hotel came to the hotel on 28 September, responded:

> That's not precise. That's not correct. I would have to change part of that statement to indicate that its occasion in October, Friday the 1st of October when we first began taking patients over.

N. *Conversations Regarding the Strike*

Several employees testified about alleged conversations they had with their supervisors about the strike. Marie Font, a mental health worker whose supervisor was Norma Burgos, testified that on 23 September, after a strike vote had been taken, she had a conversation with Burgos. During the conversation, Burgos asked her what had happened at the meeting and she told Burgos that the employees had voted to strike. On the following day, when Font was in Burgos' office, Burgos told her to bring her notes up to date before she went on strike on 29 September. During a staff meeting on 28 September, in the presence of Gabriel Mack and Allen Anderson,[35] Burgos asked Font not to discuss the strike with the clients. Later that day, according to Font, as she was leaving work with two employees, Colinet and Naut, Burgos told the group that she would see them in a few months. Burgos admitted that during the week before the strike started the members of her staff worked on records in an effort to bring them up to date. However, she denied that she directed her staff members to do this. She also denied that she had a conversation with Font about the strike or that she told Font, Colinet, or Naut on 28 September that she would see them in a few months.

Mercedes Colinet, a clerk typist, testified that her supervisors, Norma Burgos and Rose Fabian, the clerical coordinator, spoke to her about the strike. According to Colinet, on 28 September, at some point between 1 and 3 p.m., Fabian told her that the Center would provide transportation for those employees who wanted to work, but Colinet told Fabian that she was going to strike. On 28 September Burgos also asked her for her keys and told her that she wanted them because Colinet was going on strike the next day. Burgos then told Colinet, Marie Font, and Marie Naut that she would see them in a few months. Colinet claimed that on 28 September there was general talk about the strike starting the next day. Fabian did not testify and Burgos denied that she asked Colinet for her keys or told her that she would see her in a few months.

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[33] Perira could not recall the names of any of the clients who were in the Supportive Living Program who came to the Hudson Hotel on 28 September.

[34] According to Perira, at some point after 29 September the Center began to operate a treatment program at the hotel. This was a new program for clients with an acute illness as opposed to those who were considered chronically ill.

[35] The record established that Mack and Anderson were on Burgos' staff. They were not called to testify.

Audrey Singleton, who was purchasing agent at the time of the relevant events,[36] testified that on 28 September Mary Brown, who was her supervisor, called her to her office before lunch and at that time they had a conversation about the strike. During the conversation, Brown asked Singleton for the keys to her desk and told her to leave her bank because she knew the employees were going to strike the next day. Singleton claimed that she also had a conversation with Elizabeth Payne, the acting administrator, on 28 September. During this conversation, Payne asked Singleton whether she was going to strike the following day and when Singleton replied that she was going to strike, Payne told her that she did not have to strike and she showed Singleton an article in the New York Times that explained that employees did not have to join a strike called by a union. Payne also advised Singleton that the Center would provide buses for those employees who did not strike and she told Singleton the locations where the employees could meet the buses. Brown did not testify and Payne denied that she spoke to any employee on 28 September about the strike.

Azeeza Hurston, who was evening registrar at the time of the events in this case, testified that at the end of the day on 28 September when she turned in her papers to Elizabeth Payne, as was her usual practice, Payne told her that the people who did not come to work on the following day would be fired. Payne expressed the hope that Hurston would not be one of the employees who did not report to work. Hurston replied that management had put her in the unit and, although she had not voted to strike, she would strike the next day. That night Hurston received a call from Mary Brown, who was her supervisor. Brown told Hurston that she knew that Hurston did not want to strike and the Center was prepared to provide bus service for her. Hurston rejected the offer. As noted, Brown did not testify and Payne denied that she spoke to any employee on 28 September about the strike.

O. *Security—The Picketing*

Security services for the Center are supplied by the New York City Health and Hospital Corporation. Lieutenant Theodore Beasley, who has been employed by that corporation since 1963, was in charge of the security services at the Center. On 16 September, Pemberton notified Beasley that the Center was to be on strike alert and that the alert was to become effective on 20 September. According to Pemberton, he made the decision to put the Center on strike alert because he was about to discharge those employees who he thought had engaged in work stoppages on 15 and 16 September and he anticipated that there would be problems. Pemberton spoke to Beasley about the strike again on 24 September but he denied that in that conversation or any other conversation he told Beasley that the strike was to commence on 29 September.

Beasley testified that at the Center there are three tours of duty; the first tour is from midnight to 0800, the second from 0730 to 1530, the third from 1530 to 2400 hours. There are three security officers on duty on the first tour and four officers on the second and third tours and the officers, on a rotating basis, make entries in a logbook which is maintained in accordance with regulations of the Health and Hospital Corporation. It was Beasley's responsibility, at the time of the events in this case, to see that the logbook was maintained and that security conditions and other events that occurred at the Center were entered into this book. According to Beasley, when Pemberton advised him to put the Center on strike alert he spoke to all the security officers about the possibility of a strike and he instructed them to make entries in the logbook about the number of pickets, when the picketing began, and what the pickets did while at the Center. Despite these instructions, Beasley admitted that on several occasions, he was not certain how often[37] the officers failed to make entries about the presence of pickets at the Center when, in fact, they had been present. Beasley testified that on some occasions he failed also to record in the logbook the presence of pickets at the Center. The logbook was not corrected in either situation. The record also establishes that not all entries in the logbook were made on the basis of firsthand knowledge by the officer who made the entry and that the officer who was at post 1, where the logbook was maintained, could not see the vehicular traffic entrance from that post. Beasley did not have an independent recollection about the presence or absence of pickets at any point between September 1982 and August 1983, but relied rather on entries made in the logbook on that issue.

An examination of the logbook establishes that Beasley was on duty on the first tour on 28 September. On that tour, and on subsequent tours on that day, there were the usual number of officers on duty for each tour. Additional officers were not added and officers on duty were not required to work overtime. An entry made in the logbook on 28 September, about 5 p.m., notes, "Mr. Cavin Allen, the field representative,[38] called in reference to the strike 9/29/82, Wednesday." The entries made on 29 September, unlike the entries made on 28 September, establish that additional officers were on duty on 29 September. Thus, according to an entry in the logbook, there were six officers rather than the usual four officers on duty for the tour that began at 7:30 a.m. and the logbook contains the notation next to their names, "emergency standby."

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[36] Singleton was employed with the Government at the time of the hearing.

[37] He thought it might not have occurred more than 10 times.

[38] Allen was a representative for the Health and Hospital Corporation.

It is the position of the General Counsel that the fact that the logbook does not contain references to the pickets for certain periods of time proves that the pickets did not engage in continuous picketing, but rather engaged in intermittent picketing and, when so engaged, they failed to give the proper notification. The following are the periods when the General Counsel contends that the pickets were not present at the Center:

1982

December 16 through December 23, inclusive
December 29 through January 3, inclusive

1983

January 5 through January 27, inclusive
January 19 through February 11, inclusive
February 21 through February 24, inclusive
February 28 through March 14, inclusive
March 16 through April 25, inclusive
April 29 through May 11, inclusive
May 16 through May 18, inclusive
June 23 through June 27, inclusive
June 29 through July 28, inclusive
August 3 through August 5, inclusive
August 17 through August 19, inclusive

It is undisputed that the picketing, which commenced on 29 September, was continuous from that day through 16 December. An examination of the logbook reveals that there were several days in that period when no entries were made about the presence of pickets. Thus, on 29 September there is the following entry, "Tour #1 relieved but remaining on duty due to strike." There is no reference in any entry made on that day, the first day of the strike, about the presence of pickets. Although there is an entry on 1 October about strike conditions "being on," there is no reference to the presence of pickets. Furthermore, there is no reference about the strike or pickets in the entries made on 2, 3, 4, 6, and 9 October. A similar situation exists with respect to other days in October and November. The entry for 1 December states that a police officer was present at the picket line.[39] Although there is no mention whether pickets were present, there is the possibility that they were because the police were present. The entry for 3 December states that no demonstrators were present; however, at some point on that day Brathwaite called and requested the police who had left to return to the Center. The log entry does not state that pickets were present but again an inference can be drawn that they were present because of Brathwaite's request for the police to return to the site. The first entry for 6 December states that no demonstrators were present, however, later entries indicate that there were communications between the Center and the police department about whether police could be made available for duty at the Center. There are three entries for 7 December, none refer specifically to the presence or absence of pickets but one entry does state that the police were removed after consultation with Pemberton. The entries for 8, 9, and 10 December also do not refer to the presence or absence of the pickets but they do contain references to the presence of police at the site. The first time that pickets are mentioned in the first 2 weeks of December is on 13 December, and the entry on that date states, "the 'pickets' have arrived (4) pickets."

In the period between 16 and 23 December, when the General Counsel contends there were no pickets at the site, the log entries establish the following facts. The entries for 16, 17, 20, 21, and 22 December state that police were present at the site, they do not mention whether pickets were present or absent. However, the entry for 17 December refers to the police being on duty at the picket line and at another point on that date it states that there were two police officers "who were on strike patrol." Thus, the entries for the period from 16 through 22 December are similar to the entries made in October, November, and the first 2 weeks of December when the General Counsel does not dispute that pickets were present. In both the period before 16 December and the period thereafter, although there is no mention about the presence of pickets there, are references to the presence of the police at the site.

The second period when the General Counsel contends that pickets were not present at the site is from 29 December 1982 through 3 January 1983. The logbook for that period does not state that pickets were present but it does state that police were present at the site on 29 and 30 December. In the entry for 3 January, the officer noted that there were no police or pickets at the site.

The log entries for the period between 5 and 17 January, a period when allegedly there were also no pickets at the site, establishes these facts. There is no reference to either the police or the pickets in the entries for 5 January; the entry for 6 January states that the police made a check on strike conditions and on 7 January the entry states that there were no police or pickets present at the site. There is no reference to the police or pickets in the entries made between 7 and 17 January. On 18 January, the logbook contains a notation that there were 10 demonstrators on the picket line.

In the period between 19 January and the end of April, the logbook contains several references to the police and/or the strike. On 25 January there is a notation that the police called the check on strike conditions; on 2 February there is an entry that Beasley was instructed to allow all strikers, except those who had been discharged, to enter the building; on 11 February the logbook contains the statement that the Union was planning a demonstration on 14 February, and on 14 February; there is another reference to a union demonstration. A later entry for that day contains the statement that a union rally was going on; on 15 February there is a notation that the police had called to report about the possibility of another demonstration and there is a reference to the police being "on patrol for the strikers"; on 16 February there is another notation about demonstrators being on the picket line and about the police being present; on 18 February there is a notation that five demonstrators were walking the picket line; on 14 February the logbook contains a reference to police officers being present at the Center but it is unclear if they are present because of the strike;[40] on 25 February there is an entry about strikers walking the picket line; on 16 March there is an entry about strike walkers putting up a picket line and walking the line; on 26 April there is an entry that states that Pemberton directed Beasley to call the police to ask them to clear pickets from the main gate; on that day there is also a notation about demonstrators at the main gate; and later on that day there is a notation that six demonstrators were walking the picket line, on 28 April there is a notation that 10 demonstrators were at the main gate. In the period between the end of April and 11 May, there are no entries about police or pickets being at the site, but there are references about the union demonstrators in the entries made on 12, 13, 19, 20, 24, 26, 27, and 31 May. There are also references to the presence of strikers/or demonstrators in the entries made for 2, 3, 6, 7, 9, 10, 15, 16, 19, 20, 22, and 28 June; 29 July, 2, 8, 9, 10, 11, 16, 10 22, 23, and 26 August.

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[39] This same type of entry was made in logbooks in October and November.

It was the position of the Union that the picketing was continuous throughout and in support of that position it submitted documentary evidence in the form of attendance and lunch money sheets, the testimony of Edward Lane, a union representative,[41] and the testimony of employees Lloyd Bowers, Audrey Singleton, Kamala Mottl, Mary Pearl Taylor, Mary Harviley, and Mercedes Colinet.

According to White, the Union maintained attendance sheets either at the strike headquarters located near the Center or at times at the picket line. Strikers were required to sign these sheets before they commenced picketing, although at times strikers signed them at various times during the day when they picketed. It was the responsibility of the strike committee and the organizers to see that these sheets were signed. Strikers were also required to sign sheets when they received lunch money on the day they picketed.

Lane testified that he went to the strike headquarters "each and every day" except Christmas Day. According to Lane, initially he had not been in charge of the strike headquarters but beginning in December he assumed responsibility for the headquarters and when he took charge he posted the attendance sheets on the walls of the strike headquarters and he directed the strikers to sign these sheets. He also required strikers who received lunch money to sign the list maintained for that purpose. Lane claimed that he picketed every day that he went to the headquarters through August 1983 and he picketed on an average of 5 hours a day. Lane also claimed that at times he was the only person picketing, but this occurred in early morning and as the day progressed other strikers joined him. A comparison of the days when the General Counsel contends there were no pickets and the days when Lane's name appears on the attendance sheet establishes the following:

Alleged Absences of Pickets	*Lane's Name on Attendance Sheet*
16 to 23 December	16, 17, 20–23 December
29 to 3 January	29 and 30 December
5 to 17 January	2, 5, and 14 January
19 January to 11 February	21, 24–28, and 31 January; 1, 2, 3, 7–9, and 19 February
21 to 24 February	22–24 February
28 February to 14 March	1–4 and 7–11 March
16 March to 25 April	16–18, 21–25, and 28–30 March; 5–8, 20, 22, and 25 April
29 April to 11 May	29 April; 3, 5, 9–11 May
16 May to 18 May	None
23 to 27 June	23, 24, and 27 June
29 June to 28 July	29 and 30 June; 1, 5–8, 11–15, 19–21, and 25–27 July
3 to 5 August	3–5 August
17–19 August	17–19 August

Bowers testified that when he picketed he signed the attendance sheet at the strike headquarters. According to Bowers, the Union paid the strikers a weekly allowance and therefore the strikers were required to sign when they picketed. An examination of these sign-in sheets establishes that Bowers signed in on the 21, 22, 23, and 29 December and on 5, 14, 25, and 26 January.[42]

Kamala Mottl picketed until May 1983 when she returned to work. Mottl claimed that she picketed every day between September 1982 and May 1983 for about 3 or 4 hours a day. She testified that usually she picketed early in the day but she also picketed in the afternoon and evenings. She claimed that she picketed every day that she signed the list for lunch money, however, there were times when she picketed but did not sign the attendance sheet. According to Mottl, after she returned to work in May she observed pickets every day at the Center and after work she would be at the strike headquarters to lend support to those on strike. Mottl testified that at times there were many pickets at the picket line and at other times there were only one or two pickets. Mottl claimed that there were a few occasions when she was the only picket. According to Mottl, the employees picketed on a continuous basis and although she claimed that she usually carried a sign when she picketed, she admitted that not all those who picketed carried signs.

Mottl signed the attendance sheets on 20–23 and 29–30 December; 14, 15, 25, and 26 January; 1–3, 14, 16, 18, 23, and 24 February, 1, 2, 4, 9, 15, 17, 18, 22–25, and 28 March; 5 and 20 April; and 3, 13, and 25–27 May. Her name appears on the lunch money list on 3, 7, 10, 11, 18, and 19 January, and 12 April.

Mary Pearl Taylor, who also was a striker, testified that she picketed at the Center and that when she picketed she signed an attendance sheet at the strike headquarters. She also claimed that she picketed on the days that she received lunch money and that she signed when she received the money. Taylor testified that she never spent less than 3 hours picketing and on some days she picketed for as much as 6 hours. There were times when several other employees picketed with her and times when she was the only picket. Taylor's name appears on the attendance sheets on 16, 21, 23, 27, and 30 December 1982; 5, 14, and 26 January 1983; 1, 2, 7, 8, 14–17, 23, and 28 February 1983; 1–3, 8–11, 14, 18, 22, 28, and 31 March 1983; 1, 15, 19, 21, 25, 28, and 29 April 1983; 9, 11, 12, 23, and 25–27 May 1983; 22–24, and 30 June 1983; 6, 8, 11, 14, 15, 21, and 27 July 1983; 3, 17, and 18 September 1983. Her name also appears on records that indicate she received lunch money on 10, 13, and 20 January 1983; 4 and 28 February 1983; and 11, 12, and 14 April 1983.

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[40] There are several references during the entire period to the presence of the New York City police at the Center because of problems with the clients.

[41] Lane was a former employee of the Center who had been terminated. There was an arbitration about the discharge and the Center had been directed to reinstate Lane but had not done so at the time of this hearing.

[42] Bowers also signed in on 20 December, however, he apparently did not picket but went to the unemployment office.

Mary Harviley, Audrey Singleton, and Mercedes Colinet, employees who also went on strike, basically testified that on the days they picketed they signed attendance sheets and when they received lunch money when they picketed they signed to indicate that they had received the money. The records establish that Harviley signed attendance sheets on 4, 5, 14, 21, 24, 28, and 31 January 1983; 1–3, 7, 9, 10, 16–18, 22, 25, and 28 February 1983; 1–4, 7, 11, 14–18, 21–25, 28–30, and 31 March 1983; 4–8, 18, 19, 21, 22, 25, 26, and 29 April 1983; 3–6, 9, 10, 22, 12, 13, and 16–20 May 1983; 23, 24, 29, and 30 June 1983; 1, 5–8, 11–15, 19, 20, 22, 25, 27, and 28 July 1983; and 3, 4, and 18 August 1983. The records also establish that Harviley signed the lunch sheet records on 3, 6, 7, 11–13, and 18–20 January 1983; 4 and 28 February 1983; 11, 12, and 14 April 1983; 28 June 1983; and 22 and 29 July 1983.

Singleton's name[43] appears on the attendance sheet records on 16, 20, 21, 22, 28, and 30 December 1982; 4, 14, and 24 January 1983; 2, 7, 9, 14–18, 23–25, and 28 February 1983; 1, 3, 7–9, 14–17, 22, 24, 28, and 30 March 1983; 18, 19, 21, 22, 26, and 28 April 1983; 2, 3, 6, 10–13, 16, and 18 May 1983; 22 and 29 June 1983; 5–7, 11–12, 18, 20–21, 25, 26, and 28 July 1983; and 2, 3, and 8 August 1983. Singleton's signature appears on the lunch sheets on 16, 21, 28, and 30 December 1982; 3, 4, 6, 7, 10–13, 19–20, and 31 January 1983; 11 February 1983; 11 April 1983; and 9 August 1983.

Colinet's signature appears on attendance sheets on 16, 17, 21, 22, 27, 29, and 30 December 1982; 4, 21, 25, 26, and 31 January 1983; 1, 2, 8, 9, 16–18, 22, 23, 25, and 28 February 1983; 1, 3, 8, 9, 11, 14–16, 18, 21, 24, 25, 28, 30, and 31 March 1983; 5, 6, 8, 15, 18, 19, 21, and 22 April 1983; 2, 4, 9, 10, 11, 19, 20, 25, 27, and 31 May 1983; 23, 24, and 29 June 1983; 1, 12, 15, 19, 20, 22, 26, and 27 July 1983; and 3, 5, 18, and 19 August 1983.

As noted above, the General Counsel contends that from the 16 December 1982 through until August 1983 there were 13 different periods of time when the Union ceased picketing and then resumed it without giving the proper notification to the Center. However, Lane, Bowers, Singleton, Taylor, Colinet, Harviley, and Mottl testified that they signed either an attendance sheet or a lunch money sheet or both on the days when they picketed. An examination of those records establishes that there is either an attendance sheet or a lunch money sheet signed by Lane or one or more of the striking employees for each day in the different periods of time when the General Counsel contends that there was no picketing.

The strike began on 29 September and continued until August 1983. On 4 October 1982, a few days after the strike started, White reiterated the Union's request that the 11 employees be reinstated and stated that strike was in support of those who had been discharged. It does not appear that the Center responded to this appeal.

On 15 April 1983 the Center discharged the 34 employees in the instant case. During the hearing, the Center stipulated that the employees were discharged because they had engaged in an strike in violation of Section 8(g).

Discussion

A. *The Alleged Denial of Due Process*

It is the position of the Center that it was denied due process with respect to the investigation and trial of this case and in support of that position the Center raises certain arguments. The Center contends that the Regional Director failed to conduct an independent investigation in this case, and relied on the earlier complaints that had issued in Cases 2–CA–19132 and 2–CA–1940 with respect to the allegation that it was the Center's unfair labor practice in discharging 11 employees on 20 September which caused or prolonged the strike. The Center also contends that it was "patently impermissible" for the General Counsel to include in the instant complaint any reference to matters contained in those prior complaints in view of the fact that those cases had been settled and withdrawn. The Center further argues that the complaints in the instant cases that were issued simultaneously, involve inconsistent theories of law and, therefore, they negate each other. Moreover, the Center claims that the Regional Director continued to deny the Center due process when he consolidated these cases and refused to allow counsel for the General Counsel in the 8(g) case to cross-examine witnesses or to give counsel for the Center access to the Board's investigative file in order that he might properly fulfill the prosecutorial role, which had been abandoned by the counsel for the General Counsel. The Center argues that the result of this improper consolidation resulted in a lack of confidentiality that normally exists when a charging party produces witnesses and documentary evidence in support of its position. Finally, the Center claims that counsel for the General Counsel in the 8(g) case, unlike counsel for the General Counsel in the 8(a)(3) case, failed to rebut the affirmative defense advanced to the 8(g) case and thereby failed to introduce sufficient evidence to prevail on the 8(g) complaint.

An examination of all these arguments advanced by the Center discloses that they can be divided into three sections; the failure by the Regional Director to investigate certain allegations contained in the 8(a)(3) complaints, the prejudice suffered by the Center because of the consolidation of the 8(g) and 8(a)(3) complaints, and the violations of the terms of the settlement agreement by counsel's attempt to introduce evidence and seek an unfair labor practice finding concerning the discharge of 11 employees who were the subject matter of the settlement agreement. The Center's position with respect to the effect of the settlement agreement will be discussed under a separate heading.

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[43] Singleton testified that she usually signed the attendance sheet but on occasion someone signed her name for her.

There is no evidence in this record to support the Center's assertion that certain allegations contained in the 8(a)(3) complaint were not investigated. It is true that such statements were made by counsel for the Center during the hearing, but he did not testify regarding the basis for his statements and counsel for the General Counsel denied his allegations. It is difficult to understand how counsel could make such a claim in view of the fact that a counsel for a charging party or respondent is not privy to information concerning the manner in which an investigation is conducted. In view of the fact that statements by counsel do not constitute testimony, I do not find support in this record for this argument.

The Center contends that it was prejudiced by the consolidation of the cases. However, these two cases presented the Regional Director with an unusual situation. A crucial issue in both cases was whether the Union gave proper notification to the Center about when the strike would start. Several witnesses for the Center claimed that the union representatives did not tell them on 22 September that the strike would commence on 29 September, while several witnesses for the Union claimed that such a notice was given. If the Union gave proper notice about when the strike would start, as it contended, then the Center may have violated Section 8(a)(3) of the Act when it discharged the 34 strikers. On the other hand, if the Union failed to give the proper notice then the Center may have been justified when it discharged the 34 strikers. Thus, the Regional Director was faced with a credibility issue, the resolution of which could determine the outcome of both cases. A Regional Director, however, does not have the authority to decide that type of credibility issue, such issues are within the province of an administrative law judge. While it may be that the allegations in one complaint could negate the allegations in the other complaint, as the Center claims, the Regional Director, faced with the credibility problem, had no alternative but to issue both complaints. Further, in view of the fact that the cases are inextricably intertwined and the resolution of one could possibly resolve the other it would have been inappropriate to have the matter decided by different administrative law judges at different times. The proper procedure, which was followed by the Regional Director, was to consolidate the cases. The Center contends, however, that the Regional Director's stated reason for the consolidation was to avoid unnecessary costs and delay and that purpose was not achieved, rather the consolidated proceeding resulted in protracted litigation. Although, it is true that one of the reasons advanced by the Regional Director for the consolidation of the cases was to avoid unnecessary costs and delay, it clearly was not the most significant reason. The Regional Director specifically stated, "The central unfair labor practice issue in both cases are dependent, to a great degree, on credibility resolutions which cannot be properly made at an administrative level." Furthermore, it is possible that had the cases not been consolidated the monetary costs and time expended could well have exceeded the expense and time spent in the instant cases.

Both the Center and the Union were timely notified of the procedure that both counsels for the General Counsel would follow and of the limitations on their respective roles. The Center and the Union also were advised that they were entitled to have counsel to fully represent them in those areas where counsels for the General Counsel would not pursue an active role. During the very lengthy hearing that ensued, counsel for the Center and the Union cross-examined witnesses extensively and both made detailed arguments on many points. Both counsels were afforded every opportunity to call witnesses, to cross-examine witnesses, and to present every argument in support of their respective positions during the hearing that began in May 1984 and was not concluded until January 1985. It is difficult to understand, in these circumstances, how the Center can contend that it was denied due process when every opportunity was granted to it to present its version of the events. *Barrus Construction Co. v. NLRB*, 483 F.2d 191, 195 (4th Cir. 1973); NLRB v. *Bancroft Co.*, 516 F.2d 436, 446 (5th Cir. 1975), cert. denied 424 U.S. 914 (1976).

The Center argues that it was also denied due process because affidavits of its witnesses, which contained material on both the 8(g) and 8(a)(3) violations were given to counsel for the Union after the witnesses testified with respect to only one of the cases. It is true that both counsels for the General Counsel took the position that the affidavits of witnesses for both the Center and the Union would be given to the other side when a witness concluded his/her testimony with respect to either case. It was the position of the Government that the affidavits secured from witnesses for both sides during the investigation contained material with respect to aspects of both cases and that it would be difficult to separate the cases and the Government concluded, therefore, to give to counsel the entire affidavit when a witness for either side testified about either case. The Center contends that this action by the Government resulted from a misapplication of the "Jencks" rule. However, the central purpose of the "Jencks" rule is to limit the Government's right to refuse to produce affidavits that it has secured during the investigation of a case. Here, the Government was not attempting to withhold affidavits, rather because counsels for the General Counsel considered that the affidavits contained material relevant to both cases, they believed it would be difficult to comply with the rule unless an affidavit was produced once a witness testified. In fact, the majority of the witnesses who testified with respect to allegations in the 8(a)(3) case testified on direct examination about certain aspects of the 8(g) case. Counsel for the Center requested and was given their affidavits when they concluded their testimony. I do not consider the procedure that the Government followed to be a misap-

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plication of the "Jencks" rule. Rather, I view it as an effort to fully comply with that rule.

The Center also claims that it was denied due process because counsel for the General Counsel in the 8(g) case did not object to evidence that was offered by the counsel in the 8(a)(3) case to establish that the Center had received constructive notice of when the strike would commence. In view of the fact that the counsel in the 8(g) case took the position that constructive notice as a matter of law would be insufficient, the Center contends that he should have objected to the introduction of factual evidence that was related to this constructive notice theory. However, the Center was aware that this procedure would be followed in order to allow the evidence in both cases to be presented. Counsel for the Center also claims that counsel in the 8(g) case did not fulfill his obligation as a counsel because he did not rebut "the affirmative defense that the strike on September 29, 1982 was an unfair labor practice strike." The complaint in the 8(a)(3) case alleged that the strike that commenced on 29 September was an unfair labor practice strike. The Center was aware that counsel in the 8(a)(3) case would seek to prove this allegation as part of her case and was also aware that it would need to defend against this allegation. Counsel for the Center was afforded the opportunity to cross-examine witnesses who testified with respect to this element and for many weeks he did engage in lengthy cross-examinations of those witnesses. The Center also was provided with the opportunity to call witnesses to rebut the assertion that the strike was an unfair labor practice strike, but it chose not to do so. It cannot now claim that it was denied due process when it failed to avail itself of the opportunity afforded to it. *Barrus Construction Co.*, supra.

It may well be, as the Center contends, that if only the 8(g) case existed and the Union established an affirmative defense to that case, counsel for the General Counsel would have sought to rebut that defense. However, that was not the situation that existed and the Regional Director, faced with a conflict on an essential issue in two cases, decided to provide both parties with the opportunity to be heard, to produce witnesses or documentary evidence, and to argue their respective positions. It would have been unfair to both Charging Parties for the Regional Director to have followed any course other than the one he did. In fact, had the Regional Director decided the credibility issue against the Center and refused to issue the 8(g) complaint, the Center would have objected to that action. The Center cited *Morrissey v. Brewer*, 408 U.S. 471 (1972), in support of its argument that it was denied due process. The *Morrissey* case involved a parole revocation issue, the deprivation of a right for an individual to be free. This obviously is not the situation present in the instant case. However, even in the *Morrissey* case where the issue of the right to due process was posed in a criminal as opposed to a civil context, the Supreme Court stated that due process is flexible and calls for such procedural protection as the situation warranted. In the instant case, the situation required the Regional Director to give the parties their day in court, which he did. The fact that the Center declined to use the opportunity afforded to it to explain its actions does not mean that the Center was denied due process. In *Confectionery Workers v. McElroy*, 367 U.S. 886, 895 (1961), the Court stated that due process, unlike some other legal rules, is not a technical concept with a fixed content unrelated to the time, place, and circumstances of the event. Due process is concerned with substance and not with form. In the instant case, the Center was provided with the opportunity to present the substance of their position but they argued that form, who should present the substance of their position, was the important issue. The Center contended that it was the counsel for the General Counsel in the 8(g) case who should have advanced their argument and when he failed to do so they were denied due process. That argument might have some appeal if the counsel for the General Counsel was the only entity who could have presented the Center's position and if the Center had been denied the opportunity to present its position. That was not the situation in the instant case. Rather, the Center consistently was urged to present all the evidence it had to present. The Center either had no additional evidence to present or it made a calculated determination not to present additional evidence.

The Center also contends that counsel for the General Counsel in the 8(g) case abandoned his prosecutorial duties and it had to assume that role and, therefore, it was entitled to all the material secured during the investigation of the case. Both counsel for the Union and the Center were given affidavits of all witnesses who testified and the requests of both counsel were denied when they sought material contained in either file which was not disclosed at the hearing. In refusing the requests of counsel for both parties, the Regional Director followed the Board's consistent policy, which policy has been honored by the Courts, to protect confidential material contained in files that is not introduced at a hearing *NLRB v. Robbins Tire & Rubber Co.*, 437 U.S. 214 (1978); *Wellman Industries v. NLRB*, 490 F.2d 427 (4th Cir. 1974).

The Center has cited several additional cases in support of its position that it was denied due process. However, an examination of those cases does not establish that the Center was denied due process. In *Morgan v. U.S.*, 304 U.S. 1 (1938), the Court stated that the appellants were entitled to a full and fair hearing with the right to have a reasonable opportunity to know the claims advanced against them. In the instant case, the Center was represented by two competent attorneys who participated fully in the hearing which continued for several months. The Center was aware for some months before the hearing started of the allegations contained in both complaints and was on notice of the limited roles that both counsels representing the General Counsel would take during the hearing. There was no element of surprise in the actions of counsel for the General Counsel at the hearing. In *Mathews v. Eldridge*, 424 U.S. 319 (1976), the Court stated that a party had the right to be heard at a meaningful time and in a meaningful manner. It is evident in the instant case that the Center was given the right to be heard for several months at a hearing where its counsels participated in lengthy cross-examinations and detailed arguments. The real thrust of the Center's argument that it was denied due process arises from its view that counsel for the General Counsel in the 8(g) case should have defended the Center against the allegation that the strike, which began on 29 September was caused by the Center's unfair labor practices when it discharged the 11 employees on 20 September. It should be noted, however, that had the 8(a)(3) case been tried separately, as counsel for the Center advocates, then it would have been solely his burden to defend against the alleged 8(a)(3) charges. In the unusual circumstances of these cases, it was not an unfair burden or a denial of due process to require both Charging Parties to defend themselves against alleged violations of the Act, which both would have needed to do if the cases had not required consolidation.

The Center argues that its private interests have been affected by these proceedings and that it is a matter of record that if it was required to pay backpay it would render the Center bankrupt and thereby terminate the mental health services available to residents in the community. However, there is no evidence in this record to support the conclusion that a decision, which was contrary to the interests of the Center would cause either bankruptcy or the termination of the services provided by the Center. This institution provides services that are backed by various governmental agencies and what these agencies would decide to do in the event that the Center was required to pay backpay is an unknown factor.

B. *The Effect of the Settlement Agreement*

The Center argues that efforts by the counsel for the General Counsel to go behind the terms of the settlement agreement in order to establish that the discharge of the 11 employees on 20 September was an unfair labor practice constitutes both a denial of due process and a violation of the terms of the agreement. The Center concedes that the settlement agreement contains a reservation of rights clause but it maintains that that clause was inserted to protect the 8(a)(3) charge in the instant case and was not intended to permit litigation of the very cases that were being settled. The Center also claims that there is no basis to set aside the agreement because the agreement has not been breached and the instant case cannot be used to establish that there was postsettlement breach because the instant case was filed some several weeks before the settlement agreement was signed. Counsel for the General Counsel and for the Union maintain that the existence of the reservation-of-rights clause in the agreement and the action of the Center's representatives establishe that it was the understanding of all parties that the issue of the legality of those 11 discharged employees was reserved for litigation in the present proceeding. Both also contend that the Center waived the settlement agreement as a bar to litigating the original unfair labor practices by joining issue in the answer filed by it and by participating in the hearing on the merits. Both also argue that, notwithstanding the settlement agreement, the Union is entitled to litigate the legality of the 11 discharged employees because the Union has asserted as an affirmative defense that the strike was an unfair labor practice counsel for the General Counsel requests that if the administrative law judge is of the opinion that she cannot make a finding with respect to the discharge of the 11 employees because of the existence of the settlement agreement, then counsel requests the administrative law judge to set aside the agreement.

The record discloses that the charge in the present 8(a)(3) case was filed on 21 April 1983 and the settlement agreement in the prior cases was signed by the Center on 12 May 1983 and approved by the Regional Director on 1 June 1983. The Regional Director had not revoked his approval of the settlement agreement prior to the hearing in the instant case. However, as noted, counsel for the General Counsel did request the administrative law judge to revoke the settlement agreement if she deemed it necessary to decide certain issues in this case. A settlement agreement will not be set aside unless a respondent fails to comply with the terms of the agreement, commits unfair labor practices subsequent to the signing of the settlement agreement, or has committed presettlement misconduct of which the Regional Director was unaware through no fault of his own at the time he approved the agreement. In the instant case, there is no evidence that the Center failed to comply with the terms of the agreement. The Center offered the 11 discharged employees reinstatement, paid a substantial sum of money in backpay, and posted the required notice. Nor does it appear that the Center committed unfair labor practices subsequent to the signing of the settlement agreement. The instant charge was filed several weeks prior to the signing of the settlement agreement. In *Electronics Equipment Co.*, 94 NLRB 62 (1951), the Board held that a settlement agreement could not be set aside on the ground that the employer had committed subsequent unfair labor practices when the settlement agreement was signed on the same day that a new unfair labor practice charge was filed. In the present situation, the charge was filed several weeks before the settlement was signed and, therefore, the Center's actions cannot be considered postsettlement conduct, which would require revocation of the settlement agreement.[44] Further, there is no evidence that the Center engaged in presettlement misconduct of which the Regional Director was unaware at the time he approved the settlement agreement. In these circumstances, I do not find a basis to set aside the settlement agreement.

It is well established that a settlement agreement disposes of all issues involving presettlement conduct of a charged party, unless the prior violations were unknown to the General Counsel, not readily discoverable by investigation, or specifically reserved by the mutual understanding of the parties. *Universal Blanchers*, 275 NLRB 218 (1985); *E.S.I. Meats, Inc.*, 270 NLRB 1430 (1984);

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[44] Counsel for the General Counsel cited *Livernois Moving & Storage*, 269 NLRB 299, 306 (1984), and *Furr's Cafeterias*, 251 NLRB 879 fn. 3 (1980), in support of her position that the agreement should be set aside. However, in both cases the employer's conduct, in fact, occurred after the settlement agreement had been signed. This is not the present situation. Moreover, in *Tompkins Motor Lines*, 142 NLRB 1, 3 (1963), the Board stated, "There is no contention or evidence that the Respondent engaged in any improper activity subsequent to entering the settlement agreement other than the very matter which was reserved at the time of the signing." This is the situation in this case.

Cambridge Taxi Co., 260 NLRB 931 (1982); *Steves Sash & Door Co.*, 164 NLRB 468, 473 (1967); *Laminate Plastics Mfg. Corp.*, 238 NLRB 1234 (1978).

In the instant case, there are two clauses that relate to the issue of reservation of rights. The first clause states specifically that the signing of the agreement shall not preclude the introduction by any party of any evidence contained in Cases 2-CA-19140 and 2-CA-19132 in any forum or proceeding. The second clause states that the agreement settles only the unfair labor practice charge in Cases 2-CA-19140 and 2-CA-19132 and does not settle any other cases that were pending before the Regional Office, the Office of Appeals, the office of the General Counsel, or the Board, nor does it constitute a waiver of any claim that a party may have. It is the position of the counsel for the General Counsel that these clauses "clearly reserved to the General Counsel the right to litigate and seek a finding with respect to the underlying unfair labor practices." Counsel maintains that it would be meaningless and illusory to include such a reservation-of-rights clause for the sole purpose of allowing presettlement conduct to be introduced as background evidence, this counsel can do without a reservation-of-rights clause. In support of her position, counsel cites *Tompkins Motor Lines*, supra. In *Tompkins*, the Board found that despite the absence of a written reservation-of-rights clause the parties had agreed that the settlement agreement, which normally settles all presettlement conduct, would not bar a new charge from being filed by the charging party about presettlement conduct. The Board further stated that the "Trial Examiner properly held that it was proper to consider evidence predating the settlement agreement in this case to establish the employer's motive." The Board did not state that it would allow the introduction of evidence concerning the presettlement conduct as a basis for finding that the conduct settled by the agreement was a violation of the Act. In fact, in footnote 8, the Board stated that it would not make a finding of unfair labor practices based on the conduct that had been settled. In *Metropolitan Alloys Corp.*, 233 NLRB 966 (1977), in which there was a reservation-of-rights clause, the Board stated, "Obviously the settlement agreement permits the General Counsel, in this proceeding, to introduce evidence concerning the matters disposed of by thesettlement agreement, but the use of such evidence is limited to that of shedding light on the issues raised by the amended complaint. No unfair labor practice findings can be made with respect to the allegations which have been disposed of in the settlement agreement." The Board did not adopt the administrative law judge's findings of independent violations. In *Superior Sanitation*, 234 NLRB 454, 467 (1978), in which there also was a reservation-of-rights clause, the administrative law judge found that he could not make findings of unfair labor practices with respect to the violations that had been settled, and his conclusions were affirmed by the Board.

The General Counsel argues that the Center, however, has waived its right to contend that the settlement agreement bars a finding about the settled cases because of its actions in this proceeding. The record reveals that the Center in its answer, as an affirmative defense, stated that the discharge of the 11 employees did not constitute an unfair labor practice because the conduct of those employees was unprotected by the Act. The answer also admitted that the settlement agreement had been executed by the Center and it further stated that the agreement "in its entirety speaks for itself." In addition, during his opening statement counsel for the Center gave a detailed presentation of the events of the 15 and 16 September, during which he contended that the employees had engaged in work stoppages on those days and he discussed whether the discharge of the 11 employees was an unfair labor practice and what the impact would be on the Union's obligation under Section 8(g) of the Act, if those discharges were found to be violative of the Act.[46] It does appear that the Center, notwithstanding the settlement agreement, was prepared to and did litigate, in this proceeding the issue of the status of the 11 employees. However, assuming that by that action, the Center did not waive any rights that it might have by virtue of the settlement agreement, the Center does concede that the reservation language in the settlement agreement permits the General Counsel to litigate the complaint allegations regarding the 34 strikers who were discharged on 15 April 1983. The decision whether the Center violated the Act when it discharged those 34 employees depends on whether those employees were engaged in an unfair labor practice strike, as the Union contends, or unprotected activity, as the Center contends. Thus, it appears that when the Center executed the settlement agreement it understood that the General Counsel reserved the right to establish the nature of the strike engaged in by the 34 strikers on and after 29 September and understand also that the General Counsel would seek a finding concerning the nature of that strike.

Further, it should be noted that the Union alleged, as an affirmative defense against the 8(g) complaint, that the strike was an unfair labor practice strike, and, therefore, that the Union was not required to give the notices normally required by Section 8(g) of the Act. The basis of the Union's assertion that the strike was an unfair labor practice strike is its claim that the employees who struck on 29 September did so because the 11 employees were discharged on 20 September in violation of the Act. In *Hotel & Restaurant Employees Local 274 (Warwick Caterers)*, 269 NLRB 482 (1984), the issue was whether a union charged with a violation of Section 8(b)(7)(C) of the Act should be permitted to interpose as a defense to that complaint an allegation concerning an alleged 8(a)(5) charge that had been dismissed by the Regional Director and which dismissal had been upheld by the General Counsel. The Board in concluding that the Union was entitled to put in its defense stated, "'We acknowledge that under Section 10(b),' 'The person so complained of shall have the right to file an answer to the original or amended complaint and to appear in person or otherwise and to give testimony. . . .' 'Absent any limitation on these rights, the Board is bound to hear, receive, and consider the Respondent's answer at a trial-like hearing.'" and a subsequent case, *Mine Workers*

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[46] Tr. 189-199.

Local 1329 (Alpine Construction), 276 NLRB 415 (1985), involved violations of Section 8(b)(7)(C) of the Act. However, the language used by the Board in *Warwick* was broad in scope and did not indicate that a respondent's right to file an answer and to be heard with respect to defenses raised by the answer was limited to 8(b)(7)(C) situations. In sum, I find that I am obligated, in order to resolve the issues in the 8(a)(3) case, to decide whether the 34 employees were engaged in protected or unprotected activity when they struck.

C. *The Reason for the Strike*

It is undisputed that representatives of the Center were not present during the union meetings when the employees discussed the strike issue. Nevertheless, it is the position of counsel for the General Counsel that the employees struck for economic considerations and did not strike to protest the discharge of the 11 employees. In support of this position, counsel makes the several points. Months before the discharges, the employees had expressed concern over the Center's failure to sign a prior contract and about their belief that the Center had cheated them out of money. It was these topics and other economic issues that were of paramount interest to the employees and not the discharges. Although counsel concedes that there was some discussion about the discharges, he maintains that the union representatives did not push the issue when the Center stated that the discharges were not a proper subject for discussion at the negotiation meeting. Further, counsel argues that the fact that the employees did not strike when the discharges occurred also establishes that the discharges were not the cause for the strike.

The record reveals that the employees had been concerned for months before 29 September about the Center's failure to sign the earlier contract and its alleged failure to pay money that the employees believed were owed to them by the Center. Notwithstanding their unhappiness over these issues for several months, the employees did not strike or even vote to strike. It was in early September when the employees finally decided that some action was warranted, but even then the employees voted only to hold a series of demonstrations they did not vote to strike. Although that vote was in early September, the employees did not hold any demonstrations between early September and 16 September when the first negotiation meeting was held. At this first session, the Union presented its proposals, there was some discussion about the proposals and the parties agreed to meet again. The Center did not offer any proposals at that meeting, but in negotiations that is not an unusual situation and there is no evidence that the union negotiators considered this failure to offer counterproposals as evidence of a failure to bargain by the Center. At the second meeting on 22 September, there was further discussion about the Union's proposals, and Pemberton agreed to the concept of a daycare center, agreed to consider hiring members sent by the Union and made a counterproposal on wages. Although the Center did not make counterproposals, there was some evidence of movement by the Center on proposals made by the Union. The parties were in disagreement about which side proposed 29 September as the next day for negotiations. However, there is no dispute that the parties did agree to meet for negotiations on that day.

As noted, there was another situation that was unfolding as the parties met to negotiate. This situation involved the attendance of employees at the union meeting on 15 September, the receipt by the employees of warning letters because of Pemberton's belief that the employees had engaged in a work stoppage on 15 September, and the discharge of the 11 employees, first on 17 September and then on 20 September, because of Pemberton's belief that these employees had engaged in a second work stoppage on 16 September. There is no dispute that the Union and the employees were angered by the warning letters and the discharge of the 11 employees and they attempted to raise both topics at the negotiation meeting. It is true that when Pemberton said that the discharges were not a proper subject matter for discussion, the union representatives did not attempt to force the issue. It is possible that had the Union attempted to do so, the Center would have filed a refusal-to-bargain charge. However, it is inaccurate to say that the Union and employees abandoned the matter. To the contrary, White forwarded a letter to Pemberton on 24 September in which he stated that the reinstatement of the 11 discharged employees "would be a giant step towards coming to an understanding between the administration and the Union."[46] The record reveals that on the day the 11 employees were discharged a union meeting was called immediately to discuss the discharges. At this meeting, the employees expressed their anger at the discharge of the 11 employees and for the first time they voted to strike. The employees voted to strike unless the 11 employees were reinstated. The evidence further reveals that throughout the week that followed the issue of the discharges was the prime topic at all the union meetings. The Center contended that if the discharges were the cause for the strike then the employees would have struck on 20 September, it ignores the fact that the union representatives and the employees were of the belief that they could not strike before the date set in the strike notice, which was 28 September. The testimony by White and the employees establishes that during the negotiation meeting on 22 September White stated that if the issues that existed between the parties were not settled there would be a strike. One of those issues, as evidenced by White's letter and the testimony of the employees, was the discharge of the 11 employees. Based on the evidence in this record and my observation of the employees, I am convinced that the discharge of the 11 employees was the main, if not the only, reason for the strike.

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[46] As noted, in his telegram of 5 October 1982, White reiterated that reinstatement of the discharged employees would help resolve the issues between the parties.

D. *Whether the Issuance of the Disciplinary Letters and the Discharge of the 11 Employees Were Unfair Labor Practices*

The Center's representatives did not testify as to why the disciplinary letters were issued on 16 September or why the employees were discharged on 20 September. However, in the warning letters that were issued to the employees, Pemberton stated that the employees were being disciplined because they had engaged in an illegal work stoppage and had ignored management's request to return to work. The letters do not disclose when Pemberton believed that the work stoppage had occurred nor does it state the basis on which Pemberton concluded that the employees had engaged in a work stoppage, and witnesses were not called to clarify either point.[47] However, the record does disclose that some employees attended a meeting between 2 and 3 p.m. on 15 September and that Pemberton told employees who were at the meeting to return to work. Gordon, Buchinji, Harris, and de la Torre credibly testified that between 2 and 3 p.m. employees, on a rotating basis, attended a union meeting, as they had several times before in room 153 at the premises of the Center. The Center did not dispute that employees had held union meetings at the premises before this meeting on 15 September.[48] However, counsel for the Center did state that one of the reasons the Center issued the disciplinary letters was due to the unauthorized use of the room by the employees. No evidence was offered to support the claim that the use of the room was unauthorized. In fact, Irma Quitcon testified, without contradiction, that she followed the practice established by Sitgraves; she checked to see if the rooom was available and she found that the room was not being used for any other purpose and, therefore, it could be used for the union meeting. Sitgraves testified and she did not refute that testimony.

The Center did not establish that an investigation had been conducted by its representative on either 15 or 16 September, before the disciplinary letters were issued, and that as a result of that investigation it had discovered that the employees had failed to perform their work. Notwithstanding this fact, counsel for the Center attempted, during cross-examination, to prove that the employees had neglected their duties in order to be present at the meeting.[49] Initially, he attempted to establish that the employees had taken their lunch period before 2 p.m. and, therefore, they were on worktime when they attended the meeting. Gordon, Buchinji, Harris, and de la Torre all denied that they had taken their regular lunch period before 2 p.m. Based on my observation of the witnesses, I credit those denials.[50] Subsequently, counsel attempted to show that the employees failed to keep scheduled appointments between 2 and 3 p.m. Gordon and Harris credibly testified that they did not have appointments scheduled for the afternoon of 15 September. Buchinji testified that she checked several times during that afternoon to ascertain whether a client who was scheduled for a 3 p.m. appointment had arrived and she found that the client had not come to the Center. The Center did not offer evidence to refute that testimony. De la Torre conceded that she did not see a client who she had scheduled for a 2:30 p.m. appointment and who had signed the client logbook on that afternoon. The record does not disclose the reason de la Torre did not see the client. The record does disclose that at times clients have signed the logbook but for some reason or another they have failed to keep a scheduled appointment. De la Torre also testified that after the meeting she returned to her office where she picked up records and returned them to the medical records division. Her testimony that she saw and spoke to Pemberton and Charles while at work at 3:30 p.m. was also not refuted. The Center did not produce any employee's supervisor to establish that an employee failed to perform duties that they had scheduled between 2 and 3 p.m. or thereafter. Nor did the Center produce a client to testify that any employee failed to keep a scheduled appointment. The Center did produce service rendered documents (SRD), which are the records maintained by employees to establish the work they performed and logbooks signed by clients when they come to the Center to support its contention that the employees had failed to keep scheduled appointments. As noted, the SRD for Gordon was rejected because of unexplained defects on the face of the document. The Center did not produce a SRD for Buchinji[51] or Harris for 15 September and, apparently, the SRD for other employees also were missing. These documents were within the control of the Center and the Center failed to offer an explanation why some SRD were missing or why the SRD for Gordon contained erasures, cross-outs, etc. De la Torre testified that on occasion when clients arrived at the Center they told the receptionist that they were to meet with de la Torre, although, in fact, they were not her patients or were not scheduled to see her. This type of situation arose because she acted as a translator for other therapists or doctors and the clients knew this. Further, other witnesses testified that clients sometimes came to see a therapist, although they did not have appointments. Thus, the logbooks would not always reflect whether a patient who signed the book actually was scheduled to see a therapist. In these circumstances, I do not consider either the SRDs or the logbooks as sufficiently reliable evidence to prove that employees failed to perform their duties between 2 and 3 p.m. on 15 September. Moreover, as noted, the Center failed to establish that it had examined any records prior to the time it issued warning letters to ascertain whether employees had failed to perform their duties.[52]

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[47] The letters do not state, specifically, that the employees were being disciplined because they had failed to perform their duties.

[48] Counsel for the Center indicated that the meetings usually were held at noon or after 5 p.m.

[49] Counsel indicated that the employees were engaged in a demonstration rather than a meeting but he failed to offer evidence to support that assertion.

[50] Although Gordon initially testified she took her lunch between 2 and 3 p.m. and then admitted that she had sent a notice to Pemberton in which she stated that she had taken lunch between 1:30 and 3 p.m., I do not consider that this difference is sufficient to warrant the conclusion that her overall testimony was not credible.

[51] Buchinji could not recall if she had completed an SRD for that day.

The Center's representatives did not explain which particular situation on 15 September they considered to be the work stoppage. Counsel for the Center did state that employees did not work between 2 and 5 p.m. on 15 September. Based on my evaluation of the evidence in this record, I find that between 2 and 3 p.m. some employees attended a union meeting on their own time, as they had done on other occasions.[53] The evidence also reveals that the employees met with union representatives during that meeting to assist those representatives in their preparations for the upcoming negotiations. There is no evidence in this record to establish that the employees failed to perform their duties because of their attendance at the meeting or that the meeting disrupted the operations of the Center or interfered with patient care. It should be noted that due to the nature of their work these employees had great flexibility with respect to their lunch and break periods and with respect to arranging their schedules.

The Act protects the right of employees to form, join, or assist a labor organization and it is a violation of the Act to interfere with, restrain, or coerce an employee in the exercise of those rights or to discriminate against employees in order to encourage or discourage union membership. The Supreme Court has stated that Section 7 is not to be interpreted and applied in a limited fashion. *Eastex, Inc. v. NLRB*, 437 U.S. 556 (1978); *NLRB v. J. Weingarten*, 420 U.S. 251 (1975); *NLRB v. Washington Aluminum Co.*, 370 U.S. 9, 14 (1962). In the instant case, I find that when the employees attended the meeting to assist the union representatives they were engaged in protected concerted activities and were not engaged in a work stoppage. Nor do I consider that the employees lost the protection of the Act because of events that happened after 3 p.m. It is conceded that some employees[54] went to the second floor to see Pemberton about the timecards, which he had removed from the rack while the employees attended the union meeting. I find that the confusion that occurred thereafter was attributable to Pemberton's action in removing the timecards and his adamant refusal to speak to the employees about the matter. It could be argued that when he pulled the cards Pemberton, in effect, discharged the employees. In these circumstances, it would be difficult to conclude that the employees had engaged in a work stoppage.[55] Although, it is true that these employees were health care workers, that fact does not mean that they lose the right to engage in protected concerted activity. *Phase, Inc.*, 263 NLRB 1168, 1169 (1982).

In the letter of termination that was issued first on 17 September and then 20 September, Pemberton stated the following, "After your receipt of a warning letter, you were specifically instructed to return to your work station. This you refused to do. Indeed the substantial time which elapsed until you reported to your work station, leads to the determination that you again participated in a work stoppage; that of a.m. of September 16, 1982." In addition to that statement about the reason for the discharges, the Center stipulated that the employees were discharged "in part based upon the warnings which were previously issued to these employees on September 16, 1982." The Center did not call witnesses or produce documents to explain what it considered to be the second work stoppage. Nor did it produce evidence to establish that an investigation had been conducted between 16 and 17 September to ascertain the facts about this alleged work stoppage. The record does establish that on the morning of 16 September the Center's representatives prohibited employees from performing their duties in order to distribute to them the disciplinary letters. There is no evidence about how the work of these employees was performed or if it was performed during this period of time. In fact, some employees were kept from performing their duties for a much longer period of time than the hour they had spent at the union meeting. It is undisputed that employees were instructed to return to their work after they received their letter. According to the credited testimony of the employees, they did return to work. Gordon returned to the nursery, put toys away, and helped Rose Ann Harris to put children on the schoolbus. At this point, some employees came to the first floor and started to draft a letter to Pemberton requesting that the issue of the disciplinary letters be put on the agenda for contract negotiations. Gordon joined them for a few minutes and then she returned to work in the nursery for the remainder of the day. De la Torre did not receive her disciplinary letter until about noon. De la Torre had lunch at some point before 1 p.m. and, thereafter, she joined the group of employees who were drafting a letter to Pemberton, she remained with this group about 50 minutes and then returned to work. Buchinji received her letter also about noon, and went to the first floor. She observed employees drafting the letter to Pemberton and she stayed with the group about 20 minutes and then returned to work. Harris received her disciplinary letter between 11:30 and 11:45 a.m., and after she received it she went to the nursery and helped to put children on the schoolbus. She noticed the employees drafting the letter and she joined them for a few minutes and then returned to work. Counsel for the Center stated that the employees were not discharged for writing the letter because the Center's representatives did not know about it, they were discharged for not performing their work sometime on 16 September. However, counsel did not state what time of day the employees failed to perform their duties or what duties they failed to perform. Nor does the evidence disclose why the Center decided to discharge the 11 employees who were discharged. In sum, the Center has failed to establish any reason for the discharge of the employees other than its stipulated reason, i.e., because the employees attended the union meeting. In view of my finding that the employees were engaged in protected concerted activities at the time they attended the meeting, I find that the Center committed an unfair labor practice when it issued the disciplinary letters and discharged the 11 employees. *Brodart, Inc.*, 257 NLRB 380, 384 (1981); *Empire Steel Mfg. Co.*, 234 NLRB 530, 531 (1978).

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[52] The Board has considered the failure by an employer "to conduct an investigation of an employee's alleged misconduct is evidence of discriminatory intent, especially when viewed in light of the employer's union hostility." *Beverly Enterprises*, 272 NLRB 83, 90 (1984).

[53] If this was the only time employees had attended a union meeting on the premises of the Center, Pemberton might have had some basis to believe this to be a work stoppage. As noted, however, this was not the first meeting. Moreover, Pemberton's good-faith belief would not be a defense if the employees, in fact, were engaged in protected concerted activities. *NLRB v. Burnup & Sims, Inc.*, 379 U.S. 25 (1964).

[54] There is no evidence to establish whether the Center's representatives knew which employees came to the second floor. Harris, for example, claimed that she never came to the second floor. De la Torre testified that she came to the second floor after she heard about the timecards but she remained only for a few minutes.

[55] In fact, it would have been impossible for employees to keep any appointment after the Center's representatives closed the doors to the Center.

E. *Whether the Union Was Required to Give Notice*

Counsel for the General Counsel in the 8(a)(3) case and counsel for the Union contend that the employees struck to protest the Center's unfair labor practices and, therefore, the strike was an unfair labor practice strike. In these circumstances, they contend, that under the doctrine of *Mastro Plastics v. NLRB*, 350 U.S. 270 (1956), the Union was not required to give any notice. Moreover, both also argue that the Center's conduct during the 10-day period excused the failure, if there was a failure, by the Union to notify the Center about the delay in the start of the strike. Counsel for the General Counsel in the 8(g) case agrees that the notice requirement of 8(g) does not apply to a strike that is called to protest an employer's unfair labor practices. However, he maintains that in the instant case, the strike was an economic strike. The Center did not state specifically that the strike was an economic strike but it did claim that the union was required to give the 8(g) notices timely, which it failed to do. It further claims that the doctrine of *Mastro Plastics* was not applicable to the instant situation because in *Mastro Plastics* the Supreme Court dealt with a strike that occurred prior to the expiration of the 60-day "cooling-off period" mandated by Section 8(d) and prior to the expiration of the contractual no-strike period. Therefore, counsel argues, it has no application to a strike commenced after the time specified in the 10-day notice. Rather, counsel claims, the legislative history limits the application of *Mastro Plastics* to two situations, the Union may choose not to give a 10-day notice or if it gives such a notice it is not required to wait until the expiration of the 10-day notice before it strikes.

A strike caused by unfair labor practices is an unfair labor practice strike even if it also has economic objectives. *NLRB v. Louisville Chair Co.*, 385 F.2d 922, 929 (6th Cir. 1967), cert. denied 390 U.S. 1013 (1968). The unfair labor practice need not be the sole cause of the strike, it is enough if it is one of the reasons for the strike. *Crown Cork de Puerto Rico*, 273 NLRB 243 (1984); *Boyles Galvanizing Co.*, 239 NLRB 530 (1978); *C & E Stores*, 221 NLRB 1321 (1976). As noted, the various work-related issues that had concerned the employees for months had not caused them to strike or to even hold the demonstrations they had discussed. There is no evidence that at the union meeting on 15 September the employees discussed the possibility of a strike. However, when the Center issued the disciplinary letters and discharged the employees it did provoke the other employees to action. The undisputed and credited testimony of the employees establishes that it was these events that triggered the employees to vote for a strike unless the discharged employees were reinstated. Pemberton did not dispute White's claim that he raised the issue of the disciplinary letters and the discharges at the negotiation meetings. Nor did he dispute the assertion that he refused to discuss these issues. White's letter of 24 September makes clear that the Union and the employees were concerned about the employees who had been discharged. In fact, White told Pemberton that a resolution of that problem would go a long way to resolving the other differences between the parties. These outward expressions of concern by the Union and the employees about the discharged employees occurred several days before the strike commenced and were not afterthoughts to protect the employees who went on strike on 29 September. In these circumstances, I find that the strike that commenced on 29 September was caused, at least in part, by the unfair labor practices of the Center. I further find that the strike was prolonged by those unfair labor practices at least until the Center remedied those unfair labor practices.[56] In *Waiters & Bartenders Local 500 (Mission Valley Inn)*, 140 NLRB 433, 438 (1963), a union claimed that it was picketing to protest unfair labor practices, although the case had been settled by an agreement to which the Union was not a party. The Board stated:

> The fact remains that under established and regular administrative procedures, any unfair labor practices embraced in the charges must be deemed to have been remedied. . . . For the Board to accord recognition to a continued protest against unfair labor practices thereafter would be inconsistent with its obligation to respect established administrative practice and would impinge on the statutory authority of the General Counsel.

Both counsels for the General Counsel agree that the legislative history of the health care amendments and the limited Board law in this area establish that under the doctrine stated in *Mastro Plastics Corp.*, 350 U.S. 270 (1956), a union is not required to comply with the 10-day notice requirements of Section 8(g) when a strike is caused by an employer's serious unfair labor practices. However, counsel for the Center contends that the *Mastro Plastics* doctrine, by its very terms, does not apply to the strike in the instant case, which was commenced after the time specified in the 10-day notice. Counsel also argues that there is no indication in the legislative history of health care amendments that Congress intended to apply the *Mastro Plastics* doctrine to a strike that commenced after the 10-day period.[57] Moreover, counsel maintains that the failure by the Union to take economic action when the alleged unfair labor practices occurred misled the Center and lulled it into a situation in which the Center believed that the Union would strike, at the time specified and it was unprepared for the strike that occurred 24 hours later. Finally, counsel contends that the alleged conduct in the instant case does not constitute interference with rights of the employees to select their own bargaining representative, which was the situation that existed in *Mastro Plastics*.

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[56] The settlement agreement was approved on June 1983, but the precise date when the Center complied with the terms of the agreement is unclear.

[57] It does not appear that this contention is being advanced by counsel for the General Counsel. However, counsel for the General Counsel in the 8(g) case does argue that this was an economic strike and not an unfair labor practice strike.

It is clear from the legislative history of the health care amendments that Congress recognized that the principles of the *Mastro Plastics* doctrine would apply even in the health care industry, notwithstanding the Congressional concern about patient care. Thus, the Senate Report states the following:

> Likewise, the public interest demands that employees of health care institutions be accorded the same type of treatment under the law as other employees in our society, and that the notice not be utilized to deprive employees of their statutory rights. It is clear, therefore, that a labor organization will not be required to serve a ten day notice or to wait until the expiration of the ten day notice when the employer has committed unfair labor practices as in *Mastro Plastics Corp. v. NLRB*, 350 U.S. 270, 37 LRRM 2587 (1956).[58]

Further evidence that the doctrine would be applicable even to the health care industry can be found in these statements by Congressmen Ashbrook and Thompson, who cosponsored the bill in the House. They made the following statement:

> *Mr. Ashbrook*: I would say to my colleague from Florida that the Supreme Court has clearly enunciated a policy which would override the 10-day requirement but it is in a very limited situation. Say, for example, that the hospital fired all employees. The Court has said in effect that the unfair labor practice was so aggravated that a nonstrike clause was not enforceable. Only a very narrow, limited number of situations would be covered. I would answer "yes" to his question. Despite the provision for a 10-day notice, in aggravated situations where the notice is meaningless, the union would not have to give this notice.
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> *Mr. Thompson of New Jersey*: Mr. Chairman, this particular provision was written in because of the nature of the matter and would apply only to an aggravated unfair labor practice, as distinguished, in the normal course of events, under section 8(d)(3) of the act. If one was, shall we say, fired as in *J. P. Stevens* case, on the first day of wearing a union button, this gives the protection to the health care worker and is only applicable in that kind of case.[59]

The issue of the applicability of the *Mastro Plastics* doctrine to a health care institution has not been before the Board. However, in *Cedarcrest, Inc.*, 246 NLRB 870 (1979), it was contended that the employer was a health care institution. Although the administrative law judge did not find the employer to be such an institution, he did state that if he had made such a finding then he would have concluded that the requirements of Section 8(g) would not be applicable because the employer in that case had committed serious unfair labor practices. The Board affirmed his findings, on this issue, without comment. Thus, based on both the legislative history and limited Board law it appears that the doctrine of *Mastro Plastics* is applicable even if the employer involved is an institution involved in the health care field.

Counsel's argument that *Mastro Plastics*, by its terms, does not apply to a strike that commenced after the time specified in the 10-day notice is not persuasive. *Mastro Plastics*, of course, did not deal with the notice requirements imposed on a union, either before or after the 10-day notice, and, therefore, in that sense it did not address the immediate issue. However, to say that the doctrine is not relevant to this case is to misunderstand the opinion of the Court. The Court in *Mastro Plastics* was concerned that employees who struck to protest an employer's unfair labor practice should not lose their status as employees because they failed to give notice in advance to an employer, who by its conduct, had caused the strike in the first place. Thus, the Court in seeking to protect these rights of employees in such circumstances held that, notwithstanding the explicit language of the Section 8(d), employees could strike prior to the expiration of the 60-day cooling-off period and prior to the expiration of a contractual no-strike period. The Court eliminated entirely the only type of notice required under the facts existing in the *Mastro Plastics* case. The scope of that holding was broad and demonstrates the Court's belief that an employer who has committed serious unfair labor practices is not entitled to receive advance notice of the strike that was caused by those practices. Congress, when it stated that the doctrine would be applied to employers in the health field who committed serious unfair labor practices, could not have meant that a union would be excused from giving the 10-day notice specifically required by the Act, but would not be excused from giving the 12-hour notice which is not set forth in the Act. Rather, I find that the rationale of *Mastro Plastics* applies whether the issue is the 10-day notice or the 12-hour notice.

Further, I do not find merit to counsel's contention that the only conduct by an employer that will excuse a union from the need to give the required notice is conduct which interferes with the employees' right to select their bargaining representative. That the conduct is not the only type of conduct that will eliminate the union's need to give advance notice of its intention to strike is evident from the following comment by Senator Williams. Thus, he stated:

> Second, it should be clear that the exception to the section 8(g) notice was never intended to be limited to the precise facts found in *Mastro Plastics*

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[58] S. Rep. No. 766, 93d Cong., 2d Sess., reprinted 120 Cong.Rec. 12935 (1974).

[59] 120 Cong.Rec. 16901 (1974).

> *Corp. v. NLRB*, 350 U.S. 270 (1956). *Mastro Plastics* involved a strike against an employer within the 8(d) waiting period and in the face of a no-strike clause solely because the employer discharged an employee because of his organizational activities in support of the union. The Court held that neither section 8(d) nor the no-strike provision prohibited employees from engaging in a strike to protest an employer's unfair labor practices.[60]

In the instant case, the issuance of disciplinary letters to the majority of the bargaining unit employees because they attended a union meeting and the discharge of a significant number of bargaining unit employees, at least in part, because they attended such a meeting constitutes the type of serious unfair labor practice that would relieve the Union of any obligation to give advance notice of its intention to strike.

Counsel for the General Counsel in the 8(a)(3) case and counsel for the Union also argue that the Center's conduct during the 10-day period after the Union gave notice of its intention to strike, even if it did not rise to the level of an unfair labor practice, nevertheless released the Union from its obligation to give the required notices. In support of this position counsel cites the following language from the Senate Report:

> . . . it is the sense of the Committee that during the ten-day notice period the employer should remain free to take whatever action is necessary to maintain health care, but not to use the ten-day period to undermine the bargaining relationship that would otherwise exist. For example, the employer would not be free to bring in large numbers of supervisory help, nurses, staff and other personnel from other facilities for replacement purposes. It would clearly be free to take extraordinary steps to stock up on ordinary supplies for an unduly extended period. While not necessarily a violation of the Act, violation of these principles would serve to release the labor organization from its obligation not to engage in economic action during the course of the ten-day notice. [S. Rept. 93-766, 93d Cong., 2d sess., Coverage of Nonprofit Hospitals Under the National Labor Relations Act.]

Counsel for the Union claims that the following conduct demonstrates that the Center undermined the collective-bargaining relationship and, therefore, the Union was not required to give any notice. The Center, after it received the 10-day notice, discharged 11 employees for their participation in a union meeting, refused to discuss the issue of the discharges, hired several employees as permanent replacements for the striking employees, moved a major program to another site, subcontracted food services, hired a private security agency, refused to meet with the Federal mediator, and refused to participate in mediation as requested by FMCS.

As stated, with respect to the discharge of the 11 employees, I have concluded that that conduct was violative of the Act. However, it should be noted that if the conduct had not been found violative of the Act, an employer's refusal to discuss legitimate discharges during negotiations would not necessarily indicate that an employer was attempting to undermine the collective-bargaining process. As will be discussed below, I do not consider that the Center hired additional employees, as replacements for the strikers. It is clear that employees were hired because of the anticipated takeover of the operation of the Hudson Hotel by the Center and these hirings were unrelated to the strike. Further, for reasons hereafter stated, I do not find that the adult day treatment program was transferred to the Hudson Hotel because of the strike or that the Center actually made arrangements to subcontract food services. The only conduct that I find the Center actually engaged in that could be considered to have an effect on the collective-bargaining process involved Pemberton's refusal to meet with the Federal mediators. Section 8(d)(C) states as follows:

> The parties shall participate fully and promptly in such meetings as may be undertaken by the Service for the purpose of aiding in a settlement of the dispute.

Pemberton admitted that he refused to meet with the Federal mediators both because he did not like the particular mediator and/or because he did not believe that the mediation was necessary. However, it does not appear that Pemberton communicated his belief that mediation was unnecessary to the FMCS. The Act states that the parties *shall* participate fully and promptly with the FMCS in an effort to resolve a dispute. That language does not indicate that either party has the discretion to decide whether to meet. In these circumstances, I find that Pemberton's refusal to meet with the mediators as required by the Act was conduct calculated to undermine the collective-bargaining process and, therefore, was conduct that released the Union from any obligation that it had to comply with the notice requirements of Section 8(g). *Hospital Employees District 1199 (CHC Corp.)*, 229 NLRB 1010 (1977).

F. *Whether the Union Notified the Center of the Delay in the Start of the Strike*

As stated above, I have concluded that the Union was released from its obligation to give any notice of its intention to strike. However, I consider it necessary, in the circumstances of this case, to discuss whether the Union did comply with the notice requirements of Section 8(g). Section 8(g) states:

> A labor organization before engaging in any strike, picketing, or other concerted refusal to work at any health care institution shall not less than ten days prior to such action, notify the institution in writing and the Federal Mediation and Conciliation Service of that intention. . . . The notice shall state the date and time that such action shall commence. The notice, once given, may be extended by the written agreement of the parties.

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[60] 120 Cong.Rec. 22575 (1974).

The Board has held that with respect to the 10-day notice the requirement that the notice state the time and date when the strike would commence was a mandatory and not a discretionary requirement. *Operating Engineers Local 39 (Kaiser Foundation Hospitals)*, 268 NLRB 115 (1983), enfd. *NLRB v. Operating Engineers Local 39*, 746 F.2d 530 (9th Cir. 1984); *Hospital & Institutional Workers Local 250 (Affiliated Hospitals of San Francisco)*, 255 NLRB 502, 504 (1981). In *Kaiser Foundation Hospitals*, the union argued to the Court that the Board had relaxed its literal interpretation of Section 8(g) and in support of that position the union cited the Board's holding in *Greater New Orleans*, 240 NLRB 432 (1979). The Court rejected that argument and noted the following distinction between the two cases. *Greater New Orleans Artificial*, the Court stated, involved the issue of the timeliness of the receipt of the notice, a matter not specifically addressed in the statute. On the other hand, *Kaiser Foundation Hospitals* involved the issue of whether the contents of the notice were in conformity with the specifics required by the statute. The Court held that in *Greater New Orleans Artificial* the Board had more flexibility in deciding whether the notice was timely, in *Kaiser Foundation Hospitals* the statute dictated the contents of the 10-day notice and the Board is not free to rewrite the second sentence of Section 8(g). *Affiliated Hospitals of San Francisco*, supra.

It is the Union's position that it fully complied with the 10-day notice requirements set out in Section 8(g), the notice was in writing, and it specified the time and date when the strike would commence. The evidence supports that position. However, the Union did not commence its strike until 24 hours after the time stated in the notice and the Center contends that it was not notified about this change and the Union, therefore, violated the Act. The issue then is whether the Union was required to notify the Center about the delay in the start of the strike and, if so, whether the notice had to be in writing and had to state the time and date when the strike would start.

As counsel for the Union has stated, the Act does not refer to what notice, if any, a union must give when it delays the start of a strike beyond the date contained in the 10-day notice. However, the legislative history does refer to that issue:

> The 10-day notice is intended to give health care institutions sufficient advance notice of a strike or picketing to permit them to make certain arrangements for continuity of patient care. It is not the intention of the Committee that a labor organization shall be required to commence a strike or picketing at the precise time specified in the notice; on the other hand, it would be inconsistent with the Committee's intent if a labor organization failed to act within a reasonable time after the time specified in the notice. Thus, it would be unreasonable in the Committee's judgment, if a strike or picketing commenced more than 72 hours after the time specified in the notice. In addition, since the purpose of the strike is to give a health care institution advance notice of the actual commencement of a strike or picketing, if a labor organization does not strike at the time specified in the notice, at least 12 hours' notice should be given of the actual time for the commencement of the action.[61]

The legislative history, therefore, establishes that Congress intended to permit a union to postpone unilaterally the start of a strike and to thereafter strike without giving a new 10-day notice provided the union followed certain conditions, i.e., the postponement of the strike could not be more than 72 hours after the time set forth in the initial 10-day notice and the union had to give at least 12 hours' advance notice to the employer of the actual time when the strike would commence. In the instant case, there is no dispute that the first provision was met, the Union struck within 24 hours after the time stated in the 10-day strike notice. Although the Union claims that it gave adequate notice to the Center about the delay in the start of the strike, the Center denies that it received any notice or that it was notified as to the actual time when the strike would commence.

White, Quitcon, Gordon, Baptiste, and Adams testified that at the negotiation meeting on 22 September, White told the Center's representatives that the employees would walk or strike on 29 September. Counsel for the General Counsel contends that the contradictions in the testimony given by these witnesses establishes that no such notification was given. It is true that these witnesses did not all testify precisely the same about White's statements and there was some conflict in their versions about the sequence of events. Nevertheless, I do not find that these contradictions are sufficient to undermine their basic testimony, which was that White said that the employees would walk or strike on 29 September. I credit their testimony not only on my observation of these witnesses, but on my evaluation of the actions of the Center's representatives after that negotiation meeting. On the day following the meeting Pemberton told the board of directors that he did not believe that the strike would start on either Tuesday, 28 September, or Wednesday, 29 September. It is undisputed that until the meeting on 22 September, the only date mentioned for the start of the strike was Tuesday, 28 September. It is significant that it was following the negotiation meeting that Pemberton, for the first time, mentioned Wednesday, 29 September, as a possible date for the strike to commence.

The Center's actions with respect to the security guards also supports the Union's position that they told Pemberton about the delay in the start of the strike. An examination of the logbook shows that the Center did not add additional security guards for the early shift, or for any other shift on 28 September but additional guards were added for 29 September. Further, the logbook contains the notation that a representative of Health and Hospital Corporation referred to the fact that the strike was to be on 29 September, there is no such statement for any entry on 29 September. In view of the fact that this representative was the liaison between the city and the Center, an inference is warranted that he gained his knowledge about when the strike would start from management representatives.

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[61] S. Rep. No. 766, 93d Cong., 2d Sess.; represented 120 Cong.Rec. 12935 (1974).

The Center, in support of its position that it was never advised of the delay in the start of the strike, points to the extensive preparation it made for the strike to begin on 28 September. An examination of the testimony given by the Center's representatives reveals that the extent of that preparation was limited to a general discussion about what would happen in the event of a strike. Although Pemberton claimed that on 27 September he discussed a strike plan with management representatives in anticipation of the strike on 28 September, both Charles and Payne denied that there was any such discussion. In fact, Payne claimed that the first preparations that were made for the strike occurred after the strike began. I credit that testimony based on my observation of Payne. Furthermore, Pemberton's own testimony establishes that he did not make preparations for the strike because he did not think one would occur. Thus, Pemberton told the board of directors on 23 September that he did not think there would be a strike on Tuesday, 28 September, or Wednesday, 29 September, and he refused to meet with the mediators because he did not believe that mediation was necessary. Neither Sigraves nor Terri Reid Payne, who allegedly was directed to make arrangements for catering services to provide food at the Hudson Hotel for 28 September, made such arrangements. It is difficult to accept that these supervisory personnel would have failed to follow through with the instructions given to them by the director of the Center. Perhaps the most significant act Pemberton alleged he did in anticipation of a strike on 28 September was to transfer the adult treatment program from the Center to the Hudson Hotel. I do not credit that claim. According to Pemberton, he gave the responsibility for the transfer of this program, including the medical needs of the clients in the program, to Ana Perira. However, Perira was not the supervisor of the clinical portion of the program, that was the responsibility of Norma Burgos. Burgos allegedly was ill when Pemberton spoke to Perira about the transfer of the program. However, this record fails to disclose that Pemberton had discussed this alleged transfer with Burgos at any time before 28 September and there is no evidence that he discussed the transfer with members of her staff before that date. It would appear that if Pemberton, in fact, planned to transfer such a program, he would have made arrangements with Burgos to do so some time before 28 September. There were no such arrangements made because Pemberton did not plan to transfer the program, he did not anticipate that there would be a strike. Pemberton may have discussed with Perira how the Center would conduct its operations at the hotel when it assumed management and control of the hotel on 28 September. Perira had been preparing for that eventuality since July and had spent a considerable part of her time at the hotel. I find that Perira and her staff were at the hotel because the Center was to assume control of the hotel on 28 September and they were not at that location because of the strike. I also find that the employees who were hired were hired in anticipation of this takeover of the hotel and not because of the strike. Although, the Center claimed that it was necessary to transfer the adult treatment program on 28 September because of the strike, there is no evidence that that program was transferred on 29 September when the strike started or was transferred thereafter to the hotel. In sum, I conclude that the Center did not produce convincing evidence that it prepared for the strike to start on 28 September and was lulled into canceling those arrangements because the strike did not start on that day.

Although I find that White did tell Pemberton that the strike would commence on 29 September,[62] the evidence fails to establish that he notified the Center of the actual time when the strike would start. Counsel for the General Counsel contends that this failure to give the specific time when the strike would start is not an insignificant requirement and not a de minimis violation. In support of that argument, counsel has cited several cases. However, an examination of the cases cited by counsel establishes that they refer to the specific details which are required to be included in the 10-day notice and they do not refer to whether the need for such specificity is required with respect to the 12-hour notice. It is true that the legislative history states that the Union should give notice of the actual time when the strike will start; however, I am not convinced that the failure to give the specific hour when the strike would start warrants the conclusion, in the circumstances of this case, that the Union failed to give the proper notice. The Center was on notice from 16 September that the strike would start on 28 September. Six days before the strike was to start, the Union notified the Center that the strike would be delayed 1 day. I do not believe that the failure by the Union to specify the exact hour when the strike would start is sufficient to establish that the Union failed to meet the requirements of Section 8(g). In *Greater New Orleans*, the Board quoted from comments made by Congressmen Ashbrook and Thompson, which comments were made in the context of a union's notice of the postponement of the initial time set for the start of a strike, a situation present in the instant case. The Board (240 NLRB at 435) quoted as follows:

> *The Board, in considering extenuating circumstances, is expected to act in a reasonable manner consistent with the Committee's intent as stated in its Report*. Furthermore, the status of strikers as "employees" would also be determined by the decision of the Board. Section 8(d) of the Act, which has been amended by this bill, clearly states "employees" will lose their status as such if they participate in a strike outside of the notice periods. Should the labor organization be in violation of Section 8(g), the employees would then, according to statute, lose their status as "employees." *Consequently, the reasonableness of the Board in applying the intent of*

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[62] I do not find that constructive notice by a union would satisfy a union's obligation under Sec. 8(g) of the Act, as contended by counsel for the General Counsel. Therefore, I did not rely on the conversations between supervisors and employees on 28 September to establish that the Union gave the required notice, but those conversations do support the conclusion that the Union notified the Center that the strike would commence on 29 September.

> *the Committee to the facts is of major importance.* [Emphasis supplied.]

e Board then stated:

> Therefore, the legislative history of the health care amendments demonstrates not only Congress' concern for the continuity of patient care, but also its concern that Section 8(g) not be rigidly applied in light of serious consequences flowing from noncompliance with its provisions, i.e., the strikers' loss of employee status under the Act. We believe that our decision herein satisfies both of these expressed concerns of Congress.

therefore, conclude that it would be unreasonable to d that the 34 employees should lose their status as em- oyees because the Union failed to state the specific our when the strike would start in circumstances where e Center was on notice about the actual day of the rike at least 6 days prior thereto.

G. *The Intermittent Picketing*

Based on my evaluation of the security logbooks, the ttendance sheet, and lunch sheet records described in etail above, I conclude that the Union picketed continu- usly from September 1982 through August 1983, al- hough as noted above I do not find that the picketing, fter the initial cases were settled, was to protest the dis- charge of the 11 employees.[63]

H. *Conclusions*

Based on the record in this case, I conclude that the issuance of the disciplinary letters to the employees on 16 September and the discharge of the 11 employees on 20 September because they engaged in protected concerted activities was violative of the Act. I further conclude that when the employees struck on 29 September to protest these violations, at least in part, they were engaged in an unfair labor practice strike and, therefore, the Union was not obligated to give the notices required under Section 8(g) of the Act. Moreover, I find that the Union did comply with the notice requirement of Section 8(g). Therefore, I find that the Center violated Section 8(a)(3) when it discharged the 34 employees who were engaged in protected concerted activities.[64] Finally, I conclude that the Union did not violate the Act as alleged in the complaint.

CONCLUSIONS OF LAW

1. Washington Heights-West Harlem-Inwood Metal Health Council, Inc., d/b/a The Council's Center for Problems of Living (Center) is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act and a health care institution within the meaning of Section 2(14) of the Act.

2. District 1199, National Union of Hospital and Health Care Employees, RWDSU, AFL-CIO (Union) is a labor organization within the meaning of Section 2(5) of the Act.

3. By discharging and refusing to reinstate its employees because they engaged in protected concerted activities, the Center has violated Section 8(a)(3) and (1) of the Act.

4. The above are unfair labor practices affecting commerce within the meaning of Section 2(6) and (7) of the Act.

5. The Union has not violated the Act as alleged.

REMEDY[65]

Having found that the Center has engaged in certain unfair labor practices, I shall recommend that the Center cease and desist therefrom and take certain affirmative action necessary to effectuate the policies of the Act.

The Respondent having wrongfully discharged William Wright, Audrey Singleton, Roslyn Darzy, Barbara Ross, Michael Johnson, Marion Francis, Irma Quitcon, Sandra Powell, Jonny Ramos, Thelma Dye, Deborah Carroll, Mary Pearl Taylor, Wakil Shakur, Carl Baptiste, Lauri Taylor, Charles Vines, Doris Shepperson, Lillian Font, Almarie Simmons, James Rashard, Allen Anderson, Ernest Adams, Ida Newton, Victoria Brown, Mercedes Colinet, Mary Harmley, Victoria Anderson, Edith Albatt, Norma Akamatsu, Judith McKenzie, Andaye Dela Cruz, Sandra McFall, Lynn Nortman, Edith Beauchamp, and Azeeza Burston on 15 April 1983 and thereafter refused to reinstate them I shall recommend that the Center offer them immediate reinstatement to their former jobs or, if such jobs no longer exist, to substantially equivalent jobs, without prejudice to their seniority and other rights and privileges, and to make them whole for any loss of earnings they may have suffered by reason of unlawful discrimination against them. The backpay provided and any interest due thereon shall be computed in the manner prescribed in *F. W. Woolworth Co.*, 90 NLRB 289 (1950), and *Florida Steel Corp.*, 231 NLRB 117 (1977).

I shall recommend also that the Center be required to post the usual notice advising its employees of their rights and the result of this proceeding.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[66]

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[63] Counsel for the General Counsel contends that the logbooks are reliable, probative evidence of when the Union picketed. However, as noted, the logbooks did not always reflect the presence of pickets in the period between 29 September and 16 December, a period when it is conceded that the Union engaged in continuous picketing.

[64] *Sav-On Drugs, Inc.*, 253 NLRB 816, 822 (1980); *Schnabel Associates*, 272 NLRB 1022 (1984).

[65] The Center's contention that there should not be a backpay remedy because it discharged the 34 strikers after it was advised that the Regional Director would issue the 8(g) complaint is without merit. The Regional Director's decision did not provide an excuse for or mitigation of the Center's conduct. *Sav-On-Drugs*, supra.

[66] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

ORDER

The Respondent, Washington Heights-West Harlem-Inwood Mental Health Council, Inc., d/b/a The Council's Center for Problems of Living, New York, New York, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Discharging its employees or otherwise discriminating against them with respect to their tenure of employment, or any term or condition of employment because they engaged in protected concerted activities on behalf of the Union, or any other labor organization.

(b) In any like or related manner interfering with, restraining, or coercing its employees in the exercise of their Section 7 rights.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Offer immediate and full reinstatement to William Wright, Audrey Singleton, Roslyn Darzy, Barbara Ross, Michael Johnson, Marion Francis, Irma Quitcon, Sandra Powell, Jonny Ramos, Thelma Dije, Deborah Carroll, Mary Pearl Taylor, Wakil Shakur, Carl Baptiste, Lauri Taylor, Charles Vines, Doris Shepperson, Lillian Font, Almarie Simmons, James Rashard, Allen Anderson, Ernest Adams, Ida Newton, Victori Brown, Mercedes Colinet, Mary Harmly, Victoria Anderson, Edith Albatt, Norma Akamatsu, Judith McKenzie, Andaye Dela Cruz, Sandra McFall, Lyn Nortman, Edith Beauchamp, and Azeeza Burston to their former jobs and, if those jobs no longer exist, to substantially equivalent jobs without prejudice to their seniority or other rights and privileges and make them whole in the manner described in the remedy section. Further, the Center will expunge from its records any reference to the discharge of the above-named employees on 15 April 1983, and notify them in writing that this has been done and that evidence of these unlawful discharges will not be used as a basis for future personnel action against them.

(b) Preserve and, on request, make available to the Board or its agents for examination and copying, all payroll records, social security payment records, timecards, personnel records and reports, and all other records necessary to analyze the amount of backpay due under the terms of this Order.

(c) Post at its New York, New York facility, copies of the attached notice marked "Appendix."[67] Copies of the notice, on forms provided by the Regional Director for Region 2, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material.

IT IS FURTHER RECOMMENDED that the complaint against the Union in Case 2-CG-3[illegible] be dismissed.

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

WE WILL NOT discourage activities on behalf of District 1199, National Union of Hospital and Health Care Employees, RWDSU, AFL-CIO or any other labor organization by discharging our employees or otherwise discriminating against our employees with respect to their tenure of employment, or any term or condition of employment.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce our employees in the exercise of their Section 7 rights.

WE WILL offer immediate and full reinstatement to William Wright, Audrey Singleton, Roslyn Darzy, Barbara Ross, Michael Johnson, Marion Francis, Irma Quitcon, Sandra Powell, Jonny Ramos, Thelma Dye, Deborah Carroll, Mary Pearl Taylor, Wakil Shakur, Carl Baptiste, Lauri Taylor, Charles Vines, Doris Shepperson, Lillian Font, Almarie Simmons, James Rashard, Allen Anderson, Ernest Adams, Ida Newton, Victoria Brown, Mercedes Colinet, Mary Harmley, Victoria Anderson, Edith Albatt, Norma Akamatsu, Judith McKenzie, Andaye Dela Cruz, Sandra McFall, Lynn Nortman, Edith Beauchamp, and Azeeza Burston to their former jobs or, if those jobs no longer exist, to substantially equivalent jobs, without prejudice to their seniority or other rights and privileges, and make them whole in the manner described in the Remedy. Further WE WILL expunge from our records any reference to the discharge of the above-named employees on 15 April 1983, and notify them in writing that this has been done and that evidence of these discharges will not be used as a basis for future personnel actions against them.

WASHINGTON HEIGHTS-WEST HARLEM-INWOOD MENTAL HEALTH COUNCIL, INC. D/B/A THE COUNCIL'S CENTER FOR PROBLEMS OF LIVING

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[67] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

Rose Metal Products, Inc. *and* **Tony Tettleton, Petitioner and Sheet Metal Workers Local 208.** Case 17–UD–98

July 26, 1988

DECISION ON REVIEW AND ORDER

By Chairman Stephens and Members Johansen, Babson, and Cracraft

Following a hearing, the Regional Director on October 9, 1987, issued his Decision and Order Dismissing Petition. Thereafter the Employer filed a Request for Review of the Regional Director's decision. On December 24, 1987, the Board granted the request for review.

The National Labor Relations Board has reviewed the record in light of the request for review and has decided to affirm the Regional Director.

The Employer is engaged in the fabrication and sale of custom metal products. The Employer and the Union have had a collective-bargaining relationship for at least the past 20 years.[1] The most recent collective-bargaining agreement runs from September 1, 1987, to August 31, 1989. It contains a union-security provision.

The Petitioner, Tony Tettleton, has worked for the Employer since March 1968. He spends a minimum of 80 percent of his time performing unit work. He is a union member, pays union dues, and votes in union elections.[2] Subsequent to the filing of the deauthorization petition on September 11, 1987, the Union argued that Tettleton was a supervisor and thus ineligible to file the petition.

In his decision, the Regional Director determined that Tettleton was a statutory supervisor and was therefore ineligible to file the deauthorization petition. We agree.

We find that Tettleton is a supervisor under Section 2(11) of the Act.[3] Tettleton is responsible for assigning work to the unit employees, and he utilizes independent judgment to do so. When a work order is given to him by Foreman Keeter, Tettleton assigns the task to from six to eight employees based on his assessment of the skill level required by the work order, his knowledge of the skill level possessed by the individual employees, and the availability of the employees to work on the order. He has also transferred work from one employee to another. He can also instruct the unit employees to correct flaws in their work.

Tettleton also makes effective recommendations on discharges. He informs Foreman Keeter and Vice President Lehar of the progress of the unit employees. He also gives Keeter and Lehar his estimation of the employees' skill levels and whether they can perform the required work. After Tettleton expressed dissatisfaction with the work of employees Gates and Hamilton, they were terminated. There is no evidence that the Employer conducted an independent investigation to verify Tettleton's evaluations.

As noted, the Regional Director found that as a supervisor, Tettleton was barred from filing the deauthorization petition. We agree with the Regional Director's result but note that the Board has never directly addressed this question.[4]

After examining the language of Section 9(e) of the Act,[5] we find that a statutory supervisor is precluded from filing a deauthorization petition. This holding is consistent with our prior decisions precluding a statutory supervisor from participating in matters that concern solely the relationship between the employees and their collective-bargaining representative. Interpreting the former Section 9(e)(1) of the Act,[6] the Board in *St. Paul & Tacoma Lumber Co.*, 81 NLRB 434 (1949), concluded that supervisors could not vote in union-shop authorization elections. The Board reasoned that as Congress had decided to let only "employees" vote in an election to authorize a union-shop agreement and as a supervisor was not an employee within the meaning of the Act, the supervisor was precluded from voting in the election. Having found that

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[1] The unit description in the most recent contract is: All full-time and part-time production and maintenance employees employed by Rose Metal Products, but excluding professional employees, office clerical employees, guards and supervisors as defined in the Act.

[2] For purposes of our analysis, we have assumed arguendo that Tettleton is a unit member.

[3] The Regional Director also determined that Tettleton possessed apparent authority to act on behalf of the Employer and was therefore an agent of the Employer. We find it unnecessary to reach this determination as we have found that Tettleton is a statutory supervisor.

[4] We disavow the Regional Director's reliance on *Hydraulics Unlimited Mfg. Co.*, 107 NLRB 1646 (1954), and *Helena Cable T.V.*, 249 NLRB 542 (1980), as supporting the proposition that a supervisor is ineligible to file a petition under Sec. 9(e)(1). In both cases, the Board found that the individuals filing the petitions were not representatives of the employer, but were employees eligible to file a deauthorization petition. In neither case did the Board decide whether a supervisor is eligible to file a deauthorization petition pursuant to Sec. 9(e)(1).

[5] Sec. 9(e)(1) states:

> Upon the filing with the Board, by 30 per centum or more of the employees in a bargaining unit covered by an agreement between their employer and labor organization made pursuant to Section 8(a)(3), of a petition alleging they desire that such authorization be rescinded, the Board shall take a secret ballot of the employees in such unit and certify the results thereof to such labor organization and to the employer.

[6] Sec. 9(e) of the Act, which provided for elections to authorize and rescind union-shop agreements, was enacted by Congress as part of the Labor Management Relations Act, 1947. Former Sec. 9(e)(1), which provided for elections to authorize these agreements, was repealed in 1951. Pub. L. 189-534 § (c), 65 Stat. 601 (1951). Congress eliminated the necessity for these elections because they had proven expensive and burdensome for the Board, and because they had almost always resulted in a vote favoring the union shop. H. Rep. 1082, 82d Cong., 1st Sess. 2-3, *reprinted in* 1951 U.S. Code Cong. & Ad. News 2379, 2381.

289 NLRB No. 146

Congress did not intend to permit supervisors to vote in elections to authorize such agreements, we believe that it would be anomalous to conclude that Congress gave supervisors the right to file petitions to rescind such agreements.

Furthermore, the Board relied on similar reasoning to find that a supervisor could not file a decertification petition in *Doak Aircraft Co.*, 107 NLRB 924 (1954). The Board noted that Section 9(c)(1)(A),[7] which provides for the right to file a decertification petition, refers only to "employees" filing such petitions. Declaring that one purpose of the Act was to delineate supervisors as representatives of management, the Board concluded that permitting supervisors to act as employee representatives by filing such petitions would defeat the Act's purpose because supervisors would then be faced with a divided allegiance to the employees and to management.

We are persuaded that Congress was guided by the same considerations in enacting the present Section 9(e)(1). Section 9(e)(1) refers to a deauthorization petition filed by "30 per centum or more of the *employees* in a bargaining unit." (Emphasis added.) We do not discern any indication that Congress was not equally concerned with the problem of divided allegiance in the situation when a supervisor files a deauthorization petition.

We therefore reaffirm our holdings in *St. Paul & Tacoma Lumber*, and in *Doak Aircraft* and subsequent cases,[8] that Congress did not intend to include supervisors under the term "employees" in Section 9(e) and Section 9(c)(1)(A). We thereby preclude the anomalous situation of a supervisor/-petitioner being a party in decertification and deauthorization cases. As a party, the supervisor/-petitioner could call, examine and cross-examine witnesses, file objections to the elections, and file requests for review. The supervisor/petitioner would act as the representative of the unit members but simultaneously would be an agent of the employer. Our holding today precludes a conflict arising under Section 9(e), just as *Doak Aircraft* foreclosed it under Section 9(c)(1)(A).[9]

Contrary to the Employer, we do not find *Montgomery Ward*, 115 NLRB 645 (1956), and its progeny[10] controlling. In *Montgomery Ward* Supervisor DuFour was a unit member and had been allowed to vote in the representation election by agreement of the employer and the union. The Board determined that DuFour's fellow employees viewed him as "one of themselves." Therefore the Board concluded that certain statements made by DuFour did not intimidate the unit employees and were not attributable to the employer. Thus, DuFour's statements did not violate Section 8(a)(1) of the Act.

That line of cases is not inconsistent with *Doak Aircraft*, nor our holding today because the *Montgomery Ward* line of cases concern different concepts under the Act. *Montgomery Ward* concerned an alleged violation of Section 8(a)(1). The Board determined whether the employer "interfere[d] with, restrain[ed], or coerce[d] employees" in the exercise of their Section 7 rights. That determination turned on whether the supervisor's actions could coerce employees because they feared retaliation from management and, thus, whether the actions inhibited the exercise of their Section 7 rights. The finding that the employees viewed the supervisor as "one of themselves" and that management had not authorized his actions indicated that the employees could not feel coerced or intimidated. That issue is different from the one of whether a supervisor should act as a representative of the employees by filing a decertification or as here, a deauthorization petition on their behalf. The issue in *Montgomery Ward*, therefore, was employer liability for the conduct of its supervisor. As stated in *Doak Aircraft*, which we have reaffirmed today, a supervisor may not file such a petition because he is a member of management and may not engage in activities that would create the possibility of a divided allegiance. That determination is fully consistent with *Montgomery Ward*. Indeed, the Board emphasized in *Montgomery Ward* that the supervisor who was a unit member remained "an arm of management."

In light of our analysis and determination that Tettleton is a supervisor, we conclude that Tettleton was not eligible to file a deauthorization petition. Accordingly, we shall affirm the Regional Director's Decision and Order, and shall dismiss the petition.

ORDER

It is ordered that the petition is dismissed.

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[7] The pertinent language of Sec. 9(c)(1)(A) is:

> (c)(1) Whenever a petition shall have been filed, in accordance with such regulations as may be prescribed by the Board—(A) by an employee or group of employees or any individual or labor organization acting in their behalf . . . .

[8] See, e.g., *Times-Herald*, 253 NLRB 524 fn. 1 (1980).

[9] Sec. 102.83 of the Board's Rules and Regulations provides further support for our conclusion. That section, in relevant part, states that a "petition to rescind the authority of a labor organization to make an agreement requiring as a condition of employment membership in such labor organization may be filed by an *employee or group of employees* on behalf of 30 percent or more of the employees in the bargaining unit covered by such an agreement." [Emphasis added.]

[10] See, e.g., *Craft Maid Kitchens*, 284 NLRB 1042 (1987); *A. T. & K. Enterprises*, 264 NLRB 1278 (1982); *Robertshaw Controls Co.*, 263 NLRB 958 (1982).

Frank Mascali Construction, G.C.P. Co.; Frank Mascali Construction Co., Inc. *and* **John Kuebler**

Local 282, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, AFL-CIO[1] *and* **John Kuebler**

Local 282, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, AFL-CIO (Willets Point Contracting Corp.) *and* **Charles Curd**

Local 282, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, AFL-CIO (Allied Used Truck Exchange, Inc.) *and* **Charles Curd.** Cases 29-CA-5975, 29-CB-3075, 29-CB-3115, and 29-CB-3235

July 26, 1988

SUPPLEMENTAL DECISION AND ORDER

BY CHAIRMAN STEPHENS AND MEMBERS JOHANSEN AND BABSON

On November 17, 1986, Administrative Law Judge William F. Jacobs issued the attached supplemental decision. The Respondent filed exceptions and a brief in support of its exceptions. The Charging Parties also filed exceptions and the Respondent filed a brief in opposition to the Charging Parties' exceptions.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the supplemental decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings,[2] and conclusions[3] as modified, and to adopt the recommended Order as modified.[4]

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge as modified below and orders that the Respondent, Local 282, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, AFL-CIO, Flushing, New York, its officers, agents, and representatives, shall take the action set forth in the Order as modified.

Elliot J. Mandel, Esq., for the General Counsel.

J. Warren Mangan, Esq. (O'Connor & Mangan, P.C.), of Long Island City, New York, and *Franklin K. Moss, Esq. (Cohen, Weiss & Simon)*, of New York, New York, for the Respondent.

Arthur Z. Schwartz and *Daniel E. Clifton, Esqs. (Clifton & Schwartz)*, of New York, New York, for the Charging Parties.

Robert M. Ziskin, Esq. (Kimmel & Ziskin), of Melville, New York, for Hendrickson Brothers.

SUPPLEMENTAL DECISION

WILLIAM F. JACOBS, Administrative Law Judge. This is a supplemental proceeding[1] to determine what, if anything, is due to the discriminatees under the make-whole order issued in these consolidated cases.[2] More specifically, there is the question concerning the amount of backpay and other benefits due John Kuebler and Charles Curd for losses they may have suffered by reason of Respondent's discriminatory implementation of

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[1] On November 1, 1987, the Teamsters International Union was readmitted to the AFL-CIO. Accordingly, the caption has been amended to reflect that change.

[2] The judge made the following inadvertent factual errors that we find do not affect his ultimate conclusions. Contrary to the judge's statement, discriminatee Curd requested equipment trailer work on more than one occasion since his reinstatement. It was discriminatee Curd, not Kuebler, who testified that if he were still working at Willets and his Union told him to work behind the picket line, he would have done so. The judge failed to mention that Curd initially failed to report earnings from RCR, a construction company.

[3] The General Counsel listed earnings from Curd's cab and RCR employment as interim earnings only to the extent that, absent the discrimination, Curd's employment at Willets on particular days would have precluded employment with these employers. Other earnings from these employers were not listed as interim earnings, but as supplemental income not set off against gross backpay, inasmuch as they were considered earnings from a second job that he also held prior to the unfair labor practice and that he continued to hold during the backpay period. The Respondent excepts to those portions of the cab and RCR earnings that were treated as supplemental income. We find that the General Counsel was correct in her determination that portions of the cab and RCR earnings constituted supplemental income. *Cumberland Farms Dairy of New York*, 266 NLRB 855 (1983).

We adopt the judge's conclusion, to which no exceptions have been filed, that under the circumstances of this case, Curd and Kuebler did not waive their rights to obtain backpay from the Respondent Union by demanding that it withdraw its arbitration request to Willets Point and by signing general releases concerning that arbitration. We, therefore, find it unnecessary to pass on the judge's reliance on *Michael M. Schaefer*, 261 NLRB 272 (1982), enfd. 697 F.2d 558 (3d Cir. 1983), rehearing denied 702 F.2d 57 (1983). We also note that the judge's June 19, 1986 Decision and Order, cited by him at sec. I,6, par. 2 of his supplemental decision, was reversed by the Board in *Teamsters Local 282 (Willets Point Contracting)*, 288 NLRB 56 (1988). This reversal does not affect the outcome of this case.

[4] We find that the judge made the following errors in his computation of backpay. The judge inadvertently calculated gross backpay, annuity, and pension fund contributions through June 30, 1983, 2 months past the May 2, 1983 reinstatement of the discriminatees. The computation for this quarter should, therefore, be recalculated, using a daily computation. Further, the record establishes that Curd earned $200 when he drove a truck to Florida on July 27, 1977, and that this trip continued through July 28. The judge erroneously failed to include these interim earnings in his calculations. Finally, the judge, in his supplemental order and in his appendix B, inadvertently calculated Curd's cab and RCR interim earnings based on the General Counsel's rejected backpay formula, rather than the Christman formula, which the judge in his decision had adopted.

The Regional Director should recalculate the discriminatees' respective backpay entitlements in accordance with these corrections.

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[1] Case 29-CB-4937, which had been consolidated for hearing with the other cases here by Order dated 8 November 1983, was subsequently severed therefrom for decision-writing purposes by Order dated 16 June 1986.

[2] *Frank Mascali Construction*, 251 NLRB 219 (1980), enfd. 697 F.2d 294 (2d Cir. 1982), cert. denied 456 U.S. 988 (1982).

289 NLRB No. 147

their referral arrangement and the question whether contributions should be made on behalf of Kuebler and Curd to the Local 282 Health and Welfare, Annuity, and Pension Funds. The instant proceeding was held before me on various dates between 13 August 1984 and 4 October 1985 in Brooklyn, New York, based on a backpay specification that issued 29 July 1983 and an amended backpay specification that issued 23 September 1983.[3] All parties were afforded opportunity to participate in the hearing, to present evidence, examine witnesses, and to argue orally. Briefs were filed by the parties.

Issues

The issues are framed by the pleadings—the Region's amended backpay specification and Respondent's answer thereto that contains numerous affirmative defenses—all considered in light of the record and the legal arguments and citations included in the briefs.

The Backpay Specification Formula

1. Whether the Regional Director properly issued the backpay specification in accordance with the Board's Rules and Regulations and Compliance Manual.
2. Whether the formula selected by the Region in drafting the backpay specification is reasonable and appropriate or whether one of the four alternative formulas suggested by the Respondent would be more accurate and therefore preferable.
3. Whether the *Woolworth* formula should be used under the circumstances of this case and, if so, in what periods of time.

Additional Affirmative Defenses[4]

1. Whether union dues and assessments should be subtracted from backpay owed.
2. Whether Kuebler and Curd obtained substantially equivalent employment at Hendrickson Brothers.
3. Whether Kuebler and Curd waived their backpay claims by:
   (a) Demanding that the Union withdraw its arbitration request, and (b) signing general releases without reservation.
4. Whether Curd willfully concealed interim earnings and is therefore not entitled to backpay for those quarters in which he did so.
5. Whether Kuebler and Curd failed to make adequate efforts to mitigate damages by:
   (a) Failing to seek interim employment during certain quarters, and (b) voluntarily being absent an excessive number of days at their interim employers.
6. Whether Hendrickson Brothers is either soley or primarily liable for damages caused by its discharge of Kuebler and Curd.
7. Whether the fringe benefit computations in the Region's backpay specification are correct.
8. Whether the backpay claim is punitive and would endanger the Union's continuing viability.

On the entire record in this case, including my observation of the demeanor of the witnesses, and after due consideration of the briefs, I make the following

FINDINGS OF FACT

I. THE BACKPAY SPECIFICATION FORMULA

1. In Respondent's first affirmative defense, as contained in its answer to the Region's backpay specification, Respondent asserts that the Regional Director failed to comply with the requirements of Section 102.52 and 102.53(a) of the Board's Rules and Regulations and of paragraph 10532.3(m) of the Board's Compliance Manual. Although this defense appears in Respondent's answer it is neither discussed nor argued in its brief. It would appear that the Respondent has abandoned this defense.

Section 102.52 deals with the issuance of the backpay specification and notice of hearing while Section 102.53(a) discusses the content of the backpay specification. The Regional Director has complied with both sections of the Board's Rules and Regulations.

Section 10532.3(m) of the Board's Compliance Manual requires that a copy of the backpay computation be sent to the Respondent together with a letter requesting payment. The record clearly indicates that the Regional Office sent a copy of the backpay specification to the Respondent, that the same was received by Respondent, and, indeed, that Respondent acknowledged receipt thereof. The Regional Director complied with the Rules and Regulations and with the Board's Compliance Manual and I shall recommend that Respondent's first affirmative defense pleading to the contrary be rejected.

2. On 15 August 1980 the Board issued its Decision and Order in the underlying case.[5] The Order provided inter alia:

> (b) Request Willets Point Contracting Corp. to immediately and fully reinstate John Kuebler and Charles Curd to their former jobs or, if those jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority or any other rights or privileges previously enjoyed.
>
> (c) Make whole John Kuebler and Charles Curd for any loss of pay and other benefits they may have suffered by reason of Respondent Union's discriminatory action in causing their discharge from Willets Point Contracting Corp. and its discriminatory failure and refusal to refer them to work assignments. In the event that that employer reinstate the above-named employees as requested, pay them backpay for all days they would have worked between October 21, 1977, and the date of their reinstatement. In the event that that employer will not reinstate them, continue to pay them backpay until such time as they have found substantially equivalent employment. Backpay with interest thereon shall be computed in the manner prescribed in *F. W. Woolworth Company*, 90 NLRB 289 (1950),

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[3] The General Counsel's motion to amend backpay specification made at the hearing was granted.

[4] Although Respondent's answer contains 16 affirmative defenses, several are repetitive, and deal with the same subjects as contained in others.

[5] *Frank Mascali Construction*, supra.

> and *Florida Steel Corporation*, 231 NLRB 651 (1977). (See, generally, *Isis Plumbing & Heating Co.*, 138 NLRB 716 (1962).) Further, make whole the above-named employees by making contributions on their behalf to the Union's health and welfare and pension funds.[6]
>
> (d) In conjunction with Respondent Employers, with Respondent Union primarily liable, make whole John Kuebler and Charles Curd for any loss of pay and other benefits they may have suffered by reason of Respondent Union's discriminatory implementation of its referral system arrangement with Respondent Employers from July 25, 1977, to October 21, 1977. Backpay shall be computed in the manner set forth above. Further, in conjunction with Respondent Employers, with Respondent Union primarily liable, make whole the above-named employees by making contributions on their behalf to the Union's health and welfare and pension funds.[7]

The procedure chosen by the Region to effectuate the Board's Order consists of examining the seniority list of Willets Point Contracting Corp., where Kuebler and Curd would have been employed but for the discrimination against them, and ascertaining which employees were junior to them during the backpay period. As the individual who prepared the backpay specification, Field Examiner Comstock testified she examined Willet's shape sheets to see which of these junior employees were being referred to Frank Mascali Construction. She then looked up the earnings of those employees in the Mascali ledger and credited Kuebler and Curd with those earnings. Where the junior employees were sent to employers other than Mascali, and Comstock did not have access to their records, she assumed that the junior employees would work an 8-hour day and multiplied the hourly wage provided by the Teamsters Local 282 contract by the assumed number of hours worked to determine earnings. Comstock examined Willet's payroll records for the period 21 October 1977 through 2 May 1983, which showed for every one of its employees which days he worked and in most cases how many hours. Then, using the Willets' seniority list, Comstock determined which employees were immediately junior to Kuebler and Curd and substituted those employees' earnings for Kuebler and Curd on days when Kuebler and Curd should have worked. Comstock determined Kuebler's and Curd's places on the seniority list by referring to the underlying Decision and Order.

The backpay specification takes into account the days of work that should have been made available to Kuebler and Curd for the entire backpay period and those days that Kuebler and Curd testified to being unavailable. Interim earnings were also computed and deducted from gross backpay.

The General Counsel and Charging Party take the position that the backpay specification issued by the Region is reasonable, appropriate, and follows the mandate of the Board. According to Comstock, the formula used by the Region was selected because there were so many variables to be considered. Thus, the various drivers worked under different contracts from time to time, sometimes the excavation contract, at other times the materials contract. There were also different amounts of overtime worked by different drivers. There was premium pay for driving the equipment trailer and for towing. Because of the numerous variables, to simplify the backpay specification, the Region decided simply to take the earnings paid by Willets to the employees immediately junior in seniority to Kuebler and Curd and use such earnings as a basis for finding the gross earnings that Kuebler and Curd might have earned but for the discrimination against them. Whichever of these employers worked a particular day, his earnings were used in the computation.

The Region rejected the use of the formula suggested in the compliance manual in which a discriminatee's predischarge earnings are averaged and projected into the postdischarge period because the use of such a formula presupposes that employment throughout the backpay period remains steady, that it not be seasonal, and that the seniority position of the discriminatee involved remain constant. However, Frances Comstock, the Board agent who investigated the backpay situation and who formulated the backpay specification, testified that following the discriminatory failure to refer the discriminatees and their subsequent discharge, work opportunities increased at Willets Point, the construction industry being seasonal, and Kuebler and Curd moved far up the seniority list so that use of such a formula would not be equitable to the discriminatees.

Counsel for the Respondent, in his brief, agrees with the Charging Parties' counsel that an administrative law judge may adopt the General Counsel's formula so long as a rational basis exists for the formula used.[8] He states correctly, however, that when Respondent has presented alternative formulas the Board requires that the administrative law judge make recommendations to the Board concerning the most accurate method of determining the amounts.[9] That I intend to do.

Rather than my adopting the Region's formula, which Respondent terms irrational, Respondent urges that I adopt any one of four formulas contained in the Compliance Manual. Respondent charges that instead of taking the earnings of one representative employee or averaging the earnings of a group of representative employees, the Region's formula aggregates the earnings of junior employees and presumes that "Kuebler and Curd were available for work 365 days a year (including weekends) during the backpay period, and that they would in every case have been qualified *and* willing to accept all available overtime work, and to perform equipment trailer work which they did not perform prior to the backpay period or after its conclusion."

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[6] Fns. omitted.

[7] *Ibid.*

[8] *Teamsters Local 164*, 274 NLRB 909 (1985); *Kansas Refined Helium Co.*, 252 NLRB 1156 (1980); *Laborers Local 38 (Hancock-Northwest)*, 268 NLRB 167 (1983).

[9] *American Mfg. Co. of Texas*, 167 NLRB 520 (1967); *J.F.S. Alberici Construction Co.*, 249 NLRB 751 (1980); *East Wind Enterprises*, 268 NLRB 655 (1984); *Kansas Refined Helium*, supra.

Respondent points out that as a consequence of the Region's methodology the gross backpay claimed by the General Counsel for Curd and Kuebler far exceeds the actual earnings of employees with much greater seniority than they, and who historically, both before and since the backpay period, have worked more regularly, sought more overtime, and earned much more than Kuebler and Curd.

Regarding Respondent's position concerning the failure of the Region's formula to take into account probable absences of Kuebler and Curd during the backpay period, Comstock admitted in her testimony that she relied soley on the testimony of the discriminatees, that if they said they would have been available for work, she credited them with whatever earnings any one of the junior employees who happened to work that day would have earned. She also admitted that she did not compare the amounts credited to Kuebler and Curd as gross backpay to amounts earned by senior employees. Rather, she stated that even if she had made such comparisons and found that she had credited them with greater earnings than more senior employees, she would merely have assumed that senior employees would have turned down available work that Kuebler and Curd were available for and willing to perform. Comstock testified that this assumption would have been made on the basis of resolving all doubts in favor of the discriminatees.

While under examination by Respondent's counsel, Comstock testified that she did not ask Kuebler or Curd whether they were ready, willing, and able to work at Willets Point each day, rather she asked them to identify any day when they were not ready, willing, or able to work. Their replies were that there were no such days. She also testified that she asked them if they were available for work every day that work was available for them at their interim employer, Hendrickson Brothers, and they replied in the affirmative that there were no days when they were not ready or willing or able to work. Under cross-examination, however, Kuebler freely admitted that there were a few times when work was available at Hendrickson Brothers when he did not shape because he was campaigning for union office, was ill, or was involved in litigation at the NLRB. Comstock testified that if she had been aware at the time she formulated the backpay specification that either Kuebler or Curd had missed work at Hendrickson Brothers because of illness not related to employment she would not have credited them with gross backpay due for those days.

Based on the testimony of Kuebler and Comstock, Respondent urges[10] that because the Region's formula does not take into consideration the discriminatees' absences, it is unreasonable and should be rejected in favor of one of those suggested in its brief and in the Compliance Manual because each of the formulas contain "normal or average amounts of absenteeism built into the computation."[11] I find Respondent's argument persuasive and one reason for rejecting the Region's formula in favor of one of the standard formulas suggested by Respondent.

A second argument put forth by Respondent for rejecting the Region's formula concerns its presumption that Kuebler and Curd would have been equipment trailer drivers. The record indicates that equipment trailer drivers receive a preminum pay and substantial overtime, working sometimes 15 or 16 hours a day. The drivers of 10-wheelers and flat trucks do not receive nearly as much overtime.

During the backpay investigation Comstock asked Kuebler whether he had ever operated an equipment trailer for Willets prior to his discharge. He told her that he had not. Kuebler, at the hearing, testified that he had never driven the trailer nor ever claimed the right to do so. Frank Daly, a member of Willets' management familiar with the duties of its employees, confirmed in his testimony that Kuebler never drove the equipment trailer, never was taught how to do so, and never expressed any interest in learning how to drive either the equipment trailer or the equipment carried thereon.

Since Kuebler's return to Willets he has been driving a flat truck and occasionally a 10-wheeler. At times when Kuebler had an opportunity to make more money driving a 10-wheeler, he turned down the opportunity in favor of driving the flat truck. He has also, on occasion, refused opportunities to work overtime and to accept available night premium work.

On the basis of the fact that Kuebler never drove an equipment trailer either before his discharge or after his return to Willets and his disinclination, at times, to accept premium work or overtime, Respondent argues that it is too speculative to credit him with backpay based on the equipment trailer rate. Comstock testified that although she felt that crediting Kuebler with the equipment trailer rate was speculative, she nevertheless did so because she did not know for certain that Kuebler would not have been given the trailer work before the junior employees, or made a claim for it. Nor did she know whether Willets would have trained him to perform such work.

She testified that the question of awarding Kuebler the equipment trailer work was resolved in his favor because when there are ambiguities they are resolved in favor of the discriminatee rather than the wrongdoer.

Although I am aware of the line of cases[12] that stands for the proposition that "the backpay claimant should receive the benefit of any doubt rather than the Respondent, the wrongdoer responsible for the existence of any uncertaintly and against whom any uncertaintly must be resolved," the application of that doctrine to the set of circumstances here extant would be unjust. To credit Kuebler with an equipment trailer rate when he had never performed such work before his discharge nor after his return, was not trained to operate the equipment he might have to carry, and showed no interest in operating the equipment trailer based on the mere possibility that he might have done so had he not been discharged strains the proposition beyond the bounds intended by the Board. It is far more likely that, but for the discriminatory actions of the Respondent, Kuebler would have continued to drive the flat truck and 10-wheeler just as he had before his discharge and after his reinstatement.

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[10] Citing *Sioux Falls Stock Yards*, 236 NLRB 543 (1978).

[11] Citing *Midwest Hanger Co.*, 221 NLRB 911 (1975), modified on other grounds 550 F.2d 1101 (8th Cir. 1977).

[12] *United Aircraft Corp.*, 204 NLRB 1068 (1973); *Laborers Local 38 (Hancock-Northwest)*, 268 NLRB 167 (1983); *East Wind Enterprises*, 268 NLRB 655 (1984); *Davis Coal Co.*, 275 NLRB 722 (1985).

Like Kuebler, Curd did not drive an equipment trailer[13] for Willets either before his discharge or after his reinstatement. He did not drive an equipment trailer for Hendrickson Brothers nor did he ask to drive one. After reinstatement at Willets, Curd asked Daly for equipment trailer work. Daly replied that Curd was not qualified. Although Curd insisted that he was qualified, Daly refused Curd's request because in order to be able to drive the equipment trailer, the driver must not only know how to operate the tractor trailer itself, but must also be able to load and unload it. That is, he must also be able to drive the various pieces of equipment onto and off of the trailer. He must know, as well, something about the mechanics of the equipment so that when he is alone at the worksite at 4 or 5 a.m. and has to start the equipment, he must know what to do if an engine will not start. Daly testified that to learn to operate the various pieces of equipment, asphalt spreaders, dynahoes, graders, rollers, shovel loaders, etc., as well as the equipment trailer itself, it is a matter of experience. This experience is gained by accompanying an experienced equipment driver and learning from him on the learner's own time. Curd never asked Daly, who handles such matters, if he could learn to operate the various pieces of equipment in this way. Daly credibly testified that he had never seen Curd on the equipment trailer.

Although Curd, on the one occasion since his reinstatement, requested equipment trailer work, he had never done so before. When told by Daly that he was not qualified, Curd did not pursue the matter. He filed no grievance over the matter nor did he make a claim for the work when more junior employees were given the work he had requested. Finally, there is no indication that Curd attempted, as did other employees, to get the experience necessary to thoroughly learn how to operate the various pieces of equipment to qualify for the equipment trailer driver's job.

Because neither Kuebler nor Curd was qualified to operate the equipment trailer, nor seriously attempted to obtain the experience necessary for qualification either before his discharge or after his reinstatement, I find no basis for concluding that they would have been qualified or would have attempted to become qualified during the backpay period. Therefore, I find that the Region erred when it awarded Kuebler and Curd equipment trailer rates in its backpay specification. These unwarranted awards are persuasively a second reason for rejecting the Region's formula in favor of one of the standard formulas.

A third argument put forth by Respondent for rejecting the Region's formula concerns its presumption that Curd and Kuebler would have volunteered to be strikebreakers and work behind the picket lines at Aqueduct and Belmont Racetracks during the first and second quarters of 1979.

Sometime in 1974 a dissident organization within Local 282, FORE (Fear of Reprisal Ends) was founded. Its purpose was the reform of Local 282. To accomplish this purpose FORE distributed leaflets and periodically published newsletters critical of the Union's leadership. It also fielded slates of candidates during Local 282 elections in opposition to the incumbent leadership. In January 1977 Kuebler joined FORE and in June, Curd also joined.

In January 1978 there was a strike at Aqueduct and Belmont Racetracks and picket lines were established by the striking union, IBEW Local 3. Willets had the snow removal contract for both racetracks and made work available behind the picket line for its own employees and outside employees as well. Some of Willets' employees, including members of Local 282, chose to go through the picket line to work at the tracks.

On 15 February 1978 Walter Kudla, a member of FORE, wrote a letter to the president of Local 282, John Cody, charging that secretary-treasurer of Local 282, Robert Sasso, had given his permission to Willets' steward, Robert Worhacz, to have Willets' employees, members of Local 282, go through the picket lines at the racetracks and perform work that had previously been performed by the strikers. Kudla termed the strikebreakers "SCABS." In the May 1978 issue of the FORE newsletter, Kudla's letter was published, clearly placing FORE in opposition to Local 282's sanctioning of the strikebreaking activities of the membership. Although neither Kuebler nor Curd were mentioned in connection with the strikebreaking issue, another article in the same newsletter covered their longstanding feud with Worhacz and other members of Local 282's leadership.

In September 1978, FORE published another newsletter. Under the heading, "Reasons FORE Retiring Cody Sasso & Company" the article listed a number of grievances including the following paragraph:

> Secretary-Treasurer Robert Sasso allowed employee's [sic] of Willets Point Construction to cross a sanctioned picket line at Aqueduct & Belmont Race Tracks. This scab action was led by one of Sasso's top henchman, Shop Steward Robert Worhacz.

Neither Kuebler nor Curd, nor anyone else for that matter, signed this article. However, their names appear elsewhere in the newsletter in connection with other articles critical of Local 282's leadership and Curd testified that Worhacz had made the members cross the picket line and he was not happy about Worhacz leading this scab action.

In the last quarter of 1978, Kuebler and Curd were engaged in running for union office on behalf of the FORE faction against the incumbents. Kuebler ran for vice president of Local 282, Curd for delegate trustee. During their campaign for office neither Kuebler nor Curd took issue with any of the positions of FORE as reflected by the newsletter articles of May and September 1978.

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[13] In the late 60s or early 70s Curd drove the tractor that was on the equipment trailer while on a job on Staten Island "all over the place." He also moved equipment "a couple of times" in East Meadow, Long Island. He testified that he had driven certain pieces of equipment "a long time ago" but had never driven other types of equipment. On one occasion, after being reinstated, an experienced equipment trailer driver let Curd take over the operation of the tractor for a few minutes. Curd told Daly about this when he asked for tractor trailer work. This, however, was the extent of Curd's experience.

In the winter of 1979 Willets again contracted to supply operating engineers and chauffeurs to work behind picket lines at Belmont and Aqueduct Racetracks where once again racetrack employees were on strike. Once again Willets offered this work first to its own employees, then to outside workmen. Kuebler testified, regarding this period, that much later, during the 1981 election campaign, when he was running once again for union office, he referred back to the period in 1979 when employees worked behind the picket line at the tracks and termed such work, "scab work." Kuebler explained, however, that if he termed such work, "scab work that shouldn't be performed by any union member," he did so in one of the newsletters, and was campaigning at the time and that "all is fair in love and war." He thus implied that this remarks should be merely considered campaign puffing and that whatever he said about working behind the picket line being scab work should be taken with a grain of salt and that had he been given the chance, he would have accepted the job himself. On another occasion, while testifying, Kuebler took an even more affirmative position stating that he would have gone through the picket line because he had been blackballed by the Union, was on the street and starving, and could have earned $17,000 for 7-1/2 weeks' work.

Curd testified in a fashion somewhat similar to Kuebler. He stated that IBEW Local 3 took a lot of jobs away from Local 282 and defied Local 282's picket line. Curd testified in explanation, "This is one of Sasso's reasons for getting even with them (Local 3). Basically it's an election year and I can yell about that because we weren't there and its an election. We tried to zing them with it." When asked if he agreed with what Sasso did, Curd replied:

> To an extent I did. Like I said, it shouldn't have went that far. We should have never let Local 3 get away with what they did. They took our jobs away and they took Teamsters jobs away and everything and they crossed our picket lines. Basically, what this is is an eye for an eye. Its [sic] not a Teamster local. If it was a Teamster Local, you don't cross their picket line, but this is not another Teamster Local . . . . As long as the Secretary-Treasurer of this Local orders me to cross the picket line, I'm going to cross it.

From the testimony and other record evidence cited, Respondent argues that in the absence of discrimination if Kuebler had continued to work at Willets, it is inconceivable that he would have compromised his publicly proclaimed principles and worked as a strikebreaker. Regarding Curd, Respondent argues that although Curd has no such principles and is capable of lying and being hypocritical, his closeness to and his respect for Kuebler would not permit him to go through the picket line if Kuebler refused to do so. However, Respondent's testimony when he said that if he were still working at Willets and his Union told him to work behind the picket line, he would have done so. If Kuebler would have worked behind the picket line, so would Curd. To this extent, the Region's formula is acceptable, but the use of any one of the four standard formulas is not inconsistent with this finding.

Respondent argues in the alternative that even if Kuebler and Curd would have worked as strikebreakers, the General Counsel's formula presupposes that Kuebler and Curd would have worked behind the picket line 7 days a week, 24 hours a day, for 2 months. Respondent points out that since no other member of Local 282 undertook such a grueling schedule, such a presumption is not well founded. In support of this contention Respondent points out that initially only one employee of Willets chose to work at the track behind the picket line and when others joined him, they all worked on an intermittent basis. Indeed the record shows that only a few employees worked the 24-hour schedule for as much as a few weeks. Most worked 2 weeks or less of the 24-hour schedule. In determining how much of the work done behind the picket line should be credited as backpay for Kuebler and Curd, I shall take into consideration Respondent's argument that no other employee worked a 24-hour schedule for the entire period during which the racetrack work was available.

A fourth argument put forth by Respondent for rejecting the Region's formula is that it is punitive in nature in that it results in Kuebler and Curd receiving far more than they would if any one of the traditional formulas were used. Respondent argues that when Comstock compared the amount of backpay due the discriminatees under the Region's formula with the amount that they earned prior to their discharge, a substantial difference, the backpay due being far in excess of the amounts earned prior to the discharge, she should have abandoned the formula used and replaced it with one of the traditional formulas. Respondent argues that her failure to do so was unfair to Respondent. Comstock, however, in her testimony, stated that she chose to keep the Region's formula because her evaluation was made from the standpoint of what would be fair to the Respondent.

The General Counsel points out, as noted above, that predischarge earnings would not have been an appropriate basis for a formula because job opportunities at Willets increased substantially during the backpay period and Kuebler's and Curd's place on the seniority list improved drastically during the backpay period. Therefore, to simply use the predischarge earnings as a basis for a formula would not put Kuebler and Curd in the position they would have been in but for the discrimination against them, but rather would unfairly penalize them. I believe that the General Counsel has the better of the argument and that it would have been unfair to Kuebler and Curd to use their predischarge earnings as a basis for the backpay formula.

Respondent argues further that before adopting the formula eventually used in the backpay specification, the compliance officer and Ms. Comstock should have compared the gross backpay awarded to Kuebler and Curd with the pay that other more senior employees earned during the backpay period. If this had been done, Respondent posits, it would have been determined that Kuebler and Curd were being credited with backpay far in excess of that earned by employees senior to them and that the formula used was unreasonable.

Comstock testified that she made no such comparison and was not obligated to do so. She stated that it is quite conceivable that under certain circumstances Kuebler and Curd could legitimately have earned more during the backpay period than employees with more seniority.

Without deciding that the compliance officer had any obligation to compare the backpay sums awarded to Kuebler and Curd with those earned by more senior employees, I find that the record reflects that this is the case and that this fact is some indication that the Region's formula may not be a reasonable one. Indeed, the fact that Kuebler's and Curd's calculated backpay is higher than the pay actually earned by more senior employees during the backpay period is merely the product of Comstock's failure to take into consideration the discriminatees' probable absences and her crediting them with trailer work that they never would have performed.

It is well established that any formula that approximates what the discriminatees would have earned had they not been discriminated against is acceptable if it is not unreasonable or arbitrary under the circumstances.[14] The Board is vested with broad discretion in selecting a backpay formula appropriate to the circumstances of a particular case. Where awards may be only close approximations, the Board may adopt formulas reasonably designed to produce such approximations.[15]

In keeping with these principles the General Counsel and the Charging Parties would have me adopt the Region's formula as a reasonable approximation of what Kuebler and Curd would have earned but for the discrimination practiced against them. However, even keeping in mind the well-established principle that, when there are uncertainties or ambiguities, doubts should be resolved in favor of the wronged party rather than the wrongdoer,[16] there are, in my opinion, reasons discussed above for determining that perhaps the Regions' formula should not be used to determine the amount of backpay due the discriminatees. On the basis of these reasons, I choose to adopt one of the four formulas proffered by Respondent rather than the one chosen by the Region's compliance officers. Indeed, it is not only my duty to determine, under these specific circumstances, whether the backpay formula proposed by the General Counsel is a proper method of determining amounts due, but also my duty to determine which of several conflicting backpay formulas is the most accurate method of determining backpay amounts.[17]

In my opinion, the General Counsel's formula, for reasons stated above, produces backpay calculations far in excess of the wages Kuebler and Curd would have earned if they had continued in the employ of Willets without having been discriminatorily discharged. Of the four standard formulas offered in its stead by Respondent, I agree with Respondent that the formula that uses Christman's income as its base is the fairest. This is so because, first of all, he was employed at Willets Point before, during, and after the backpay period. Second, Christman, like Kuebler and Curd, drove only 10-wheelers and flat trucks and did not drive equipment trailers as did employees used by the Region in its backpay formula. Third, Christman was close to both Kuebler and Curd on the Willets Point seniority list, being the employee immediately above Curd and just two above Kuebler on the list, during all relevant periods. I shall therefore recommend that a formula based on Christman's income be used to calculate backpay due Kuebler and Curd.

3. Respondent's second affirmative defense, the third issue listed above, states that the standard *Woolworth*[18] formula is inappropriate and should not be used in the backpay calculations. Respondent argues further that if *Woolworth* is used, it should be used for the entire period including 1977 when the Region's compliance officer used a daily computation.

It is first noted that Respondent did not argue against use of the *Woolworth* formula in its brief and appears to have abandoned this position. Moreover, Respondent urges adoption of the Christman formula that is attached to its brief. The Christman formula itself includes use of the quarterly *Woolworth* formula.

Finally, in the underlying *Mascali*[19] case, the Board, in its Order, stated in relevant part:

> Backpay with interest thereon shall be computed in the manner prescribed in *F. W. Woolworth Company*, 90 NLRB 289 (1950), and *Florida Steel Corporation*, 231 NLRB 651 (1977). (See, generally, *Isis Plumbing & Heating Co.*, 138 NLRB 716 (1962)).

I see no reason why the traditional *Woolworth* formula should not be used in this proceeding and Respondent has provided me none. I shall therefore use the *Woolworth* formula in computing backpay, just as originally ordered.

Similarly, I find the Region's use of the daily computation for the third quarter 1977 to be reasonable in light of the fact that the period is less than a whole quarter. Inasmuch as Respondent failed to give any basis for its objection to the use of the daily computation, I shall recommend approval of its use.

4. Respondent urges that union dues and assessments should be subtracted from backpay owed because Kuebler and Curd would have had to make such payments had they not been discharged. True enough. However, as the General Counsel states in his brief, the figure offered by Respondent as a deduction for dues has no basis in the record. Where the particular sums mentioned come from is not at all clear. That being the case, I find that Respondent has not maintained its burden of moving that these sums should be deducted from backpay.[20]

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[14] *Kansas Refined Helium Co.*, supra; *Laborers Local 38 (Hancock-Northwest)*, supra.

[15] *Ibid.*

[16] *J. S. Alberici Construction Co.*, supra, citing *American Mfg. Co. of Texas*, 167 NLRB 520 (1967).

[17] *J. S. Alberici Construction Co.*, supra; *East Wind Enterprises*, supra.

[18] *F. W. Woolworth Co.*, supra.

[19] Supra.

[20] *Triangle Sheet Metal Works*, 267 NLRB 650 (1983).

Moreover, the Board found in the underlying case that Respondent was responsible[21] for Kuebler's and Curd's discharges and for their loss of wages during the backpay period. Respondent would now have Kuebler and Curd pay for the privilege of being discharged. I find something basically inequitable in having the discriminatees pay for the very questionable disservices rendered to them by Respondent and reject its request for payment of dues for the backpay period.

5. Respondent takes the position that Kuebler and Curd obtained substantially equivalent employment at Hendrickson Brothers while the General Counsel and the Charging Party argue that they did not. In arriving at their divergent conclusions, the parties used separate factors but similar formulas. The General Counsel used the same formula used by the Region in computing gross backpay, aggregating the earning of less senior employees at Willets without giving due consideration to the type of work they performed and without giving proper weight to the likelihood that the discriminatees would have had some absences and would not have worked every single hour of overtime available. As noted earlier, Respondent objected to this formula and I have found, for reasons stated, that these objections are well founded.

Respondent, however, urges that Kuebler and Curd not only worked many hours at Hendrickson Brothers, but that they failed to work many hours at Hendrickson Brothers when work was available to them. By adding the hours worked to those available, Respondent derives a figure far in excess of what Kuebler and Curd could have earned at Willets. The problem with Respondent's calculations is that it is based on the same type of formula used by the General Counsel to which Respondent so strenuously objects. Thus, Respondent took whatever junior employee who showed up for work at Hendrickson Brothers when Kuebler and Curd did not and assumed that if they wished to do so Kuebler and Curd could have performed that work. But this formula for determining interim earnings suffers from the same inequities as does the Region's gross backpay formula. I shall therefore recommend against its use.

Respondent recommended for calculating overall backpay the Christman formula because Christman was just one position above Curd and performed the same work, i.e., driving flat trucks and 10-wheelers. I have accepted that formula as the fairest way of calculating backpay. I see no reason why I should not adopt the same formula for purposes of determining whether Hendrickson Brothers offered substantial equivalent employment to Kuebler and Curd. Therefore, using Respondent's own suggested formula, I find that Kuebler and Curd would have earned approximately the same wages during the backpay period as Christman minus 10 percent because Christman was higher on the seniority list and minus another 10 percent based on the fact that both Kuebler and Curd had voluntary absences at Willets in excess of that of Christman. Using this formula, I find that both Kuebler and Curd would have earned far more at Willets than at Hendrickson Brothers and that, for this reason, their employment at Hendrickson Brothers was not substantial equivalent employment, and that their employment at Hendrickson Brothers during the backpay period did not toll Respondent's backpay liability.[22]

6. Respondent claims that Kuebler and Curd waived their backpay claims by demanding that the Union withdraw its arbitration request and by signing general releases without reservation. Respondent argues that any backpay claims that Kuebler and Curd may have are not attributable to Respondent because once the decision was rendered in the underlying case, Respondent filed an arbitration demand on their behalf and fairly processed a grievance to obtain their reinstatement. According to Respondent, litigation with respect to the reinstatement of the discriminatees was still pending when Kuebler and Curd demanded that Respondent withdraw its efforts on their behalf. Respondent then complied with their demand and abandoned all efforts to obtain compensation or indemnification from Willets Point. Thereafter Kuebler and Curd executed general releases, which failed to reserve rights as against Respondent. Thus, Respondent argues, Kuebler and Curd waived any rights they may have had against it.[23]

I find Respondent's position untenable. On 16 June 1986 Case 29-CB-4937 was severed from the consolidated cases considered herein. On 19 June 1986 a Decision and Order issued in which it was decided that Respondent had violated the Act by coupling its demand for reinstatement of Kuebler and Curd at Willets with a demand that Willets assume the Union's backpay liability. The evidence underlying that decision indicated that Willets owed nothing to Kuebler and Curd, neither reinstatement nor backpay. The Union, by insisting that Willets reinstate Kuebler and Curd and pay them the backpay that the Union owed them, resulted in Willets refusing to do either. Finally, in order to get reinstated with Willets, Kuebler and Curd signed releases, relieving Willets of any liability. These releases had absolutely nothing to do with Respondent's liability and clearly no waiver was intended.

Moreover, Kuebler and Curd had no obligation to pursue their reinstatement rights through the Union's grievance and arbitration process. Indeed, the Board stated in *Henrickson Bros.*,[24] in which it was dealing with the same parties involved herein:

> The judge rejected the Respondent's contention, renewed in its exceptions, that the discharges

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[21] Respondent is primarily liable from 25 July to 21 October 1977, and solely liable thereafter.

[22] *Clear Pine Moldings*, 268 NLRB 1044 (1984), affd. 765 F.2d 148 (9th Cir. 1985); *Laborers Local 38 (Hancock-Northwest)*, supra; *Teamsters Local 559 (Mashkin Freight)*, 257 NLRB 24 (1981), affd. 714 F.2d 115 (2d Cir. 1982).

[23] Respondent cites sec. 15-105(1) of New York's General Obligation Law as stating:

> If an obligee releasing or discharging an obligor without express reservation of rights against a co-obligor, then knows or has reason to know that the obligor released or discharged did not pay so much of the claim as he was bound by his contract or relation with that co-obligor to pay, the obligee's claim against that co-obligor shall be satisfied to the amount which the obligee knew or had reason to know that the released or discharged obligor was bound to such co-obligor to pay.

[24] 272 NLRB 438 (1984).

should be deferred to contractual arbitration. He reasoned that neither the employees nor the Union, Teamsters Local 282, elected to use that forum, and that the Respondent made no effort to compel arbitration. We agree with the judge that deferral is inappropriate, but only for the following reasons. In *United Technologies Corp.*, 268 NLRB 557 (1984), the Board held that cases alleging violations of Section 8(a)(1) and (3) and Section 8(b)(1)(A) and (2) of the Act are subject to deferral to arbitration. We shall not, however, defer Curd's and Kuebler's discharges, because deferral would involve representation by Teamsters Local 282, a union whose interest is clearly inimical to the dischargees. Further, the Respondent's own interest conflicts with Curd's and Kuebler's in ways that go well beyond the immediate discharge issue.

Although the Respondent and the Union were willing to arbitrate the discharges, Curd and Kuebler declined the Union's offer to represent them because, as the judge found, they distrusted the Union and doubted whether it would properly represent them in an arbitration proceeding. The judge documented at considerable length the longstanding animosity between Local 282 representatives and the employees, and we need not recount it here. We note, however, that Curd and Kuebler engaged in extensive efforts to oust Local 282's leadership and participated in various unwelcome challenges to the Local's administration of the collective-bargaining agreement. In *Frank Mascali Construction*, 251 NLRB 219 (1980), enfd. mem. 111 LRRM 2423, 95 LC ¶ 13,919 (2d Cir. 1982), the Board found that Local 282 committed numerous unfair labor practices against Curd and Kuebler in reprisal for their exercise of Section 7 rights and their filing charges with the Board, including causing their discharges, refusing to refer them to job assignments, preferring fraudulent intraunion charges against them, and refusing to process their grievances.

The Respondent's hostility toward Curd and Kuebler is also fully detailed in the judge's decision. He found that the Respondent's officals, including Foreman Brown and Executive Vice President Farley, openly resented and resisted their vigorous attempts to enforce the contract and improve working conditions. Given this background, in which both parties to the contract are plainly opposed to the employees' interests, we conclude that deferral to arbitration is inappropriate. The Board addressed a similar situation in *Kansas Meat Packers*, 198 NLRB 543, 544 (1972), stating as follows:

> [W]e conclude that it would be repugant to the purposes of the Act to defer to arbitration in this case as to do so would relegate the Charging Parties to an arbitral process authorized, administered, and invoked entirely by parties hostile to their interests. [Fn. omitted.]

So, in light of the Board's findings as to the existing animus of Respondent toward Kuebler and Curd, it would be folly to except Kuebler and Curd to place their trust in Respondent Union's processing of their grievance to obtain backpay from an innocent party rather than in the Board's processing of the ULP against the Respondent who was the cause of all their difficulties. Similarly, it would be equally unreasonable to decide that Kuebler and Curd waived their rights to backpay when they chose not to use Respondent's questionable offices to represent them against Willets.

Further, even if the issue of Respondent's animosity toward Kuebler and Curd were not controlling, as I have found it to be, the Board has stated:

> It is well settled that an individual may not waive, bargain away, or compromise any backpay which might be due him (or her) since it is not a private right which attaches to the discriminatee, but is, indeed, a public right which only the Board or the Regional Director may settle.[25]

Neither the Board nor the Regional Director entered into the agreement, which Respondent claims to be a waiver. Therefore, it is not.[26]

Respondent claims that Curd willfully concealed interim earnings and is therefore not entitled to backpay for those quarters in which he did so. Counsel for Curd argues that any discrepancies between reported earnings and actual earnings were unintentional and the result of misunderstandings or ignorance. The General Counsel takes the position that most of the unreportea interim earnings were not deductible because they were, for the most part, second job earnings similar to those earned before Curd's discharge and those that do not fall into this category were small amounts not sufficient to warrant disqualifying Curd for earnings during entire quarters.

In support of his position on this issue, counsel for Respondent argues that Curd did not report "off the books" earnings when initially asked to do so. The record supports this assertion. It was not until about November 28, 1983, that Curd reported to his attorney and then to the Region's compliance personnel that he had earned certain "off the books" income not previously reported. On 12 December 1983 Curd supplied to the compliance section a complete report of all "off the record" earnings during the backpay period. He also amended his tax return to reflect such earnings.

Curd testified that he had not reported his cab earnings because they were earned evenings and on weekends and he believed that he did not have to report them. It was only after he mentioned these earnings to his attorney and then to Comstock that he was told to report them and then did so. When Curd advised his attorney and the Board agent of his unreported cab earnings he also told them of his "off the books" earnings at Allied, a trucking firm. He was told to calculate, report, and pay taxes on those earnings as well, and he did so. Curd's explanation why he did not report the cab earnings or the Allied earnings was simply that they were "off the books" and he did not think they counted. Respondent, on the other hand, charges that Curd only belatedly reported his "off the books" earnings in 1983 when he heard that he was being investigated by a private detective. Evidence supporting this charge is, however, inconclusive.

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[25] *Michael M. Schaeffer*, 261 NLRB 272 (1982), affd. 697 F.2d 558 (3d Cir. 1983).

[26] *Stevens Ford*, 271 NLRB 628 (1984); *Finishline Industries*, 181 NLRB 756 (1970). *Bottle Blowers Local 106*, cited in Respondent's brief, is clearly inapposite. Similarly, New York State statutes relied on by Respondent are inapplicable.

Counsel for Respondent, during the hearing, examined Curd extensively concerning a large number of deletions in Curd's 1977 diary in which he maintained a record of earnings along with other information. When asked what had been deleted Curd, for the most part, testified that he could not remember. What appears to have been deleted are all references to employers for whom Curd might have worked during 1977. What was left undeleted were numbers, which would appear to reflect earnings for that year. With regard to these numbers Curd testified in most cases that he could not recall what the numbers referred to. In some few cases he denied that they reflected earnings while in still fewer cases he admitted that they were earnings. In defense of his lack of memory, while testifying at the hearing, Curd pointed out that the deletions had been made 8 years before. However, in the underlying case heard in 1978, just 1 year, or in some cases just a few months, after the deletions had been made, Curd's testimony concerning the entries in and deletions from his 1977 diary was no more enlightening[27] than at the hearing in the instant case.

Curd testified that he deleted certain entries in his 1977 diary in preparation for a series of meetings scheduled both before and after 31 December 1977 with certain union officals during which he was expected to show them his books indicating when he shaped and when he worked. He deleted everything from the diary that he thought was none of Respondent's business. This was done, of course, because of the demonstrated hostility of Respondent toward Curd and after Curd's discharge, which had been engineered by Respondent. Curd testified, and the record supports his testimony, that he made no deletions in any of the diaries he prepared for each of the following years, 1978 through 1983.[28]

Respondent's counsel argues that his extended examination of Curd concerning his entries in and deletions from his 1977 diary prove that Curd was lying and that the numerous references to $55 or $60 "undoubtedly refer to unreported or misreported RCR earnings." However, after analyzing the relevant documentation I cannot find evidence to support this charge. Indeed, Curd insisted that he earned $50 per day working at RCR and named the days when he did so. In his diary he marked 2 or 3 days when he purportedly worked at RCR when he earned $55 but there were more days when he earned $50 per day. The evidence on this point is inconclusive, and without something stronger, I will not credit Respondent's statement. Discrepancies do exist, but are minor and, I find, innocent.

Respondent's brief points out that Curd lost, misplaced, or threw away a piece of paper on which he had recorded his RCR earnings and infers something sinister about this fact. In light of the large number of records that Curd did, in fact, make available, his loss of a single sheet paper after carrying it around for 6 or 7 years is not, to me, a matter of great concern. I assume it was innocently lost or misplaced.

Respondent relies on *American Navigation Co.*[29] and *C. R. Adams Trucking*[30] for the proposition that where a discriminatee is found to have willfully concealed from the Board his interim employment, he will be denied backpay for all quarters in which he engaged in the employment so concealed. However, the cases cited are factually distinguishable. In *American Navigation* the Board found that the discriminatee had been employed during the backpay period and had concealed this fact and the amounts he had earned from that employment from the Board, lying during his testimony at the backpay hearing. In the instant case there is no evidence that Curd lied at the hearing or concealed earnings during his testimony at the hearing. Therefore *American Navigation* is not in point. Similarly, Respondent's reliance on *C. R. Adams Trucking* is misplaced. In the *Adams* case, the discriminatee earned several hundred dollars on a snow removal job in early 1982. In August 1982 when he submitted the compliance forms to the NLRB he neglected to include these earnings. The backpay specification issued 14 December 1983 and did not, of course, include the discriminatee's snow removal earnings. In January 1984 the discriminatee found a W-2 form that reflected the snow removal earnings. Nevertheless, the discriminatee did not report these earnings to the compliance officer. Just before the backpay hearing the Respondent's attorney somehow found out about the discriminatees' snow removal earnings and told the compliance officer about them. The compliance officer then confronted the discriminatee with the fact that he had concealed earnings and the discriminatee admitted having earned the unreported income. When questioned at the hearing why he had failed to report the snow removal income prior to the hearing, the discriminatee simply stated that he had forgotten about it. The judge determined that although the discriminatee might well have simply forgotten the snow removal income from the previous winter when he submitted his compliance forms the following August, he must have had his mind jogged by the W-2 forms containing the snow removal earnings information just 2-1/2 months before the backpay hearing and nevertheless chose not to report the income, thus concealing it, and thus making himself subject to forefeiture of quarterly backpay payments due to the concealment. Unlike the *Adams* case, Curd, in the instant case, was not discovered to have concealed earnings but rather, voluntarily admitted the unreported earnings to his counsel, then to the Board, and the matter was rectified by issuance of a revised backpay specification. So, I find, *Adams* is not the same type of case as that being considered.

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[27] *Frank Mascali Construction*, 251 NLRB 219 (1980). The administrative law judge conducting that hearing noted at 233 fn. 38:

> Curd's testimony also presents difficulties. If he had not kept a diary, he might have presented less of a problem, but he did. He kept a diary showing his day-to-day activities, but prior to this hearing, he had expunged the bulk of the entries, leaving only cryptic references to activities or numbers. His stated reason for this, that he feared reprisal from the Union against people and employers listed is plausible, but his assertions that he could not remember what any of the entries were, or stood for, is plainly incredible. Curd showed otherwise that his memory was not that bad.
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> . . . .
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> With respect to the credibility of that testimony, he lied about the contents of his diary in the sense that he testified that the deleted portions concerned only the names of persons he did not want identified for fear of reprisal, and other references to his private business. I believe, in fact, that the diary showed jobs and income which he received during the year which, for some reason, he did not want the Union, or anyone else, to know about.

[28] The exception that proves the rule: 29 April 1981.

[29] 268 NLRB 426 (1983).

[30] 272 NLRB 1271 (1984), enfd. 767 F.2d 1276 (8th Cir. 1985).

In the *American Navigation* case, the Board chose to consider two other cases that were clearly not factually on all fours with that case but which the Board felt should be reversed. Those cases were *Big Three Industrial Gas*[31] and *Flite Chief, Inc.*,[32] and are closer in point of fact to the instant case than either *American Navigation* or *Adams*. In both *Big Three* and *Flite Chief*, the Board had awarded backpay to discriminatees who had initially concealed interim employment, but who had subsequently admitted the employment. In *Big Three* the Board had earlier decided that a penalty had no place in the national labor law scheme because the Act is remedial, not punitive, in nature, and therefore the claimant's backpay should only be reduced by the amount of the belatedly admitted interim earnings. In *Flite Chief* the Board had earlier decided that a claimant's initial concealment of earnings had not undermined the Board's remedial processes and that a penalty would be inappropriate when the claimant had voluntarily admitted, at the 11th hour, the earnings he had previously concealed. Factually, in *Big Three*, the claimant admitted the previously concealed earnings while on the witness stand during the backpay hearing while undergoing questioning by Respondent's counsel; while in *Flite Chief* the claimant disclosed his concealed earnings to a Board representative on the day that the backpay hearing commenced.

The Board, in its *American Navigation* decision (268 NLRB at 428), noted that it disagreed with the rationale of the *Big Three* and *Flite Chief* decisions and overruled them because:

> As the Ninth Circuit reasoned in *Flite Chief*, supra at 993, to award full backpay to a claimant who attempts to pervert an order issued in the public interest into a scheme for unjustified personal gain is to reward perfidy.

Based on this philosophy, the Board stated:

> We find that a remedy which denies backpay for the quarters in which concealed employment occurred will discourage claimants from abusing the Board's processes for their personal gain and will also deter respondents from committing future unfair labor practices. This remedy will be applied, of course, only in cases where the claimant is found to have willfully deceived the Board, and not where the claimant, through inadvertence, fails to report earnings.

While the instant case appears to bear certain similarities to *Big Three* and *Flight Chief*, there is one very important difference, namely, that Curd voluntarily admitted the unreported income months before the hearing, in plenty of time to revise the backpay specification to Respondent's benefit. To hold that Curd must suffer forfeiture of wages because initially he failed to report all of his income despite the fact that subsequently he did, in fact, report all income, long before the hearing, would put a premium on concealment. Thus, in *C. R. Adams*, supra at 1276, as facts described supra, the judge made the following observation:

> Moreover, there seems to have been a "last clear chance" for avoiding willful deceit which Becker failed to take. He testified that he "found" the W-2 form reflecting the snow removal income about 4 months before the hearing, but he said nothing about the matter until the compliance officer, spurred by Respondents' counsel, inquired into it some 2-1/2 months later. When asked why on such a discovery, he had not promptly notified the Region, Becker testified, "it just—I forgot all about it, that's all." I find it difficult to conceive of Becker having his mind jogged by discovery of the form and then forgetting about the income for the second time.

The implication here is that if Becker, the discriminatee in the *C. R. Adams* case, had reported his snow removal earnings after finding the W-2 forms it would not have been too late to rectify the situation. But suppose, at the time, the Board had been applying *American Navigation—Big Three—Flite Chief* dictum to his and Curd's situation, as Respondent would have me do. That is to say, suppose Becker or Curd were told that if they belatedly reported previously undeclared earnings, the Board might charge him with concealing those earnings and dock him 3 months' backpay or more. Would such an approach be *more* or *less* likely to advance full disclosure of interim earnings? I think a person faced with this dilemma might well opt for concealing the previously undeclared earnings, whether they were initially deceitfully concealed or innocently overlooked. Thus, application of the cited cases to the factual situation here would have the effect of undermining the remedial purposes of the Act: punish honesty and reward dishonesty. Moreover, what would be the result of applying the rationale of the cited cases to the situation here discussed? Who would gain and who would lose? A discriminatee who is faced with the choice of declaring previously undisclosed interim earnings and possibly forfeiting large amounts of backpay who chooses not to reveal those earnings, if he succeeds, unlawfully cheats the Respondent out of deductions from interim earnings to which it is entitled. If a discriminatee who is faced with the choice of declaring previously underclosed interim earnings and possibly forfeiting large amounts of backpay chooses not to reveal those earnings, but is detected at the hearing and loses several quarters of backpay because of this concealment, the sole winner is the Respondent. Such a result hardly effectuates the purposes of the Act.

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[31] 263 NLRB 1189 (1982).

[32] 246 NLRB 407 (1979), enf. denied 640 F.2d 989 (9th Cir. 1981).

In the instant case Curd did not initially reveal all interim earnings to the Board. However, when his counsel advised him that it was necessary to do so, he did so honestly, making full disclosure of all income. He did so voluntarily in a timely fashion so that by the date of the hearing all parties were fully apprised by the contents of the backpay specification what interim income Curd had earned. For the reasons stated, I do not believe that the rationale of the *Big Three—Flite Chief* reversals as declared in *American Navigation* should be applied to this case. Where a discriminatee, in timely fashion, makes full disclosure of all interim earnings long before the backpay hearing commences, his failure to report all interim earnings earlier should not be considered a reason for requiring forfeiture of backpay.

8. Respondent claims that Kuebler and Curd failed to make adequate efforts to mitigate damages by failing to seek interim employment during certain quarters and by being absent an excessive number of days at their interim employers.

The record reveals that Kuebler and Curd did make good-faith efforts to find interim employment. Between the dates of his discharge and reinstatement at Willets Point Contracting Kuebler sought and obtained employment at Hendrickson Brothers, Inc., RCR Services, Rason Asphalt, Inc., Heckscher Nurseries, Inc., Peter Scalamandre & Son, and Typhoon Fence of L. I. Inc. Of the 23 quarters covered by the amended backpay specification, Kuebler worked and received interim earnings from the listed companies during 18 of them. Most of Kuebler's interim income was earned at Hendrickson Brothers. However, because of his low place on the seniority list, his employment with this company was irregular despite the fact that he shaped often. When not employed by Hendrickson or by one of the other companies listed above, Kuebler, at various times during the backpay period, sought employment, albeit unsuccessfully, at certain liquor distributors—Star and Knickerbocker, certain oil companies—Massapequa, Slomin, Reliance, and Agway, and certain trucking and warehousing companies—C & R Steel, Dubarry, and Block. Kuebler would seek employment at these companies during the winter season when construction was down or on a day-to-day basis during the busy construction season, after shaping, when he was unsuccessful at landing a job with Hendrickson Brothers. In April 1982, Kuebler was fired by Hendrickson Brothers, and thereafter remained jobless for the next four quarters, although during this period he sought employment at Nazzara,[33] Star, Knickerbocker, Landsdale,[34] C & R Steel, J. D. Pasilico,[35] S&W Hardware, and Atlas virtually every day. He also checked out help-wanted ads for limousine drivers. Some of the companies where Kuebler sought work were companies with contracts with Teamsters Local 282 and other Teamsters Locals while others were nonunion or were not construction or trucking companies. Throughout the backpay period, whether he was still employed at Hendrickson Brothers, but not working that particular day, or had been already discharged by Hendrickson Brothers, Kuebler continued to search for work. He sought work stacking shelves in a supermarket and inquired about jobs tending bar and pumping gas. But Kuebler was limited in his capacity to perform many jobs because of his age and lack of experience outside the truckdriving trade. In any event, he was unsuccessful in his attempts to find employment.

Between the dates of his discharge and reinstatement at Willets Point, Curd sought and obtained employment at Hendrickson Brothers, Inc., Bess & Co., RCR Services, Rason Asphalt, Inc., Herscher Nurseries, Inc., Sunshine Biscuits, Inc., and Star Industries, Inc. Of the 23 quarters covered by the amended backpay specification, Curd worked and received interim earnings from the listed companies during 20 of them. Like Kuebler, most of Curd's interim earnings were from Hendrickson Brothers. But he, like Kuebler, was not steadily employed. Although he shaped almost daily, he did not receive regular assignments because of his inferior position on the seniority list. Similarly, Curd made many unsuccessful attempts at finding employment. His credited testimony indicates that he tried to obtain employment, to no avail, with various oil companies during the winter seasons while still employed by Hendrickson and thereafter unsuccessfully sought employment with Conservative Express, Tempo, Star Liquors, Sunshine Biscuits, Knickerbocker Liquor, Landsdale, Newport Tire, Puritan, Petro, and other oil companies. In addition, Curd drove a cab on many occasions when one was available.

Respondent asserts that Kuebler and Curd failed to make continuing efforts to obtain interim employment, and correctly argues that, in order to receive backpay, a discriminatee must make reasonable efforts to obtain interim employment. Though granting that Kuebler and Curd did make such efforts, Respondent argues that the obligation to seek employment is a continuing one and that each period of time must stand on its own, citing *Murbro Parking*.[36] However, the discriminatee in the *Murbro* case admitted that during a certain portion of the backpay period he had joined the ranks of the discouraged unemployed and did not search for work because the labor market was flooded with teenagers. Neither Kuebler nor Curd made such an admission, but rather claimed to have shaped or sought employment virtually every day so that it remains the burden of Respondent to prove that they willfully incurred loss of earnings during the backpay period. *Fugazy Continental Corp.*,[37] citing *Brown & Root*.[38]

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[33] A company signatory to the Local 282 contract.

[34] Ibid.

[35] Ibid.

[36] 276 NLRB 52 (1985).

[37] 276 NLRB 1334 (1985).

[38] 132 NLRB 486, 495 (1961), enfd. 311 F.2d 447 (8th Cir. 1963).

Respondent's brief notes that Kuebler and Curd meticulously kept daily diaries that showed periods of time during which they appeared to be regularly seeking work. It notes further that these diaries contain lengthy intervals of time in which the diaries reflect no efforts at all to obtain interim employment. Concerning some of these blank periods, neither Kuebler nor Curd could recall what efforts they had made to find interim employment. Respondent would have me decide on the basis of these incomplete records and the discriminatees' faulty memories that neither Kuebler nor Curd sought interim employment during these periods. I shall not, however, make such a finding. I am, in fact, impressed with the amount of information contained in the diaries of Kuebler and Curd and will not recommend reduction of their backpay simply because these two truckdrivers failed to keep records as accurately or completely as would a CPA. Indeed, they faithfully kept these diaries for 7 years while Respondent continued to refuse to pay them the backpay rightfully theirs, which was the remedy provided in the underlying case and which resulted from Respondent's violation of the Act. It is not essential that a discriminatee keep records at all to establish the extent of effort he had made to find interim employment. *Teamsters Local 164.*[39] But if a discriminatee has, throughout a multiyear backpay period, chosen to keep records of efforts to find interim income, it is not surprising that such records are less than perfect. *Big Three Industrial Gas.*[40] I find that the failure of Kuebler and Curd to account for every day in the backpay period is not evidence of inadequate efforts on their part to seek interim employment. And their inability to recall the specifics of where, when, and under what circumstances they sought employment during the periods unaccounted for in their diaries is neither surprising after a period of so many years nor evidence of a willful loss of earnings. *Neely's Car Clinic.*[41]

Kuebler and Curd both testified that they shaped a number of occasions at Star Liquor and Knickerbocker Liquor. Their diaries support their testimony. In fact, Curd did actually work at Star Liquor 1 day. Kuebler, in describing the shaping procedure at Star, credibly testified that Star did not require employment applications to be filled out but, rather, required the men to report to

> a gigantic room like this and the men would come their 6:00 o'clock in the morning. The shop steward's name was Kelly. The dispatcher was White and it was a case of like the old days down on the dock.
>
> If you stayed there long enough and your face was in front, they'd pick you by familiar [sic] in accordance to how busy they were.

I found the particularity of Kuebler's description quite convincing.

Respondent produced two witnesses at the hearing, Fred Acquavita, the shop steward at Knickerbocker, and Alfred Ortiz, the dispatcher and shop steward at Star Liquor. Acquavita testified that he would be at the shape at Knickerbocker every morning at 5:30 in 1982 and that he would recognize and get to know the faces and names of men who came to shape regularly. When Acquavita was asked if he recognized the faces or was familiar with the names of Kuebler and Curd, he replied in the negative. He testified further that during the busy season if a man shaped regularly, he would remember that man, and in June or July 1982, a man who shaped frequently would have been hired.

Ortiz, also more generally known as Kelly, testified that he was present every morning at 5 a.m. for the shape at Star Liquor in 1982. He testified further that in July 1982 Star was very busy and was hiring. Ortiz, like Acquavita, stated that he did not recognize either Kuebler or Curd and was unfamiliar with Kuebler's name. He admitted, however, that Curd worked 1 day for Star, and that he was aware of this fact because his bookkeeper looked up the name and told him. This was done in preparation for the hearing. Finally, Ortiz testified in one place that he did not know if he would recognize, 3 years later, men who had shaped every day 3 years before. Elsewhere he stated that he would, after a while, recognize the faces of men who shaped every day. On cross-examination, Ortiz admitted that he could not recall the names of off-the-street extras who may have shaped 3 years before.

When Kuebler and Curd were asked to identify Acquavita and Ortiz, Kuebler could not do so, while Curd properly identified Ortiz as being behind the cage at Star Liquor but mistakenly placed Acquavita at the same location.

I am satisfied, despite Acquavita's and Ortiz' failure to identify Kuebler and Curd, that they did, in fact, shape at Star Liquor and Knickerbocker Liquor in 1982. It was 3 years by the time of the hearing since Kuebler and Curd shaped at Star and Knickerbocker. Their contact with Acquavita and Ortiz was minimal and over a period of years hundreds of men shaped at these two employers. It is quite understandable that neither of the two stewards could recognize Kuebler and Curd and their failure to do so is not controlling.[42] *Teamsters Local 164*, supra, *Neely's Car Clinic,*[43] *Murbro Parking.*[44] Moreover, Kuebler's and Curd's knowledge of the location of the two liquor distributors, their description of the layout of the shaping area and of the shaping procedure, Kuebler's recall of Kelly's name, and Curd's identification of Kelly at the hearing strongly support their testimony that they regularly shaped at Star and Knickerbocker and I so find.

Respondent argues that when a discriminatee has unexcused and unexplained absences from his interim employment, an amount reflecting the income lost as a result of these absences should be added to his actual interim earnings, citing *Carter Lumber*.[45] However, *Carter Lumber* is factually distinguishable from the instant case. In *Carter*, the discriminatee found a regular steady job as interim employment offering a 40-hour week or more. Nevertheless, the discriminatee chose to take off frequently just because he felt like it. His excessive absences were under those circumstances considered a willful loss of employment. In the instant case Kuebler's and Curd's employment at Hendrickson was neither regular nor steady. A day's work depended on their shaping each morning, which they did, and on whether work was available, which sometimes it was and sometimes it was not. Frequently, because of their low position on the seniority list, they were not assigned work. In the case of Kuebler and Curd at Hendrickson, I see no willful loss of interim employment similar to that found in the *Carter* case.

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[39] 274 NLRB 909 (1985).

[40] 263 NLRB 1189 (1982), overruled on other grounds *American Navigation Co.*, 268 NLRB 426 (1983).

[41] 255 NLRB 1420 (1981).

[42] When there is direct conflict between the testimony of the two stewards and the discriminatees, the latter are credited.

[43] Supra.

[44] Supra.

Respondent notes the frequency of Kuebler's and Curd's absences from Hendrickson, that in the summer Curd took long weekends and in the fall went on annual hunting trips, and that both took off to campaign for union office and to attend NLRB hearings. I do not consider these absences as willful loss of earnings, but only legitimate absences that will be given proper consideration in the calculation of backpay due. *Mid-West Hanger Co.*,[46] *Sioux Falls Stock Yards*,[47] and *Wayne Trophy Corp.*[48]

9. Hendrickson Brothers, the primary interim employer of Kuebler and Curd, unlawfully terminated them on 21 April 1982. *Hendrickson Bros.*[49] The Decision and Order in *Hendrickson* provided a make-whole remedy in which the company was ordered to make the discriminatees whole for any loss of earnings they might have suffered as a result of its discrimination against them. However, as of this writing there is no evidence that Hendrickson has complied with or intends to comply with the Board's Order despite the fact that the court of appeals ordered enforcement. Hendrickson may appeal further, may succeed in its appeal, may go bankrupt, or, for whatever reason, may never comply with the Board's Order. The most equitable decision to make at this juncture would be to order Respondent to pay the discriminatees full backpay and leave any set off from Hendrickson to future proceedings. To hold that Local 282 need pay no backpay due after 21 April 1982 on the supposition that Hendrickson might make the discriminatees whole for backpay due thereafter would be to undermine the Board's Order in the underlying case herein at the expense of Kuebler and Curd, the innocents, to the benefit of Respondent, the wrongdoer. This I am not willing to do. If, in the future, Hendrickson is made to pay all or a part of the backpay due the discriminatees after 21 April 1982, arrangements can at that time be made for an equitable set off. As of the moment, the discriminatees have waited long enough.

Respondent argues that Local 282 was in no way responsible for Kuebler's and Curd's discharges by Hendrickson Brothers in 1982. This is true. However, Respondent was, as found in the underlying case, responsible for their discharges from Willets Point[50] and, but for this action, Kuebler and Curd would never have had to obtain interim employment with Hendrickson. The case law is clear that when a discriminatee is discharged by an interim employer through no fault of his own, his backpay continues to run until he is offered reinstatement at his original job. *Artim Transportation System*.[51] I see no reason why this case law should not apply to the facts of the instant case.

Respondent points out that it vigorously protested the discharges of Kuebler and Curd by Hendrickson and sought immediately to arbitrate on their behalf. This is true as well as the fact that the grievances filed on behalf of Kuebler and Curd were ultimately withdrawn by the Union only because of their insistence that it do so. Respondent argues that by refusing to permit it to grieve their discharges from Hendrickson Brothers, Kuebler and Curd prevented the Union from obtaining compensation for them and thereby waived any right to demand money from the Union.

The answer to Respondent's waiver argument regarding the Hendrickson discharge is the same as the answer to Respondent's waiver argument regarding the Willets discharge. Neither Kuebler nor Curd was obligated to have Teamsters Local 282 represent them because that Union's interest was and is clearly inimical to that of the discharges.[52] Therefore, based on the Board's own rationale, I find that Kuebler and Curd did not waive their right to backpay from Respondent by refusing to take their grievances to arbitration.

Respondent urges that in the alternative, Local 282 should be found to be secondarily liable rather than primarily liable for damages caused by Hendrickson Brothers' misconduct. But the instant proceeding concerns backpay due Kuebler and Curd as a result of the *Mascali* decision. There is no allegation that Respondent is either primarily or secondarily liable for damages resulting from the Hendrickson Brothers' discharge of Kuebler and Curd. If and when there is a backpay hearing in the *Hendrickson Bros.* case, or if there are settlement proceedings in that case resulting in an award, Respondent can pursue a course to obtain an equitable setoff. Double recovery is not contemplated.[53] In the meantime, Kuebler and Curd should not be denied the backpay due them that resulted from Respondent's violation simply because they were unlawfully terminated by an interim employer. Nine years is long enough to have waited.

10. Respondent takes the position that the General Counsel's fringe benefit computations concerning the annuity fund, welfare fund, and pension fund are incorrect. Although Respondent concedes that its backpay obligation requires it to make Kuebler and Curd whole for

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[45] 227 NLRB 730 (1977).

[46] 221 NLRB 911 (1975), modified 550 F.2d 1101 (8th Cir. 1977).

[47] 236 NLRB 543 (1978).

[48] 254 NLRB 881 (1981).

[49] 272 NLRB 438 (1985), enfd. 762 F.2d 990 (2d Cir. 1985).

[50] *Frank Mascali Construction*, supra.

[51] 193 NLRB 179 (1971).

[52] *Hendrickson*, supra at 438.

[53] Respondent's reliance on *Claremont Resort Hotel & Tennis Club*, 260 NLRB 1088 (1982), is misplaced. The two cases are factually distinguishable.

fringe benefits lost as well as backpay, it asserts that the General Counsel's computations are wrong.

Regarding the Local 282 annuity fund, Respondent agrees that under the various Local 282 contracts, employers are obligated to make contributions to the fund. It concedes that the methodology used by the General Counsel in determining how much was due the annuity fund is correct, but denies the accuracy of the General Counsel's figures in two respects. First, Respondent notes that the General Counsel's gross annuity figures are based on his backpay formula to which Respondent objects. Because I do not intend to use the General Counsel's backpay formula, for reasons stated, I find Respondent's objection well founded. Respondent urges that if the Christman formula is used, then Christman's actual annuity fund contributions should be taken with proportional adjustments made. I agree with Respondent on this point and will follow its suggestion. Second, Respondent argues that although the General Counsel's computations of interim annuity payments accurately reflect actual annuity contributions, they fail to account for interim annuity contributions that would have been made had Kuebler and Curd availed themselves of all work opportunities at Hendrickson Brothers. However, because I have found that Kuebler and Curd did not sustain a willful loss of employment at Hendrickson Brothers, I reject Respondent's argument on this point. Similarly, I reject Respondent's argument that contributions will be made by Hendrickson Brothers pursuant to the Board Order in *Hendrickson Bros.* and that these should be taken into account because there is no guarantee that such contributions will, in fact, be made. The argument is premature and speculative. If and when set off arrangements are made, contributions to the annuity fund should also be considered at that time.

Regarding the welfare fund, Respondent concedes that it is obligated to Kuebler and Curd for any benefits covered by the fund that they failed to receive. Because Curd presented evidence of $54 in unpaid medical bills, Respondent concedes that it owes that amount. The General Counsel would, on the other hand, have Respondent pay all the contributions into the welfare fund that would have been made on behalf of the discriminatees had the discrimination not taken place. Respondent argues that contributions to the welfare fund would do Curd and Kuebler no good because contributions attributable to work during a particular quarter vest an employee with benefits only with respect to the succeeding quarter and would give Curd and Kuebler no present benefits. This is true.

Respondent argues further that the welfare fund did not suffer from the loss of contributions due to Kuebler's and Curd's unlawful terminations because the same amount of contributions to the welfare fund were made by Willets Point as would have been made absent discrimination because the work previously done by Kuebler and Curd was thereafter done by replacements and contributions were made on behalf of the replacements. Respondent takes the position that if Respondent were ordered to make contributions on behalf of Kuebler and Curd, the fund would receive an unjustified windfall serving a punitive, rather than a remedial, purpose. I find Respondent's argument persuasive and shall recommend that Respondent only be liable for the amount reflected by the medical bills for which it concedes liability. This is the standard-type remedy. *Seligman & Associates.*[54]

Regarding the Local 282 pension trust fund contributions, Respondent concedes that it is liable for such payments, but only to the extent necessary to make Kuebler and Curd whole. Contrary to Respondent, the General Counsel and the Charging Parties would have Respondent contribute payments to the pension fund over and above the amount necessary to give each of the discriminatees a full year's credit. They would have me require Respondent to pay the proper contractual sum into the pension fund for each hour that Kuebler and Curd would have worked but for the discrimination against them. The argument is that Kuebler and Curd and other beneficiaries of the pension system have a vested interest in the pension fund and in its being as solvent and as strong as it would have been but for the discrimination. In dealing with this question in *Acme Wire Works,*[55] the administrative law judge stated:

> Morever, the right of an employee to a pension benefit also implies, of necessity, the right to a viable pension fund. As the fund is maintained on certain actuarial considerations which include an estimate of the average contributions made on behalf of employees who are high and low earners, it seems clear that the fund would soon be depleted if employers were permitted to contribute the minimum amounts required to enable employees to obtain an additional year of credited service and not the amounts required in the collective-bargaining agreement. While it is no doubt true that the pension fund would not likely be jeopardized by the failure to make the full contributions on behalf of this one employee, it could reasonably be surmised that, in the aggregate, if employers who contribute to the fund could avoid full liability by discriminating against employees, this would serve, to some extent, as an inducement to violate the law. *Finishline Industries, Inc.* [181 NLRE 756, 760 (1970)]. It also might lead, in the aggregate, to an unwarranted depletion of the Fund's assets which would affect not only [the discriminatee's] ability to collect his pension benefits but also every other covered employee's ability to obtain such benefits. [251 NLRB at 1571.]

I shall follow the law of *Acme Wire.* The specific amounts that Respondent owes the Pension Fund on behalf of Kuebler and Curd will be treated infra.

11. Respondent argues that the backpay claim is so large as to be punitive and payment of the sum would endanger the Union's continued viability. I have already determined not to use the Region's formula, not because it results in a claim that is too large or because the payment of such a sum would impair the financial stability of Local 282. Indeed, such considerations are irrelevant,

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[54] 273 NLRB 1216 (1984).

[55] 251 NLRB 1567, 1571 (1980).

for the purpose of a backpay proceeding is to determine the amount due the discriminatees, not to determine Respondent's ability to pay. *Teamsters Local 164*;[56] *Victoria Medical Group*.[57] I have found the Region's formula inequitable and for that reason will not recommend its use. The size of the award is not the controlling factor.

II. THE CHRISTMAN FORMULA

The Christman formula takes Willets' employee, Christman, as a representative employee, and Kuebler and Curd are credited with his earnings during the backpay period. I find Christman a good choice for this purpose for reasons discussed supra. Respondent would adjust these earnings downward by approximately 19 percent because Kuebler's and Curd's earnings both before their discharge and after their reinstatement were considerably below those of Christman. I find the adjustment justified.

On these findings and conclusions I issue the following recommended[58]

ORDER

The Respondent, Local 282, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, AFL–CIO, its officers, agents, and representatives, shall pay to John Kuebler and Charles Curd, in accordance with the computations contained in the revised backpay specification attached as Appendices A and B, the sums of $62,206 and $58,805, respectively, plus interest as provided in *Florida Steel Corp.*, 231 NLRB 651 (1977), less tax withholdings required by Federal and state laws. Similarly, Respondent shall pay into the Local 282 annuity fund on behalf of John Kuebler and Charles Curd, in accordance with the computations contained in the revised backpay specification attached as Appendices C and D, the sums of $3,605.58 and $3,524.79, respectively, plus interest as provided in the cases cited. Further, Respondent shall pay into the Local 282 pension trust fund on behalf of John Kuebler and Charles Curd, in accordance with the computations contained in Appendices E and F, the sums of $8846 and $8271, respectively, with interest as provided in the cited cases. Finally, Respondent shall pay Charles Curd $54 for unpaid medical bills owed to him under the provisions of the welfare fund with interest as provided for under the cases cited supra.

APPENDIX A.—NET BACKPAY—KUEBLER

Year/Qtr.	*Gross Backpay*[1]	*Interim Earnings*[2]	*Net Backpay*
25 Jul–21 Oct 77[3]	$0[4]	$0[5]	[6]$ 305.00
1977/4	0	1,236.00	0
1978/1	1,268.00	746.00	522.00
1978/2	3,930.00	1,001.00	2,929.00
1978/3	1,106.00	3,026.00	0
1978/4	5,101.00	2,405.00	2,696.00
1979/1	[7]2,788.00	391.00	2,397.00
1979/2	5,596.00	5,013.00	583.00
1979/3	5,872.00	5,453.00	419.00
1979/4	5,826.00	5,694.00	132.00
1980/1	4,319.00	0	4,319.00
1980/2	5,651.00	3,611.00	2,040.00
1980/3	6,707.00	5,949.00	758.00
1980/4	6,841.00	3,857.00	2,984.00
1981/1	2,460.00	83.00	2,377.00
1981/2	6,324.00	1,831.00	4,493.00
1981/3	3,298.00	5,069.00	0
1981/4	6,086.00	3,259.00	2,827.00
1982/1	5,420.00	176.00	5,244.00
1982/2	6,440.00	1,320.00	5,120.00
1982/3	1,070.00	0	1,070.00
1982/4	7,685.00	0	7,685.00
1983/1	5,259.00	0	5,259.00
1983/2	8,047.00	0	8,047.00
Total net backpay			$62,206.00

[1] Figures based on Tables D and I of Respondent's brief and exhibits cited as sources therein.

[2] Figures based on actual interim earnings as reflected in App. C of the amended backpay specification.

[3] Period computed on a daily basis.

[4] Gross backpay for this period is not in dispute.

[5] Interim earnings: One day--25 August--cancels out gross backpay for that day.

[6] Net backpay is the sum of total net backpay reflected in App. G and App. J of the amended backpay specification.

[7] Includes estimated racetrack earnings.

APPENDIX B.—NET BACKPAY—CURD

Yr./Qtr.	*Gross Backpay*[1]	*Interim Earnings*[2]	*Net Backpay*
25 Jul–21 Oct 77[3]	$0[4]	$0[5]	[6]$1,562.00
1977/4	659.00	1,236.00	0
1978/1	1,268.00	1,348.00	0
1978/2	3,930.00	978.00	2952.00
1978/3	1106.00	3,220.00	0
1978/4	5,101.00	2,941.00	2,160.00
1979/1	[7]2,788.00	1,039.00	1,749.00
1979/2	5,596.00	5,456.00	140.00
1979/3	5,872.00	4,680.00	1,192.00
1979/4	5,826.00	4,587.00	1,239.00
1980/1	4,319.00	231.00	4,088.00
1980/2	5,651.00	3,869.00	1,782.00
1980/3	6,707.00	5,462.00	1,245.00
1980/4	6,841.00	4,424.00	2,417.00
1981/1	2,460.00	0	2,460.00
1981/2	6,324.00	2,329.00	3,995.00

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[56] Supra.

[57] 274 NLRB 1006 (1985).

[58] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

Appendix B.—Net Backpay—Curd—Continued

Yr./Qtr.	*Gross Backpay*[1]	*Interim Earnings*[2]	*Net Backpay*
1981/3	3,298.00	4,859.00	0
1981/4	6,086.00	3,075.00	3,011.00
1982/1	5,420.00	575.00	4,845.00
1982/2	6,440.00	1,741.00	4,699.00
1982/3	1,070.00	991.00	79.00
1982/4	7,685.00	677.00	7,008.00
1983/1	5,259.00	857.00	4,402.00
1983/2	8,047.00	267.00	7,780.00
Total net backpay			$58,805.00

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[1] Figures based on Tables D and I of Respondent's brief and exhibits cited as sources therein.

[2] Figures based on actual interim earnings as reflected in App. E of the amended backpay specification.

[3] Period computed on a daily basis.

[4] Gross backpay for this period is not in dispute.

[5] Interim earnings: Three days--27 July, 8 and 16 August--cancels out virtually all backpay for those day.

[6] Net backpay is the sum of total net backpay reflected in App. A and App. L of the amended backpay specification.

[7] Includes estimated racetrack earnings.

Appendix C.—Contributions to Annuity Fund—Kuebler

Yr./Qtr.	*Christ-man*	*Adjusted Annuity*	*Interim Annuity*	*Net Due*
25 Jul–21 Oct 77				
1977/4				
1978/1	?	?	0	[1]8.80
1978/2	?	?	$10.40	[2]28.00
1978/3	[3]14.55	$11.80	[4]31.50	0
1978/4	59.60	48.28	25.40	22.88
1979/1	30.85	25.00	4.05	20.95
1979/2	63.75	51.65	49.60	2.05
1979/3	62.55	50.68	53.70	0
1979/4	63.40	51.36	55.75	0
1980/1	147.30	119.32	0	119.32
1980/2	187.20	151.64	102.60	49.04
1980/3	269.60	218.38	219.40	0
1980/4	288.40	233.61	125.00	108.61
1981/1	108.60	87.97	0	87.97
1981/2	266.00	215.46	62.80	147.26
1981/3	349.50	283.10	482.00	0
1981/4	621.50	503.42	286.50	216.92
1982/1	537.00	434.97	8.00	426.97

Appendix C.—Contributions to Annuity Fund—Kuebler—Continued

Yr./Qtr.	*Christ-man*	*Adjusted Annuity*	*Interim Annuity*	*Net Due*
1982/2	659.00	533.79	129.50	404.29
1982/3	184.00	149.04	0	149.04
1982/4	1092.80	885.17	0	885.17
1983/1	710.80	575.75	0	575.75
1983/2	1159.20	938.96	586.40	352.56
Total annuity				$3,605.58

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[1] App. D of backpay specification. Figure not disputed.

[2] Ibid.

[3] Figures obtained from R. Exh. 138.

[4] Figures obtained from R. Exh. 141.

Appendix D.—Contributions to Annuity Fund—Curd

Yr./Qtr.	*Christ-man*	*Adjusted Annuity*	*Interim Annuity*	*Net Due*
7/25–10/2177				
1977/4				
1978/1	?	?	$1.60	[1]13.60
1978/2	?	?	9.60	[2]36.80
1978/3	[3]$14.55	$11.80	[4]33.70	0
1978/4	59.60	48.28	31.10	17.18
1979/1	30.85	25.00	4.00	21.00
1979/2	63.75	51.65	54.60	0
1979/3	62.55	50.68	45.55	5.13
1979/4	63.40	51.36	41.35	10.01
1980/1	147.30	119.32	3.15	116.17
1980/2	187.20	151.64	109.05	42.59
1980/3	269.60	218.38	201.48	16.58
1980/4	288.40	233.61	165.60	68.01
1981/1	108.60	87.97	0	87.97
1981/1	266.00	215.46	85.20	130.26
1981/3	349.50	283.10	452.50	0
1981/4	621.50	503.42	260.50	242.92
1982/1	537.00	434.97	24.00	410.97
1982/2	659.00	533.79	145.50	388.29
1982/3	184.00	149.04	0	149.04
1982/4	1092.80	885.17	0	885.17
1983/1	710.80	575.75	0	575.75
1983/2	1159.20	938.96	621.60	317.36
Total annuity				$3,534.80

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[1] App. F of backpay specification. Figure not disputed.

[2] Ibid.

[3] Figures obtained from R. Exh. 138.

[4] Figures obtained from R. Exh. 142.

Appendix E.—Pension Fund–Kuebler

Yr./Qtr.	*Christman's Hours*	*Kuebler's*[1] *Adjusted Hours*	*Less Interim Hours*	*Time Pension Rate*	*Total Amount Due*
7/25–10/21/77	64	52	[2]8	44x1.8525	$82.00
1977/4	24	19	120		- 0 -
1978/1	128	104	- 0 -	104x1.8525	193.00
1978/2	392	318	104	214x1.8525	396.00
1978/3	104	84	304		- 0 -

APPENDIX E.—PENSION FUND–KUEBLER—Continued

Yr./Qtr.	*Christman's Hours*	*Kuebler's[1] Adjusted Hours*	*Less Interim Hours*	*Time Pension Rate*	*Total Amount Due*
1978/4	464	376	232	144x2.2525	324.00
1979/1	128	104	40	64x2.2525	144.00
1979/2	488	395	464		- 0 -
1979/3	520	421	504		- 0 -
1979/4	464	376	520		- 0 -
1980/1	461	337	- 0 -	337x2.6025	877.00
1980/2	512	415	328	87x2.6065	226.00
1980/3	520	421	512		- 0 -
1980/4	424	343	304	39x2.6025	101.00
1981/1	240	194	8	186x2.8525	531.00
1981/2	520	421	160	261x2.8525	745.00
1981/3	304	246	432	- 0 -	- 0 -
1981/4	432	350	256	94x2.8525	268.00
1982/1	424	343	16	327x2.8525	933.00
1982/2	496	402	61	341x2.8525	973.00
1982/3	104	84	- 0 -	84x2.8525	240.00
1982/4	496	402	- 0 -	402x2.8525	1147.00
1983/1	360	292	- 0 -	292x2.8525	833.00
1983/2	360	292	- 0 -	292x2.8525	833.00
					$8,846.00

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[1] Christman's hours x .90 -- 10 percent as per Christman formula.

[2] G.C. Exh. 1 (n), App. K.

APPENDIX F.—PENSION FUND–CURD

Yr./Qtr.	*Christman's Hours*	*Curd's[1] Adjusted Hours*	*Less Interim Hours*	*Time Pension Rate*	*Total Amount Due*
7/25-10/21/77	64	52	- 0 -	52x1.8525	$96.00
1977/4	24	19	120		- 0 -
1978/1	128	104	16	88x1.8525	163.00
1978/2	392	318	96	222x1.8525	411.00
1978/3	104	84	328		- 0 -
1978/4	464	376	288	88x2.2525	198.00
1979/1	128	104	48	56x2.2525	126.00
1979/2	488	395	512		- 0 -
1979/3	520	421	416	5x2.6025	13.00
1979/4	464	376	368	8x2.6025	21.00
1980/1	461	337	8	329x2.6025	856.00
1980/2	512	415	336	79x2.6065	206.00
1980/3	520	421	464		- 0 -
1980/4	424	343	384		- 0 -
1981/1	240	194	- 0 -	194x2.8525	553.00
1981/2	520	421	192	229x2.8525	653.00
1981/3	304	246	408		- 0 -
1981/4	432	350	256	94x2.8525	268.00
1982/1	424	343	32	311x2.8525	887.00
1982/2	496	402	133	269x2.8525	767.00
1982/3	104	84	- 0 -	84x2.8525	240.00
1982/4	496	402	- 0 -	402x2.8525	1147.00
1983/1	360	292	- 0 -	292x2.8525	833.00
1983/2	360	292	- 0 -	292x2.8525	833.00
					$8,271.00

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[1] Christman's hours x .90-10 percent as per Christman formula.

Communications Workers of America, Local 4354, AFL–CIO (American Telephone and Telegraph Company) *and* Julia A. Jefferson *and* Windy K. Holliman. Cases 9–CB–6608 and 9–CB–6614

July 26, 1988

DECISION AND ORDER

BY MEMBERS JOHANSEN, BABSON, AND CRACRAFT

On March 10, 1988, Administrative Law Judge Richard H. Beddow Jr. issued the attached decision. Charging Party Julia A. Jefferson filed exceptions and a supporting brief.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and supporting brief and has decided to affirm the judge's rulings, findings,[1] and conclusions, and to adopt the recommended Order.

In adopting the recommended Order, we agree with the judge, as more fully set forth by him, that Jefferson was a member of Respondent CWA Local 4354 when she crossed its picket line on June 23 and 24, 1986. The judge found that when Jefferson was hired by Ohio Bell in 1973 she joined CWA Local 4310 and signed a dues-checkoff card. In 1983, following AT&T's divestiture of Ohio Bell, Jefferson was assigned to AT&T's Worthington facility. Although Worthington employees were represented by the Respondent, CWA Local 4354, rather than by CWA Local 4310, Jefferson neither resigned her membership nor canceled her dues checkoff. On the contrary, Jefferson supported the Respondent against Local 4310's rival claims by signing a petition in 1984 and by voting in a 1985 CWA-conducted election restricted to Worthington members. After the Respondent won this intraunion election, and the CWA designated it as the Worthington representative, the judge found, crediting the Respondent's witnesses, that Jefferson's Local 4310 membership automatically transferred to Respondent Local 4354. Finally, Jefferson honored the Respondent's picket line until she wrote the Respondent that, "As of Monday, June 23, 1986, I am officially resigning from the Union, Local 4354, CWA." Jefferson placed this letter in the mail on June 24 and the Respondent received it on June 25.

We agree that these facts demonstrate that Jefferson was a member of the Respondent on June 23 and 24. In addition, we find further record evidence to support this conclusion. Thus, although the judge found that Jefferson joined Local 4310 in 1973, the record demonstrates that, under CWA procedures, applicants for union membership sign cards with and join the CWA. The CWA, which receives all membership dues, determines the local having jurisdiction over the applicant, affixes a local sticker to the membership card and remits a portion of the dues to the designated local. When disputes arise between CWA locals, the CWA constitution provides for resolution by the CWA executive board or convention. Once the dispute is resolved, according to the credited testimony of the Respondent's president, "the Local with that jurisdiction will have the members at that location."

Therefore, by signing a membership card in 1973, Jefferson joined the CWA and bound herself to its rules. Although the CWA initially placed Jefferson and other Ohio Bell employees in Local 4310, Jefferson subsequently transferred to Worthington where Respondent Local 4354 had been granted jurisdiction. Indeed, when Local 4310 challenged the Respondent's jurisdiction, Jefferson supported the Respondent. And, once the CWA awarded jurisdiction to the Respondent, Jefferson and all Worthington members became members of the Respondent.

Under all these facts, we agree with the judge that Jefferson was a member of the Respondent on June 23 and 24. However, we reject the judge's alternative finding that the Respondent's internal charges against Jefferson would not violate the Act even were Jefferson not a member. We have held that a union's initiation of disciplinary proceedings against nonmembers, or the threat of such discipline, violates Section 8(b)(1)(A). See, e.g., *Electrical Workers Local 213 IBEW (Rucker Electric)*, 217 NLRB 46 (1975); *Mylen Iron & Aluminum Works*, 216 NLRB 865, 870 (1975).

ORDER

The complaint is dismissed.

Wyrone A. Cravanas, Esq., for the General Counsel.

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[1] There were no exceptions to the judge's dismissal of Case 9–CB–6614.

Charging Party Jefferson has excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

It is unclear from his decision whether the judge stated that two of the Respondent's officials asked Jefferson to sign a union membership card or a dues-checkoff card in early 1986. In fact, she testified that she was asked to sign a membership card. We have considered Jefferson's testimony, but conclude based on the other factors here that Jefferson was and continued to be a member of the Respondent until she resigned during the strike.

289 NLRB No. 148

Jerry L. Riseling, Esq. and *Paul L. Thompson, Esq.*, of Columbus, Ohio, for the Respondent.

Glenn M. Taubman, Esq., of Springfield, Virginia, for the Charging Parties.

DECISION

Statement of the Case

Richard H. Beddow Jr., Administrative Law Judge. These consolidated cases were heard in Columbus, Ohio, on 23 and 24 April 1987. Subsequently, briefs were filed by all the parties. The proceedings are based on charges filed 20 and 29 October 1986,[1] respectively, by individuals Julia A. Jefferson and Windy K. Holliman. The Regional Director's consolidated complaint dated 10 December alleges that Communications Workers of America Local 4354, AFL–CIO (Respondent or Local 4354) violated Section 8(b)(1)(A) of the Act by bringing intraunion disciplinary charges against Jefferson and Holliman.

On a review of the entire record in this case and from my observation of the witnesses and their demeanor, I make the following

Findings of Fact

I. JURISDICTION

The Charging Parties are employees of American Telephone and Telegraph Company, a Delaware corporation with a place of business in Worthington, Ohio, engaged in furnishing interstate telephone communications. At all times material it has been an employer engaged in operations affecting commerce within the meaning of Section 2(2), (6), and (7) of the Act. It is admitted that the Respondent is a labor organization within the meaning of Section 2(5) of the Act and that it has a collective-bargaining agreement with the Employer. Accordingly, I find that inasmuch as the allegations of each complaint charge interference with the statutory rights of an individual, I find that it effectuates the policy of the Act to exercise jurisdiction, see *Iron Workers Local 577 (Various Employers)*, 199 NLRB 37 (1972).

II. THE ALLEGED UNFAIR LABOR PRACTICE

Following the resolution of a jurisdictional dispute in January 1986, Respondent was determined to be the collective-bargaining representative of the American Telephone and Telegraph employees at the Employer's Worthington facility, where both Jefferson and Holliman are employed.

Respondent Local 4354 had jurisdiction at the Worthington location before 1984, however, another local contested its jurisdiction after various changes were made as a result of the court-ordered divestiture of the Employer. It was determined that a vote would be conducted in order to allow members to make their own determination.

Julia Jefferson began working for the Employer's predecessor, Ohio Bell Telephone Company, in October 1973. Ohio Bell employees were then represented by Local 4310 of the Union and Jefferson signed a membership card and dues-checkoff authorization card shortly after beginning her employment. In September 1983, after the divestiture, Jefferson was assigned to the AT&T Worthington facility where she continued her employment as a sales representative. During the course of the jurisdictional dispute, Jefferson signed a petition on 27 March 1984 expressing her desire to have Local 4354 as her representative.

Local 4354 won the election and was designated as the local affiliate for the Worthington location by the executive board of the International Union. In accordance with union practices, all members thereafter automatically came under the jurisdiction of Local 4354. Jefferson's union dues continued to be withheld by the Employer although she never signed another dues-checkoff authorization card. She testified that she was requested to sign a new card in early 1986 by Linda Morrison (Local 4354's treasurer), but told her that she "would think about it" and gave the same response to a request by another individual who was a union steward. This occurred at a time when the International Union was negotiating a new national contract and when the union local had sent all employees a memo that stated: "only members, which are those who have signed membership cards on file, have the right to direct the union and to vote in any election—and strike vote elections." On 31 May the contract between the Employer and Respondent expired and Respondent began a strike at the Employer's facilities, including its Worthington location. Jefferson did not cross the picket line until 23 June when she returned to work. The strike ended on 26 June and a new collective-bargaining agreement subsequently was signed.

Windy Holliman is a communications technician who started work for Ohio Bell in 1970. She became an AT&T employee in January 1984 at its Dayton, Ohio office and signed a membership and dues-checkoff authorization with Local 4354 at that time. In May 1986, she transferred to the Worthington facility, however, she asserts that in December 1985 she became "disgusted" with the Union and mailed a certified letter to Respondent containing her resignation from the Union. She testified that in a general conversation in the lunchroom she stated she "would not be honoring the strike and I was not a member of the local" (although she asserts that Steward Lawanda Martin was present on that occasion, she also stated that at that time she did not know that Martin was a union steward).

Despite her alleged statement, Holliman in fact did honor the picket line for about a week, asserting that it was "not so much because of the strike, but because I was moving from Dayton to Columbus." On 9 June, she crossed the picket line and returned to work.

As noted above, the Union began a lawful economic strike on 1 June in an effort to obtain a more favorable contract. All negotiations were done at the national level. Inasmuch as the collective-bargaining agreements governing the conduct of the parties in this case contained an agency-shop provision, the local union reviewed its membership list in preparation for the strike and it set up a procedure for the possible discipline of members who crossed the strike line.

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[1] All following dates will be in 1986 unless otherwise indicated.

In May 1986, Steward Judy May prepared a list of nonmember employees by obtaining a complete list of all persons working at the Worthington facility and checked the list against membership cards on file at the union hall. Those persons without a membership card were recorded on a list designated nonmembers as of 6 June 1986. Several names had a notation "resigned" subsequently written after them. Neither Jefferson nor Holliman's names were on this union list of nonmembers. After the strike was underway, May prepared a list of members who had crossed the picket line. This list contained 25 names and notations that indicated if they were nonmembers or had resigned and the date of the resignation. Holliman was identified as having crossed from 9 June on, and as a "member no resignation." Jefferson was recorded as crossing on 23 and 24 June and as "member resignation in office 25 June 1986." May testified that she also checked membership cards, including Jeffersons, when she prepared this list. She also said that before the strike the cards were kept in locked files, however, during the strike the cards frequently were referred to and were often left out. Subsequently Respondent discovered that Jefferson's membership card was missing. Kent Cales, the president of the local, testified that he observed membership cards signed by both Jefferson and Holliman during the latter part of June when he was reviewing records after he had been informed that they had crossed the picket line.

After the strike was underway, charges in the form of affidavits were prepared by the union members detailing which individuals, including Jefferson and Holliman, had crossed the picket line. As noted, Steward May then checked the card file to determine if these individuals were members and if a resignation had been received.

In accordance with internal union practices, James Coles was appointed as "prosecutor" with duty to investigate the charges, see if the complaints had merit, and recommend action to the membership. He found that some charges were meritorious and that some others were not. He then instructed the Union that individuals would not be prosecuted if they were not members, or were members and had resigned, and that, for the individuals resigning, they would only be prosecuted for crossing the picket line before receipt of the resignation.

Based on his investigation and all the information he received, he determined that Jefferson, Holliman, and 10 other individuals should be charged under the constitution and bylaws of the Union. Once the determination was made to try an individual, the worker was notified of the charges, a trial date was established, and the individual was advised of his or her rights under the constitution and bylaws to be present, and to present testimony and witnesses in their defense. The 10 other people charged were tried by the Union in the fall of 1986, however, because both Jefferson and Holliman filed charges with the National Labor Relations Board before their trial dates, their cases were indefinitely postponed by the Union pending the resolution of this Board proceeding.

III. DISCUSSION

Under the provisions of the Act, a union has the right to regulate its own internal affairs including the right to discipline members who violate union rules that are reasonably consistent with the basic legislative purpose of the Act, *NLRB v. Allis-Chalmers Mfg. Co.*, 388 U.S. 175 (1967), and *Scofield v. NLRB*, 394 U.S. 423 (1969). See also *Electrical Workers IBEW Local 453*, 263 NLRB 862 (1982).

Here, the General Counsel contends that the Union's attempt to enforce its rules by the mere filing of intraunion disciplinary charges against Jefferson and Holliman was improper because it is asserted that neither was a member of the Union at the time they were alleged to have violated the Union's rules.

Section 8(b)(1)(A), which is claimed to have been violated here, provides, that:

> (b) It shall be an unfair labor practice for a labor organization or its agent—(1) to restrain or coerce (A) employees in the exercise of the rights guaranteed in section 7 . . . *provided, That this paragraph shall not impair the right of a labor organization to prescribe its own rules with respect to the acquisition or retention of membership therein.* [*Emphasis added.*]

It is well established that in furtherance of this right, any union discipline of members must relate to properly adopted rules which reflect a legitimate union interest, must impair no policy Congress has imbedded in the labor laws, and must be reasonably enforced, see *Scofield*, supra.

Here, there is no claim nor showing of proof that relates to any of the *Scofield* criteria, except the reasonableness of the Union's attempt to enforce its rules. The attack on the Union's enforcement effort otherwise begs the question and directs itself at the employees' potential defense to the charges, namely the assertion that each was not a member at the time she engaged in conduct in violation of the union rules.

First, the record shows that both Jefferson and Holliman had been union members and continued to be recorded on the Union's records as members. Because of a jurisdictional dispute between locals of the Union that arose out of the court-ordered reorganization of the Employer, and because of its preparation for an anticipated strike, the Union made extensive reviews of its membership list. Both Jefferson and Holliman were recorded as members. Subsequently, after the strike began, after charges were filed against a number of individuals who crossed the lawful picket line, and after the Union followed elaborate internal procedures to review the validity of the changes and each person's membership status (paying specific attention to any receipt of a resignation of membership), about 10 or more persons were formally referred to trial. There is no showing that the Union was made aware that either of the Charging Parties asserted her innocence to the union charges because of any change in their membership status at any time before their filing of the charges with the Labor Board.

The Charging Parties were not treated any differently than about 10 other persons who were charged with rules violations and scheduled for trial. They were given an opportunity to appear and present an appropriate defense in an internal trial procedure; however, they instead choose to file their own charges against the Union alleging an unfair labor practice. There is no showing that the Union's filing of internal charges was motivated by anything other than a desire to maintain union discipline validly related to rules pertaining to retention of membership. There is no showing that the Union knew or should have known that Jefferson and Holliman claimed nonmembership status by virtue of resignation (or any other reason) or that the Union otherwise acted unreasonably in pursuing the charges. The Union undertook a detailed investigation and had valid reasons to believe that Jefferson and Holliman were still members at the time each crossed the picket line and at the time it attempted to pursue charges against them. Here, I find that the mere existence of the possibility that a person charged could show a proper defense to the Union's allegations during the trial on such charges does not act to invalidate the reasonableness of the Union's rule enforcement effort. Accordingly, I conclude that the General Counsel has failed to substantiate his contentions that the Respondent has violated Section 8(b)(1)(A) of the Act and, accordingly, I recommend dismissal of the complaint.

I find that it is unnecessary to determine the truthfulness of the Charging Parties' assertions that they were not union members when they crossed the picket line to reach the conclusion that the General Counsel has failed to show a violation of the Act. However, I otherwise find that the record also fails to support a factual conclusion that the Charging Parties in fact did submit valid resignations from membership or otherwise took such actions or nonactions that effectively changed their status to that of nonmembers.

Jefferson's claim to nonmembership status is based on the fact that she initially signed a membership card with Local 4310 and never executed a card with Local 4354, although she was requested to do so subsequent to the resolution of the jurisdictional dispute in Local 4354's favor and before the strike in May 1986. During all this period, union dues continued to be deducted from her pay and she took no affirmative steps to specifically resign her membership from Local 4310 or the International or to otherwise check on her status.

To the contrary, she signed a petition 27 March 1984 in favor of Local 4354 and she participated in the jurisdictional vote. To so participate, it was necessary for her to be a member of the Communications Workers. Jefferson also honored the picket line from 1 June until 23 June. On that day she prepared a letter of resignation, which she mailed the next day to both Local 4310, Local 4354, and the International. Local 4354 received it on the 25th and it accordingly limited its charge against her to alleged rule violation only for the 2 days she worked before the Union's receipt of the resignation.

The General Counsel points out some actions that Jefferson did not take, such as allegedly not signing a new card for Local 4354 and not attending union meetings, as being indicative of nonmembership. Proof of negative indications, however, falls far short of being proof of an unequivocal separation from membership status. The General Counsel also seeks to draw some inference that Jefferson was not a member because the Union acknowledged that they could not locate her membership card. Two union officials, however, credibly testified that they saw and utilized her card during the course of preparing for the strike and the filing of charges and this testimony is corroborated by union records prepared as a result of these examinations. Although it seems probable that the card would have reflected her original membership in Local 4310, rather than a specific joining of Local 4354, I otherwise accept Respondent's position that the employees' membership automatically transferred to the properly authorized local when the question of jurisdiction was resolved by the noted election.

Jefferson admittedly signed a card with Local 4310 and I find that the current existence of the card is irrevelant to the question of Jefferson's membership status. I also conclude that it is not implausible that the card was mislaid during the unusual activities surrounding the strike. Jefferson professed to be unaware of Local 4354 union matters, however, she understood that her work location was under the jurisdiction of Local 4354 and she otherwise is shown to be an informed individual capable of fulfilling the responsible duties of a sales representative for the Employer telephone company. She made no inquiries about her status after the resolution of the jurisdictional dispute or when the Union went on strike. After she returned to work, she promptly prepared and mailed a resignation to both Local Unions, as well as the International. Under these circumstances, I find that it was her responsibility to take affirmative and unequivocal action to obtain nonmembership status. Here, it is not shown that she took one affirmative step that could be interpreted as conveying to the Union that she was resigning her membership.

Accordingly, I find that Julia Jefferson was a member of the Union on 23 and 24 June, the dates relevant to the union charge against her, and that she did not change, nor convey to the Union her intentions to change, her membership status until 25 June. Therefore, the Union acted properly and reasonably by considering her to be a member on those days she crossed the picket line before the receipt of her resignation from membership.

Holliman's claim to nonmembership status is based on her allegation that she became "disgusted" and resigned from the Union in December 1985. The Union asserts that no such resignation was ever received.

Holliman, who also is shown to be an informed individual that holds a responsible position as a communications technician, testified that she typed a letter of resignation at work in Dayton, and drove to Columbus, Ohio, where she maintained a post office box and mailed the letter from the main post office. In support of her testimony, she presented a sales receipt for certified mail that bears a stamp impression indicating that a letter was mailed on 9 December 1985.

She testified that she waited in line because of heavy traffic, told the postal clerk she wanted to mail the letter, paid him, and he stamped a receipt. He returned the top portion of it to her and she filled out the union name and address, and left. She asserts that she did not read the receipt, nor did the clerk ask her if she wanted a return receipt.

When Respondent began preparations for this proceeding, it observed that the stamp impression contained on Holliman's receipt was identical to that of two other individuals who allegedly sent resignations that also had not been received by the Union. In all three cases, the receipt for certified mail was stamped Columbus, Ohio M.O.C.U. with a date. Suspicions were further raised when one of the receipts was stamped on 21 April 1985, which was a Sunday.

Respondent requested the post office to conduct an investigation. This investigation resulted in a letter dated 4 February 1987, to the General Counsel's office and to counsel for Local 4354. The letter states that the main post office in Columbus, after searching its files, found there was no record of delivery or receipt for certified receipt, P 041 658 872 (the letter allegedly mailed by Holliman) or for one of the other receipts (P 050 010 474, dated 18 March 1985). The letter was prepared by Ruth Thompson, an employee of the consumer affairs section of the post office, who also testified that the stamp with the letters, M.O.C.U. (for Main Office Carrier Unit), is not available to the window clerks where Holliman claims to have mailed her letter and could not have been used by mistake at the window.

George Calhoun, a claims and inquiry clerk for the post office, researched Holliman's receipt. He found no record of delivery or return on this receipt. He indicated that he and another person conducted the search order to cross check each other and still no record could be found. Although they do lose a couple of receipts a day, there are 4000 to 6000 other receipts that are properly accounted for.

Charles Boren, the area manager for the postal service, testified that the M.O.C.U. stamp is only found in the main office carrier unit, which is located at least 100 yards from the window unit. The carrier unit is in the extreme rear of the building and the window unit is at the extreme front. The carrier unit is not accessible to the general public and the M.O.C.U. stamp is never available to the counter unit. Boren further testified that temporary employees are never used at the window unit and, further, window unit employees are trained to ask customers whether they want a return receipt. At the suggestion of the court, Boren made an attempt to review when receipts in numerical sequence with Holliman's receipt were used but reported back that he had no record of where such information might be kept.

It also was established that Holliman is well acquainted with a number of employees at the Columbus post office that are letter carriers, including her former husband, who is a clerk (but not a window clerk) and that a postal investigator interviewed her about this matter. To her knowledge, no charges against any postal employees were brought as a result of the investigation.

The General Counsel argues that where there is no evidence of actual delivery as here, it is presumed that membership resignations are received the day after mailing, citing *Electrical Workers IBEW Local 340 (Hulse Electric)*, 273 NLRB 428 (1984).

In the instant case, however, the Respondent has persuasively shown the existence of irregular circumstances surrounding the purported mailing of the resignation letter. These circumstances include the fact: (1) that Respondent has no record of having received it, yet freely admits and has records of receiving a large number of other resignations; (2) that Holliman's testimony regarding the way in which she mailed and obtained a "receipt" (but not a return receipt) of mailing is directly at odds with the probative testimony of post office officials regarding the procedures and use of the involved "receipt" stamp; (3) that Holliman engaged in conduct inconsistent with her expressed "disgust" with the Union by failing to request a return receipt or otherwise seeking any confirmation of her membership status and then observing the picket line for approximately a week; and (4) that Holliman had the opportunity through her acquaintanceship with post office employees who has unique access to the receipt stamp used on her inappropriately stamped receipt slip.

I find that post office officials have persuasively shown that in the ordinary course of business Holliman could not have obtained a sales receipt bearing the stamp impression appearing on her asserted proof of mailing. The indication that postal investigators apparently did not find sufficient evidence to support any further action is immaterial to proof of the validity of Holliman's mail receipt stamped 9 December 1985. I conclude that the receipt stamped 9 December 1985 is not valid and is not entitled to any affirmative weight as proof of the mailing of a membership resignation.

I therefore find that the Respondent has shown that no presumption of mailing (and receipt) of Holliman's purported resignation from membership is warranted. Otherwise, the General Counsel has failed to show that the questioned receipt should be considered to be valid.

I further find that Holliman's testimony that she mailed a letter of resignation stands uncorroborated and, in view of all the circumstances, including the suspicion of possible fabrication, her testimony is not entitled to credible weight that could affirmatively establish that she resigned from membership prior to the date she crossed the picket line. Accordingly, the Union acted properly and reasonably by considering her to be a member at the time she violated union rules.

CONCLUSIONS OF LAW

1. Respondent is a labor organization within the meaning of Section 2(5) of the Act and it has a collective-bargaining agreement with an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act, and it will effectuate the purposes of the Act to assert jurisdiction.

2. Respondent did not engage in an unfair labor practice in violation of Section 8(b)(1)(A) of the Act by charging Julia A. Jefferson and Windy K. Holliman with a violation of internal union rules and notifying them that a trial court concerning those charges would be conducted on 6 November 1986.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[2]

ORDER

It is recommended that the complaint be dismissed in its entirety.

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[2] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

Beckley Belt Services d/b/a Beckley Belt Services and Roofing Co., Inc. *and* United Mine Workers of America. Case 9-CA-20653

July 26, 1988

SUPPLEMENTAL DECISION AND ORDER

BY CHAIRMAN STEPHENS AND MEMBERS BABSON AND CRACRAFT

On April 11, 1988, Administrative Law Judge Richard H. Beddow Jr. issued the attached supplemental decision. The Respondent filed exceptions and a supporting brief.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the supplemental decision and the record in light of the exceptions and brief and has decided to affirm the judge's rulings, findings,[1] and conclusions,[2] and to adopt the recommended Order as modified.[3]

Discriminatee Wallace Coy, although subpoenaed by the General Counsel, did not appear at the hearing. As a result the Respondent was denied an opportunity to cross-examine him.[4] We shall order the Respondent to pay the amount found due Coy to the Regional Director for Region 9 to be held in escrow for 1 year.[5] The Regional Director will make suitable arrangements including, if necessary, further supplemental proceedings to afford the Respondent, together with the General Counsel, an opportunity to examine Coy, and any other witness with relevant testimony, and to introduce any relevant and material evidence bearing on the amount of backpay due. The Regional Director shall make a final determination whether any interim earnings or other amounts, in excess of those shown in the specification, or any other factors are revealed which may reduce the amount of backpay due under existing precedent. In the event the Regional Director determines that deductions are warranted, the amount so deducted shall be returned to the Respondent.[6]

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge with the modifications listed below and orders that the Respondent, Beckley Belt Services d/b/a Beckley Belt Services and Roofing Co., Inc., Beckley, West Virginia, its officers, agents, successors, and assigns, shall

1. Make whole discriminatees William Crawford and Neal Parrish as set forth in the recommended Order minus tax withholdings required by law.

2. Pay to the Regional Director for Region 9 the net backpay found due employee Wallace E. Coy. The Regional Director shall place this backpay in escrow for a period not exceeding 1 year from the date the money is deposited. If the Respondent seeks review and then deposits the money after court enforcement of the Board's Order, the escrow period will end 1 year after the money is deposited. Finally, if the Respondent deposits the money and then seeks review the escrow period will end 1 year after the Board's Order is enforced. The Regional Director shall make arrangements to afford the Respondent, together with the General Counsel, an opportunity to examine Coy, and any other witness with relevant testimony, and to introduce any relevant and material evidence bearing on the amount of backpay due. The Regional Director shall make a final determination whether any interim earnings or other amounts, in excess of those shown in the specification, or any other factors are revealed which may reduce the amount of backpay due under existing precedent. In the event the Regional Director determines that deductions are warranted, the amount so deducted shall be returned to the Respondent.

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[1] The Respondent has excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

[2] The Respondent, in its brief, states that it agrees that the judge's award of $15,675.88 to Neil Parrish should be paid.

[3] The judge's recommended Order will be modified to deduct any tax withholding required by law.

[4] Unlike the judge, we attach no significance to the Respondent's failure to subpoena Coy since he had already been subpoenaed by the General Counsel.

[5] *Starlite Cutting*, 280 NLRB 1071 (1986) (*Starlite I*), as amended by *Starlite Cutting*, 284 NLRB 620 (1987) (*Starlite II*). *Starlite I* overruled *Duncan Foundry & Machine Works*, 222 NLRB 768 (1976), and stated that a respondent's backpay obligation in the absence of the discriminatee will lapse at the end of a 1-year escrow period and, absent the discriminatee's showing by a preponderance of the evidence that there were compelling reasons to justify the failure to come forward during that period, a respondent shall not remain obligated for the gross backpay amount specified for the discriminatee after the end of the 1-year escrow period. *Starlite II* clarified the starting date of the 1-year escrow period discussed in *Starlite I*. In *Starlite II* the Board majority held that the 1-year escrow period shall begin either on the respondent's compliance by payment of the backpay for deposit into escrow or on the date the Board's supplemental decision and order becomes final, including enforcement thereof, whichever is later. The provisions of *Starlite I and II* are applicable in the instant case with regard to backpay owed to Coy. For reasons stated in his concurring and dissenting opinion in *Starlite I* Chairman Stephens would not have Coy's backpay lapse if he should be unavailable during the escrow period. Similarly, Member Cracraft, who did not participate in *Starlite I*, agrees with former Member Dennis' dissent that backpay for unavailable discriminatees should not lapse after 1 year. However, so long as *Starlite I* remains Board law, Chairman Stephens and Member Cracraft will apply the remedy set forth in that decision.

[6] *O.K. Machine & Tool Corp.*, 279 NLRB 474 (1986).

289 NLRB No. 152

Patricia R. Fry, Esq., for the General Counsel.
Fred F. Holroyd, Esq., of Charleston, West Virginia, for the Respondent.
George Davis, Esq., of Beckley, West Virginia, for the Union.

SUPPLEMENTAL DECISION

RICHARD H. BEDDOW JR., Administrative Law Judge. This matter was heard in Beckley, West Virginia, on January 12, 1988. Subsequently, briefs were filed by the General Counsel and Respondent.

The proceeding is based on backpay specifications dated November 4, 1987, following a consent judgment filed April 1, 1987, by the United States Court of Appeals for the Forth Circuit enforcing the Decision and Order of the National Labor Relations Board dated April 28, 1986, reported at 279 NLRB 512 the Decision ordered Respondent to make laid-off employees Neal Parrish, Wallace Coy, and William Crawford whole for any loss of pay suffered by their unlawful layoff.

On review of the backpay specifications, as amended, Respondent's answer and the evidence presented at the hearing, it appears that the primary issues presented are as follows:

1. Whether the formula used in the backpay specifications, based on the discriminatees' estimated share of total actual wages paid during the backpay period, should be reduced.
2. Whether medical expenses claimed by Crawford, Coy, and Parrish are reimbursable.
3. Whether Respondent tolled its pension obligation by terminating the contract in March 1984.
4. Whether Crawford, Coy, and Parrish were entitled to backpay during the first and second quarters of 1984.
5. Whether William Crawford was entitled to backpay after the second quarter of 1986.

Testimony

Claude Harrell, the Board's compliance officer, testified regarding his review and preparation of the backpay specifications and the basis for his conclusions.

He determined the ratio of "belting work" verses "roofing work" and then took all wages paid by the Employer and multiplied it by a factor to determine what percentage of belting work would have gone to each discriminattee. This method was devised because a request to the employer for pertinent records was not responded to. On cross-examination, Harrell answered that he did not take into consideration the Employer's alleged cancellation of the collective-bargaining agreement (in 1984) when he evaluated the pension contribution figures. He also stated that he looked at medical bills represented to be unreimbursed and, in the case of Parrish, a discussion with his wife resulted in the elimination of a significant portion of his initial figure because the bills had been otherwise reimbursed. He also was asked about his investigation of interim employment and answered that tax returns had been examined. These documents were made available to Respondent's counsel for examination and, after a 15-minute recess, counsel stated he had no further questions.

Discriminatees Parrish and Crawford were called and testified regarding their unreimbursed medical expenses and their search for employment.

The General Counsel did not call Wallace Coy but supplied Respondent's counsel with his underlying tax returns and W-2 forms, which had been obtained in the course of the Board's investigation. Respondent's counsel made a demand that the General Counsel produce Coy. When it was stated that an effort had been made to obtain his presence but that he did not appear, Respondent's counsel made no further attempt to seek the witness through issuance of a subpoena but stated it was willing to proceed. He then moved to strike the backpay specifications that related to Coy. The motion was denied and counsel called Respondent's president, Gary Stegal, as its only witness.

Stegal introduced a copy of an unsigned letter he allegedly sent on March 30, 1984, to District 29 of the Union. It purports to be a notice to terminate the existing labor agreement effective 30 September 1984. The letter also asserts that Respondent would not be bound by any contract negotiated by any association but was prepared to negotiate a new agreement. Such negotiation never occurred and the Union asserts its files do not contain the document. The Union and the General Counsel objected to the letter's authenticity, pointing out that the letter is not a carbon or Xerox copy of an original, it is not executed, and there is no showing that it was mailed or delivered to the Union.

Stegal testified regarding occasions after Coy was laid-off when he allegedly observed him going to work at Allen Belt Company. The General Counsel, however, indicated that the witness had examined the Board's documentation that shows that Coy's wife was employed at that company in 1984 and 1985; however, Stegal indicated that he believed the documents were false or inaccurate. Stegal also testified regarding an employment-subcontracting arrangement he made with laid-off employee Crawford during the backpay period.

Discussion and Conclusions

It is well established that the only burden on the General Counsel in a backpay proceeding is to show the gross amount of backpay due, and that the finding of an unfair labor practice presumes that some backpay is owed, see *Hacienda Hotel & Casino*, 279 NLRB 601 (1986).

Turning first to Respondent's contention that its pension obligations were tolled by its March 1984 letter terminating its contract, this letter is not shown to be authentic or entitled to be afforded any probative weight. I find that the asserted letter of termination is not a carbon or Xerox copy of an original, it is not executed, there is no showing that it was mailed, and it was not received by the Union. Otherwise, I conclude that the Respondent's testimony, standing alone, is inherently unbelievable[1] and insufficient to support the Respondent's burden to show that the pension contribution liability stated in the backpay specifications should be reduced. Moreover, the Board's Decision and Order of April 28, 1986, in this proceeding specifically ordered the Respondent to:

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[1] There was no mention of any termination of the contract in the unfair labor practice hearing, which was conducted on May 22, 1984, and it was undisputed that Respondent was then a member of the Association of Bituminous Contractors.

> (d) Honor and give effect to the collective-bargaining agreement between the Respondent and the Union and make the employees in the above-described bargaining unit whole for any losses they may have suffered as a result of the Respondent's failure to honor, abide by, and apply to unit employees the term of the collective-bargaining agreement, including the wage rate, health and benefit plan, pension fund, and grievance arbitration procedure, in the manner set forth in the section herein entitled "The Remedy."

Respondent cannot unilaterally toll the backpay period except as provided by the Order, which requires an offer of immediate and full reinstatement to each discriminatee and, under these circumstances, I find that Respondent has not shown that its obligation to employees' pension fund was terminated at an earlier date.

Respondent's position on its pension obligation also appears to be inconsistent with its failure to dispute the fact that the discriminatees' medical expenses would be covered by the contract's insurance provisions. Here, the discriminatees are shown to be entitled to medical and dental insurance coverage under the National Coal Mine Construction Agreement, by which Respondent was bound. Although Respondent contended that Crawford and Parrish were covered by hospitalization plans and thus incurred no actual medical expenses, the Board's compliance officer and both Crawford and Parrish testified concerning their medical bills. Crawford testified that he did not obtain any medical insurance after January 1984, and that his wife was not covered by any insurance.

Parrish testified that he did not obtain any other insurance until January 1985 and that his new policy did not cover all items that had previously been covered by his contractual insurance plan under Respondent, nor did it cover 100 percent of expenses.

Inasmuch as the Board's investigation shows that the discriminatees incurred unreimbursed medical bills which would have been paid under Respondent's insurance coverage and their bills were not covered by any other insurance, they are entitled to reimbursment as set forth in the backpay specifications.

Respondent contends that the gross backpay amounts in the backpay specifications should be reduced because of changes in the distribution of work, however, it presented no evidence to support its contention and, otherwise, the compliance officer testified that application of Respondent's theory to the General Counsel's formula in fact would result in an increase in gross backpay.

Additionally, Respondent did not furnish any alternative computation of backpay, whereas the compliance officer looked at all wages paid to employees who performed belt work and roofing work during the year preceding the backpay period and computed the percentage of those wages which had been paid to each of the discriminatees. He applied the percentage for each discriminatee to the total belt and roofing wages for each quarter in the backpay period to compute gross backpay for each discriminatee. (This formula was used because the discriminatees had performed only belt work while employees who replaced them performed both belt work and roofing work and it was not appropriate to use the wages paid to replacement employees during the backpay period as gross backpay.)

Respondent's answer alleges that Crawford and Parrish made no attempt to find interim employment in the first quarter in 1984 and that Coy received unreported interim earnings during the first and second quarters of 1984. The only evidence in support of its contention was the testimony of Respondent's president that he had observed Coy going to Allen Belt. As noted, it appears that Coy's wife was employed at Allen Belt Co. and, otherwise, no effort was made to subpoena records or present evidence from Allen or its payroll records to show whether Coy had received any pay from Allen Belt prior to the third quarter of 1984.

The burden of showing interim earnings for mitigation of damages rests with Respondent. *Rainbow Coaches*, 280 NLRB 1420 (1986). Here Crawford and Parrish testified at length concerning their efforts to find work during the period and, otherwise, Respondent's testimony regarding his observation of Coy going to another company merely gives rise to speculation and falls far short of meeting its burden of proof that Coy concealed some of his income. Respondent was given the opportunity to examine the underlying documentation on which Coy's backpay specifications were based and to cross-examine the responsible compliance officer. Otherwise, counsel indicated his willingness to proceed and no attempt was made by Respondent to subpoena Coy's presence at the hearing and I conclude that the record fails to show that any change in the backpay specifications is warranted.

Respondent also contends that a proper offer of reinstatement was tendered to Crawford on May 22, 1986. No evidence was submitted of such an offer and Stegal affirmed that he did not send a letter offering reinstatement to Crawford. Crawford did some sporadic work for Respondent in 1986 that appears to have been principally in the nature of a subcontracting arrangement, although Respondent's payroll records reflect employee earnings for Crawford of $734 (less appropriate deductions) during May 1986.

The testimony indicates that Crawford had formed a business, Cardinal Belt, with another individual and sought to perform belt services for coal mines. Some of Cardinal Belt's services were performed in partnership with Respondent, using Respondent's equipment. Respondent claims that because Cardinal Belt failed to pay Respondent its share of the proceeds on such jobs, Crawford was subsequently terminated for cause as an employee.

Respondent made no apparent attempt to recover these funds and in fact again used Crawford's personal services in the third quarter of 1986 when Respondent's payroll records showed (by stipulation of the parties) that Crawford received $320. It therefore appears that

Crawford was not terminated for cause but continued to be called for sporadic employment. Inasmuch as such sporadic, casual employment does not meet the requirements of the remedial Order that Crawford be offered "full reinstatement" to his former position, I find that no action occurred that would effectively toll the backpay period and I conclude that it continues though the period alleged in the backpay specifications.

Under these circumstances, I concluded that the gross backpay computations in the backpay specifications are the most accurate possible estimates of backpay and that Respondent has failed to establish any reasonable alternative basis for a dimension of damages. I therefore conclude that gross backpay should be computed according to the backpay specifications.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[2]

ORDER

On the basis of the findings and conclusions set forth above and pursuant to Section 10(s) of the Act, it is ordered that Respondent Beckley Belt Services d/b/a Beckley Belt Services and Roofing Company, Inc., Beckley, West Virginia, its officers, agents, successors, and assigns, shall make whole each of the discriminatees' named below by payment to each of them as reimbursement for medical expenses and backpay the amount set forth next to his name, plus interest to the date of payment as computed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987),[3] and payment to the United Mine Workers of America pension fund the total of $10,204.46 plus interest, on behalf of the discriminatees.

Discriminatee	*Medical*	*Backpay Less Earnings*	*Total*	*Pension Trust*
Wallace E. Coy	$ 962.28	$23,645.00	$24,607.28	$3,501.26
William Crawford	2,343.00	7,590.00	9,933.00	2,903.59
Neal Parrish	5,145.27	6,742.00	11,869.27	3,804.61

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[2] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

[3] Under *New Horizons for the Retarded*, interest is computed at the "short-term Federal rate" for the underpayment of taxes as set out in the 1986 amendment to 26 U.S.C. § 6621. Interest on amounts accrued before January 1, 1987 (the effective date of the amendment) shall be computed as in *Florida Steel Corp.*, 231 NLRB 651 (1977).

Zayre Department Stores *and* **United Food and Commercial Workers Union, Local 1444, as Chartered by United Food and Commercial Workers International Union, AFL-CIO-CLC.** Case 30-CA-9355

July 26, 1988

DECISION AND ORDER

BY CHAIRMAN STEPHENS AND MEMBERS JOHANSEN AND BABSON

On April 3, 1987, Administrative Law Judge Lowell Goerlich issued the attached decision. The Respondent filed exceptions and a supporting brief, and the General Counsel filed a limited exception and an answering brief.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings,[1] and conclusions and to adopt the recommended Order.[2]

In his recommended remedy, the judge provided that the Respondent make whole its employees for any loss of wages or other employment benefits they may have suffered as the result of the Respondent's failure to sign the contract, plus interest. The judge further provided that the loss of earnings shall be computed in the manner set forth in *F. W. Woolworth Co.*, 90 NLRB 289 (1950), and *Florida Steel Corp.*, 231 NLRB 651 (1977). We modify the judge's recommended remedy to provide that the loss of earnings shall be computed in the manner set forth in *Ogle Protection Service*, 183 NLRB 682 (1970), enfd. 444 F.2d 502 (6th Cir. 1971), with interest to be computed in the manner provided in *New Horizons for the Retarded*, 283 NLRB 1173 (1987).[3]

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge and orders that the Respondent, Zayre Department Stores, Racine, Wisconsin, its officers, agents, successors, and assigns, shall take the action set forth in the Order.

Benjamin Mandelman, Esq. and *Paul Bosanac, Esq.*, for the General Counsel.

David E. Jarvis, Esq. and *Lynn English, Esq.*, of Milwaukee, Wisconsin, for the Respondent.

Scott D. Soldon, Esq., of Milwaukee, Wisconsin, for the Charging Party.

DECISION

STATEMENT OF THE CASE

LOWELL GOERLICH, Administrative Law Judge. The charges filed on 10 October 1986 by United Food & Commercial Workers Union, Local 1444, as chartered by United Food & Commercial Workers International Union, AFL-CIO-CLC (the Union) was served on Zayre Department Stores (the Respondent) by certified mail on the same date. The first amended charge filed by the Union on 14 October 1986 was served on the Respondent on the same date. A complaint and notice of hearing was issued on 6 November 1986. The complaint, among other things, alleges that the Respondent since 23 September 1986 has failed to execute a written agreement with the Union in violation of Section 8(a)(1) and (5) of the National Labor Relations Act.

The Respondent filed a timely answer in which it denied that it had engaged in the alleged unfair labor practices.

This case came on for hearing in Milwaukee, Wisconsin, on 27 and 28 January 1987. Each party was afforded a full opportunity to be heard, to call, to examine and cross-examine witnesses, to argue orally on the record, to submit proposed findings of fact and conclusions of law, and to file briefs. All briefs have been carefully considered.

On the entire record in this case and from my observation of the witnesses and their demeanor, I make the following

FINDINGS OF FACT

I. THE BUSINESS OF THE RESPONDENT

At all times material, the Respondent, a Delaware corporation with offices and places of business located in Racine, Wisconsin, has been engaged in the operation of general merchandise retail stores throughout the United States and operates two such stores located in Racine, Wisconsin.

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[1] The Respondent has excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

In adopting the judge's decision, we find it unnecessary to rely on his statement at fn. 8 of his decision that the Respondent was insisting that nonunion members participate in the ratification vote.

Member Johansen notes that Sec. 8(d) defines the obligation "to bargain collectively." The failure to bargain collectively is made an unfair labor practice by Sec. 8(a)(5) and Sec. 8(b)(3).

[2] The General Counsel has requested that the Order include a visitatorial clause. Under the circumstances of this case, we find it unnecessary to include such a clause. *Cherokee Marine Terminal*, 287 NLRB 1080 (1988).

[3] In accordance with our decision in *New Horizons for the Retarded*, 283 NLRB 1173 (1987), interest on and after January 1, 1987, shall be computed at the "short-term Federal rate" for the underpayment of taxes as set out in the 1986 amendment to 26 U.S.C. § 6621. Interest on amounts accrued prior to January 1, 1987 (the effective date of the 1986 amendment to 26 U.S.C. § 6621), shall be computed in accordance with *Florida Steel Corp.*, 231 NLRB 651 (1977).

289 NLRB No. 153

During the past calendar year, a representative period, the Respondent, in the course and conduct of its business operations described above, received gross revenues in excess of $500,000, and during the same period, purchased and received goods valued in excess of $50,000 from points located directly outside the State of Wisconsin.

The Respondent is now, and has been at all times material, an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

II. THE LABOR ORGANIZATION INVOLVED

The Union is now, and has been at all times material, a labor organization within the meaning of Section 2(5) of the Act.

III. THE UNFAIR LABOR PRACTICES

The parties stipulated that a petition for an election was filed 12 July 1983. An election was conducted on 23 September 1983 to which exceptions were filed by the Respondent. Thereafter the Board issued a Decision and Certification of Representative on 21 March 1984 certifying the Union as the bargaining agent. The Respondent refused to bargain. A complaint was issued that culminated in a bargaining order on 28 September 1984 in 272 NLRB No. 84 (unpublished). On 16 August 1985, the United States court of appeals enforced the Board's order.

Thereafter, commencing on 22 October 1986 and concluding on 23 July 1986, the Union and the Respondent met in negotiation sessions. At the 23 July 1986 session, the Respondent presented the Union, as a final offer, a complete written contract except for the duration clause. The omission was supplied by the Respondent orally. The contract offer was for a period of 3 years to commence on the date of the signing of the contract. Irving Ritz, vice president of labor relations, was the spokesman for the Respondent during the negotiations and Paul Whiteside Jr. was the spokesman for the Union. Although the subject of contract ratification had not been discussed at any of the prior bargaining sessions, including the 23 July 1986 session, Ritz insisted that at the 23 July 1986 session he stated to the union representatives that "we were prepared to sign the agreement subject to acceptance or ratification by the employees."[1] According to Ritz, "There was no direct response, no objection, no grunts, no nods . . . until the end of the contract negotiations at which time they said the contract isn't acceptable to us, but we will take it to a vote." Whiteside denied that the Respondent had proposed as a condition precedent to the execution of the proffered contract ratification by the employees.[2]

At the 23 July 1986 bargaining session the Union reviewed the contract offer and, according to Whiteside, after discussion with the Respondent's representatives, the following subjects had not been resolved: union security, probationary period, seniority, polygraph, wages, and term of the contract. At the close of the session the Respondent was advised that the union representatives present would not recommend acceptance of the proposed contract but would, nevertheless, submit the contract to a ratification vote.[3] As testified by Ritz, "At the very end of negotiations, the Union said we cannot accept this contract, but we will take it to a vote." Prior to the conclusion of the 23 July 1986 session, arrangements were agreed on whereby the Union could use the Respondent's bulletin board to announce a ratification meeting.

Notices were posted as agreed. A ratification meeting was scheduled on 3 September 1986 at the union hall.[4] The ratification meeting occurred as scheduled. At this meeting the union conferees at the negotiating session reversed their position and recommended acceptance of the proposed contract. Whiteside made the recommendation. Nevertheless, the contract was rejected; a strike vote was taken, which failed to pass.

Ritz heard of the contract rejection the next day through one of the store managers.

Neither the Respondent nor the Union communicated with each other in respect to the status of the proposed contract until 19 September 1986, when the Respondent received the following mailgram from the Union dated 18 September 1986:

> In accordance with Article 23, Section D6 of the USCW International Constitution Local 1444 has ratified your final proposal as presented in the messages on 7-23-86. Accordingly, we will be preparing copies of the Labor agreement for your signature.[5]

By letter dated 18 September 1986, the Union sent the following message:

> This is a follow-up to our mailgram of September 17, 1986. The Western Union operator somehow made several errors in the message, which should have read:

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[1] Ritz' demand is sometimes referred to at the "employee ratification" or "ballot clause."

[2] Had the Union agreed to Ritz' alleged proposition it would have violated the Union's constitution, which required an employer's final offer to be submitted to membership of the Union not the employees of the employer. (See infra.)

[3] The Union's International constitution, art. 23, sec. D3, required that an employer's final offer be submitted to the affected membership:

> The proposal judged by the President of negotiating committee to be the employer's final proposal for a collective bargaining contract or renewal of an existing contract shall be submitted to the affected membership for its consideraton. A majority vote of those present and voting shall be necessary to accept or reject the proposal.

[4] Daniel Welch, president of the Union, testified that the ratification meeting was delayed because it "was a heavy vacation period and a work period for us" and that "we wanted to consult with our International Union."

[5] Art. 23, sec. D6, provides:

> In the event of rejection of the employer's proposal judged by the Local Union President of negotiating committee to be the employer's final proposal for a collective-bargaining contract or renewal of an existing contract and the failure of the affected membership of the Local Union to approve a strike or other economic action by a two-thirds vote, the Local Union Executive Board shall, after notifying the International President and receiving acknowledgement of such notice, have authority to accept or reject such offer.

> In accordance with Article 23 Section D-6 of the *UFCW International Constitution, Local 1444 has ratified your final proposal as presented and amended* on July 23, 1986. Accordingly, we will be preparing copies of the labor agreement for your signature.
>
> The corrections are [italicized] and should clarify our previous communications. You should receive the contracts for signature in about two weeks.

Another letter dated 19 September 1986 followed:

> This letter should serve as additional notice that Local #1444 has accepted your final proposal as presented on 7/23/86.
>
> Attached is a signed copy of that document by the officers of Local #1444.
>
> We will be forwarding copies of the labor agreement for your signature.

A final letter dated 23 September 1986 contained the following language:

> Please find enclosed four (4) copies of the labor agreement covering your two (2) Racine stores.
>
> Please sign and return two (2) copies to this office.

The Respondent answered by a letter dated 29 September 1986.

> At the last collective bargaining meeting between us on July 23, 1986, you specifically stated that the contract then on the table was unacceptable to the Union, and though you couldn't recommend it, you would present it to the employees for a vote. It is our understanding that the employees also rejected the contract by majority vote on September 3, 1986. These facts clearly indicate that there was never a meeting of the minds, a requisite element for a contract, nor was there a lawful ratification by the Union or the employees. It is my belief, therefore, that it would be improper for me to affix my signature to the four copies of the contract which you have sent to me for that purpose. Under these circumstances, I am returning all copies to you herewith.

Ritz agreed that "[w]hat the Union said they were going to submit to the membership for ratification was a complete proposal"—on the part of the Company, "[a] three year agreement . . . [f]rom the date of signing." Ritz was unware of the Union's constitutional provision that permitted acceptance of a final proposal after rejection of the contract by the membership and the loss of a strike vote; nor was this information imparted to the Respondent by the Union. At no time has the Respondent withdrawn its final offer. Ritz explained why the Respondent did not sign its final offer:

> Well because I didn't feel that we had had a meeting of the minds in view of the fact that, number one, we had offered the contract subject to ratification by the employees and I was under the impression at the end of the agreement that the Union understood that when they said we can't accept it, but we will take it to a vote . . . there was no meeting of the minds because there was no ratification.

Ritz also explained why the Respondent had insisted that "employees favorably ratify the vote before the company would sign it":

> It was our impression that the Union had enduced [sic] employees to vote for them by making promises of more than what they were currently receiving and whatever resulted from the contract negotiations, our employees were going to have to live with and we were concerned about morale and we wanted them to be the ones who had the ability to determine whether or not they could live or wanted to live with the contract proposal.

Further, it would appear from the credible evidence in this case that, because the Respondent had never withdrawn its final offer, the acceptance of its final offer by the Union would have resulted in a meeting of the parties' minds as to all the provisions of the written offer 23 July 1986, including the duration clause that the Respondent orally offered. Not so, contends the Respondent, for it had imposed a condition precedent, a barrier so to speak, that had to be surmounted before there could be a meeting of the minds. This barrier was the "employee ratification" or "ballot clause." The Respondent's insistence on this barrier was unlawful because it concerned a matter without the scope of mandatory bargaining. "[I]t is unlawful to insist upon matters within the scope of mandatory bargaining and *unlawful to insist upon matters without*." (Emphasis added.) *NLRB v. Borg-Warner Corp.*, 356 U.S. 342, 349 (1958). Additionally, in the *Borg-Warner* case, supra, the Supreme Court teaches that a ballot clause, such as the one in the instant case, was not a matter that fell within the scope of mandatory bargaining and that insistence by an employer thereon as a condition precedent to the consummation of an agreement was unlawful.[6]

To allow the Respondent to dictate the method of acceptance of its offer and insist thereon would deny the Union rights given to it by statute, for it would result in the consummation of an agreement with other than the statutory representative with which the Employer was required to bargain. As was said by Justice Harlan in his concurring decision in *Borg-Warner*, supra at 362:

> The employer's duty to bargain with the representatives includes not merely obligation to confer in good faith, but also ". . . the execution of a written contract incorporating any agreement reached if requested . . ." by the employees' representatives. § 8(d). I think its hardly debatable that this language must be read to require the company, if so

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[6] The "ballot clause" in *Borg-Warner*, 356 U.S. 342, 345 fn. 3, read in part, "all employees in the bargaining unit to vote, by secret, impartially supervised, written ballot, on whether to accept or reject the Company's last offer, and on any subsequent offers made."

> requested, *to sign any agreement reached with the same representative with which it is required to bargain*. [Emphasis added.]

The Employer's stance in this case not only frustrates the objectives of good-faith collective bargaining but also affords the Employer a means by which it can avoid its obligations under Section 8(d) of the Act and dictate the Union's internal regulations as they pertain to the acceptance of a labor agreement.[7] Obviously, this may not be allowed.

The case of *Southland Dodge*, 205 NLRB 276, 279 (1973), disposes of the issues before me:

> Because an employer may not insist on a ratification of a collective-bargaining agreement by a "majority of its employees" (See *Wooster Division of Borg-Warner Corporation v. NLRB*, 356 U.S. 342 (1958)) the Respondent's refusal to execute a "written contract" upon the request of the Union constituted a breach of the Respondent's duty to bargain collectively within the meaning of Section 8(d) of the Act. [See also *C & W Lektra Bat Co.*, 209 NLRB 1038, 1040 (1974).]

I find that the Respondent's insistance on the "employee ratification" or "ballot clause" and its refusal to sign an otherwise satisfactory agreement because such "employee ratification" or "ballot clause" was not complied with was in violation of Section 8(a)(1) and (5) and Section 8(d) of the Act.

In view of my finding and conclusions, no useful purpose will be served by my determination whether Whiteside or Ritz lied about Ritz' presentation of the "employee ratification" clause at the 23 July 1986 bargaining session. For the same reason, the defenses raised by the Respondent in its brief are immaterial or are not well taken because they do not conform with the facts as found above.[8]

CONCLUSIONS OF LAW

1. The Respondent is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act, and it will effectuate the purposes of the Act for jurisdiction to be exercised here.

2. The Union is a labor organization within the meaning of Section 2(5) of the Act.

3. The following unit constitute an appropriate unit for the purpose of collective bargaining within the meaning of Section 9(b) of the Act:

> All regular, full-time and regular, part-time selling and non-selling employees, and employees in all leased departments of the Employer at its two stores located at 4101 Durand Avenue and 2210 Rapids Drive, Racine, Wisconsin; excluding all other employees, casual employees, seasonal employees, all leased department managers, confidential employees, professional employees, guards and supervisors as defined in the Act.[9]

4. The Union has been at all times material the exclusive representative of the employees in the aforesaid appropriate unit for the purpose of collective bargaining within the meaning of Section 9(a) of the Act.

5. By insisting that it would not sign its proposed labor agreement unless the employees in the appropriate unit ratified it, the Respondent engaged in unfair labor practices within the meaning of Section 8(a)(1) and (5) of the Act.

6. By unlawfully failing and refusing to execute a written contract embodying the terms and conditions of the agreement reached with the Union, as found, the Respondent engaged in unfair labor practices in violation of Section 8(a)(1) and (5) and Section 8(d) of the Act.

7. The aforesaid unfair labor practices affect commerce within the meaning of the Act.

THE REMEDY

It is recommended that the Respondent cease and desist from its unfair labor practices and take certain affirmatve action deemed necessary to effectuate the purposes of the Act. It is further recommended that the Respondent sign the collective-bargaining agreement marked General Counsel's Exhibit 12(b); that it give effect to such written contract retroactively to 20 September 1986;[10] that it continue the contract in effect for 3 years after 20 September 1986; and that it make whole its employees for any loss of wages or other employment benefits they may have suffered as the result of the Respondent's failure to sign the contract, plus interest. The loss of earnings, if any, under the recommended Order shall be computed in the manner set forth in *F. W. Woolworth Co.*, 90 NLRB 289 (1950), and *Florida Steel Corp.*, 231 NLRB 651 (1977).

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[11]

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[7] "[I]t is for the union and not the employer, to construe and apply its internal regulations relating to what would be sufficient to amount to ratification." *M & M Oldsmobile*, 156 NLRB 903, 905 (1966).

[8] The credible evidence established that the Respondent did not refuse to sign the contract because its offer had expired or had been withdrawn, or because of a mutual misunderstanding, or because the Union had insisted on a termination date of 16 September 1989. (The mailgram acceptance was dated 18 September 1986 and was received by the Respondent on 19 September 1986.) It was the acceptance of the Respondent's offer as presented at the bargaining session of 23 July 1986, which became the parties contract.

This contract was rejected by the Respondent solely (as expressed by Ritz "there was no meeting of the minds because there was no ratification") because, although the contract had been accepted by the Union, it had not been accepted by the employees. In its brief the Respondent puts it this way: "The Company's refusal to sign is based on its contention that no meeting of the minds occurred because the Company's obligation to agree was conditioned on a favorable employee ratification vote which never occurred." Thus it is also clear that the Respondent was also insisting that nonunion members participate in the ratification vote.

[9] The Respondent admitted the appropriate unit. The appropriate unit and the unit described in the contract are the same.

[10] The date of 20 September 1986 is chosen because it is the first date a signed copy of the agreement was submitted to the Respondent.

[11] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

ORDER

The Respondent, Zayre Department Stores, Racine, Wisconsin, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Failing and refusing to sign the written contract containing the Respondent's proposal of 23 July 1986.

(b) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Forthwith sign the contract, containing the Respondent's proposal of 23 July 1986 to remain in effect for 3 years following 20 September 1986.

(b) On execution of the aforesaid agreement, give retroactive effect to the provisions thereof, make whole its employees for any losses they may have suffered by reason of the Respondent's failure to sign the agreement in the manner set forth in the remedy section.

(c) Preserve and, on request, make available to the Board or its agents for examination and copying, all payroll records, social security payment records, timecards, personnel records and reports, and all other records necessary to analyze the amount of backpay due under the terms of this Order.

(d) Post at its Racine, Wisconsin establishment copies of the attached notice marked "Appendix."[12] Copies of the notice, on forms provided by the Regional Director for Region 30, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material.

(e) Notify the Regional Director in writing within 20 days from the date of this Order what steps the Respondent has taken to comply.

APPENDIX

NOTICE TO EMPLOYEES
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

WE WILL NOT fail or refuse to sign the written contract containing our proposal of 23 July 1986.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL forthwith sign a written contract with United Food & Commercial Workers Union, Local 1444, as chartered by United Food & Commercial Workers International Union, AFL-CIO-CLC effective 20 September 1986 for a period of 3 years.

WE WILL give retroactive effect to the terms and conditions of the contract and WE WILL make whole our employees for any losses they may have suffered by reason of our failure to sign the contract, plus interest.

ZAYRE DEPARTMENT STORES

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[12] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

North Star Steel Company ***and*** **United Steelworkers of America, AFL–CIO, CLC.** Case 18–CA–10208

July 27, 1988

DECISION AND ORDER

BY CHAIRMAN STEPHENS AND MEMBERS JOHANSEN, BABSON, AND CRACRAFT

Upon a charge filed by the Union on September 10, 1987, the General Counsel of the National Labor Relations Board issued a complaint against North Star Steel Company, the Respondent, alleging that it has violated Section 8(a)(5) and (1) of the National Labor Relations Act.

The complaint alleges that on July 30, 1987, following a Board election in Case 18–RC–14119, the Union was certified as the exclusive collective-bargaining representative of the Respondent's employees in the unit found appropriate. (Official notice is taken of the "record" in the representation proceeding as defined in the Board's Rules and Regulations, Secs. 102.68 and 102.69(g); *Frontier Hotel*, 265 NLRB 343 (1982).) The complaint further alleges that since September 1, the Respondent has refused to bargain with the Union. On September 25, the Respondent filed its answer admitting in part and denying in part the allegations in the complaint.

On October 5, the General Counsel filed a Motion for Summary Judgment. On December 30, the Board issued an order transferring the proceeding to the Board and a Notice to Show Cause why the motion should not be granted. The Respondent filed a Cross-Motion for Summary Judgment and a statement in support of its motion and in opposition to the General Counsel's motion.

Ruling on Motion for Summary Judgment

In its answer, the Respondent admits its refusal to bargain with the Union. It contends, however, that the Union's certification is invalid on the grounds that in the prior representation proceeding, the Regional Director improperly rejected the Respondent's objections to the election as untimely.

In her motion, the General Counsel contends that summary judgment is appropriate because the Respondent's answer raises no litigable issue of fact.

Effective September 29, 1986, the Board revised its Rules and Regulations regarding the time periods in which to file documents with the Board. Section 102.69(a) of the revised rules provides that objections to the conduct of a Board election be filed "within 7 days after the tally of ballots has been prepared." Section 102.111(b) requires that election objections be received by the Regional Director "on or before the close of business on the last day of filing." The Respondent contends that the revised rules should not be applied strictly in this case.

Review of the record establishes that the Respondent's position has already been fully argued to, and considered by, the Board in the underlying representation proceeding. We are fully aware of the circumstances that resulted in the Regional Office receiving the Respondent's objections shortly after opening for business on the day after they were to be received. In the representation proceeding we cited *Drum Lithographers*, 287 NLRB 22 (1987), to support our finding that the Respondent's objections were filed untimely. As we stated in *Drum Lithographers:*

> [A]ll parties were put on notice, with full explanation, that the new rule would be strictly applied, and that election objections now must actually be received in the Regional Office on the due date.
>
> The Board's rule is explicit: objections to election must be received—not just postmarked or otherwise transmitted—within 7 days.[1]

The Respondent, like the petitioner in *Drum Lithographers*, presents a particularly unpersuasive case for a reappraisal of our position. The Regional Office was a mere three blocks away from the Respondent's attorney's office. In order to ensure timely receipt—the gravamen of our rule—the attorney might have delivered the objections in person to the Regional Office.[2]

Furthermore, this is an unpersuasive case for returning to the *Rio de Oro Uranium*[3] rule as urged by our dissenting colleague. Even if we were to apply the former rule to the instant case, we cannot say that the Respondent "took every precaution necessary to assure compliance with the Board's rules."[4] The Respondent asserts that the delivery service took the objections to the Federal building in nearby St. Paul rather than the Federal building in Minneapolis located three blocks away from the office of the Respondent's attorney, and that by the time the mistake was discovered, it was too late for timely receipt. Yet, the Respondent itself failed to clearly signal to the delivery service which of the two Federal buildings was the destination for the filing. When initially telephoning the delivery service, the Respondent stated that the request included a filing at the Minneapolis offices of

289 NLRB No. 107

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[1] *Drum Lithographers*, supra, slip op. at 4.

[2] Ibid.

[3] *Rio de Oro Uranium Mines*, 119 NLRB 153 (1957).

[4] Ibid.

the National Labor Relations Board. However, the Respondent merely attached a note stating, "Please file with the NLRB immediately" to the Minneapolis-addressed filing, including with it a service of process for St. Paul.[5] Given the close proximity of the two Federal buildings, the Respondent should have highlighted the Minneapolis destination to ensure that the delivery service did not make a readily foreseeable mistake. We find that the Respondent's failure to do so falls short of the requirement that the objecting party take "every precaution necessary" to guarantee timely filing.

Unlike our dissenting colleague, therefore, we believe the Respondent fails to state any valid reason for our reevaluating what has already been established in *Drum Lithographers* or for contravening our well-established policy that a respondent in a proceeding alleging a violation of Section 8(a)(5) is not entitled to relitigate issues that were or could have been litigated in a prior representation proceeding. See *Heuer International Trucks*, 279 NLRB 127 (1986); *Pittsburgh Plate Glass Co. v. NLRB*, 313 U.S. 146, 162 (1941); Sections 102.67(f) and 102.69(c) of the Board's Rules and Regulations.

Accordingly, all issues raised by the Respondent were or could have been litigated in the prior representation proceeding. The Respondent does not offer to adduce at a hearing any newly discovered and previously unavailable evidence, nor does it allege any special circumstances that would require the Board to reexamine the decision made in the representation proceeding. We therefore find that the Respondent has not raised any issue that is properly litigable in this unfair labor practice proceeding. Accordingly, we grant the General Counsel's Motion for Summary Judgment and deny the Respondent's Cross-Motion for Summary Judgment.

On the entire record, the Board makes the following

FINDINGS OF FACT

I. JURISDICTION

The Respondent, a Minnesota corporation, has been engaged in the manufacture of steel at its facility in St. Paul, Minnesota, where it annually sold and shipped goods and materials valued in excess of $50,000 to points outside the State of Minnesota. We find that the Respondent is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act and that the Union is a labor organization within the meaning of Section 2(5) of the Act.

II. ALLEGED UNFAIR LABOR PRACTICES

A. *The Certification*

Following the election held on July 23, 1987, the Union was certified as the collective-bargaining representative of the employees in the following appropriate unit:

> All full-time and regular part-time clerical employees designated non-exempt by the Employer at the Employer's facility located at 1678 Red Rock Road, St. Paul, Minnesota, including pricing specialist, purchasing, sales, accounting, and inventory clerks, typists, sales receptionist and secretary, and office equipment operators, plant clerical employees, including rolling mill clerks, maintenance clerk, quality assurance clerk, melt shop clerk and shipping clerk; but excluding temporary employees, executive secretary, personnel secretary, confidential employees, guards, professional and professional trainee personnel, management and management trainee personnel, nurse, sales persons and supervisors, as defined by the National Labor Relations Act.

The Union continues to be the exclusive representative under Section 9(a) of the Act.

B. *Refusal to Bargain*

Since August 28, 1987, the Union has requested the Respondent to bargain, and since September 1, the Respondent has refused. We find that this refusal constitutes an unlawful refusal to bargain in violation of Section 8(a)(5) and (1) of the Act.

CONCLUSION OF LAW

By refusing on and after September 1, 1987, to bargain with the Union as the exclusive collective-bargaining representative of employees in the appropriate unit, the Respondent has engaged in unfair labor practices affecting commerce within the meaning of Section 8(a)(5) and (1) and Section 2(6) and (7) of the Act.

REMEDY

Having found that the Respondent has violated Section 8(a)(5) and (1) of the Act, we shall order it to cease and desist, to bargain on request with the Union, and, if an understanding is reached, to embody the understanding in a signed agreement.

To ensure that the employees are accorded the services of their selected bargaining agent for the period provided by law, we shall construe the initial period of the certification as beginning the date the Respondent begins to bargain in good faith with the Union. *Mar-Jac Poultry Co.*, 136 NLRB 785 (1962); *Lamar Hotel*, 140 NLRB 226, 229 (1962), enfd. 328 F.2d 600 (5th Cir. 1964), cert. denied 379 U.S. 817 (1964); *Burnett Construction Co.*, 149 NLRB 1419, 1421 (1964), enfd. 350 F.2d 57 (10th Cir. 1965).

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[5] The delivery service asserts that it saw only Respondent's service of process for St. Paul and overlooked the filing for Minneapolis until it got to St. Paul.

ORDER

The National Labor Relations Board orders that the Respondent, North Star Steel Company, St. Paul, Minnesota, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Refusing to bargain with United Steelworkers of America, AFL–CIO, CLC as the exclusive bargaining representative of the employees in the bargaining unit.

(b) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) On request, bargain with the Union as the exclusive representative of the employees in the following appropriate unit on terms and conditions of employment and, if an understanding is reached, embody the understanding in a signed agreement:

> All full-time and regular part-time clerical employees designated non-exempt by the Employer at the Employer's facility located at 1678 Red Rock Road, St. Paul, Minnesota, including pricing specialist, purchasing, sales, accounting, and inventory clerks, typists, sales receptionist and secretary, and office equipment operators, plant clerical employees, including rolling mill clerks, maintenance clerk, quality assurance clerk, melt shop clerk and shipping clerk; but excluding temporary employees, executive secretary, personnel secretary, confidential employees, guards, professional and professional trainee personnel, management and management trainee personnel, nurse, sales persons and supervisors, as defined by the National Labor Relations Act.

(b) Post at its facility in St. Paul, Minnesota, copies of the attached notice marked "Appendix."[6] Copies of the notice, on forms provided by the Regional Director for Region 18, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material.

(c) Notify the Regional Director in writing within 20 days from the date of this Order what steps the Respondent has taken to comply.

MEMBER CRACRAFT, dissenting.

The election in the underlying representation case was held on July 23, 1987.[1] The Union won the election. The filing date for objections was July 30. It is undisputed that on July 30 the Respondent's attorney retained a professional process server in the Minneapolis-St. Paul area to file and serve its objections to the election. The Respondent's attorney affixed the proper address to the objections.

The process server received the objections at 3:10 p.m. on July 30 and proceeded to the Federal building in St. Paul, Minnesota, rather than to the Federal building in Minneapolis, Minnesota, where the Board's Regional Office is located. Discovering the mistake, the process server returned to the correct address only to learn that the Regional Office had already closed. The next morning (July 31), at 8:25 a.m., the process server delivered the objections to the Regional Office. By letter written that same date, the Regional Director notified the Respondent's attorney that the objections had been rejected as they had been filed untimely.

On August 12, citing the above facts as the basis for its appeal, the Respondent filed exceptions to the decision of the Regional Director. By Order dated December 30, the Board denied the Respondent's exceptions. I dissented from the Board's denial of the Respondent's exceptions. Because I would have accepted the Respondent's objections as timely filed, I would deny the General Counsel's Motion for Summary Judgment herein.

Revised Rule 102.69(a) provides that an objecting party may file objections within 7 days after the preparation of the tally of ballots. The objections in this case were accordingly due no later than July 30. In my dissent in *Drum Lithographers*, 287 NLRB 22 (1988), I stated my preference for the principles set forth in *Rio de Oro Uranium Mines*, 119 NLRB 153 (1957), when the objecting party "took every precaution necessary to assure compliance with the Board's rules" the objections should be considered timely.[2]

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[6] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

[1] All dates are in 1987 unless otherwise noted.

In the instant case, the Respondent took certain precautions to assure compliance with the Board's Rules. The Respondent retained a process server at a time when it was clearly reasonable for the Respondent to assume that filing could be effected by the deadline. The properly addressed documents were picked up by the process server at the Respondent's attorney's office at 3:10 p.m. on July 30. The attorney's office is located only three blocks from the Regional Office.[3]

The Rules regarding the filing and service of objections have been developed and adopted for the purpose of providing orderly processing and prompt resolution of representation issues. However, we must avoid slavish adherence to form rather than substance in administering our Rules. In applying the rules, I would examine whether it was reasonable for the objecting party to expect that its objections would be timely filed. As the Board succinctly stated in *Alfred Nickles Bakery*, 209 NLRB 1058, 1059 (1974), in addressing this issue:

> In order to maintain the orderly processing of these cases, there must be adherence to the Board's Rules and Regulations. We do not say that there will be a "slavish" adherence to form rather than substance. What we do say, however, is that in order to support a variance or deviation from the clear requirements of the Board's Rules, there must be some showing that there has been an honest attempt to substantially comply with the requirements of the Rules, or, alternatively, a valid and compelling reason why compliance was not possible within the time required by the Rules.

See also *Atlantic Forest Products*, 282 NLRB 85 (1987).

I believe that the standard set out in *Alfred Nickles* is a standard which protects all parties as well as the policies and procedures of the Act. It requires strict compliance with the Rules and Regulations yet allows for an exception in extraordinary situations, such as the one before us. I would find that the Respondent made an honest attempt to substantially comply with the filing requirements. Finally, though certainly not the only consideration, I find it relevant that there is absolutely no prejudice shown here to any party to the proceeding if the Board accepts the objections on the merits. As I noted in my dissent in *Drum Lithographers*:

> The Board's preference in all proceedings which come before it is and should be to decide disputes on the merits. The Board's own regulations provide that its rules "shall be liberally construed to effectuate the purposes and provisions of the Act." 29 C.F.R. § 102.121 (1983). When, as in this case, the objecting party has acted diligently and in good faith, and there is no prejudice shown to any party to the proceeding, the objections must be accepted and considered on the merits. See *NLRB v. Washington Star Co.*, 732 F.2d 974 (D.C. Cir. 1984).

287 NLRB 22 at fn. 7. Thus, I would have accepted Respondent's objections for consideration and will not join my colleagues in the granting of summary judgment.

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

WE WILL NOT refuse to bargain with United Steelworkers of America, AFL-CIO, CLC as the exclusive representative of the employees in the bargaining unit.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

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[2] The holding in *Rio de Oro* was generally applied to the late receipt of mailed objections prior to the most recent amendment to our Rules. Under *Rio de Oro*, objections postmarked before the filing date were treated as timely filed even if received after the due date. See, e.g., *Nestle Co.*, 240 NLRB 1310 fn. 1 (1979); *Chromalloy Mining & Minerals*, 238 NLRB 688 (1978), enfd. in relevant part 620 F.2d 1120 (5th Cir. 1980); *Gruber's Super Market*, 201 NLRB 612 (1973), enfd. in relevant part 501 F.2d 697 (7th Cir. 1974). However, the Board also applied the *Rio de Oro* principles to filing methods other than mailing. *Bechtel Inc.*, 218 NLRB 827 (1975); *Sig Wold Storage*, 205 NLRB 378 (1973).

[3] According to the affidavit of the process server's agent, the Respondent's attorney's secretary called the process server that morning to make arrangements for the pickup and delivery of the documents. At that time she informed the process server that the order was to be completed by 4 p.m. Contrary to my colleagues, I see nothing in the record before us that would indicate that the messenger's mistake in going to St. Paul rather than to the NLRB office in Minneapolis was caused by any carelessness on the part of the Respondent. Rather, the record indicates that the Respondent's attorney gave the messenger, the filing request for objections for the NLRB in Minneapolis at the same time that he gave the messenger a process service request for St. Paul. The Respondent's attorney's secretary had previously instructed the messenger that the objections were to be filed in Minneapolis. When the objections were delivered to the messenger the Respondent's attorney appended a written notation reminding the messenger that the objections were to be delivered to the NLRB Regional Offices. There are no NLRB offices in St. Paul. The fact that the messenger somehow got the destination for the process service request mixed up with the destination for the objections is certainly not attributable to the Respondent.

WE WILL, on request, bargain with the Union and put in writing and sign any agreement reached on terms and conditions of employment for our employees in the bargaining unit:

> All full-time and regular part-time clerical employees designated non-exempt by the Employer at the Employer's facility located at 1678 Red Rock Road, St. Paul, Minnesota, including pricing specialist, purchasing, sales, accounting, and inventory clerks, typists, sales receptionist and secretary, and office equipment operators, plant clerical employees, including rolling mill clerks, maintenance clerk, quality assurance clerk, melt shop clerk and shipping clerk; but excluding temporary employees, executive secretary, personnel secretary, confidential employees, guards, professional and professional trainee personnel, management and management trainee personnel, nurse, sales persons and supervisors, as defined by the National Labor Relations Act.

NORTH STAR STEEL COMPANY

Mohawk Steel Fabricators, Inc. ***and*** **Shopmen's Local Union No. 455, International Association of Bridge, Structural & Ornamental Iron Workers, AFL–CIO and Steel, Metals, Alloys and Hardware Fabricators and Warehousemen, Local 810, affiliated with International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, AFL–CIO,[1] Party to the Contract.** Cases 29–CA–4853 and 29–CA–6895

July 27, 1988

SUPPLEMENTAL DECISION AND ORDER

BY MEMBERS JOHANSEN, BABSON, AND CRACRAFT

On June 30, 1987, Administrative Law Judge James F. Morton issued the attached supplemental decision. The Respondent filed exceptions and a supporting brief, the General Counsel filed exceptions and a supporting brief, and the Respondent filed a brief in response to the General Counsel's exceptions.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the supplemental decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings,[2] and conclusions only to the extent consistent with this Supplemental Decision and Order.

The Respondent's employees, represented by Local 455, went on strike July 1, 1975.[3] In January 1976, the Respondent violated Section 8(a)(5) and (1) of the Act by executing a contract with Teamsters Local 810 before communicating its withdrawal from the multiemployer group to Local 455.[4] In August 1978, Local 455 made an unconditional offer to return to work. In 1980, the Board found that the Respondent violated Section 8(a)(3) by failing to reinstate fully its striking employees.[5] Thereafter, the Regional Director issued the instant backpay specification.

The judge found, inter alia, that no discriminatee for whom the General Counsel sought backpay, pursuant to the make-whole order, was entitled to reimbursement for fringe benefits lost as a result of participating in the strike. Additionally, he did not find that Paul Beaudreau, Alf Lango, Joseph Morris, Peter Rebecca, and Siegbert Hicke were entitled to reimbursement of medical expenses. For the reasons set forth below, we disagree with the judge.

1. It is well settled that the "finding of an unfair labor practice . . . is presumptive proof that some backpay is owed by the [Respondent]."[6] The burden is on the General Counsel to prove the gross amount of backpay due.[7] The burden then shifts to the Respondent to establish facts that negate or mitigate its liability.[8]

In analyzing the General Counsel's backpay claims for Paul Beaudreau, Joseph Morris, William Daniels,[9] Miguel Quevedo, Peter Rebecca, Alf Lango, Siegbert Hicke, Ronald Michaud, and Richard White, the judge acknowledged that the collective-bargaining agreement effective just prior to the 1975 strike provided unit employees various fringe benefits. He found that the Respondent changed employees' fringe benefits beginning in late 1975. The judge mistakenly stated that the amended specification sought to make the discriminatees whole by requiring the Respondent to provide contributions to Local 455's Welfare, Pension, and Annuity Funds at the rates Local 455 had established in subsequent contracts with other employers during the backpay period. The judge then reasoned that requiring the Respondent to provide such benefits, as well as continuing the other fringe benefits established in the expired contract, would compel the Respondent to grant concessions to the Union that had not been achieved in negotiations, thereby contravening Section 8(d) of the Act.

The amended backpay specification does not seek to impose on the Respondent any terms in Local 455's subsequent collective-bargaining agreements with other employers; rather, the specification uses a formula based on continuing the terms of the parties' expired agreement. According to the circuit court, the Respondent's unlawful execution of a contract with Teamsters Local 810 before notifying Local 455 of its withdrawal from the multiemployer group was a violation of Section 8(a)(5).[10] The Board subsequently ordered the Respondent to bargain with Local 455.[11] As the Respondent never bargained to impasse with Local 455, it was obligated to continue giving effect to its expired collective-bargaining agreement with Local 455.[12] Thus, the amended backpay specification, based on the expired agreement's terms, correctly calculated the gross amounts of backpay due. The Respondent, on the other hand, has not established any facts to negate or mitigate its liability.

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[1] The Union's name is changed to reflect the readmission of the International Brotherhood of Teamsters into the AFL–CIO, effective November 1, 1987.

[2] We affirm the judge's findings that the Respondent is obligated to reimburse employees for unlawfully withheld dues and fees and discriminatees Beaudreau, Daniels, Lango, Morris, Quevedo, and Rebecca for lost net earnings. We also affirm the judge's findings that Warren and Helene Riis are not the Respondent's alter egos and are not liable for backpay.

[3] The Respondent was a member of a multiemployer bargaining group whose collective-bargaining agreement with Local 455 expired June 30, 1975.

[4] *NLRB v. Independent Assn. of Steel Fabricators*, 582 F.2d 135, 149 (2d Cir. 1978), enfg. in pertinent part 231 NLRB 264 (1977), cert. denied 439 U.S. 1130 (1979).

[5] *Kuno Steel Products Corp.*, 252 NLRB 904 (1980), enfd. sub nom. *NLRB v. Koenig Iron Works*, 681 F.2d 130 (2d Cir. 1982). Mohawk Steel Fabricators, Inc. was one of the respondents in *Kuno.*

289 NLRB No. 135

[6] *NLRB v. Mastro Plastics Corp.*, 354 F.2d 170, 178 (2d Cir. 1965), cert. denied 384 U.S. 972 (1966).

[7] *NLRB v. Brown & Root*, 311 F.2d 447 (8th Cir. 1963).

[8] Ibid.

[9] We find no merit to the Respondent's exception that Daniels was unavailable for work because he was living in Mississippi during the backpay period. The mere fact that an employee moved and found interim employment out of town during the backpay period does not demonstrate that he would not have returned to his former position upon a valid offer of reinstatement.

Specifically, the judge denied all claims set forth in the amended backpay specification for vacation and severance pay, as well as contributions to Local 455's Welfare, Pension, and Annuity Funds. We will, therefore, order the Respondent to make the discriminatees whole by paying them the respective amounts set forth in the amended backpay specification for vacation and severance pay, and by making the contributions to the Local 455 Welfare Fund,[13] Pension Fund, and Annuity Fund on their behalf in the respective amounts set forth in the amended backpay specification.

2. The General Counsel has excepted to the judge's failure to include in the make-whole remedy reimbursement of the discriminatees for the purchase of substitute health insurance and out-of-pocket medical expenses incurred during the backpay period. The amended backpay specification, together with the documents introduced at the hearing, claimed $965.33 for Beaudreau's, $240.60 for Lango's, $268.30 for Morris', $1,342.21 for Rebecca's, and $1,438.93 for Hicke's substitute medical insurance premiums and out-of-pocket medical expenses during the backpay period. The judge, who, as stated above, dismissed all fringe benefit claims for all discriminatees, did not specifically address medical expenses.

It is customary to include reimbursement of substitute health insurance premiums and out-of-pocket medical expenses in make-whole remedies for fringe benefits lost.[14] Because the Respondent has established no facts that would negate or mitigate its liability, we will order the Respondent to reimburse Beaudreau $965.33, Lango $240.60, Morris $268.30, Rebecca $1,342.21, and Hicke $1,438.93 for their documented medical expenses during the backpay period.

ORDER

The National Labor Relations Board orders the Respondent, Mohawk Steel Fabricators, Inc., Deer Park, New York, its officers, agents, successors, and assigns, to make whole the employees named below by paying them the amounts of backpay set forth opposite their names, plus interest in the manner prescribed in *New Horizons for the Retarded*,[15] less tax withholdings required by Federal and state laws, and by paying to the Welfare Fund, Pension Fund, and Annuity Fund of Shopmen's Local Union No. 455, International Association of Bridge, Structural & Ornamental Iron Workers, AFL–CIO, the respective amounts on their behalf set forth opposite their names, plus interest in the manner prescribed in *Merryweather Optical Co.*[16]

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[10] *NLRB v. Independent Assn. of Steel Fabricators*, 582 F.2d 135, 149 (2d Cir. 1978).

[11] *Independent Assn. of Steel Fabricators*, 252 NLRB 922 (1980), enfd. sub nom. *NLRB v. Koenig Iron Works*, 681 F.2d 130 (2d Cir. 1982).

[12] See *NLRB v. Katz*, 369 U.S. 736 (1962); *Taft Broadcasting Co.*, 163 NLRB 475 (1967).

[13] The Respondent asserts that a discriminatee is made whole when he is reimbursed for the cost of premiums incurred in obtaining substitute health insurance coverage and for his out-of-pocket medical expenses to the extent that those expenses would have been reimbursed through the Local 455 Welfare Fund. In order to be made whole, however, a discriminatee must be restored to the position he would have occupied had the discrimination not occurred. This includes not only reimbursement of the discriminatee's premiums and medical expenses, but also requires the Respondent to contribute to the Welfare Fund according to the expired contract's terms so that the discriminatee's future interests in the Fund will be ensured. "[T]he diversion of contributions from the union funds undercut[s] the ability of those funds to provide for future needs." *Stone Boat Yard v. NLRB*, 715 F.2d 441, 446 (9th Cir. 1983).

Hassett Maintenance Corp., 260 NLRB 1211 (1982), a cryptic decision on which the Respondent relies, focused on what it characterized as the double insurance costs that would result from requiring the employer (which had provided other coverage) in that case to make contributions to the welfare fund. *Hassett* did not address restoring the full range of an employee's interests in the welfare fund. The *Hassett* decision did not reconcile its limited remedial order with pre-*Hassett* precedent requiring employer contributions to union welfare funds on employees' behalf, see, e.g., *Kraft Plumbing & Heating*, 252 NLRB 891 (1980), affd. mem. 661 F.2d 940 (9th Cir. 1981), as does precedent decided after *Hassett*. See *Stone Boat Yard*, 264 NLRB 981 (1983), which the Ninth Circuit enforced. The court rejected the double-coverage/punitive claim: the "employer cannot complain of the extra cost of improperly created, substitute fringe benefits . . . . The company is merely required to repay what it has unlawfully withheld." *Stone Boat Yard v. NLRB*, 715 F.2d at 446.

[14] See, e.g., *RMC Constructors*, 266 NLRB 1064 (1982).

[15] 283 NLRB 1173 (1987). Interest on and after January 1, 1987, shall be computed at the "short-term Federal rate" for the underpayment of taxes as set out in the 1986 amendment to 26 U.S.C. § 6621. Interest on amounts accrued prior to January 1, 1987 (the effective date of the 1986 amendment to 26 U.S.C. § 6621), shall be computed in accordance with *Florida Steel Corp.*, 231 NLRB 651 (1977).

[16] 240 NLRB 1213 (1979).

Name	*Backpay*	*Medical Expenses*	*Welfare Fund*	*Pension Fund*	*Annuity Fund*
P. Beaudreau	$2,220.00	$ 965.33	$ 689.00	$ 862.00	$ 173.00
W. Daniels	1,830.00	- 0 -	4,601.00	5,754.00	1,153.00
A. Lango	2,168.00	240.60	357.00	446.00	89.00
J. Morris	2,065.00	268.30	2,156.00	2,696.00	540.00
M. Quevedo	7,659.00	- 0 -	6,700.00	8,373.00	1,678.00
P. Rebecca	12,867.00	1,342.21	1,570.00	1,962.00	392.00
S. Hicke	11,971.00	1,438.93	8,880.00	11,098.00	2,214.00
R. Michaud	867.00	- 0 -	3,398.00	4,249.00	851.00
R. White	- 0 -	- 0 -	4,182.00	5,226.00	1,044.00

IT IS FURTHER ORDERED that the Respondent shall pay to the employees named below the dues and fees unlawfully deducted from their wages, in the amounts shown opposite their names, with interest in the manner prescribed in *New Horizons for the Retarded*, supra.

Name	*Dues & Fees*
S. Hicke	$164
R. Michaud	165
R. White	164

Kathleen M. Troy, Esq., for the General Counsel.

Stanley Israel, Esq. (Kliegman, Goldstein, Israel & Cooper), of New York, New York, for Mohawk Steel Fabricators, Inc.

Belle Harper, Esq. (Sipser, Weinstock, Harper, Dorn & Leibowitz), of New York, New York, for Shopman's Local Union No. 455, International Association of Bridge, Structural & Ornamental Iron Workers, AFL–CIO.

SUPPLEMENTAL DECISION

STATEMENT OF THE CASE

JAMES F. MORTON, Administrative Law Judge. This is a proceeding to determine (a) how much backpay, if any, is due to three employees who had not been fully reinstated after returning to work from a strike, (b) how much is due eight strikers who had been refused reinstatement, (c) how much is due to those employees from whom dues and initiation fees had been unlawfully extracted, and (d) whether the two stockholders of Mohawk Steel Fabricators, Inc. (Respondent) should be personally liable, jointly and severally with Respondent, for backpay due.

In Case 29–CA–6895, reported as part of *Kuno Steel Products Corp.*, 252 NLRB 904 (1980), enfd. sub. nom. *NLRB v. Koenig Iron Works*, 681 F.2d 130 (2d Cir. 1982), Respondent was found to have violated Section 8(a)(1) and (3) of the National Labor Relations Act (the Act) in two respects by not having fully reinstated returned strikers and by refusing to reinstate other strikers. In Case 29–CA–4853, reported at 231 NLRB 264 (1977), enfd. in relevant part, sub nom. *NLRB v. Independent Assn. of Steel Fabricators*, 582 F.2d 135, 153 (2d Cir. 1978), Respondent was ordered to reimburse employees for initiation fes, dues, and assessments which had been unlawfully extracted from their wages. At the hearing before me, the General Counsel amended the backpay specification to allege that Respondent's president, Warren Riis, and his wife, Helene, stockholders of Respondent, should be held personally liable for any award.

The answer filed to the amended specification sets out defenses discussed separately below.

The hearing in this matter was held in New York City. It opened simultaneously with hearings in five related cases and closed on 7 October 1986. On the entire record, on due consideration of the briefs filed by the General Counsel and Respondent, and on my observation of the demeanor of the witnesses, I make the following

FINDINGS OF FACT

A. *Background*

In 1975 Respondent was a member of a multiemployer bargaining association which was then negotiating with Shopmen's Local Union No. 455, International Association of Bridge, Structural & Ornamental Iron Workers, AFL–CIO (Local 455) for a contract to succeed the one expiring on 30 June of that year. Local 455 struck the next day. Notwithstanding Local 455's status as exclusive bargaining representative of its employees, Respondent signed a collective-bargaining agreement on 9 January 1976 with Teamsters Local 810. That agreement contained union-security provisions that were applied to unit employees. Respondent's recognition and its execution of the contract with Local 810 were found unlawful. Respondent was ordered to reimburse its employees for all moneys exacted from its employees pursuant to the union-security provisions of that contract.

B. *The Claim for Dues and Initiation Fees*

The amended specification alleges that Respondent had unlawfully deducted dues and initiation fees from Teamsters Local 810 from the wages of three employees. Respondent's answer does not place that allegation in issue. Region 29's supervisory compliance examiner testified that the factual allegations set out in the amended specification were based on data and information furnished by Respondent. Based on the foregoing, I find that Respondent is obligated to make whole the following employees for having unlawfully deducted Local 810 dues and initiation fees by paying them the sums as set out below, with interest.

Qtr.	*Siegbert Hicke*	*Ronald Michaud*	*Richard White*
1976			
I	22.	33.	22.
II	44.	39.	44.
III	33.	22.	33.
IV	39.	45.	39.
1977			
I	26.	26.	26.

C. *Backpay Claimed for the Returned Strikers*

The amended specification alleges that Siegbert Hicke, Ronald Michaud, and Richard White had returned to Respondent's employ after having taken part in the strike referred to above and that they had not been fully reinstated to their former positions in which they received fewer fringe benefits than allegedly were due them. Respondent contends that it has, at least since the start of the backpay period, fully reinstated them and asserts that it owes them no backpay as to the fringe benefits claim. Relevant to these contentions, is the excerpt quoted below from footnote 5 at 906 of the underlying Board decision, discussed supra:

> The General Counsel presented evidence establishing a *prima facie* case, which [Respondent has] not adequately rebutted, that economic and unfair labor practice strikers individually returned to work prior to August 9, [1978] and were not fully reinstated to conditions current at the time the strike began. Since an individual employee may make an unconditional offer to return to work, each individual employee who was reinstated pursuant to an unconditional offer was entitled to full reinstatement to the status quo which he occupied at the time he went on strike. *The Laidlaw Corporation*, 171 NLRB 1366, 1381-82 (1968), enfd. 414 F.2d 99 (7th Cir. 1969), cert. denied 397 U.S. 920 (1970). Accordingly, in light of [Respondent's] failure to rebut the General Counsel's *prima facie* case, we find [its] conduct in this regard to be violative of Section 8(a)(3) of the Act.
>
> We agree with the Administrative Law Judge's recommendation that determination whether the total wages and benefits package these employees have received since returning to work is substantially equivalent to the wages and benefits they received prior to the strike—and thus satisfies the full reinstatement requirement—should be considered in the compliance stage of this proceeding. Under the circumstances of this case, we hold that [Respondent's] backpay liability to any employee who returned to work before August 9 shall run only from 6 months prior to the filing of charges herein [i.e., from 1 July 1978].

The General Counsel acknowledges that these three returned strikers have been fully reinstated insofar as the hourly wage rates paid them are concerned. The amended backpay specification alleges that Hicke is entitled, under the Board's Order, to receive severance pay based on the contract with the Union which expired in 1975, on the closing of Respondent's plant in July 1984. The amended specification also claims certain vacation benefits for Hicke and Michaud. For example, the General Counsel claims that Hicke was entitled, under the 1975 expired contract, to have received 4 weeks' vacation in 1979 but, as he received only 3, that he is due 1 week's vacation for that year. Finally, the General Counsel claims that Respondent owes all three returned strikers for contributions and coverages it failed to provide for since July 1978 under the provisions for pension, annuity, and welfare benefits in contracts Local 455 has negotiated with other employers that superseded the provisions of the Local 455 agreement that expired on 30 June 1975.

In its answer, Respondent asserts that it has met the full reinstatement requirements expressly set by the Board in the language of its footnote 5, quoted above. In particular, Respondent urges that the total wages and benefits package these employees have received on their return to work is substantially equivalent to the wages and benefits they received prior to the strike.

The Board, at footnote 5, left open, for the compliance stage, the extent of backpay liability to these three employees since 1 July 1978—the start of the limitations period under Section 10(b) of the Act.

Neither party has provided an actual evaluation, if one could be made, of the respective wages and benefits packages—1 July 1975 versus 1 July 1978. The General Counsel apparently construes the Board's guidelines as requiring Respondent to continue to apply the basic benefits package under the 1975 association—union contract notwithstanding that Respondent had withdrawn from that bargaining and although an impasse thereon had been reached. When those considerations are taken into account, together with the rebuttable presumption that Respondent's actions in implementing fringe benefit changes late in 1975 (in 1976 and thereafter) were lawful, it seems clear that the General Counsel's construction of those guidelines is unwarranted. In effect, the General Counsel would interpret those guidelines to compel Respondent to maintain in effect contract terms it has not agreed to in any contract negotiations and which it apparently has been resisting since 1975. The compelling of a contract concession is itself expressly prohibited by Section 8(d) of the Act. I note too that there appears to be an inconsistency in the General Counsel's position. On the one hand, it uses the expired 1975 contract to determine the number of vacation weeks claimed for an employee, but applies the wage rates paid in 1978 and later that were much higher than those paid in 1975.

Respondent apparently would dismiss the claims of these three returned strikers simply by noting that they had been given substantial wage increases (e.g., Hicke received increases which raised his rate from $8 an hour between 1978 and 1984) and by finding that those increases easily offset any differences in fringe benefits as provided in 1975 and as provided on 1 July 1978, and thereafter. That view assumes that the "package" contemplated by the Board in its language in footnote 5, supra, would no include a requirement that a returned striker be given the raises granted replacements on a nondiscriminatory basis.

Neither the approach used by the General Counsel nor that used by Respondent addresses the basic purpose of a backpay specification. This compliance proceeding has been undertaken to ensure that there will have been no discriminatory treatment of the returned strikers since the start of the 10(b) period. Using that as the touchstone, it is obvious that Respondent's use of a literal application of certain language of the Board at footnote 5 as the "law of the case" is based on the assumption that the returned strikers would not have received the raises comparable to those that the replacements received. That is hardly a way to ensure that discriminatory conduct has ended. The General Counsel would have the Board give the returned strikers vastly better benefits than those enjoyed by the other employees, and this would have to be based ultimately only on the fact that they had originally taken part in the strike. The General Counsel's view also cannot be said to be aimed at ending discriminatory treatment of employees.

There is no evidence that Respondent has engaged in any discriminatory treatment of the returned strikers since the start of the backpay period. It may be that Respondent had, at some point, effected substantial unilateral changes in the wage rates or the other terms and conditions of unit employees and it may be that it did so after impasse, but no matter. I am concerned here with whether there has been discriminatory treatment of these employees since 1 July 1978. The figures set out in the amended backpay specification indicate that the wage rates they were paid were equal to or better than the rates paid to replacements. Indeed, and as noted earlier, the General Counsel acknowledges that no backpay claim can be made based on those wage rates. Nor is there even a suggestion that other employees received better fringe benefits.

Based on the foregoing, I find that, on and since 1 July 1978, the three returned strikers have been treated on a nondiscriminatory basis, and that they have been fully reinstated by Respondent.

D. *The Claims of the Unreinstated Discriminatees*

Nine employees of Respondent were found by the Board, in the underlying case, to have been unlawfully denied reinstatement since 9 August 1978. Their names are Beaudreau, Carmelo Consolo, Joseph Morris, William Daniels, Fritz O'Connor, Miguel Quevedo, Peter Rebecca, Alf Lango, and Max Stein. The General Counsel concedes that, under the backpay formula set out in the amended specification, Consolo and Stein would have had no gross backpay; Respondent's records established to the General Counsel's satisfaction that Respondent had no work available for either of them on or since the start of their backpay period. The General Counsel also seeks no backpay for O'Connor as he has refused to cooperate in the compliance investigation undertaken by Region 29.

In support of the amended specification, the General Counsel called the Supervising Compliance Examiner of Region 29 as a witness. He testified that the wage rates, hours, and other payroll data set out in the amended specification were all contained in payroll data obtained by a member of his staff from Respondent, and that he reviewed and edited the computations contained in the specification. Respondent, in its brief, would dismiss the specification as based only on hearsay evidence. Respondent, however, did not object to the General Counsel's acceptance of its records as the basis of the waiver of backpay claims for two of the discriminatees. Respondent's argument lacks merit. See *Painters Orange Belt District Council 48 (Ghiannni Construction)*, 275 NLRB 1180, 1182 (1985), and particularly so in the instant case where the records relied on are in Respondent's control.

The gross backpay formula in the amended specification is a standard one-wage rate last earned by the discriminatees plus increases given to replacements multiplied by the work hours of the replacements. The amended backpay specification also concedes that the claims for Lango and Stein ended with their respective deaths on 31 March and 30 September 1981, and the claim for Morris ended with the retirement on 1 February 1980.

Respondent offered no data to controvert the computations contained in the amended specification. Rather, it contended that the Board should apply to the unreinstated discriminatees the forumla discussed above in the section dealing with the three discriminatees who had returned to Respondent's employ. That formula, as is obvious from the Board decision, applies only to the reinstated strikers. I find that the gross backpay formula proposed by the General Counsel is appropriate and supported by the evidence in the record. Accordingly, I further find that the six discriminatees, who were not reinstated and for whom backpay is sought, would have earned the respective sums claimed for them in the amended specification as lost wages and that, after allowance for their net interim earnings, Respondent owes each, with interest, the respective amounts claimed to be due them as net backpay.

The amended specification also seeks pension, annuity, welfare, and other benefits for these discriminatees. The basis therefor, as asserted by the General Counsel, is the same as that considered and rejected above, with respect to the claims of the three strikers who had returned to work. I reject those claims for the same reasons that those of the three returned strikers were denied.

E. *The Joint Liability Issues*

The General Counsel asserts that Warren Riis and his wife Helen, are personally liable, jointly and severally with with Respondent, for the backpay due under the Board Order in this case. The General Counsel alleges that they have been the directors, officers, and stockholders of Respondent, that they have integrated or intermingled corporate and personal assets, and siphoned off corporate assets to their personal benefit in an attempt to render Respondent insolvent and thereby to frustrate the efforts of the General Counsel to collect backpay for the discriminatees. The General Counsel asserts that Warren and Helen Riis are the alter egos of Respondent.

Helen Riis admitted, in the answer filed on her behalf, that she was "a nominal stockholder" of Respondent; Warren Riis, admitted in his answer that he was a director, stockholder, and chief operating officer of Respondent. They deny they commingled corporate and personal assets.

The record in this case reveals the following. In 1956 Warren Riis and another individual, Joseph Michaud, formed a partnership, trading as Mohawk Steel Company. Riis took care of the commercial aspects of the partnership while Michaud was in charge of the plant and field operations. The partnership was engaged in the structural steel business.

Respondent was formed about 1961. Its issued stock was owned one-third by Warren Riis, one-third by Michaud. Warren and Helen Riis were the directors and officers. Michaud, however, had and exercised the authority to issue corporate checks. Helen Riis' role with Respondent was inactive.

Riis and Michaud, from 1961 on, performed the same respective functions as they had performed for the partnership, Mohawk Steel Company. Thus, Riis handled all administrative matters while Michaud took care of prduction and installation work and he also operated a crane.

On 13 January 1961 Riis purchased real property in Deer Park, New York, and, in his capacity as Respondent's president, signed a lease agreement in which Respondent occupied those premises.[1] He also signed the lease in his capacity as an individual lessor. Respondent, on 1 January 1962, agreed in writing with Riis, as an individual, to pay (a) a yearly rental varying according to property taxes, (b) the mortgage payments due monthly, and (c) $100 a week each to Warren Riis and Joseph Michaud. Respondent also agreed to be fully responsible for the cost of maintaining and repairing the real property. By 1 January 1964, the total of these weekly payments to Riis and Michaud had increased annually from $10,400 to $15,500, and by 1 January 1968, to $17,600. By 1975, the total reached $30,550. Riis testified that he and Michaud agreed on those increases. Those moneys were paid into the partnership, which was founded in 1956 as discussed previously; partnership tax returns have been filed annually. The 1975 return shows income of $30,550 for the partnership and a deduction of $15,401 for real estate taxes. The General Counsel's brief notes that, under the lease, Respondent was obligated to pay those taxes in addition to the $30,550. If Respondent actually paid the taxes, it would appear that the partnership should not have deducted the taxes and that Michaud may not have received the amount due him under the partnership arrangement. That may have something to do with the matter before me, but there also may be other ramifications to the accounting aspects of these transactions. Absent explanatory testimony from an accountant thereon, I am left with only speculation. Along those lines I noted that the partnership tax returns for 1978, and later, do not claim any deduction for real estate taxes. The General Counsel observes in her brief that Riis maintained the fiction of a partnership by filing tax returns with Michaud. On the very limited evidence before me, I am unable to find that the partnership existed contemporaneously with Respondent since about 1961 as a fiction or that it at any time after 1961 was converted by Riis into a device to divert funds for his own use.

As compensation for services rendered, Warren Riis received a salary from Respondent; Michaud received a smaller sum as salary for his services. Both enjoyed fringe benefits. Thus Respondent paid for welfare and pension benefits for Michaud and it provided a family golf club membership for Warren Riis. Both drove automobiles owned by Respondent and maintained them using corporate credit cards. It appears that they used those cars both for business and for pleasure.

In 1984, Respondent discontinued its structural steel operations and sold its assets to two companies. Nationwide Steel Corporation and Calbar Construction Company. Riis has no ownership interest in either of these concerns. Respondent realized about $69,000 from the sale of those assets. Those moneys were placed into Respondent's bank accounts. In 1985, those accounts were closed out. Respondent notes in its brief that it "utilized the proceeds from the sale of its business to pay its creditors." The General Counsel offered no evidence to the contrary.

In 1984, Riis leased the Deer Park property to Nationwide and Calbar. The rentals therefrom were paid into the partnership owned by Riis and Michaud. They have filed partnership tax returns reflecting receipt of those rentals and disbursements of the profits to each in equal shares.

The General Counsel's argument, in furtherance of her contention that Warren and Helen Riis should be held personally liable for Respondent's backpay obligations, at times, assumes the very point it seeks to prove. Thus, it is argued that Riis decided to shut down Respondent and that he personally "negotiated the sale of its assets." From a corporate law point of view, it is more accurate to say, instead, that Riis, as corporate stockholder, officer, or director, decided on behalf of the corporation to discontinue its operations and that he, in his corporate capacity, negotiated on its behalf the sale of its assets. The General Counsel, along similar lines, assumes that Riis, in using corporate credit cards, "utilize[d] corporate expeditures for his personal gain" when the evidence discloses that the principal use of the cards was for business, e.g., the oil company cards were used to gas up the trucks and corporate cars for business.

The General Counsel notes too that, after Respondent ceased operations in 1984, Riis and Michaud continued to share in rentals paid by new tenants. There seems to be nothing mysterious about that as the record discloses that Riis and Michaud, as partners, were the beneficial owners of the realty leased to these tenants. I am told, in the General Counsel's brief, that Riis "used [Respondent] to capitalize his venture into real estate which continues to provide him with lucrative returns from his new tenants." The record before me does not bear that out. Rather, it appears that Riis in 1961 took out a mortgage on the real estate, that it had been paid off a long time ago, and that he and Michaud have continued over the years to receive increased rentals therefrom. Rather than characterization, the use of criteria cited in Respondent's brief and relied on by the Board in determining alter ego liability or, alternatively, liability based on a wrongful diversion of corporate assets, as discussed by the Board in *Las Villas Produce*, 279 NLRB 883 (1986), is to be preferred.

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[1] In 1969, Helen Riis purchased a small adjacent lot that she leased to Respondent for the storage of its trucks.

In *Las Villas*, the Board observed that corporate officers may be liable as alter ego for corporate obligations based on a case-by-case examination of a group of factors constituting an initial "single employer" test and, as an additional element of proof, of the factor of a sham-disguised continuance. The Board also observed, in that case, that corporate officers may have limited liability, under a separate theory, to the extent that specific corporate assets had been wrongfully distributed to them in avoidance of backpay, citing *F & W Oldsmobile*, 272 NLRB 1150 (1984).

There is insufficient evidence to support a finding that Warren and Helen Riis were Respondent's alter ego. Rather, the evidence discloses that Helen was inactive and that Joseph Michaud (not named as a party herein) was a de facto principal in Respondent's operations, a one-third owner of its issued stock, and a codeterminant with Warren Riis of Respondent's business affairs. Neither is there evidence that corporate assets were improperly diverted to Warren and Helen Riis so as to frustrate payment of backpay due the discriminatees. Under either theory of stockholder liability as propounded in *Las Villas* then, the General Counsel's claim that Warren and Helen Riis are liable jointly and severally with Respondent for backpay due must be denied.

[Recommended Order omitted from publication.]

Pennsylvania Electric Company *and* **Violet L. Shugerts.** Case 6–CA–17557

July 27, 1988

DECISION AND ORDER

BY CHAIRMAN STEPHENS AND MEMBERS JOHANSEN AND BABSON

On May 20, 1985, Administrative Law Judge Marvin Roth issued the attached decision. The Respondent filed exceptions and a supporting brief, and the General Counsel filed an answering brief.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings[1] and conclusions,[2] as modified, and to adopt the recommended Order as modified.[3]

In its exceptions and brief the Respondent raises various questions concerning the judge's factual findings, asserting, inter alia, that these findings are based on inferences rather than credibility resolutions. We have carefully examined the issues raised by the Respondent and conclude that the judge has made the requisite credibility resolutions and that his analysis of the facts is essentially sound. In this regard, we note the following.

The Respondent contends that the judge erroneously relied on Storeroom Supervisor Ogden's alleged remark to employee Erhard concerning Plant Superintendent Bilotte's stated motivation for asking Ogden to lay off Erhard. It is clear from the judge's decision, however, that while he credited Ogden's denial that Bilotte actually told Ogden that Erhard should be laid off because he was a "troublemaker," the judge also credited Erhard's testimony that Ogden conveyed Bilotte's sentiments to Erhard by using words to the effect that Bilotte asked her to lay off Erhard because he was a "troublemaker." In this regard, the judge credited Ogden's testimony that Bilotte told her that "maybe we should consider not having temporaries in the storeroom at all" because the regular employees were complaining. Given this testimony by Ogden as to what Bilotte told her and her failure to testify as to how she in fact conveyed Bilotte's sentiments to Erhard (other than to specifically deny using the words attributed to her by Erhard), the judge's factual determinations concerning this incident are, contrary to the Respondent, both plausible and consistent.

Regarding Erhard, the Respondent also contends that the record does not support the judge's findings that Erhard worked in the storeroom in February 1984 and that Erhard lodged complaints with Ogden in 1984 rather than during 1983. The record does contain conflicting evidence on these points. The Respondent's own exhibit (memo from Superintendent Povlich to C. R. Suvakas dated February 14, 1986), however, lists Erhard as working in the storeroom as of February 13, 1984. More significantly, whether Erhard's complaints to Ogden about his job assignment and rate of pay occurred in 1983 or 1984, it is clear that the conversation between Ogden and Erhard containing the reference to Erhard as a "troublemaker," described above, occurred in February 1984. Erhard testified that the conversation took place in February 1984, and Ogden, although differing about the substance of

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[1] The Respondent has excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

The Respondent also has requested oral argument. The request is denied as the record, exceptions, and briefs adequately present the issues and the positions of the parties.

[2] We note that no exceptions were filed to the judge's recommendation that the alleged violation of Sec. 8(a)(4) and (1) and the alleged independent violation of Sec. 8(a)(1) of the Act be dismissed.

[3] In the remedy section of his decision, the judge recommended that the discriminatees be given "preference in hiring and retention for temporary employment, in a non-discriminatory manner, and without prejudice to their seniority or other rights and privileges previously enjoyed." Because we agree with the judge's finding that the Respondent had abandoned use of a seniority list for hiring purposes by January 1984, we will delete reference to retention of "seniority" in the recommended Order and notice. The judge also recommended that the Respondent offer preference in hiring and retention for temporary employment to "all other employees who are entitled to such preference by reason of our past practice." Inasmuch as the issue of discrimination against a well "defined and easily identified class" has been litigated only for the unit 3 and unit 1 outages, however, we will limit the preferential hiring to "all other employees who are entitled to such preference by reason of our unlawful practice in connection with the unit 3 and unit 1 outages in 1984" rather than leave the determination of discrimination in future outages to compliance proceedings. *Teamsters Local 328 (Blount Bros. Corp.)*, 283 NLRB 779 (1987). In this regard we note that inasmuch as the factual context and particular variables present in the 1984 Shawville unit 3 and unit 1 outages are essential predicates to our finding a violation pertaining to them, leaving the litigation of violations concerning subsequent outages to the compliance stage would be tantamount to leaving to the compliance stage the litigation of subsequent unfair labor practices. No agreement by the parties to litigate alleged discrimination in future outages, assuming the record supports such an agreement, permits the litigation of unfair labor practice allegations in compliance proceedings. The Order and notice are modified accordingly. Additionally, while the judge singles out former employees Hughes, Hampton, and Hubler to be made whole regarding the unit 3 and unit 1 outages at Shawville in 1984, it is not clear from the record that, even absent discrimination, these employees would have been employed during those outages. Hence, we leave this matter to compliance and shall modify the Order and notice accordingly.

In accordance with our decision in *New Horizons for the Retarded*, 283 NLRB 1173 (1987), interest on and after January 1, 1987, shall be computed at the "short-term Federal rate" for the underpayment of taxes as set out in the 1986 amendment to 26 U.S.C. § 6621. Interest on amounts accrued prior to January 1, 1987 (the effective date of the 1986 amendment to 26 U.S.C. § 6621), shall be computed in accordance with *Florida Steel Corp.*, 231 NLRB 651 (1977).

289 NLRB No. 136

the conversation, testified that it took place in January 1984.[4] It is apparent from the content of the conversation that it was a reaction to Erhard's complaints and the grievances of the full-time stockkeepers in response to Erhard's assignment. In this light, the judge appropriately relied on Ogden's remarks as an indicium of animus.

Finally, the Respondent maintains that Superintendent Povlich was unaware of Shugerts' complaints regarding her work assignments and rate of pay. We agree with the judge's conclusion, however, that Povlich was aware of the complaints because, inter alia, as set forth by the judge, Supervisor Selvage referred Union Steward Leggs to Povlich for assistance concerning Shugerts' request for an upgrade in August 1983 and Leggs did talk to Povlich about the matter.[5]

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge as modified below and orders that the Respondent, Pennsylvania Electric Company, Shawville, Pennsylvania, its officers, agents, successors, and assigns, shall take the action set forth in the Order as modified.

1. Substitute the following for paragraphs 2(a) and (b).

"(a) Offer preference in hiring and retention for temporary employment at its Shawville, Pennsylvania facility to Violet Shugerts, Paula Kitko, Richard Diggs, Rex Neiger, David Graham, Leonard McCale, George Gould, Dennis Jury, Jacob Kukla, Frank Josefik, Randy Erhard, Dale McCracken, Richard Shirey, Scott Duckett, Michael Dubo, Paula Shepler Zitzelberger, Dessie Woodling Lee, Lorenzo Carella, Julia Short, Lorraine Stewart, Dennis Marino, Stephen Selfridge, Carol Frelin, Herbert Baumgartner, and James Butterbaugh, and to all other employees who are entitled to such preference by reason of its past practice in connection with the unit 3 and unit 1 outages in 1984, in a nondiscriminatory manner, and without prejudice to any rights and privileges previously enjoyed.

"(b) Make whole the above-named employees, and any other employees who are entitled to such preference in connection with the unit 3 and unit 1 outages at Shawville in 1984, for any loss of earnings they may have suffered by reason of the discrimination against them, as set forth in the remedy section of this decision."

2. Substitute the attached notice for that of the administrative law judge.

APPENDIX

Notice To Employees
Posted by Order of the
National Labor Relations Board
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

We will not terminate employees, refuse to interview or hire job applicants, or in any other manner discriminate against employees regarding their hire or tenure of employment or any term or condition of employment, because they or any of their fellow employees claim rights under a collective-bargaining contract, or because they engage in any other union or concerted activities for the purpose of collective bargaining or other mutual aid or protection.

We will not in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

We will offer preference in hiring and retention for temporary employment at our Shawville, Pennsylvania facility to Violet Shugerts, Paula Kitko, Richard Diggs, Rex Neiger, David Graham, Leonard McCale, George Gould, Dennis Jury, Jacob Kukla, Frank Josefik, Randy Erhard, Dale McCracken, Richard Shirey, Scott Duckett, Michael Dubo, Paula Shepler Zitzelberger, Dessie Woodling Lee, Lorenzo Carella, Julia Short, Lorraine Stewart, Dennis Marino, Stephen Selfridge, Carol Frelin, Herbert Baumgartner, and James Butterbaugh, and to all other employees who are entitled to such preference by reason of our past practice in connection with the unit 3 and unit 1 outages in 1984 in a nondiscriminatory manner and without prejudice to any rights and privileges previously enjoyed.

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[4] Inasmuch as the unit 4 outage did not take place until February 1984, Erhard's date would appear to be more accurate.

[5] The Respondent also excepts to certain inferences drawn from the testimony of Murray, a maintenance supervisor. In this regard, we find it unnecessary to rely on the judge's finding that "Murray's testimony may properly be considered as an admission that the Company made a conscious decision to hire new employees for the July 1984 outage." Additionally, in his decision, the judge stated that the Respondent gave "inconsistent and demonstrably false reasons" for refusing to hire Shugerts for the February-March outage and for refusing to retain or rehire Shugerts and other temporary periodic employees "at the next two outages." The judge's reference is potentially confusing in its inclusion of Shugerts and other alleged discriminatees who were hired for the unit 3 outage in May-June. It is, however, correct, in view of the fact that we adopt the judge's findings that there was discrimination in the hiring and/or retention of certain employees during the unit 3 outage and the unit 1 outage in July-August. Nonetheless, for the sake of clarity, we note that the violation found concerns the core group employees who, although working during the May-June unit 3 outage, were not retained or hired for the subsequent unit 1 outage in July-August and any other core group employees who may have been discriminated against with respect to the unit 1 outage.

Additionally, we do not adopt the judge's finding that Howarth's stated reason for scheduling interviews for the July-August outage between the hours of 7:30 a.m. to 3 p.m. was "frivolous." We agree, however, that the Respondent's failure to provide for any procedure by which core group employees could be rehired for the July-August outage supports the judge's conclusions as it appears, without adequate explanation on the Respondent's part, to conflict with the Respondent's stated lawful interest.

WE WILL make whole those employees, and any other employees who were entitled to such preference in connection with the unit 3 and unit 1 outages in 1984 for any loss of earnings they may have suffered by reason of the discrimination against them.

PENNSYLVANIA ELECTRIC COMPANY

Charles H. Saul, Esq., for the General Counsel.
Anthony A. DeSabato, Esq., of Philadelphia, Pennsylvania, for the Respondent.

DECISION

STATEMENT OF THE CASE

MARVIN ROTH, Administrative Law Judge. This case was heard at Clearfield, Pennsylvania, on 20 and 21 December 1984 and at Pittsburgh, Pennsylvania, on 23 January 1985. The charge and amended charges were filed respectively on 20 August and 5 and 15 October 1984 by Violet L. Shugerts, an individual.[1] The complaint, which was issued on 18 October and was amended at the hearing, alleges that Pennsylvania Electric Company (the Company or Respondent) violated Section 8(a)(1), (3), and (4) of the National Labor Relations Act. The gravamen of the complaint is that the Company allegedly threatened employees with loss of employment because of their union and concerted activities; laid off and failed and refused to recall or rehire certain employees known as "temporary periodic" or "temporary non-recurring" employees, including Shugerts, because of Shugerts' union and concerted activities, and because she filed an unfair labor practice charge against the Company; and discouraged employees from engaging in such activity. The Company's answer denies the commission of the alleged unfair labor practices. All parties were afforded full opportunity to participate, to present relevant evidence, to argue orally, and to file briefs. The General Counsel and Respondent each filed a brief.

On the entire record in this case[2] and from my observation of the demeanor of the witnesses, and having considered the briefs and arguments of the parties, I make the following

FINDINGS OF FACT

I. THE BUSINESS OF THE COMPANY

The Company, a Pennsylvania corporation with its principal office in Johnstown, Pennsylvania, is engaged in the distribution and sale of electricity to residential and commercial users. In the operation of its business the Company annually derives gross revenues in excess of $250,000 and annually purchases electricity valued in excess of $50,000 directly outside Pennsylvania for use at, and distribution from, its Pennsylvania power stations, including the Shawville station which is involved in the present proceeding. I find, and the Company admits, that it is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

II. THE LABOR ORGANIZATION INVOLVED

The International Brotherhood of Electrical Workers, Local No. 1124 (the Union) is a labor organization within the meaning of Section 2(5) of the Act.

III. THE ALLEGED UNFAIR LABOR PRACTICES

A. *The Status of the Temporary Periodic or Nonrecurring Employees, Developments Before June 1984, and the Alleged Unlawful Threats*

The Company maintains 10 generating stations at various locations (9 in Pennsylvania and 1 in Maryland) including the Shawville station. The Company's production and maintenance employees, including Shawville, have for many years been represented by the Union and covered by a series of collective-bargaining contracts. The contracts have provided and still provide for three categories of employees. Regular employees are those who have been hired into a regular job vacancy and have successfully completed a 6-month probationary period. Temporary probationary employees are those who have been hired into a regular job vacancy and are serving their probationary period. Temporary periodic or temporary nonrecurring employees are those who have been hired for a defined period of time or for specific job.[3] These temporary employees are entitled to the contractual wage rate for the work they perform, and they receive the same holidays as regular employees, including premium pay for holiday work. However they are not entitled to sick, vacation, personal, or military leave or pension and other contractual fringe benefits, they do not accumulate seniority, and they have no seniority rights. At the commencement of a period of employment, each temporary employee is required to sign an agreement that acknowledges that his or her employment "is strictly temporary" and "will be terminated whenever your services are no longer required." Like other employees, they are required to join the Union after 30 accumulative days of employment. (Subsequently at the end of a period of employment, they maintain inaccurate membership status until their next employment.) The contract language does not preclude temporary employees from presenting grievances. However, as will be discussed, the short duration of their employment may effectively prevent them from pursuing or even filing such grievances.

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[1] All dates are for 1984 unless otherwise indicated.

[2] Certain errors in the transcript have been noted and corrected.

[3] The collective-bargaining contracts use both the terms "temporary periodic" and "temporary non-recurring." For purposes of this litigation, the General Counsel prefers to use the term "temporary periodic," whereas Respondent prefers to refer to "temporary non-recurring" employees. However employee evaluation forms, which were introduced in evidence, indicate that the Company has consistently classified the employees, at least at Shawville, as "temporary periodic." In this decision I shall refer to the employees involved as "temporary" employees. If necessary, I shall refer to temporary probationary employees as "probationary" employees.

The Company conducts periodic maintenance outages at each of its generating stations. At Shawville the Company normally conducts one outage per year for each of four units. These outages are scheduled 4 or 5 years in advance. Because these outages entail a shutdown of the unit, the schedules must be approved by PJM Interconnection, a power pool of 12 companies that provide electricity in the Pennsylvania-New Jersey-Maryland area. However, the dates may be and frequently are revised before the actual outage. At Shawville an outage may run from 3 to 6 weeks, depending on the size and nature of the maintenance work involved. Preoutage preparation and postoutage cleanup usually each take 1 week. The Company has found it necessary to hire temporary employees to assist in conducting the outage and the pre- and post-outage work. The Company will normally hire from 30 to 60 temporary employees, again depending on the amount and nature of the work involved, e.g., more employees are needed for an "internal" outage, which involves breaking down a turbine engine. A smaller number, usually about 15, are used for preoutage and postoutage work. The Company hires temporary employees principally, but not exclusively, in connection with maintenance outages. The Company hires temporary employees for estimated periods of time, based on its protected needs, rather than for a specific outage or outages. Company records indicate that in recent years, one or two temporary employees might be kept on for an unusually long period of time (from 3 to 5 months). However, the evidence otherwise indicates that at Shawville, temporary employees worked either in connection with maintenance outages or performed cleanup or routine maintenance work during short intervals between outages (known as "back to back" outages, which will be discussed further).

At one time, the Company directly received all applications for temporary employment. However, in or about 1975, the Company began using the Pennsylvania Bureau of Employment Security (BES) as its exclusive source of applicants. The Company's personnel office would notify the local BES office of its anticipated needs, and request that BES schedule interviews with a designated number of applicants (usually about twice the number needed, at a designated place, date, and timeframe. The plant's maintenance supervisor and an official from the Company's personnel office in Johnstown would then interview the applicants referred by BES. The interviews were short (normally not more than 10 minutes) in contrast to the in-depth interviews for applicants for regular employment. The interviews would also consider recent evaluations of applicants who had previously worked for the Company. The interviewers would select the number of employees required from among the applicants, and notify BES of the names of the applicants hired and the dates they would start work. Charles Savukas, the Company's senior administrator for human resources, who has participated extensively in the hiring process, testified that the Company prefers temporary employees with a background in heavy industry. As the Company's generating stations, including Shawville, are located in predominantly semirural areas, it is unlikely that the Company would be able to draw from a significant number of applicants with such experience, except among applicants who previously worked for the Company. As part of the hiring process, prospective employees were referred for physical examinations when necessary. In practice, this meant that all new employees would be referred for physicals, whereas employees who worked three or four times a year for the Company would not have to take a physical for every period of employment. Thus in May 1984, only one among those hires who had worked an outage earlier that year was required to take a physical, whereas all new employees were required to do so.

Although temporary employees had no contractual seniority rights, the Company continually hired the same core group of about 30 individuals for its scheduled outages, supplemented as and if needed by new employees. In practice, these core people would reregister with BES on completion of each term of employment, BES would, absent special circumstances, invariably refer them to the Company for the next outage, and the Company would invariably hire them if a slot was available. Indeed, the Company not only gave preference to this core group, but even hired them in accordance with an informal seniority system. It is undisputed that, at least until the end of 1982, the Company maintained seniority lists of temporary employees, based on the number of days or hours previously worked, and followed this list in hiring and terminating at Shawville and other locations. Shawville Maintenance Superintendent Robert Povlich testified that when he assumed his position in March 1981, he was instructed by the personnel department to use this list. Thus temporary employees were hired in accordance with their seniority, and the first hired were the last laid off. Senior Administrator Suvakas testified that the Company discontinued this practice in late 1982 or early 1983. Union Assistant Business Manager Ardell Shirey, who was presented as a General Counsel witness, testified that he was informed in early 1983 that the Company discontinued its practice of following the seniority list. However, the testimony of Company witnesses indicates that at Shawville the Company continued to adhere to a seniority practice for temporary employees until 1984. In January 1984, Suvakas and Povlich jointly interviewed and hired applicants for a unit 4 outage. They testified, in sum, that after the interviews, when Suvakas said they should proceed with the selection process, Povlich said they needed the list of days worked for previous employees. Suvakas told him that they no longer used the list, and they proceeded to select employees without the list. It is evident from this conversation that before 1984, no one told Povlich that he should not use the list, and that he continued to use the list through 1983.[4]

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[4] Povlich testified that he stopped using the list "Last part of '82 to the middle of '83, somewhere in the area." However, "the middle of '83" was the last time before 1984 that temporary employees were hired at Shawville.

The January 1984 interview and hiring process is significant in several respects to the present case, which involves the termination and hiring of temporary employees since June 1984. The unit 4 outage was a relatively small operation, anticipated to last 3 weeks, which required only about 30 temporary employees. The interviews and selection were conducted jointly by Povlich, who knew the core group employees and was familiar with their performance, and by Suvakas, a high-ranking personnel officer who was familiar with the Company's hiring policies and had ostensibly informed Povlich that seniority was no longer considered as a factor in hiring temporary employees. If the Company had a practice of spreading work in the community, or for some other reason, of hiring a mix of new and experienced employees, then presumably this practice would have been reflected in the January 1984 hiring process. The result is enlightening. Suvakas and Povlich interviewed 59 applicants, 41 of whom had previously worked as temporary employees. They hired 31 employees, all of whom had previously worked as temporary employees at Shawville, and nearly all of whom had worked on a sufficiently regular or frequent basis to be regarded as part of the core group. Among the 10 experienced employees who were not hired, 2 had not worked at Shawville in recent years, 5 had worked only once or twice, and only 3 had worked often enough to be regarded as part of the core group (Violet Shugerts had worked 10 times in the preceding 4 years, and Lloyd Hampton and Richard Gulish worked 4 and 5 times, respectively, during that period).[5] Shugerts was placed on an alternate list with an applicant who had not previously worked for the Company. Shugerts testified without contradiction that office clerk David Butler, who notified employees concerning their hire and when to report, told her that she was not hired, but was the first name on the alternate list (which was true). However, when a vacancy developed, the Company did not hire Shugerts. Instead the Company hired John Bungo, an applicant who had no prior company experience and was not on the alternate list. Shugerts, who is the Charging Party in the present case, filed an unfair labor practice charge based on the Company's failure to hire her in January (Case 6-CA-17201). She filed the charge on March 16 and withdrew it on April 26.

Apart from the matter of Shugerts, which will be discussed further, the January 1984 hiring pattern plainly demonstrates that the Company, if it used a seniority list, preferred to draw initially from the core group in meeting its temporary needs. Moreover, other evidence introduced in this case, particularly evaluations of temporary employees, indicates that this was not merely a coincidence, but reflected a longstanding and well-established practice at Shawville, and that the Company was well aware of such a practice. Company officials based in Johnstown, specifically Manager of Labor Relations Richard Gallatin and Human Resources Administrator Gary Howarth, who were presented as Company witnesses, professed difficulty in thinking of work performed by temporary employees beyond "clean up type work." In fact, in the usual complement of temporary employees only about one-fourth would be classified as janitors and assigned primarily to cleanup work. Most of the employees were classified as "Utility B," and were assigned to assist regular employees in a wide variety of tasks which paralleled the scope of work of the regular employees. Some of these tasks required the exercise of mechanical or electrical skill. Jacob Kukla, a longtime and well-regarded core employee, testified concerning various equipment on which he worked, and that it took him four outages in which to learn to perform each job well. Much of the Utility B work involved obtaining equipment, parts, and supplies for regular employees. Such work did not require skill. However, the Shawville station is a seven-story structure, with four power units; equipment, parts, and supplies were stored at various locations throughout the plant; and some of these items required a parts order. Therefore the outage operation, in which time was of the essence, would be facilitated if the temporary employee was familiar with the plant and plant procedures. Even Howarth reluctantly admitted that this would be advantageous to the Company. Employee evaluations, which were prepared by first-line supervisors and relied on by the Company in the hiring process, indicated that the Company monitored the performance of its temporary employees and attached significance to their progression. For example, the Company determined that Frank Josefik "has maintenance skills, but needs to be exposed to a variety of jobs," that Alvin Hughes "would better productivity . . . with more exposure to plant and maintenance operations," that Dessie (Woodling) Lee was "willing and able to develop mechanical skills," and that Richard Shirey was "learning the plant, the location of equipment and the lubrication job well." The Company requested and received recommendations from its supervisors concerning rehire of temporary employees and their suitability for regular employment, contrary to the testimony of Maintenance Supervisor Blair Murray, the Company's evaluation records indicate that supervisors continued to make such recommendations in June 1984. Murray also testified that "sometimes a person who has been there several outages gets a bit complacent," but that "somebody new may be aggressive and desirous of really performing." However, the employee evaluations, which were introduced in evidence, indicate a different pattern, and this is particularly true regarding Violet Shugerts. In 1981 Shugerts received a mildly critical evaluation which indicated that she tended to waste time. Thereafter her evaluations were increasingly favorable.

Murray, who was presented as a Company witness, also gave testimony that is particularly significant to the ultimate merits of this case. Murray was a group supervisor of mechanical maintenance, who directed the work of several crews, and had been in that position for about 10 years. Murray testified that he was "upset with the decision to hire all experienced [sic] temporary employees" and that he expressed his dissatisfaction to Assistant Maintenance Manager William Selvage, Povlich's immediate subordinate, who directed the work of the mechanical maintenance department. Murray made clear in his testimony that he was talking about the July 1984 outage, i.e., "the outage that all the new people were hired for." In the context of Murray's testimony, it is evident that Murray meant "inexperienced," but was reluctant to say it. Murray's testimony may properly be considered as an admission that the Company made a conscious "decision" to hire new employees for the July 1984 outage, and that this result did not simply come about through happenstance.

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[5] Alvin Hughes, who was not hired, worked an outage in 1982 and another in 1983, and he was later hired for the May-June 1984 outage.

As discussed, at least until 1984 the Company was satisfied with the performance of the core group at Shawville and routinely rehired them. However, beginning in 1983, several incidents occurred that brought the temporary employees in conflict not only with the Company's policies and practices, but also the interests of the regular employees. The core group, by virtue of their longstanding union membership and familiarity with plant personnel and conditions, became increasingly knowledgeable concerning contract wage rates, and although they were classified as "Utility B" or "Janitor," which placed them at the bottom of the wage scale, they sometimes were called on to perform work which at least arguably entitled them to a higher rate.[6] Violet Shugerts was particularly vocal in this regard. In March 1983 Shugerts complained to Assistant Maintenance Supervisor Selvage that a temporary employee with less experience was assigned to a forklift at an assistant rate (higher than Utility B), while Shugerts was "pushing a broom."[7] The Company did not change Shugerts' assignment, but shortly after her complaint, some temporary employees were downgraded.[8] In August 1983 Shugerts was working on the condenser. She and temporary employee Dennis Jury were assigned to paint the condenser. Under the union contract Shugerts and Jury would be entitled to an assistant rate for performing such work, i.e., a rate higher than that of Utility B for which they were classified. Jury received the higher rate, and Shugerts asked Group Supervisor John Norman if she could also get the assistant rate. Norman initially said he thought she could, but later that day he told her that she could not get the assistant rate because the Company had already upgraded four temporary employees, and budget limitations precluded any further upgrading. Norman testified that he told Selvage that he needed two people to paint and that he "probably" told Selvage that Shugerts wanted to be upgraded. Selvage refused to upgrade Shugerts. As a result, Shugerts was taken off painting work, and the Company had to make do with one temporary employee (Jury) doing the painting. Shugerts also complained to the Union. She spoke to Assistant Business Manager Ardell Shirey and Steward Charles Leggs. Leggs asked Selvage the rate of pay for employees working in the condenser. Selvage answered that Leggs "would have to take it up with Bob Povlich." Leggs testified that Povlich told him that one person in the condenser was upgraded to keep the job running, and the rest were paid at a lower rate. Selvage testified that he personally told Shugerts that they were permitted to upgrade only one person in the condenser work and that Jury was given the higher rate. Selvage testified that he never spoke to Maintenance Supervisor Povlich about the matter, and Povlich testified that he was not aware of any complaints by Shugerts concerning upgrading of pay or work assignments. However, they did not deny Leggs' testimony concerning his conversations with them. I do not credit the testimony of Povlich and Selvage to the effect that Povlich was unaware of Shugerts' complaint. Selvage would not have referred Leggs to Povlich unless Povlich was knowledgeable concerning the problem and in a position to make a final decision. If Shugerts' name was not mentioned when Leggs spoke to Povlich, then it is evident that Povlich already knew that Shugerts made the complaint. If he did not know, then it is probable that he would have inquired of Leggs, since it was evident from Leggs' question that there was a problem, from the Union's viewpoint, concerning the wage rates of temporaries working on the condenser. Moreover, there was no indication that anyone other than Shugerts was assigned to do work on the condenser at less than the contract rate. I find that Povlich was aware of and rejected Shugerts' complaint. Consequently, Povlich was aware of the matter in January 1984 when he and Suvakas refused to rehire Shugerts, and was specifically aware that by complaining about the matter and going to the Union, Shugerts frustrated the Company's effort to use temporary employees to perform work without paying them the rate they were entitled under the contract.

Shugerts was not rehired for the next outage, but the problems did not cease. In February 1984 temporary employees Randy Erhard and Dale McCracken were assigned to the storeroom as stockkeepers and initially at least paid the appropriate rate, which was higher than that for Utility B. Beyond that point the facts are in dispute. Erhard testified that they were downgraded, whereupon Erhard complained to Storeroom Supervisor Pam Ogden and to Union Assistant Business Manager Shirey. The Company agreed to upgrade Erhard and McCracken. Then lower rated regular employees complained because the temporaries were making more than them. Erhard testified that Ogden told him that Plant Superintendent Kenneth Bilotte asked her to lay off Erhard because he was a "troublemaker." Ogden, who was presented as a company witness, did not mention McCracken in her testimony. Ogden testified that Erhard was hired and paid at the "Stockeeper B" rate, which was higher than the Utility B rate, that his rate never changed because "There's no way he could have got upgraded or lower," and that Erhard never asked for a higher rate. Ogden testified that when Erhard began work, two regular stockkeeper employees filed a grievance, alleging that they were deprived of overtime work because Erhard was working in their place. Ogden denied that Bilotte told her that Erhard was a troublemaker, or that she told Erhard that Bilotte asked her to lay him off because he was a troublemaker. However, she testified that Bilotte told her that "maybe we should consider not having temporaries in the Storeroom at all," because the regular employees were complaining. Ogden did not testify about what she did tell Erhard. I credit Erhard. The Company's roster of temporary employees hired at Shawville for 1980-1984, which was presented in evidence, indicates that until 31 May 1984, when McCracken was hired as a "Stockkeeper," no temporary employee was hired directly into that classification. The roster indicates that in February 1984 McCracken was hired as a janitor.[9] Therefore it is evident that there must have been upgrading involved, and that Ogden's contrary premise was erroneous. I credit Ogden's testimony concerning her conversation with Plant Superintendent Bilotte. However, in the absence of any explanation by her of what she told Erhard, it is quite possible that she conveyed Bilotte's sentiments to Erhard in the manner described by Erhard. I find that the incident is significant in that it demonstrates that the Company was aware that core group complaints were resulting in conflicts between the regular and temporary employees, and that in such event the Company was inclined to favor the regular employees, even if this meant dispensing with the services of the core group personnel.

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[6] Several company witnesses testified that it was common for employees, including temporaries, to request upgrading. However, as admitted by Group Supervisor John Norman, while it was not unusual for temporary employees to request more skilled work, e.g., to assist a mechanic instead of doing cleanup work, it would be unusual for a new employee to request a higher rate of pay under the union contract.

[7] Shugerts testified that Carol Frelin, the other employee, had not recently worked as a temporary employee. In fact, although Frelin had less experience than Shugerts, she had been working outages since early 1982 and by 1983 could be regarded as one of the core group.

[8] John Kukla, one of the downgraded employees, testified that Group Supervisor Murray told him that he and another employee were downgraded "because some girl went to the office complaining that she's an older employee and she's not upgraded," and that Shugerts told Kukla that she made the complaint. Murray testified that he never made the alleged statement to Kukla, that he was not aware of Shugerts' complaint, and that temporary employees were downgraded in March 1983 because the number of upgrade employees exceeded the allowable limit of four. Murray testified that according to his records, the employees were downgraded on March 3, 1983, more than halfway through the outage. If so, then it is evident that something must have occurred that called management's attention to the number of upgraded employees. The evidence fails to indicate any pertinent occurrence other than Shugerts' complaint. I credit Kukla, and I find that Shugerts' complaint precipitated the downgrading.

The complaint alleges that "in and about March and June 1984 (the exact dates being unknown)," the Company, acting through Group Supervisor Norman "threatened employees with loss of employment because of their Union and protected concerted activities." Jacob Kukla testified in sum that during several outages he asked Norman, who was his supervisor, to be upgraded to an assistant rate because he was assigned to perform mechanical work without a regular repairman being present, and under the union contract he could not perform such tasks at his present rate. Kukla testified that Norman always told him that "they are only upgrading certain ones and they couldn't upgrade" him. Kukla further testified that Norman told him that "if I go to the office and complain about you, Jake, maybe they won't call you back," and therefore he "dropped the matter." Norman in his testimony admitted that Kukla asked about upgrading. However, he denied telling Kukla that he might not be recalled if he asked to be upgraded. Norman testified that to his recollection, he handled Kukla's requests himself without consulting Assistant Maintenance Supervisor Selvage. However, Norman testified that he sometimes discussed such requests with Selvage, and that he could not recall the names of temporary employees who requested upgrading, other than Shugerts and Kukla. I find it unlikely that Norman did not at least inform Selvage of Kukla's requests, and I find it probable that both Povlich and Selvage were aware of those requests. However, I am not persuaded that the General Counsel has proven that Norman threatened Kukla with loss of employment. Kukla testified that Norman always rejected his requests because only certain employees were upgraded. He did not indicate that Norman threatened him more than once, and he did not indicate, even approximately, when the alleged threat occurred. I am not persuaded that Kukla's testimony is any more credible than Norman's denial. Bearing in mind that we are here dealing with a specific alleged unfair labor practice, I find that the General Counsel has not proven a violation by a preponderance of the credible evidence. Therefore I am recommending that the allegation be dismissed.

The General Counsel contends (Br. 10) that the circumstances of the Company's refusal to hire Violet Shugerts for the February-March 1984 outage May properly be considered as evidence with respect to the alleged unfair labor practices in the present case, occurring in and since June 1984. I agree. Evidence involved in a settled or withdrawn charge may properly be considered as background evidence in determining the motive or object of a respondent in activities occurring either before or after the settlement or withdrawal, which are in litigation. *Steves Sash & Door Co. v. NLRB*, 401 F.2d 676, 678 (5th Cir. 1968); *NLRB v. Carpenters*, 383 F.2d 89, 95-96 (8th Cir. 1967). The limitation period of Section 10(b) of the Act does not preclude receipt or consideration of such evidence, or other evidence predating the 10(b) period, e.g., concerning motive, animus, and knowledge of union or concerted activity, unless the General Counsel's case is inescapably grounded on evidence predating the 10(b) period. Here, the General Counsel's case is not so limited. Rather, the General Counsel is also relying on evidence within the 10(b) period, including alleged pretextual reasons for terminating and refusing to rehire the core group employees, departure from prior practice, and statements and admissions by the Company. Therefore the Company's refusal to hire Shugerts in January 1984 may properly be considered in the present case. See *NLRB v. Carpenters*, supra; *Denzil S. Alkire*, 259 NLRB 1323, 1329 fn. 4 (1982), revd. on other grounds 716 F.2d 1014 (4th Cir. 1983); *Laborers Local 282 (Millstone Construction)*, 236 NLRB 621, 623 (1978). Moreover, it is not possible to intelligently evaluate the present allegations without considering the Company's hiring and termination practices in the February-March outage. Indeed, the Company is contending that its actions in June 1984 were lawful in that they reflected a continuation of practices that were initiated or followed in the February-March outage (see, e.g., Br. 3, 16, 18, 21). In furtherance of its position, the Company presented testimony concerning the manner in which employees were selected for that outage. Therefore the selection process, including the Company's refusal to hire Shugerts, was properly and fairly placed in litigation, and it is necessary for me to consider that process to determine its significance concerning the present alleged unfair labor practices.

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[9] The roster fails to list Erhard for the February 1984 outage, although it is undisputed that he was hired and did in fact work at that time.

I find that the Company intentionally refused to hire Shugerts for the February-March outage because of her insistence at the previous outage that she receive the contract rate for painting the condenser, as a result of which the Company was forced to perform this work with only one temporary employee. Shugerts was one of only three case group employees who were interviewed but not hired at that time, and she had considerably more experience than the other two. Shugerts testified that she began working as a temporary employee in 1980, and that to her knowledge she worked every outage for which temporary employees were hired until 1984. The Company gave conflicting, and patently false, explanations for its failure to hire her for the February-March outage. Assistant Business Manager Shirey testified without contradiction that Maintenance Superintendent Povlich told him that her evaluation was good, but that the list was full and she was "first on the extra list in case somebody didn't make it." As indicated, Shugerts was told the same thing, and the Company's records indicate that she was first on the list of alternates, but when an opening developed, the Company hired a new employee who was not listed as an alternate. Union Steward Leggs testified that Povlich told him that Shugerts should not be concerned about this outage, but if she was called for the next outage (which she was) she should be concerned about improving her performance. Shugerts testified that Povlich told her that to his knowledge there was no reason why she was not hired, that she did nothing wrong, and that applicants were hired based on their evaluations and performance at the interviews. However, Shugert's evaluations indicate that the Company regarded her as a competent employee and after 1981 they contained no adverse remarks.[10] I find that the Company's discriminatory refusal to rehire Shugerts for the February-March outage is evidentiary with respect to its subsequent actions beginning in June 1984.

The Company's hiring and termination practices concerning the February-March outage are significant in other respects. As found, although the Company ostensibly discontinued using an informal seniority system at an earlier time, the admissions of Suvakas and Povlich indicate that the Company used the seniority system at Shawville until January 1984. If the Company used the seniority list in January 1984, then Suvakas and Povlich would have had to hire Shugerts, who was near the top of the list. However, by discarding the list, the Company could avoid hiring Shugerts. As the Company's abandonment of the list at that time was tainted by its discriminatory refusal to rehire Shugerts, that abandonment cannot validly be considered as evidence that the Company, for legitimate reasons, stopped giving preference to the core group before the events that gave rise to the present case. Rather, as indicated, the evidence indicates otherwise, because the Company hired only experienced temporary employees, with the exception of one new employee who was hired in place of Shugerts.

Before 1984 the Company consistently followed a practice at Shawville of first hired, last terminated. Those employees who were hired for preoutage preparation were retained for postoutage cleanup. The Company was thereby assured of the services of its most experienced employees throughout the operation, and the most experienced employees were assured of the maximum possible employment. However, in March and again in June 1984 the Company followed a practice of first hired, first terminated. At the completion of the General Counsel's case-in-chief, the Company moved for dismissal of the pertinent allegation, asserting that because the Company switched to a practice of first hired, first terminated in March, the subsequent application of such a practice in June could not be viewed as discriminatorily motivated. The difficulty with this argument is that the two situations were not comparable. Human Resources Administrator Howarth testified that the Company applied a practice of first hired, first terminated at Shawville in March "in order to equalize the work among the temporaries." However, this was a relatively small operation involving 31 temporary employees, all but one of whom had prior experience. The practical effect of last hired, first terminated in this outage was simply, as confirmed by the Company's records, to equalize work among the core group. Therefore, the Company still had the benefit of using experienced employees throughout the operation. However, the Company hired 38 employees for the May-June outage, of whom 12 had little or no prior experience. These 12 were in the second and last group hired. Therefore, for the first time, the Company retained a large group of new temporary employees for postoutage work while a substantial number of experienced core group personnel were terminated.

B. *The May-June and July-August Outages and the Company's Alleged Unlawful Termination and Refusal to Rehire Core Group Temporary Employees*

By letter dated 24 April to BES employment interviewer Marshall Shaw, Howarth requested that 70 applicants be scheduled for interviews on 3 and 4 May for temporary employment, estimated for about 5 weeks. Since November 1982, the Company had outages scheduled at Shawville for unit 3 during the weeks of 28 May and 4 and 11 June and for unit 1 during the weeks of 9, 16, and 23 July. Allowing 1 week before and after each outage for preparation and cleanup, the Company could therefore anticipate that there would be a 1-week interval (week of 25 June) between outages. In fact, by April 28 at the latest, Maintenance Superintendent Povlich knew that the unit 3 outage would be delayed 1 week, and that consequently there would be only a weekend between completion of cleanup for the unit 3 outage and commencement of preparation for the unit 1 outage. Povlich testified that in accordance with his request (by memo dated April 3) the unit 3 outage was rescheduled to commence on June 4, that the decision was made between March 25 and April 26, and that he was officially notified of the change by April 28, when he received the revised maintenance schedule.[11]

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[10] Jacob Kukla testified that "acting supervisor" Dean Johnson told him that Shugerts was not rehired because she complained about not getting the assistant rate in the condenser in 1983, and "I guess" she would not be rehired because "She's more or less a troublemaker and she's never satisfied with her job." Johnson, who was presented as a company witness, denied that he had a conversation with Kukla concerning Shugerts. Johnson described himself as a repairman who was upgraded to temporary foreman and put in charge of a crew. Kukla admitted that Johnson was not acting as his foreman when they had their conversation. I am not persuaded that Kukla's testimony is more credible than Johnson's denial. Assuming that the conversation took place as described by Kukla, I would find in the circumstances, including Johnson's normal status as a rank-and-file employee, that Johnson was not speaking on behalf of the Company, and that Kukla did not have just cause to believe that Johnson was speaking on behalf of management.

On 3 and 4 May Povlich and Howarth interviewed and selected from among the applicants. One core group employee, Scott Duckett, commenced work on May 14. Sixteen additional hirees, all core group employees, including Violet Shugerts, Jacob Kukla, and Randy Erhard, were initially scheduled to begin on 28 May, but were subsequently told to report instead on Thursday, 31 May. The remaining 21 hirees, including 9 core group employees, commenced work on 4 June. As indicated, Povlich already knew that there would be a continuous need for temporary employees through both the unit 3 and unit 1 outages. Nevertheless, by letter dated May 16, Howarth requested BES interviewer Shaw to schedule interviews for 80 applicants on 12 and 13 June, commencing each day at 7:30 a.m., with 10-minute intervals, i.e., with a lunchbreak until about 3 p.m. Howarth specifically told Shaw that no interviews should be scheduled after 3 p.m., and that the Company would not give currently working employees time off for the interviews.[12] The temporary employees worked from 7 a.m. to 3:30 p.m. Therefore, as Howarth admitted in his testimony, he knew that the employees who were hired for the unit 3 outage were precluded by his own instructions from applying for and consequently working the unit 1 outage. BES policy did not preclude currently working individuals from applying for future work, so long as unemployed individuals were added to the list. As indicated, Shaw normally referred core group employees to the Company. Shaw contacted Violet Shugerts, who said she was working and would have to get time off. Office clerk Butler told her that Shaw was not supposed to call the employees who were not working, that they could not be interviewed, and therefore they could not work the July outage. On May 29 Shaw began setting up interviews. However, because of Howarth's instructions, he did not schedule any applicants who were currently working, i.e., working on the unit 3 outage. As a result, nearly all the interviewed applicants had not previously worked for the Company. The Company hired 42 temporary employees for the unit 1 outage, of whom 6 had previously worked for the Company. Three of the six (Linda McGonigal, Julia Short, and Dessie Lee) had worked the February-March outage and were interviewed but not hired in May. On 22 and 23 June the Company terminated 13 of the 16 employees who were began on 31 May, and these 13 individuals are specifically named in the complaint as alleged discriminatees. They are Violet Shugerts, Paula Kitko, Richard Diggs, Alvin Hughes, Rex Neiger, David Graham, Leonard McCale, George Gould, Dennis Jury, Jacob Kukla, Frank Josefik, Randy Erhard, and James Hubler.[13] Fifteen of the employees who began on June 4 were terminated on Friday, 29 June; the remaining six were terminated on 22 June. On Monday, 2 July, the Company began preparation for the unit 1 outage with 10 temporary employees. Four more employees began the next day, 25 began work on 9 July, and 3 more began work on 10 or 11 July.

The Company's hiring practice regarding the July-August outage was unprecedented. The Company had never scheduled interviews for temporary employees at a time when temporaries were currently working at Shawville. In recent years, the Company had consistently offered employment to core group applicants for every outage that required temporary employees, consistently preferred to hire them, and consequently, until July 1984, always had a temporary work force that consisted predominantly of core group employees. The Company offered conflicting and demonstrably false explanations for its failure to hire or retain core group employees for the July-August outage, both at the time of the events and through its witnesses at the present hearing. In June, union representatives met with company officials to discuss why core group employees were not being retained or interviewed for the July-August outage. Plant Superintendent Bilotte and Maintenance Superintendent Povlich told Union Stewards Semler and Leggs that the Union did not have the right to tell the Company who to recall, adding that the Company wanted to spread work throughout the community and therefore would not interview working employees for the next outage. Administrators Gephart and Howarth similarly told Union Business Manager Jim Brinker and Assistant Manager Shirey that the Company would not hire "just a certain group of people," but would spread out work because of unemployment, and therefore would not interview anyone on the payroll. However, Howarth testified that although the Company tried to spread out opportunities, he was "never instructed to do that," and he did not consider this factor when he scheduled the June interviews and hired temporaries for the July–August outage. In fact, as discussed, the Company had consistently and as late as May 1984 demonstrated a preference for core group employees.[14] Subordinate supervisors suggested that the Company was required by law to spread work through the community. Zitzelberger testified without contradiction that in June Selvage told her he wanted to keep her, but "the government is getting on us about hiring the same people all the time." Randy Erhard credibly testified that on 21 June we asked Group Supervisor Porter "why they were getting rid of all of us old timers and bringing new people in," whereupon Porter answered that he should "thank the governor because it was a new law in unemployment and the company had no choice."[15] In fact, no evidence was presented concerning any pertinent governmental requirement, pressure, or persuation, and the Company does not contend in this proceeding that the Federal or state government had anything to do with its failure to retain or rehire the core group employees.

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[11] The asserted reason for the change is questionable. In his April 3 memo Povlich stated that he wanted to avoid the expense of holiday pay (Memorial Day) on the first day of the outage. Povlich testified that PJM would not allow the Company to begin an outage "during the middle of the week," i.e., on a Tuesday following a Monday holiday. However, such considerations of economy did not prevent the Company from commencing preparation for the unit 1 outage on July 2, shortly before a paid holiday (Independence Day), or as indicated by the Company's records, from scheduling 1985 outages to commence at Shawville on Washington's Birthday and at Conemaugh on Labor Day, both paid holidays.

[12] Shaw, who was presented as a company witness, testified that Howarth told him that he was not planning to give currently working employees time off for interviews, and therefore Shaw did not schedule them. Howarth testified that they spoke after 12 June, that Shaw said that some currently working employees were concerned because they were not interviewed, whereupon Howarth told him that the Company had already interviewed and made its selections. Shaw is a state government officer who has no motivation to testify falsely in this proceeding. I credit Shaw.

[13] Scott Duckett, who was hired on 14 May, and Richard Shirey and Dale McCracken, who began on 31 May, continued to work through and after the unit 1 outage. The Company's records indicate that Michael Dubo worked from 31 to 25 May. Although this was an obvious error, I have no other basis for determining the duration of his employment, and he is not specifically named as an alleged discriminatee.

As found, Group Supervisor Murray indicated in his testimony that the Company made a conscious decision to hire new employees for the July–August (unit 1) outage. Nevertheless, the Company contends, through the testimony of Superintendent Povlich, that the Company did not intentionally refuse to hire core group employees for that outage, specifically, those who worked the prior outage, but that its failure to hire them was unintentional and caused by a coincidental series of events. Povlich testified, and the Company's records indicate, that as of November 1982 the Company had scheduled the 1984 outages for unit 3 during the weeks of 28 May and 4 and 11 June and for unit 1 during the weeks of 9, 16, and 23 July, which would indicate a 1-week interval between postoutage cleanup for unit 1. Povlich testified that "probably" in the fall of 1983 he submitted a proposed budget to Johnstown that included the two outages and was based on the premise that there would be separate hirings for the outages. As discussed, in April the Company rescheduled the unit 3 outage to commence on 4 June, thereby indicating that preparation for the unit 1 outage would commence on the first workday after completion of cleanup for the unit 3 outage. On 4 May, the same day that the Company was interviewing applicants who later worked only the unit 3 outage, Povlich submitted a personnel request for replacement form (form PL-52A) to Johnstown, requesting authorization for temporary employees as follows: 15 for preoutage preparation from 30 June to 6 July, 50 for the unit 1 outage from 7 to 27 July, and 15 for postoutage cleanup from 28 July to 3 August. The request, which was approved on 17 May, said nothing about whether the temporaries should be newly hired or retained from the unit 3 outage. The original proposed budget for 1984, referred to by Povlich in his testimony, was not presented in evidence. At the present hearing, company counsel sought to prove that the Company had no alternative but to [illegible] separately for the 1984 outages because in 1982 Povlich anticipated that there would not be a continuous need for temporary employees and therefore submitted a proposed budget that required separate hiring for the unit 3 and unit 1 outages. However, Povlich did not cooperate. Despite leading questions from company counsel, Povlich indicated in his testimony that the PL-52A request was part of the ongoing budgeting process, and that he could have submitted a request which took changed conditions into consideration. Thus Povlich testified as follows:

> Q. What is a back to back to outage?
>
> A. It's a outage when there is little or no time between the outages, when they run right together. When that occurs I would treat them like one block of required need of people and that's the way I would budget for them.
>
> Q. How do you determine whether or not you're going to budget them as a single need or budget for them separately?
>
> A. How do I determine that?
>
> Q. Yeah.
>
> A. By the length of time between the outages.
>
> Q. What length would that be?
>
> A. I'd say two weeks or more, I'd submit a PL-52 A separately.
>
> Q. What happens if there was originally three or four weeks between the outages when you both budgeted them and submitted the PL-52 A, and somehow or another that period of time compressed? Would you treat them as one outage or separate outages?

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[14] In a letter to the Board's Regional Office during the investigation of the present charge, Business Manager Brinker stated that "Approximately a year to a year and a half ago the Company chose to change the practice of hiring the same person time after time and elected to hiring many different people from the communities surrounding the site having need for temporary workers." Brinker added that this practice provided "a more equitable way of offering employment to many different persons rather than a select few," and "has merit and should be supported." Brinker's assertions have no evidentiary value in this proceeding. First, as found, the Company never changed its practice, at least at Shawville, and Brinker's letter simply reflected what the Company told the Union. Second, Brinker's letter cannot be deemed as an admission by the Charging Party or other alleged discriminatees. Evidence adduced in this proceeding indicates a conflict of interest between the union leadership and regular employees in one hand, and the core group temporaries and union functionaries associated with them, on the other. The union contract specifically excluded temporary employees from seniority rights. Therefore if the Union took the position, for any reason, that temporaries were entitled to renewed or continued employment, this might be viewed as an attempt to renege on its contract. Thus, when core group employee Paula (Shepler) Zitzelberger sent a letter to Brinker, attempting to grieve her termination on June 29, Brinker told her in sum that her grievance lacked merit. Earlier, in July, when Zitzelberger and two other temporaries attempted to enter the plant to present their grievance, Superintendent Bilotte told them they were no longer employees and should get off the property. Additionally, as discussed, the temporaries' demands for contractual wage rates sometimes brought them into conflict with the interests of regular employees. Although Shirey and Leggs, who serviced the temporaries, may have been sympathetic to their cause, that sympathy may not have been shown by other officials.

[15] On direct examination Porter testified that he told Erhard that he did not know "why the temporaries that had been employed down there for several outages before weren't recalled." However, on cross-examination Porter inconsistently testified that at the time of the conversation he did not know whether the current employees would be working the July–August outage. I credit Erhard.

> A. *No, I would probably already have the PL-51 A submitted, we would just treat as they were submitted.* [Emphasis added.]

In summary, although company counsel was suggesting that the final decision was made when Povlich submitted his original proposed budget, Povlich was testifying only that he would not change his budgeting after the PL-52A was submitted. Povlich expressly conceded that the PL-52A authorization request is part of the budgeting process. Moreover, nothing in either the original budget proposal of the PL-52A authorization prevented Povlich from retaining the employees who began on 31 May through both outages, instead of hiring a completely new complement of employees. Povlich expressly admitted that the amount of wages paid to the temporary employees would have been the same, whether the same temporaries or a new set of temporaries was used. Indeed, it would have cost less to retain employees because the Company could have eliminated or reduced the need for interviews, physical exams, and the training and familiarization of new employees with the Company's operations. Additionally, Povlich's testimony, and the PL-52A forms themselves, demonstrate that those personnel authorization requests are not cast in stone, but are subject to change as warranted by changed circumstances. Thus the PL-52A form, which Povlich submitted concerning the unit 3 outage, indicating that the outage would begin on 28 May, and that was approved by Johnstown, did not prevent Povlich from requesting that the outage be moved to a later date. The forms also do not correspond with the number of temporaries actually hired. Povlich also testified concerning an outage in the summer of 1982, when a low-pressure rotor cracked. The outage was extended and temporaries were kept on to perform cleanup work, until Povlich ran out of budget money, while regular employees were assigned to work on the outage. Therefore it is evident that the maintenance budget was sufficiently flexible to allow for unanticipated costs including extended employment of temporary employees.

Much testimony was adduced in this proceeding concerning the Company's hiring and retention practices in "back to back" outages, where there was a short interval between outages. I am not persuaded that the present record indicates a situation precisely comparable to that involved in the present case, i.e., a 2-week interval between outages, in which cleanup for the first outage continued up to, but did not overlap preparation for, the second outage. The General Counsel presented in evidence the Company's roster of temporary employees since January 1980, including dates of employment. The Company presented records of actual or projected maintenance outages throughout its system since January 1982. The General Counsel's witnesses were rather vague in their recollection of the intervals between past back-to-back outages. Although the Company's employment roster indicates some relatively long spans of employment in 1981 and 1982, it is not possible to determine whether these involved back-to-back outages, which were two or more weeks apart, with no intervening needs. The Company's records indicate that in early 1982 and again in early 1983, there were two outages which fell 1 week apart. In each instance, the temporaries who began with preparation for the first outage continued through cleanup for the second outage, and those employees who started work at the beginning of the first outage (1 week after the first group) were terminated at the end of the second outage (1 week before the initial group). In these situations cleanup for the first outage would be performed concurrently with preparation for the second outage, thereby requiring nearly a full complement of temporaries during the intervening week. The Company's records fail to indicate, before May 1984, any other outages at Shawville that were sufficiently close together to be even arguably regarded as back-to-back outages. Administrator Howarth testified, and the Company presented records concerning 1984 outages, which were 3 weeks apart, at the Company's Seneca and Warren stations. Howarth testified that although the two stations are treated as one location, there was separate hiring for the two outages. However a 3-week interval would indicate that there was a 1-week period during which there would be no need for temporaries. Moreover, the evidence in this case indicates that at Shawville, the Company had a strong preference for the same group of temporaries, which was not necessarily the case at other locations, and that the Johnstown personnel administrators were, until May 1984, willing to accommodate this preference even if it differed from their asserted general policies. Administrator Howarth, who together with Povlich, interviewed and hired temporaries for Shawville in both May and June, testified that when outages were 2 or 3 weeks apart, he would use the same employees for both "if we have a need for those people during an interim period." Applying this policy, and given Povlich's strong demonstrated past preference for core group employees, it is probable that absent a discriminatory motive the Company would at the least have retained those employees who began on 31 May, as needed through cleanup following the second outage. I also find significant Howarth's adamant refusal to permit currently working employees to apply for the July-August outage. Howarth suggested that he scheduled the interviews from 7:30 a.m. to 3 p.m. as a personal accommodation, in order to enable him to get home to Johnstown by about 6 p.m. His suggestion borders on the frivolous. Howarth had no reservations about getting up in the middle of the night to drive 2-1/2 hours from Johnstown to Shawville to begin interviewing at 7:30 a.m. I find it unlikely that Howarth would have given priority to an early dinner hour if this meant the difference between hiring experienced and inexperienced employees. Even if Howarth sincerely wanted to conduct the interviews during the temporaries' working hours, it would have taken only 10 minutes of their time to be interviewed. Nevertheless Howarth adamantly made clear in advance that the temporaries would not be given any time off.[16] Howarth's actions were not only arbitrary

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[16] Howarth testified that some of the temporaries were working on the night shift. However BES interviewer Shar would have no way of identifying those employees. Therefore, when Howarth informed Shaw that

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and unreasonable, but more significantly, they were inconsistent with the Company's longstanding preference for core group temporaries at Shawville.

I find that the Company terminated the 13 named core group employees on 22 and 23 June, instead of retaining them through postoutage cleanup for the July-August outage, in reprisal for the activities of core group employees in claiming appropriate wage rates under the union contract, and as part of a campaign to discourage such claims by depriving them of the benefit of the Company's past practice of routinely favoring them in hiring and thereby assuring them of temporary employment on what in fact was a routine basis.[17] I further find that in furtherance of that campaign, the Company terminated additional core group temporaries hired on 4 June, at the end of the unit 3 outage, instead of retaining or rehiring them for the unit 1 outage, as the Company would have done had it followed its past practice of preferring their employment over that of new temporaries. The core group temporaries, who had been repeatedly hired by the Company, were Paula Shepler, Zitzelberg, Lorenzo Carella, Lorraine Stewart, Dennis Marino, Stephen Selfridge, Carol Frelin, Herbert Baumgartner, James Butterbaugh, and Lloyd Hampton.[18] The Company initially sought to discourage such employee activity by discriminatorily refusing to hire Violet Shugerts for the February-March (unit 4) outage. Shugerts was the first core group employee to vigorously invoke her asserted contract rights by complaining both to management and the Union, and by doing so she forced the Company to change its work assignment pattern. However, during that outage the Company found that Shugert's absence did not deter other core group employees, specifically Randy Erhard and Jacob Kukla, from claiming wage rates to which they and fellow temporaries were entitled under the union contract, and that these claims conflicted not only with the Company's policies, but also to some extent with the interests of the regular employees. Statements by higher management at Shawville demonstrated a hostility toward such claims and an inclination to refrain from hiring temporaries who made such claims. Thus Plant Superintendent Bilotte told Storeroom Supervisor Ogden, after Erhard and McCracken were upgraded and the regular employees complained, that maybe they should not have temporaries in the storeroom. Maintenance Supervisor Povlich told steward Leggs that if Violet Shugerts was called for the next outage, she should be concerned about improving her performance. However, Shugert's evaluations indicated that the Company regarded her as a competent employee, and that her performance compared favorably in all respects with the employees who were hired for the February-March outage. The inference is inescapable that by "performance," Povlich was referring to Shugerts' aggressive assertion of contract rights. At a lower level, Ogden told Erhard that she was instructed to lay him off because he was a troublemaker. The Company advanced inconsistent and demonstrably false reasons for refusing to hire Shugerts in February and similarly advanced inconsistent and demonstrably false reasons for refusing to retain or rehire Shugerts and other core group temporaries at the next two outages. The Company adamantly and pretextually deprived them of even an opportunity to apply to work the July-August outage, knowing that in light of its prior practice of favoring the use of such employees, the Company would be hard put to justify their rejection. In these circumstances, I find that the Company embarked upon a course of action to deprive the core group employees of temporary employment on a routine basis, in reprisal for the actions of core group employees in invoking their contract rights; and to discourage other employees from invoking such rights and reducing or eliminating such activity. See generally regarding motive, *Shattuck Denn Mining Corp. v. NLRB*, 362 F.2d 466, 470 (9th Cir. 1966); *W. T. Grant Co. v. NLRB*, 337 F.2d 447 (7th Cir. 1964). Shugerts, Erhard, and Kukla invoked the union contract in the honest and reasonable belief that they were entitled to the higher wage rate for the work assigned to them. Therefore, they were engaged in protected union and concerted activity, and the Company violated Section 8(a)(1) and (3) of the Act by discriminating against the core group employees because of such activity. *NLRB v. City Disposal Systems*, 465 U.S. 822 (1984); see also *Gulf Coast Steel*, 236 NLRB 831, 832 (1978), enfd. 594 F.2d 238 (5th Cir. 1979); *Crown Wrecking Co.*, 222 NLRB 958, 962 (1976). Where as here, an employer discriminates against a group or class of employees because of the union or other protected activities of some members of that group or class, the employees action is unlawful as to all the discriminatees, and all are entitled to relief. *American Bottling Co.*, 99 NLRB 345, 352 (1952), enfd. 205 F.2d 421 (5th Cir. 1953), cert. denied 346 U.S. 921 (1954); *Arnoldware, Inc.*, 129 NLRB 228 (1960). The evidence is insufficient to establish that Violet Shugerts' first unfair labor practice charge was a motivating factor in the Company's subsequent discrimination against the core group temporaries. Shugerts withdrew the charge in March, and Povlich may well have believed that this action improved her "performance." She was hired for the next outage. However, the employees' invocation of their contract rights presented a continuing problem to the Company.

C. *Alleged Unlawful Discrimination Since August 1984*

Evidence was introduced at the present hearing that indicated that in late 1984 and early 1985 the Company was following the same course of conduct that it initiat-

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currently working employees would not be given time off, Shaw would have no reason to schedule any of them for interviews. Rather, the Company's course of conduct is consistent with what clerk Butler told Shugerts, namely, that the Company decided not to interview or rehire any currently working employees.

[17] It is evident from the Company's records that there was sufficient work for them through the workweek beginning 30 July. The Company employed 15 temporaries during that week, none of whom were core group employees.

[18] I do not agree with the General Counsel's contention (Br. fn 10) that the names of all discriminatees should be left to the compliance stage of the proceeding, insofar as that contention relates to the 1984 unit 3 and unit 1 outages. The record evidence is adequate in this regard to enable me to specifically identify the discriminatees. The General Counsel's position regarding later or future outages will be discussed further in the next section and in the remedy section of this decision.

ed in the spring and summer of 1984, namely, of hiring core group temporaries for one outage but not the following outage. Randy Erhard testified that he was hired on December 3 and anticipated that he would be terminated on December 21, but that he did not anticipate working the next outage, sheduled to begin in January 1985, because he was not interviewed and the interviews had already taken place. The General Counsel was reluctant to delay the hearing in order to investigate the present situation. I permitted the General Counsel to amend the complaint in order to allege violations since July 1984, specifically to allege that since June 22 the Company has failed and refused to recall or rehire the 13 named core group temporaries and "other employees whose names are currently undetermined" to their former or substantially equivalent positions. The Company requested that if evidence were introduced concerning alleged discrimination subsequent to August 1984, it wanted an opportunity to respond to such evidence. I ruled that subsequent events could be litigated, if necessary, at the compliance stage of this proceeding. However, such litigation must of course, in accordance with usual Board procedure, be considered in light of the findings and conclusions in the unfair labor practice case, and decided in a manner consistent with the remedy and Order in the case.

CONCLUSIONS OF LAW

1. The Company is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

2. The Union is a labor organization within the meaning of Section 2(5) of the Act.

3. By discriminatorily failing and refusing to retain or rehire Violet Shugerts, Paula Kitko, Richard Diggs, Alvin Hughes, Rex Neiger, David Graham, Leonard McCale, George Gould, Dennis Jury, Jacob Kukla, Frank Josefik, Randy Erhard, James Hubler, Paul Shepler Zitzelberger, Lorenzo Carella, Lorraine Stewart, Dennis Marino, Stephen Selfridge, Carol Frelin, Herbert Baumgartner, James Butterbaugh, and Lloyd Hampton because of the union and concerted activities of Violet Shugerts and other of those employees, and thereby discouraging membership in the Union, the Company has engaged in, and is engaging in, unfair labor practices within the meaning of Section 8(a)(1) and (3) of the Act.

4. The aforesaid unfair labor practices are unfair labor practices within the meaning of Section 2(6) and (7) of the Act.

5. The General Counsel has failed to prove by a preponderance of the credible evidence that the Company violated Section 8(a)(4) of the Act or through Supervisor John Norman, violated Section 8(a)(1) by threatening employees with loss of employment because of their union and concerted activities.

THE REMEDY

Having found that the Company has committed violations of Section 8(a)(1) and (3) of the Act, I shall recommend that it be required to cease and desist therefrom, and from like or related conduct, and to take certain affirmative action designed to effectuate the policies of the Act. Plainly, this is not a case like those involving the discriminatory discharge of a regular employee or a discriminatory refusal to hire for regular employment, in which a conventional order of reinstatement or offer of employment would be warrented. In cases such as the present case, involving discriminatory denial of intermittent temporary employment, it has been Board policy to direct the employer to offer employment to the discriminatees on the same nondiscriminatory basis that they enjoyed before to the unlawful discrimination. See *Great Lakes Dredge & Dock Co.*, 169 NLRB 631, 635 (1968); *Gallant Man*, 154 NLRB 1795, 1808 (1965), modified in other respects 161 NLRB 1310 (1966), enfd. 389 F.2d 701 (5th Cir. 1968); *Republic Corp.*, 260 NLRB 486, 514 (1982), enfd. 701 F.2d 221 (D.C. Cir. 1983). In summary, the Board will endeavor to restore the status quo, i.e., the "last peaceable uncontested status which preceded the pending controversy." *Black's Law Dictionary* (5th ed. 1979). In the present case, it would not effectuate the remedial purposes of the Act to require the Company to adhere to a rigid seniority system, either on the basis of prior days worked or other standard. The evidence indicates that although the Company used such indicia of seniority as a guide, it did not invariably hire or retain temporary employees on that basis. Thus the Company did not invariably hire or retain employees who had worked once or occasionally in the past, in preference to less experienced employees. However, the evidence does indicate that the Company consistently demonstrated a preference to hire and retain an identifiable group of core temporaries in preference to other employees or applicants. Specifically, the Company's records and other evidence indicates that 25 employees were hired for either the May–June or July–August 1984 outages and previously for at least each of the three preceding outages, i.e., that they were consistently hired, during a 1-year period preceding the present discrimination. It is also significant that the Company hired only experienced temporaries for the three outages which preceded the May–June 1984 outage, except for one applicant who was hired in place of Violet Shugerts for the February–March outage. I have included Shugerts in this category because the Company discriminatorily refused to hire her for that outage. The other core group employees in this category are Paula Kitko, Richard Diggs, Rex Neiger, David Graham, Leonard McCale, George Gould, Dennis Jury, Jacob Kukla, Frank Josefik, Randy Erhard, Dale McCracken, Richard Shirey, Scott Duckett, Michael Dubo, Paula Shepler Litzelberger, Dessie Wodling Lee, Lorenzo Carella, Julia Short, Lorraine Stewart, Dennis Marino, Stephen Selfridge, Carol Frelin, Herbert Baumgartner, and James Butterbaugh. I find that these employees are entitled to preference in employment by reason of the Company's established nondiscriminatory past practice. Therefore I am recommending that the Company be ordered to give them preference in hiring and retention for temporary employment, in a nondiscriminatory manner, and without prejudice to their seniority or other rights and privileges previously enjoyed. In this regard, the Company's records indicate that throughout 1981, 1982, and 1983, Violet Shugerts was invariably among those core group employees who were given top preference in hiring and retention for employment. The Company may not avoid this order by limiting such offers to applicants referred by BES because that procedure was tainted when the Company discriminatorily informed BES that it would not hire currently employed temporaries. The present record is inadequate for the purpose of identifying other experienced employees who are or may be entitled to equal or lesser preference in temporary employment on the basis of past practice. The Company's records indicate that some employees repeatedly worked for the Company in 1983 and in some instances also in early 1984, but were not interviewed or hired for either the May–June or July–August outages. This might indicate that they were no longer available or interested in employment. Alvin Hughes and Lloyd Hampton worked some but not all outages, and both were interviewed and rejected in January 1984. This might indicate that the Company was not entirely satisfied with their performance. (Hughes' evaluation in June 1984 was somewhat qualified.) James Hubler worked the last two outages in 1983 and the May–June outage in 1984, but was neither interviewed nor hired for the February–March outage. His status may depend on the reason why he did not work that outage. Therefore, I am leaving for the compliance stage of this proceeding, the identification of additional discriminatees, if any, concerning temporary employment after August 1984. However, Hughes, Hampton, and Hubler are entitled to be made whole for the discrimination against them in connection with the May–June and July–August 1984 outages. I am further recommending that the Company be ordered to make whole each of the discriminatees for any loss of earnings they may have suffered by reason of the discrimination against them, by paying each of them a sum of money equal to that which they normally would have earned from the date they were first discriminatorily terminated or denied employment to the date of the Company's offer of preferential employment in accordance with its prior practice. Because they were employed on a temporary basis, the net earnings to be subtracted from the gross backpay due them shall be only the money they actually earned on those days they would have been employed by the Company had it not discriminated against them. *Great Lakes Dredge & Dock Co.*, supra, 169 NLRB at 636 fn. 19. The backpay for the said employees shall be computed quarterly in accordance with the formula in *F. W. Woolworth Co.*, 90 NLRB 289 (1950), with interest computed in the manner and amount prescribed in *Florida Steel Corp.*, 231 NLRB 651 (1977).[10] It will also be recommended that the Company be required to preserve and make available to the Board, or its agents, on request, payroll and other records to facilitate the computation of backpay due. I shall also direct posting of an appropriate notice. To assure adequate dissemination of the notice, I shall direct that the notice be posted for a 60-day period which includes at least a 21-day period of temporary work in connection with a maintenance outage, or for an additional 21-day period when such work is in progress.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[20]

ORDER

The Respondent, Pennsylvania Electric Company, Shawville, Pennsylvania, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Terminating employees, refusing to interview or hire job applicants, or in any other manner discriminating against employees with regard to their hire or tenure of employment or any term or condition of employment, because they or any of their fellow employees claim rights under a collective-bargaining contract, or because they engage in any other union or concerted activities for the purpose of collective bargaining or other mutual aid or protection.

(b) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Offer preference in hiring and retention for temporary employment at its Shawville, Pennsylvania facility to Violet Shugerts, Paula Kitko, Richard Diggs, Rex Neiger, David Graham, Leonard McCale, George Gould, Dennis Jury, Jacob Kukla, Frank Josefik, Randy Erhard, Dale McCracken, Richard Shirey, Scott Duckett, Michael Dubo, Paula Shepler Zitzelberger, Dessie Woddling Lee, Lorenzo Carella, Julia Short, Lorraine Stewart, Dennis Marino, Stephen Selfridge, Carol Frelin, Herbert Baumgartner, and James Butterbaugh, and to all other employees who are entitled to such preference by reason of its past practice, in a nondiscriminatory manner, and without prejudice to their seniority or other rights and privileges previously enjoyed.

(b) Make whole those employees, and any employees who were entitled to such preference in connection with the units 3 and 1 outages at Shawville in 1984, including Alvin Hughes, Lloyd Hampton, and James Hubler, for any loss of earnings they may have suffered by reason of the discrimination against them, as set forth in the remedy section of this decision.

(c) Preserve and, on request, make available to the Board or its agents for examination and copying, all payroll records, social security payment records, timecards, personnel records and reports, and all other records necessary to analyze the amount of backpay due under the terms of this Order.

(d) Post at its Shawville, Pennsylvania facility, copies of the attached notice marked "Appendix."[21] Copies of

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[10] See generally *Isis Plumbing Co.*, 138 NLRb 716, 717–721 (1962).

[20] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

[21] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the Nation-

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the notice, on forms provided by the Regional Director for Region 6, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. The notices shall be at the discretion of the Regional Director, be posted for a 60-day period which includes at least a 21-day period of temporary work in connection with a maintenance outage, or for an additional 21-day period when such work is in progress.

(e) Notify the Regional Director in writing within 20 days from the date of this Order what steps the Respondent has taken to comply.

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al Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

Local 1575, International Longshoremen's Association, AFL–CIO *and* Puerto Rico Marine Management, Inc. and Local 402, Office and Professional Employees International Union, AFL–CIO. Case 24–CD–17

July 27, 1988

DECISION AND DETERMINATION OF DISPUTE

BY MEMBERS JOHANSEN, BABSON, AND CRACRAFT

The charge in this Section 10(k) proceeding was filed October 19, 1987,[1] by the Employer, Puerto Rico Marine Management, Inc., alleging that the Respondent, Local 1575, International Longshoremen's Association, AFL–CIO (Local 1575), violated Section 8(b)(4)(D) of the National Labor Relations Act by engaging in proscribed activity with an object of forcing the Employer to assign certain work to employees it represents rather than to employees represented by Local 402, Office and Professional Employees International Union, AFL–CIO (Local 402). The hearing was held November 30 and December 1 and 2, 1987, before Hearing Officer Harold E. Hopkins Jr.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board affirms the hearing officer's rulings, finding them free from prejudicial error. On the entire record, the Board makes the following findings.

I. JURISDICTION

The Employer, a Delaware corporation, provides marine transportation or related services between Puerto Rico and the mainland of the United States and in interstate and foreign commerce. It has its principal office and place of business in Elizabeth, New Jersey, and maintains other places of business and port facilities throughout the United States, including those located within the Commonwealth of Puerto Rico. During the 12 months prior to the hearing, the Employer has derived gross revenues in excess of $500,000 from the handling and transportation of cargo in interstate and foreign commerce in connection with its service as manager and operator of vessels and related facilities owned by Puerto Rico Maritime Shipping Authority, a public corporation. During the same period, it has performed services valued in excess of $50,000 for companies located outside the Commonwealth of Puerto Rico. The parties stipulate, and we find, that the Employer is engaged in commerce within the meaning of Section 2(6) and (7) of the Act and that Local 1575 and Local 402 are labor organizations within the meaning of Section 2(5) of the Act.

II. THE DISPUTE

A. *Background and Facts of Dispute*

In 1968, TransAmerican Trailer Transport commenced operations in Puerto Rico and utilized Roll-on/Roll-off (Ro/Ro) vessels to transport sea cargo between Puerto Rico and various locations on the mainland. Ro/Ro vessels are ships in which the cargo is loaded and unloaded by means of vehicles that drive onto the ship and haul cargo to and from the vessel. No predetermined on-board location is assigned to the cargo as Ro/Ro vessels are equipped with ballast-adjusting mechanisms. Before 1974, Sea-Land Services and Seatrain Lines also operated sea cargo transport services between Puerto Rico and the continental United States using Lift-on/Lift-off (Lo/Lo) type vessels. These vessels are loaded and unloaded by a crane, which lifts cargo to a specific location on the Lo/Lo ship. The cargo is loaded pursuant to a specific plan that is necessary in order to balance the Lo/Lo ships as they are not equipped with ballast-adjusting mechanisms. In 1974, the Puerto Rico Maritime Shipping Authority purchased some of the Ro/Ro and Lo/Lo vessels of the aforementioned companies and contracted with the Employer to run its newly acquired sea cargo operations. The Employer, on initiating its operations, recognized both Local 1575 and Local 402, and has negotiated and signed several successive collective-bargaining agreements with both labor organizations. Currently, Local 402-represented employees, called stowage coordinators, write the cargo plans for the Employer's Lo/Lo operations.[2] The stowage coordinator uses a calculator and other mathematical tools to determine the proper balancing location of cargo.

The work in dispute, the Ro/Ro cargo planning work, had been performed by employees represented by Local 1575 under TransAmerican and currently, Local 1575-represented employees have been assigned the work by the Employer. In assigning the work, the Employer uses a seniority list of five cargo planners represented by Local 1575. The disputed work consists of boarding a Ro/Ro vessel and registering the location of trailers, which hold cargo, on a cargo plan form. The cargo planner makes the cargo plan form entries while on board and prepares a summary inventory sheet off the vessel. The entire process requires 10-15 hours, including 1 hour to prepare the summary inventory sheet in an office.

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[1] All dates refer to 1987 unless otherwise indicated.

[2] At the time of the hearing, the Employer employed two employees in this classification.

In 1983, Local 402 made a claim for the disputed work. In November 1986, it filed a grievance in which it reiterated its demand that the disputed work be assigned to employees it represents rather than to employees represented by Local 1575. An arbitration was scheduled for April 1987. A Local 1575 attorney appeared at the arbitration and requested time to consider whether Local 1575 would participate. The arbitration was rescheduled for August. The Employer's director of industrial relations testified that Local 1575 made no strike threats between April and August. The arbitration was again rescheduled for October 20 and 21. In early October, the Local 1575 president warned the Employer that he would not accept any arbitral decision resulting from Local 402's grievance. During a meeting between the Employer and Local 1575 on October 16, he also warned that "the resources which the contract established have to be used or else the ILA would picket." The Employer's director of industrial relations testified that Local 1575's president stated that Local 1575 would not participate in the arbitration and if the arbitrator's decision was adverse to the ILA and the work was assigned to OPEIU-represented employees, "they would stop our vessels." Accordingly, on October 19, 1987, the Employer filed the instant 8(b)(4)(D) charge.

B. *Work in Dispute*

The notice of hearing defines the work dispute concerning the Ro/Ro vessels in the following manner:

> *Cargo Planning Checkers*: Their work entails registering the location of the trailer in the cargo plan form. This they do by including the prefix number, origin, destination, weight, equipment type, measurement of trailer. Once this complete inventory is done they proceed to do three breakdowns, first by equipment, then by ports, and weight distribution by decks. They then photostat cargo plan copies, ten (10) in total: one copy for the vessel, one for Marine Department, three for Trailer Control, one for costs clerk, one for Port Authority and three for destination port.

C. *Contentions of the Parties*

The Employer contends that reasonable cause exists to believe that Local 1575 violated Section 8(b)(4)(D) of the Act and that the work in dispute should be awarded to the employees represented by Local 1575 currently performing the work. With respect to the merits of the dispute, the Employer relies on the factors of its collective-bargaining agreement with Local 1575, the Employer's practice at its other locations, relative skills, economy and efficiency of operations, and the Employer's preference and past practice.

Local 1575 contends that this is a case in which Local 402 is attempting to obtain work that Local 1575-represented employees are performing. Local 1575's president threatened to strike the Employer if the Employer reassigned the work to Local 402-represented employees. It also argues that there is no method for voluntary adjustment of the dispute to which both Unions are bound. It also admits it prefers that the Board decide this jurisdictional dispute. Local 1575 also argues that the disputed work should be awarded to employees represented by it based on the Employer's preference, past practice, relative skills, and economy of operations.

Local 402 contends that the Board lacks jurisdiction over the dispute because there has been no genuine threat or other action prohibited by Section 8(b)(4)(D) to trigger the 10(k) hearing. Local 402 argues that the notice of hearing should be quashed because the timing of the charge, occurring only 2 days before the scheduled October arbitration, shows the sham nature of Local 1575's strike threat. Moreover, no threats were made between April and early October and both the Employer and Local 1575 admit that they would prefer having the dispute settled before the Board. Finally, Local 402 maintains that other contractual remedies are available for settling the dispute. At the hearing, Local 402 argued that because Local 1575 voluntarily entered into arbitration initiated by Local 402, there is an agreed-on method for the voluntary adjustment of the dispute.

Local 402 also contends that if the Board asserts jurisdiction, the disputed work should be awarded to employees it represents because the disputed work is merely a clerical listing function that can be performed by these employees. Local 402 also argues that the work should be awarded to employees it represents based on its collective-bargaining agreement with the Employer, specialized skills, economy and efficiency, job impact on employees represented by Local 402, and employer preference regarding the off-ship portion of the cargo-planning work.

D. *Applicability of the Statute*

Before the Board may proceed with a determination of dispute pursuant to Section 10(k) of the Act, it must be satisfied that there is reasonable cause to believe that Section 8(b)(4)(D) has been violated and that the parties have not agreed on a method for the voluntary adjustment of the dispute.

As discussed above, the president of Local 1575 specifically threatened the Employer with picketing if the Employer reassigned the disputed cargo-planning work to Local 402-represented employees. Local 402 argues that this threat is a sham because of Local 1575's admission that it would prefer to have the dispute settled by the Board, the absence of strike threats from April to early October, and the timing of the 8(b)(4)(D) charge. We disagree. The Employer's director of industrial relations testified, without contradiction, that Local 1575 threatened to halt operations if the arbitration resulted in an assignment of the work to Local 402-represented employees. The statement on its face constitutes a threat to strike and there is no evidence that the threat was not made seriously or that Local 1575 had in any way colluded with the Employer in this matter.[3]

Local 402 also claimed that Local 1575 agreed to participate in the October arbitration resulting from Local 402's grievance over the disputed work. On the contrary, the record indicates that Local 1575 refused to participate and threatened to strike if the arbitration award assigned the disputed work to Local 402-represented employees. Local 1575 is not bound by the arbitration provision in the OPEIU contract. We therefore reject Local 402's contention that the parties have agreed on a method to voluntarily adjust this dispute.

We find reasonable cause to believe that a violation of Section 8(b)(4)(D) has occurred and that there exists no agreed-on method for voluntary adjustment of the dispute within the meaning of Section 10(k) of the Act. Accordingly, we find that the dispute is properly before the Board for determination.[4]

E. *Merits of the Dispute*

Section 10(k) requires the Board to make an affirmative award of disputed work after considering various factors. *NLRB v. Electrical Workers IBEW Local 1212 (Columbia Broadcasting)*, 364 U.S. 573 (1961). The Board has held that its determination in a jurisdictional dispute is an act of judgment based on common sense and experience, reached by balancing the factors involved in a particular case. *Machinists Lodge 1743 (J. A. Jones Construction)*, 135 NLRB 1402 (1962).

The following factors are relevant in making the determination of this dispute.

1. Employer preference and past practice

Since its inception in 1974, the Employer has assigned cargo-planning work for Ro/Ro vessels to employees represented by Local 1575 and prefers to maintain this assignment. We therefore find the factor of past practice and employer preference favors an award to employees represented by Local 1575.

2. Relative skills and efficiency of operations

The record indicates that employees represented by Local 1575 possess the necessary skills to perform Ro/Ro cargo-planning duties. Although the Employer admits that these skills are of such a nature that the Local 402-represented stowage coordinators could learn them, the record also shows that employees represented by Local 402 do not currently possess the skills. The Employer maintains that it would require at least 6 weeks to properly train Local 402-represented employees to become Ro/Ro cargo planners. Local 402 admits that the portion of Ro/Ro cargo-planning work done on board the vessel requires a familiarization with a Ro/Ro ship's configuration.

Local 402 argues that awarding the work to employees it represents would be more economical because these employees are paid a lower hourly rate[5] than Local 1575 cargo planners. Local 402 also argues that an award to Local 402-represented employees would require less overtime because stowage coordinators work in shifts, unlike a Local 1575 cargo planner who completes an entire job. The Employer, however, maintains that reassigning the disputed work to employees represented by Local 402 would require several weeks of costly training and would disrupt the Employer's operations. Local 1575 cargo planners would also have to be discharged in order to hire and train Local 402-represented employees to perform the disputed work. The displacement of one group of employees for another group of employees would add to the disruption of operations. We find that the employees represented by Local 1575 possess the specialized skills to perform the work in dispute and the assignment of the work to Local 1575-represented employees would be more efficient and less disruptive of the Employer's operations. Accordingly, this factor favors an award to employees represented by Local 1575.

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[3] See *Teamsters Local 6 (Anheuser-Busch)*, 270 NLRB 219, 220 (1984).

[4] We therefore deny Local 402's motion to quash the notice of hearing.

[5] The Board does not consider wage differentials as a proper basis for awarding disputed work. See *Painters Local 91 (Frank M. Burson)*, 265 NLRB 1685, 1687 (1982); *Cincinnati Mailers 17 (S. Rosenthal & Co.)*, 265 NLRB 1052, 1055 fn. 10 (1982).

3. Collective-bargaining agreements

The Employer has voluntarily recognized and signed a series of agreements with both Unions. Both Unions were certified with the companies whose assets were previously acquired by the Puerto Rico Maritime Shipping Authority. Local 402 relies on the recognition clause of its National Master Agreement, which includes "all office and clerical employees" in arguing that the disputed work should be assigned to employees it represents. Local 402 also points out that Local 1575's agreement with the Employer excludes office workers. Local 1575 relies on its contract with the Employer, recognizes Local 1575 as the representative of employees in the "manual operations of loading and unloading of ships" and "classification of cargo."

There is no reference to the position of Ro/Ro cargo planner in either collective-bargaining agreement. We find that this factor favors neither group of employees.

4. Area and industry practice

The Employer's vice president of industrial relations testified that one other company in Puerto Rico has Ro/Ro operations, but that all Ro/Ro duties for that company are performed by employees represented by the Teamsters. He also testified that in the Employer's other Ro/Ro operations in the United States, Local 1575-represented employees perform cargo-planning duties.

Local 402 presented the Puerto Rico Minimum Wage Board definitions for office and clerical employees that are used in the Puerto Rico transportation industry. Local 402 argues that cargo planning is encompassed in these definitions. Based on the limited evidence the parties have presented regarding area and industry practice, we find that these factors are inconclusive and do not favor an award of the disputed work to either group of employees.

Conclusions

After considering all the relevant factors, we conclude that employees represented by Local 1575 are entitled to perform the work in dispute. We reach this conclusion by relying on the Employer's past practice and preference, and skills and efficiency of operations. In making this determination, we are awarding the work to employees represented by Local 1575, not to that Union or its members. The determination is limited to the controversy that gave rise to this proceeding.

DETERMINATION OF DISPUTE

The National Labor Relations Board makes the following Determination of Dispute.

Employees of Puerto Rico Marine Management, Inc. represented by Local 1575, International Longshoremen's Association, AFL-CIO are entitled to perform the Roll-on/Roll-off cargo-planning work at the Employer's facilities in Puerto Rico. The work involves registering the location of the trailer on a cargo plan form; by including the prefix number, origin, destination, weight, equipment type, and measurement of the trailer; breaking down the complete inventory by equipment, ports, and weight distribution by decks; and making 10 photostat cargo plan copies for distribution.

W. E. Colglazier, Inc. ***and*** **Southern California District Council of Laborers, Laborers' International Union of North America, AFL–CIO.** Case 21–CA–21371

July 27, 1988

DECISION AND ORDER

BY CHAIRMAN STEPHENS AND MEMBERS BABSON AND CRACRAFT

On August 19, 1983, Administrative Law Judge Roger B. Holmes issued the attached decision. The Respondent filed exceptions and a supporting brief, and the Charging Party filed an answering brief.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings,[1] findings, and conclusions as modified and to adopt the recommended Order as modified.

The facts are set out more fully in the judge's decision. Briefly, the judge found that since 1955 the Respondent, a general building contractor, has had various collective-bargaining agreements with the Laborers Union, and has employed members of the Laborers Union since that time. On December 30, 1980, the Respondent signed a collective-bargaining agreement entitled "Laborers' Short-Form Agreement" with the Union.[2] The agreement was effective July 1, 1980–June 15, 1983, with annual renewals thereafter unless notice was given by a party as provided for in the contract.

On April 14, 1982, the Respondent sent two mailgrams to the Union, each of which stated that the Respondent was terminating and/or repudiating any agreement existing between it and the Union. On June 17, 1982, Mike Sullivan and Associates, Inc., a management consulting firm, sent a letter on behalf of the Respondent to the Union. The letter stated, inter alia, that Mike Sullivan and Associates was the exclusive bargaining representative for the Respondent; that the short-form agreement between the Respondent and the Union was an 8(f) agreement; and that from June 17 forward, the Respondent was implementing unilateral changes in the contract, i.e., it would no longer abide by the union hiring hall provision or the mandatory union membership requirements. Commencing about June 1982, the Respondent, without prior notification to or bargaining with the Union, failed to make accurate reports and required contributions to certain pension, health and welfare, and other trust funds as required by the contract; failed to comply with the contractual hiring hall provisions; and failed to adhere to the union-security provisions. After June 1982, the Respondent made contributions only to the Union's pension trust fund. The Respondent placed health and welfare coverage for its employees with a private company.

Analyzing the evidence pursuant to the then-applicable "conversion" doctrine, the judge found that the parties' bargaining relationship "ripened" in July 1979 from a prehire relationship into an 9(a) relationship and, therefore, since July 1979 the Union was the exclusive representative under Section 9(a) of the Act of the unit of laborers employed by the Respondent.[3] Accordingly, the judge found that the Respondent violated Section 8(a)(5) and (1) of the Act by repudiating the collective-bargaining agreement between it and the Union and by making unilateral changes in wages, hours, and working conditions of unit employees.

In *John Deklewa & Sons*, 282 NLRB 1375 (1987), the Board overruled *R. J. Smith Construction Co.*, 191 NLRB 693 (1971), enf. denied sub nom. *Operating Engineers Local 150 v. NLRB*, 480 F.2d 1186 (D.C. Cir. 1973), abandoned the conversion doctrine, and modified unit scope rules in 8(f) cases. As set forth more fully in *Deklewa*, supra at 1377–1378, the Board decided to apply the following principles in 8(f) cases:

> (1) a collective-bargaining agreement permitted by Section 8(f) shall be enforceable through the mechanisms of Section 8(a)(5) and Section 8(b)(3); (2) such agreements will not bar the processing of valid petitions filed pursuant to Section 9(c) and Section 9(e); (3) in processing such petitions, the appropriate unit normally will be the single employer's employees covered by the agreement; and (4) upon the expiration of such agreements, the signatory union will enjoy no presumption of majority status, and either party may repudiate the 8(f) bargaining relationship.

The Board also noted, at footnote 41 of *Deklewa*, that it will require the party asserting the existence of an 9(a) relationship to prove it.

Under *Deklewa*, we find that the General Counsel, although asserting that the Respondent is

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[1] The Charging Party contends that the Respondent's exceptions fail to comply with Sec. 102.46 of the Board's Rules and Regulations, and therefore should be disregarded. We find no merit in the Charging Party's contention, and accordingly deny it.

[2] The Respondent previously had timely withdrawn bargaining authority from the Associated General Contractors of California, Inc., a multiemployer association.

[3] No exceptions were filed to the judge's finding that the parties' bargaining relationship prior to July 1979 was pursuant to Sec. 8(f) of the Act.

289 NLRB No. 143

bound to recognize the Union under Section 9(a), has failed to establish that the relationship between the Respondent and the Union is anything other than a relationship governed by Section 8(f) of the Act. Thus, as the evidence shows that the Respondent is engaged in the construction industry and that it entered into its contractual relationship with the Union at a time when the Union's majority status had not been established, we find that the relationship between the Respondent and the Union is governed by Section 8(f) of the Act.

Further, applying *Deklewa*, we agree with the judge's conclusion that the Respondent violated Section 8(a)(5) and (1) of the Act on June 17, 1982, when it repudiated the 1980–1983 contract between it and the Union, and implemented unilateral changes in the terms and conditions of employment of the unit employees. We note, however, that under *Deklewa* the Union enjoyed no presumption of majority status following the expiration of the 1980–1983 contract, and therefore the Respondent was free to repudiate the contract upon its expiration.[4] We shall limit the make-whole remedy accordingly.

CONCLUSIONS OF LAW

1. The Respondent is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

2. The Charging Party is a labor organization within the meaning of Section 2(5) of the Act.

3. The following constitutes an appropriate unit for the purpose of collective bargaining under the Act:

> All laborer employees including craft foremen, employed by the Respondent within the work jurisdiction of the Charging Party union, in the area known as Southern California, and more particularly described as the counties of Los Angeles, Inyo, Mono, Orange, Riverside, San Bernardino, Imperial, Ventura, Santa Barbara, San Luis Obispo and Kern, and the offshore islands of Richardson Rock, Santa Cruz Island, Arch Rock, San Nicholas Island, Santa Catalina Island, San Clemente Island, San Miguel Island, Santa Rosa Island, Anacapa Island, Santa Barbara Island, and all offshore man-made islands and drilling platforms in the aforementioned counties and offshore waters, excluding all non-laborer employees, executives, civil engineers, superintendents, assistant superintendents, master mechanics, timekeepers, messenger boys, office workers, or any other employees above the rank of craft foremen.

4. By repudiating its 1980–1983 collective-bargaining agreement with the Union and making unilateral changes in the terms and conditions of that agreement, including failing to make accurate reports and required contributions to certain pension, health and welfare, and other trust funds as required by the agreement; failing to comply with the contractual hiring hall provisions; and failing to adhere to the union-security provisions of the collective-bargaining agreement, the Respondent has engaged in unfair labor practices within the meaning of Section 8(a)(5) and (1) of the Act.

5. The unfair labor practices affect commerce within the meaning of Section 2(6) and (7) of the Act.

REMEDY

Having found that the Respondent has engaged in certain unfair labor practices, we shall order it to cease and desist and take certain affirmative action designed to effectuate the policies of the Act. We shall order the Respondent to comply with the terms of its collective-bargaining agreement with the Union from June 17, 1982, through the expiration of the agreement on June 15, 1983.[5] We also shall order the Respondent to make the unit employees whole as prescribed in *Ogle Protection Service*, 183 NLRB 682 (1970), for any losses they may have suffered as a result of the Respondent's failure to comply with the 1980–1983 contract, with interest as computed in the manner prescribed in *New Horizons for the Retarded*.[6]

In accordance with *Deklewa*, supra, this make-whole remedy does not extend beyond the expiration date of the July 1, 1980–June 15, 1983 contract. The question of whether interest must be paid on trust fund contributions shall be left to the compliance stage of the proceeding. *Merryweather Optical Co.*, 240 NLRB 1213 (1979).[7]

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[4] *Deklewa*, supra at 39.

[5] In view of the Respondent's timely withdrawal of bargaining authority from the multiemployer association, the Respondent is not bound to any changes in the 1980–1983 Master Labor Agreement negotiated after its withdrawal.

[6] In accordance with our decision in *New Horizons for the Retarded*, 283 NLRB 1173 (1987), interest on and after January 1, 1987, shall be computed at the "short-term Federal rate" for the underpayment of taxes as set out in the 1986 amendment to 26 U.S.C. § 6621. Interest on amounts accrued prior to January 1, 1987 (the effective date of the 1986 amendment to 26 U.S.C. § 6621) shall be computed in accordance with *Florida Steel Corp.*, 231 NLRB 651 (1977).

[7] Whether there are any individuals entitled to be made whole because they were denied an opportunity to work because of the Respondent's unlawful failure to continue using a contractual hiring hall is best left to the compliance stage of this proceeding. See, e.g., *Southwestern Steel*, 276 NLRB 1569 fn. 1 (1985), and *Wayne Electric*, 226 NLRB 409 (1976).

ORDER

The National Labor Relations Board orders that the Respondent, W. E. Colglazier, Inc., Cathedral City, California, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Repudiating the July 1, 1980–June 15, 1983 collective-bargaining agreement between the Respondent and the Union, and making unilateral changes in the terms and conditions of the 1980–1983 collective-bargaining agreement between the Respondent and the Union, including: (1) failing and refusing to make accurate reports and required contributions to certain pension, health and welfare, and other trust funds as required by the collective-bargaining agreement; (2) failing to comply with the contractual hiring hall provisions; and (3) failing to adhere to the union-security provisions of the collective-bargaining agreement.

(b) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Make whole its unit employees, in the manner set forth in the remedy, for any losses they may have suffered as a result of the Respondent's failure to adhere to the contract with the Union from June 17, 1982, through June 15, 1983.

(b) Comply with the terms and conditions of the above-described contract from June 17, 1982, through June 15, 1983, including making the contractually required contributions to the trust funds.

(c) Preserve and, on request, make available to the Board or its agents for examination and copying, all payroll records, social security payment records, timecards, personnel records and reports, and all other records necessary to analyze the amount of money due under the terms of this Order.

(d) Post at its facility in Cathedral City, California, copies of the attached notice marked "Appendix."[8] Copies of the notice, on forms provided by the Regional Director for Region 21, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material.

(e) Sign and return to the Regional Director sufficient copies of the attached notice marked "Appendix" for posting by the Union, if willing, in conspicuous places where notices to employees and members are customarily posted.

(f) Notify the Regional Director in writing within 20 days from the date of this Order what steps the Respondent has taken to comply.

APPENDIX

NOTICE TO EMPLOYEES AND MEMBERS
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

WE WILL NOT repudiate the collective-bargaining agreement between our company and Southern California District Council of Laborers, Laborers' International Union of North America, AFL–CIO during the term of that agreement.

WE WILL NOT make unilateral changes in the terms and conditions of the collective-bargaining agreement between our company and the Union, until the June 15, 1983 expiration date, by: (1) failing and refusing to make accurate reports and required contributions to certain pension, health and welfare, and other trust funds as required by the collective-bargaining agreement; (2) failing to comply with the contractual hiring hall provisions; and (3) failing to adhere to the union-security provisions of the collective-bargaining agreement.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL make whole, with interest, the unit employees who have incurred losses of wages and benefits because of our failure to abide by the terms and conditions of the collective-bargaining agreement between our company and the Union, until the agreement's expiration on June 15, 1983, and WE WILL pay the contractually agreed-upon trust funds in the amounts of the contributions which were not made on behalf of the unit employees during the term of the contract.

WE WILL honor and apply the terms of the collective-bargaining agreement executed by us and the Union until the agreement's expiration on June 15, 1983.

W. E. COLGLAZIER, INC.

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[8] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

Joel B. Martinez, Esq., for the General Counsel.
Julius Reich, Esq. (Reich, Adell & Crost), of Los Angeles, California, for the Charging Party.
Richard Reincke (Mike Sullivan and Associates), of Covina, California, for the Respondent.

DECISION

Roger B. Holmes, Administrative Law Judge. The original unfair labor practice charge in this case was filed on June 25, 1982, by Southern California District Council of Laborers, Laborers' International Union of North America, AFL-CIO. The first amended charge was filed on November 1, 1982, by the Union.

The General Counsel's original complaint in this case was issued on November 10, 1982, against W. E. Colglazier. The General Counsel's amended complaint was issued on February 7, 1983, against the Respondent. The General Counsel alleges that the Respondent has engaged in unfair labor practices within the meaning of Section 8(a)(1) and (5) of the Act. In answers filed both to the original complaint and the amended complaint, the Respondent denied that it had engaged in the alleged unfair labor practices.

The trial in this proceeding was held on March 1 and 2, 1983, at Los Angeles, California. The time for the filing of posttrial briefs was set for April 6, 1983.

Findings of Fact

I. JURISDICTION AND LABOR ORGANIZATION

The jurisdiction of the Board over the business operations of the employer is not an issue in this proceeding. The employer is engaged in the business of construction and remodeling, and the employer has a facility located at Cathedral City, California. The employer's business operations meet the Board's indirect inflow jurisdictional standard, as well as the standard for retail business enterprises.

The status of the Charging Party as a labor organization within the meaning of Section 2(5) of the Act also is not in issue in this proceeding. Such status was admitted in the pleadings.

II. THE WITNESSES AND CREDIBILITY RESOLUTIONS

Eight persons were called as witnesses to testify at the trial in this proceeding. In alphabetical order by their last names, they are: Louis Bravo, the president and a field representative of the Charging Party; Alfred R. Brune, an estimator for the Respondent; Walter E. Colglazier, the president of the Respondent; Cacimiro Gradilla, an employee of the Respondent and a member of the Charging Party; James Edward Muca, an employee of the Respondent and a member of the Charging Party; Wendy L. Sherwood, a secretary, bookkeeper, and office clerical of the Respondent: Jessie Stinson, a field representative of Laborers Local 1184, which is affiliated with the Charging Party; and Ray Wilson, the business manager of the Charging Party.

In addition to the foregoing persons who gave testimony about the substantive issues in the case, one other person testified briefly. He is Raul G. Cavazos, who is an interpreter, and his testimony only pertained to his own qualifications to render that service.

The findings of fact to be set forth here will be based on portions of the testimony from each one of the eight witnesses who testified about substantive matters at the trail. In determining which portions of the testimony should be a basis for the findings of fact, I have given consideration to the demeanor of the witnesses on the stand. I have also considered the occupations of the various witnesses in the sense that a witness was identified with the interests of one of the parties to the proceeding, and, therefore, may have an interest in the outcome of the litigation. I have also considered whether the record shows a basis for a witness' knowledge concerning the facts about which he testified. For example, Muca several times indicated that he was guessing in attempting to respond to certain questions being put to him. The foregoing observation is not made in the sense of being critical, but rather to indicate that Muca was being candid in replying, at times, that he did not have specific knowledge of the particular subject about which he was being questioned. His testimony shows that he did have knowledge of other matters.

Several questions, which were in the nature of what a hypothetical person would have thought, were asked and what conclusion that person would have reached if that person was to pass by one of the jobsites of the Respondent, and that the person was to observe the employees of the Respondent performing work at the jobsite. I conclude that those questions, in effect, were seeking to ascertain the opinion of the witness based on what work the witness and other employees of the Respondent were performing at that time, and based on how the witness thought those activities would be perceived by a passing observer. (Fed.R.Evid. 701, "Opinion Testimony By Lay Witnesses.") However, after considering the matter, I conclude that other testimony by the witnesses and documentary evidence provides a more reliable basis for the findings of fact instead of the responses to the types of questions described above.

In addition, some of the findings of fact will be based on documentary evidence, stipulations by the parties, and certain facts not in dispute.

III. THE COLLECTIVE-BARGAINING AGREEMENTS

Since 1955 the Respondent has been engaged in business as a general building contractor. Colglazier stated (Tr. 220), "We are general building contractors who do anything in the way of small commercials, small engineering projects, new houses, we will do new commercial buildings, we will remodel commercial banks, and so forth."

Since 1955 the Respondent has had various collective-bargaining agreements with the Laborers Union, and the Respondent has employed members of the Laborers Union since that time (Tr. 215). The Respondent has routinely signed and submitted on a monthly basis such forms as General Counsel's Exhibit 13(a) to the construction laborers trusts. Introduced into evidence as General Counsel's Exhibits 24(a) through (l) were copies of such reports filed by the Respondent during the period from

January 1979 through December 1979. Introduced into evidence as General Counsel's Exhibits 14(a) through (l) were copies of such reports filed by the Respondent during the period January 1980 through December 1980. Introduced into evidence as General Counsel's Exhibits 15(a) through (l) were copies of such reports filed by the Respondent during the period from January 1981 through December 1981. Introduced into evidence as General Counsel's Exhibits 16(a) through (l) were copies of such reports filed by the Respondent for the period from January 1982 through December 1982.

The report forms provide for contributions by an employer on behalf of his employees for the following funds: vacation/dues, pension, training and retraining, health and welfare, and industry. Through June 1982, the Respondent made contributions in each of those categories of trust funds. (See G.C. Exh. 16(f) for June 1982.) Thereafter, the Respondent made contributions on behalf of his employees, who were members of the Charging Party Union, to the pension trust only (G.C. Exhs. 16 (g) through (l). According to Colglazier, he placed health and welfare coverage for his employees with a private company, and all of his employees were placed under the same plan.

Since 1955 the Respondent also has been signatory to collective-bargaining agreements with the Carpenters Union, and the Respondent has been making contributions on behalf of his employees, who are members of the Carpenters Union, to the Carpenters' trust funds.

Introduced into evidence as General Counsel's Exhibit 2 was a copy of a collective-bargaining agreement, which indicates that it was signed on February 3, 1964, by the Charging Party Union and the Respondent. The effective dates provided for in the agreement were May 1, 1962 to May 1, 1967, with annual renewals thereafter unless notice was given by a party as provided for in the contract.

Introduced into evidence as General Counsel's Exhibit 3 was a copy of a collective-bargaining agreement entitled "Laborers' Short-Form Agreement," which indicates that it was signed on October 1, 1971, by the Charging Party and the Respondent. The effective dates provided for in the agreement were from May 1, 1970 to June 15, 1974, with annual renewals thereafter unless notice was given by a party as provided for in the contract.

Introduced into evidence as General Counsel's Exhibit 4 was a copy of a collective-bargaining agreement entitled "Southern California Master Labor Agreement," which indicates that the agreement was between the Charging Party and four employer associations on behalf of the employer members of those associations. The names of the employer associations are: The Associated General Contractors of California, Inc.; the Building Industry Association of California, Inc.; the Engineering Contractors' Association, Inc.; and the Southern California Contractors' Association. The effective dates provided for in the agreement were from July 1, 1977 to June 15, 1980, with annual renewals thereafter unless notice was given by a party as provided for in the contract.

Introduced into evidence as General Counsel's Exhibit 6 was a copy of a letter dated February 13, 1979, from the Associated General Contractors of California, Inc. AGC, addressed to "Holders of Regular and Specialty List of Members." The document lists the names of the members of that employer association who were covered by the terms of the Southern California master labor agreement with certain craft unions—one of which was the Laborers. The Respondent's name is one of the employers listed on the attachment to the AGC letter. At the trial, Colglazier acknowledged that the Respondent had been at one time a member of the AGC and had authorized it to bargain with labor organizations on behalf of the Respondent.

Introduced into evidence as General Counsel's Exhibit 7 was a copy of a letter dated January 22, 1980, from the AGC to "Holders of Regular and Specialty List of Members." The document lists certain changes in the information contained in General Counsel's Exhibit 6. Among the changes is the deletion of the Respondent as a member.

Introduced into evidence as General Counsel's Exhibit 5 was a copy of a collective-bargaining agreement entitled "Laborers' Short-Form Agreement," which indicates that it was signed on December 30, 1980, by the Charging Party and the Respondent. At the trial, Colglazier did not recall the exact date in December 1980 on which he signed the collective-bargaining agreement with the Union. He recalled that he received the document in the mail, signed it, mailed it back to the Charging Party, and subsequently received a signed copy from the Union. The effective dates provided for in the agreement were from July 1, 1980 to June 15, 1983, with annual renewals thereafter unless notice was given by a party as provided for in the contract.

The parties stipulated at the trial that the same language that appears in article IX on page 128 of General Counsel's Exhibit 4 also appears in the 1980–1983 master labor agreement (142–145). Article IX stated:

> Existing and Other Agreements
>
> A. No contractor, party hereto, shall be required to pay higher wages or be subject to less favorable working conditions than those applicable to other Contractors employing workmen covered by the terms of this Agreement, performing similar work in the area covered by this agreement, with the exception as set forth in Paragraph B below.
>
> B. It is understood by the contractors and the Union that there may be other Agreements pertaining to the rental and use of construction equipment and that the contractors signatory to this Agreement may also be signatory to agreements between other organizations with the Union.
>
> C. This Agreement shall be deemed to be executed when the parties signing shall have affixed their signatures hereto. Before accepting as an affiliate or issuing a charter to a local Union in the area herein defined, the Union shall require as a condition of such affiliation that said local Union be bound by the terms hereof.

During the examination of Union Business Manager Wilson by the representative of the Respondent at the trial, the following took place (Tr. 141 and 142):

> Q. How many different types of contracts are there in the construction industry for the Laborers?
>
> A. The type that Mr. Colglazier signed, there are only two. There is a Master Labor Agreement, and there is a so-called Short-Form Agreement which he signed.
>
> Q. Is it possible for a contractor to negotiate directly with the Southern california District Council of Laborers and come up with any agreement other than the Short-Form Agreement or the Master Labor Agreement?
>
> A. If he is willing to negotiate with the intent and purpose of concluding an agreement, yes.
>
> Q. Has that ever happened, to your knowledge?
>
> A. Sometimes.
>
> Q. Can you give us any specific examples?
>
> A. I cannot. I don't recollect any names. Sometimes there are contractors that are willing to even pay more than the economic package in the Master Labor Agreement and the so-called Short-Form. And on [that] basis we certainly are willing to accept their generous offers.

IV. THE EMPLOYEES OF THE RESPONDENT

The parties entered into stipulations regarding the names of Respondent's employees employed as of March 1, 1983. None of these employees had any break in service during his employment. The parties stipulated concerning the date of hire of the employee, the rate of pay of the employee at that time, and the union affiliation of the employee (Tr. 9–12, 154). Those employees are:

Name	*Date of Hire*	*Rate of Pay*	*Affiliation*
1. H. H. Tuchfarber	1955	$21.79	Carpenter
2. Richard Krings	Dec. 1976	19.79	Carpenter
3. Jack Acord	Mar. 1980	18.29	Carpenter
4. Oclate Brownlee	June 1977	18.29	Carpenter
5. W. J. Mulvihill	June 1977	18.29	Carpenter
6. Kenny Trask	June 1980	18.29	Carpenter
7. Cacimiro Gradilla	July 1979	14.52	Laborer
8. James Muca	Aug. 1979	14.52	Laborer
9. Al Brune	Oct. 1973	14.52	Laborer

Two other persons are retired employees. They are Douglas Roberts, who had worked for the Respondent for about 5 or 6 years, and who retired on October 1, 1980, and Nelson Nickerson, who had worked for the Respondent for several years, and who retired on July 1, 1982. Roberts' affiliation was with the Laborers union, and Nickerson's affiliation was with the Carpenters union.

Introduced into evidence as General Counsel's Exhibits 12(a) through (d) were copies of computer printouts of the Union's membership records regarding Roberts, Brune, Gradilla, and Muca. General Counsel's Exhibit 12(a) reveals Roberts' union initiation date was April 30, 1970, and that his union membership dues were paid through May 19, 1982. General Counsel's Exhibit 12(b) reveals that Brune's union initiation date was November 29, 1979, and that his union membership dues were paid through July 12, 1982. General Counsel's Exhibit 12(c) reveals that Gradilla's union initiation date was March 30, 1979, and that his union membership dues were paid through May 20, 1982. General Counsel's Exhibit 12(d) reveals that Muca's union initiation date was August 30, 1979, and that his union membership dues were paid throught May 14, 1982.

The parties stipulated that Brune is primarily a managerial employee of the Respondent who does estimating work for the employer. On occasion, Brune works at jobsites (Tr. 225). Concerning Brune's being a member of the Charging Party Union, Colglazier explained (Tr. 221), "At the time that I personally enrolled him in the Union to maintain benefits, I was not able to get anything for one or two people. And also for his retirement benefit." At the same time, Colglazier also enrolled Nancy Larson as a member of the Laborers Union. Larson works as a secretary in the Respondent's office. The parties stipulated that Larson is an office clerical employee (Tr.225).

Union Field Representative Stinson said that he and Representative Don Sanders were the ones who were responsible for servicing the employees of the Respondent. Stinson said he had visited the Respondent's jobsites "probably three or four times" over the last 4 or 5 years (Tr. 102). He said that no employees of the Respondent had come to him with any grievances against the Respondent. He acknowledged that he had not told Muca, Gradilla, Roberts, Brune, or any other employee of the Respondent what their duties were as a laborer. In Stinson's view, it was the employer's responsibility to see to it that his employees who were Laborers Union members performed laborers' work. Stinson also acknowledged that it was possible for someone to be a member of the Laborers' union and not perform laborers' work. Stinson said that the Charging Party held meetings on a monthly basis. Muca said at the trial that he had never been to a union meeting, that he did not know who his union representatives were, and that no one had ever explained to him what a laborers' duties were under the collective-bargaining agreement. Gradilla said that he had not seen a union business representative at a jobsite of the Respondent while he was working on that jobsite.

When he began working for the Respondent in July 1979, Gradilla worked with Douglas Roberts. At that time, Roberts and Gradilla were the only two laborers employed by the Respondent. According to Gradilla, the employer also had two carpenters and two forklift drivers when he began his employment.

Muca began working for the Respondent in August 1979. Thus, at that time, the Respondent had three laborers. Muca, who had not been a union member prior to his employment by the Respondent, explained the circumstances of his hiring by the Respondent (Tr. 156). "I called Walt Colglazier and asked him if he could use anyone. I specified laborer. He told me he wasn't hiring unless I was in the union, and he directed me to the union hall to get a card." Muca then went to the union hall, paid an initiation fee and union dues, and received a union card. Muca took his union card on a Thursday or Friday to Harry Tuchfarber. The following Monday Muca went to work for the Respondent, and since that time has remained a member of the Union.

According to both Gradilla and Muca, Tuchfarber is the one who tells them what work is to be done each day. Gradilla and Muca go to the jobsite in a company truck driven by Muca, because Gradilla does not have a license to drive the truck. The carpenters employed by the Respondent use their own automobiles to drive to the jobsite.

According to Gradilla, he and Muca work together as a team. He stated (Tr. 125), "Most of the time we work together, Jim Muca and I. He fills out the card because we do most of the things." Another reason for Muca's filling out Gradilla's timecard, as well as his own, is that Muca is able to write the English language. As Gradilla explained (Tr. 133), "It is easier to me because he knows how to write English." Muca estimated that he and Gradilla work alongside each other 90 percent of the time, while Gradilla placed his estimate at "ninety-seven percent of all the time" (Tr.135). Muca also stated (Tr. 126), "Most of the time we have to go . . . do cleaning work." concerning what they did when Gradilla and Muca reached the jobsite in the company truck, Gradilla said (Tr. 127), "If it is going to be cleaned, then we clean it. If you are going to pull down the wall, then to start pulling down the wall." The debris is put on a 1-ton dumptruck, and it is driven by Muca to the dump. On one or two occasions, Gradilla has accompanied Muca to the dump.

On the Company's truck, the following tools are kept: shovels, brooms, rake, water hose, a few stakes, hammers, and sledgehammers. All of those tools belong to the Respondent, except that Muca and Gradilla each owns a shovel. Sometimes they used power tools. Muca described these power tools as a cement saw, a wet-and-dry vacuum, drills to drill holes in cement, chipping hammers, large jackhammers, and air compressors. In the course of his employment with the Respondent, Muca also has used a square and a level. Muca also recalled one occasion when he attempted to take apart a compressor and take it in for repairs, and he recalled one occasion when he drove a skip loader. Gradilla recalled using a trowel to level cement and a hammer to remove nails when he was taking forms apart at a jobsite.

On some occasions, Muca and Gradilla have been the only employees of the Respondent at a jobsite that day, but on the average, there are two or three carpenters at the jobsite. Muca acknowledged that he had received no special training for the performance of the work that he did for the Respondent. He estimated that 50 percent of the work involved cleanup duties, and that 40 percent of the work involved demolition such as tearing down brick walls and wood walls. When demolition work was being performed, Muca said that many times he worked alongside carpenters who were doing the same type of work. Regarding the carpenters performing demolition work, Muca said (Tr. 170), "If we are at a point on a particular job where a carpenter, rather than just to stand around doing nothing, he will join us and help us tear down a wall."

Sometimes carpenters have asked Muca to hold drywall in place while the carpenters nailed it. Muca said that he had never refused to do so. Gradilla also recalled that he helped carpenters put up a wall. Muca said that he had helped repair roofs, and that normally a carpenter worked with him when that was done. A few times, Muca helped the carpenters hang doors. He has unloaded lumber from the truck for the carpenters, and if necessary, the carpenters have helped with the unloading of the lumber. On more than one occasion, Muca has helped the carpenters to put up a fence. On one occasion, Muca put up forms for concrete and the carpenters helped him. He also recalled putting in a skylight, and that he worked with carpenters in doing so. He further recalled sanding with a power sander, which job he said carpenters had done, and he removed acoustical ceilings, which carpenters had done. According to Muca, it was not unusual for the carpenters to grind concrete, which is a job Muca has done. He has also observed carpenters picking things up and sweeping up with a broom.

According to office employee Sherwood, the Respondent's employees in some cases have performed a small amount of plaster, concrete, and roof patching. She said that the Respondent subcontracts the following types of work: electrical, plumbing, large concrete pouring, roofing, air conditioning, sheet metal, structural steel, and glazing.

Introduced into evidence as General Counsel's Exhibits 20(a) through (j) were copies of the timecards for employees of the Respondent for the week ending November 28, 1981. Those employees are: Trask, Tuchfarber, Krings, Law, Acord, Brownley, Gradilla, Nickerson, Muca, and Mulvihill. Among other things, the timecards contain notations regarding the work performed by those employees during that particular time period.

Introduced into evidence as General Counsel's Exhibits 17 and 18 were copies of the timecards for the week ending May 1, 1982, for Muca and Gradilla, respectively. According to Muca, the notations regarding the types of work shown on the timecards are typical of the work done by both Muca and Gradilla (Tr. 202). The notations on their timecards are similar. The notation "clean up" appears several times. Other notations include "clean up roof," "grading," "remove lumber, take to shop," "Worked with carpenters on sky light," "remove forms," "grading as needed," "remove material not being used, and "trip to dump."

Introduced into evidence as General Counsel's Exhibits 19(a) through (g) were copies of the timecards for the other employees of the Respondent for the time period ending May 1, 1982. Those employees are: Brune, Trask, Mulvihill, Brownlee, Acord, Tuchfarber, and Krings.

Introduced into evidence as Respondent's Exhibit 1 were photostatic copies of certain "lien waiver" forms maintained in the business records of the respondent. Sherwood is the person who selected the documents that she described as " a random sample of jobs that our company has performed." (Tr. 302). She considered a

$10,000 or $15,000 job to be "a big job," and she made her selection from that category in an effort she believed would comply with a pretrial subpoena.

Brune, who has been in charge of the billing of customers for the Respondent's for approximately 9 years, indicated that it was the Company's practice to include such "lien waiver" forms with the customer's bills. The "lien waiver" forms show the name of the customer, the date, printed items of "supervision" and "carpentry," the number of hours billed, the hourly rate of pay, the amount paid, the name of the person, and the total amount billed. Sometimes there are notations written in; example, "11-24 Remove walls & cleanup 7-1/2 hours." (See the first page of R. Exh. 1 for the Security Bank at Palm Desert for Nov. 28, 1981, opposite Acord's name.)

According to Brune, the "lien waiver" forms are prepared on a weekly basis based on information contained on the employees' timecards. That does not necessarily mean that the information on the timecard is copied verbatim on the "lien waiver" form. For example, on one timecard there was a notation of "removed walls," whereas the "lien waiver" form stated "demolition" (Tr. 276-279). Also, the "lien waiver" forms show the hours billed to the customer on a standard hourly basis, rather than an overtime basis. For example, 5 hours of overtime work shown on an employee's timecard would be recomputed to show 7-1/2 hours at a standard hourly rate on the "lien waiver" form (Tr. 280). The "lien waiver" forms are signed by the Respondent's employees underneath their printed names at the time the employees receive their paychecks from the Company.

V. THE EVENTS IN APRIL, JUNE, AND JULY 1982

Introduced into evidence as General Counsel's Exhibits 8(a) and (b) were copies of two mailgrams addressed to the Charging Party and dated April 14, 1982. General Counsel's Exhibit 8(a) indicates that it is from W. E. Colglazier, and General Counsel's Exhibit 8(b) indicates that it is from W. E. Colglazier and W. E. Colglazier, Inc. The text of General Counsel's Exhibit 8(a) is: "This is to notify you that we hereby terminate and/or repudiate any agreement that may exist between your union and W. E. Colglazier." General Counsel's Exhibit 8(b) is similarly worded except that "W. E. Colglazier, Incorporated appears in place of "W. E. Colglazier." The documents were received in the Charging Party union's office (Tr. 46-49).

Introduced into evidence as General Counsel's Exhibit 9 was a copy of a letter dated June 17, 1982, and addressed to the Charging Party from Richard Reincke of Mike Sullivan & Associates, Inc., on behalf of the Respondent. The text of the letter states:

> Be advised that Mike Sullivan & Associates, Inc. is the exclusive collective-bargaining representative for W. E. Colglazier, Inc. in all labor-related matters including contract enforcement and negotiations. Please direct all future correspondence regarding that company to our office in Covina. An authorization letter naming Mike Sullivan & Associates, Inc. as the exclusive collective-bargaining agent for W. E. Colglazier is enclosed for your convenience.
>
> After reviewing the conditions under which your contract was signed and the actual scope of work of the employees of Colglazier, we feel that the short-form agreement which Colglazier signed is an 8(f) agreement under the National Labor Relations Act.
>
> In accordance with the Ninth Circuit Court's interpretation of Section 8(f) *Todd v. McNeff (Feb. 8, 1982)*, we hereby serve notice that W. E. Colglazier, Inc. will make unilateral changes in the collective bargaining agreement from this date forward as circumstances dictate. At this time, Colglazier intends to continue to pay into the Laborers Trust Funds for some of its employees. However, Colglazier will not abide by the union hiring hall provisions or the mandatory union membership requirements.
>
> If it is your position that the 8(f) agreement has matured into a full and complete collective bargaining relationship under either Section 9(a) or 9(c) of the Act, please provide all documentation which would substantiate that claim, including copies of all contracts, interim agreements, authorization cards, and the names of all employees of Colglazier whom you claim to represent.
>
> If it is determined that you are the authorized representative of some of our employees, it would be prudent for us to meet for the purpose of clarifying the unit of employees which you claim to represent. At this time, most of our employees do a wide variety of tasks which cannot be clearly delineated under the usual AFL-CIO jurisdictional agreements.
>
> Further, after we have mutually agreed upon the appropriate collective bargaining unit (or after this has been clarified by the National Labor Relations Board) we would expect to negotiate with you on all mandatory areas of collective bargaining. We would negotiate regarding the terms and conditions of employment of our employees only, and would expect that you would be free to negotiate for those employees and those employees only. We would expect to negotiate a contract dealing with the particular work duties and demands of our employees; we do not expect to negotiate amendments to an existing multi-employer/multi-employee contract negotiated by other parties.
>
> Thank you for anticipated co-operation in these matters. Please respond immediately so that we may make arrangements to inspect documentation, negotiate terms and conditions of employment, or clarify the appropriate unit of employees and the status of any collective bargaining agreement which your union may have with W. E. Colglazier, Inc.

Introduced into evidence as General Counsel's Exhibit 10 was copy of a letter dated July 2, 1982, and addressed to the Charging Party from Reincke. The text of that letter states:

Please be advised that Mike Sullivan & Associates is the exclusive collective bargaining representative for W. E. Colglazier, Inc. in all labor-related matters, including contract negotiations and enforcement.

Recently, the Associated General Contractors received notice from the various building and construction trades unions that those Unions desired, as per the terms and conditions of Article V, Section 506 of the Master Labor Agreement, to renegotiate that Article and Sections thereof commonly known in toto as the "restrictive subcontracting language."

On or about December 30, 1980, Mr. Ray Wilson signed the Laborers Short-Form Agreement with W. E. Colglazier, Inc.; you allege that said Agreement bound Colglazier, by reference, to substitute provisions reached between the parties to the master Labor Agreement should those parties renegotiate the restrictive subcontracting provisions.

While it is still our position that any contract which Colglazier signed with your union falls under Section 8(f) of the National Labor Relations Act and that any such contract is currently unenforceable (having been repudiated), it is prudent for us to take all appropriate actions to protect the interests of Colglazier, as it is possible that the National Labor Relations Board or the courts could find, at some future date, that a valid and enforceable contract exists.

We have been advised that the Associated General Contractors intends to enter into renegotiations of the subcontracting provisions. However, as Colglazier is not a member of any employer association, but is rather an independent party to the Master Labor Agreement *if he is a party to said Master Labor Agreement at all*, Colglazier intends to renegotiate said provisions independently of the AGC or any other employer association. We shall act as Colglazier's agent in the renegotiations.

Should you desire to renegotiate the provisions in question, this letter will constitute the fifteen (15) days' notice of our desire to renegotiate. If you take the position that the parties signatory to the Master Labor Agreement will renegotiate those provisions and the renegotiated provisions will then be substituted and incorporated into the Short-Form Agreement, then this letter will serve as a formal request for a written copy of the Master Labor Agreement, as parts of that Agreement are included in the Short-Form Agreement which you allege is a valid Agreement Between Colglazier and your union.

Further, by copy of this letter to the Associated General Contractors, we hereby notify all involved and/or interested parties that Colglazier will not be bound by the renegotiations of any contractor association or other third party, but will renegotiate independently any and all contract modifications,. additions or deletions.

We also request a copy of the notification letter sent by the building trades unions to the Associated General Contractors, as said letter and its ramifications may have a tremendous impact upon any contract which may exist between Colglazier and any labor organization, including but not limited to the Laborers Union and all affiliated locals.

Should you have any questions regarding the above, please don't hesitate to contact me at our offices in Covina.

Thank you for your anticipated co-operation in this matter.

Introduced into evidence as General Counsel's Exhibit 11 was a copy of a letter dated July 13, 1982, and addressed to Reincke from Attorney Julius Reich of Reich, Adell & Crost, who represent the Charging Party in this proceeding. The letter was received by Reincke (Tr. 27). The text of that letter states:

> Your letter of July 2, 1982 concerning the subcontractor clause of the collective bargaining agreement between W. E. Colglazier, Inc. and the Southern California District Counsel of Laborers has been referred to this firm for reply.
>
> At such time as you acknowledge that Colglazier is obligated to recognize the District Council and is party to an agreement with the District Council, we shall respond to your letter.

VI. CONCLUSIONS

In paragraphs 12(a) and 13(a), (b), and (c) of his complaint, The General Counsel sets forth certain allegation, which the General Counsel alleges to be refusals to bargain by the Respondent in violation of Section 8(a)(1) and (5) of the Act. The factual allegations of paragraph 12(a) of the General Counsel's complaint were admitted in the pleadings, whereas the allegations of paragraphs 13(a), (b), and (c) were denied. The allegations in question are:

> 12. (a) By letter dated June 17, 1982, Respondent gave written notice to the Union of its repudiation of the Short-Form Agreement, of its intent to implement unilateral changes, to include Respondent's making trust fund contributions for some of its employees, and its discontinuing to abide by the hiring hall and union security provisions.
>
> . . . .
>
> 13. Commencing in or about June, 1982, and continuing to date, Respondent, without prior notification to or bargaining with the Union, changed the terms and conditions of employment of the employees in the unit described in paragraph 6 above, by:
>
> (a) Failing and refusing to make accurate reports and required contributions to certain pension, health and welfare, and other trust funds established pursuant to Section 302 of the Act, as required by the provisions of the 1980 MLA [Master Labor Agreement];
>
> (b) Failing to comply with the Union's hiring hall provisions; and
>
> (c) Failing to adhere to the union security provisions.

A crucial issue in the case is whether the contract between the Respondent and the Charging Party union was a prehire collective-bargaining agreement of the type that is permissible under Section 8(f) of the Act. To resolve that issue, it is necessary to ascertain whether the Charging Party Union ever achieved majority status among the Respondent's employees in an appropriate, permanent, and stable unit. In *Giordano Contruction Co.*, 256 NLRB 47 (1981), the Board held:

> It is well established that a union, originally recognized under Section 8(f), can achieve Section 9(a) status in one of two ways. The first means is for the union to demonstrate that it has achieved majority status "among employees who make up a permanent and stable work force of the employer." *Precision Stripping, Inc.*, 245 NLRB 169 (1979). Where a permanent and stable work force is not employed by the employer, however, the union can attain Section 9(a) status only by demonstrating majority status of the employees employed at a particular jobsite. *Davis Industries, Inc.; Stag Construction, Inc.; and Add Miles, Inc.*, 232 NLRB 946 (1977); see, generally, *Hageman Underground Construction, et al.*, 253 NLRB 60 (1980).

Without repeating here all of the findings of fact set forth above in section IV, I conclude from those facts that the Respondent has employed a permanent and stable work force. The findings show that the employees of the Respondent at the time of the trial had worked for various numbers of years for the employer. Thus, the situation presented here is unlike the situation where employees are employed to work, for example, just at one jobsite and are then laid off. In its decision in *Construction Erectors, Inc.*, 265 NLRB 786, 787 (1982), the Board held that:

> At the outset, we believe it is important to emphasize that the determination of whether a work force is "permanent and stable" is more than a mechanical exercise in tabulating the makeup, longevity, and fluctuation of a group of employees. For in making the determination, the Board ultimately is deciding whether the work force is of such a nature that a showing of majority support made at a particular point in time reasonably can be said to have significance at a subsequent time. In this regard, we do not require a showing that the work force is a static group of employees who work for a long period of time with no fluctuation in the overall unit. Indeed, in view of the special nature of the construction industry [fn. omitted], such a requirement would virtually eliminate the possibility of finding a construction industry work force that is "permanent and stable." In fact, a literal reading of "permanent and stable" would not even be workable in traditional Section 9(a) relationships where unit fluctuation and employee turnover are recognized as industrial facts of life. In short, our analysis in cases of this nature must go beyond the calculation of numbers and dates and focus upon the issue of whether the employee complement possesses sufficient continuity as to merit continued reliance on showing of majority support for the union made at any point during the relevant period [fn. omitted].

With the Board's holding in mind, I conclude, as indicated above, that there was a sufficient continuity in the employer's work force so that there has existed a permanent and stable work force of the Respondent's employees during the times relevant.

Like an employer unit, a plant unit or subdivision a craft unit is one of the types of bargaining units specifically mentioned in Section 9(b) of the Act. The Board has held that a unit of laborers employed by a construction company constituted an appropriate bargaining unit. In *R. B. Butler, Inc.*, 160 NLRB 1595, 1598 (1966), the Board stated: "In the construction industry, the Board has found separate units of craft employees to be appropriate." (fn. omitted.) The Board also stated (at 1599):

> While an overall unit is presumptively appropriate for the purposes of collective bargaining, the Act does not compel labor organizations to seek representation in the most comprehensive grouping of employees, but only in an appropriate unit. [11] In the circumstances of this case, the question of the appropriateness of some unit other than the single unit of requested construction laborers is not before us. [12] All we need decide here is whether a separate unit of laborers in the building and construction industry is an appropriate unit for collective bargaining under the Act.

In a representation case where a Laborers local union and Operating engineers local unions had petitioned for two separate units, the Board found the two units to be appropriate notwithstanding the fact that the operators sometimes performed laborers' work. In *Dick Kelchner Excavating Co.*, 236 NLRB 1414 (1978), the Board stated: "The Employer basically contends that because operators spend a substantial amount of time performing as laborers the petitioned-for units are inappropriate and the only appropriate unit would be one including all of the petitioned-for employees in a single unit. We do not agree."

As set forth in the findings of fact in section III, above, there has existed a longtime collective-bargaining relationship between the Respondent and the Charging party Union going all the way back to the year 1955. Such a long history of collective bargaining in a separate unit of the laborers employed by the Respondent is a factor to be considered. Also to be considered is the fact that the Respondent has had a separate collective-bargaining relationship with the Carpenters Union, which covers the carpenters employed by the Respondent, and which collective-bargaining history also goes back to the year 1955. While both Gradilla and Muca have performed a variety of tasks for the employer, the substantial majority of their work falls into the two categories of demolition work and clean-up duties. (See the findings of fact in section IV, above.) They work together as a team, and they work alongside one another between 90 and 97 percent of their working time. As indicated above, the Board has found that a unit of laborers is an appropriate unit of employees in the construction industry, and I reach the same conclusion based on the findings of fact presented here.

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[11] *Metropolitan Life Insurance Company*, 156 NLRB 1408.

[12] See the *Plumbing Contractors Association of Baltimore, Maryland, Inc.*, 93 NLRB 1081, 1091.

Based on the findings of fact set forth in section IV, above, I conclude that at least since July 1979 and thereafter, the Charging Party Union has been the majority representative of the employees who have performed laborers work for the Respondent. At the time that Gradilla commenced his employment with the Respondent in July 1979, there was only one other person performing laborers work for the employer. That person was Roberts. Both Roberts and Gradilla were members of the Charging Party Union, and, thus, the Charging Party Union represented both of the employees in the two-person bargaining unit. In August 1979, Muca commenced his employment with the Respondent as a laborer. Muca also was a member of the Charging Party Union, and, thus, the Charging Party Union represented all three of the employees in the laborers unit. After Roberts retired on October 1, 1980, Gradilla and Muca continued their work as laborers for the Respondent in what has been a two-person unit since that time.

In concluding that the Charging Party Union has enjoyed majority status in the laborers unit since July 1979, I have excluded Brune, who is primarily a managerial employee of the Respondent, and who does estimating work, and I have excluded Larson who is an office clerical employee. Notwithstanding their union membership, their type of work performed for the employer is different from the work performed by Gradilla and Muca.

I also conclude that such facts as Muca's failure to attend monthly union meetings and the infrequent visits of union representatives to the jobsites of the Respondent do not negate the fact that both Gradilla and Muca have been members of the Charging Party Union during the entire time of their employment with the Respondent, and that based on such union membership, the Charging Party Union has enjoyed majority status in the laborers unit.

Having concluded that the Charging Party Union achieved majority status in an appropriate, permanent, and stable unit of laborers employed by the Respondent, I further conclude that the bargaining relationship between the Respondent and the Charging Party Union ripened in July 1979 from a prehire relationship into a 9(a) bargaining relationship, which has continued at all times material. Under those circumstances, the Respondent was not free to repudiate the collective-bargaining agreement between the Respondent and the Union, and it was not free to make unilateral changes in wages, hours and working conditions of employees in that unit. In *Hageman Underground Construction*, 253 NLRB 60, 63 (1980), the Board held:

> Under the Board law discussed above, from that time forward Respondent was under a statutory duty to recognize the Union as the exclusive bargaining representative of the unit employees working at all existing and future jobsites. And, in view of the collective-bargaining agreement in existence, the Union was entitled to an irrebuttable presumption of majority status for the duration of the contract. Accordingly, Respondent was not free to withdraw recognition from the Union or to repudiate the collective-bargaining agreement in midterm. By doing so, we conclude that Respondent violated Section 8(a)(5) and (1) of the Act.

As indicated previously, the allegations of paragraph 12(a) of the General Counsel's complaint were admitted to be true on a factual basis, but denied as being unfair labor practices. I conclude that the factual allegations of paragraph 13 of the General Counsel's complaint are established by the findings of fact. (See sec. V, above, and G.C. Exh. 9. See also sec. III, above, and G.C. Exhs. 13 through 16.) Furthermore, I conclude that a preponderance of the evidence, when considered with the Board decisions noted above, establish that the Respondent has engaged in unfair labor practices within the meaning of Section 8(a)(1) and (5) as, alleged in the General Counsel's complaint.

Finally, I have given consideration to the Respondent's contention that the Charging Party Union is unable to bargain in good faith with the Respondent. The Respondent urges, in summary, at page 1 of his posttrial brief: "As a separate affirmative defense, Respondent will prove that the Union cannot negotiate with Respondent in good faith because the Union is bound by a 'Most Favored Nations Clause' in the Master Labor Agreement which restricts its ability to bargain." (See pp. 11–16 of the Respondent's posttrial brief for a fuller expression of Repondent's Position.) In examining article IX of the master labor agreement, which is set forth in section III, above, I conclude that a literal reading of that article does not preclude the Charging Party Union from negotiating contracts containing different terms and conditions wiht other employers. However, the contractors, who are party to the master labor agreement, would not be required "to pay higher wages or be subject to less favorable working conditions" than those to which the Union agreed with other contractors. Nevertheless, even if the above interpretation is found by others to be an untenable interpretation of the contract language, Wilson's testimony shows that the Charging Party Union is willing to negotiate with an employer for a contract that contains different terms than the master labor agreement or the short-form agreement. As Wilson testified, "If he is willing to negotiate with the intent and purpose of concluding an agreement, yes." (See sec. III, above.) In these circumstances, I conclude that the affirmative defense urged by the Respondent does not have merit.

CONCLUSIONS OF LAW

1. The Respondent has been an employer engaged in commerce, at all times material, within the meaning of Section 2(6) and (7) of the Act.

2. The Charging Party Union is a labor organization within the meaning of Section 2(5) of the Act.

3. At the times material, and more particularly since July 1979, the Charging party Union has been the exclusive collective-bargaining representative of the employees in the following appropriate unit:

> All laborer employees including craft foremen, employed by the Respondent within the work jurisdiction of the Charging Party union, in the area known as Southern California, and more particularly decribed as the counties of Los Angeles, Inyo, Mono, Orange, Riverside, San Bernardino, Imperial, Ventura, Santa Barbara, San Luis Obispo and Kern, and the offshore islands of Richardson Rock, Santa Cruz Island, Arch Rock, San Nicholas Island, Santa Catalina Island, San Clemente Island, San Miguel Island, Santa Rosa Island, Anacapa Island, Santa Barbara Island, and all offshore man-made islands and drilling platforms in the aforementioned counties and offshore waters, excluding all non-laborer employees, executives, civil engineers, superintendents, assistant superintendents, master mechanics, timekeepers, messenger boys, office workers, or any other employees above the rank of craft foremen.

4. The Respondent has engaged in unfair labor practices within the meaning of Section 8(a)(1) and (5) of the Act in the following manner:

a. Failing and refusing to bargain in good faith with the Charging Party Union by on or about June 17, 1982, repudiating the short-form agreement between the Respondent and the Charging Party Union, and by stating its intent to implement unilateral changes, which included the Respondent's making trust fund contributions for some of its employees, and the Respondent's discontinuing to abide by the hiring hall and union-security provisions of the collective-bargaining agreement.

b. Failing and refusing to bargin in good faith with the Charging Party Union commencing in June 1982, and continuing thereafter, by making unilateral changes in the terms and conditions of the collective-bargaining agreement between the Respondent and the Charging Party Union by: (1) failing and refusing to make accurate reports and required contributions to certain pension, health and welfare, and other trust funds established pursuant to Section 302 of the Act, as required by the provisions of the 1980 master labor agreement; (2) failing to comply with the Charging Party Union's hiring hall provision; and (3) failing to adhere to the union security provisions of sthe collective-bargaining agreement.

5. The unfair labor practices described above affect commerce within the meaning of Section 2(6) and (7) of the Act.

THE REMEDY

Because I have found that the Respondent has engaged in certain unfair labor practices within the meaning of Section 8(a)(1) and (5) of the Act, I shall recommend to the Board that the Respondent be ordered to cease and desist from engaging in such unfair labor practices. I shall also recommend to the Board that the Respondent be ordered to take certain affirmative action in order to effectuate the policies of the Act. Such recommendations will be set forth in the recommended Order.

As described in General Counsel's Exhibit 5 in section III of this decision, the effective dates of that short-form agreement were from July 1, 1980 to June 15, 1983, with annual renewals of the agreement thereafter unless notice was given by a party as provided for in the contract. The time specified in the contract was " sixty (60) days prior to June 15, 1983." (See art. IX, on p. 7, of G.C. Exh. 5.) The trial in this proceeding was held on March 1 and 2, 1983, and thus, the trial took place before the 60-day time period. If such notice was given subsequent to the trial, that is a matter which could be more appropriately explored during the compliance stage of this proceeding. At this point, I shall recommend to the Board the usual remedial order in these circumstances, and I shall leave the foregoing question to be explored in the compliance stage.

Pursuant to the Board's decision in *Hickmott Foods*, 242 NLRB 1357 (1979), I shall recommend to the Board that a narrow worded cease and desist order, as distinguished from a broadly worded one, be imposed in this case.

[Recommended Order omitted from publication.]

Printing Methods, Inc. *and* **Graphic Communications International Union 503M.** Case 3–CA–13801

July 27, 1988

DECISION AND ORDER

By Chairman Stephens and Members Johansen and Babson

Upon a charge filed by the Union May 15, 1987, the General Counsel of the National Labor Relations Board issued a complaint June 25, 1987, against the Company, the Respondent, alleging that it has violated Section 8(a)(1) and (3) of the National Labor Relations Act. Although properly served copies of the charge and complaint, the Respondent has failed to file a timely answer.

On October 21, 1987, the General Counsel filed a Motion for Summary Judgment, with exhibits attached. On October 26, 1987, the Board issued an order transferring the proceeding to the Board and a Notice to Show Cause why the motion should not be granted. On October 28, 1987, the Board received a copy of an answer to the complaint, which the Respondent indicates was filed with the Region on October 26, 1987. On November 23, 1987, the Respondent filed a Reply in Opposition to the General Counsel's Motion for Summary Judgment.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

Ruling on Motion for Summary Judgment

Section 102.20 of the Board's Rules and Regulations provides that the allegations in the complaint shall be deemed admitted if an answer is not filed within 14 days from the service of the complaint, unless good cause is shown. The complaint states that unless an answer is filed within 14 days of service, "all of the allegations in the complaint shall be deemed to be admitted to be true and shall be so found by the Board." Further, the undisputed allegations in the Motion for Summary Judgment disclose that on July 17, 1987,[1] the Respondent, by its owner, represented to the Region that it had not been served with a copy of the complaint that had issued on June 25. Based on this assertion, the Regional Office served an additional copy of the complaint by certified mail on July 20 on the Respondent. Subsequently, on September 11, counsel for the General Counsel served a third copy of the complaint in person on the Respondent's owner. At that time, the Respondent's owner was told that he had to file an answer and that the 14-day period for such filing had already expired. On September 24, counsel for the General Counsel sent the Respondent's owner a letter, by certified mail, advising him of the necessity for filing an answer and the consequences of failing to do so. On September 29, the Respondent's owner spoke to counsel for the General Counsel by telephone and requested samples of answers to Board complaints. Counsel for the General Counsel then sent, by regular mail, copies of two answers, one of which had been filed by an individual who was not a labor practitioner. As noted, the Respondent did not file an answer until about October 26.

In its reply to the General Counsel's Motion for Summary Judgment, the Respondent contends that its failure to file a timely answer was due to ignorance and excusable neglect, and that it has a meritorious defense to the complaint. Regarding its failure to file a timely answer, the Respondent asserts that its owner, who was not born in this country and who has lived here for many years but speaks with an accent, is unfamiliar with Board proceedings and has never been involved in an unfair labor practice case before; that on several occasions after the complaint issued, the Respondent presented the Board with both a meritorious defense to the complaint and oral statements of its position and, in light of ongoing discussions to resolve this case, thought the oral statements were sufficient; that the Respondent was not represented by an attorney in this matter and, as soon as it retained an attorney, it filed an answer; and, finally, that it believed the Board had no jurisdiction to intercede in a dispute over who would be selected and appointed as a supervisor.[2] As indicated above, however, it is undisputed that the General Counsel repeatedly served copies of the complaint on the Respondent, including one that counsel for the General Counsel personally served on its owner. The complaint indicated the need to file an answer and that all allegations in the complaint were to be deemed to be admitted to be true unless an answer was filed. Further, the General Counsel, in its September 24 letter to the Respondent, expressly noted that "[n]ot withstanding the fact that we have entered into settlement discussions, you are still required to file" an answer and the General Counsel set September 30 as the last date to file an answer. The Respondent has not offered a sufficient explanation for its failure to act until about 4 weeks after the extended deadline for filing a timely answer.[3]

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[1] All dates are in 1987 unless otherwise noted.

[2] The Respondent claims that the alleged discriminatee is a statutory supervisor.

[3] See *Lee & Sons Tree Service*, 282 NLRB 905 (1987); and *Urban Laboratories*, 249 NLRB 867 (1980).

289 NLRB No. 151

Under these circumstances, we find that the Respondent has not shown good cause for its failure to file a timely answer, and we, therefore, decline to accept the answer that the Respondent untimely filed with the Region on October 26.[4]

In the absence of good cause being shown for the failure to file a timely answer, we grant the General Counsel's Motion for Summary Judgment.

On the entire record, the Board makes the following

FINDINGS OF FACT

I. JURISDICTION

The Respondent, a New York corporation, maintains its principal office and place of business in Rochester, New York, where it is engaged in the processing, sale, and distribution of commercial printing and related products. During the year preceding the issuance of the complaint, the Respondent, in the course and conduct of its business operations, sold and shipped from its Rochester facility products, goods, and materials valued in excess of $50,000 directly to other enterprises located within the State of New York, including Kodak and Xerox, which enterprises are directly engaged in interstate commerce. We find that the Respondent is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act and that the Union is a labor organization within the meaning of Section 2(5) of the Act.

II. ALLEGED UNFAIR LABOR PRACTICES

About May 11 the Respondent, by its owner, interrogated employees regarding their own or other employees' union activities, sympathies, or desires. About May 18 the Respondent, by its plant manager, threatened to discharge an employee because of his union activities, sympathies, or desires. We find that the Respondent violated Section 8(a)(1) of the Act by this conduct.

About May 11 the Respondent terminated John Van Niel. About May 18 the Respondent reemployed Van Niel in a different position at lower pay. Since about May 18, the Respondent has imposed more difficult and onerous working conditions on Van Niel. The Respondent engaged in such discrimination against Van Niel because he joined, supported, or assisted the Union and engaged in concerted activity for the purposes of collective bargaining or other mutual aid or protection, and in order to discourage employees from engaging in such activities or other concerted activities for the purposes of collective bargaining or other mutual aid or protection. We find that the Respondent violated Section 8(a)(3) and (1) of the Act by this treatment of Van Niel.

CONCLUSIONS OF LAW

1. By interrogating employees regarding their own or other employees' union activities, sympathies, or desires, and by threatening to discharge employees because of their union activities, sympathies, or desires, the Respondent has engaged in unfair labor practices affecting commerce within the meaning of Section 8(a)(1) and Section 2(6) and (7) of the Act.

2. By terminating John Van Niel, by reemploying him in a different position at lower pay, and by imposing more difficult and onerous working conditions on him because he joined, supported, or assisted the Union and engaged in concerted activity for the purposes of collective bargaining or other mutual aid or protection, the Respondent has engaged in unfair labor practices affecting commerce within the meaning of Section 8(a)(3) and (1) and Section 2(6) and (7) of the Act.

THE REMEDY

Having found that the Respondent has engaged in certain unfair labor practices, we shall order it to cease and desist therefrom and to take certain affirmative action designed to effectuate the policies of the Act.

Having found that the Respondent unlawfully discharged employee John Van Niel and then reemployed him in a different position at lower pay, we shall order it to offer him immediate and full reinstatement to his former position or, if this position no longer exists, to a substantially equivalent position, without prejudice to his seniority or any other rights or privileges previously enjoyed, and to make him whole for any loss of earnings he may have suffered as a result of the Respondent's unlawful conduct. Backpay shall be computed in the manner prescribed in *F. W. Woolworth Co.*, 90 NLRB 289 (1950), with interest thereon to be computed in the manner prescribed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987).[5]

ORDER

The National Labor Relations Board orders that the Respondent, Printing Methods, Inc., Rochester, New York, its officers, agents, successors, and assigns, shall

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[4] We therefore do not reach the Respondent's contention that it has a meritorious defense.

[5] The General Counsel requests that, as part of the remedy, the Order include a provision for a visitatorial clause. Under the circumstances of this case, we find it unnecessary to include such a clause. See *Cherokee Marine Terminal*, 287 NLRB 1080 (1988).

1. Cease and desist from

(a) Interrogating employees regarding their own or other employees' union activities, sympathies, or desires.

(b) Threatening to discharge employees because of their union activities, sympathies, or desires.

(c) Imposing more difficult and onerous working conditions on employees because they join, support, or assist Graphic Communications International Union 503M, or any other labor organization, and engage in concerted activity for the purposes of collective bargaining or other mutual aid or protection.

(d) Discharging employees and then reemploying them in a different position at lower pay because they engage in union or concerted activities.

(e) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Offer John Van Niel immediate and full reinstatement to his former job or, if that job no longer exists, to a substantially equivalent position, without prejudice to his seniority or any other rights or privileges previously enjoyed, and make him whole for any loss of earnings and other benefits suffered as a result of the discrimination against him, in the manner set forth in the remedy section of the decision.

(b) Remove from its files any reference to the unlawful discrimination against John Van Niel and notify him in writing that this has been done and that this unlawful action will not be used against him in any way.

(c) Preserve and, on request, make available to the Board or its agents for examination and copying, all payroll records, social security payment records, timecards, personnel records and reports, and all other records necessary to analyze the amount of backpay due under the terms of this Order.

(d) Post at its facility in Rochester, New York, copies of the attached notice marked "Appendix."[6] Copies of the notice, on forms provided by the Regional Director for Region 3, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material.

(e) Notify the Regional Director in writing within 20 days from the date of this Order what steps the Respondent has taken to comply.

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

WE WILL NOT interrogate employees regarding their own or other employees' union activities, sympathies, or desires.

WE WILL NOT threaten to discharge employees because of their union activities, sympathies, or desires.

WE WILL NOT impose more difficult and onerous working conditions on employees because they join, support, or assist Graphic Communications International Union 503M, or any other labor organization, and engage in concerted activity for the purposes of collective bargaining or other mutual aid or protection.

WE WILL NOT discharge employees and then reemploy them in a different position at lower pay because they engage in union or concerted activities.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL offer John Van Niel immediate and full reinstatement to his former job or, if that job no longer exists, to a substantially equivalent position, without prejudice to his seniority or any other rights or privileges previously enjoyed and WE WILL make him whole for any loss of earnings he may have suffered as a result of our discrimination against him, with interest.

WE WILL remove from our files any references to the unlawful discrimination against John Van Niel and notify him in writing that this has been done and that our unlawful action will not be used against him in any way.

PRINTING METHODS, INC.

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[6] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

Gupta Permold Corporation *and* United Steelworkers of America, AFL-CIO-CLC. Cases 6-CA-18542, 6-CA-18655, and 6-RC-9627

July 27, 1988

DECISION AND ORDER

BY CHAIRMAN STEPHENS AND MEMBERS BABSON AND CRACRAFT

On December 29, 1986, Administrative Law Judge Irwin Kaplan issued the attached decision. The Respondent filed exceptions and a supporting brief, and the General Counsel filed limited cross-exceptions and a supporting brief.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and briefs[1] and has decided to affirm the judge's rulings, findings,[2] and conclusions as modified, but not to adopt the recommended Order.[3]

1. We agree with the judge's finding that the Respondent violated Section 8(a)(1) of the Act by departing from existing policies and erroneously telling employees that it could not consider them for merit wage increases during the pendency of the union campaign. We disagree, however, with his failure to find that the Respondent actually withheld merit wage increases in violation of Section 8(a)(3) and (5) of the Act.

The record shows the Respondent's practice was to give its employees a 25-cent-per-hour wage increase at the end of a 90-day probationary period. Additionally, employees were eligible for merit wage increases of 25 cents to 50 cents per hour approximately every 90 days after the initial increase. The Respondent explained this wage policy to new employees at the hiring interview.

Employee Rose Miller began working for the Respondent March 11, 1985,[4] and received her first wage increase about July 1. In October, Miller inquired about a merit raise and was told by Plant Manager James Mazzoni that the Respondent's attorney had advised against giving any raises not promised prior to the union campaign. In addition, the Respondent's president, Lakshmi Gupta, also told employee Harold Morgan that Gupta would think about Morgan's request for a merit increase, but would discuss it further with him only "after all this Union business was over with."

We agree with the judge's finding that, while the Respondent had discretion in the implementation of merit wage increases, it violated Section 8(a)(1) by its statements predicating the suspension of that policy on the advent of the Union.[5] We disagree, however, with the judge's conclusion that the General Counsel did not establish that the Respondent actually withheld merit raises in violation of Section 8(a)(3). By announcing a freeze on merit increases because of the Union's presence, the Respondent precluded Miller and Morgan from being reviewed for such increases when they were due

289 NLRB No. 154

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[1] The Respondent filed a brief in response to the General Counsel's limited cross-exceptions and answering brief. The General Counsel filed a motion to strike the Respondent's reply to counsel for the General Counsel's answering brief, alleging that pp. 7 through 9 of that document were not limited to questions raised in the cross-exceptions, and thus violated Sec. 102.46 of the Board's Rules and Regulations. In light of our ultimate decision on the issues addressed in this portion of the Respondent's reply, we find it unnecessary to rule on the General Counsel's motion to strike.

[2] The Respondent has excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

The Respondent has requested oral argument. The request is denied as the record, exceptions, and briefs adequately present the issues and the positions of the parties.

283 NLRB 1173 (1987).

We find it unnecessary to pass on the judge's finding in sec. II,B,2(g) of his decision that Greg Ohler was a statutory supervisor and the Respondent's agent, and that his conduct violated Sec. 8(a)(1), as those violations would be cumulative. For the same reason, we also find it unnecessary to pass on the judge's finding in sec. II,B,2(h), that the Respondent's campaign sign did not constitute a threat in violation of Sec. 8(a)(1).

We further note that even were Greg Ohler to be included in the bargaining unit, that would bring the total number of employees in the unit to only 43. Thus the issue of Ohler's employee status does not affect our finding that the Union achieved majority status when it obtained 23 authorization cards as of October 8, 1985.

In *Hoschton Garment Co.*, 279 NLRB 565 (1986), the Board reaffirmed the principle that "an employer's mere observation of open, public union activity on or near its property does not constitute unlawful surveillance." In agreeing with the judge that on November 13, 1985, at its Monroeville facility the Respondent unlawfully created the impression of surveillance of its employees' union activities, we emphasize the judge's finding that the Respondent was simultaneously and unlawfully interfering with the distribution of union literature on public property. Thus, the Respondent's conduct went beyond the "mere observation" permitted by *Hoschton*. See *Gainesville Mfg. Co.*, 271 NLRB 1186 (1984), which the judge and the Board cited in *Hoschton*. Indeed, in *Hoschton* itself, the Board found that the respondent engaged in unlawful surveillance when its plant manager did not "merely observe union activity," but rather attempted to prohibit the distribution of union handbills on public property and stood very close to a union representative for the duration of the handbilling. In sum, *Hoschton* is fully consistent with the judge's findings here.

[3] The General Counsel has excepted to the judge's failure to order the Respondent to offer to restore employee Edward Ross to his former position. We find merit in the General Counsel's exception. As the judge found, and we agree, that Ross' transfer was in violation of Sec. 8(a)(3), we see no reason to depart from the Board's traditional remedy regarding discriminatory transfers. Accordingly, we shall substitute a new Order for the one recommended by the judge to provide that the Respondent offer to restore employee Edward Ross to his former position in the storeroom. We also shall modify the judge's recommended Order to reflect our findings that the Respondent unlawfully failed to consider employees for merit wage increases after October 8, 1985, in violation of Sec. 8(a)(3) and (5) of the Act.

[4] All dates herein refer to 1985.

[5] *Stumpf Motor Co.*, 208 NLRB 431, 433–434 (1974); *Centre Engineering*, 253 NLRB 419, 420–421 (1980); *Atlantic Forest Products*, 282 NLRB 855 (1987).

under the Respondent's previously existing policy of reviewing employees for merit increases every 90 days, and thereby violated Section 8(a)(3) and (1) of the Act.[6]

When a company implements a merit wage system based on reward for good work, employees reasonably expect that such a program will continue. Here, the reasonable message derived by the employees was that their reviews and attendant raises had been delayed because of the union activity. Clearly, such an effect discourages union activity. See *Interstate Transport Security*.[7] As the Board stated in *Smith & Smith Aircraft Co.* (at fn. 2):[8]

> When an employer, prior to a union campaign, has an established wage increase policy, the suspension of that policy during the union campaign will normally be found to violate Sec. 8(a)(3) unless the employer postpones the increases only for the duration of the campaign and informs the employees at the time of the postponement that the sole reason for its action is to avoid the appearance that it seeks to intervene in the election, and the Board finds that this in fact was its reason.

More recently, in *Times Wire & Cable Co.*,[9] the Board upheld a finding that the company had violated Section 8(a)(3) and (1) by failing to grant a normal and expected wage increase to employees and attributing the loss of the increase to the union.

Accordingly, we find that the Respondent violated Section 8(a)(3) by withholding merit increases because of its employees' union activities. In addition, because we agree with the judge that the Respondent incurred a bargaining obligation as of the October 8, 1985 demand for recognition, we find that on and after that date, the Respondent violated Section 8(a)(5) and (1) by unilaterally suspending its merit increase policy.[10]

2. The Respondent has excepted to the judge's finding that the revocations of authorization cards by employees Denning, Lukehart, and Smutek were triggered by the unlawful discharges of employees Zang and Diskevich. The Respondent alleges that these three employees did not sign their authorization cards until after the September 27 discharges and that they signed the cards despite the discharges. The record indicates that these events occurred contemporaneously over a single weekend. The discharges occurred on Friday, September 27, and the three employees' authorization cards were dated September 27, 29, and 30. The Respondent has offered no evidence that these employees knew of the discharges prior to signing. Moreover, as the judge found, these early October revocations occurred in an atmosphere of continuing coercion. On September 23 and 26 the Respondent convened its employees and urged them to retrieve their authorization cards and repudiate the Union. At the September 23 meeting, Plant Manager James Mazzoni advised the employees to send their revocation letters by certified mail, noted that he had posted the Union's address on the bulletin board, and offered to help any employee needing assistance in writing a revocation letter. The Respondent's unrequested advice regarding the method of revocation was combined with instructions that employees tear up their cards and throw them away. The Respondent called an employee meeting on September 26 at which President Lakshmi Gupta instructed the employees not to attend a union meeting that evening. On September 27 the Respondent unlawfully interrogated a number of the employees who had attended the union meeting and discriminatorily discharged Diskevich and Zang.

Given this background, we agree with the judge that when employees Denning, Smutek, and Lukehart approached Mazzoni for help in writing revocation letters in early October, they did so in an atmosphere tainted by the Respondent's numerous and repeated unfair labor practices. Both Denning and Smutek credibly testified that they were concerned about losing their jobs and had discussed the discharges and the Union's inability to get Diskevich and Zang reinstated. Similarly, Lukehart acknowledged that when she tried to revoke her card she was aware of the terminations and the fact that unfair labor practice charges had been filed. In addition, Denning and Smutek had advised Lukehart of their reasons for trying to retrieve their cards before Lukehart wrote to the Union asking that hers be returned. Further, Mazzoni assisted the employees by supplying the revocation language, providing the stationery and the Union's address, and reminding the employees that the letter had to be certified. The continuing nature of the coercion is further emphasized by the fact that a few days after assisting employees Denning, Lukehart, and Smutek, Mazzoni began to pressure employee Gerald Deer about revoking his card. Thereafter, the Respondent continued to violate the Act by withholding merit increases, promising benefits if

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[6] *Gossen Co.*, 254 NLRB 339, 354 (1981), enfd. in relevant part 719 F.2d 1354 (7th Cir. 1983); *Duo-Fast Corp.*, 278 NLRB 52 (1986).

[7] 240 NLRB 274, 278-279 (1979). (Postprobation raises were intended, but the plan was aborted with the advent of the union. Failure to grant the raises was found violative of Sec. 8(a)(3) and (1).

[8] 264 NLRB 516 fn. 2 (1982), revd. on other grounds 735 F.2d 1215 (10th Cir. 1984).

[9] 280 NLRB 19 (1986).

[10] *Southeastern Michigan Gas Co.*, 198 NLRB 1221 (1972), affd. 485 F.2d 1239 (6th Cir. 1973); *Oneita Knitting Mills*, 205 NLRB 500 (1973).

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the Union was defeated, and interfering with union representatives passing out literature.

Because we find that the Respondent engaged in unfair labor practices almost from the time it learned of the organizational campaign to the final days of the election, we conclude the revocations were coerced and were, therefore, ineffective.

ORDER

The National Labor Relations Board orders that the Respondent, Gupta Permold Corporation, Monroeville, Pennsylvania, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Coercively interrogating employees about their union activities and sympathies.

(b) Creating the impression among its employees that their union activities are under surveillance.

(c) Discriminatorily promulgating, maintaining, and enforcing a no-access rule and interfering with the distribution of union literature at its Monroeville facility.

(d) Soliciting employee grievances and indicating a willingness to rectify them to undermine the Union.

(e) Soliciting employees to repudiate the Union and to revoke union authorization cards and assisting employees in revoking union authorization cards and instructing employees not to attend a union meeting.

(f) Promising to provide improved benefits if the employees repudiated the Union.

(g) Recruiting, encouraging, and authorizing employees to tell other employees that the Respondent will provide certain improved benefits if the Union is eliminated.

(h) Departing from existing policies and erroneously telling employees that it cannot consider merit increases during the pendency of the union campaign.

(i) Threatening to close the plant before accepting the Union and threatening employees with various other unspecified reprisals for their support of the Union.

(j) Conveying to employees that unionization will result in the loss of a major customer and loss of jobs.

(k) Discharging, transferring, or otherwise discriminating against employees because of their union activities and sympathies.

(l) Refusing to recognize and, on request, bargain with United Steelworkers of America, AFL-CIO-CLC as the exclusive collective-bargaining representative of its employees in the following unit:

> All production and maintenance employees employed by Respondent at its foundry located at 1375 Frey Road, Penn Hills, Pennsylvania, and its production facility located at 530 Seco Road, Monroeville, Pennsylvania; excluding office clerical employees, technical employees and guards, and professional employees and supervisors as defined in the Act.

(m) In any other manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action to effectuate the policies of the Act.

(a) Offer David Diskevich and Robert Zang immediate and full reinstatement to their former jobs or, if those jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority or any other rights or privileges previously enjoyed, and make them whole for any loss of earnings and other benefits suffered as a result of the discrimination against them, in the manner set forth in the remedy section of the judge's decision.

(b) Remove from its files any reference to the unlawful discharges of David Diskevich and Robert Zang and notify the employees in writing that this has been done and that the discharges will not be used against them in any way.

(c) Offer Edward Ross the option of transferring back to his former job in the storeroom without prejudice to his seniority or other rights and privileges.

(d) Immediately reinstate and implement the merit evaluation and wage increase system and, after notice and an opportunity to bargain with the above-named labor organization regarding the amount of each increase, grant retroactive increases to each employee found eligible with interest.

(e) Recognize and, on request, bargain with the above-named labor organization as the exclusive collective-bargaining representative of its employees in the bargaining unit set forth above with respect to wages, hours, and other terms and conditions of employment and, if an understanding is reached, embody the understanding in a signed agreement.

(f) Post at its Penn Hills and Monroeville, Pennsylvania facilities copies of the attached notice marked "Appendix."[11] Copies of the notice, on forms provided by the Regional Director for Region 6, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material.

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[11] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

(g) Notify the Regional Director in writing within 20 days from the date of this Order what steps the Respondent has taken to comply.

IT IS FURTHER ORDERED that the election in Case 6–RC–9627 is set aside and that the petition in that matter is dismissed.

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

WE WILL NOT coercively interrogate our employees about their activities and sympathies for United Steelworkers of America, AFL–CIO–CLC or any other labor organization.

WE WILL NOT create the impression that the union activities of our employees are under surveillance.

WE WILL NOT discriminatorily promulgate, maintain, and enforce a no-access rule and interfere with the distribution of union literature at our Monroeville facility.

WE WILL NOT solicit our employees' grievances and indicate a willingness to rectify them in order to undermine the above-named Union.

WE WILL NOT solicit our employees to repudiate the above-named Union, to revoke their union authorization cards and assist our employees in revoking union authorization cards, and instruct our employees not to attend a union meeting.

WE WILL NOT promise to provide our employees improved benefits if they repudiate the Union.

WE WILL NOT recruit, encourage, and authorize any employees to tell other employees that we will provide certain improved benefits if the Union is eliminated.

WE WILL NOT depart from our existing policies by erroneously informing our employees that we cannot consider merit increases during the pendency of the union campaign.

WE WILL NOT threaten to close the plant before accepting the Union and threaten employees with various other unspecified reprisals for their support of the Union.

WE WILL NOT convey to our employees that unionization will result in the loss of a major customer and loss of jobs.

WE WILL NOT discharge, transfer, or otherwise discriminate against our employees because of their union activities and sympathies.

WE WILL NOT refuse to recognize and, on request, bargain with the above-named Union as the exclusive representative of our employees in the appropriate unit with respect to wages, hours, and other terms and conditions of employment and, if an understanding is reached, embody the understanding in a signed agreement. The appropriate unit is:

> All production and maintenance employees employed by Gupta Permold Corporation at our foundry located at 1375 Frey Road, Penn Hills, Pennsylvania, and our production facility located at 530 Seco Road, Monroeville, Pennsylvania; excluding office clerical employees, technical employees and guards, and professional employees and supervisors as defined in the Act.

WE WILL NOT in any other manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL offer David Diskevich and Robert Zang immediate and full reinstatement to their former jobs or, if those jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority or any other rights or privileges previously enjoyed and WE WILL make them whole for any loss of earnings and other benefits resulting from their discharge, less any net interim earnings, plus interest.

WE WILL remove from our records any reference to the discharges of David Diskevich and Robert Zang and notify them in writing that this has been done and that these discharges will not be used against them in any way.

WE WILL offer Edward Ross the option of transferring back to his former job in the storeroom without prejudice to his seniority or other rights and privileges.

WE WILL immediately reinstate and implement our merit evaluation and wage increase system and grant retroactive increases to each employee found eligible with interest.

WE WILL recognize and, on request, bargain with the above-named Union as the exclusive representative of our employees in the appropriate unit with respect to wages, hours, and other terms and conditions of employment and, if an understanding is reached, embody the understanding in a signed agreement.

GUPTA PERMOLD CORPORATION

Michael Poprik, Esq., for the General Counsel.
W. Timothy Barry, Esq. (Barry, Dattilo & Fasulo, P.C.), of Pittsburgh, Pennsylvania, and *David J. Eckle, Esq.*, of Monroeville, Pennsylvania, for the Respondent.
George Radulovich, of Pittsburgh, Pennsylvania, for the Charging Party.

DECISION

STATEMENT OF THE CASE

IRWIN KAPLAN, Administrative Law Judge. These consolidated cases were heard in Pittsburgh, Pennsylvania, on 24, 25, 26, 27, and 28 February 1985. The underlying charges in Cases 6-CA-18542 and 6-CA-18655 were filed by the United Steelworkers of America, AFL-CIO-CLC (the Charging Party) on 30 September 1985 and 18 November 1985 and gave rise to a complaint and notice of hearing on 14 November 1985 and 26 December 1985 (amended 7 February 1986), respectively. These cases were consolidated by order consolidating cases on 26 December 1985 and consolidated further with Case 6-RC-9627 by order further consolidating cases on that same date.

The Charging Party in the unfair labor practice cases is also the Petitioner in Case 6-RC-9627. That petition gave rise to a Stipulation upon Consent Election Agreement on 31 October 1985 and an election on 15 November 1985. The Petitioner, having lost the election, filed timely objections thereto. The investigation to these objections, inter alia, disclosed evidence of other alleged misconduct, and as these matters are largely coextensive with the complaint allegations, they were subsequently (as noted above) consolidated therewith.

In essence, it is alleged that Gupta Permold Corporation (Respondent) violated Section 8(a)(3) and (1) of the Act by terminating David Diskevich and Robert Zang, by transferring Edward Ross, and by withholding merit increases from employees because of the pendency of the union petition. Further, it is alleged that Respondent engaged in numerous other acts of misconduct independently violating Section 8(a)(1) of the Act by, inter alia, interrogation, surveillance, creating the impression of surveillance, discriminatorily enacting and enforcing a no-access rule regarding the distribution of union literature, soliciting complaints and grievances, and promising benefits in order to discourage union activities, informing employees that merit increases were being withheld because of union activities, and threatening employees with various reprisals including loss of job and plant shutdown to dissuade them from engaging in union activities. Still further, the General Counsel, relying largely on *NLRB v. Gissel Packing Co.*, 395 U.S. 575 (1969), contends that Respondent, by its "commission of widespread and flagrant violations," violated Section 8(a)(5) and (1) of the Act. As such, the General Counsel contends that the record justifies a bargaining order.

The Respondent filed an answer and amended answer, conceding, inter alia, jurisdictional facts and the supervisory and agency status of certain individuals, but denying the status of Foreman Greg Ohler and also denying that it committed any unfair labor practices. Further, Respondent disputed "majority status" and, relying on *Gourmet Foods*, 270 NLRB 578 (1984), noted that under "no circumstances" will the Board grant a nonmajority bargaining order.

Based on the entire record[1] including my observations of the demeanor of the witnesses as they testified, and after careful consideration of the posttrial briefs, I find as follows

FINDINGS OF FACT

I. JURISDICTION

Respondent is a Pennsylvania corporation with its principal office and place of business in Monroeville, Pennsylvania, and is engaged in the manufacture and nonretail sale and distribution of dynamic breaking systems. Concerning the aforenoted business operations, Respondent, during a representative 12-month timeframe, purchased and received at its Monroeville facilities products, goods, and materials valued in excess of $50,000 directly from points outside the Commonwealth of Pennsylvania. It is admitted, the record supports, and I find that the Respondent is now, and has been at all times material, an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

It is also admitted, and I find, that the Charging Party, United Steelworkers of America, AFL-CIO-CLC (Union), is now, and has been at all times material, a labor organization within the meaning of Section 2(5) of the Act.

II. THE ALLEGED UNFAIR LABOR PRACTICES

A. *Background and Sequence of Events*

The Union was first contacted by Respondent's employees in September 1985.[2] On Friday, 13 September, George Radulovich, a union organizer and staff representative, spoke to employee Ed Ross on the telephone and a meeting was arranged to be held at the latter's home on 16 September to explore union representation. In attendance at the meeting were Radulovich and employee Ross, employees Brian Moree, Bob Zang, and Harold Morgan. The union organizational campaign began at that meeting as each of the employees in attendance signed authorization cards and turned them over to Radulovich.[3] The employees at the meeting agreed to serve as union "committeemen" and "official organizers."

On Friday, 20 September, minutes before the end of the 4 p.m. shift, Radulovich, accompanied by Jim

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[1] The General Counsel's unopposed motion to correct transcript is granted.

[2] All dates refer to 1985 unless otherwise indicated.

[3] According to the credited testimony of ***Radulovich*** and ***Moree***, the latter's original card was lost by the Union and ***Radulovich*** asked him to submit another signed card. (G.C. Exh. 7, dated 25 October.)

Coates, another staff representative, appeared outside Respondent's Monroeville facility[4] and distributed union materials, including authorization cards, as the employees left work. (See G.C. Exh. 6.) The union representatives left the Monroeville location after a brief period but returned to catch the second-shift employees leaving the facility around 11 p.m.

Plant Manager James Mazzoni testified that he first learned of union activity after 4 p.m. on 20 September, when one of the second-shift employees told him that there were union organizers outside Respondent's facility. Respondent's owner, Lakshmi Gupta, testified that Mazzoni phoned him that evening around 6 p.m. to tell him, "Bad news. We had been invaded by United States Steel Workers."[5]

On Saturday, 21 September, Mazzoni asked Ross about the Union while they were bowling at the Monroe Bowl. As testified by Mazzoni, he told Ross, "[T]here's a rumor going around about you, that you are the one instigating the Union in there." Although Ross' testimony on this point is essentially the same, Ross added that when he (Ross) denied union involvement Mazzoni asked him for a favor, to tell that to Gupta.

On Monday, 23 September, Respondent assembled all its employees at the Monroeville facility and urged them to reject the Union. According to the testimony of the General Counsel's witnesses (largely undisputed), Gupta told the employees that he was aware of the Union's organizational activities and understood that some employees had signed union cards. Gupta asked those employees who had received union cards but had not signed them to discard those cards; those who had already submitted signed cards Gupta asked to get their cards back and offered assistance. He explained to the employees that the Company was too young and small to afford a union and noted that Westinghouse, the Company's only customer, did not like the idea of dealing with a union. Gupta also invited employees to discuss their problems and to feel free to ask questions. In response, employees raised concerns and questions dealing with, inter alia, hospitalization coverage, sick days, dental and eye care, establishing employees' savings accounts, a college tuition reimbursement program, and the installation of a microwave oven and refrigerator.

Gupta was receptive to some of these points and totally rejected other items. For example, employee Ed Ross suggested that Gupta institute employee savings accounts. To this, Gupta told Chief Inspector Frank Bruno to "Jot that down, its a good idea." Employee Bashir Masaoud suggested that Respondent acquire a microwave oven and refrigerator. Gupta again was receptive, directing Purchasing Agent Vince Visco to order these items. Gupta turned down Ross' suggestion that he deal with an employee committee over employees' problems. In doing so, Gupta told the assembled employees that he was always accessible to them on a one-to-one basis and therefore they did not need a union.

As noted above, for the most part, the accounts presented by the General Counsel's witnesses vis-a-vis the 23 September meeting are not disputed. A few points, however, are in conflict. For example, Gupta and Mazzoni contend that it was Mazzoni (not Gupta) who introduced the subject of union authorization cards and made an offer of assistance to get those cards back. The other point in dispute involved the microwave oven and refrigerator. According to Gupta and Mazzoni, Visco had been told to purchase the microwave and refrigerator long before the advent of the Unon, but failed to place the order. Gupta testified that he was "surprised" when one of the employees asked for these items. Thus, when the subject was raised at this meeting, Gupta assertedly told Visco, "Vince, I told you before, I'm telling you right now in front of all these people, go get it [the microwave and refrigerator]." According to the General Counsel's witness, Gupta merely asked Visco to look into acquiring these items. Ross testified that a few days later, he overheard Mazzoni tell other "people" in the office "that once we got the [employees] the refrigerator and microwave that they would knock this [union] shit off." The microwave oven and refrigerator were installed approximately 1 month later.

On 25 September, around lunchtime, Radulovich appeared just outside Respondent's Monroeville facility. There, Radulovich distributed a written notice to employees, as they broke for lunch, of a special union meeting at Denny's Restaurant to be held the following evening. The notice, in pertinent part, stated as follows:

> The purpose of this meeting will be to explain the procedure in filing a petition with the National Labor Relations Board, the organizing drive at your plant, cost-of-living, sick & accident plan, wages and job classification plan. [G.C. Exh. 8.]

One of the aforenoted notices found its way into the hands of Mazzoni. The union meeting at Denny's was scheduled for 26 September at 4:30 p.m. A short time earlier, on that same date, at approximately 3:30 p.m., Gupta assembled all Respondent's employees at the Monroeville facility and informed them that he knew of the upcoming union meeting and told them not to attend. As testified by Gupta, "I [Gupta] wanted to point out to our people that, by attending that meeting [Denny's], they're not going to benefit with any additional information . . . and would be subject to some of the high sales pitch things to join the Union."

The union meeting at Denny's was held as scheduled. Approximately 13 employees attended, including the three alleged discriminatees, Ross, Diskevich, and Zang. The next day (27 September), around 2:30 to 3 p.m., a number of these employees, including Rose Miller, Rich Sneddon, Brian Moree, and Bob Cable were paged one at a time on the intercom to go to Gupta's office. There they were questioned separately by Gupta and Mazzoni about the meeting at Denny's and asked whether they had signed union cards and why. Miller testified, without contradiction, that Gupta told her that he was "shocked" and "disappointed" that she had attended the union meeting. He asked her what she did with her union card. Gupta pointed out that he was not a rich man and suggested that she look at his house. During the course of that meeting, Gupta also asked Miller whether her husband was a union man and responsible for her union activities. Miller got upset at Gupta's reference to her husband and when she left Gupta's office she cried and went directly to the ladies' restroom.[6]

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[4] Respondent then also employed approximately five employees at its nearby Penn Hills facility.

[5] According to *Mazzoni* and *Gupta*, earlier that day (and before knowledge of union activity), *Mazzoni* recommended terminating *David Diskevich* and *Robert Zang*, both probationary employees. Because *Gupta* was assertedly late for another business meeting, a final decision was deferred until 27 September when *Diskevich* and *Zang* were discharged. Their status as alleged discriminatees will be treated more fully below.

The account provided by Brian Moree was largely undisputed by Respondent's witnesses. Thus, as testified by Moree, Gupta asked him whether he attended the meeting at Denny's and whether he had signed a union card. Mazzoni pointed out to Moree that while employees move from job to job, the Company has left him on the same machine because he was happy on that job and he could be trusted.

Cable and Sneddon were questioned in much the same way. Later that same day (27 September), Respondent terminated probationary employees Diskevich and Zang (alleged discriminatees). Shortly before 4 p.m., Gupta questioned employee Barbara Potocnik at her work station regarding her attendance at the union meeting. Potocnik testified that Gupta asked her *why* she attended, noting that she had only been employed for 1 month. According to Gupta, he asked Potocnik *whether* she attended and was told by the latter that it was none of his business.

In late September, Gupta had a conversation with employee Frank Sabash concerning the reasons for the advent of the Union and the terminations of Diskevich and Zang. According to Sabash, on the occasion in question, Gupta stepped inside his welding booth and asked him why the employees thought they needed a union. Sabash testified that he explained to Gupta that the employees "thought they needed a little more voice in what was going on in the Company." Further, Sabash advised that employees wanted more money and other benefits. During the course of the conversation, Sabash asked about the firings of Diskevich and Zang and was told that they had not performed satisfactorily during their probationary period.

Gupta's version of that September meeting with Sabash is subsequently different, particularly regarding how the conversation arose. According to Gupta, after he and Sabash exchanged amenities, the latter asked to speak with him in private and they took a walk around the building. Gupta testified that Sabash opened the conversation by asking why Diskevich and Zang were fired. When Gupta told him, "They didn't make it their probation," Sabash responded, "Come on, level with me. There must be something else." It is undisputed that Gupta told Sabash that there were no other reasons. Assertedly, Sabash then represented that all the employees wanted was "a little more money," suggesting 25 cents an hour (as a good will gesture), and for Gupta to reinstate Diskevich and Zang. Gupta asserted that he merely listened to Sabash and did not negotiate or promise anything. Finally, according to Gupta, Sabash told him, "Don't worry there would be no union."

It is undisputed that Gupta and Sabash had a second private meeting, this time, admittedly, called by Gupta, to discuss employee benefits and the union situation. According to Gupta, this second meeting occurred a few days after the earlier meeting and before he received the Union's demand for recognition and the representation petition.[7] Sabash testified that this meeting occurred around 1 November (during the critical period vis-a-vis the objections to the election). In virtually all other respects, Sabash's account of what transpired at this second meeting was uncontradicted and in large part confirmed by Gupta's testimony.

On this occasion, Gupta called Sabash away from his work station and took him for a ride in his car from parking lot to parking lot inside that industrial complex. Inside the car, Gupta spoke privately to Sabash about providing certain employee benefits if the Union were discarded. Gupta promised, inter alia, to provide 25-cent across-the-board wage increases, with an additional 25 cents for second-shift employees and improved family insurance coverage. As testified by Sabash, "Gupta assured me that these things . . . would all be implemented and reinforced into company policy, if I helped him talk people out of voting for the Union." In Gupta's words, "I expected [Sabash] to communicate [the promise of benefits] to others . . . [t]o make everyone be happy, and the Union will disappear."

While in Gupta's car, Sabash asked him whether Ross' transfer was related to his union activities.[8] Gupta did not respond directly, but held out the possibility of Ross' return to the storeroom if the Union failed in its organizational efforts.

Sabash testified (with substantial corroboration) that as soon as he got back inside the building he related the substance of his conversation with Gupta to other employees (about 12 employees were identified by name). Further, Sabash testified that another three or four employees had come to him for verification, stating that other employees told them of the Gupta-Sabash meeting.

In early October, employees Margaret Denning, Penny Lukehart, and Debbie Smutek wrote to the Union requesting "to withdraw" their signed union cards (G.C. Exhs. 33-35). Prior thereto, Denning and Smutek had discussed the terminations of Diskevich and Zang, along with the Union's inability to get them reinstated, and decided to seek Mazzoni's help in getting their union cards returned. Mazzoni referred them to Respondent's attorney, David Eckle, who advised them of the withdrawal language contained in their letters and about mailing those letters certified, return receipt requested. Lukehart's letter was sent under similar circumstances. Although Lukehart discussed withdrawing her union card with employees Denning and Smutek, she asserted that the subject of Diskevich's and Zang's discharges did not come up in their conversation.[9]

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[6] Employee *Edward Ross* corroborated *Miller* to the extent that he observed her crying when she came out of Gupta's office. *Ross* also testified that *Miller* told him that *Mazzoni* knew all about the union meeting at Denny's. Earlier that day and before *Miller* was called into *Gupta's* office, *Miller* told *Mazzoni* that she was at the union meeting at Denny's and found it boring. *Mazzoni* made a comment about 13 employees at the meeting and that remark was passed on to other employees by *Miller*. *Mazzoni* admitted making the remark, but asserted that he guessed at the number. He denied that he actually knew the number of employees who attended the meeting at Denny's.

[7] The petition and demand for recognition are both dated 8 October (G.C. Exhs. 2 and 3). The parties stipulated that Respondent received these documents on 9 October.

[8] On 28 September, *Ross* had been transferred from the storeroom to the production area in the ILS department. As noted previously, it is alleged that the transfer was discriminatory, in violation of Sec. 8(a)(3).

Sometime in October, Mazzoni summoned employee Patricia Christian to Gupta's office, where he informed her that he heard that she had signed a union card, and proceeded to denigrate the Union. As testified by Christian, Mazzoni told her that other companies had gone bankrupt and had to lay off employees because of the Union.[10]

Other employees also testified to antiunion statements, conveying the impression of surveillance, interrogation, and threats made by Mazzoni around the same time. Thus, employee Gerald Deer testified that on or about 7 October, Mazzoni questioned him in Gupta's office regarding his reasons for signing a union card. According to Deer, Mazzoni told him that he knew that he had signed a union card; he (Mazzoni) wished he had not and asked Deer to reconsider. Mazzoni's account of this conversation is substantially different. According to Mazzoni, he told Deer that he had heard from Jim Sisteck that he, Deer, wanted to talk to him (Mazzoni), which Deer then assertedly confirmed. Mazzoni testified that Deer told him that he submitted a signed card to the Union and "think[s] [he] made a mistake." To this, Mazzoni assertedly responded, "well, why did you send it in?" Mazzoni denied saying anything else to Deer.

Employe Edward Ross testified that on or about 8 October Mazzoni, in the presence of Chief Inspector Frank Bruno, told him (Ross) "to put the union shit on hold, that [Gupta] didn't want [the Union] and the workers out in the shop didn't want it."[11] Employee Barbara Potocnik testified that sometime in October, Mazzoni told her, "There will be no Goddamn union here, and if a Goddamn union gets in, I'll close the Goddamn place myself." Although Mazzoni admitted having a conversation with Potocnik at the time in question, he denied saying anything to her about the Union.

It is also alleged that Gupta and Greg Ohler made coercive statements during the month of October. Employee Harold Morgan testified that sometime around the second week in October he met with Gupta in the latter's office to ask about a wage increase. According to Morgan, he raised that subject because, when he was hired, he was told that he could expect a raise every 90 days and that did not happen. Morgan asserted that Gupta told him, on the occasion in question, that he was entitled to a raise and would receive one, although he was uncertain about the amount. Gupta also assertedly told Morgan that he would put the matter on hold until after the union activity had stopped. Additionally, Morgan testified that Gupta told him that Westinghouse could "pull out" if the Company became unionized and urged him (Morgan) to dissuade younger employees from supporting the Union. Gupta testified that he told Morgan that he had been "advised by legal counsel not to discuss it (wage increases)" and denied that he promised to give Morgan a raise.[12]

According to employee Bruce Moree, in late September or early October, Working Foreman Ohler[13] told him and other employees at Respondent's Penn Hills facility, if the Union got in, their wages would revert to $3.35 per hour. This testimony was corroborated by employee Greg Schoch, who also asserted that Ohler told them that if the Union got in there was a chance of the Company's closing.[14] As testified by Ohler, at least 2 or 3 weeks before the November election, he told employees at Penn Hills that their wages and benefits were not guaranteed and if the Union got in, "[e]verything is going to have to be negotiated."

Employee Ross testified that in mid-October, Ohler asked him what he knew about the "union business." Further, Ohler complained that the Union was holding up everyone, including himself, from receiving their bonus and threatened to "make life rough" for the person responsible. Although Ohler admitted that he told Ross and other employees that wages and other benefits were on hold during the pendency of the election, he denied making any threats.

On 8 November, concerning the upcoming union election, Respondent displayed a campaign poster on the door leading to the Company's offices from the shop area stating, in essence, that Americans purchase goods made overseas because they are produced more cheaply in nonunion shops, which results in American plants closing and loss of jobs. The poster also contained the admonition, "Protect Your Jobs: VOTE NO." (G.C. Exh. 5.)

On 12 November, Respondent assembled its entire work force at its Monroeville facility, to hear speeches from Mazzoni, Ohler, and Inspector Frank Bruno urging them to vote against the Union. Mazzoni related his previous employment experience with another company at which the great majority of jobs were lost because of the union strike. There (as told by Mazzoni to Respondent's employees), the Company transferred machinery and jobs to facilities in other States and only approximately 25 employees were still employed, down from 1500 employees, and the Union was now facing a decertification petition.

Bruno told the employees of the Union's unwillingness or inability to help him when he was laid off from Westinghouse. Ohler noted, inter alia, that the Respondent does not have a history of layoffs and urged the employees to vote no in the upcoming union election.

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[9] As the General Counsel is urging a *Gissel* bargaining order, the effectiveness of these withdrawal letters is material and will be discussed more fully below.

[10] It is noted that Christian's testimony was largely uncontradicted. *Mazzoni* described her as "probably one of the most *honest* people that I know." (Emphasis added.)

[11] *Ross'* testimony on this matter was uncontradicted. *Bruno* did not testify nor was any reason advanced by any party for the failure to call him as a witness.

[12] *Rose Miller* testified that in early October, she questioned *Mazzoni* about a merit raise, which she thought was due. She was told by *Mazzoni* that, on the advice of the Company's attorney, no raises could be given during the pendency of the election.

[13] The supervisory and agency status of *Ohler* are in dispute.

[14] Respondent's witness *Daniel Grum* when asked by the General Counsel whether *Ohler* told him that if the Union came in, the Company might close down, responded, "In a round about fashion, yeah."

The following day, 13 November, 2 days before the Board-conducted election, Respondent provided another of its periodic pizza lunches for all its employees. On this occasion, Gupta spoke of the need to operate a business in a nonunion setting noting, inter alia, that American companies face competition from foreign companies that are free of restraints imposed on American businesses. Employee Edward Ross recalled Gupta stating that "the world is one big trade market" and that companies lay off employees, transfer jobs, and relocate in order to reduce costs. As testified by Gupta, he told the assembled employees that the Union posed "a very real threat to the survival of this Company, and their job[s]." Further, he implored them to "Save your company. Save your jobs, vote no."

Later that same day (13 November), at approximately 3:15 p.m., Union Representatives Jack Coates and Thomas Antel arrived at Respondent's Monroeville facility to distribute union literature. Coates and Antel were met by Mazzoni, who told them that they could not distribute literature on company property and asked them to leave. Coates and Antel refused to leave, contending that they were not on company property. Mazzoni contacted Attorney David Eckle, who arrived at the site minutes later, and he too asked the union representatives to leave the company property. Coates disagreed that the area was company property and told Eckle that the area in question "looks like a thoroughfare to me."

According to union witnesses, employees from the area of the loading dock observed this union-company encounter, and these employees, in turn, told other employees. Coates and Antel asserted that employees were reluctant to accept union literature from them in the presence of company officials and, according to employee Edward Ross, he was physically blocked by Mazzoni and had to move around him in order to receive the union material. Eckle and Mazzoni testified that at the time they first spoke with the union representatives, the employees were not in the immediate area, but were still in the building and working. According to them, they went back into the building when the 4 o'clock bell rang, signifying the end of the day shift, because they were unable to get the union representatives to leave and because they did not want to interfere as employees departed. Eckle testified that after everyone left the building, he came out and spoke to Coates for a few minutes noting to the latter that they would see each other at the election in a few days. Eckle recalled that two employees had come out of the building while he was engaged in this second conversation with Coates, and one of them accepted union material while the other refused.

Still, on 13 November and around the same time Coates and Antel were at the Monroeville facility, Union Representative Radulovich attempted to distribute union literature at Respondent's Penn Hills facility. According to Radulovich, Gupta came out of the building and stayed close to Radulovich, thereby inhibiting and discouraging the Penn Hills employees who had just finished work from accepting any of his union material. According to Gupta, he did not come out of the building, but merely opened the door and looked out at Radulovich. It is undisputed that Gupta did not say anything to the employees or to Radulovich.

B. *Discussion and Conclusions*

1. Credibility

This case, in large part, turns on credibility. The documents or exhibits in evidence shed little light on motivation. It is noted, however, that Respondent does not contend that the discharges of Diskevich and Zang or the transfer of Ross was predicated, in whole or in part, on any downturn in business or economic conditions. Although Respondent advanced nondiscriminatory reasons for its disputed action, those reasons are largely subjective in nature, the plausibility of which must be assessed in light of the entire record. This, of course, includes the credibility resolutions pertaining to the various independent 8(a)(1) allegations. The General Counsel, in support of those allegations, paraded about 17 witnesses, the great majority of whom were still employed at the time they testified adversely to their Employer. As such, they faced considerable economic risk, a factor that tends to support their testimony. See *Shop-Rite Supermarket*, 231 NLRB 500, 505 fn. 22 (1977); *DePaul Community Health Center*, 221 NLRB 839, 844 (1975).

In addition, there are a number of other significant factors that persuade me that the essence of the testimony adduced from the General Counsel's witnesses should be credited. I find, for example, that these witnesses, in large part, not only mutually corroborated each other, but in certain material respects, their testimony was also confirmed and admitted by Respondent's witnesses.

Thus, Gupta and Mazzoni acknowledged that the accounts provided by the General Counsel's witnesses of the company-held employee meetings on 23 and 26 September were basically accurate. As such, it is undisputed that Gupta and/or Mazzoni told the employees, inter alia, to throw away their union cards and, if the Union already had their cards, they offered to help them get those cards back. Further, Gupta confirmed that he told all the employees on 26 September not to attend the union meeting scheduled to be held later that day at Denny's Restaurant.

Basically, the only factual conflict regarding the meeting of 23 September pertained to Gupta's response to an employee's request that Respondent install a refrigerator and microwave oven. According to Gupta and Mazzoni, Gupta expressed surprise that this had not been done earlier because he had long before directed Vince Visco, Respondent's purchasing agent, to purchase these items, and reminded Visco of that in a loud voice in front of all the employees. In assessing credibility in favor of the General Counsel's witnesses, it is noted, inter alia, that although virtually all Respondent's employees attended the meeting (approximately 40 in number), some of whom were clearly friendly to Respondent, not one corroborated Gupta or Mazzoni on this matter. Moreover, Visco might have been expected to provide some corroborative testimony, but he was not called to testify nor was any reason advanced for his failure to appear as a witness.[15]

I also find that the witnesses who testified in support of the allegations demonstrated a high degree of internal consistency. For example, Gupta and Mazzoni confirmed, inter alia, that they had called at least three employees into Gupta's office, one at a time, to question them about their attendance at a union meeting. Further, Mazzoni confirmed the testimony of Edward Ross and Patricia Christian to the extent that he admitted questioning them about their union activities. Regarding Ross, Mazzoni asked him whether it was true that he was the union instigator. Regarding employee Christian, Mazzoni admittedly called her into Gupta's office to ask her if she signed a union card as he had been told. Christian also testified that Mazzoni told her that companies go "bankrupt" and lay off employees because of the Union. In crediting Christian's account in its entirety, it is noted, inter alia, that even Mazzoni described her as "one of the most honest people I know."

Respondent's modus operandi, having been clearly established, I find it entirely consistent and likely that Gupta and Mazzoni similarly questioned other employees about their union activities and engaged in the related acts of interference as the General Counsel's witnesses had testified. Thus, I credit the testimony of employee Gerald Deer over Mazzoni's version regarding the substance of their meeting in Gupta's office. Deer credibly testified that Mazzoni told him that he knew that he had signed a union card and asked him to reconsider and get his card back because the Company did not need a union. According to Mazzoni, on the occasion in question, Deer volunteered that he thought he had made a mistake by sending the Union his authorization card, to which Mazzoni responded, "Gerry, the decision is up to you, I can't tell you if you've made a mistake or not." Mazzoni denied saying anything else on that occasion noting, however, that Mazzoni and Gupta admittedly had previously urged employees to get their union cards back or throw them away. I reject Mazzoni's sudden professed reluctance to assist Deer, as incredible.

Similarly, I reject Gupta's testimony as incredible when in conflict with employee Frank Sabash. It is undisputed that Gupta and Sabash met twice privately and discussed improved employee benefits in the context of eliminating the Union as a threat to Respondent. The first meeting occurred in late September. According to Sabash, Gupta initiated this meeting and questioned him about the reasons employees were engaging in union activities. Although Gupta denied that he initiated this meeting, he corroborated virtually all Sabash's testimony regarding the second meeing, including the fact that he, Gupta, summoned Sabash and that the two of them rode in Gupta's car, where the latter promised to provide certain improved employee benefits if they rejected the Union.

Basically, all that is in dispute regarding the second meeting is that when it occurred Sabash asserted that it took place around 1 November. Gupta testified that this second meeting occurred within a few days of the first (or early October) and before he received notice of the representation petition and demand for recognition.[16]

In crediting Sabash over Gupta, it is noted, inter alia, that virtually all the corroborative testimony tends to support the former rather then the later.[17] Sabash noted, as a frame of reference, that Gupta showed him some type of notification (presumably from the NLRB) precluding him (Gupta) from interfering with employees' union activities. Because these restrictions did not extend to Sabash, Gupta approached the former to serve as a conduit from him to the other employees. Sabash credibly testified that as soon as he left Gupta's car and returned to the facility, he began to transmit to other employees Gupta's promises of benefits, which were linked to the demise of the Union.

As indicated previously, the half dozen witnesses to testify on this subject all corroborated Sabash, including Patricia Christian "one of the most honest people" known to Mazzoni. Thus, the overwhelming weight of the credible testimony disclosed, and I find, that the critical second meeting between Gupta and Sabash occurred around 1 November, as testified by Sabash.

Although I was impressed with the overall testimony of the General Counsel's witnesses, I found the Respondent's principal witnesses largely unresponsive, evasive, inconsistent, implausible, lacking in candor, and unreliable. Gupta, for example, incredibly asserted that during his first meeting with Sabash in late September, he told Sabash that he did not want to talk about the Union. (Tr. 836–837.) In this connection, it is noted that Gupta displayed no such inhibition vis-a-vis the subject of the Union, when admittedly a short time before he had urged all his employees to reject the Union and to throw away their union cards. Further, Gupta urged all his employees not to attend a union meeting and summoned several employees into his office, one at a time, to question them regarding their attendance at that meeting. One of these employees, Rose Miller, testified credibly, without contradiction, that Gupta told her, inter alia, that he was "shocked" and "disappointed" in her for going to the union meeting and asked her what she did with her union card.

In these circumstances, noting particularly that Gupta maintained a high antiunion profile, I find it highly unlikely and rejected his assertion that he told Sabash that he did not want to talk to him about the Union. Similarly, I find it incongruous and reject Gupta's testimony that he "kept quiet" and merely listened to Sabash at that first meeting (Tr. 851–852).

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[15] Although *Visco* is not alleged to be a statutory supervisor or agent, it is noted that, at all material times, he was also the manager in the storeroom, where, inter alia (as testified to by *Mazzoni*), *Visco* supervised *Diskevich* and *Zang*. It is not alleged nor contended that *Visco* engaged in any conduct violative of the Act.

[16] The date is critical if such conduct is to serve as a basis for setting aside the election. Moreover, in the circumstances of this case, as a predicate to any bargaining order, objections to the conduct of the election must be sustained and the election results must be set aside.

[17] It is also noted that *Gupta* perceived *Sabash* as a person who generated employee respect because he spoke in a "straightforward" manner. I found *Sabash* to be responsive, forthright, consistent, plausible, and credible as a witness.

Further, I found Gupta to be unresponsive, evasive, and lacking in candor regarding certain statements he made to employees on 13 November. For example, Gupta denied that he told employees on that occasion that he might close if the Union got in. When pressed further, however, Gupta admitted that he told employees, "There is a very real threat to the survival of the Company." Gupta belatedly admitted that he was referring to the Union when he made the remark.

I also found Mazzoni to be equivocal, unresponsive, inconsistent, implausible, and unreliable as a witness. Mazzoni's testimony regarding his transfer of employee Edward Ross is a case in point.

According to Mazzoni, employees are frequently transferred from one job to another and they are so informed at the time of hiring. Mazzoni testified that the decision to transfer Ross from the storeroom to the production area was made in early September with the change to take place whenever inventory was completed.

On 28 September, Mazzoni informed Ross that he was needed in production and reminded him that he was told when he was hired that he could expect such transfers. However, Mazzoni's testimony a moment later disclosed a far different reason for Ross' transfer, thereby raising serious questions as to his credibility and motivation. Thus, when Mazzoni was asked to clarify the matter of Ross' transfer, he explained that he "suspected" Ross of "shenanigans" in the storeroom and related one instance when he overheard Ross tell a truckdriver to take his time and not to return to the facility before 12 o'clock. Incredibly, Mazzoni testified that he did not take any action against Ross, "because I could never prove it," but he (assertedly) told the truckdriver, "You'd better be back before 12 o'clock." Mazzoni was then asked whether he at least spoke to Ross, to which Mazzoni provided a smorgasbord of responses. First, Mazzoni stated that he did not talk to Ross about the incident; however, when asked why, Mazzoni responded as follows:

> I might have—I don't know why, Your Honor. I might have talked to him. I'm—you know, I'm going by—trying to go by memory. I might have talked to him. I'm not saying that I—I could have talked to him. I don't know if I did or not.

Clearly, these responses do not inspire confidence that Mazzoni testified with conviction. In my view, based on my observations of Mazzoni as a witness and considering his entire testimony, I find it highly unlikely that Mazzoni merely experienced a lapse in memory or even that the incident occurred. Rather, I am persuaded that such equivocation, along with the shifting reasons for Ross' transfer,[18] indicates lack of candor and reflects adversely on Mazzoni's overall credibility.

Similarly, I reject as incredible Mazzoni's explanation for arriving at 13 when he spoke to employee Rose Miller about the number of employees at the union meeting at Denny's Restaurant. Although 13 employees attended that union meeting, Mazzoni denied that he knew how many attended. According to Mazzoni, it was "a pure guess." Mazzoni testified that he took a guess and figured that one-third of the employees would be interested in attending the union meeting, one-third would not be, and one-third would not care. Thus, of approximately 40 employees, 13 would attend. When asked why he made reference to any number, Mazzoni replied, "I have no reason."

As noted previously, also in dispute is whether Foreman Greg Ohler made certain coercive antiunion statements. I found Ohler not to be a credible witness and reject his denials. I find him to be generally vague, elusive, unsure, unresponsive, and implausible. For example, Ohler denied that he told employees "directly" that if the Union got in, the Company would close. When asked what he told the employees, Ohler responded, "Well, just like [there] might be rumors. I don't have any control over that myself whether the Company stays open or closes." A moment later Ohler displayed more confusion and uncertainty adding, "I don't know what I said. I don't think I said it would close."

It also appears, and I find, that Ohler took liberties with candor by testifying that Gupta merely asked him to make a speech to employees on behalf of Respondent without discussing the contents of such a speech. According to Ohler, Gupta's request that he make such a speech was "spur of the moment." Even Gupta acknowledged that "[Ohler] discussed with me what he thought he would speak." Clearly Gupta did not treat Ohler's speech on the basis of "spur of the moment." Thus Gupta testified that about 2 weeks before Ohler's speech, as part of Respondent's election campaign "strategy," the decision was made to have Ohler speak to all the employees on behalf of Respondent.

In sum, on the basis of the foregoing, the entire record, including demeanor factors, and except in those instances in which I specifically credit Respondent's witnesses, I credit the General Counsel's witnesses in all material respects when the testimony is in conflict.

2. The 8(a)(1) allegations

Having disposed of virtually all material credibility disputes in favor of the General Counsel, it then follows, and I find, for reasons noted more fully below, that Respondent, by its supervisors and/or agents, unlawfully interfered with employees within the meaning of Section 8(a)(1) by, inter alia, coercively interrogating employees about their union activities; conveying the impression to employees that their union activities were under surveillance; threatening employees with certain reprisals, including a plant shutdown; and promising higher wages and other benefits if the employees abandoned their support for the Union.

a. *Interrogation*

In large part, the testimony adduced by the General Counsel regarding the questioning of employees about their union activities by Respondent's officials was uncontroverted or admitted. Respondent, however, relying largely on the Board's decision in *Rossmore House*, 269 NLRB 1176 (1984), contends that such questioning was noncoercive and directed against employees "who should be considered open and active Union supporters." Regarding those employees who were not open and active union supporters, Respondent contends that its questioning of them was merely "innocuous" and not accompanied by threats or promises. Respondent also contends that such noncoercive questioning is privileged free speech under Section 8(c) of the Act.[19]

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[18] Later, *Mazzoni* supplied still another reason for transferring *Ross* out of the storeroom. According to *Mazzoni*, he decided to experiment and consolidate the work in the storeroom so that *Jerry Beduck*, an inspector, could also do the paperwork in that department (Tr. 731).

In *Rossmore House*, the Board held that in the total circumstances of that case, the questioning of a known and active union adherent about his union sentiments, unaccompanied by threats or promises, was noncoercive and did not violate Section 8(a)(1) of the Act. In so finding, the Board signaled its disapproval of any per se approach in analyzing alleged unlawful interrogation. Above at 1177. The Board noted some of the factors that may be considered, such as (1) the background; (2) the nature of the information sought; (3) the identity of the questioner; and (4) the place and method of interrogation (above at 1178 fn. 20).

In *Sunnyvale Medical Clinic*, 277 NLRB 1217 (1985), the Board applied the totality-of-circumstances test to a questioned employee who, unlike *Rossmore House*, was not an open and active union supporter. There, as in *Rossmore House*, the Board found the questioning noncoercive and lawful. The Board noted, inter alia, an absence of any history of animus or discrimination against union supporters; that the disputed questioning was general and nonthreatening; and that the questioner and individual involved had a friendly relationship and their conversation was casual and amicable.

The instant case disclosed a number of significant factors clearly distinct from the circumstances found in *Rossmore House* or *Sunnyvale Medical Clinic*. For the most part, the inquiries in dispute were not isolated, casual, or conducted in a context free of union hostility or other serious unfair labor practices. The admitted interrogations by Gupta on 27 September, as described below, are cases in point.

Respondent does not dispute that on 27 September, in the afternoon, employees Rose Miller, Brian Moree, and Richard Sneddon were separately summoned into Gupta's office, where they were asked by Gupta whether they attended the union meeting held the previous evening and why, and if they had signed union cards. Mazzoni, Respondent's plant manager, was also present. In evaluating the total circumstances, it must also be noted that the previous day, Gupta has repeated his profoundly held opposition to the Union to all his employees at a company-called meeting; that he urged his employees on that occasion to get their union cards back and throw them away; and that he told them not to attend the union meeting that night. Against this backdrop, I find no discernible basis for treating disputed inquiries of employees, one at a time, by the highest company officials in the owner's office (the locus of final authority), as isolated, casual, or nonthreatening. In any event, the record disclosed much more reflecting on the coercive nature of the interrogation.

Contrary to Respondent's assertions, Gupta did not limit his conversation with these employees to the aforenoted inquiries. Thus, Miller testified credibly and without contradiction that Gupta told her that he was "shocked" and "disappointed" that she had attended the union meeting. Gupta also inquired of Miller whether her husband was "a union man" and whether he put her up to it. In these circumstances, such inquiries cannot be deemed to be "casual" or "innocuous." Rather, this kind of probing more closely resembles a confrontation, with the employee forced to take a defensive posture for no legitimate reason. In Miller's case, she defended herself by telling Gupta "I didn't do anything [wrong]. No my husband doesn't tell me what to do." Miller was "upset" and left Gupta's office in a state of tears. I also reject the notion that Miller was an open and active union supporter. Clearly, the fact that Miller volunteered to Mazzoni that she had attended the union meeting does not establish that she was a self-proclaimed union advocate. Cf. *Premier Rubber Co.*, 272 NLRB 466 (1984) (questioned employees who wore union buttons).

As noted previously, Brian Moree and Richard Sneddon were interrogated separately much in the same manner as Miller. In the meeting with Moree, in addition to Gupta's inquiries, Mazzoni reminded him (Moree) of the Company's practice to frequently move employees around from job to job, but that this was not done to Moree because the Company knew that he enjoyed his job and that he could be trusted. Although Mazzoni's remarks contain an element of ambiguity, it is likely, and I am persuaded, that they were calculated to remind Moree, in a pressure setting (locus of final authority), that he (Moree) continued to work at a job he enjoyed at the pleasure of the Company and to get him to rethink his support for the Union. As such, I find that the questioning of Moree (as with Miller and Sneddon) in the manner and circumstances undertaken tends to restrain, interfere with, and coerce employees in violation of Section 8(a)(1), as alleged.

Later that same afternoon Gupta appeared at the work station of employee Barbara Potocnik and questioned her about her attendance at the union meeting. Gupta told Potocnik that he wanted to know why she went to the meeting because she had only been employed by the Company for 1 month. I find such questioning of Potocnik also coercive, noting, inter alia, that over the preceding few days, Gupta's distaste of unions was widely publicized; that Potocnik, as a relatively new employee, made her an easy and vulnerable target; that she was not an open and active union supporter within the meaning of *Rossmore House*; and, an hour or two earlier, Gupta coercively interrogated Miller, Sneddon, and Moree. Clearly, in such circumstances, Gupta's questioning of Potocnik cannot be deemed isolated, casual, or innocuous.

Respondent's officials coercively interrogated employees almost from the start of the union campaign and continued this course of conduct and related activities over the following weeks. Thus, on 21 September, only 1 day after union representatives first appeared outside Respondent's Monroeville facility, Mazzoni told Ross that he heard that the latter was the union instigator and questioned him (Ross) about that involvement. Although this conversation took place in a social setting at a bowling alley, the context was hardly casual. Ross did not regard the inquiry lightly; he denied any involvement, assertedly out of fear of losing his job. Similarly, Mazzoni treated Ross' possible involvement with deep concern as he asked the latter to do him a favor and repeat his denial to Gupta at work.[20]

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[19] Sec. 8(c) in pertinent part provides:

> The expressing of any views, argument, or opinion . . . shall not constitute or be evidence of an unfair labor practice . . . if such expression contains no threat or reprisal or force or promise of benefit.

Over the following week, Gupta questioned all his employees collectively (meeting of 23 September) and some individually about their reasons for supporting the Union. At the 23 September meeting Gupta not only told his employees that he did not want a union, he also linked the Union with possible loss of jobs and promised to satisfy certain of their concerns such as obtaining a refrigerator and microwave oven. In these circumstances, Gupta's inquiries, when considered along with his total remarks, clearly tend to restrain, coerce, and interfere with statutory rights within the meaning of Section 8(a)(1).

The credited testimony disclosed that on or about 7 October, Mazzoni told employee Gerald Deer that he would like to talk to him and then escorted Deer into Gupta's office. There, Mazzoni asked Deer, "What did the company ever do to you?" Mazzoni also told Deer that he knew that he (Deer) had signed a union card and urged him to get it back adding that the Company did not need a union. Although Mazzoni also told Deer that the Company would not hold a grudge or fire him because he had signed a union card, Deer testified that he still feared for his job. Approximately 1 hour later Mazzoni again pressed Deer about retrieving his union card and still again, a few days later. Here too, I find that Mazzoni's inquiry of Deer to explain his support for the Union ("What did the Company ever do to you?"), when coupled with Mazzoni's other remarks and continued efforts to pressure Deer to get his union card back unduly placed Deer in a defensive posture in violation of Section 8(a)(1), as alleged.[21]

In late October, Mazzoni also summoned employee Patricia Christian to Gupta's office, where he coercively interrogated her about her union card. As testified by Mazzoni, he told Christian, "Pat, I heard that you sent in a union card. Is there something wrong, are we doing something wrong to you?" Mazzoni then reminded Christian of their good longstanding relationship and urged her to tell him if anything was wrong. However, Christian also noted that Mazzoni described the "downfalls" of a union such as forcing companies to go bankrupt and lay off employees.[22]

b. *Surveillance and creating the impression of surveillance*

It is alleged that on 26 September, Respondent, acting through Mazzoni, kept under surveillance a union meeting at Denny's Restaurant, attended by Respondent's employees. In support thereof, Robert Cable testified that on 27 September someone he believed to be Mazzoni, "mentioned that someone has spotted my car at the Denny's Restaurant." I find Cable's testimony ambiguous, vague, and uncertain, and without more, it falls far short of establishing actual surveillance. Moreover, as noted previously, I was otherwise unimpressed with Cable as a witness (see fn. 12 above) and do not credit his testimony in any material respect when not corroborated. Accordingly, I will recommend that this allegation be dismissed.

It is also alleged that Gupta and/or Mazzoni at various times conveyed the impression to employees that their union activities were under surveillance. These types of cases have long turned on whether the inference was warranted that employees would reasonably assume from the supervisor's statements that their union activities were under surveillance. See *Schrementi Bros., Inc.*, 179 NLRB 853 (1969); *7-Eleven Food Store*, 257 NLRB 108, 116 (1981); *Aero Corp.*, 237 NLRB 455 fn. 2 (1978).

According to the General Counsel, Respondent's acts on 27 September of calling some employees into the office to interrogate them, inter alia, about their attendance at the union meeting held on 26 September "is clearly the type of conduct from which employees would reasonably assume that their union activities were placed under surveillance by Respondent." I find that the record does not warrant the aforenoted conclusion. It is noted, inter alia, that the union meeting at Denny's Restaurant was widely publicized. In fact, shortly before the union meeting, Gupta had convened all his employees and urged them not to attend that union meeting. Miller, one of the three employees called into Gupta's office and interrogated on 27 September, had advised Mazzoni a day earlier that she was going to attend the union meeting, and then again informed Mazzoni the following morning (without being asked) that she had in fact attended the union meeting.

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[20] Although *Mazzoni's* inquiry of *Ross* 21 September was not specifically alleged as unlawful interrogation, the General Counsel contends, and I find, that it clearly relates to the subject matter in the consolidated complaint and was fully litigated. Thus, it is noted, inter alia, that *Ross* and *Mazzoni* both testified and were cross-examined regarding this matter. Further, the essence of *Ross'* testimony regarding the conversation in question was largely uncontradicted or admitted. In these circumstances, the record supports, and I find, that *Mazzoni* interrogated *Ross* on 21 September, as contended by the General Counsel. See, e.g., *Caruso & Ciresi, Inc.*, 269 NLRB 265 (1984); *Gogin Trucking*, 229 NLRB 529 fn. 2 (1977), enfd. 575 F.2d 596 (7th Cir. 1978).

[21] I also find that *Mazzoni* by telling *Deer* that he knew that the latter had signed a union card conveyed the impression that Deer's union activities were under surveillance, as alleged.

[22] As noted previously, *Mazzoni* described *Christian* as "probably one of the most honest people that I know." I have accepted *Christian's* account of that meeting in its entirety. Thus, I find that *Mazzoni*, on that occasion, additionally violated Sec. 8(a)(1) by conveying the impression that union activities were under surveillance and threatening the loss of jobs. It is also alleged that *Mazzoni* coercively interrogated employee *Robert Cable* variously about union activities. Because I was unimpressed with *Cable* and *Mazzoni* as witnesses, and because the matters in conflict between them are essentially cumulative to previous findings, I deem it unnecessary to make any additional findings in this regard. Finally, it is alleged that on or about 19 October, Supervisor and/or Agent *Greg Ohler*, inter alia, coercively interrogated employee *Edward Ross*. I will treat this allegation below, together with other alleged unspecified reprisals made by *Ohler* on the occasion in question.

Moree and Sneddon, the other employees questioned by Gupta in his office on 27 September, were asked whether they had attended the union meeting; they were not told by either Gupta or Mazzoni that they had acquired knowledge of their attendance. In these circumstances, without more, I cannot infer that these employees reasonably assumed that their attendance at the union meeting or related union activities were under surveillance. For reasons noted below, I find that Mazzoni, on other occasions, created the impression to employees that their union activities were under surveillance, as alleged.

As noted above, Miller volunteered to Mazzoni that she had attended the union meeting at Denny's Restaurant. Miller also testified that Mazzoni, in turn, told her "that he knew that there were—I thought he [Mazzoni] said 13 people [were] at the Union meeting the previous day." Mazzoni confirmed that in responding to Miller, he told her that there were 13 employees at the meeting (the exact number). Mazzoni, however, asserted that his reference to the number of employees was a "pure guess" and denied that he knew the identity of the employees at the union meeting.

Although Miller subsequently downplayed the conversation by asserting that Mazzoni made reference to 13 employees in a joking manner, her own acts tend to betray this assessment. For example, Miller was unable to explain why she repeated Mazzoni's remarks to other employees.[23] Mazzoni himself did not assert that he was merely joking. It appears that Miller's defense of Mazzoni was predicated largely on their relationship, which Mazzoni acknowledged was "quite friendly." In circumstances in which, as here, a high-ranking company official makes reference to a specific number of employees at a union meeting for no apparent reason, which number corresponds or closely corresponds to the actual number in attendance, I find it reasonable for employees to assume that the company has that meeting under surveillance. See *Link Mfg. Co.*, 281 NLRB 294 (1986); *Sierra Hospital Foundation*, 274 NLRB 427 (1985).

It is also undisputed that in late October, Mazzoni summoned employee Patricia Christian into Gupta's office and told her that he heard that she had signed a union card, and then proceeded to denigrate unions. In these circumstances, noting that Mazzoni did not identify his source and that Christian was not an open and active union supporter, I find Mazzoni's unsolicited reference to Christian's card signing reasonably implies a form of surveillance in violation of Section 8(a)(1).[24] See *Pilgrim Life Insurance Co.*, 249 NLRB 1228, 1243 (1980); *Richlands Textile*, 220 NLRB 615, 625 (1975).

c. *No-Access Rule and interfering with the distribution of union literature*

In essence, it is alleged that Respondent, on 13 November, promulgated, maintained, and enforced a no-access rule vis-a-vis the distribution of union literature. The parties stipulated that since January 1985, Respondent's only written notice to nonemployees prohibiting access to its facilities in Monroeville and Penn Hills was a sign posted outside the front entrance of its Monroeville location stating "Salesmen by appointment only."

The General Counsel contends, the record supports, and I find that the no-access sign was aimed at keeping nonemployee salesmen or vendors who had not obtained prior company clearance from dealing with Respondent or reaching Respondent's work force *inside* Respondent's facilities. As testified by Mazzoni, the Company's policy was not to permit salesmen "or bring any vendor *in there*, unless it is cleared through us." (Emphasis added.) Mazzoni's use of the phrase "in there" is entirely consonant with the view that Respondent's policy related solely to access within (not outside) the walls of the building.

Mazzoni also testified that on three occasions during the summer of 1985, he had asked vendors to leave the premises. It appears, however, that the vendors had already entered the building without company clearance and were attempting to sell items to Respondent's employees. For example, employee Harold Morgan testified credibly that on the one occasion he observed Mazzoni ask a vendor to leave, that vendor was already inside the facility trying to sell items to Morgan at the latter's work station. The record is devoid of credible or corroborative testimony tending to establish that the rule was ever invoked outside the building structure. On the other hand, employee Ross testified credibly that Respondent's employees (with no apparent difficulty), have daily access at lunchtime to Munch's Lunches, a foodstuff vendor just *outside* Respondent's Monroeville facility.

Also militating against any finding that Respondent had a rule or policy dealing with nonemployee access outside the building structure prior to 13 November is the fact that the Union had twice before distributed union material in virtually the same disputed area and Respondent had not raised objections. Indeed, on the second such occasion (4 or 5 October), Mazzoni had come to the door of the facility to inquire whether the Company was being picketed, and when told by Union Representative Coates that it was not Mazzoni, went back inside the facility without making any attempt to curb Coates' activities.

It is undisputed that, on 13 November, Respondent's officials attempted to prevent Union Representatives Coates and Antel from distributing union literature immediately outside the Monroeville building facility. Respondent's building in Monroeville is located in an industrial park where it appears that there are a number of building complexes. It also appears that Respondent's premises is part of a larger building structure shared by three other companies (Miss Chic, Responics, and Kenny Korten) with separate access doors for those companies. (G.C. Exh. 32.)

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[23] *Miller* conceded that she repeated *Mazzoni's* remarks to other employees. Employee *Ross* credibly testified that *Miller* told him that *Mazzoni* knew who had attended the union meeting in question.

[24] The General Counsel contends that *Mazzoni* further conveyed the impression of surveillance to employee *Edward Ross* on or about 8 October and employee *Joe Shropshire* sometime in November. I find it unnecessary to treat these additional counts noting, inter alia, that they were not specifically alleged; that these matters were not fully litigated; and that findings concerning these matters are merely cumulative and do not impact on the recommended remedy. But see fn. 20, above.

On the occasion in question, Coates and Antel arrived at the Monroeville location at approximately 3 p.m., where they remained for several minutes in the parking lot facing the rear of Respondent's facility. At approximately 3:15 p.m. Mazzoni appeared at the rear exit door and told Coates and Antel that "You have the right to pass out literature, but not on our property. I want you to get off. I want you to leave." Coates disputed Mazzoni's claim that they were on company property, contending that the disputed area was a public roadway. Mazzoni told Coates and Antel that he would contact his lawyer (Eckle) to remove them from the property and with that Mazzoni went back inside to phone Attorney Eckle. There were no employees in the immediate vicinity at the time of this encounter.

Sometime between 3:45 p.m. and just before the end of the 4 p.m. day shift, Eckle, accompanied by Mazzoni, introduced himself to Coates and Antel and (as testified by Eckle) told them that "we felt that they were on our property." Eckle asked the union representatives to move to another area in the parking lot pointing out that "we considered them trespassing." Coates and Antel debated Eckle's claim that the disputed area was private rather than public and they refused to leave. Eckle threatened to call the police, but when told by Coates to go ahead, the former elected not to take further action. This discussion took place approximately 15 feet from the rear of the exit door.

The credible testimony disclosed that while the aforenoted company-union encounter was in progress, other employees could observe them from the nearby open-loading area and word spread rapidly to other employees inside the facility. Employee Rose Miller testified that approximately 10 minutes before she signed out, she was told by another employee of the encounter at her work station which is near the front or opposite side of the facility. Miller also testified that she noticed that after she had signed out, at least 10 employees were standing around in the parking lot "to see if anything was going to happen." Employee Edward Ross testified that, around the same time, Mazzoni stepped in front of him making it more difficult for Ross to receive the union material from Coates.

First, I find, contrary to Respondent, that the record is devoid of any probative evidence tending to show that the disputed area is Respondent's private property. Thus, Respondent made no effort to proffer a deed, lease, or other written instrument in support of its private property contention. On the other hand, the credited testimony disclosed that the area between the building and parking lot, about 20 to 30 feet wide, is commonly traversed by cars, trucks, various vendors, and employees of other companies located in the same industrial park. In this regard, it is also noted that there are no signs prohibiting such travel. Even Attorney Eckle's words to Coates that he "felt" that Coates was on "our property" does not smack of unqualified conviction. In these circumstances, I am persuaded that Coates and Antel were not conducting union business on Respondent's private property and trespassing. As such, Respondent's efforts to curb them in the manner set forth above wrongfully and unlawfully interfered wirh employee rights to receive union material, as alleged. See *Gainesville Mfg. Co.*, 271 NLRB 1186 (1984).[25] In any event, I find that Respondent's no-access rule, as it was applied to Coates and Antel on 13 November, was actually a new rule, discriminatorily promulgated, maintained, and enforced in violation of Section 8(a)(1). See *Knogo Corp.*, 262 NLRB 1346, 1360–1362 (1982), enfd. in pertinent part 727 F.2d 55 (2d Cir. 1984); *Chrysler Corp.*, 232 NLRB 466, 476–478 (1977).

According to the General Counsel, on that same day (13 November), Gupta similarly interfered with Union Representative Radulovich at Respondent's other location. Regarding Respondent's Penn Hills location, it is alleged that Gupta "Physically interfered with the distribution of union literature to employees." I find, for reasons noted below, that this allegation is not supported by credible evidence.

According to Radulovich, he attempted to distribute union material to employees about 4 p.m., as they left work, but that Gupta interfered by stepping outside Respondent's building, where he stationed himself a few feet away from Radulovich. Thus, Radulovich asserted that because of Gupta's presence, the employees refused to accept any of his union material and raced past him to the parking lot and their cars and departed.

It is undisputed that Gupta and Radulovich said nothing to each other and that Gupta did not make any physical gesture. Gupta denied that he came out of the building, asserting that he merely looked out from the office door facing Radulovich. Employees Daniel Grum and Lloyd Ohler fully corroborate Gupta. The only other employee to leave the premises during the time in question was Bruce Moree, and he testified that he did not notice Gupta's presence at all.[26] I credit the overwhelming weight of the testimony that tends to contradict Radulovich's assertion that Gupta has stationed himself outside the building at the time in question. Radulovich's affidavit to the Board also tends to confirm Gupta's version. There, in pertinent part, Radulovich stated, "I was standing about 10 feet from the doorway. Gupta had the door open in the building and was watching me. Gupta did not say anything to me."

In these circumstances, I find that the record is devoid of any probative evidence tending to show that Gupta physically, or otherwise, interfered with the distribution of union literature, as alleged. Accordingly, I shall recommend dismissal of this allegation.

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[25] The General Counsel contends, the record supports, and I find that the Respondent's acts and conduct on this occasion, in the presence of other employees, reasonably conveyed the impression that union activities were under surveillance, particularly, as here, Respondent had no legitimate right to curb such activities outside its facility. See *Gainsville Mfg.*, above; cf. *ITT Automotive Electrical Products*, 231 NLRB 878 fn. 1 (1977).

[26] The only other individual working that day was *Greg Ohler*, and he workerd overtime on that occasion.

d. *Soliciting complaints and grievances and making promises in the context of the Union's organizational drive*

It is undisputed that on 23 September, within days after the Union commenced its organizational drive, Respondent convened all its employees at its Monroeville facility to dissuade them from supporting the Union. Gupta told his employees that Respondent was a young company and could not afford a union and that the employees did not need a union. In the course of this speech, Gupta acknowledged that "maybe" he had not paid sufficient attention, but he was now prepared to listen. As testified by Gupta he asked the employees "to [tell] us what are the things that bother you. What are the things you want us to look into." Employee Frank Sabash pointed out that employees were afraid to talk to Gupta. Gupta replied that his door is always open and that employees could talk to him at any time.

The employees raised some 20 to 25 items of concern that were noted in writing by a Gupta official at Gupta's request. Although Gupta rejected some of these items, he was receptive to others and promised to provide a refrigerator and microwave oven, items requested by one of the employees.[27]

Gupta apparently perceived Sabash to be an employee-spokesman. Within days of the 23 September meeting, Gupta approached Sabash at the latter's work station to learn more about the employees' concerns and their attraction to the Union. Sabash told Gupta, inter alia, that employees wanted more money and broader, family-type hospitalization coverage. It is undisputed that, subsequently, Sabash was ushered into Gupta's office and from there to Gupta's car where Gupta spoke privately to Sabash about higher wages and certain improved benefits to keep the Union out. Sabash testified credibly without contradiction that Gupta promised to provide 25-cent across-the-board wage increases, with an additional 25 cents for the second shift and improved family insurance coverage "if I helped him talk people out of voting for the Union." As stated by Gupta, he told Sabash "if that's what it takes [to keep the union out], we'll go ahead." Admittedly, Gupta expected Sabash to bring these promises to the attention of other employees.

In these circumstances, it is unmistakable, and I find, that Gupta solicited employees' grievance and complaints; indicated that he would remedy some of them; and conditionally promised higher wages and improved benefits to induce employees to abandon the Union. Gupta, by so inextricably linking his actions to the defeat of the Union, interfered with, restrained, and coerced employees within the meaning of Section 8(a)(1). See *Long-Airdox Co.*, 277 NLRB 1157 (1985); *Sangamo Western* 251 NLRB 1597, 1608-1610 (1980); *Studio S. J. T.*, supra.

e. *Soliciting employees to repudiate the Union, to revoke union authorization cards and offering assistance therewith, and instructing employees not to attend a union meeting*

The record disclosed that at the 23 September meeting, Gupta convened all his employees for the principal purpose of urging them to repudiate the Union. As noted previously, he told his employees that the Company could not afford a union and that they did not need a union.

It is also undisputed that Gupta, on his own initiative, told his employees at that 23 September meeting to discard their union authorization cards. Further, Gupta instructed those employees who had already submitted signed cards to the Union to send letters to the Union asking for those cards to be returned. Mazzoni advised the employees to send the letters by certified mail and noted that he had posted the union address on the bulletin board. The credited testimony also disclosed that Mazzoni offered to help any employee needing assistance in writing the letter. I find, for reasons noted below, that Respondent by such statements, acts, and conduct unlawfully interfered with and restrained employees in violation of Section 8(a)(1).

Although under "[e]stablished Board principle," employers may bring to employees' attention their right to resign from the Union and revoke authorizations if done in a setting free of promises of benefit or threats and coercion, "*employers may not solicit employees to withdraw from union membership.*" (Emphasis added.) See *Ace Hardware Corp.*, 271 NLRB 1174 (1984). Here, inter alia, Respondent's unrequested advice regarding the mechanics of revocation was coupled with a command that employees tear up their union cards and throw them away.[28] Respondent's reliance on *Aircraft Hydro-Forming*, 221 NLRB 581 (1975), is factually distinguishable and misplaced. There, the employer made no attempt to elicit information whether employees availed themselves of its unrequested advice, nor did it assist or offer to assist employees in the process of revocation. It was noted, however, that "giving assistance where the idea originates with the employer is violative of the Act." Above at 583. In the instant case, aside from Respondent's offer of assistance on 23 September, the record disclosed that Respondent, by Mazzoni, in early October actually assisted employees Dinning, Lukehart, and Smutek in the revocation process. Thus, Respondent, inter alia, provided the stationery on which the letters were written, supplied the revocation language, reminded these employees that the letters had to be certified, and also provided the Union's address.

I reject Respondent's contention that these employees approached Mazzoni of their "own free will" and that therefore the revocations "were not [the product] of any impermissible conduct" on its part. Respondent fails to address its earlier unrequested efforts on 23 and 26 September to get employees to repudiate the Union and retrieve their union cards. Denning, for example, recalled Mazzoni stating at one of their meetings that he would help employees write the revocation letters. It is also noted that alleged discriminatees Diskevich and Zang were discharged before these employees approached Mazzoni for help in retrieving their union cards. On this subject, Respondent's witness, Smutek, provided the following explanation for withdrawing her card: "[T]he Union didn't show me anything. Bob Zang and Dave Diskevich didn't get their jobs back. Also . . . there's a lot other people that are unemployed because the Union." Dinning testified in a similar fashion.[29]

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[27] The record disclosed that the refrigerator and microwave oven were installed about 1 month later. As previously indicated, I have rejected the testimony of *Gupta* and *Mazzoni* regarding the timing of the decision to purchase these items as not credible. Clearly *Gupta's* promise o provide these benefits was calculated solely to stall and defeat the Union's organizational effects. As employee *Ross* overheard *Mazzoni* say few days later that once the Company gets the refrigerator and microwave, "they [the employees] would knock this shit off." Compare *Studio J. T.*, 277 NLRB 1189 (1985), in which it was noted that the new benefits "may well have been under some sort of consideration prior [to the ate offered], but they were inchoate until Tasse got wind of the [union] rganizing."

[28] At the same meeting Respondent, for reasons noted previously, unlawfully solicited grievances and complaints sufficient for employees to draw an inference that at least some of them would be rectified.

The credited testimony also disclosed that a few days after Mazzoni assisted employees Dinning, Lukehart, and Smutek in retrieving their union cards, he began to pressure employee Deer about his intentions to write the Union for the return of his union card.

Under all the circumstances, the conclusion is inescapable, and I find, that Respondent unlawfully interfered with, restrained, and coerced its employees in its effort to get them to retrieve their union authorization cards and repudiate the Union.[30] Accordingly, I find that Respondent violated Section 8(a)(1), as alleged. See also *Studio S. J. T.*, above; cf. *Aircraft Hydro-Forming*, above.

f. *Withholding merit increases and bonus payments during pendency of petition*

A composite of the credited testimony disclosed that employees generally receive a 25-cent-per-hour wage increase after a 90-day probationary period and are eligible to receive merit wage increases of 25 to 50 cents per hour approximately every 90 days thereafter for good work performance. This policy is explained to new employees by Respondent at the hiring interviews.

Employee Rose Miller commenced her employment for Respondent on 11 March 1985 and received her first wage increase on or about 1 July 1985. Sometime in October, Miller asked Mazzoni about a merit raise, which she thought was due. Mazzoni told her that the company attorney had advised against giving anyone a raise who had not been promised one before the union campaign. I find, in the circumstances of this case, that Mazzoni's statement as conveyed to Miller is erroneous and does not comport with the clear weight of Board authority.

Although Respondent undoubtedly had discretion in the implementation of merit wage increases regarding particular employees it could not predicate the suspension of that policy on the advent of the Union. *Stumpf Motor Co.*, 208 NLRB 431, 433–434 (1974); *Gossen Co.*, 254 NLRB 339, 353–355 (1981); *General Motors Acceptance Corp.*, 196 NLRB 137 (1972). As noted by the Board in *Duo-Fast Corp.*, 278 NLRB 52 (1986): "It is well settled that an employer must continue to provide benefits as if an election was not pending." Here Mazzoni's statement, amounting to a freeze and linking such action to the pendency of the union campaign, contravenes established Board principle and interferes with employees' Section 7 rights. See, e.g., *PJR Enterprises*, 240 NLRB 274, 277 (1979); *Gates Rubber Co.*, 182 NLRB 95 (1970); *Stumpf Motor Co.*, above. Accordingly, I find that Respondent violated Section 8(a)(1) as alleged.[31]

The record also disclosed that Respondent provides a production bonus to its employees on a quarterly basis. The size of the bonus is based on the amount of units built and shipped. Employee Edward Ross credibly testified that on 19 October, Foreman Greg Ohler complained to him that no one, including Ohler, would be getting the bonus "because all this union shit is going on." Ohler, for his part, admitted telling Ross, "Everything is on hold." Because the bonus was an existing benefit, Ohler's statement is governed by the same principles noted above regarding merit raises. Accordingly, I find that Ohler's statement is impermissible and violative of Section 8(a)(1).[32]

g. *Greg Ohler's supervisory and/or agency status and alleged misconduct*

(1) Supervisory and/or agency status

The record disclosed that Ohler is paid hourly, receives overtime pay, and spends a large portion of his time doing production work in the production area. Although these factors tend to militate against a finding of supervisory status, the record also disclosed that Ohler possessed significant responsibilities tending to support such a finding.

Thus, the record disclosed that Ohler is responsible for meeting deadlines as called for on customer purchase orders and for filling these orders. As testified by Ohler: "I make arrangements to have the job completed by [the order] date so [the customer] receives it on time." To accomplish this, Ohler is directly responsible for assigning all the production work and compiles and maintains the appropriate production records. Ohler performs these recordkeeping functions in Gupta's office, where he spends approximately 2 hours each day. Ohler is also responsible for keeping and maintaining employees attendance records. In this connection, it is noted, that Ohler is expected to be advised if employees are out sick, and Ohler will talk to employees about excessive tardiness. It is also noted that Ohler's hourly rate of $7 is substantially more than the average hourly rate of about $4.50 earned by the other casting division employees.

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[29] This testimony will be treated further, below, regarding majority status and recommended remedy. It should be noted, for reasons discussed below, that *Zang* and *Diskevich* were found to have been discriminatorily terminated in violation of Sec. 8(a)(3), as alleged.

[30] Given the contemporaneous unlawful conduct engaged in by Respondent on 23 September, I also find that Respondent unlawfully directed its employees to refrain from attending the union meeting on 26 September.

[31] I find that *Gupta* also violated Sec. 8(a)(1) by telling employee *Harold Morgan* that he would think about Morgan's request for a merit raise, but that he would talk further with him on the subject only "after all this union business was over with." In crediting Morgan's testimony I have noted, inter alia, *Gupta's* antiunion hostility and that *Morgan's* testimony is internally consistent with that of *Miller*. *Morgan's* testimony and the record otherwise were too imprecise to support the 8(a)(3) allegations on the merit raises in question. *Morgan* exhibited poor recall and his testimony on this subject was disjointed, somewhat inconsistent, unclear, and otherwise unsupported by credible or probative evidence. Because the General Counsel has not established by a preponderance of credible or probative evidence that Respondent has actually withheld merit raises in violation of Section 8(a)(3), I will recommend that these allegations be dismissed.

[32] I find, for reasons discussed separately below, that *Ohler* is a statutory superior. As such, I will treat more fully the conversation in question as well as other alleged misconduct by *Ohler*.

Although the foregoing factors are not inconsequential, I find even more significance in the fact that Ohler is in complete charge of the casting division in Gupta's absences. As Gupta splits his time between the Penn Hills and Monroeville facilities, there are substantial periods, including Gupta's vacations, when Ohler is the highest-ranking company official at Penn Hills. On all occasions, Ohler reports only to Gupta, as does Mazzoni, the plant manager at Monroeville.

Still further, it appears that Respondent also perceived Ohler to be supervisory or managerial as it did not include his home on the election eligibility list. In this regard, it is also noted that Ohler was admittedly scheduled by Respondent to deliver a campaign speech on its behalf at the Monroeville facility and was introduced on that occasion as a "boss" (as credibly testified by employee Ross).[33]

Under all the circumstances, noting particularly that Ohler, on numerous occasions, was the highest-ranking company official at Penn Hills, in charge of the casting division employees, and exercised some independent judgment in this regard, I find that at all material times Ohler performed as a statutory supervisor and agent, as alleged.

(2) Ohler's alleged misconduct

For reasons discussed previously, I found Ohler's statement to Ross on 19 October blaming the Union for Respondent's withholding of bonus payments, to be violative of Section 8(a)(1). Ohler conceded, inter alia, that on the same occasion he told Ross that he had heard Ross' name concerning the Union; that he asked Ross "what he heard about the Union"; and that he asked Ross "who was organizing [the Union]." Ross testified credibly that Ohler also told him that "if he [Ohler] got his hands on the guy who started this, he would make life rough for him." Although Ohler denied that he threatened any reprisals, he admitted telling Ross that "[he] would like to get [his] hands on the person doing this union stuff."

Having found Ohler to be a statutory supervisor, I further find that Respondent, by Ohler's remarks, unlawfully interrogated Ross and threatened unspecified reprisals in violation of Section 8(a)(1), as alleged.

The General Counsel also contends, the credited testimony supports, the matter has been fully litigated, and I find that Ohler threatened employees in violation of Section 8(a)(1) with a reduction in wages to the minimum hourly rate[34] and a possible plant closedown if the Union got in.[35]

h. *References to Westinghouse, threatening loss of jobs, plant shutdown, and other unspecified reprisals*

Respondent's Monroeville facility produces resistors. It is undisputed that Respondent's sole customer for resistors is Westinghouse. The record disclosed that after the Union initiated its organizing campaign and both before and after the union representation petition was filed, Gupta made reference to Westinghouse in antiunion speeches. The first such occurrence was on 23 September, 3 days after the Union first appeared at Respondent's Monroeville facility to distribute the union material. On that occasion, Gupta convened all his employees and told them that they did not need a union noting, inter alia, that Westinghouse would probably not like the idea of Respondent's employees being unionized either.

Although for reasons discussed previously, I found that Gupta, on the occasion in question, inter alia, unlawfully solicited employee grievances, I am not persuaded and reject the General Counsel's contention that Gupta also threatened employees at that time with the specter of Westinghouse pulling its contract and dealing with another supplier. In this connection, it is noted that although the General Counsel paraded a host of witnesses, only former employee Joe Shropshire testified in support thereof and only after being led somewhat by the General Counsel. Shrosphire may have confused this meeting with the meeting on 13 November in which Gupta admittedly referred to Westinghouse in an antiunion speech dealing with the potential loss of jobs to competitors overseas.

Gupta admittedly told his assembled employees in a speech on 13 November (2 days before the election), that Westinghouse was merely a customer and noted that "competition is tough" with "ten different manufacturers for [our] product worldwide." He explained that "international competitions" are free of union restrictions and to make his point, Gupta gave an exaggerated illustration of a football game restricted by union rules. In essence, Gupta told his employees of a quarterback who is denied the option of throwing to a running back because under union rules, the runner's job description precludes him from catching a pass. Employee Edward Ross testified credibly that on the same occasion, Gupta told the employees that if payroll costs are not kept down, companies relocate overseas and jobs are lost and employees are laid off.[36] Gupta, in advising the employees to vote against the Union and to protect their jobs, admittedly warned that "[the union represented] a very real threat to the survival of this company, and their job[s]."

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[33] As noted previously, I found *Ohler* to be, inter alia, generally vague, elusive, unsure, and lacking candor as a witness. *Ohler*, when asked whether he was introduced as the boss of the casting division, responded, "I don't think so, no." I found Ohler's equivocal denial reflective of his testimony generally and reject it as unreliable.

[34] Compare *Coach & Equipment Sales Corp.*, 228 NLRB 440, 441 (1977), in which the foreman "remarked on the Company's 'legal right' to lower wages to the minimum if the Union came in."

[35] As noted previously, I did not find *Ohler* to be a credible witness. Regarding the aforenoted threats ascribed to *Ohler* by employees *Bruce Moree* and *Greg Schoch*, *Ohler* was ambiguous, elusive, evasive, inconsistent, and implausible. For example, when asked whether he told employees that Respondent would be forced to close down if the Union got in *Ohler* responded, "Not directly, No." Ohler's effort to clarify was hardly a satisfactory explanation. Thus, Ohler explained, "I don't have any control over that myself whether the Company stays open or closes." In crediting the General Counsel's witnesses, it is also noted that Respondent's witness, employee *Daniel Grum* testified on recross-examination that *Ohler* told the employees "in a round-about fashion that if the Union got in, the Company might close."

In assessing Gupta's remarks in their entirety, I find the conclusion inescapable that he unlawfully threatened his employees that if they unionized, they faced the risk that Westinghouse, its sole customer for resistors, would find another supplier, forcing Respondent to close its plant with a concommitant loss of jobs. Gupta did not predicate his warning vis-a-vis, the Company's "survival" and loss of "job[s]," on objective facts. For example, the record is devoid of any evidence tending to show that Westinghouse maintained a policy against contracting with unionized companies. See *National Micronetics*, 277 NLRB 993 (1985); *Crown Cork & Seal Co.*, 255 NLRB 14 (1981). Cf. *Long Airdox Co.*, 277 NLRB 1157 (1985) (employer's statement had a "factual basis" and was squarely protected by 8(c)). Gupta's unsubstantiated assertion regarding the risks of unionization, coming as it did from Respondent's owner and president in such explicit terms, presented a distinct and imminent danger. Compare *Tri-Cast, Inc.*, 274 NLRB 377 (1985) (in which the comments in dispute were "moderate in tone" and "couched in terms of what might happen *'if'* certain events occur").

Respondent's heavy reliance on *Daniel Construction Co.*, 264 NLRB 569 (1982), is misplaced and other cited cases are factually distinguishable. In *Daniel Construction*, a company vice president was asked by employees whether the general contractor would cancel its contract with the subcontractor if they unionized, and he responded, "[I]f we were no longer competitive, why they could cancel the contract." There, the Board found the vice president's remarks protected by Section 8(c) of the Act but noted, inter alia, that he "neither expressly nor impliedly predicted what impact unionization would have on Respondent." In the instant case, unlike *Daniel Construction*, Gupta stated directly that the Union posed "a very real threat" to Respondent's demise and loss of jobs, thereby focusing responsibility for such economic consequences squarely on the Union.[37] In the absence of objective facts showing that unionization impacts on Respondent's survival and loss of jobs, I find that Respondent, by Gupta's statements on 13 November, constituted a threat in violation of Section 8(a)(1), as alleged. See *NLRB v. Gissel Packing Co.*, 395 U.S. 575, 618 (1969).

The General Counsel also contends that Respondent's posted campaign sign independently threatened employees with loss of jobs in violation of Section 8(a)(1). The parties stipulated, the record disclosed, and I find that the sign was conspicuously posted on the door leading to the office at the Monroeville facility on 8 November and observed at all material times by employees.

According to the sign, jobs are lost to overseas competitors because they are "non-union" and employees' "wages are far less." The wage gap is shown graphically by percentages. Further, the sign noted that Americans in ever-increasing percentages are buying products produced overseas because they "buy products for the best bargain." Immediately thereunder, the sign depicted, in miniature picture form, 12 industries that are losing their share of the American market to overseas competitors since 1978 and 1979 and the percentages. At one side on the bottom the sign concludes, "So plants close and jobs go overseas." At the other side, the sign concludes with the admonition, "Protect your jobs: Vote No."

I find, in agreement with Respondent, that the "[admonition] when viewed in the context of the entire sign becomes unobjectionable." The General Counsel does not contend, nor does the record disclose, that the charts, graphs, or percentages are inaccurate. I construe the sign in its entirety as representing Respondent's opinion on the basis of demonstrable facts that American jobs are being lost generally to nonunion competitors overseas and that Respondent is not immune from such economic consequences. As such, I find that the sign falls short of containing a threat within the meaning of Section 8(a)(1), and I will recommend that this allegation be dismissed.

Still further, it is alleged, the credited testimony supports, and I find that Mazzoni also made various threats to employees in violation of Section 8(a)(1). Thus, I find that on 27 September Mazzoni threatened employee Brian Moree with some unspecified reprisal, perhaps a job transfer, when Mazzoni reminded Moree of the ease in which employees are moved from job to job, but noted that Moree continued to work on the same machine because Respondent knew he was happy and could be trusted. Noting, inter alia, that Mazzoni's remarks were made in an antiunion context, it is highly likely, and I find that he intended to convey to Moree that he too could be moved or face some other reprisal if he continued to support the Union.

Other threats by Mazzoni in violation of Section 8(a)(1) were directed at employees Edward Ross and Barbara Potocnik. Employee Ross testified credibly that on or about 8 October, Mazzoni told him that he had heard that he, Ross, and Potocnik were talking about the Union on the job and that if such information came to him again, Mazzoni would take disciplinary action against both of them. In the absence of any evidence that such protected concerted activity conflicted with any valid nondiscriminatory company rule, I find that Mazzoni's remarks, inter alia, constituted a direct threat of reprisal in violation of Section 8(a)(1).

Regarding Potocnik, she testified credibly that about 2 weeks later, she met with Mazzoni and complained about her job assignments and told Mazzoni that she thought she was being punished for having attended the union meeting at Denny's. As described by Potocnik, Mazzoni got really upset. She testified credibly that Mazzoni responded as follows: "There will be no Goddamn union here; and if a Goddamn union gets in, I'll close the Goddamn place myself."

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[36] It is noted that *Ross'* testimony is largely corroborated by *Gupta* and consistent with the information contained in Respondent's campaign sign posted on 8 November (G.C. Exh. 5). Although *Gupta* spoke of the need to keep payroll costs down, it is also noted that Respondent's existing policy provides for merit raises for good work and bonus payments every 90 days.

[37] Clearly, *Gupta* intended employees to perceive his remarks as a threat. As employee *Harold Morgan* credibly testified, a few weeks earlier, *Gupta* told *Morgan*, if the Union got in, Westinghouse would pull out, and the plant would close down. Further, *Gupta* urged *Morgan*, a more senior employee, to pass on *Gupta's* remarks to the younger employees. It is noted that *Gupta's* efforts to enlist *Morgan* were similar to his efforts to deputize *Sabash* around 1 November for much the same purpose, to wit, to dissuade employees on *Gupta's* behalf, from supporting the Union.

3. The 8(a)(3) allegations

a. *The transfer of Edward Ross*

A careful analysis of the total circumstances involving the transfer of Ross persuades me that it was done for discriminatory reasons. Ross was clearly the principal union protagonist at Respondent's facilities. The initial union organizing meeting was arranged between Union Representative Radulovich and Ross and then held on 16 September in Ross' apartment. Ross signed a union authorization card on that occasion, and a day or two later he became an "official organizer."

On 20 September, Union Representatives Radulovich and Coates appeared for the first time at Respondent's Monroeville facility to distribute union material. As testified by Gupta, Mazzoni phoned him at home to tell him "Bad news. We h[ave] been invaded by United States Steel Workers Union."

It is admitted that Mazzoni told Ross the following evening at a bowling alley that he had heard that Ross was "the one instigating the Union." Although Ross denied union involvement, and Mazzoni professed to have believed him, I am hardly persuaded that Mazzoni was satisfied with Ross' assurances, particularly, as Mazzoni acknowledged that he was told by a number of employees "[Ross] was behind the union cards." One week later, Mazzoni transferred Ross out of the storeroom, where his work had permitted him to travel about the facility, to production, where he was physically restricted to his work area. Ross' wages and benefits and work conditions otherwise remained the same.

The disputed transfer must be assessed against a backdrop of Respondent's antiunion hostility and contemporaneous unfair practices, much of which has been previously described in detail. Only 2 days before Ross was transferred, Gupta told all his employees that they did not need a union and directed them not to attend the union meeting that was held later that evening at Denny's Restaurant. Ross was one of 13 employees to ignore Gupta's wishes. I find it highly likely that Mazzoni had knowledge of Ross' attendance, noting, inter alia, that the following morning, he told his good friend, employee Rose Miller, that 13 employees were at the union meeting and that she and other employees were unlawfully interrogated about their attendance at the union meeting.

Of overriding significance, however, in terms of company knowledge, is the credited and uncontradicted testimony of employee Frank Sabash. Thus, Sabash testified credibly that in early November, Mazzoni told him that Ross was moved out of the storeroom where Ross could no longer be trusted because of his union activities.[38] Further, Sabash testified credibly and without contradiction that, around the same time, Gupta told him that there was a chance of Ross going back to his job in the storeroom if the Union did not get in. In the foregoing circumstances, noting particularly that Sabash, for reasons discussed previously, was an impressive and credible witness otherwise, and that his key testimony regarding statements made by Mazzoni and Gupta about Ross was uncontradicted, I find that such testimony clearly establishes a nexus between Ross' union activities and Respondent's disputed action. Thus, by crediting Sabash and having considered the highly suspicious timing of Ross' transfer, as well as Respondent's antiunion animus and contemporaneous unfair labor practices, I find, applying the Board's *Wright Line*[39] principles, that the General Counsel has demonstrated that Respondent's disputed action, at least in part, was predicated on union or unlawful considerations.

Under *Wright Line* principles, once having found unlawful motivation, the burden then shifts to Respondent to establish that it would have taken the disputed action, apart from any unlawful considerations.[40] I find that Respondent failed to satisfy this burden noting, inter alia, its shifting positions, conclusionary and implausible testimony, and the manner and circumstances of the disputed transfer itself.

Mazzoni testified that in early September, he and Gupta made a decision to transfer Ross out of the storeroom but not until inventory was to be completed, on or about 23 September. According to Mazzoni's unsubstantiated testimony, on 28 September Respondent needed someone in production and decided to move Ross at that time.[41] Although at first Mazzoni did not indicate that there was anything wrong with Ross' work performance, when questioned further, he later explained that in early September he had decided to move Ross out of the storeroom because he had overheard Ross tell one of his truckdrivers to take his time in returning to the storeroom with his pickup. As testified by Mazzoni, "I wasn't completely happy with the job Mr. Ross was doing . . . there [were] a lot of shenanigans." Incredibly, Mazzoni did not take any action, stating, "I could never prove it." Mazzoni could not recall whether he ever complained to Ross about his work. (Later Mazzoni volunteered, "I probably didn't talk to him," but asserted without corroboration that he had complained to Storeroom Manager Visco. In fact, when Mazzoni informed Ross on 28 September, he merely reminded him that he was told at the time of hiring that he would expect to move from place to place.[42]

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[38] It is noted that *Mazzoni* made this admission against interest around e same time *Gupta* had deputized *Sabash*, to work on Respondent's half against the Union. This may explain why *Mazzoni* took liberties in vulging such information to *Sabash*.

[39] *Wright Line*, 251 NLRB 1083 (1980).

[40] Id. at 1089.

[41] It is noted this action came on the heels of Respondent's open expressions of union hostility and followed by 1 day the discriminatory discharges of *Diskevich* and *Zang* (for reasons discussed separately below).

[42] Although it is not highly unusual for employees to move around, Respondent has not demonstrated by credible evidence the frequency or circumstances for such moves. In this regard, I find, Respondent's exhibit (R. Exh. 3), of little probative value. The information is based solely on Mazzoni's recollection, a witness found to be unreliable otherwise, and admittedly, the document may contain errors. Moreover, the document contains an unspecified number of moves occurring after Ross was transferred and, therefore, is not limited to any relevant or material timeframe.

According to Mazzoni, he thought it necessary to so remind Ross because he did not want the latter to take it "as an insult." Admittedly, Mazzoni said nothing to Ross at that time about any shortcomings, but could not offer any explanation why he had not. Mazzoni's professed concerns for Ross' feelings have a hollow ring, and I reject his testimony as unsubstantiated, implausible, incredible, and unreliable. On the other hand, Ross testified credibly and without contradiction that he received his first wage increase in September and was told by Mazzoni and Gupta that he was doing an "outstanding job." At that time, Ross had been working exclusively in the storeroom for about 2 months.

Mazzoni advanced still another reason for moving Ross out of the storeroom on 28 September. According to Mazzoni's unsubstantiated testimony, the "ratio of direct to indirect labor was getting high." To meet this exigency, Respondent decided "to experiment," by replacing Ross with Jerry Bedoch, an inspector, who could do the incoming inspection along with the paperwork in the storeroom and thus eliminate the use of an "indirect employee." I am unpersuaded that this so-called experiment had anything to do with Ross' transfer on 28 September. Not only was this reason belatedly advanced by Mazzoni, he was unable to assign any weight to its importance in the decision to transfer Ross. In the circumstances of this case, I am persuaded that Mazzoni merely seized on this reason as a mere pretext to cover his discriminatory purpose, to wit, to curb Ross' union activities by restricting his acccess to other employees at the facility.[43] Because the Board has observed, "A pretextual reason, of course, supports an inference of an unlawful one." *Keller Mfg. Co.*, 237 NLRB 712, 717 (1978).

On the total state of this record, noting particularly Sabash's credited testimony that Mazzoni told him that he had moved Ross out of the storeroom because of his union activities, and that such action admission against interest is consistent with the surrounding circumstances, I am persuaded, and I find, that Respondent transferred Ross on 28 September in violation of Section 8(a)(3), as alleged.

b. *The discharges of Diskevich and Zang, the probationary employees*

David Diskevich and Robert Zang, probationary employees, were both terminated on 27 September, allegedly for discriminatory reasons in violation of Section 8(a)(3). The Respondent contends that Diskevich and Zang were terminated "as a result of their inability to work unsupervised and other [nondiscriminatory] secondary reasons." The Respondent also denied any knowledge of their union activities before they were terminated.

Zang commenced working for Respondent on 26 August; Diskevich on 3 September. From on or about 3 September to on or about 20 September Diskevich and Zang worked largely as a team in the storeroom under the routine direction of Edward Ross and supervision of Visco, the storeroom manager. From on or about 20 September until the time Diskevich and Zang were terminated, they worked in the assembly area under Ron Smith, a leadman.

According to Mazzoni and Gupta, on 20 September, Mazzoni told Gupta that he wanted to terminate Diskevich and Zang because "they were unable to work unsupervised." Mazzoni also pointed out that Zang has been late twice and reminded Gupta that he (Gupta) had observed Diskevich in two "safety" incidents. On one such occasion, Diskevich climbed racks to reach the inventory without the use of a ladder; the other, Diskevich, while walking, held his head between the rungs of the extension ladder. Mazzoni, admittedly, had never observed Diskevich working in an unsafe manner. According to Mazzoni and Gupta, the latter told Mazzoni that he was then unable to discuss the subject further because he was late for a meeting. The final decision to terminate Diskevich and Zang was not made until a week later.

Mazzoni testified that on 27 September, after lunch, he once again went over the reasons with Gupta for terminating Diskevich and Zang, and the decision was made to let them go at the end of the day. According to Mazzoni, he had not taken final action sooner because they had a "hectic week" and they "were in a state of shock." More particularly, Respondent was "shocked" that "the union was passing out cards and . . . [t]rying to organize the place." In the total circumstances of this case, I am persuaded, and I find, that Respondent took all measures it believed necessary to eliminate the Union, including the discriminatory transfer to Ross (previously discussed) and the terminations of Diskevich and Zang. In arriving at this conclusion, I find that all the essential elements establishing discriminatory motivation are clearly supported by the record: animus, activity, timing, and company knowledge inferred from the surrounding circumstances.

The record is replete with illustrations of Respondent's deep antiunion hostility, as previously detailed. A few illustrations bear repeating, particularly those expressions of animus during the week of 23 September leading up to the disputed terminations. Thus, Respondent told all its employees during the week of 23 September that it did not want a union and they did not need a union; he urged his employees to throw away their union cards or to get them back and offered company assistance in retrieving those cards; and told his employees not to go to the union meeting at Denny's Restaurant. In all, 13 employees, including Ross, Diskevich, and Zang attended the meeting at Denny's despite Gupta's efforts earlier in the day to discourage such attendance. The next day Diskevich and Zang were terminated, 1 day before Ross was discriminatorily moved out of the storeroom. A few hours before Diskevich and Zang were terminated, Gupta and Mazzoni coercively interrogated employees about their attendance at the union meeting and their union sentiment more generally. Also earlier that same day Mazzoni admittedly told his good friend, employee Rose Miller, inter alia, that he would bet that there were

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[43] The fact that *Ross* was later permitted to operate a machine that he requested, does not militate against the finding that he was moved out of the storeroom to restrict his union activities. *Ross* continued to be restricted to an area around his machine and the request was made about 1 month after the disputed transfer. *Mazzoni* was apparently aware of *Ross'* preference for the storeroom because he took some care not to "insult" Ross when he moved him to production.

13 employees (the precise number) at the union meeting at Denny's, and Miller in turn told employees that Mazzoni knew all about the union meeting (e.g., Ross' credited testimony). Miller testified, without contradiction, that Gupta told her that he was "shocked and disappointed" that she attended the union meeting at Denny's.

Although the evidence may fall short of establishing directly that Respondent had knowledge of Diskevich's and Zang's attendance at the union meeting, I find that an inference of such knowledge is clearly warranted.[44] As the Board has recently noted, "[I]t has not hesitated to infer a Respondent's knowledge of employees' protected activity where the circumstances reasonably warrant such a finding." *Dr. Frederick Davidowitz, D.D.S.*, 277 NLRB 1046 (1985); see also *Metai (U.S.A.) Inc.*, 281 NLRB 327 (1986).

It is undisputed that at no time during the probationary period were either Diskevich or Zang told that they were not performing satisfactorily. In fact, they testified, without contradiction, that Visco, the storeroom manager, offered to provide them employment references and praised the work they performed under his supervision. Under all the circumstances, I find that the General Counsel has clearly demonstrated that Respondent was unlawfully motivated in terminating Diskevich and Zang, as required under *Wright Line*.[45]

Having found that the General Counsel established a prima facie case of unlawful motivation, I further find, for reasons noted below, that Respondent failed to show by credible evidence that it would have taken the disputed action even in the absence of union considerations.

According to Respondent, the principal reason for the terminations of Diskevich and Zang was "their inability to work unsupervised." The weight of the credited and uncontroverted testimony tends to belie this defense. Thus, Diskevich and Zang credibly testified without contradiction that Visco, the storeroom manager, told them that they were good workers and that he hated to see them leave his department to work in the production area. Ross testified credibly and without contradiction that he heard Visco make virtually the same comments. In fact, the credited and uncontroverted testimony disclosed that after Diskevich and Zang were terminated, Visco volunteered to provide both of them job references.[46] Although Mazzoni admittedly did not solicit or obtain Visco's opinion of Diskevich and Zang, he checked with Ron Smith, their leadman in the production area, for his assessment and was told that both were okay (Smith's testimony).[47]

I give little or no weight to the testimony of Respondent's witness, employee Laurel Leigh (now a group leader.) Leigh testified that on one occasion, about 1 week before the disputed discharges, she had requested some parts from the storeroom and observed Diskevich and Zang sitting around instead of getting her parts. According to Leigh, Ed Ross was their supervisor but she did not complain to Ross because she could not find him. She also never complained to either Mazzoni or Gupta. In fact, not until November or December (long after the discharges) did Leigh tell anyone about her observations, when she spoke to Respondent's attorney. Moreover, Respondent conceded that Leigh's observations were not a factor in the decision to terminate Diskevich and Zang. In these cirumstances, I tend to view Leigh's testimony as reflecting on the weakness of Respondent's position.

Repondent also provided some "secondary reasons." For example, Mazzoni referred to two "safety" incidents involving Diskevich. The first such incident occurred on Diskevich's first day at work for climbing a storage rack without a ladder. Mazzoni told him on that occasion to get down and use a ladder in pulling merchandise from the higher shelves.[48] Diskevich testified credibly that thereafter he always used a ladder except on one occasion when Jim Sisteck (a group leader or supervisor) had him climb up and pull some boxes off a shelf without the use of a ladder because one was not available. The record disclosed that on occasion, others, including Mazzoni, have pulled supplies from shelves without using a ladder. As for Diskevich walking with his head between the rungs of a ladder, Mazzoni knew of only one such occasion, and he did not observe it himself. Further, it happened in the early days of Diskevich's employment. Diskevich testified, without contradiction, that at the time he was hired, he was not informed of safety rules or regulations. Moreover, it is noted that the decision to fire Diskevich was made by Mazzoni who admittedly had never observed Diskevich work in an unsafe manner. In these circumstances, I am unpersuaded and reject Mazzoni's assertions that he relied on these so-called safety incidents in deciding to terminate Diskevich on 27 September.

Regarding Zang, Mazzoni noted lateness and that he had also misstamped some terminal tags. As for the tardiness during Zang's period of employment, Mazzoni asserted that this factor was considered "quite a bit" in the decision to terminate him. The record disclosed that

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[44] The record disclosed that *Diskevich* and *Zang* did not confine their union activities to the meeting at Denny's. *Zang* for example, on 16 September attended the first union meeting, which was held in *Ross'* apartment. There, *Zang* agreed to serve on the Union's in-house organizing committee and was designated an "official" volunteer organizer. He also signed a union authorization card, as did *Diskevich* on the following day. Regarding *Diskevich*, it is also noted that when *Gupta* told his employees that he did not want a union, *Diskevich* was one of the employees to voice certain complaints, i.e., why employees had to use leave time if out sick. Still further, it is noted that *Diskevich* and *Zang* had worked in the storeroom under *Ross*, the principal union activist, and that *Zang* rode to and from work with Ross, a fact admittedly known to *Mazzoni*. *Mazzoni* also admitted that he was told by a number of employees that *Ross* was having employees sign union cards. I find it likely that *Mazzoni* calculated that *Diskevich* and *Zang* also supported the Union.

[45] *Wright Line*, 251 NLRB 1083 (1980).

[46] Although *Visco*, was not alleged to be a statutory supervisor and/or agent, *Mazzoni* at times referred to *Visco* as manager or supervisor and in complete charge of the storeroom. As such, he was directly over *Diskevich* and *Zang* and directed their work on a day-to-day basis. It is also noted that Respondent omitted *Visco's* name from the list of unit employees (G.C. Exh. 4). He was also Respondent's purchasing agent. *Visco* did not testify and no explanation was offered to explain the failure to call him as a witness to rebut such critical testimony.

[47] According to *Mazzoni*, in assessing the performance of probationary employees, he relies on his own observations and does not rely on the input of others. He offered no explanation why he appeared to depart from his self-proclaimed practice in his inquiry of *Smith*.

[48] According to *Mazzoni*, it was *Gupta* who observed and spoke to *Diskevich* about climbing shelves without a ladder. In these circumstances of this case I do not deem the conflict critical.

Zang was barely tardy on three occasions over the 30-day period of his employment, in the range of 2 to 5 minutes late (G.C. Exh. 37). Admittedly, Mazzoni never spoke to Zang about lateness. In these circumstances, I fail to discern how Mazzoni treated Zang's lateness as a problem, particularly as Mazzoni also acknowledged that employees are permitted a 10-minute grace period and are not docked any pay for punching in within 10 minutes of the scheduled reporting time. On the state of this record, noting, inter alia, that Zang's attendance record was perfect otherwise, I am persuaded and reject the notion that the few instances of lateness (never more than 5 minutes), served as a consideration in the decision to discharge Zang.

Similarly, I reject Respondent's professed reliance on the misstamped terminal tags. The only testimony linking Zang to the terminal tags in question is Mazzoni's uncorroborated testimony. Noting that I have found Mazzoni to be an incredible and unreliable witness otherwise, I find, in the absence of any corroborative, documentary, or other probative evidence no basis to credit his testimony on this subject, particularly where, as here, Mazzoni did not see Zang work on these tags, nor could he "guarantee" that Zang was responsible for the misstamped tags. In any event, Mazzoni acknowledged that the decision to terminate Zang was made before Mazzoni learned about the tags, and this was only an "afterthought." I am unpersuaded and reject Mazzoni's bootstrap testimony and, accordingly, I find that the misstamped tags were not considered in the decision to terminate him.

The record disclosed still other factors that tend to support the unlawful motivation finding and militate against Respondent's defenses. According to Mazzoni, he terminated Diskevich and Zang on the same day because he wanted to remove them from the payroll before they had accumulated 30 days of employment necessary to qualify for Respondent's hospitalization plan benefits. Clearly, regarding Zang, qualifying for coverage under the hospitalization plan could not have been a factor at all. Zang had already worked more than 30 days and was already enrolled in the plan (G.C. Exh. 38(a) and (b); G.C. Exh. 39(a) and (b)). As for Diskevich, Mazzoni could have waited another week, particularly as Mazzoni also testified that he needed employees in the production area. The inescapable conclusion is that given the unsettled union situation, he did not want Diskevich and Zang to become permanent employees. Mazzoni admitted as much stating, "I didn't want to hire anybody on a permanent basis until, you know, we found out what was going on with the Union." Thus, on the basis of union considerations, Mazzoni admittedly contacted the Kelly services to hire temporary employees. Mazzoni acknowledged that by doing so, "the employer would not have to be concerned about any [union] organizing campaign being conducted for those employees."

In sum, on the basis of the foregoing, and on the total state of this record,[49] I find that Respondent was discriminatorily motivated in discharging Diskevich and Zang and that Respondent would not have taken this action, absent unlawful considerations. Accordingly, I find that Respondent violated Section 8(a)(3) by discharging David Diskevich and Robert Zang.

4. Objections to election

The Union's objections are largely coextensive with certain of the unfair labor practice allegations.

I have found, for reasons set forth above, that Respondent engaged in serious unfair labor practices almost from the time it learned of the Union's organizational efforts to the final days of the election itself. However, I have considered only those objections and misconduct alleged to have occurred after the Union filed its representation petition on 8 October 1985 in determining whether to recommend setting aside the election. The Board has long determined that the critical period for considering objectionable conduct begins with the filing of the petition and ends with the election. *Goodyear Tire & Rubber Co.*, 138 NLRB 453, 455 (1962); *Red's Novelty Co.*, 222 NLRB 899 (1976). Because I have found merit to most of the unfair labor practice allegations related to Respondent's conduct after the filing of the petition, a fortiori, I further find those objections meritorious that mirror the unfair labor practices. See *Dal-Tex Optical Co.*, 137 NLRB 1782, 1786 (1962).

The first three objections listed by the Regional Director for purposes of hearing are closely related and are treated together. They allege that the Employer and its agents engaged in conduct as follows:

> 1. Told Gupta employees "Westinghouse Company would not want a Union here at this plant. We do all our work for Westinghouse."
>
> 2. Made threats to close the plant if employees voted for a Union.
>
> 3. Held pizza party at noon two days before election; and, at a captive audience meeting, Company President L. P. Gupta told employees, "Two protect your job, vote 'no' on Friday." (G.C. Exh. 1(s).)

I find that the aforenoted objections are meritorious, noting, inter alia, that they are largely encompassed by my previous discussion and findings that Gupta's speech to employees on 13 November contained threats within the meaning of Section 8(a)(1). Gupta, on that occasion, spoke of the impact of unionization and the loss of Westinghouse (its major customer), to the "survival" of the Company and loss of jobs and finished, admittedly, with this admonition: "Save your company. Save your job. Vote No."

Objection 4 is as follows:

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[49] The record also disclosed that only on the rarest of occasions has a probationary employee been discharged. Thus, the record disclosed that employee *David Ross* did not complete his probationary period. However, his attendance record disclosed, inter alia, that he was absent on five occasions and was treated as a "quit." (G.C. Exh. 36.) It also appears that *J. McAllister* was terminated after working briefly for Respondent. The record however, disclosed that *McAllister* was insubordinate and also broke a number of resistor rings during his brief employment.

> Company Lawyer and Plant Manager interfered with Staff Representatives Jack Coates and Tom Antel in their attempt to pass literature after employees were leaving the plant. They stayed to intimidate employees who scattered in all directions. Plant Manager moved between the employees and the two staff representatives from the Union.

The aforenoted incident occurred on 13 November and during the critical period for considering objections. Because this same objection is independently alleged and found to be violative of Section 8(a)(1) of the Act, a fortiori, I find merit to this objection.

The aforenoted objection related to Respondent's misconduct at its Monroeville facility. The next objection ascribed essentially the same misconduct to Gupta on the same day, at Respondent's Penn Hills facility. Thus, Objection 5 states as follows:

> Mr. L. P. Gupta, President, did the same at Penn Hills plant. Organizer George Radulovich could not give one piece of important literature to employees.

The aforenoted objection is virtually identical to a separate allegation in the complaint. In recommending dismissal, I found "that the record is devoid of any probative evidence tending to show that Gupta physically, or otherwise interfered with the distribution of Union literature." Because I found no credible record support for this objection, I shall recommend that Objection 5 be dismissed.

I find merit to Objection 6, the last of the Union's specific objections, which states, "Threats were made that bonuses could not be be paid because of Union activities at the plant."

The aforenoted objection was also an independent allegation in the complaint. In finding previously that the threats violated Section 8(a)(1) of the Act, I noted, inter alia, that the bonus was an existing benefit and that Supervisor Ohler admittedly told employee Edward Ross, on 19 October (during the "critical period"), that because of the Union, "everything is on hold."

In addition to the specific objections set forth above, the Regional Director noted other alleged misconduct that occurred during the critical period that had come to his attention during the investigation of the objections. In this regard, the Regional Director noted as follows:

> This conduct includes allegations that the Employer informed its employees that merit increases were being withheld because of their union activities, that employees were threatened with a loss of jobs if they selected the Union as their bargaining representative that their activities on behalf of the Union were under surveillance, that the employees were interrogated regarding their union activities, and that employees were promised benefits and improved terms and conditions of employment in order to dissuade them from supporting the Union.

The Board has a "longstanding policy" that permits an election to be set aside on the basis of conduct uncovered by a Regional Director during his investigation, "even though that particular conduct has not been the subject of a specific objection." *American Safety Equipment Corp.*, 234 NLRB 501 (1978); see also *Carter-Lee Lumber Co.*, 119 NLRB 1374, 1376 (1958), ("It is well established that the Regional Director in making post-election investigations is not limited to the specific issues raised by the parties.")

In the instant case, such misconduct not specifically raised as objections but uncovered during the postelection investigation has also been included in the instant consolidated complaint. Because I have found merit to virtually all these allegations, a fortiori, I also find that such misconduct, which occurred during the critical period, serves as an additional basis for setting aside the election. Thus, for reasons noted previously, I have found, inter alia, that about 1 November, about 2 weeks before the election and well within the "critical period," Gupta made certain promises to employee Sabash of improved benefits, but only if the Union was defeated. Of particular significance, in terms of impacting on the election, is that Gupta admittedly expected Sabash to publicize Gupta's promises to the other employees and that Sabash, in fact, transmitted Gupta's promises to many of them.

Additionally, I have found, for reasons discussed previously, that during the "critical period," Gupta and Mazzoni had wrongfully and in violation of Section 8(a)(1) informed employees that Respondent was unable to provide merit raises during the pendency of the union campaign (a departure from Respondent's existing policy of providing such raises for outstanding work),[50] and that Mazzoni and Foreman Ohler threatened employees with plant shutdown, loss of jobs, and other unspecified reprisals to dissuade them from supporting the Union. In short, I find that Respondent's serious misconduct during the critical period clearly warrants setting aside the election. See generally *B. E. & K. Inc.*, 252 NLRB 256 (1980).

5. The 8(a)(5) allegations

Having found that the objections are meritorious and that Respondent's misconduct during the critical period warrants setting aside the election, the case now turns on the 8(a)(5) allegations. *Bernel Foam Products Co.*, 146 NLRB 1277 (1964); *Irving Air Chute Co.*, 149 NLRB 627 (1964), enfd. 350 F.2d 176 (2d Cir. 1965).

a. *Demand for recognition and appropriate unit*

Certain of the critical elements necessary to support 8(a)(5) allegations are admitted by the pleadings and/or stipulated at the hearing.

The parties stipulated, the record disclosed, and I find, that the Union, by letter dated 8 October, demanded recognition as the majority collective-bargaining representative on the basis of authorization cards covering a unit, which I find is identical in material respects to the unit set forth in the complaint (G.C. Exh. 1(o)) and admitted in the corresponding answer (G.C. Exh. 1(u)). I find the appropriate unit is set forth in the complaint as follows:

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[50] In the circumstances of this case, it is not a defense that Respondent's officials had raised their position on legal advice. See *Otis Hospital*, 222 NLRB 402, 404 (1976), enfd. 545 F.2d 252 (1st Cir. 1976). Compare *National Micronetics*, 277 NLRB 993 (1985). (Respondent statement constituted an unlawful threat by effectively but erroneously informing employees that unfair practice strikers could be permanently replaced.)

> All production and maintenance employees employed by Respondent at its foundry located at 1375 Frey Road, Penn Hills, Pennsylvania, and at its production facility located at 530 Seco Road, Monroeville, Pennsylvania; excluding office clerical employees, technical employees and guards, professional employees and supervisors as defined in the Act.[51]

b. *Majority status*

As noted previously, the General Counsel contends that an 8(a)(5) *Gissel* bargaining order is warranted. It is now clear, that in the absence of any union majority at some relevant time, the Board will not issue a bargaining order. *Gourmet Foods*, 270 NLRB 578, 580 (1984). Thus, the Union's majority status has to be determined as a critical threshhold matter before a bargaining order under *Gissel* is to be assessed.

The General Counsel contends that the critical relevant date is 8 October, by which time the Union had assertedly acquired its majority and had demanded recognition in writing. (G.C. Exh. 3.) As noted above, the "demand" and "appropriateness of the unit" are not in dispute. However, the Respondent denies that the Union had obtained majority status at any relevant time. The Respondent relies largely on its positions being sustained regarding the discharges of David Diskevich and Robert Zang, the supervisory status of Greg Ohler, and the validity of the authorization card revocations by employees Peggy Dinning, Penny Lukehart, and Debby Smutek.

In evidence is a document containing the names of 40 employees the Respondent contends comprised the entire unit on 8 October, the date of the Union's demand. This document does not contain the names of Diskevich and Zang, both of whom were found to have been discriminatorily discharged on 27 September and, as such, their names are to be added. In addition, the name of employee Robert Cable was omitted and is to be added. Regarding Cable, the record disclosed that he was actively employed until 16 October, when he was suspended until further notice. On the other hand, the name of Greg Ohler is to be deleted from the list because I have previously found that he was, at all material times, a statutory supervisor. Thus, by adding the names of Diskevich, Zang, and Cable and deleting Ohler, I find that Respondent, on 8 October, employed 42 employees. Of this group, 23 employees had signed union authorization cards before that date,[52] a required majority (G.C. Exh. 7, 10–31).

In finding that the Union had obtained a valid majority, I have rejected the revocation of employees Dinning, Lukehart, and Smutek because Respondent provided unlawful assistance and these employees were otherwise coerced by Respondent's contemporaneous unfair labor practices. These revocations, inter alia, were clearly triggered by Respondent's discharge of employees Diskevich and Zang. This was largely confirmed by Respondent's witness, Dinning, who acknowledged that she and Smutek were concerned about losing their jobs and had talked to each other about Diskevich and Zang being terminated and that the Union had not been able to get them their jobs back. Smutek testified in a similar fashion. See section II,B,2,(e), above. As for Lukehart, she acknowledged that when she attempted to revoke her union card, she already knew that Diskevich and Zang had been terminated and had filed unfair labor practice charges over their discharges. Further, Dinning and Smutek told Lukehart their reasons for attempting to get their union cards back before Lukehart wrote to the Union asking for her card to be withdrawn. In the circumstances of this case, I cannot deem the revocation in question to be voluntary and effective to invalidate cards signed earlier by these three employees. See *World Wide Press*, 242 NLRB 346, 365–366 (1979); *L'Eggs Products*, 236 NLRB 354 (1978), enfd. in pertinent part 619 F.2d 1337 (9th Cir. 1980).

Having found that the Union made a demand for recognition at a time when it had obtained valid union authorization cards from a majority of Respondent's employees in an appropriate unit, I further find, for reasons discussed below, that an 8(a)(5) bargaining order under *Gissel* principles is warranted.

6. A *Gissel* bargaining order

In *NLRB v. Gissel Packing Co.*, 395 U.S. 575 (1969), the Supreme Court, inter alia, delineated certain categories of unfair labor practices in terms of their severity and lingering effects on employees when assessing the appropriateness of a remedial bargaining order (613–615). The first such category involved "exceptional cases" marked by "outrageous and pervasive" unfair labor practices that destroyed the possibility of a fair election (*Gissel I* at 613–614). The second major category dealt with "less extraordinary cases" marked by "less pervasive practices" (*Gissel II*). Regarding *Gissel II*-type cases, the Court stated as follows:

> If the Board finds that the possibility of erasing the effects of past practices and of ensuring a fair election (or a fair rerun) by the use of traditional remedies, though present, is slight and that employee sentiment once expressed through cards would,

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[51] At the hearing it was disclosed that Respondent relocated its Penn Hills foundry to its Monroeville facility. Although all of Respondent's employees are now housed within the same complex, Respondent still maintains two separate divisions, but one overall unit, in the same manner as it had prior to the relocation.

[52] The record disclosed that employee *Brian Moree* signed two cards, one on 16 September, which was lost by the Union, and, a second, signed by *Moree* on 25 October (G.C. Exh. 7). Although the card itself is the best evidence, the Board has held that testimony of the card signer itself is "probative of a union's majority status in circumstances where the card has been misplaced." *Hedstrom Co.*, 223 NLRB 1409, 1411 (1976), enfd. in pertinent part 558 F.2d 1137 (3d Cir. 1977). In the circumstances of this case, noting, inter alia, that *Moree's* testimony was corroborated by *Radulovich*, I have counted the earlier card for majority purposes. See fn. 3, above.

> on balance be better protected by a bargaining order, such an order should issue. [614–615.]

I find that the circumstances present such a case thereby warranting a remedial bargaining order. In arriving at this finding, it is noted, inter alia, that Respondent unlawfully discharged two employees, discriminatorily transferred another employee (the leading union supporter), spoke, without justification, of losing its major customer, and threatened a plant shutdown and loss of jobs, which conduct has long been "recognized" as "hallmark violations." See, e.g., *Long-Airdox Co.*, 277 NLRB 1157 (1985). In addition, Respondent engaged in a wide range of other misconduct including coercive interrogations,[53] conveying the impression to employees that union activities are under surveillance, promising and granting of benefits (e.g., microwave oven and refrigerator) and threatening unspecified reprisals.

Of particular significance is that the great majority of the violations were committed by Gupta, the president and owner of Respondent and Plant Manager Mazzoni,[54] and touched all unit employees, albeit in varying degrees. As the Board has noted, "The effect of unfair labor practices is heightened when they are committed by top management officials who are readily perceived as representing company policy and as possessing the ability to implement unlawful threats." *Long-Airdox Co.*, above.

Regarding the dissemination of Respondent's threats and promises, much of this was done directly by Gupta and Mazzoni in speeches to the entire assembled work force, the last of which was made by Gupta on 13 November, 2 days before the election. The record, however, also disclosed that Gupta relied on senior trusted employees to transmit his promise of benefits and threats to dissuade employees from supporting the Union. Thus, Gupta promised employee Sabash that he would provide 25 cents across-the-board wage increases, with an additional 25 cents for the second shift and improved family insurance coverage if that is what it would take to defeat the Union and persuade Sabash to transmit this message to the rest of the unit employees. Over the next 3 or 4 days, Sabash spoke with nearly 50 percent of the unit employees about Gupta's conditional package of benefits, if the Union were kept out. Some of these employees had approached Sabash having already heard about Gupta's promises to Sabash from other employees and they were asking Sabash to confirm what they had heard. Sabash testified credibly with substantial corroboration that Gupta's package of benefits was virtually the only topic of conversation at work. Clearly, such widespread dissemination is likely to impede the election process, and it was so intended. Gupta acknowledged as much by admitting that he selected Sabash to deliver his message because of his high standing among his fellow employees, and Gupta "wanted to make sure the Union would stay away."

On still another occasion, Gupta urged employee Morgan to tell other employees that Westinghouse would pull out if Respondent became unionized and that the plant would have to close down. Other threats of reprisals have previously been described. The impact of such conduct to frighten employees from otherwise supporting the Union is clearly heightened when, as here, employees are discriminatorily discharged. This perhaps is best illustrated by employee Smutek (Respondent's witness), who, in explaining why she decided to withdraw her union card, stated as follows:

> Like I said before, the Union didn't show me anything. Bob Zang and Dave Diskevich didn't get their jobs back. Plus, also, there's a lot of other people that are unemployed because of the Union.

In the total circumstances of this case, noting that the size of the unit is relatively small (42 employees); that virtually every unit employee was touched directly by Respondent's misconduct; that the misconduct was serious and pervasive and included the discriminatory discharge of two employees and a discriminatory transfer of the leading union advocate as well as threats and promises of benefits, I am persuaded that it is highly unlikely the lingering impact of such collective activity can be fully dissipated by traditional remedies. As such, I find it highly unlikely that a fair rerun election can be conducted. I therefore conclude that a union's majority based on valid authorization cards is a more reliable indicator than an election reflecting the employees' representation desires. Accordingly, in the total circumstances of this case, I find that a bargaining order based on the union card majority is appropriate.[55] See, e.g., *Quality Aluminum Products*, 278 NLRB 338 (1986); *Kona 60 Minute Photo*, 277 NLRB 867 (1985); *Studio S. J. T.*, 277 NLRB 1189 (1985); *Long-Airdox Co.*, above.

III. THE EFFECT OF THE UNFAIR LABOR PRACTICES ON COMMERCE

The activities of the Respondent set forth in section II, above, occurring in connection with the Respondent's operations described in section I, above, have a close, intimate, and substantial relationship to trade, traffic, and commerce among the several States and tend to lead to labor disputes burdening and obstructing the free flow of commerce.

Conclusions of Law

1. The Respondent is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

2. The Union is a labor organization within the meaning of Section 2(5) of the Act.

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[53] In all, approximately 20 percent of the unit employees was coercively interrogated individually, including employees *Miller, Moree, Sneddon, Cable*, and *Potocnik* on 27 September, and employees *Ross, Deer*, and *Christian* on other occasions.

[54] Foreman *Ohler* was the only other supervisor to have engaged in violation conduct. *Ohler's* misconduct was largely confined to Penn Hills, where 4 of the 42 unit employees were employed.

[55] It is noted that the record is devoid of any mitigating factors relative to the issuance of such a bargaining order. Thus, management remained unchanged and the few new employees were hired as temporaries.

3. The Respondent violated Section 8(a)(1) of the Act by

(a) Coercively interrogating employees about their union activities and sympathies.

(b) Creating the impression that it was engaging in the surveillance of the union activities of its employees.

(c) Discriminatorily promulating, maintaining, and enforcing a no-access rule and interfering with the distribution of union literature at its Monroeville facility.

(d) Soliciting employee grievances and indicating a willingness to rectify them in order to undermine the Union.

(e) Soliciting employees to repudiate the Union revoke union authorization cards, and provide assistance and instruct employees not to attend a union meeting.

(f) Promising to provide improved benefits if the employees repudiate the Union.

(g) Recruiting, encouraging, and authorizing employees to tell other employees that Respondent will provide certain improved benefits if the Union is eliminated.

(h) Departing from existing policies and erroneously telling employees that it cannot consider merit increases and bonus payments during the pendency of the union campaign.

(i) Threatening to close the plant before accepting the Union and threatening employees with various other unspecified reprisals for their support of the Union.

(j) Conveying to employees that unionization will result in the loss of a major customer and loss of jobs.

4. The Respondent violated Section 8(a)(3) and (1) of the Act by discharging David Diskevich and Robert Zang because they engaged in union activities and transferred Edward Ross from the storeroom to the production area because of his union activities.

5. The following unit is appropriate for purposes of collective-bargaining within the meaning of Section 9(b) of the Act.

> All production and maintenance employees employed by Respondent at its foundry located at 1375 Frey Road, Penn Hills, Pennsylvania, and its production facility located at 530 Seco Road, Monroeville, Pennsylvania; excluding office clerical employees, technical employees and guards, and professional employees and supervisors as defined in the Act.

6. On or about 8 October 1985, and at all times material thereafter, the Union represented a majority of the employees in the above-described appropriate unit and has been the exclusive representative of the employees for purposes of collective bargaining within the meaning of Section 9(a) of the Act.

7. By refusing to recognize and bargain with the Union as the exclusive collective-bargaining representative of its employees in the above-described unit since on or about 8 October 1985, the Respondent has engaged in unfair labor practices within the mearning of Section 8(a)(5) and (1) of the Act.

8. The aforesaid unfair labor practices are unfair labor practices affecting commerce within the meaning of Section 2(6) and (7) of the Act.

9. The Respondent's unlawful conduct interfered with the representation election held on 15 November 1985.

THE REMEDY

Having found that the Respondent has engaged in certain unfair labor practices, I shall recommend that it be required to cease and desist therefrom and take certain affirmative action designed to effectuate the policies of the Act.

As I have found that Respondent unlawfully discharged David Diskevich and Robert Zang because they engaged in union activities, I shall recommend that the Respondent be ordered to offer them immediate and full reinstatement to their former positions or, if those positions no longer exist, to substantially equivalent jobs, without prejudice to their seniority and other rights and privileges, and to make them whole for any loss of earnings suffered as a result of the discrimination by payment of a sum equal to that which they would have earned absent the discrimination, with the backpay and interest computed in accordance with *F. W. Woolworth*, 90 NLRB 289 (1950) and *Florida Steel Corp.*, 231 NLRB 651 (1977); see generally *Isis Plumbing Co.*, 138 NLRB 716 (1962). In addition, I shall also recommend that any reference to their terminations be removed from the employees' employment records.

Although I have found that Edward Ross was discriminatorily moved from the storeroom to the production area, it is noted that his terms and conditions of employment remained substantially the same with no loss of earnings. Because the record also disclosed that it is not uncommon for Respondent to move employees from job to job, and because Ross was last assigned to work on a machine he had requested, I shall only recommend that Respondent cease and desist from discriminatory transfers regarding Ross.

Having also found, for reasons set forth above, that Respondent embarked on a course of misconduct in violation of Section 8(a)(5), I shall recommend that the Respondent be ordered to recognize and, on request, bargain collectively with the Union as the exclusive bargaining representative of the employees in the above-described unit. However, noting that at the time the Union demanded recognition, on 8 October, the Respondent has already engaged in serious misconduct I recommend that the date of recognition revert back to the date of the demand. See *Kona 60 Minute Photo*, above.

Having recommended a remedial bargaining order, it would be consistent that the election in Case 6-RC-9627 be vacated and that the petition in that matter be dismissed.[56]

[Recommended Order omitted from publication.]

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[56] Given the gravity of the unfair labor practices committed by the Respondent, including discriminatory discharges, I shall recommend it cease and desist therefrom and any other manner from interfering with the rights of employees guaranteed under Section 7 of the Act. See *Hickmott Foods*, 242 NLRB 1357 (1979). In the absence of any evidence of previous noncompliance on the part of the Respondent, however, I find it unnecessary to recommend a visitorial clause for discovery purposes, as requested by the General Counsel.

Ersel Prince d/b/a Prince Trucking Company *and* **Local Union 9553, United Mine Workers of America.** Cases 9–CA–23189, 9–CA–23364–2, 9–CA–23457, and 9–CA–23475

July 27, 1988

SUPPLEMENTAL DECISION AND ORDER

BY CHAIRMAN STEPHENS AND MEMBERS JOHANSEN AND BABSON

On April 30, 1987, the National Labor Relations Board issued a Decision and Order in this proceeding in which it, inter alia, ordered the Respondent to make whole certain of its employees for any loss of pay and other benefits resulting from the Respondent's unlawful layoff of these employees because they filed grievances and engaged in other protected concerted activities.[1] On November 5, 1987, the United States Court of Appeals for the Fourth Circuit entered a judgment enforcing in full the backpay provisions of the Board's Order. A controversy having arisen over the amount of backpay owed the discriminatees, the Regional Director for Region 9, on January 15, 1988, issued a backpay specification (specification) and notice of hearing that was served by certified mail on the Respondent on January 15, 1988, and on the Respondent's representative on January 19, 1988. The Respondent has failed to file an answer to the specification, and its allegations, therefore, stand uncontroverted.

On March 4, 1988, counsel for the General Counsel filed directly with the Board a "Motion to Transfer Proceedings to the Board and Motion for Summary Judgment" and memorandum in support thereof, with exhibits attached.

Subsequently, on March 9, 1988, the Board issued an order transferring proceeding to the Board and Notice to Show Cause why the General Counsel's Motion for Summary Judgment should not be granted. The Respondent has failed to file a response to the Notice to Show Cause.[2]

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

Ruling on Motion for Summary Judgment

Section 102.54 of the Board's Rules and Regulations provides in pertinent part:

> (a) . . . The respondent shall, within 21 days from the service of the specification, if any, file an answer thereto. . . .
>
> . . . .
>
> (c) . . . If the respondent fails to file any answer to the specification within the time prescribed by this section, the Board may, either with or without taking evidence in support of the allegations of the specification and without notice to the respondent, find the specification to be true and enter such order as may be appropriate.

The specification issued and served on the Respondent and its representative about January 15, 1988, specifically states that the Respondent shall, within 21 days from the date of the specification, file an answer with the Regional Director for Region 9, and to the extent that the answer fails to deny the allegations of the specification in the manner required under the Board's Rules and Regulations and the failure to do so is not adequately explained, such allegations shall be deemed to be admitted to be true and the Respondent shall be precluded from introducing any evidence controverting them. According to the uncontroverted allegations of the Motion for Summary Judgment, counsel for the General Counsel had a telephone conversation with the Respondent's representative shortly before the due date for an answer, during which "the relative merits of Respondent filing an answer" were discussed, and the due date for the answer noted. The Respondent claimed that it is defunct and asserted a financial inability to meet any backpay claims resulting from the Board Order in this case.[3]

The Respondent has not filed an answer to the specification and the only apparent explanation offered is the claim that the Respondent is defunct

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[1] 283 NLRB 806 (1987).

[2] The affidavit of service of the Motion for Summary Judgment was neither signed nor dated and the record contains no return receipt cards that would establish service of the motion. We note, however, that the Notice to Show Cause, which specifically referred to the General Counsel's filing of the Motion for Summary Judgment, was sent to the Respondent by certified mail as there is a return receipt card for that document. Because the Respondent has made no response to the Notice to Show Cause, including no contention that the Motion for Summary Judgment had not been served, we find that the Motion for Summary Judgment is properly before us.

[3] In a similar vein, the Board's files contain a letter from the Respondent's representative directed to the Board's Division of Enforcement Litigation. The letter states that Ersel Prince requested that the Board be informed of "the current economic status of the Prince Trucking Company." After indicating awareness of the Board's application with the Fourth Circuit for Summary Entry of Judgment Enforcing the Board's Order in this case, the letter states:

> [W]hile Prince Trucking exists in a technical sense on paper, even without a dissolution, it does not practically exist. It's [sic] assets have been dissolved by virtue of creditor's demands both secured and unsecured as this office is informed. This Respondent lies dormant as an entity without its assets, as its business was transportation.
>
> Due to this circumstance, it would appear that pursuit of this action on the Appellate level is not only fruitless and moot, but also a monumental waste of Government resources.

The letter ends with an appeal to the Board to "end pursuit of this action."

298 NLRB No. 159

and financially unable to meet any backpay claims resulting from the Board Order in this case. In *Star Grocery Co.*,[4] in which the respondents made a similar claim, the Board held:

> Respondents' bare assertion that they are unable to satisfy the backpay order because their business is defunct and without assets is an invalid defense in a backpay proceeding where the issue is the amount due and not whether Respondents are able to pay. Neither is it an adequate explanation of their failure to file a timely answer to the backpay specification, and we so find.

We find here that the bare assertion that the Respondent is defunct and financially unable to comply with the Board's backpay order does not provide an adequate explanation for the Respondent's failure to file an answer to the specification.[5]

Accordingly, as the Respondent has not answered the specification, nor adequately explained its failure to do so, the Board grants the General Counsel's Motion for Summary Judgment and deems the allegations of the specification to be admitted as true pursuant to Section 102.54(c).

ORDER

It is ordered that the General Counsel's Motion for Summary Judgment is granted.

IT IS FURTHER ORDERED that the Respondent, Ersel Prince d/b/a Prince Trucking Company, Logan, West Virginia, its officers, agents, successors, and assigns, shall make whole the discriminatees listed below by paying them the amount opposite each discriminatee's name, with interest accrued to the date of payment and computed in the manner prescribed in *New Horizons for the Retarded*.[6] The Respondent shall make the appropriate deduction from said amount of any tax withholdings required by state and Federal laws, and shall submit the withholdings to the appropriate authorities:

Everett Vance	$120.92
Randall Morgan	120.00
Arvid Con Barker	118.62
Jerry Carter	118.62
Arnold Toler	483.68
Cecil Bobbet	118.62
John Sizemore	2,965.50
Arthur Farley	1,571.96
James Dean	3,202.74
Roger Johnson	2,771.04
Chauncey Adams	2,771.04
Aubrey John Hartman	1,934.72

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[4] 245 NLRB 196, 197 (1979).

[5] See *Harvey Hubbell, Inc.*, 285 NLRB No. 22 (July 30, 1987) (unpublished); *Columbia Engineers International*, 268 NLRB 337 (1983); and *Star Grocery Co.*, supra.

[6] In accordance with our decision in *New Horizons for the Retarded*, 283 NLRB 1173 (1987), interest on and after January 1, 1987, shall be computed at the "short-term Federal rate" for the underpayment of taxes as set out in the 1986 amendment to 26 U.S.C. § 6621. Interest on amounts accrued prior to January 1, 1987 (the effective date of the 1986 amendment to 26 U.S.C. § 6621), shall be computed in accordance with *Florida Steel Corp.*, 231 NLRB 651 (1977).

Southwestern Portland Cement Company *and* United Cement, Lime, Gypsum & Allied Workers Division, International Brotherhood of Boilermakers, Iron Shipbuilders, Blacksmiths, Forgers and Helpers, Local Lodge D-357, AFL-CIO. Cases 9-CA-22509 and 9-CA-22942

July 27, 1988

DECISION AND ORDER

BY CHAIRMAN STEPHENS AND MEMBERS JOHANSEN AND CRACRAFT

On June 22, 1987, Administrative Law Judge Robert W. Leiner issued the attached decision. The Charging Party, the General Counsel, and the Respondent filed exceptions and supporting briefs and the Respondent filed an answering brief.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings, and conclusions[1] and to adopt the recommended Order.[2]

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge and orders that the Respondent, Southwestern Portland Cement Company, Fairborn, Ohio, its officers, agents, succcessors, and assigns, shall take the action set forth in the Order.

CHAIRMAN STEPHENS, concurring.

In adopting the judge's dismissal of the 8(a)(5) allegation with respect to the Respondent's refusal to meet with a union grievance committee of the size indicated in the Union's request for meetings, I find it unnecessary to decide whether, in all cases, the question of *how many* individuals are to serve as representatives of a union or an employer is a mandatory subject of bargaining. It is entirely conceivable that in some cases a restriction on the number might, in practical effect, be a restriction on the identity of a party's representative; and the identity of a party's representative is a permissive subject in which the other party may not interfere unless "the presence of the chosen representative would make good-faith bargaining virtually impossible." *Missouri Portland Cement Co.*, 284 NLRB 432, 434 at fn. 13 (1987).

The Respondent's refusal to meet with the Union's committee in this case, however, does not involve insistence on a permissive subject of bargaining. Under article 6 of the parties' expired 1981-1984 collective-bargaining agreement, which created a condition of employment that would remain in effect unless the parties agreed to change it or bargained to impasse (*Indiana & Michigan Electric Co.*, 284 NLRB 53 (1987)), the Respondent was required to compensate an employee—according to his or her regular classified hourly rate—when the employee attends grievance meetings scheduled either within the normal workday or beyond the employee's normal quitting time. Compliance with the Union's demand would therefore have potentially subjected the Respondent to greater financial liability than was provided for in the contractually established procedure. Paid time for grievance processing is plainly a mandatory subject of bargaining. See *BASF Wyandotte Corp.*, 274 NLRB 978 (1985), enfd. 798 F.2d 849 (5th Cir. 1986); *Axelson, Inc.*, 234 NLRB 414 (1978), enfd. 599 F.2d 91 (5th Cir. 1979).

I also note that the Union's September 11, 1985 letter to the Respondent described its newly designated grievance committee as consisting of five named individuals and, in addition, "all members of the bargaining unit." I know of no authority suggesting that a union's right to choose its own bargaining or grievance adjustment representative includes the right to require the employer to meet with the entire bargaining unit to resolve grievances.

Damon W. Harrison, Jr., Esq., for the General Counsel.
Stephen P. Pepe, Esq. (O'Melveny & Meyers), of Los Angeles, California, for the Employer.
Michael J. Stapp, Esq. (Blake & Uhlig, P. A.), of Kansas City, Kansas, for the Charging Party.

DECISION

STATEMENT OF THE CASE

ROBERT W. LEINER, Administrative Law Judge. This consolidated matter was heard in Dayton and Cincinnati, Ohio, on 28-30 January 1986 and 16-18 March 1987 on issues raised by the General Counsel's amended complaints alleging, in substance, that the Respondent (the Company) in violation of Section 8(a)(1) and (5) of the

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[1] In adopting the judge's dismissal of the 8(a)(5) allegation with respect to the Respondent's refusal to meet with the Union's grievance committee of more than four members, we rely on the fact that the contractual grievance procedure establishing a union grievance committee of four members survived the expiration of the contract. Accordingly, the Respondent was privileged to refuse to meet with the Union's grievance committee consisting of more than four members.

We note certain typographical errors in the judge's decision and the occasional use of "Respondent" for "Union" and "Weaver" for "O'Malley." The appropriate reference is clear from the context of the decision. These inadvertent errors do not affect the result.

[2] The General Counsel excepts that the judge's recommended Order does not include a visitatorial clause. We find that in the circumstances of this case it is unnecessary to include such a clause. See *Cherokee Marine Terminal*, 287 NLRB 1080 (1988).

289 NLRB No. 161

National Labor Relations Act (the Act) (a) on 1 September 1985, unilaterally implemented changes in the terms and conditions of employment of its employees without affording their statutory representative, United Cement, Lime, Gypsum & Allied Workers Division, International Brotherhood of Boilermakers, Iron Shipbuilders, Blacksmiths, Forgers and Helpers, Local Lodge D-357, AFL–CIO (the Union) an opportunity to negotiate and bargain on the changes; (b) since 1 September 1985, refused to meet with the Union to discuss grievances if the Union's grievance committee had more than four members; and (c) since 6 November 1985 insisted that bargaining for a new contract be limited solely to counterproposals based on Respondent's proposals implemented on 1 September 1985.[1]

At the hearing, all parties were represented by counsel and were given full opportunity to call and examine witnesses, to submit relevant oral and written evidence, and to argue orally on the record. At the close of the hearing, counsel waived final argument and elected to file posthearing briefs, which had been received and carefully considered. Counsel are to be commended for the thoroughness and quality of the briefs.

On the entire record, including the briefs, and from my observation of the demeanor of the witnesses as they testified, I make the following

Findings of Fact

I. RESPONDENT AS STATUTORY EMPLOYER

Based on the allegations of the complaints, Respondent and all parties concede that at all material times Respondent, Southwestern Portland Cement Company, a Delaware corporation with a cement plant in Fairborn, Ohio, has been and is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

II. THE UNION AS A STATUTORY LABOR ORGANIZATION

The complaints allege, Respondent admits, and I find that at all material times the Union was and is a labor organization within the meaning of Section 2(5) of the Act.

III. THE ALLEGED UNFAIR LABOR PRACTICES

Southwestern Portland Cement Company, the Respondent, is engaged in the production and manufacture of cement at its plant and quarries in and about Fairborn, Ohio, the sole site of the alleged unfair labor practices.

For more than 20 years, the Union and its predecessor have represented the production and maintenance employees at the Fairborn facility. Other locals of the Cement Workers Union (since April 1984, merged into the International Boilermakers Union) represent units of Respondent's production and maintenance employees at Victorville, California (Local 49), and at Odessa, Texas (Local 476).

In the spring of 1981, the three local unions at Fairborn, Odessa, and Victorville entered into separate, 3-year collective-bargaining agreements with Respondent at the above three locations, the expiration dates being 30 April 1984 at Victorville, California; 30 April 1984 at Fairborn, Ohio; and 31 May 1984 at Odessa, Texas. Respondent, at all material times, has steadfastly refused to engage in joint bargaining with respect to the three production and maintenance units.

In fact, the collective-bargaining arrangements between the local unions and Respondent, in the three production and maintenance units, were not reduced to a single document; rather, each of the three had a separate "labor agreement," governing the wages, hours, and working conditions at the particular plant; a separate agreement dealing with health and life insurance for the employees in each unit; and agreements relating to supplemental unemployment benefits (SUB) and pensions that applied collectively to employees at all three plants. These separate contract elements, however, had a common termination date in each unit. During collective bargaining, at the three plants, both immediately prior to and following the 1984 expiration of the three agreements, local union representatives of two of the three plants were often present at the collective-bargaining sessions at the plants other than their own. Indeed, all three of the local unions were and are part of a multilocal union bargaining organization (Southwestern Cement Joint Locals Conference), a coordinated bargaining group established by the Union. This "Joint Conference" consists of 12 boilermaker (actually "cement") local lodges representing units of employees at 12 different cement plants employed by 6 different employers including Respondent.

As noted above, the Fairborn collective-bargaining agreement (all four elements) expired on 30 April 1984. The chief Fairborn negotiator and bargainer for the Charging Party, commencing 1984, was Boilermakers International Representative Kent Weaver. He was also the chief bargainer and negotiator for the local unions at Respondent's Victorville and Odessa units. The chief negotiator and bargainer for Respondent at all three plants was Ronald O'Malley, Respondent's director of labor relations. The local union bargainers were responsible for accepting or rejecting Respondent's offers. Actually, they recommended their decision to the joint conference whose majority vote accepted or rejected all local contracts.

With the collective-bargaining agreement relating to the Fairborn unit expiring at the end of April 1984, Respondent served timely statutory notice to terminate the existing agreeement and, by February 1984, sent the Union its proposals incorporating proposed changes. The

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[1] The underlying docket entries relating to the filing of charges and amendments of the complaints are as follows:

The charge in Case 9–CA–22509 was filed on 17 October 1985 with complaint issuing on or about 27 November 1985 to which Respondent filed a timely answer on or about 2 December 1985. As above noted, the hearing was first held in Case 9–CA–22509 on 28–30 January 1986 and adjourned until 17 March 1986. Prior to resumption however, the Charging Party filed a charge in Case 9–CA–22942 on 10 March 1986 and the Region issued complaint thereon on 9 July 1986, amended on 19 December 1986. Thereafter the above complaints were consolidated by my Order of 12 January 1987. The hearing resumed, as above noted, on 16 March 1987 and was closed on 18 March 1987.

Company's proposals were forwarded not only to Chief Negotiator Kent Weaver but also to Kenneth Pack, also an International representative of the Boilermakers Union. Pack, who had earlier appeared at the 1981 Fairborn contract bargaining sessions, served principally, with regard to the Fairborn plant, as the International representative concerned with the initiation and processing of Local D-357 grievances.[2]

In 1984, the parties had four sets of Fairborn contract negotiations, each of 2 days: the first, 2 and 3 April (prior to expiration of the collective-bargaining agreement) and thereafter on 17 and 18 May, 6 and 7 August, and 25 and 26 September 1984. During these negotiations, the parties, at Respondent's insistence, followed the procedure of discussing each of the Company's proposals in numerical order with the Company explaining its proposals. By 26 September 1984, the last session of collective bargaining in 1984, Respondent explained only 18 of approximately 100 proposals. None of the union proposals had been discussed. In the parties' respective 1984 proposals, Respondent requested substantial economic and other concessions in the labor agreement and the other areas; and the Union requested substantial increases. Following the 2 and 3 April negotiations, O'Malley protested Weaver's unavailability to meet until May 1984 (after the contract would expire) but Weaver rejected O'Malley's suggestion of a 5-day strike extension and told O'Malley that he did not give a "damn" about his unavailability. Weaver was vehement and obdurate in his resistance to wage and other concessions that Respondent demanded. As O'Malley recalled, Weaver, at the 6 August 1984 negotiations, remarked that he hoped the plant would burn down before the Union would accede to any "give-backs." Weaver told O'Malley that he would certainly resist "give backs" or "take aways" at least in the absence of convincing justifying proof for the economic necessity for such action. My observation of Weaver and the record indicate that Weaver's flexibility was theoretical.

Of the eight Fairborn collective-bargaining sessions, commissioners of the Federal Mediation and Conciliation Service (FMCS) were present at three. In total, there were 32 collective-bargaining sessions at the 3 unit locations from April 1984 through June 1985, some of which were attended by FMCS commissioners. After January 1985, O'Malley insisted that Weaver schedule collective-bargaining sessions through the FMCS.

Collective bargaining in 1984 at the Fairborn plant ended on 25 September 1984, when the Union filed an unfair labor practice charge alleging that Respondent, in violation of past practice and its collective-bargaining responsibility, refused to provide meeting accommodations at Respondent's Fairborn plant that, the Union alleged, Respondent was obliged to do. The Union apparently had occupied all seats at the plant conference room and Respondent refused to provide other plant meeting space. The Union refused to meet with Respondent in collective bargaining while the charge was pending. The charge was dismissed by the Regional Director on 1 November 1984 and the Union did not appeal the dismissal. After the dismissal, the parties did not contact each other until Weaver wrote to O'Malley on 11 January 1985 requesting meeting dates. O'Malley explained the failure of the *Company* to secure immediate further bargaining with the Union, on the 1 November 1984 dismissal of the Union's unfair labor practice charge, by testifying that he had promptly sought, through the Federal Mediation and Conciliation Service (FMCS), dates prior to the year's end but was informed that Weaver had accrued vacation time prior to the New Year and was unavailable for collective bargaining in that period. Although Weaver denied both that he had a great deal of accrued vacation time and that he took a great deal of vacation in the period of November through December 1984, I nevertheless conclude, in the absence of documentary or other persuasive contrary evidence, that O'Malley was so told by FMCS and that it explains O'Malley's inaction in that period.

When Weaver, thereafter, on 11 January 1985, wrote to O'Malley requesting meeting dates, O'Malley responded on 23 January 1985 (1) that FMCS had been involved in the past in the parties' relations and should continue being involved; suggested (2) that Weaver contact FMCS and have a mediator at the negotiations; and told Weaver (3) that Respondent would meet to negotiate at times and places "as scheduled by the Federal Mediation and Conciliation Services."

For whatever reason, however, there was, on this record, not only no collective bargaining between the parties in the following 5 to 6 months, but there was no contact between them, oral or written, until O'Malley dispatched a letter, dated 27 June 1985, to Weaver (Jt. Exh. 6(a); Tr. 1284).[3] The letter enclosed and accompa-

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[2] It is material to find and observe that Kent Weaver and Ronald O'Malley, the respective principal negotiators, reside in and around Los Angeles, California. The West Coast is where Respondent's and the Union's principal business was located. International Representative Pack resides in Kentucky, not far from Fairborn.

[3] The letter states:

Re: Negotiations, Local Lodge D-357
Fairborn, Ohio

Dear Mr. Weaver:

Southwestern Portland Cement Company negotiatiors have met with your committee approximately forty times at Victorville, Fairborn and Odessa in an attempt to reach and conclude successful Collective Bargaining Agreements for each facility. These forty meetings began fifteen long months ago and have failed to produce any satisfactory results.

We have reviewed all proposals. While all proposals at each location are not identical, there is sufficient similarity among them, to allow complete understanding of the issues. Once again, we have looked at your proposals and have looked at ours. Upon reviewing your proposals, again we must reject them as completely unacceptable.

Due to the economic and business changes that have taken place over the past fifteen months, we have put together a whole new complete proposal (enclosed). This proposal is substantially the same as the previous proposal with some changes in various areas; some resulting in minor deviations, others have slightly different positions caused by the abnormal fifteen-month delay by the Union.

The Company is most anxious to sit down with you and resolve this dilemma one way or the other.

We desire to have some meetings at Fairborn within the next thirty days to discuss this proposal, or in the absence of any meetings in the next thirty days, we will be at impasse. Further, if, upon your reviewing this proposal you feel there is no basis to resolving our differences, we will also be at impasse.

Continued

nied a completely new and detailed proposal concerning all four contractual elements relating to the Fairborn facility. Again, these four elements were the labor agreement, the SUB agreement, the pension agreement, and the health insurance agreement.

O'Malley's 27 June 1985 letter to Weaver notes, inter alia, that the parties had been meeting, by that time, for 15 months without agreement; that the Company had reviewed and was again rejecting the Union's proposals, that because of economic and business changes following expiration of the contract, the Company was attaching to this cover letter "a whole new complete proposal"; and that the Company requested meetings at Fairborn within 30 days or would consider the parties to be at *impasse*. O'Malley also observed that if the Union, after reviewing this new proposal, believed that there was no basis for resolving differences, the parties would similarly be at impasse. O'Malley sent a copy of the letter to FMCS.

The four sections of the proposed collective-bargaining agreement, including the labor agreement, are approximately 100 pages in length with accompanying tables. At the hearing, the parties stipulated that this Respondent 27 June 1985 proposal was more beneficial to the Union than the Company's 1984 proposal but it was also less beneficial to the Union than the terms of the expired contract (Tr. 1310). It is in this new offer that Respondent both withdrew its request that unit employees take a $3-per-hour, across-the-board wage cut and, in fact, gave certain unit employees a modest wage increase (Tr. 1313). On the basis of the 30-day timetable, specified by O'Malley in his 27 June letter, Respondent would implement the terms of this offer no earlier than 27 July 1985.

In response to O'Malley's 27 June letter, Weaver, on or about 2 July 1985, telephoned O'Malley and told him that although he was willing to meet with him, he could not meet with him within the 30-day deadline. When O'Malley then accused Weaver of stalling, Weaver told him that he would give O'Malley a choice of meeting with him after the deadline or, if O'Malley insisted on meeting within 30 days, he would have O'Malley meet with Union International Representative Kenneth Pack. O'Malley said that they would not get anything accomplished in meeting with Pack and that they would just be "spinning their wheels" (Tr. 1448). O'Malley then asked Weaver when Weaver would be actually available. Weaver told him that the earliest he could be available was the week commencing Monday, 5 August 1985, but that he was not actually sure he could make it at that time because he might be tied up in that week as well. The parties agreed to get back to each other with regard to firming up the dates concerning when in the week commencing 5 August they might get together. The record of such firming up is not entirely clear but I find that, in the interim, O'Malley and Weaver agreed to meet at least on 6–8 August and continue on 9–10 August if necessary.[4]

On 2 August 1985, Weaver telephoned O'Malley and told him that he might be tied up in the Los Angeles area because FMCS had scheduled a meeting for 6 August between the Union (and other unions) and Kaiser Cement Corporation in San Jose, California. Weaver told O'Malley that he had to attend that meeting because he was the chief spokesman on behalf of 10 International unions and because there had been a strike at Kaiser for a month without a negotiation session. In view of this situation, Weaver said it was unlikely that he would be available on 6 August for the Fairborn meeting but would be there thereafter. When O'Malley answered that he would not accept Weaver's failure to be there and stated that the date of 6 August for negotiations had been "locked in" since early July (Tr. 1325–1326), Weaver told him that if he were not there, Pack would be there; and that he was trying to reach Pack to notify him of the eventuality but had not yet contacted him. O'Malley finally told Weaver that he would prefer to start the meeting with Pack and that he did not want to delay the meeting until the next week when Weaver said his calendar would permit his presence.

When O'Malley arrived at the Fairborn plant from California on 5 August, his local management people at the Fairborn plant told him that there would be no meeting on 6 August and in fact there was no such meeting held.[5]

A. *Collective-Bargaining Sessions of 7 and 8 August 1985*

There was a meeting on the morning of 7 August 1985 at a hotel in nearby Dayton, Ohio. O'Malley walked into the room and found Kenneth Pack acting as the Union's chief negotiator. Also representing and bargaining for the Union were Local D-357 President Jim Cantrell; Local D-357 Recording Secretary Franklyn Deaton, and Local D-357 committeemen Gullett and Lykins. Present on behalf of Respondent were O'Malley, Plant Manager

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cc: S. C. Anderson, Federal Mediator & Conciliation Service, w/encl.
T. E. Stute, w/encl.
K. A. Herr, w/encl.

[4] Although the precise date is unknown, there was another phone conversation between 2 July and the phone conversation of 2 August, see the above text, infra, in which the parties agreed that they would actually meet on 6, 7, and 8 August and that they would keep the balance of the week open if necessary (Tr. 1322–1323). To the extent O'Malley repeatedly testified that in the 2 August telephone conversation, Weaver did not mention the *reasons* it would be unlikely for Weaver to make the 6 August 1985 session, I do not credit O'Malley's repeated denial (Tr. 1451–1453) over Weaver's assertion (Tr. 140) that, in the 2 August telephone conversation, Weaver told O'Malley the reason for his inability to be there on the 6 August date: the Kaiser Cement strike and the negotiations relating thereto. I make this resolution against O'Malley in light of O'Malley's admission and contrary testimony (Tr. 1325) that, in the 2 August conversation, Weaver excused his inability to be present on 6 August because it was "something pertaining to the Kaiser strike situation." In addition, O'Malley did not on 2 August, remonstrate with Weaver concerning Weaver's failure to have Weaver's cochairman replace Weaver at the Kaiser negotiations thus leaving Weaver free to attend the Fairborn sessions. O'Malley mentioned this only later, on 7 and 8 August, to local union bargainers. O'Malley's attempt to show Weaver as secretive and arbitrary failed with such testimony.

[5] Respondent offered only hearsay to explain the failure to have a meeting and, on the Union's objection, I excluded the explanation (Tr. 1331–1332).

Ted Stute, and Fairborn Industrial Relations Director Ken Herr. There was a Federal mediator present.

Sometime between 2 and 6 August 1985, Weaver telephoned Pack and told him of the existence of the Respondent's 27 June 1985 offer. He admittedly did not go into specifics; only that there were four parts to the Respondent's offer: labor agreement, SUB, pension, and insurance (Tr. 621). Weaver did not tell any of the Local Union's personnel of the new offer nor did Pack.

When O'Malley walked into the meeting and saw Pack, he asked where Weaver was. Pack told him that Weaver was unable to attend due to his commitments in California and that Pack was there to act as the chief negotiator in Weaver's stead. Cantrell told O'Malley that Weaver had telephoned Cantrell on the prior evening (6 August) and told him that he probably could not get to Fairborn, if at all, until late in the session on 7 August (Tr. 616-617). When O'Malley told Pack that he had no authority to bind the Union and that he did not want to deal with him and had agreed to deal only with Weaver, Pack angrily told him that Pack, as Weaver, was an International representative and had full authority to negotiate with the Respondent.

At this point, O'Malley asked the union bargainers if they had a response to Respondent's 27 June offer. The union representatives, in chorus, asked: "What offer?" (Tr. 503). O'Malley answered: "Well I sent Mr. Weaver a complete new proposal about 6 weeks ago." None of the union agents had known of the existence the new proposal and only Pack had heard of it. After the Federal mediator asked Respondent if it had copies, the Company supplied the union committee members with the new proposal that, as above noted, exceeded 100 pages in its 4 sections. On inspecting Respondent's offer, Pack told O'Malley that the Union needed time to evaluate the documents before they could make a response. The mediator suggested that the parties break off to give the union bargainers time to study the documents (Tr. 560). Thus, the meeting started about 10 a.m., and broke up about 10:15 a.m. (Tr. 558, 561).

At the opening of this collective-bargaining session, the union negotiators not only did not have a copy of the expired (1981-1984) contract (they had printed copies in booklet form that they found to be untrustworthy compared to the actual signed agreement) but they also did not have a copy of the Respondent's 1984 original offer (Tr. 563). When the FMCS mediator told them that he would adjourn the meeting that day until 10 a.m. the following day (8 August 1985), Gullett and Cantrell left to get copies of the old contract and the 1984 offer while the remaining union bargainers remained at the bargaining situs.

At the time of the 10:15 a.m. adjournment, Pack told the union committee that each of them should take one of the four documents to study for differences between the Company's 1984 proposal and the 27 June proposal. After about 1 hour of study Pack told the union committee to concentrate only on the labor agreement section (Tr. 566) because they were "getting nowhere" in analyzing the four titles (Tr. 563).

Between about 11:15 and 5 p.m., the union bargainers analyzed the labor agreement (Tr. 567). Because they did not have the expired contract at hand until 12:30, between 11 and 12:30 they were just reading the new labor agreement proposal. As the General Counsel observes, due to the length of the proposals, the committee was unable to complete review of the documents that day (G.C. Br. 7; Tr. 505-506, 536-537, 543, 567). Moreover, the union committee did not continue its review of the proposal that evening (R. Br. 11; Tr. 540-541).

On the next day, 8 August at 10 a.m., with the same persons present for bargaining, the Respondent's bargainers entered about 10 a.m. and O'Malley again addressed the union bargainers: "where was Weaver?" O'Malley stated that Weaver had promised that he would be there and wanted to know if the union bargainers had a counterproposal (Tr. 570). Pack told him that the Union was not ready to submit a counterproposal because they had not had enough time to evaluate the Company's proposal. O'Malley accused the Union of stalling and said that the Union had plenty of time to give a counterproposal (Tr. 570). O'Malley then proceeded to amend the Company's offer by granting further benefits in the insurance program (Tr. 570-571) but there was no union discussion of these proposed changes. When O'Malley asked the union representatives if there was a counterproposal to any of the Company's proposals, Pack told him that there was no counterproposal. O'Malley again accused the Union of stalling (Tr. 574), and said that because there was no counterproposal and in view of the fact that Weaver had been engaged in stalling and dilatory conduct for 16 months, and particularly because of Weaver's failure to appear at the scheduled negotiation sessions, he was declaring an impasse. Pack told O'Malley that the union representatives had been working on the documents since they had received them the day before; that the Union wanted to reach agreement; that he hoped O'Malley would give the Union more time; and that Weaver would be arriving later that day and would be available for the next 2 days for negotiations. When Local Union President Cantrell then told O'Malley that O'Malley had agreed to meet with Pack in Weaver's absence, O'Malley answered that Weaver said he would be present but was absent, and that the Company would not be available in the next few days. O'Malley said he was heading back to the West Coast. At that point, the meeting ended when the Respondent's representatives left the bargaining table. O'Malley, however, went to the Fairborn plant, dictated a letter (see, infra), and remained overnight in Dayton at the hotel where the negotiating sessions were held and where he and Weaver usually slept.

Weaver flew from California and arrived at Dayton, Ohio, around midnight of 8 August. He did not stay at the hotel where the negotiations were in progress (the Holiday Inn in Dayton) because of the lateness of his arrival. Apparently at the time of his arrival, he telephoned Cantrell and Cantrell told him there would be no collective-bargaining session the next day because O'Malley had left town.

When O'Malley, the next morning (9 August), was in the process of leaving the hotel, he checked the register to discover whether Weaver had arrived at the hotel and discovered that Weaver had not checked in. O'Malley then left for California.

Weaver testified that, on the next morning (9 August), he did not telephone or attempt to contact any of the Company's representatives nor did he attempt to contact them at any other time in order to reestablish Fairborn negotiations. In fact, Weaver did not explain why he did not attempt to contact the Company's representatives either while he was in Dayton or thereafter. (Tr. 143.)

There then followed an exchange of sometimes self-serving and self-justifying letters between O'Malley and Weaver:

(a) Before O'Malley left the Fairborn plant on 8 August, he dictated a letter to Weaver (certified mail), dated 8 August 1985:

> Dear Mr. Weaver:
>
> I can't tell you how disappointed Southwestern Portland Cement Company negotiators are in your failure to appear in negotiations this week at Fairborn, as agreed upon. As you will recall the Company delayed the meetings one week to accommodate your schedule and this series of meetings was locked in the first week of July. Also Commissioner Addison of the Federal Mediation and Conciliation Service changed his schedule going so far as to postpone his vacation to insure the parties of his availability this week. Moreover, the Company's proposals were sent to you on 27 June 1985, approximately 6 weeks ago; yet your negotiating committee continued their stalling tactics stating that they had not reviewed them.
>
> This is further evidence of the dilatory tactics the Union has engaged in for the past 16 months. Your conduct this week continues to frustrate the bargaining process. As a result of the Union committee's failure to bargain in good faith, as opposed to stalling, the parties are at impasse.
>
> Sincerely,
> R. O'Malley
> Director of Labor Relations

(b) Weaver testified that he did not see O'Malley's 8 August letter until around 12 or 13 August. In any event, by letter dated 14 August 1985, he responded:

> Dear Mr. O'Malley:
>
> Your 8 August 1985 letter relative to the above matter was received in this office on 12 August and brought to my attention on 13 August 1985. When I arrived in Dayton, Ohio on 8 August 1985 and learned that you had terminated the meeting I was upset and disappointed in your conduct. It is obvious to me that you have some (ulterior) motive behind [your] action rather than good faith bargaining.
>
> You stated that the parties have reached impasse. However, the record will disclose otherwise. We have not reached impasse and the Union is ready to reach an agreement. Please contact this office when you are available to continue the negotiations.
>
> Sincerely,
> Kent Weaver

(c) Having received no reply to his 8 August 1985 letter, and Kent Weaver's 14 August letter not having been received, O'Malley wrote (Jt. Exh. 9) on 13 August 1985 to Weaver:

> Dear Mr. Weaver:
>
> In light of the bargaining record and the history of our recent negotiations, we conclude that we are at impasse on all issues which we bargained at Fairborn, Ohio.
>
> Therefore, we intend to *implement* certain changes and working conditions, wages and benefits. These changes will be effective at 7:30 A.M., *25 August 1985*. The changes we intend to make on 25 August 1985 are the complete proposals forwarded to your office on 27 June 1985, over which we are at impasse. Should you have any questions, please contact me. [Emphasis added.]
>
> Sincerely,
> Ron O'Malley
> Director of Labor Relations

(d) On 15 August 1985 Weaver responded (Jt. Exh. 10) to O'Malley's 13 August 1985 letter:

> Dear Mr. O'Malley:
>
> I received your 13 August 1985 letter today when you advised that you intend to implement changes in our contract on 25 August 1985.
>
> As I mentioned to you in my 14 August 1985 letter, we have not reached impasse on the issues. If you implement changes in the wages, hours, or working conditions we will file unfair labor practice charges against you.
>
> More important however is good employee-employer relations. Good relations evolve from actions or inactions by the parties, meaning of course, "do unto others as you would have others do unto you." The Union's conduct, actions and proposals to you have occurred in the interest of continually improving our relations.
>
> If the Company has problems relating to the efficient operations of the plant we propose to meet and see if we can find a way, which will not ill-effect the employees' rights, benefits and earnings, to alleviate the problem and benefit the Company. Cooperation between the parties always produces better results than an adversary approach does.
>
> As I also mentioned in my 14 August 1985 letter, we are interested in resuming negotiations at the Fairborn plant *as soon as you are ready*. [Emphasis added.]
>
> Sincerely,
> Kent Weaver
> International Representative

(e) O'Malley responded on 16 August 1985:

> Dear Mr. Weaver:
>
> We are in receipt of your letter dated 14 August 1985 in reference to negotiations for our Fairborn, Ohio plant. You state in your communication that the parties are not at impasse. While we do not agree with your position, the company is agreeable to postponing its implementation of its last proposal, for one week to 1 September 1985 on the basis that the parties meet and bargain in good faith towards an agreement.
>
> The Company's representatives will be available on any date between 19 August, 1985 and 31 August 1985. [Emphasis added.] Please advise us of your availability and we will make the necessary arrangements for meeting facilities in the Dayton, Ohio area.
>
> Sincerely,
> Ron O'Malley
> Director of Labor Relations

(f) Weaver testified that he was on vacation on 22 and 23 August and did not receive O'Malley's 16 August letter until 24 August (Tr. 149).

(g) Weaver, having received O'Malley's 16 August letter on 24 August, telephoned O'Malley on the next working day, Monday, 26 August, and told him that he could not meet with him that week because he was in negotiations with Kaiser in San Antonio, Texas (Tr. 149–150). Weaver also told O'Malley that he understood that O'Malley's boss and Weaver's boss had a meeting scheduled for 5 or 6 September and that they *did not want Weaver and O'Malley to hold any more negotiations* (Tr. 150) until that meeting. O'Malley said that that was not his understanding but that he would check back with Weaver. When O'Malley did not immediately check back with Weaver, Weaver telephoned O'Malley on 27 August and asked him what he had found out. O'Malley told him that there was no such agreement between the bosses and that if Weaver's boss told him not to meet with Respondent, that was Weaver's business (Tr. 150–151). Weaver told O'Malley that his boss had not *instructed* him not to meet but *preferred* that they not meet (Tr. 151).[6] O'Malley told Weaver that he wanted to meet with him *on 28 and 29 August* but Weaver told O'Malley that he could not meet because of his negotiations in Texas. Weaver added that if O'Malley insisted on meeting, he would meet him on the weekend, Saturday and Sunday, 31 August and 1 September, but that he would have to be back in California for Labor Day, Monday, 2 September. Weaver said that if those dates were okay with O'Malley, O'Malley should get hold of the FMCS commissioner, confirm the dates with the commissioner, and get back to Weaver.

(h) In response to these telephone calls of 26 and 27 August 1985, O'Malley, by certified mail, wrote (Jt. Exh. 12) to Weaver on 27 August:

> Dear Mr. Weaver:
>
> It should not come as any surprise to you that we certainly are very puzzled by your behavior of late. As you stated in both your 14 and 15 August 1985 letters, "we are interested in resuming the negotiations at the Fairborn plant as soon as you are ready." However, yesterday, when the company offered you 28 and 29 August, you stated you were unavailable. Again, yesterday, after you allowed that you might be available on Saturday and Sunday, 31 August and 1 September, the Company agreed to meet on those dates and then all of a sudden you insisted on a commissioner from the FMCS be present. This latest wrinkle comes as quite a shock inasmuch as in the past you never cared one way or the other about the presence of a commissioner from the FMCS. Nontheless, in the interest of cooperation, the Company contacted Regional Director O'Keefe and District Director Evans of the Central Region of the FMCS, and they have assured us *that no meeting need be cancelled on 31 August and 1 September due to the unavailability of a commissioner from their office.* [Emphasis added.]
>
> We look forward to seeing you at the Dayton Hilton at 10 A.M. on Saturday, 31 August 1985.
>
> Sincerely,
> Ron O'Malley
> Director of Labor Relations

(i) Either on 27 or 29 August while he was in San Antonio at the Kaiser negotiations, Weaver was contacted by FMCS. When the FMCS told Weaver that there was no FMCS commissioner available for the negotiations on 31 August and 1 September (Saturday and Sunday), Weaver said that if there was no mediator available, Weaver did not want to meet with Respondent no matter what the date was (Tr. 156). The FMCS commissioner told Weaver that O'Malley had told him that he was going ahead with the meeting anyway. Weaver told the commissioner to telephone O'Malley and tell him that Weaver would not be there without a commissioner. Weaver testified that he insisted on the presence of an FMCS commissioner because he was convinced that the parties would, at that time, be engaged in very serious bargaining and that the presence of the mediator is necessary "in case you get in trouble" (Tr. 164). By "getting in trouble," Weaver explained (Tr. 165) that the commissioner would keep the parties talking and working when negotiations became difficult.

At this point, 29 August 1985, Weaver flew from San Antonio, Texas, to San Jose, California, for a meeting on the next day Friday, 30 August, regarding the Kaiser Cement strike (Tr. 158). He did not thereafter contact O'Malley.

(j) By letter (Jt. Exh. 13) of 29 August 1985 to Weaver, O'Malley confirmed the meeting of 31 August and said that, unless the parties came to agreement, Respondent was implementing its last offer due to the fact that the parties were at impasse.

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[6] I was not favorably impressed with this switch in Weaver's testimony. It not only adversely affected Weaver's overall credibility but also led me to infer that Weaver was using his "boss" as a strawman excuse not to meet. In a similar vein, there is O'Malley's credited testimony, infra, that the Union's hierarchy (Henry Bechtoldt) forbade Weaver and Cantrell from bargaining in the absence of a FMCS commissioner, which condition, I believe, was another strawman pretext.

Around noon on Friday, 30 August 1984, O'Malley was at the Fairborn plant and there had a conversation with Local Union President Cantrell. O'Malley, who had tried without success to obtain a mediator for the bargaining sessions, was told by Cantrell that there would be no negotiation on the next day, 31 August. Cantrell told O'Malley that he and Weaver had been told by the Union's district director (Henry Bechtholdt) not to meet with the Company and that Weaver was not coming (Tr. 1560–1561). Cantrell also told O'Malley that because of the holiday weekend, at least some of the union bargaining committee were not available. O'Malley told Cantrell that the Company was proceeding with the meeting as scheduled and that the union committee should be assembled for purposes of collective bargaining.

The next day, the company bargainers appeared for bargaining and remained in the area available for collective bargaining through 1 September. Neither Weaver nor any of the negotiating committee appeared or contacted O'Malley or the Company by phone.

(k) On 30 August 1985, after speaking with Cantrell, O'Malley wrote to Cantrell, copy to Weaver (Jt. Exh. 14), in which, inter alia, he summarized the relationships of the parties through their communications ending with the Company's declaration of impasse and its threat to implement (Jt. Exh. 9 and 10) on 25 August 1985. The letter continues:

> Subsequently Mr. Weaver wrote on 14 August and again on 15 August stating he would meet *any time the Company was available* (emphasis added). The Company responded that they would be available *any* [sic] day between 19 August and 31 August and Mr. Weaver was to pick a day and we would be there. The Company offered Mr. Weaver possible meeting dates on Wednesday, 29 August and Thursday 30 August to which he stated he was unavailable again. In one last final desperate attempt, the Company, in the spirit of cooperation, offered Mr. Weaver the dates of 31 August and 1 September inasmuch as we were up against a deadline of 1 September 1985. At first Mr. Weaver stated he was free on those dates but he would have to be back in California on September 3 1985[7] for another appointment. But on second thought he then felt he needed a commissioner from the FMCS. This latest wrinkle comes as a real surprise since he never cared one way or the other about the presence of the FMCS prior to this weekend. Now, today you notify me that you think he stated his boss instructed him not to come.
>
> It now becomes mind-boggling how the parties will ever resolve their differences when the Union continues to refuse to meet and continues stalling, dilatory tactics and flaunts the labor laws designed to protect the working man. . . .
>
> Sincerely,
> Ron O'Malley
> Director of Labor Relations

(l) On 1 September, the Respondent notified its employees of the implementation of its collective-bargaining proposals, to be effective at 7:30 a.m., on 1 September 1985 (Jt. Exh. 16(A)). The notice to employees was also sent to Weaver and the Local Union's recording secretary (Franklyn Deaton). The summary of the benefits in the implemented company proposals was separately posted (Jt. Exh. 16(B)).[8]

(m) *Weaver's testimony*: Weaver testified, with regard to the proposed meetings on 6, 7, and 8 August, and particularly about his failure to send the Company's 27 June proposal (during the 6-week period after receipt), to either Pack or Cantrell and his failure to be present himself, that he was not present on 7 or 8 August because he regarded the Kaiser strike in California to be a more important problem than whether Respondent implemented proposals at Fairborn (Tr. 184). Although Weaver denied that he failed to send Pack or Cantrell (or any of the other union bargainers) a copy of Respondent's 27 June 1985 proposals and failed to tell them about the proposal in detail in order to frustrate collective bargaining, he admitted that the ignorance of the union bargaining committee, concerning the Company's outstanding offer, would limit its bargaining function to getting a copy of the proposals from the Company (because it did not have a copy), reading them over and then adjourning (Tr. 186). Weaver further testified that Pack, an International representative like himself, had full authority to bargain and negotiate with the Company. As above noted, however, neither Pack nor Weaver had the authority to execute the collective-bargaining agreement. Rather, that authority was vested in the officers of the Local Union who could recommend the agreement to the Southwestern Joint Conference that acted as a committee to accept or reject all local collective-bargaining agreements. (Tr. 188.)

Lastly, Weaver admitted that the Kaiser strike negotiations in San Jose, California, in which he participated as cochairman, had another cochairman who was an International representative of the International Association of Machinists (Tr. 191). Although Weaver testified that it was not "practical" or "responsible" to have the IAM cochairman become responsible for the Kaiser strike negotiations in San Jose and for Weaver to attend the collective-bargaining sessions in Fairborn on 6, 7, and 8 August, he never explained why it was not "practical" or "responsible" (Tr. 192).

With regard to why he did not send copies of the Respondent's bargaining proposals to any of the Union's bargainers in Fairborn, Weaver testified that he wanted to instruct or explain the Respondent's offer in person and did not want to send the Company's proposals out to the bargaining committee (Tr. 192):

> [I] did not want to . . . send [the Company's 27 June offer] out to the committee without my pres-

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[7] O'Malley testified that Weaver said he would have to return to California by 2 September (Tr. 1462).

[8] Respondent has not implemented its offers at the Victorville or Odessa facilities.

> ence. And that's why I didn't send it to them in the mail. For some kind of guidance on the matter. The local has at times indicated some interest in *going on strike and various other things* that we have advised against. And I didn't want something to spark some competition that we didn't think was wise. So I purposely withheld this, with that intent, to begin with anyway.
>
> Q. But you've already testified that Mr. Pack had the same authority as you, is that right?
>
> A. That's correct.
>
> Q. You could have given the document to Pack and said, hey, Pack, here it is, this is what I want you to do with it. You go meet with the people because I can't make it and these are the positions we ought to take and go forward and meet with the company; you could have done that?
>
> A. But I thought the way I was handling it was in our best interest. *Knowing and feeling that we had plenty of time to deal with it even after they received it from the company.* [Emphasis added; Tr. 193.]

The above was Weaver's intention notwithstanding in the 27 June letter (Jt. Exh. 6(A)), covering Respondent's new contract proposals (Jt. Exh. 6(B)), Respondent had threatened implementation if there were not bargaining within 1 month from that date and thereafter extended the threat of implementation to occur after the 6, 7, and 8 August bargaining if the parties did not reach agreement at that time.

Although the preponderant evidence shows, and I conclude, that the Union, at all material times, was unequivocally opposed to Respondent's demands for "take aways" (regardless of its willingness to accede thereto on "proof" of necessity) and was itself insisting on wage and other concessions from Respondent, I further conclude that the Union, during bargaining in 1984 and 1985, was mindful of, and content with, the wages, hours, and conditions of employment in the expired 1981-1984 collective-bargaining agreement that remained in full force and effect (R. Exh. 2).

B. *Discussion and Conclusions*

1. No impasse in 1985

Contrary to Respondent's repeated arguments at the hearing and in its brief, I conclude, as I often observed during the hearing, that regardless of the force, if any, of its argument that there was impasse at the end of the September 1984 Fairborn bargaining sessions (after which the Union filed unfair labor practice charges that were thereafter dismissed), the issue of impasse, at that time, is irrelevant. Respondent's 27 June 1985 contract offer, as stipulated to by the parties and as Respondent admitted, was a brand new offer containing substantial wage and other valuable concessions to the Union (in the form of reducing the "give-backs" in large measure) and, in fact, for the first time, granting certain relatively small wage increases to a large number of unit employees. In view of this new offer, as I continually reminded Respondent (Tr. 1276-1277; see Tr. 1290-1310 for particularization; Tr. 1317-1318) whatever "impasse" existed in 1984 was surely broken by Respondent's new offer of 27 June 1985 of more beneficial terms and conditions of employment to the Union. See *PRC Recording Co.*, 280 NLRB 615 (1986); *NLRB v. Gulf States Mfrs.*, 704 F.2d 1390 (5th Cir. 1983), citing, inter alia, *Pillowtex Corp.*, 241 NLRB 40 (1979), enfd. 615 F.2d 917 (5th Cir. 1980); *Builders Institute of Worchester County*, 142 NLRB 126 (1963). Thus, I conclude, in accordance with the General Counsel's and the Union's arguments, that Respondent's new and beneficial offer, ipso facto, broke whatever impasse existed during the previous 1984 negotiations. The existence of impasse prior to Respondent's 27 June offer need not be decided.[9]

2. The Union's dilatory conduct

The remaining issue, with respect to the conduct of the parties commencing with the Respondent's 27 June 1985 offer, is whether the Respondent was privileged to implement that offer in view of the Union's alleged failure to agree to bargain or to bargain at reasonable times, thus permitting unilateral implementation by Respondent.

Neither an employer nor a labor organization is permitted to engage in bargaining behavior that inhibits the actual process of discussion, the cornerstone of good-faith bargaining, *NLRB v. Katz*, 369 U.S. 736 (1962). Although the parties, in good faith, must bargain over proposed changes in established terms and conditions of employment following expiration of a collective-bargaining agreement, *Sacramento Union*, 258 NLRB 1074 (1981), bargaining must be something more than a ritual or pro forma approach; rather, it must be a rational exchange of facts and arguments to increase mutual understanding that then often results in agreement. *Dilene Answering Service*, 257 NLRB 284 (1981), citing *Winn-Dixie Stores*, 243 NLRB 972 (1979). The Board oversees and referees the process of collective bargaining, leaving the results of the contest to the bargaining strengths of the parties, neither party being obliged to surrender a position if entertained in good faith, *NLRB v. H. K. Porter Co.*, 379 U.S. 99 (1970). The Supreme Court ruled that collective bargaining is not simply an occasion for purely formal meetings between management and labor where each maintains an attitude of take it or leave it. Although the parties need not contract on specific terms, they are bound to deal with each other in a serious attempt to resolve differences and reach a common ground. *NLRB v. Insurance Agents*, 361 U.S. 477, 485 (1960). Anything that inhibits this process may be seen as an obstruction that violates the mutual obligations of the parties, *NLRB v. Katz*, 369 U.S. 736, 747 (1962); *NLRB v. General Electric Co.*, 418 F.2d 736, 762 (2d Cir. 1969), cert. denied 397 U.S. 965 (1970); *H. K. Porter v. NLRB*, supra.

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[9] I nevertheless conclude, in order to avoid the possibility of remand on the point, that there was never any impasse. The 1984 negotiations, on the uncontradicted evidence, ended with discussion of 18 of the 100 company proposals and no discussion of the union proposals whatsoever. These circumstances, notwithstanding the Union's subsequent refusal to bargain because of its filing of unfair labor practice charges against Respondent, fail to support the finding of an impasse. "Impasse" means that the parties have in good faith reached the end of their bargaining rope and that neither will budge. The parties in the instant case openly looked forward to further bargaining after the resolution of the Union's unfair labor practice charges and had not mentioned impasse. This conclusion is also consistent with the parties' subsequent exchange of correspondence in January 1985, after the General Counsel had refused to issue a complaint on the Union's unfair labor practice charge of September 1984. The parties' correspondence demonstrates that they both desired to resume bargaining for a contract. Such a state of mind is wholly incompatible with impasse, which is a hiatus in the obligation to bargain, because the parties reached the end of their bargaining rope. See *Pillowtex Corp.*, 241 NLRB 40, 46 (1979); *Cal-Specific Furniture Mfg.*, 228 NLRB 1337 (1977); *Builders Institute of Weschester*, 142 NLRB 126 (1963). Although it is clear that, in order to find impasse, *both* parties must believe that they are at the end of their bargaining rope, *Huck Mfg. Co. v. NLRB*, 693 F. 2d 1176, 1177 (5th Cir. 1982), the instant case is not an "impasse case" but a "dilatory bargaining" case. Both "impasse" and "dilatory bargaining" cases often involve the lawfulness of unilateral implementation. As noted below, in a "dilatory bargaining" case, however, a single party's perception of the other party's tactics is a relevant consideration in determining whether unilateral implementation is a lawful act.

In *Roman Ironworks*, 275 NLRB 449, 452 (1985), the Board did not unfavorably comment on the statement of Administrative Law Judge Green that:

> It therefore is not necessarily unlawful for the stronger side to make demands or take positions consistent with its strength. Quite obviously, the respective strength of a union verses a company in bargaining is largely dependent on the support of the employees it represents, their willingness to strike and the vulnerability of the company to a strike . . . . Furthermore, collective bargaining is basically a two-way street. Thus while the union may lawfully make demands designed to improve existing employee wages and benefits, there is nothing in the Act which denies an employer the right, for its part, to demand givebacks. Where the parties are negotiating to replace a prior contract, neither side is precluded from seeking modifications to its own advantage. The Act simply does not preclude an employer from demanding that various provisions of the old contract be modified, altered, or even eliminated.

Thus, there is no question that the parties ordinarily may, if the bargaining is in good faith, bargain to impasse and the employer is thereafter free to lawfully implement his last offer made to the union. *Huck Mfg. Co. v. NLRB*, supra; *Cal-Pacific Furniture Mfg. Co.*, 228 NLRB 1337 fn. 1 (1977); *Winn-Dixie Stores*, 243 NLRB 972, 974 (1979).

On the other hand, there is a corollary to the rule requiring bargaining to good-faith impasse. As the court noted in *NLRB v. Auto Fast Freight*, 793 F.2d 1126, 1129 (1986):

> There exists a narrow exception to the bargain to impasse rule: where, upon expiration of a collective-bargaining agreement, the union has avoided or delayed bargaining, and the employer has given notice to the Union of the specific proposals the employer intends to implement, the employer may unilaterally implement the proposals without first bargaining to impasse. *Stone Boatyard v. NLRB*, 715 F.2d 441, 444 (9th Cir. 1983), cert denied, 466 U.S. 937 . . . . (1984). *Accord, M & M Building & Electrical Contractors, Inc.*, 262 NLRB 1472, 1476–77 (1982).

Consistent with this exception is the obligation of the parties not to seek to stretch out negotiations by whatever strategy, *Eastern Maine Medical Center*, 253 NLRB 224, 247 (1980); and the parties are required, for instance, to avoid the strategy of appointing an agent to bargain who is without authority. An agent, though he may not have plenary authority to negotiate, must nevertheless have sufficient authority to engage in meaningful negotiations, *Hyatt Regency New Orleans*, 281 NLRB 279 (1986). Just as an employer is forbidden to deal with a union agent that it knows is not authorized to represent the union for a particular purpose, *Raskin Packing Co.*, 246 NLRB 78, 79 (1979), it would appear that the union is obliged not to send a "spear carrier," regardless of title, when in fact the union agent does not have actual authority—as opposed to titular authority—to represent the union in collective-bargaining negotiations.

The record shows, and I find, that the Respondent was anxious to achieve "give backs" or "take backs" in its collective-bargaining relations with the Union, which "take backs" would substantially modify the terms and conditions of employment of the expired 1981–1984 agreement. The Union was just as anxious to avoid those takebacks and, indeed, was anxious to gain concessions in terms of wages, hours, and terms and conditions of employment. Basic to an understanding of union conduct herein, I also find that failing to achieve its end, the Union was content to sail along with unit employees operating under the terms and conditions of employment of the expired contract. This they were entitled to do unless the Employer bargained to impasse and thereafter lawfully implemented; unless the Union, by its bargaining tactics, would be deemed to have been engaged in stalling tactics that would invoke the narrow employer privilege to lawfully implement without impasse, under *M & M Contractors*, supra, and *NLRB v. Auto Fast Freight*, supra.

A. By the early autumn of 1984, the collective-bargaining negotiations that had begun in April 1984 were not proceeding in an entirely hopeful vein. At the negotiation of 25 September 1984 at Fairborn, Weaver told O'Malley: "You'll have to kiss my ass, O'Malley. You're not telling me what to do or what rules to follow. I'll follow my own rules" (Tr. 368). And on the same day, the Union had allegedly occupied all the chairs in the conference room (situs of bargaining) at Respondent's plant so that neither the Respondent's bargainers nor the Federal mediator had a place to sit. Thereafter, Weaver became loud and profane to O'Malley on Respondent's premises (Tr. 369, et seq.). O'Malley believed that Weaver's obscene and heated language was overheard by its vendors, employees, and customers (Tr. 370). Respondent refused to continue to provide a room for collective bargaining and agreed to bargain only at the nearby Federal building in Dayton, Ohio, or at another place where the charges for the room would be split between the Union and Respondent. On the next day, 26 September 1984, Weaver told O'Malley that he had filed an unfair labor practice charge against the Employer for refusing to bargain in good faith by failing to provide, according to past practice, the bargaining facilities at the plant.

Weaver refused thereafter to bargain with O'Malley until the National Labor Relations Board had resolved the charges. The Union's unfair labor practice charge was dismissed on 1 November 1984. O'Malley thereafter contacted FMCS agents for the purpose of engaging in further collective bargaining but was told that Weaver's schedule, through the end of the year, was occupied in large part by unused vacation time that Weaver was going to take.

Although it is true that the next contact between the parties was the Union's 11 January 1985 letter to O'Malley requesting negotiations, and while this does not speak of *union* intransigence and delay, that letter was nevertheless met by O'Malley's responsive letter of 23 January 1985 in which he requested negotiations and offered to meet at reasonable times and places (R. Exh. 65; Tr. 1468). I find, from the above, that the Union's unfair labor practice charge (with regard to the Employer's failure to provide a place to meet) was frivolous and was based on no reasonable premise. I further conclude that this was a tactic of intentional delay in bargaining, flowing from the Union's otherwise lawful refusal to accept Respondent's "give-back" offer, and manufactured by the Union in order to continue the parties in the status quo of the existing collective-bargaining agreements' terms and conditions of employment. I find, moreover, that O'Malley reasonably believed, in the period following 1 November 1984 through January 1985, that Weaver was on vacation and the Union, therefore, not available for bargaining.

B. Whatever elements of delay on the part of the Union existed theretofore, there was no contact between the parties for Fairborn bargaining (whatever the intermediate bargaining at Odessa and Victorville) from the time of the Company's 23 January 1985 letter to the Union, supra, until it again wrote to the Union on or about 27 June 1985 asking for collective-bargaining negotiations and enclosing the new offer. This does not speak of delay on the part of the Union and it hardly supports Respondent's argument that the period between January and June 1985 must be laid at the feet of the Union as a source of further delay. I find that there was no such responsibility on the part of the Union in that period. On the contrary, I find that both parties were delaying bargaining. If anybody, in that period, had the initiative or reason to seek further Fairborn bargaining, it might well have been Respondent who nevertheless appeared to be satisfied, as was the Union, with the status quo of the working conditions at Fairborn. There is, indeed, no explanation on the record why Respondent did not take the initiative in further bargaining. For whatever reason, in its 27 June letter to the Union (R. Exh. 6(a)), it not only enclosed the terms of the new and improved offer (R. Exh. 6(b)), but also suddenly threatened to unilaterally implement if there were no negotiations in 30 days. Thus, although I reject Respondent's argument (Br. 42) that it was solely the Union's "unresponsiveness" to the Respondent's letter of 23 January 1985 that led to the failure to have further negotiations between late January and the Company's letter of 27 June, and while both parties appear responsible for the January through June bargaining hiatus, I do find that the Company's letter of 27 June, with its explicit threat to unilaterally implement, was designed primarily to get Weaver's attention, to promote immediate bargaining, and to underline the seriousness of Respondent's offer. This is not unlawful conduct, nor is it claimed to be.

After Weaver told O'Malley, at the beginning of July 1985, that he was unable to meet him within that 30-day period, O'Malley and Weaver tentatively agreed to the week of 5 August for the resumption of negotiations based on the new and improved offer. I find that in July, the parties agreed that Weaver would actually be present beginning on 6 August. I find, in addition, that by 2 August O'Malley believed that Weaver would probably *not* be present on 6 August and *would be* present on 7 and 8 August, and O'Malley had agreed to the presence of Kenneth Pack as the union negotiator on 6 August to start the negotiations on Respondent's new and improved contract offer. I further find that the parties agreed that negotiations might continue on the 9, 10, and 11 August. In fact, there was no bargaining on 6 August.

When on 7 August O'Malley walked into the hotel room (for collective bargaining) and asked "where's Weaver," I credit O'Malley insofar as he believed that Weaver would be present at the collective-bargaining session. I further find that he was surprised in seeing Kenneth Pack because Weaver told him only that he would probably have Pack represent the Union on the first day of bargaining, 6 August. I further find, as inconsistent with the Union's claim of not stalling and subsequent bargaining in good faith, the following elements:

1. I find that Weaver, no later than 2 August, intentionally prevented collective bargaining of any sort on 6–8 August by failing to send the terms of Respondent's offer to Pack (or to any of the other union bargainers) when he had reason to believe that he was not going to be present. Short of sending the agreement to Pack and the others, he could have, at a minimum, sufficiently discussed the terms with Pack (and the other unior bargainers) to permit informed union bargaining on the Company's offer and, indeed, make a counteroffer to some items at least. Thus, I conclude that Weaver's intentional failure to acquaint the union bargainers with the Company's offer, even as late as 2 August, when Weaver almost definitely knew that he would not be present on 6 August and thereafter, ensured that no meaningful bargaining could occur in his absence because there were no terms to bargain about. In this regard, I was particularly unimpressed with Weaver's testimony concerning why he did not send the copies to Fairborn for the bargainers or why he did not even acquaint them with the terms (Tr. 193 et seq.):

> Q. Why didn't you send it out there in between time?
>
> A. Why didn't I?
>
> Q. Yes
>
> A. Because I wanted to be with it when I sent it out. And in fact I brought all the copies with me when I did fly out on the 8th [of August]. I didn't want them to have it. Not knowing for sure whether or not I wouldn't be the one coming out. If I was going to come out on the 5th or 6th if our negotia-

> tions in San Jose cancelled, I would have been out there. So I wanted to come with these proposals to sit down with the committee and review them with them in my presence.
>
> . . . .
>
> Q. And again, why did you want to be with them? To avoid a strike or avoid a misunderstanding?
>
> A. Yes, to avoid them getting—you know, if the company had sent a cover letter saying, hey, this is our proposal and we plan on implementing. And after eliminating the arbitration clause and the payroll deduction of union dues and things of that nature, I wasn't for sure what kind of action that the local union might take. So I wanted to sit with them and make sure that we had ample opportunity to discuss it with the Company and see whether or not we could overcome those things before they took some action.

And even when Weaver telephoned Cantrell in early July, about a week after he received the Company's offer, he failed to tell Cantrell of the details of the offer even though Cantrell wanted to know the details (Tr. 196); rather, he insisted that he wanted to speak to Cantrell in person and discuss those things. What Weaver's tactic meant was that the Union could not bargain without him. Fear of the Local Union's suddenly striking, precipitated by Respondent's new offer, in the absence of the clearest corroboration, is wholly a testimonial invention and unbelievable.

Furthermore, when Pack, Cantrell, and the other union represenatives sat down to bargain, it was not only a question of Weaver being the only agent who could actually represent the Union. For, even assuming, arguendo, that Pack and the others were union agents in the sense that they could *actually* bargain for the Union, regardless of their titles, there is no question that they arrived there with nothing to bargain about. Indeed, Weaver admitted not only that they could bargain only if they got copies of Respondent's offer from Respondent (because they did not have any idea of what the offer contained), but that they would merely receive the copies from the Respondent and then *adjourn*. On the basis of this uncontradicted Weaver testimony, I conclude that Weaver's failure to timely send the offer or to timely acquaint the Union's bargainers with the offer could only result in a waste of time and not in anything resembling meaningful collective bargaining. This is obstructionist bargaining within *NLRB v. Katz*, supra, and cannot describe a serious attempt to resolve differences within *NLRB v. Insurance Agents*, supra.[10]

2. A further basic problem is the status of Kenneth Pack. I conclude that although Kenneth Pack had the same title as Weaver and was theoretically entitled to bargain collectively for the terms of the new contract, he was not an actual union agent for that purpose. I conclude that Weaver's dispatch of Pack was not for the purpose of having Pack engage in collective bargaining. Rather, Pack, who had principally engaged in bargaining at Fairborn by dealing with the Local Union's grievances, had never been chief spokesman or indeed prominent spokesman with regard to the 1981 bargaining or any other contract collective bargaining. He was not sent to the Fairborn bargaining in August 1985 in good faith.

3. Furthermore, there seems to be little excuse for Weaver's failure to fulfill his July agreement to attend the meetings on 7 and 8 August 1985. There was no reason advanced, other than the Kaiser strike, why he could not have attended the Fairborn sessions and permitted the IAM cochairman to control the Kaiser strike negotiations. Although Weaver's preferring to remain at the Kaiser negotiations, even in the face of O'Malley's threat to implement, might not be an unreasonable position for Weaver to ordinarily take in terms of making a considered choice, it loses much of its force in the face of his prior agreement to attend the negotiations and in the availability of the I.A.M. cochairman.

4. I further find significant the fact that when Weaver arrived around midnight on 8 August, he did not thereafter immediately attempt to contact Weaver or any other company agent in order to continue collective-bargaining negotiations. Weaver's return flight to California did not excuse the Union, which had precipitated the failure to engage in collective bargaining after having chosen 5 August as the suitable week, from immediately seeking to rectify its omission and failure.

5. After the 8 August meeting with Pack and the other union representatives, O'Malley declared impasse and on the morning of 9 August left for California. Thereafter came the several self-serving letters between the parties resulting in O'Malley's agreeing not to implement, as he had threatened, if the parties could thereafter meet and bargain. There is no question, on this record, that the Union, commencing mid-August 1985, offered to meet at any reasonable time chosen by the Employer. When the Employer then offered 28 and 29 August, Weaver could not attend, again because of a Kaiser Cement problem. I conclude that under these circumstances, Weaver's failure to attend a collective-bargaining session on 28 and 29 August was further evidence that he was not seriously desirous of engaging in collective bargaining especially if that collective bargaining might result in an impasse, which O'Malley by now foresaw and which Weaver feared. Further, I find that he was under an obligation to substitute, suspend, or eliminate other business in order to facilitate bargaining with the Respondent on those dates in light of his own offer to meet and of his past failures to meet.

6. On and after 26 August 1985, Weaver and O'Malley agreed that bargaining would take place on 31 August and 1 September. I credit O'Malley in that Weaver then insisted that the meeting take place in the presence of a Federal mediator. I do not have to reach the question, briefed by Respondent, whether Weaver's insistence on a Federal mediator, as a condition for bargaining, was insistence on the presence of a *nonmandatory subject of bargaining* and therefore was unlawful. For I find that, on the facts, his insistence on a Federal mediator was *pretex-*

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[10] In response to the Company's request for a counterproposal to its proposal that had been in union hands for 6 weeks, all the union bargaining agents asked: "What proposal?"

tual and advanced for the purpose of impeding collective bargaining. I make this finding on three grounds:

(a) I conclude that the *presence* of a Federal mediator had never been a condition of the parties' engaging in collective bargaining. Rather, the most that this record shows was that O'Malley insisted on the use of the FMCS to schedule the meetings. The evidence discloses that FMCS commissioners were not present at many of the meetings whether at Odessa, Victorville, or Fairborn. Moreover, contrary to Weaver's original testimony (Tr. 201)—that there was an agreement between the parties that a mediator was required at all negotiations at Fairborn—Weaver admitted that there was no such agreement (Tr. 205) and that the only practice regarding FMCS was that the mediation service set up the meetings.

(b) In addition, the evidence is undisputed that FMCS itself told Weaver, on and after 26 August, that the presence or absence of a Federal mediator should not deter the parties from engaging in collective bargaining.

(c) I was impressed that Weaver rejected the 28 and 29 August meeting dates but agreed to 31 August and 1 September. When he then added the condition that a Federal mediator be present, and added this condition on and after 26 August, it ensured that the condition could not be fulfilled. For, as it turned out, there was no reasonable expectation of getting a Federal mediator for the Labor Day weekend when the requirement and request were first set during the same week.

For these reasons, I conclude that Weaver's failure to meet *on any* date between 28 August and 1 September was a further stalling device, a failure to bargain in good faith after he had agreed to bargain in that period, and was based on a pretext.

7. Although it is true that the instant case does not, and need not, contain an allegation of the Union's violation of Section 8(b)(3) of the Act, *NLRB v. Katz*, supra, in deciding whether Respondent violated Section 8(a)(5) by implementing its last offer, I nevertheless find that Respondent, on the above evidence, certainly as early as 26 September 1984, was guilty of systematically evasive and dilatory bargaining that permitted the Respondent to lawfully implement its last offer on 1 September 1985.[11]

The General Counsel and the Union argue that Respondent was itself setting up the entire situation so that it could unilaterally implement. See, for instance, Member Jenkins dissenting in *R. A. Hatch Co.*, 263 NLRB 1221, 1223 (1982). Whatever Respondent's predisposition was in 1984, by its 1985 offer, it showed none of the characteristics of a hidden motive of staged bargaining. In addition, the Board's rule is that when an employer implements on its decision that further bargaining would be fruitless, especially stemming from alleged dilatory union conduct, it is permissible to view the facts from the employer's point of view or perspective, *M & M Contractors*, 262 NLRB 1472, 1476 (1982); *R. A. Hatch Co.*, supra. Viewed from that perspective, it is clear what Respondent saw in September 1984. It saw the Union file a baseless unfair labor practice charge that, I have already found, was part of the process of the Union's delaying tactics. Notwithstanding that the delay between the 1 November dismissal of the charge and Respondent's 27 June 1985 letter demanding further bargaining was not solely the responsibility of the Union, I nevertheless have concluded that with the 27 June offer to the Union, Respondent was seriously interested in bargaining, threatening impasse as the alternative. From Respondent's point of view, taking into account past union procrastination in the September 1984 baseless unfair labor practice charge and then the unavailability of the vacationing Weaver for bargaining between the period of 1 November and 31 December 1985, the Employer saw Weaver's post-27 June 1985 conduct as even clearer procrastination and delay.

Following its 27 June 1985 offer, what did Respondent see? It saw Weaver, claiming unavailability, avoiding bargaining in the 30-day period 27 June through 27 July. It saw Weaver electing to remain in California rather than to arrive on 6 August because, as Weaver explained, and as O'Malley knew, Weaver attached greater importance to settlement of the Kaiser Cement strike than to bargaining with Respondent even with the threat of implementation. It saw, regardless of O'Malley's formal acquiescence, the use of Pack as the Union's bargainer without his having actual authority to engage in contract collective bargaining. It saw Pack and the union representatives totally unacquainted with the Respondent's 27 June plenary offer and, moreover, totally unequipped to bargain in good faith even if they had the authority to do so. They did not have the *new offer*; in addition, they not only did not have the *expired collective-bargaining agreement* with them, but they did not even have the ability to compare Respondent's new offer with its old offer (April 1984), because they did not have the *old offer* either. Respondent then further saw a 2-day long series of fumbling attempts by wholly unequipped bargainers, reading a complex offer, meanwhile stalling around for Weaver, notwithstanding that Weaver might never show as he had promised to do.

On the Union's request, following the 6–8 August failure, that Respondent delay implementation until further bargaining, Respondent acquiesced. Weaver offered to meet at Respondent's convenience in late August. Respondent then attempted to arrange bargaining on 28 and 29 August and, again, Weaver was again unavailable because of his commitments in San Antonio to bargain with the Kaiser Cement Co. Thereafter, Weaver agreed to bargain on 31 August and 1 September but added the proviso that a Federal mediator be present. As I have noted, that proviso was a matter of pretext and the imposition of a condition, the timing of which, in any event, would prevent bargaining. Under all these circumstances, I conclude that the Respondent was not merely engaging in an exercise of pro forma bargaining to set the stage for unilateral implementation. See *R. A. Hatch Co.*, supra at 1221, 1223; further O'Malley, on 8 August, could reasonably conclude that further delay in implementation was not warranted because attempted negotiations had been systematically frustrated by the Union. *M & M Contractors*, supra at 1476.

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[11] Whether Weaver could have implemented as early as 8 August at which time he had erroneously declared "impasse" is a matter on which I need not pass.

To the extent the Union argues that Respondent's demand (that the Union bargain on Respondent's proposal and present counterproposals) was a deviation from past practice (of going through Respondent's proposals one item at a time),[12] that argument loses sight of the fact that the Union was not equipped to bargain at all (1) by sending Pack, (2) by Weaver never appearing, and (3) by having bargainers wholly without knowledge or preparation. It also loses sight of the fact that such a process may have been in order when the parties merely exchanged proposals at the outset of negotiations. Such a proposition has no place where there is a lapse of almost a year in bargaining, and Respondent sends a full proposal with concessions and reasonably allows 6 weeks for the Union to become acquainted with the terms thereof. Moreover, the record shows that when O'Malley demanded a counterproposal, Pack did not refuse on the ground that he expected the Respondent to go through its proposals, one at a time, as it had done in previous bargaining; rather, Pack stated that the union bargainers had not enough time to evaluate Respondent's proposal; that the Respondent had not bargained on the Union's prior proposals, and that the Union had not been able to address Respondent on its own proposals. This was Pack's position both on 7 August (Tr. 560) when the attempt at bargaining opened and on 8 August (Tr. 570) when the attempt at bargaining continued. The dispositive facts are that the Union, content with the status quo of working under the terms of the expired contract, because of Weaver's absence, his failure to educate the committee on Respondent's offer, the resulting bargaining illiteracy of the union committee, and its function of merely obtaining a copy of the proposal and adjourning, was engaged only in a pro forma ritual. The union bargaining committee was simply not designed or prepared to bargain at all, much less to offer the "rational exchange of facts and argument" that the Board has repeatedly interpreted as the good-faith bargaining mandated by *NLRB v. Katz*, supra. See *Dilene Answering Service*, 257 NLRB 284, 285 (1981); *Winn-Dixie Stores*, 243 NLRB 972, 974–975 (1979). Stalling avoided "givebacks."

The General Counsel's argument that O'Malley's virtual disregard of Pack, and his insistence on Weaver as a bargaining partner, demonstrates that he was unlawfully attempting to dictate to the Union who should be its negotiator, in my judgment, misses the point. It was not that Weaver had more authority to bargain than Pack; it was that Pack, regardless of his titular equivalence to Weaver, had no authority to actually bargain.[13] He was there to stall until Weaver came. Pack, in any case, had nothing to bargain about.

Where the General Counsel and the Union argue that Weaver's failure to provide the union bargaining committee with copies of the Respondent's proposal did not significantly disrupt the 7 and 8 August negotiations, I disagree. As above noted, I conclude that it is evidence not only of Weaver's sole authority to bargain but demonstrates that Weaver intentionally permitted the union committee to engage in pro forma bargaining with the admitted aim of its merely acquiring a copy of the Company's proposal and then adjourning. I conclude that such a bargaining device was not good-faith bargaining. The General Counsel admits only that this union strategem was "perhaps not good form" (Br. 24), i.e., for Weaver not to have supplied a copy of the proposal to the union committee prior to the 7 August 1985 negotiation session. I specifically disagree with his assertion that it does not constitute "intransigence or a delay or avoidance of negotiations." I conclude that, as noted, it was a deliberate demonstration of Weaver's unwillingness to permit anything other than ritualistic pro forma bargaining in his absence.

Weaver's explanation for not sending a copy to the 6–8 August union bargainers at any time, or even explaining it by telephone (even on and after 2 August when he knew he was not going to be there), was his fear that the employees might do something precipitous, such as engaging in a strike. As above noted, this alleged fear was totally unsupported by any corroborating evidence. I regard Weaver's explanation as a fabrication, explaining away his failure to educate the union committee. Such an unfounded explanation only further exposes who was going to engage in effective bargaining on behalf of the Union: only Weaver himself.

Again, I conclude that Respondent, in spite of its 27 June threat to implement at the end of 30 days (if Respondent and the Union did not bargain), thereafter consistently refrained, at the Union's request, from unilaterally implementing even after the 7 and 8 August frustrated bargaining. It was Respondent that thereafter attempted to create further bargaining opportunities on 28 and 29 August; and on union rejection of those dates, on 31 August and 1 September. This Respondent's conduct does not demonstrate stage setting for unilateral implementation. On the contrary, its repeated delay in implementation demonstrates a fear of unilateral implementation and a desire to get union agreement or good-faith impasse. Having given the Union its detailed offer 8 weeks before implementation and the Union having intentionally and systematically delayed and avoided bargaining thereon, and there being prior evidence of union stalling, Respondent did not unlawfully implement its offer on 1 September 1985. *M & M Contractors*, 262 NLRB 1472 (1982), enfd. sub nom. *Carpenters Local 266 v. NLRB*, 707 F.2d 516 (9th Cir. 1983). Cf. *NLRB v. Auto Fast Freight*, 793 F.2d 1126 (9th Cir. 1986).

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[12] As I understand this argument, the Union is not suggesting that this practice had hardened into a mandatory subject of bargaining; rather, that the Union was merely reasonably led to expect a continuation of this format.

[13] This issue is actually academic because even if Pack had such actual authority and even if O'Malley agreed to bargain with him as chief negotiator, any such agreement was destroyed by Weaver's failure to equip Pack and the union bargainers with any substance to bargain with or against.

C. *Further Alleged Violation of Section 8(a)(5)*

By paragraph 7(A) of the amended Case 9-CA-22942 complaint, the General Counsel alleges as a further violation of Section 8(a)(5) that:

> Since on or about 1 September 1985, Respondent has refused to meet with the Union to discuss grievances if the union's grievance committee had more than four members.

With regard to paragraph 7(A), the parties agreed (Tr. 1563) that a stipulation entered on the record, together with certain jointly sponsored documentary evidence, would constitute the entire proof of the alleged violation together with Respondent's defense. The stipulation appears as follows (Tr. 1563-1564):

> The expired collective-bargaining agreement provides that the Union can have a total of four second step grievance representatives, consisting of three members and recording secretary.
>
> From May 1, 1984 to September 1, 1985, the Union and the Company have met in excess of 10 times to discuss grievances. During that period of time the Union did not have in excess of four grievance representatives (three members and the recording secretary), unless by mutual agreement.
>
> Since implementation of changes of terms and conditions of employment by the Employer, on September 1, 1985, the Employer has refused to meet with the grievance committee, other than the committee provided for in the expired collective bargaining agreement, in spite of the Union's request to do so.
>
> Between May 1, 1984 and September 1, 1985, there were no negotiations on the number of grievance representatives the Union could have.
>
> Since 1 September 1985, the Union has offered to negotiate on the number of grievance representatives, but there has been no agreement.

The joint exhibits (Jt. Exhs. 18-25) offered by the parties demonstrate as follows:

(1) Joint Exhibit 18, a letter of 11 September 1985, from the Union to Respondent lists the composition of four union committees: the negotiating committee, the grievance committee, the safety committee, and the training committee. The grievance committee lists it as its members: chairman, Cantrell; recording secretary, Deaton; and "spokesmen," Gullett, Lykins, and Grace. In addition to these five named members, the letter adds: "Other [grievance] committee members shall be all members of the bargaining unit."

(2) Joint Exhibit 19, a letter of 18 September 1985 from the Union to Respondent, notes that in a 2-week period, the Union repeatedly asked Respondent to meet with the "designated [grievance]" committee but that the Respondent refused to meet. The letter ends with a request from the Respondent to reconsider its refusal to meet with the designated committee before the Union considers "legal action."

(3) Joint Exhibit 20, a letter from Respondent to the Union, dated 20 September 1985, expresses Respondent's desire to meet with the committee on a regular basis to resolve day-to-day problems. Respondent, however, states that it reviewed its legal position concerning the *expanded committee* and states that it continues to refuse to meet with it. Respondent offers to meet with the union committee "as long as the meeting is orderly and we are able to get something accomplished."

(4) Joint Exhibit 21, the Union's 15 November 1985 letter to Respondent, requests that Respondent schedule meetings to discuss outstanding grievances and resolve them. The Union notes its willingness to meet after normal working hours and again requests Respondent to notify the Union promptly of a schedule of meetings to resolve the large number of outstanding grievances awaiting action.

(5) Joint Exhibit 22, Respondent's 18 November 1985 reply to Joint Exhibit 21, states that that Respondent is available for a grievance meeting on 20 November, but "reminds" the Union of Respondent's refusal to meet with a union grievance committee beyond the three employees and a recording secretary, based on the authority of article 5, section (a) of the implemented terms and conditions of employment. Respondent states that if "the Union continues to insist on more members than allowed, it will be assumed that the Union does not want to meet, which will affect the status of grievances relative to time limits."

(6) Joint Exhibit 23, a union letter of 19 November 1985, in apparent response to Joint Exhibit 22, requests Respondent to schedule a meeting to plan for a schedule of meetings to resolve the large number of outstanding grievances.

(7) Joint Exhibit 24, the Union's letter to Respondent of 6 February 1986, notes that no grievances, filed after 1 September 1985, have been taken to second-step grievance meetings and that the Union has received no response to its request for a plan for future second-step grievance meetings. The Union notes that this refusal to discuss grievances resulted from Respondent's contention that the Union must abide by Respondent's interpretation of what is a proper number of members for the union committee. The Union then states that it considers the grievances, in view of the time limits concerning second-step grievances, to have been *forfeited* in favor of the Union and requests Respondent to make all grievants whole as requested in the grievances.

(8) Joint Exhibit 25, Respondent's 7 February 1985 response to Joint Exhibit 24, asserts that the Union's 6 February letter (Jt. Exh. 24) was correct insofar as it asserted that management had exercised its legal right to limit the size of the grievance committee to three employees and a recording secretary as stated in article 5(a) of the implemented terms and conditions; but that the Union is incorrect in asserting that Respondent has refused to discuss grievances. Respondent states that it has repeatedly informed the Union of its desire to meet and discuss grievances with the "recognized grievance committee," but that the union committee, despite Respondent's condition, chose to arrive at the grievance meetings with

more than the allowed number that resulted in no meetings being held. The letter further states that it is Respondent's position that any violations of grievance time limits were caused by the Union and that those grievances have been denied by Respondent. The letter concludes with the stated willingness of the Employer to meet with the *recognized grievance committee.*

The expired 1981–1984 collective-bargaining agreement (Jt. Exh. 1) in its article 6, "union activity," limits the union grievance committee to four employees ("not more than three employees and a recording secretary"). The implemented 27 June 1985 offer (implemented 1 September 1985) in its article 5, "union activity," contains the same limitation.

The expired collective-bargaining agreement, article 26, "Grievance and Arbitration" contains a 3-step grievance procedure with the fourth step being a referral to binding arbitration. In article 25 of the implemented Respondent offer, entitled "Grievance and Arbitration," there is no provision for arbitration but merely the three-step grievance procedure and the other limitations contained in the expired agreement's article 26.

IV. DISCUSSION AND CONCLUSIONS

It appears from the above that under the terms of the expired (1981–1984) collective-bargaining agreement and under the terms of the implemented Respondent offer, the provisions relating to the *number* of the Union's grievance committee are the same and the *grievance procedure* in both instruments remains the same although the provision for arbitration was eliminated in the implemented provision. Because we are not here dealing with any problem relating to arbitration, I conclude that the provisions concerning both grievance procedure and committee composition of the expired collective-bargaining agreement and the newly implemented agreement remained the same.

It also appears, under the stipulation, that since 1 September 1985 the Union has *offered to negotiate* on the "number" issue, but there has been no agreement on the *number* of union grievance committee representatives. Such a *stipulated* statement does not demonstrate, nor is there any proof, that Respondent at any time refused to offer to negotiate on the issue. Merely, as far as the stipulation goes, there has been "no agreement on the number of union grievance representatives" (Tr. 1563–1565). The stipulated supporting evidence, it seems to me, the above joint exhibits, in evidence, are quite to the contrary. They show no desire on the part of either party to *negotiate*: merely the Union's notification to Respondent of changes in committee composition in terms of number of the grievance committee, and Respondent's repeated refusal to meet with the expanded committee. Thus, in the Union's first notification to the Employer, its 11 September 1985 letter (Jt. Exh. 18), it did not offer to bargain with respect to the increase (above four) in the number of members, but merely notified Respondent that the union grievance committee would consist of at least the five named persons (Cantrell, Deaton, Gullett, Lykins, and Crace) and might also include "other members who shall be bargaining unit employees. Thus, (a) in view of the unspecific nature of the stipulation with regard to the Respondent's *response* to an offer to bargain; (b) the failure of both the stipulation and the joint exhibits to indicate that the Respondent refused to bargain on any such offer; and (c) in view of the stipulation reciting merely that there has been no agreement, I do not infer that the Respondent necessarily refused to bargain on any union offer to increase the number of grievance committee members. I find, to the contrary, based on the lack of specificity in the stipulation and the specificity in the joint exhibits, that both parties remained adamant in there announced positions at all material times: the Union insisted on five or more members for the grievance committee; the Company insisted on maintaining a limit of four members as specified in article 5(a) of the implemented offer of 27 June 1985.

In *NLRB v. Haberman Construction Co.*, 618 F.2d 288, 302–303 (5th Cir. 1980), enfg. 236 NLRB 79 (1978). See *NLRB v. Haberman Construction Co.*, 641 F.2d 351 (5th Cir. 1981), the court made two observations that are pertinent to this case:

(a) The Court notes (618 F.2d at 297):

> Under section 8(d) of the Act, 29 U.S.C.A. § 158(d) . . . a party to a contract who unilaterally modifies a contractual term that is a mandatory subject of bargaining commits an unfair labor practice. See *Chemical Workers Local 1 v. Pittsburgh Plate Glass Co., Chemical Division*, 404 U.S. 157 . . . (1971).

(b) The Court also notes (618 F.2d at 302):

> At contract expiration, an employer may not unilaterally alter, without bargaining to impasse, a contractual term that is a mandatory subject of bargaining. This result obtains because such a term "by operation of statute continues even after the contract embodying it has terminated."[14]

The court observes that contractual terms (that are mandatory subjects of bargaining) that survive contract expiration include "grievance procedures," citing *Shipbuilders v. NLRB*, 320 F.2d 615, 619–620 (3d Cir. 1963), cert. denied 375 U.S. 984 (1964).

Following *NLRB v. Haberman Construction Co.*, supra, I conclude, contrary to the arguments of the General Counsel and the Union, that the *number* on the committee is part of the grievance procedure machinery established in both the expired collective-bargaining agreement and the lawfully implemented Respondent offer of 27 June 1985, and is therefore a *mandatory* subject of bargaining. I further conclude that whether the collective-bargaining agreement is deemed to be an effect because Respondent's implementation of 1 September was *unlawful* or whether the terms of the implementation are deemed *lawful* and, in effect, the composition, in so far as number is concerned, of the grievance committee remains in full force and effect and limits the parties until this provision is changed by bargaining impasse, agreement, or other legal device.

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[14] The court notes, however, that certain exceptional mandatory subjects of bargaining *do not* survive the expiration of the contract and those terms include arbitration provisions and union-security provisions. See fn. 16, *NLRB v. Haberman Construction Co.*, supra at 302.

It seems to me unpersuasive for the General Counsel and the Union to cite cases purportedly demonstrating that the expired contractual, or newly implemented, limitation on the *number* of union members on the grievance committee is a mere nonmandatory or "permissive" subject of bargaining on which the parties may not bargain to impasse. Those cases, including *Bethlehem Steel Co.*, 136 NLRB 1500 (1962), enf. denied on other grounds sub nom. *Shipbuilders v. NLRB*, 320 F.2d 615 (3d Cir. 1963), cert. denied 375 U.S. 984 (1964), relate only to the question of *who* can be on the union grievance committee. That issue, it is true, is a permissive subject of bargaining about which an employer may not negotiate to impasse.

The Union correctly notes that, in the above *Bethlehem Steel Co.* case, the Board and Third Circuit both found, however, that a *grievance procedure* is a mandatory subject of bargaining that the employer is privileged to bargain to impasse on. The Union then mistakenly, in my judgment, equates the question of whether the Employer may bargain to impasse concerning *who* may constitute the members of a union grievance committee with whether it may do so as to *number*. But who is not the same as *how many*. The fundamental difference between *who* and *how many* is apparent because the employer, as in the instant case, has a vital economic interest in establishing *how many* unit employees will be on the union grievance committee because grievance committee membership and activity may, for instance, remove unit employees from their assigned work. This functional, routine economic interest exists without regard to the further question of whether a union's unilateral imposition of *number* would demonstrate bad-faith bargaining, per se, if it insisted on an extraordinarily large number on its grievance committee. Thus unlike the narrow question of *who* can be on the union committee, where, as the General Counsel notes, the employer's bargaining interest might relate only to the identity of a member who might interfere with the process of collective bargaining (by a showing that a particular union bargainer would create such ill will as to make good-faith bargaining impossible), *KDEN Broadcasting Co.*, 225 NLRB 25, 35 (1976). Cf. *Stevens Food*, 272 NLRB 907 (1984), there is ordinarily no employer economic or bargaining interest in resolving *who* shall be the Union's bargaining representatives.[15] Furthermore, as the Union notes, in citing the Third Circuit's decision in *Shipbuilders v. NLRB*, supra at 615, 618–619, under Section 9(a) of the Act, the union is the exclusive representative of unit employees. Bargaining to impasse on a limitation that restricts who is on the union committee would restrict the Union's statutory role in the prosecution of grievances. Cf. *Postal Service*, 280 NLRB 685 (1986). Thus, not only is there an explicit statutory command under Section 9(a) demonstrating that the Union has the predominent and almost exclusive right to determine *who* shall be its committeemen, but there is no such statutory command that relates to the *number* of employees who will be on the grievance committee. I conclude that "number," unlike "who, is a mandatory subject of bargaining."

In short, therefore, the present facts demonstrates that the Union, regardless of its *offer* to bargain with regard to "number" without bargaining to impasse, agreement, or other lawful excuse, presented to Respondent the fait accompli of a unilaterally changed *number* of union bargainers. In these circumstances, the Union, itself, regardless of any motive of harassment, created a unilateral change in a mandatory subject which was to be bargained to lawful impasse or made the subject of agreement.[16] I shall recommend to the Board that the allegation of Respondent's violation of Section 8(a)(5), in refusing to accede to the Union's fait accompli regarding the number of its bargainers, in refusing to meet with the unlawfully argumented union grievance committee, and in insisting on maintaining the status quo ante (through the lawfully implemented terms and conditions of employment) be dismissed.

V. PARAGRAPH 7(B) OF THE AMENDED COMPLAINT

A. *Respondent's Alleged Restriction on the Scope of Bargaining*

The General Counsel alleges in paragraph 7(b) of the amended complaint:

> Since on or about 6 November 1985, Respondent has insisted that bargaining for a new contract be limited solely to counterproposals based on its proposals implemented on 1 September 1985 for the Unit.

After Respondent implemented its 27 June 1985 proposals on 1 September 1985, the parties, together with an FMCS commissioner, next met at Fairborn on 5 and 6 November 1985. When O'Malley said that he was ready to receive the Union's proposals, Weaver told him that the Union had some questions about the implemented Respondent proposal. They discussed the implemented subcontracting provision. When Weaver then asked O'Malley to give the reasons for the wage implementations, O'Malley told him that the Union knew the Respondent's position based on "industry problems" and further stated, correctly (Tr. 1599), that he had given the Union all the information that the Union had asked for regarding the new wage disposition in the implemented agreement. At this point, the Union, through Weaver and Gullett, read its proposals regarding all contract elements (labor agreement, pension agreement, insurance, and SUB)[17] and the Company requested a recess until the next day, 6 November. They met again on 6 November and O'Malley told the Union that he was disappointed in the Union's proposals and desired to discuss nothing except the Company's implemented proposals (Tr. 1578). He told the Union that unless it agreed to confine its discussions to the Company's implemented proposals, the Company would not negotiate further. Weaver told O'Malley (Tr. 1578) that he was prepared to negotiate on any and all terms and conditions and to ultimately reach a settlement on the contract, but the Union would not agree to the condition that it would only discuss the implemented proposals. In fact, it was the Union's position that it was free to bargain on any and all terms in the implemented elements and to change them, particularly upward (Tr. 1576).

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[15] In this case, particularly, the Union has gone out of its way to demonstrate in writing that it considers itself not bound to even five members but might include, and reserves its right to include, "other committee members" who shall be all members of the bargaining unit. Thus, the Union has not only unilaterally enlarged the committee to five members, but it specifies that any further argumentation in number will come from members of the bargaining unit and therefore capable of being withdrawn from jobs, vacations, or other situations in which the Employer has an economic interest.

[16] The Board, in the recent *Indiana & Michigan Electric Co.*, 284 NLRB 53 (1987), has again forbidden a party, after contract expiration, from unilaterally altering or abandoning contract grievance procedures.

When Weaver told O'Malley that the Union would not agree to limit bargaining to the implemented proposals, O'Malley answered that the Company had nothing further to say. O'Malley then picked up his records and the company committee marched out of the room (Tr. 1579). As O'Malley was leaving the room, Weaver told him that he thought that the Employer would return because the Union was going to file an unfair labor practice charge over the Employer's conduct (Tr. 1585).

After O'Malley and the Company's bargaining committee left the room, the Union remained with the FMCS commissioner and asked him to have O'Malley return because the Union had a proposal that it would like to submit. The FMCS commissioner then left to contact the Company, still in the hotel. He returned shortly thereafter and told the Union that O'Malley had asked him if the Union's proposal related to the implemented proposals and the FMCS commissioner told him that he did not know but would find out from the Union. Weaver told him that it did not. The FMCS commissioner then revisited the Company, returned a short time thereafter (Tr. 1587–1588), and told the Union that O'Malley said that Respondent would not return to the bargaining table unless the Union agreed to discuss and negotiate only Respondent's implemented proposals. When Weaver told the FMCS commissioner that he would not agree to that limitation, the FMCS commissioner recessed the meeting.

The union proposal, which was never presented to the Company in view of the bargaining situation, related to the grievance and arbitration procedure. It should again be noted that the Company's implemented proposal had struck out the arbitration provision from the grievance procedure in the expired 1981–1984 collective-bargaining agreement.

By a letter dated 12 November 1985, Weaver wrote to O'Malley (Jt. Exh. 26):

> Dear Mr. O'Malley:
>
> At our meeting in Dayton, Ohio, on November 6, 1985 you informed the Federal Mediation and Conciliation Service Commissioner Anderson that you would not meet in negotiations any more with the Union unless there was an understanding before the meeting that we would only work from the Company's implemented proposals. I advised you at that meeting that we would not agree to your conditions. We told you that we did not [sic][18] want to present additional proposals for your considerations [sic]. You refused to meet with us since we would not agree to premeeting conditions. You are herein again advised that we do not agree to limit our proposals and discussion to the Company's implemented proposals. However we do have meaningful proposals to present to the Company and therefore, request a negotiating meeting with you for that purpose, at our mutual earliest available date.
>
> In disrespect to you and Southwestern Portland Cement Company for the way you are treating the Fairborn workers.
>
> Sincerely,
> Kent Weaver

By its letter dated 25 November 1985, the Respondent answered the Union (Jt. Exh. 27):

> Dear Mr. Weaver:
>
> We are in receipt of your November 12, 1985 letter, in which you state that you will not agree to the Company's pre-meeting conditions for further negotiations.
>
> The Union must recognize that the Company does not have implemented proposals, but rather they are implemented terms and conditions of employment which replaced the terminated agreement that expired May 1, 1984.
>
> As the Company stated, we are only interested in working from the existing terms and conditions of employment; however, since you stated you are going to make meaningful proposals, we will, of course, meet with the Union.
>
> Inasmuch as the last meeting was recessed by Commissioner Anderson, it is suggested that you work through his office in arranging future meetings.
>
> Sincerely,
> Ron O'Malley
> Director of Labor Relations

The parties then next met on 20 February 1986 where Weaver insisted on Respondent either engaging in multiplant bargaining or agreeing on the applicability of bargaining at one plant affecting the other plants. Respondent refused either position and insisted only on single-plant bargaining. The FMCS commissioner canceled a further meeting and there have been no subsequent meetings.

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[17] These 5 November union proposals included changing the newly implemented 85-day probationary period to 45 days; adding three yearly 25-cent-an-hour wage increases; and increasing company contributions to SUB, pension, and insurance plans.

[18] Weaver credibly testified that the inclusion of the word "not" was erroneous (Tr. 1589).

B. *Discussion and Conclusions*

Based on Weaver's credited and uncontradicted testimony, as supported by the correspondence of the parties on 12 and 25 November 1985 (Jt. Exhs. 26 and 27), there is no question that in negotiations on 5 November 1985, O'Malley told the Union that Respondent would not negotiate unless there was an understanding before the meeting that the negotiations would be limited to the Company's implemented proposals. The Respondent, in its 25 November 1985 reply to the Union not only did not deny the establishment of this "pre-meeting" condition, but also offered a rationalization for taking this position. The rationalization for Respondent's position is noted in the second paragraph of its 25 November 1985 letter (Jt. Exh. 27): "The Union must recognize that the Company does not have implemented proposals, but rather they are implemented terms and conditions of employment which replaced the terminated agreement that expired 1 May 1984."

The Respondent then goes on to say: "As the Company stated, we are only interested in working from the existing terms and conditions of employment; however, since you stated you are going to make meaningful proposals, we will of course, meet with the Union."

The most that can be said of the Company's position, it seems to me, is that it not only notifies the Union that the implemented terms constitute the terms and conditions of employment that replaced the expired collective-bargaining agreement, but also delineates limits on further bargaining: working from the existing terms and conditions of employment. Having said this, the Company then states that because the Union said that it was going to make "meaningful proposals" Respondent was willing to "meet with" the Union.

If Respondent's position is read as imposing the condition that bargaining will still be limited to the implemented terms and conditions of employment, it seems clear to me that the General Counsel's allegation of a violation of Section 8(a)(5) is made out. This flows from the fact that, although I concluded that Respondent could lawfully implement its last offer to the Union on 1 September 1985 because of the Union's prior dilatory conduct, *M & M Contractors*, 262 NLRB 1472 (1982), I specifically found, however, that any alleged 1984 or 1985 impasse was broken by Respondent's 27 June 1985 offer to the Union. There was no impasse after 27 June 1985. Respondent's 1 September implementation was lawful not because of "impasse" but because of the Union's dilatory conduct. The most that can be said of Respondent's 5 November 1985 bargaining position is that Respondent was sitting at the bargaining table in possession of lawfully implemented terms and conditions of employment but sitting with nothing else. By this I mean that at the time of and after the 1 September 1985 implementation of its offer, there was no impasse on any subject of bargaining much less on the entire spectrum of the implemented terms and conditions of employment. Therefore, Respondent was obligated to bargain on *all mandatory subjects of bargaining*, whether in the implemented terms or otherwise, at the Union's reasonable and lawful request therefor.

If, however, Respondent's 25 November letter is also interpreted to mean that, if the Union presents what Respondent believes to be "meaningful proposals," Respondent would agree to "meet with" the Union, it might be argued that Respondent is departing, at least in some degree, from its written admonition and restriction that the Company was "only interested in working from the existing terms and conditions of employment." I am not entirely clear what degree of departure Respondent intends by the last sentence in the paragraph, especially its willingness to merely "meet with" the Union rather than to execute its statutory obligation: to bargain in good faith concerning *all terms and conditions of employment, whether in the implemented conditions or otherwise.* Certainly on the basis of Weaver's credited testimony concerning what was said at the 5 and 6 November bargaining sessions, Respondent was quite insistent on bargaining only with respect to its implemented terms. Whatever was the scope of O'Malley's subjective intent, as Weaver testified, and as I find, Weaver reasonably interpreted O'Malley's position as meaning that the Company would bargain with the Union only insofar as the "take-back" provisions of its implemented offer were discussed and would not bargain on the Union's proposals concerning wage increases and similar further employer contributions in favor of the Union's position.

Respondent apparently was insisting on bargaining from what it believed was a position protected by lawful implementation stemming from a lawful prior impasse in bargaining; and that because it had lawfully implemented after *impasse*, it was free to bargain only from those lawfully implemented terms and conditions of employment unless the Respondent, through counteroffers, would break the impasse.[19] Because I have specifically held that on and after 27 June 1985 there was no impasse, I find it necessary to conclude, and to recommend to the Board, that even if Respondent's position concerning its bargaining obligation be deemed, at best, treacherously ambiguous, the parties, and Respondent in particular, should be left in no doubt with regard to Respondent's obligations regarding the scope of bargaining in the future.

I therefore recommend to the Board that Respondent be ordered to bargain on all mandatory subjects of bargaining within the scope of Section 8(d) of the Act whether such subjects have been encompassed within the implemented terms and conditions of employment of the Company's 27 June 1985 offer (Jt. Exh. 6(b)). Respondent may not take the position that it is in any way protected under Section 8(d) of the Act from bargaining on these terms and conditions of employment by virtue of a prior lawful implementation, treating the lawful implementation as if the terms and conditions of employment therein were embodied in a collective-bargaining agreement. *NLRB v. Jacobs Mfg. Co.*, 196 F.2d 680 (2d Cir. 1952), Respondent must bargain on all subjects under Section 8(d) of the Act whether encompassed within the framework of the implemented terms of 27 June 1985.

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[19] It is, perhaps, for this reason that counsel for Respondent persisted in his impasse argument even in the face of formidable contrary evidence.

Although Respondent acknowledges that the conduct of the Union and the conduct of Respondent are both covered in *NLRB v. Katz*, 369 U.S. 736 (1962), in that behavior that constitutes a refusal to negotiate or constitutes an obstruction or inhibition to the process of bargaining violates Section 8(a)(5) and (3), respectively, it argues that in the further bargaining of 20 February 1986, the Company fulfilled its obligation to bargain; and that the Union, itself, raised an unlawful bargaining obstruction by bargaining to impasse on the Union's insistence that bargaining take place in a unit different from the certified unit (i.e., the Union's insistence that the Employer bargain with respect to all three plants rather than the Fairborn plant only). Respondent further argues that the parties thereafter actually bargained to impasse on 20 February when the Employer entertained and rejected the Union's counterproposals of wage increases (and other terms and conditions of employment that would increase Respondent's economic responsibilities) and rejected the Union's insistence on bargaining on a nonmandatory subject of bargaining, the unit question.

Assuming, arguendo, that Respondent is correct in that the parties reached impasse thereafter, inter alia, on a nonmandatory subject of bargaining introduced by the Union and that there was impasse as well on the Union's counterproposals of increased wages and other beneficial terms and conditions of employment, I nevertheless am not persuaded that a finding of a violation based on Respondent's conduct and a concomitant order is not necessary. This is because the most that can be said of Respondent's position, especially in the absence of any outstanding complaint alleging the Union's violation of Section 8(b)(3) of the Act, is that the parties are at impasse.

It is uncertain what course the bargaining might have taken had not Respondent introduced its original, unlawful condition to the bargaining. Certainly, Respondent, even now, has failed to repudiate or disavow specifically, openly, and unambiguously its prior illegal conduct as required by Board rule. *Passavant Memorial Hospital*, 237 NLRB 138 (1978). On the basis of Respondent's ambiguous position of 25 November with regard to the scope of bargaining, I cannot and do not conclude that the subsequent bargaining of 20 February even to impasse was a good-faith impasse within the meaning of the Board's rules once taking into account Respondent's unrepudiated prior unlawful conduct. See *Huck Mfg. Co. v. NLRB*, 693 F.2d 1176 (5th Cir. 1982); *Pillowtex Corp.*, 241 NLRB 40 (1979), enfd. 615 F.2d 917 (1980). Cf. *PRC Recording Co.*, 280 NLRB 615 fn. 1 (1986) (Chairman Dotson dissenting in part). In the presence of such an "impasse," the parties must look forward to further bargaining. In order to clarify for all parties the nature of their obligation, and especially in view of Respondent's patently unlawful original position, I believe it necessary to find not only the violation of Section 8(a)(5) and (1) of the Act, as alleged in the amended complaint (Respondent's refusal to bargain except on its implemented terms), but also to recommend to the Board that it issue an order stating that Respondent's bargaining obligation includes bargaining on all mandatory subjects even on the implemented terms and conditions of employment.

Respondent's Further Defenses

To the extent Respondent argues that the complaint in Case 9-CA-22509 be dismissed, or the case reopened for further hearing, because of the General Counsel's failure to lawfully investigate the initial charge, allegedly thereby violating Section 101.7 of the Board's Rules and Regulations and Section 554(c) of the Administrative Procedure Act (as well as Sec. 10054.1 of the Board's Casehandling Manual) and thus the complaint in Case 9-CA-22509 being issued contrary to law and resulting in a denial of due process of law (R. Br. 29), I reiterate the position I took at the hearing. My function is to hear the case on the General Counsel's complaint issued pursuant to Section 10(b) of the Act. I am without authority to dismiss the complaint based on the General Counsel's conduct in investigating the charge or in issuing the complaint;[20] and were I to exercise any such alleged authority, I would be acting in contravention of the express terms of Section 3(d) of the National Labor Relations Act. That part of the statute gives to the General Counsel not only the right to exercise supervision of all attorneys employed by the Board (other than administrative law judges and legal assistants to the Board members), but also "final authority, on behalf of the Board, in respect of the investigation of charges and issuance of complaints under Section 10, and in respect of the prosecution of such complaints before the Board." Should Respondent have further objection to the General Counsel's conduct in the investigation of the charge or issuance of complaint, matter must be taken up with the General Counsel, the Board, and the court of appeals rather than with me.

To the extent Respondent has continued to argue that it was denied due process or a fair hearing by virtue of my exclusion (or, more properly, my attempted exclusion, for the exclusion was not successful in all respects) of evidence regarding Respondent's bargaining at Victorville and Odessa locations, I note that not only did evidence of such bargaining creep into the record notwithstanding my ruling, but also that with such evidence, Respondent was attempting to show 1984 and 1985 impasses at those places. In view of my finding that Respondent's 27 June 1985 offer at Fairborn broke any prior impasse at Fairborn, I reached the conclusion that the bargaining at units other than at Fairborn would take us into immaterial proceedings beyond the scope of the complaint. In short, I find that proof of even a 1985 impasse or any other element of bargaining directed toward the Odessa or Victorville units and not directly related to Fairborn to be immaterial to this case.

CONCLUSIONS OF LAW

1. Southwestern Portland Cement Company, the Respondent, has been, and is, at all material times, an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

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[20] We are not dealing with any of the General Counsel's misconduct, for instance, in his securing evidence. *Hoosier-Cardinal Corp.*, 67 NLRB 49 (1946).

2. United Cement, Lime, Gypsum & Allied Workers Division, International Brotherhood of Boilermakers, Iron Ship Builders, Blacksmiths, Forgers and Helpers, Local Lodge D-357, AFL-CIO (the Union) is a labor organization within the meaning of Section 2(5) of the Act.

3. A unit of Respondent's empoyees employed at Fairborn, Ohio, appropriate for collective bargaining within the meaning of Section 9(b) of the Act is:

> All production and maintenance employees employed by Southwestern Portland Cement Co. at its plant and quarries located at Fairborn, Ohio, but excluding all office clerical employees and all professional employees, guards and supervisors as defined in the Act.

4. At all material times, the Union was, and is, the certified exclusive collective-bargaining represenative of the unit as defined in paragraph 3, above, and has been and is the exclusive collective-bargaining representative within the meaning of Section 9(a) of the Act in the unit.

5. Respondent, by its 1 September 1985 implementation of the terms and conditions of employment of employees in the above-noted unit contained in its 27 June 1985 offer, as modified on 8 August 1985, did not violate Section 8(a)(5) and (1) of the Act.

6. Respondent, since on or about 1 September 1985, in refusing to meet with the Union to discuss grievances if the Union's grievance committee had more than four members, did not violate Section 8(a)(5) and (1) of the Act.

7. Respondent, since on or about 6 November 1985, by insisting that bargaining for a new contract be limited solely to union counterproposals based on its proposals implemented on 1 September 1985, with regard to the above-cited unit, violated Section 8(a)(5) and (1) of the Act.

8. The aforesaid unfair labor practices affect commerce within the meaning of Section 2(6) and (7) of the Act.

THE REMEDY

Having found that Respondent is engaged in unfair labor practices within the meaning of Section 8(a)(5) and (1) of the Act, I shall recommend that it be ordered to cease and desist therefrom and to take certain affirmative action designed to effectuate the purposes of the Act including the posting of a notice.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[21]

ORDER

The Respondent, Southwestern Portland Cement Co., Fairborn, Ohio, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Refusing to bargain in good faith with United Cement, Lime, Gypsum & Allied Workers Division, International Brotherhood of Boilermakers, Iron Shipbuilders, Blacksmiths, Forgers and Helpers, Local Lodge D-357, AFL-CIO as the exclusive bargaining representative of all employees in the following appropriate bargaining unit:

> All production and maintenance employees employed by Southwestern Portland Cement Co. at its plant and quarries located at Fairborn, Ohio, but excluding all office clerical employees and all professional employees, guards and supervisors as defined in the Act.

(b) Requiring or imposing, as a condition of collective bargaining with the Union, in the above-described unit, the condition that bargaining be limited to union counterproposals to Respondent's implemented proposals of 1 September 1985.

(c) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) On request, bargain collectively in good faith with the Union, as the exclusive representative of all employees in the above-described bargaining unit, respecting rates of pay, wages, hours, or other terms or conditions of employment and, should any understanding be reached, embody the understanding in a signed agreement.

(b) Post at its Fairborn, Ohio plant and quarries, copies of the attached notice marked "Appendix."[22] Copies of the notice, on forms provided by the Regional Director for Region 9, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material.

(c) Notify the Regional Director in writing within 20 days from the date of this Order what steps the Respondent has taken to comply.

IT IS FURTHER RECOMMENDED that the complaint is dismissed insofar as it alleges violations of the Act not found here.

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[21] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

[22] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

WE WILL NOT refuse to bargain in good faith collectively with United Cement, Lime, Gypsum & Allied Workers Division, International Brotherhood of Boilermakers, Iron Shipbuilding, Blacksmiths, Forgers and Helpers, Local No. D-357, AFL-CIO as the exclusive bargaining representative of all the employees in the following appropriate bargaining unit:

> All production and maintenance employees employed by Southwestern Portland Cement Co. at its plant and quarries located at Fairborn, Ohio, but excluding all office clerical employees and all professional employees, guards and supervisors as defined in the Act.

WE WILL NOT require or impose, as a condition of collective bargaining with the Union, the condition that bargaining be limited to union counterproposals to our implemented proposals of 1 September 1985.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce employees in the exercise of the rights guaranteed them by Section 7 of the Act.

WE WILL, on request of the Union, bargain collectively in good faith with it as the exclusive representative of all employees employed in the above-described appropriate bargaining unit, respecting rates of pay, wages, hours, or other terms and conditions of employment and, should any understanding be reached, embody such understanding in a signed agreement.

SOUTHWESTERN PORTLAND CEMENT COMPANY

International Association of Machinists & Aerospace Workers, District Lodge No. 87, Local Lodge No. 1309 (O'Brien's Brake Service, Inc.) *and* **Tracy Andreas.** Case 32-CB-1864

July 27, 1988

DECISION AND ORDER

By Chairman Stephens and Members Johansen and Babson

Upon charges filed by Tracy Andreas (Charging Party), the General Counsel of the National Labor Relations Board issued a complaint on October 17, 1984, against the International Association of Machinists & Aerospace Workers, District Lodge No. 87, Local Lodge No. 1309 (the Respondent) alleging that it violated Section 8(b)(1)(A) of the National Labor Relations Act. On October 25, 1984, the Respondent filed an answer admitting in part and denying in part the allegations in the complaint.

On July 9, 1985, the parties filed with the Board a motion to transfer this proceeding to the Board and a stipulation of facts. The parties stipulated to the contents of the record and agreed that no oral testimony was necessary or desired. The parties further stipulated that they waived a hearing before an administrative law judge, the making of findings of fact and conclusions of law by a judge, and the issuance of a judge's decision, and desired to submit this case directly to the Board for findings of fact, conclusions of law, and an order.

On September 18, 1985, the Board issued its order approving the stipulation and transferring the proceeding to the Board. Thereafter, counsel for the General Counsel filed a brief in support of her position.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

On the entire record in the case, the Board makes the following findings.

I. JURISDICTION

O'Brien's Brake Service, Inc. (the Employer) is a California corporation with an office and place of business in Fresno, California, where it is engaged in the retail maintenance and service of automobiles. During the 12-month period preceding the filing of the complaint, the Employer derived gross revenues in excess of $500,000 and purchased and received goods and services valued in excess of $5000 which originated outside the State of California. The parties stipulated and we find that the Employer is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act. The parties further stipulated and we find that the Respondent is a labor organization within the meaning of Section 2(5) of the Act.

II. THE ALLEGED UNFAIR LABOR PRACTICE

The issue presented is whether the Respondent violated Section 8(b)(1)(A) by bringing postresignation internal charges against Tracy Andreas and by recommending that a fine be assessed against Andreas because he crossed a picket line and returned to work for the Employer.

On July 9, 1984,[1] certain employees of the Employer, who at that time were members of and represented by the Respondent, concertedly ceased work and commenced an economic strike against the Employer. In furtherance of the strike, the Respondent established and maintained a picket line at the Employer's Fresno, California facility.

On July 17, Tracy Andreas, an employee of the Employer who had been a member of the Respondent since about August 1983, submitted to the Respondent, in person, a written resignation of his membership to be effective at noon on July 18. The Respondent received the resignation the day it was submitted. On July 18, Andreas ceased his participation in the strike, crossed the picket line, and returned to work.

The constitution of the International Association of Machinists and Aerospace Workers provides in article L, section 3:

> Improper Conduct of a Member:
>
> Section 3. The following actions or omissions shall constitute misconduct by a member which shall warrant a reprimand, fine, suspension and/or exclusion from membership . . . :
>
> . . . Accepting employment in any capacity in an establishment where a strike or lockout exists as recognized under this Constitution, without permission. Resignation shall not relieve a member of his obligation to refrain from accepting employment at the establishment for the duration of the strike or lockout if the resignation occurs during the period of the strike or lockout or within 14 days preceding its commencement. Where observance of a primary picket line is required, any resignation tendered during the period that the picket line is maintained, or within 14 days preceding its establishment, shall not become effective as a resignation during the period the picket line is maintained, nor shall it relieve a member of his

289 NLRB No. 162

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[1] All dates are in 1984 unless otherwise indicated.

> or her obligation to observe the primary picket line for its duration. . . .

On August 16, Tom Rotella, the Respondent's trial committee chairman, sent Andreas a letter stating that charges had been brought against him for violating article L, section 3, of the constitution of the International Association of Machinists and Aerospace Workers. The letter further stated that Andreas would be tried on the charges on September 8 and that the trial would proceed, regardless of Andreas' attendance at the trial. On September 8 the Respondent's trial committee tried Andreas on the charges stated in the letter, found him guilty, and recommended that a fine be assessed against him.

It is now well settled that a union violates Section 8(b)(1)(A) of the Act by bringing internal charges and assessing a fine against an employee because of his postresignation conduct in crossing a picket line and returning to work. *Pattern Makers League v. NLRB*, 473 U.S. 95 (1985);[2] *Neufeld Porsche-Audi*, 270 NLRB 1330 (1984).

Accordingly, we find that the Respondent violated Section 8(b)(1)(A) by bringing internal charges against Andreas and by recommending that a fine be assessed against Andreas because of his postresignation conduct in crossing the picket line and returning to work for the Employer.

CONCLUSIONS OF LAW

1. O'Brien's Brake Service, Inc., Fresno, California, is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

2. The Respondent is a labor organization within the meaning of Section 2(5) of the Act.

3. By bringing internal charges against Tracy Andreas and by recommending that a fine be assessed against him for his postresignation conduct in crossing a picket line and returning to work with O'Brien's Brake Service, Inc., the Respondent violated Section 8(b)(1)(A) of the Act.

4. The foregoing unfair labor practice is an unfair labor practice affecting commerce within the meaning of Section 2(6) and (7) of the Act.

REMEDY

Having found that the Respondent has violated Section 8(b)(1)(A) of the Act, we shall order that it cease and desist therefrom and take certain affirmative action in order to effectuate the policies of the Act.

ORDER

The National Labor Relations Board orders that the Respondent, International Association of Machinists and Aerospace Workers, District Lodge No. 87, Local Lodge No. 1309, its officers, agents, and representatives, shall

1. Cease and desist from

(a) Maintaining and enforcing article L, section 3, of the constitution of the International Association of Machinists and Aerospace Workers to the extent that it provides:

> Improper Conduct of a Member:
>
> Section 3. The following actions or omissions shall constitute misconduct by a member which shall warrant a reprimand, fine, suspension and/or exclusion from membership . . . :
>
> . . . Accepting employment in any capacity in an establishment where a strike or lockout exists as recognized under this Constitution, without permission. Resignation shall not relieve a member of his obligation to refrain from accepting employment at the establishment for the duration of the strike or lockout if the resignation occurs during the period of the strike or lockout or within 14 days preceding its commencement. Where observance of a primary picket line is required, any resignation tendered during the period that the picket line is maintained, or within 14 days preceding its establishment, shall not become effective as a resignation during the period the picket line is maintained, nor shall it relieve a member of his or her obligation to observe the primary picket line for its duration. . . .

(b) Restraining or coercing employees who have resigned from and are no longer members of the Respondent in the exercise of the rights guaranteed them by Section 7 of the Act by bringing internal charges against such employees and by recommending that fines be assessed against them because of their postresignation conduct in working at O'Brien's Brake Service, Inc. during the strike that began on July 9, 1984, or by failing to honor their resignations from membership.

(c) In any like or related manner restraining or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Remove from its governing documents the portion of article L, section 3, of the constitution of the International Association of Machinists and Aerospace Workers set forth above.

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[2] While the Respondent contends that its conduct in assessing the fine against Andreas conforms with the Ninth Circuit's decision in *Machinists Local 1327 (Dalmo Victor II) v. NLRB*, 725 F.2d 1212 (1984), that case has been vacated and remanded to the circuit court for further consideration in light of the Supreme Court's decision in *Pattern Makers*.

(b) Rescind the recommendation that a fine be assessed against Tracy Andreas for his postresignation activity of crossing a picket line and returning to work at O'Brien's Brake Service and notify him that this has been done and refund to him any money that may have been paid as a result of the fine, with interest.

(c) Remove from its records any reference to the charges and disciplinary action taken against Tracy Andreas for his postresignation conduct, and notify him in writing that this has been done.

(d) Notify Tracy Andreas in writing that his resignation is effective.

(e) Post at its business offices and meeting halls copies of the attached notice marked "Appendix."[3] Copies of the notice, on forms provided by the Regional Director for Region 32, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to members are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material.

(f) Sign and return to the Regional Director sufficient copies of the notice for posting by O'Brien's Brake Service, Inc., if willing, at all places where notices to employees are customarily posted.

(g) Notify the Regional Director in writing within 20 days from the date of this Order what steps the Respondent has taken to comply.

APPENDIX

NOTICE TO MEMBERS
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

WE WILL NOT maintain and enforce article L, section 3, of the constitution of the International Association of Machinists and Aerospace Workers to the extent that it provides:

> Improper Conduct of a Member:
>
> Section 3. The following actions or omissions shall constitute misconduct by a member which shall warrant a reprimand, fine, suspension and/or exclusion from membership . . . :
>
> . . . Accepting employment in any capacity in an establishment where a strike or lockout exists as recognized under this Constitution, without permission. Resignation shall not relieve a member of his obligation to refrain from accepting employment at the establishment for the duration of the strike or lockout if the resignation occurs during the period of the strike or lockout or within 14 days preceding its commencement. Where observance of a primary picket line is required, any resignation tendered during the period that the picket line is maintained, or within 14 days preceding its establishment, shall not become effective as a resignation during the period the picket line is maintained, nor shall it relieve a member of his or her obligation to observe the primary picket line for its duration. . . .

WE WILL NOT restrain or coerce employees who have resigned from, and are no longer members of, our labor organization in the exercise of the rights guaranteed them by Section 7 of the Act by bringing internal charges against such employees and by recommending that fines be assessed against them because of their postresignation conduct in working at O'Brien's Brake Service, Inc. during the strike that began on July 9, 1984, or by failing to honor their resignations from membership.

WE WILL NOT in any like or related manner restrain or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL remove from our governing documents the portion of article L, section 3, of the constitution of the International Association of Machinists and Aerospace Workers set forth above.

WE WILL rescind the recommendation that a fine be assessed against Tracy Andreas for his postresignation activity of crossing a picket line and returning to work at O'Brien's Brake Service and notify him that this has been done and refund to him any money that may have been paid as a result of the fine, with interest.

WE WILL remove from our records any reference to the charges and disciplinary action taken against Tracy Andreas for his postresignation conduct, and notify him in writing that this has been done.

WE WILL notify Tracy Andreas, in writing, that his resignation is effective.

INTERNATIONAL ASSOCIATION OF MACHINISTS & AEROSPACE WORKERS, DISTRICT LODGE NO. 87, LOCAL LODGE NO. 1309

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[3] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

Vanden Brink Meat Company *and* General Teamsters Union Local 406, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, AFL-CIO.[1] Case 7-CA-25102

July 27, 1988

SUPPLEMENTAL DECISION AND ORDER

BY CHAIRMAN STEPHENS AND MEMBERS BABSON AND CRACRAFT

On August 11, 1986, the Board issued a Decision and Order in this case,[2] finding that the Respondent violated Section 8(a)(5) and (1) of the Act by refusing to bargain with the Union that had been certified on July 30, 1985, as the exclusive bargaining representative of the Respondent's production and maintenance employees.[3] On November 2, 1987, the United States Court of Appeals for the Sixth Circuit vacated the Board's order, holding that the Board erred in overruling the Respondent's objections to the election in the underlying representation case.[4]

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

In its objections the Respondent contended, among other things, that the Union had offered to waive or reduce its initiation fee contingent on employees' demonstrating their support for the Union before the election. After a hearing on objections, the Board found that the waiver objection lacked merit. It was the court's view, which we have accepted as the law of the case, that there was not substantial evidence to support the Board's decision overruling the objection. Under this view, the Union should not have been certified on the basis of the election results, and no bargaining order should have issued.

Accordingly, we will dismiss the complaint in this case, reopen the representation case, revoke the certification, and remand that case to the Regional Director for Region 7 for appropriate action consistent with this decision, including the direction of a new election if the Union wishes to proceed to a new election.

ORDER

The National Labor Relations Board orders that the original decision in this case (281 NLRB 39) is vacated and the complaint is dismissed.

IT IS FURTHER ORDERED that Case 7-RC-17444 is reopened, the certification issued in that case is revoked, and the case is remanded to the Regional Director for Region 7 for appropriate action consistent with this decision, including the direction of a new election if desired by the Union.

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[1] On November 1, 1987, the Teamsters International Union was readmitted to the AFL-CIO. Accordingly, the caption has been amended to reflect that change.

[2] 281 NLRB 39.

[3] The Board's Decision and Certification of Representative in Case 7-RC-17444 is not included in bound volumes of Board decisions.

[4] Nos. 86-5965, 86-6074.

289 NLRB No. 168

Fremont Ford Sales, Inc. d/b/a Fremont Ford *and* The East Bay Automotive Council and its Affiliated Local Unions; District Lodge No. 190, Local Lodge No. 1546, International Association of Machinists and Aerospace Workers, AFL–CIO; Auto, Marine and Specialty Painters Union, Local No. 1176; Teamsters Automotive Employees Union, Local No. 78, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, AFL–CIO.[1] Case 32–CA–4866

July 28, 1988

DECISION AND ORDER

BY CHAIRMAN STEPHENS AND MEMBERS JOHANSEN AND BABSON

On December 27, 1983, Administrative Law Judge Timothy D. Nelson issued the attached decision. The Respondent filed exceptions and a supporting brief.[2] The General Counsel filed a brief in support of the judge's decision and in answer to the Respondent's exceptions and brief. The General Counsel also filed limited cross-exceptions pertaining to the judge's failure to consider the complaint allegations involving the Charging Party's request for information submitted on September 13, 1982. The Charging Party, The East Bay Automotive Council and Its Affiliated Local Unions (the Unions), filed cross-exceptions[3] and a supporting brief. After the briefs were submitted, the Respondent filed a document entitled "Motion for Reopening of the Record and for Receipt of New Evidence." Thereafter, the General Counsel and the Unions filed memoranda in opposition to the Respondent's motion.[4]

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings,[5] and conclusions, as modified, to modify his remedy, and to adopt the recommended Order as modified.

The judge found that the Respondent violated Section 8(a)(1), (3), and (5) of the Act in connection with its 1982 takeover of a Ford dealership. As described below, we agree with the judge that the Respondent was a legal successor to its predecessor; that it was obligated to bargain with the Unions; that it unlawfully bypassed the Unions and unilaterally changed the terms and conditions of employment for its unit employees in several respects; that the Respondent's refusal on May 17 to employ the predecessor's employees was unlawful; and that its interviewing and hiring practices were unlawful.[6] We also adopt the other violations of Section 8(a)(1) found by the judge.[7] For the reasons below, however, we disagree with the judge to the extent he found that the Respondent was obligated to honor the last union contract between its predecessor and the Unions. We, finally, find that

289 NLRB No. 137

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[1] On November 2, 1987, the Teamsters International Union was readmitted to the AFL–CIO. Accordingly, the caption has been amended to reflect that change.

[2] The Respondent has requested oral argument. This request is denied as the record, the exceptions, and briefs adequately present the issues and the positions of the parties.

[3] The Unions' cross-exceptions are identical to the General Counsel's limited exceptions.

[4] The Respondent's motion to reopen the record to receive certain documentary evidence is denied. Our examination of the record reveals that these proffered documents are irrelevant to the events of 1982 in question.

[5] The Respondent asserts, in essence, that the judge's resolution of credibility, findings of facts, and conclusions of law are the result of bias. After a careful examination of the entire record, we are satisfied that this claim is without merit. The Respondent's request for a rehearing before a different administrative law judge is denied. There is no basis for finding that bias and partiality existed merely because the judge refused to grant the Respondent's request for a continuance during the trial and resolved important factual conflicts in favor of the General Counsel's witnesses. As the Supreme Court stated in *NLRB v. Pittsburgh Steamship Co.*, 337 U.S. 656, 659 (1949), "[T]otal rejection of an opposed view cannot of itself impugn the integrity or competence of a trier of fact." Furthermore, the Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

[6] We also agree with the judge's findings that the Respondent's inquiry about the applicants' intentions with respect to possible picketing by the Unions violated Sec. 8(a)(1) of the Act. In *Mosher Steel Co.*, 220 NLRB 336 (1975), enfd. 532 F.2d 1374 (5th Cir. 1976), the Board held that "where the record shows that at the time the questions about picketing were asked the Employer had a reasonable basis to fear an imminent strike and merely sought to ascertain the chances for keeping his business open, such inquiries are lawful [footnote omitted]." 220 NLRB at 336. Accord: *Certainteed Corp.*, 282 NLRB 1101, 1107 (1987). The Respondent here, however, did not have a lawful purpose in asking the applicants if they intended to honor a picket line established by the Unions. In this respect, the judge found important Supervisor Smith's testimony that job offers were not extended to individuals who initially expressed or indicated a reluctance to cross the Unions' picket line unless, at a later time, they indicated that they would be willing to cross the picket line. Smith's testimony shows that the inquiry about an applicant's picketing intentions was used by the Respondent in making its hiring selections and was not used to ascertain whether the Respondent could keep its operations going during the picketing. The inquiry was also accompanied by a requirement that future employees express a willingness to work "nonunion" as a condition of their retention. Cf. *Hedaya Bros.*, 277 NLRB 943 (1985) (questioning employees about their strike intentions constituted a violation of Sec. 8(a)(1)).

[7] The judge found that the Respondent violated Sec. 8(a)(5) and (1) when it gave false and misleading information to the Unions regarding the details of the dealership takeover. Because we find that the Respondent's bargaining obligation arose after these events occurred, we do not adopt the judge's findings that the Respondent violated Sec. 8(a)(5). He also found that the Respondent violated Sec. 8(a)(1) in the following two respects. First, on May 17 the Respondent refused to employ nonunit employees and required them to apply for work as part of an unlawful plan to defeat the Unions' status as the exclusive representative of the unit employees. Second, the Respondent told employees that its previously represented shop and service departments would be nonunion and that any employee wishing to work in those departments must sign an individual employment contract and cross the Unions' picket lines as a condition of hire.

the Respondent also violated Section 8(a)(5) and (1) when it failed and refused to comply with the Union's September 13, 1982 information request.[8]

Briefly stated, the relevant facts are as follows. Fremont Ford, Inc. (Fremont),[9] a California corporation, operated a Ford car and truck dealership in Fremont, California, from 1978 until May 17, 1982.[10] On May 17, after months of financial difficulties, Fremont sold the dealership to the Respondent and terminated its entire work force, including 22 unit employees working in its service, parts, and body shop departments who had been represented by the Unions. The Unions' last collective-bargaining agreement covering these employees was effective from August 20, 1980, through August 20, 1983.

The Respondent was specifically created under the Ford Motor Co.'s dealer development program to purchase and operate the Fremont dealership with Donald Barnes as the dealer operator/minority shareholder and Ford as the majority shareholder.[11] Steps to accomplish the dealership transfer to the Respondent began in mid-January. Barnes, then serving in several capacities for Fremont,[12] applied to participate in Ford's dealer development program. In March, after Barnes' application had been reviewed by various Ford personnel, the negotiations with a Ford representative occurred. These negotiations, covering the necessary financing, leasing, and takeover arrangements for the dealership sale, culminated in the granting of certain options on March 19. These options gave the Ford representative the right to enter into a buy-sell agreement with Fremont to purchase the dealership and the right to sublease certain property from Fremont's principal owners, Paul Brinkman and Leon Pettitt. The Ford representative also retained the right to assign these options to the corporation to be created under the dealer development program, viz, the Respondent. All these March arrangements were contingent on Ford's subsequent approval.

On April 22, Ford gave its approval to the deal struck by Fremont and the Respondent in March. The Respondent was then incorporated as a Delaware corporation on April 23. Between April 23 and May 17, corporate bylaws were adopted; corporate officers and directors were elected; and various licenses, permits, bank accounts, insurance, and other items necessary to do business as a Ford dealership in California were obtained by the Respondent. On May 7 Ford accepted Fremont's resignation from the dealership operation, but Fremont continued its sales and service at the dealership through May 17. On May 7, a Ford sales and service agreement was executed on behalf of the Respondent, but there is no evidence that such agreement was utilized prior to May 19. On May 14, an inventory of the dealership's assets was taken by an outside company in final preparation of the dealership sale to the Respondent which took place the following week.

The following week was a busy period for the Respondent. On May 17, the Respondent entered into a dealer development program agreement with Ford; issued preferred stock to Ford and common stock to Barnes; accepted a secured loan from Ford; and appointed Barnes to serve as the dealership's general manager and operator. On the same date, money among the interested parties to the dealership sale exchanged hands. On May 19, the Ford representative assigned the March 19 options to the Respondent. The Respondent then exercised these options by executing the buy-sell and lease agreements on May 20. During this period, Fremont's property subject to the sale was transferred to the Respondent. On May 19, using Fremont's trade name, the Respondent opened for business, providing sales and services comparable to those which had been provided by Fremont.

Several months in advance of the dealership transfer, Barnes had made plans to operate the dealership on a nonunion basis. Except for his remarks in January at a grievance meeting,[13] Barnes kept his plans secret from the Fremont unit employees. He even went so far as to instruct his parts and service director, Larry Smith, to conceal or make false or misleading statements to the Fremont unit employees who inquired about the working conditions to be expected under the Respondent's control of the dealership. Not until after the hiring process had begun, when personal interviews were conducted on May 17 and after the required written job applications had already been submitted early in May, did the Respondent first inform the Fremont unit employees that there would be significantly different employment conditions.

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[8] The judge inadvertently failed to pass on this complaint allegation even though it was fully litigated.

[9] Fremont is not a named party to these proceedings.

[10] All dates are in 1982 unless otherwise indicated.

[11] Under this program, the dealer operator/minority shareholder could use future profits of the dealership to buy Ford's corporate interest.

[12] Barnes was corporate president, director, 20-percent owner, general manager, and operator of Fremont.

[13] Based on credited testimony, the judge found that after the announcement of an adverse grievance ruling against Fremont in January, Barnes said to the Unions' representatives in attendance:

> You guys are not going to be around here. There's no union going to run my store. . . . I'll take care of that when I become the sole owner.

The judge further found that Supervisor Smith later mentioned the above remarks made by Barnes to employee Darrell Cooper by explaining that Barnes was "mad enough to blow the whole union out of the water."

On May 17, former Fremont unit employees were interviewed for possible employment with the Respondent. The next day, in accord with its recent newspaper advertisements, the Respondent interviewed job applicants who were not recently associated with Fremont. A total of more than 100 applicants were screened by the Respondent's supervisory staff, all of whom were formerly Fremont supervisors.

During the interviews, the Respondent asked questions concerning whether the applicants would work in a nonunion setting under employment conditions that differed in several ways from the terms established by its predecessor's last union contract. These new terms included a flat-rate pay scale instead of the hourly pay scale. The applicants were told that they would be required to sign a document showing their willingness to work under the new employment conditions. Having learned of probable picketing by the Unions, the Respondent also asked the job applicants if they were willing to cross a picket line. The Respondent further guaranteed the applicants a 40-hour weekly pay while any picketing occurred.

The Respondent eventually hired 10 employees, all former Fremont unit employees, to begin work on May 19. Those hired were expected to cross a picket line, work a flat-rate pay scale, and were subject to several employment conditions which differed from the terms of the last union contract between Fremont and the Unions.

After May 19, the Respondent continued to hire employees as its needs increased. On September 15, after the Respondent had received the Unions' September 13 written demand for recognition, discussed, infra, 11 of the 26 employees in the Respondent's service, parts, and body shop departments were former Fremont unit employees. On September 27, the date when the Respondent claims that it attained a full employee complement, 28 employees were in those departments, a majority of whom had not been formerly associated with Fremont.

Despite Barnes' plans to operate the dealership without the Unions, the Unions met with the Respondent on two occasions, on May 6 and 17. By letter dated May 3, Barnes had offered to discuss with the Unions the effect of the sale on those dealership employees then represented by the Unions.[14] In response to this letter, Union Business Representative Bobo met with Barnes on May 6. In that meeting, Bobo asked what it would take to keep the dealership a "union store." Bobo and Barnes then discussed three subjects raised by Barnes. The subjects were employee seniority for vacation purposes, retention of unit employees, and a flat-rate pay system for unit employees.[15] No agreements on these subjects were reached. Regarding the retention of unit employees, Barnes suggested that there were "three or four" employees, without giving any names, that he might not want to retain. Barnes then agreed to contact Bobo when the transfer of the dealership assets to the Respondent took place.

On May 17, accompanied by Union Representative Day, Bobo again visited Barnes at the dealership. Day told Barnes that he and Bobo were there to get a union contract signed. Barnes replied that he had no evidence that the Unions represented any of the Respondent's employees and it would be a couple of days before the Respondent would be in operation. The union representatives then left the dealership.

The Unions' next contact with the Respondent came 2 days later. After the Respondent opened for business on May 19, the Unions commenced picketing at the dealership and picketed for approximately 2 months.[16]

After the picketing ceased, the Unions sent a letter dated September 13 and received by the Respondent on September 15. In this letter, the Unions demanded that the Respondent honor its predecessor's contract or, alternatively, recognize and bargain with them on the basis that the Respondent was a legal successor to Fremont. The Unions also requested that they be immediately supplied with the following information:

> 1. The names, addresses, job classifications, wages and benefits, dates of employment, and hours worked per week for all employees

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[14] Barnes' letter designated May 20 as the date expected for the Respondent's ownership of the dealership to commence. Contrary to the judge, we do not find it critical that all dates for the transfer given the Unions and the employees by the Respondent and its predecessor were not always the same. These different predictions can be expected in view of the complexities involved in such a dealership transfer. We do not view these dates as inconsistent but merely approximations when the transfer could be expected to occur. In any event, we find the Unions had sufficient notice that this changeover was to take place. This, however, does not detract from our general agreement with the judge's finding that the Respondent otherwise gave false and misleading information to the Unions regarding the details of the dealership takeover.

[15] According to the credited witness testimony, the latter topic in some circles is synonymous with a nonunion operation since several unions in this industry do not want a flat-rate pay system for the employees they represent.

[16] The record gives very little description of this picketing activity. What actually appeared on the picket signs is not altogether clear. There is some evidence that the signs displayed something to the effect that the Respondent was unfair to the Unions. The Unions' letter of September 13 asserts that the Unions engaged in the picketing to protest the Respondent's nonunion status and the failure to pay area wage and benefits standards. The Unions' stated purpose for the picketing was not disputed by the Respondent.

within the bargaining unit who had worked for the Company since May 15.

2. The names of the then-current owners and officers of the Company and the percentage of ownership of the owners.

3. A copy of the purchase agreement, the May "sale of assets" agreement, the terms of the sale, and the incorporation papers of the Company.

4. A description of all benefits (holidays, vacations, sick leave, jury leave, health and welfare, retirement, etc.) to which employees were entitled, the dates when these benefits were implemented, and a copy of any and all benefit plan descriptions.

5. The status of all current owners and officers of the Company from June 15, 1981 to May 20, 1982.

By letter dated September 20 the Respondent refused all the Unions' demands. The Respondent took the position, inter alia, that it was not a successor to Fremont and that there was no existing relationship between it and Fremont requiring the submission of the requested information to the Unions.

With respect to his 8(a)(5) findings, the judge found that the Respondent was a successor to Fremont under four different theories. His first theory, which is the basis of his recommended remedy, used the principles of *East Belden Corp.*[17] and its progeny[18] to conclude that successorship attached in January, or on March 19 at the latest, based on Barnes' control of the dealership, even though the transfer of assets actually occurred much later, in May. The judge's first alternative theory for successorship was grounded on a finding that the Respondent voluntarily recognized the Unions in May as shown by its correspondence with the Unions and the subsequent May 6 meeting with Union Representative Bobo. Then, in line with his *East Belden* and voluntary recognition theories, the judge found that the Respondent had "assumed" the union contract of its predecessor because the Respondent had honored and applied this contract prior to May 17. The judge thus found that the Respondent had an obligation to apply the union contract to its employees after May 17 and was not permitted to make the unilateral changes in working conditions and engage in the direct dealing with the unit employees on May 17.

The judge's second alternative theory for successorship can be stated as follows: "but for" an unlawful hiring process the Respondent would have had almost a full employee complement with a majority composed of its predecessor's employees on May 19. In support of this theory, the judge cited *Potters Chalet Drug*, 233 NLRB 15 (1977), enfd. mem. 584 F.2d 980 (9th Cir. 1978), in conjunction with his findings that the Respondent illegally refused to employ all 22 unit employees on May 17 and discriminatorily refused to hire 12 of them when the dealership reopened on May 19. The third alternative theory of the judge found successorship because the Respondent had a "representative complement" of employees (a majority of whom were former Fremont employees) on May 19, when the Respondent opened for business to the public, even if a "full complement" was not attained until 4 months later as claimed by the Respondent. Under the judge's second and third alternative theories, the Respondent would not be obligated to honor the contract between Fremont and the Unions, but would be required to bargain with the Unions as the exclusive representative of the unit employees.

Having set forth the judge's four theories of successorship, we shall consider them in the order designated by the judge's decision.

Regarding his first theory, the judge misconstrued the criteria necessary for the *East Belden* principles to apply. In *East Belden*, the prospective buyer was in existence and executed a written purchase agreement to buy the restaurant. Then, the buyer entered the property and took control of the restaurant during an approximate 2-month escrow period until the permanent transfer of the restaurant occurred. During escrow, the buyer retained a majority of the seller's unit employees who had been represented by the union in *East Belden*. Evidence of the buyer's control was reflected in the change in the restaurant's operating records to show that the buyer was the named operator during the escrow period. The buyer also paid various operating expenses of the restaurant, including the manager salaries and employee wages, during the escrow period. The buyer was the party to reap the profits or losses of the restaurant during the escrow period. Under these circumstances, the buyer was deemed to have acquired the obligations of a successor employer during escrow.

In *Sorrento Hotel*, supra, the new lessees executed a written interim management agreement to operate the hostelry while they awaited a long-term lease with the owner to begin. During this interim period, the lessees entered the property, took control of managing the property, obtained and utilized the necessary licensing and permits to manage the property, promised to indemnify the owner for any mismanagement, and utilized the owner's employees. The lessees incurred the business' operating expenses, including the compensation of the manager, who was designated by the lessees and who reported directly to the lessees. As with the buyer in *East Belden*, the Board marked successorship when the transitional period began, which meant that the lessees' successorship began with their interim management instead of when their long-term lease began.

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[17] 239 NLRB 776 (1978), enfd. mem. 634 F.2d 635 (9th Cir. 1980). The concept developed by this case permits successorship to attach before actual complete takeover by the purchaser if the purchaser enters the property during an escrow period and utilizes a majority of the seller's employees during this escrow period.

[18] See, e.g., *Sorrento Hotel*, 266 NLRB 350 (1983).

The salient facts in *East Belden* and *Sorrento Hotel* triggering successorship status before the purchase was final or the lease commenced are that there were written agreements to purchase or lease and an escrow or interim management period officially established for the prospective buyer or lessee to take control. Here there was no written agreement to purchase or lease the dealership in existence in January or on March 19 and no escrow or transitional period. The execution of the buy-sell and lease agreements by the Respondent and the transfer of the dealership property occurred almost simultaneously and there was no interim agreement for the Respondent to operate the dealership.

The judge mischaracterized the import of the events in January and on March 19. The judge misconstrued the January plans to "apply" to buy the dealership and the March 19 "option" agreements when he found them to be equivalent to, and having the same legal effect, as written purchase and lease agreements. In January, the parties were in the exploratory and tentative planning stages, no matter how confident they may have been of dealership transfer in the future. No written agreements existed; only an application was on file. The Respondent did not exist prior to April 23, and it was not open for business until May 19. In January, the sales and services of the dealership were handled by the Respondent's predecessor, and the Respondent did not even have a Ford sales and service agreement at the time to be considered a Ford dealership. The dealership's operating records, licenses, permits, and operating expenses were those of the Respondent's predecessor. In January, the Respondent was not funded.[19] The supervisory staff, including General Manager Barnes, still reported to the Respondent's predecessor. Barnes' scope of authority remained basically the same as his authority prior to January. If anything, some restrictions on financial spending were placed on Barnes after he submitted his application to the Ford's dealer development program. In March, the situation did not change when negotiations occurred and the March 19 options were given the Ford representative, which the judge treated as fiction, disregarding basic contract-law principles.

To summarize, the facts underlying the Respondent's activity in January and on March 19 are distinguishable from the facts presented by the *East Belden* and *Sorrento Hotel*-type of case. For this reason, we do not adopt the judge's finding of successorship premised on the *East Belden* theory.

Turning to the judge's next theory of successorship, the one premised on voluntary recognition, we find that the judge wrongly concluded that an invitation to discuss the sale with the Unions coupled with a subsequent discussion on May 6 with Union Representative Bobo rose to the level of extending recognition to the Unions. Rather, the more reasonable interpretation of Barnes' conduct reflects just the opposite conclusion. Even though Barnes expressed a general willingness to discuss three subjects in terms of the Unions' desires to keep the dealership a "union store," the May 6 meeting was called on behalf of Fremont in an effort to fulfill its bargaining obligation to the Unions. During the meeting, Barnes never stated that the Respondent actually recognized the Unions as the bargaining representative of its prospective employees. At most, Barnes indicated that the Unions should check back with him at a later date. This latter statement is equivocal at best, especially when viewed in the context of Barnes' earlier remarks in January at a grievance meeting to the effect that he desired to operate the dealership in the future on a nonunion basis.

To support his second alternative, "but-for" theory, the judge found that the Respondent illegally, inter alia, refused to employ all 22 unit employees on May 17 and discriminatorily refused to rehire 12 of them when the dealership reopened on May 19. The judge found a prima facie case of discrimination based on Barnes' declared intention to have the dealership operate nonunion under the Respondent's ownership, and his requirements that employees express a willingness to cross a picket line and work "nonunion" as a condition of their retention as well as his insistence that prospective employees sign individual employment contracts. We agree and find the record does support a prima facie case of a tainted hiring process, and that the Respondent failed to meet its burden under *Wright Line*, 251 NLRB 1083 (1980), enfd. 662 F.2d 899 (1st Cir. 1981). We, therefore, adopt the judge's 8(a)(3) findings, as described above.

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[19] A bank account for the Respondent was not established until May. The record shows that no funds were drawn on the account prior to May 19 to operate the dealership.

In *Love's Barbeque Restaurant No. 62*, 245 NLRB 78 (1979), enfd. in pertinent part 640 F.2d 1094 (9th Cir. 1981), the successor did not hire the predecessor's employees based on unlawful considerations. In view of the successor's unlawful refusal to hire the former company's employees, which constituted a violation of Section 8(a)(3) of the Act, the Board determined that the successor further violated Section 8(a)(5) of the Act. "But for" the successor's unlawful conduct, the union's status as the exclusive bargaining representative would have survived the successor's takeover of the business. *Love's Barbeque*, supra at 82. Accord: *State Distributing Co.*, 282 NLRB 1048 (1987).

Applying the principles of *Love's Barbeque* here, we arrive at the same result reached by the judge, that is, the Unions' presumption of majority status would have continued had the 12 discriminatees been hired to begin work on May 19. Since we agree with the judge's finding that all the other elements of successorship are present, more fully discussed, infra, we adopt, as described above, his second alternative, "but for" successorship theory.

With respect to the judge's representative complement theory, we begin our discussion with *Fall River Dyeing Corp. v. NLRB*.[20] In that case, the U.S. Supreme Court recently reaffirmed the Board's approach to determining whether a successorship relationship exists between two entities. In particular, the Court held that the Board's "substantial and representative complement" rule is reasonable in the successorship context.[21]

The Board's traditional test for determining if a purchaser has a duty to continue the bargaining relationship established by its predecessor is whether there is a substantial continuity in the employing enterprise.[22] A comparison of business operations, plant, work force, jobs, working conditions, supervisors, machinery, equipment, production methods, and product or service is made to ascertain if continuity exists.[23]

In comparing the Respondent to its predecessor, the judge found sufficient operational continuity. As seen from the record, after a 1-day hiatus, the Respondent opened for business to sell and service vehicles at the same location with the same supervisory staff and with the same nonsupervisory job classifications. Problematic for the judge was whether a sufficient continuity in the employee complement existed on which to premise majority status for the Unions. The judge found that a "substantial and representative complement" existed when the Respondent officially opened for business to the public with 10 former Fremont unit employees on hand. The judge relied, inter alia, on the principles set forth in *Pre-Engineered Building Products*, 228 NLRB 841 (1977), enfd. 603 F.2d 134, 136 (10th Cir. 1979), and *Premium Foods*, 260 NLRB 708 (1982), enfd. 709 F.2d 623, 628 (9th Cir. 1983), which were favorably cited by the Court in *Fall River Dyeing Corp. v. NLRB*, supra.

To find a concomitant bargaining duty on the part of the Respondent under this successorship theory, there must be an outstanding bargaining demand made by the Unions. In the instant case, the Unions arguably demanded recognition on three occasions—on May 6 when Union Representative Bobo met with General Manager Barnes, on May 17 when Union Representatives Bobo and Day approached Barnes to sign a contract on behalf of the Respondent, and on September 15 when the Respondent received a written demand for recognition from the Unions. On the first occasion, the Respondent was neither legally nor functionally operational and had no unit employees on its payroll. See *Spruce Up Corp.*, 209 NLRB 194 (1974). The dealership was still under the control of the Respondent's predecessor; the employees were the predecessor's. The fact that Barnes, who intended to be the new operator, was on the scene still performing his job as the predecessor's general manager did not divest the predecessor's control. On the third occasion, the Respondent had been in control for some 4 months; however, a majority of its employees were not then former unit employees of the predecessor unless the 12 discriminatees who were not hired are considered. On the second occasion, however, the actual takeover of the dealership had begun. As previously discussed, on May 17, the Respondent had entered into a dealer development program agreement with Ford; had issued preferred stock to Ford and common stock to Barnes, and had accepted a secured loan from Ford; had appointed Barnes to serve as the dealership's general manager; had exchanged money with the other interested parties to the dealership sale; and had interviewed former Fremont unit employees and hired its supervisory staff. Thus, there was a viable demand for recognition from the Unions on 17 May.[24] The Union's demand of May 17 constituted a "continuing demand" under *Fall River Dyeing Corp. v. NLRB*, supra at 54, which triggered a bargaining obligation on May 19 when the Respondent opened for business. See *Bachrodt*

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[20] 482 U.S. 27 (1987).

[21] Id. at 52–54.

[22] Id. at 42–46.

[23] Id.

[24] Here, the Unions made clear after May 17, as shown by the picketing activity, that in their view the Respondent had a bargaining obligation.

Chevrolet Co., 205 NLRB 784 (1973), enfd. 515 F.2d 512 (7th Cir. 1975), cert. denied 423 U.S. 927 (1975).

Having analyzed the judge's four successorship theories, we now treat the 8(a)(5) allegation relating to the Respondent's implementation of new terms and conditions of employment for unit employees. Since the judge found the Respondent had assumed the union contract, he did not have to squarely resolve whether the Respondent was otherwise free to set initial employment terms under the teachings of *NLRB v. Burns Security Services*, 406 U.S. 272 (1972). Because we have rejected the judge's finding that the Respondent assumed the union contract, we must decide this issue.

In *Burns* the Supreme Court stated:

> Although a successor employer is ordinarily free to set initial terms on which it will hire the employees of a predecessor, there will be instances in which it is *perfectly clear* that the new employer plans to retain all of the employees in the unit and in which it will be appropriate to have him initially consult with the employees' bargaining representative before he fixes terms. In other situations, however, it may not be clear until the successor employer has hired his full complement of employees that he has a duty to bargain with a union, since it will not be evident until then that the bargaining representative represents a majority of the employees in the unit as required by § 9(a) of the Act, 29 U.S.C. § 159(a). [406 U.S. at 294–295 (emphasis added).]

The pivotal language of *Burns* is "perfectly clear." Several Board decisions have interpreted that language and their interpretations provide us with some guidance here. In *Spitzer Akron, Inc.*, 219 NLRB 20, 22 (1975), enfd. 540 F.2d 841 (6th Cir. 1976), cert. denied 429 U.S. 1040 (1977), the Board interpreted that language not to require that all employees had to be hired. The Board was influenced by the fact that, prior to assuming control, the successor had indicated an intention to retain the predecessor's employees and then hired enough to make it evident that the union's majority status would continue. In that case, as well as in *Howard Johnson Co.*, 198 NLRB 763 (1972), enfd. 496 F.2d 532 (9th Cir. 1974), and *Bachrodt Chevrolet Co.*, 205 NLRB 784 (1973), enfd. 515 F.2d 512 (7th Cir. 1975), cert. denied 423 U.S. 927 (1975), the predecessor's employees had been hired by the successor employer prior to the announcement of the changes in employment terms that had not been a part of the initial terms of rehiring. In *Bachrodt*, for example, the successor employer did not make the predecessor employees aware of the proposed changes when it invited them to apply for work and submit written job applications or when they were interviewed. In all three cases the Board found an 8(a)(5) violation applying *Burns.*

On the other hand, in *Spruce Up Corp.*, 209 NLRB 194 (1974), enfd. per curiam 529 F.2d 516 (4th Cir. 1975), the Board did not find a violation of Section 8(a)(5) because it found that the facts did not fall within the parameters of the "perfectly clear" exception enunciated in *Burns*. In *Spruce Up* the successor employer expressed a general willingness to hire the former employer's employees, but at the same time indicated that such employment was conditioned on their willingness to accept the terms of employment set by him. In particular, the successor employer distributed job applications which set forth the new rates of commission he intended to pay and requested that all those predecessor employees who desired to work on *that* basis submit the application. The Board stated:

> When an employer who has not yet commenced operations announces new terms prior to or simultaneously with his invitation to the previous work force to accept employment under those terms, we do not think it can fairly be said that the new employer "plans to retain all of the employees in the unit," as that phrase was intended by the Supreme Court. . . .
>
> We believe that the caveat in *Burns*, therefore, should be restricted to circumstances in which the new employer has either actively or, by tacit inference, misled employees into believing they would all be retained without change in their wages, hours, or conditions of employment, or at least to circumstances where the new employer, unlike the Respondent here, has failed to clearly announce its intent to establish a new set of conditions prior to inviting former employees to accept employment. [Fn. omitted. 209 NLRB at 195.]

Since *Spruce Up* the Board has adhered to this distinction based on when the successor employer announces its offer of different terms of employment in relation to its expression of intent to retain the predecessor's employees unless the successor has misled them. See *Starco Farmers Market*, 237 NLRB 373 (1978) (and cases cited therein).

In our view, the facts of the instant case fall within the Court's caveat in *Burns*, and we conclude that the Respondent forfeited the right to set initial terms. The judge found that when Barnes met with Union Representative Bobo on May 6 and indicated that he had doubts about the retention of only a few of the current employees it was "perfectly clear" under *Burns* that Barnes planned to retain a majority of Fremont employees. The record shows that employee William Deetz and Marvin Wiggins were even told by Supervisor Smith prior to May 17 that they would be retained when the Respondent took over the dealership operations. Smith's promise of employment was given before the Respondent later announced, in the individual employee interviews, its new employment terms and conditions. The record further shows that when Darrell Cooper received his job application, Smith assured him that nothing was going to change, including having union representation, when the Respondent took over the dealership. The judge credited all of his testimony and further found that here Barnes embarked on a misinformation campaign. Barnes instructed his supervisors to conceal or make false or misleading statements to the Fremont employees who inquired about the working conditions to be expected under the Respondent's control. Barnes gave the Unions false or misleading information about his true intentions to change more than just the three subjects discussed at the May 6 meeting. Nor does the Respondent's May 16 want ad, soliciting outside employment applications and announcing that the Respondent would operate a flat-rate shop, negate the earlier misinformation given directly to the predecessor's employees. In this regard, there is no indication that the predecessor's employees saw the ads. Indeed, it is unlikely they would have been looking at employment ads after being reassured by the Respondent that nothing would change once it took over the operation. It was not until after the hiring process had begun that the Respondent first informed the Fremont employees that there would be significantly different employment conditions. In addition, the Respondent's interviews were tainted by conditioning the hire of Fremont employees on their willingness to abandon union representation and cross the Unions' picket lines. Finally, the Respondent's refusal to employ the Fremont work force and its subsequent requirement that all apply for work was simply part of an unlawful plan to defeat the Unions' status as the exclusive representative of the unit employees.

Under these circumstances, we find, unlike the situation presented in *Spruce Up*, that the Respondent failed to clearly announce its intent to establish a new set of conditions prior to inviting former employees to accept employment. Moreover, "any uncertainty as to what Respondent would have done absent its unlawful purpose must be resolved against Respondent, since it cannot be permitted to benefit from its unlawful conduct." *Love's Barbeque Restaurant*, 245 NLRB 78, 82 (1979). Therefore, the Respondent was not free to unilaterally set initial terms of employment. Accord: *State Distributing Co.*, 282 NLRB 1048 (1987).

We finally consider the 8(a)(5) allegation relating to the Unions' information request submitted September 13. As previously noted, the Respondent's refusal to honor the Unions' request was premised on the position that the Respondent was not a successor to Fremont Ford, a position that we have rejected for the reasons discussed, supra. Generally, the Unions requested data concerning the identity and status of the unit employees, owners, and officers of the Company, a description of the wages, hours, and other terms and conditions of employment of unit employees, and certain key documents relating to the dealership transfer and takeover by the Respondent. There is no contention that the requested data is irrelevant to the Unions' functions as the exclusive collective-bargaining representative if this status existed.

It is well established that an employer has an obligation to supply requested information which is reasonably necessary to the exclusive collective-bargaining representative's responsibilities. *NLRB v. Acme Industrial Co.*, 385 U.S. 432 (1967); *NLRB v. Truitt Mfg. Co.*, 351 U.S. 149 (1956). The information requested by the Unions as it relates to unit employees is presumptively relevant to collective bargaining. *Harco Laboratories*, 271 NLRB 1397 (1984); *Equitable Life Assurance Society*, 266 NLRB 732 (1983); *Georgetown Holiday Inn*, 235 NLRB 485 (1978); *Leonard B. Hebert Jr. & Co.*, 259 NLRB 881 (1981), enfd. 696 F.2d 1120 (5th Cir. 1983); and *Barnard Engineering Co.*, 282 NLRB 617 (1987). The Respondent has not rebutted this presumption. Nor did the Respondent raise issues of relevance or lack of necessity in denying the Unions' information request. For these reasons, we find that the Unions are entitled to the information requested.

REMEDY

Having found that the Respondent has engaged in certain unfair labor practices, we shall order it to cease and desist and to take certain affirmative actions designed to effectuate the policies of the Act.

We shall order the Respondent to recognize and, on request, to bargain with the Unions as the exclusive representative of all its employees in the unit, including furnishing the information requested by the Unions in their letter of September 13, 1982. We shall also order the Respondent to rescind, on the Union's request, the unilateral changes in unit employees' wages, hours, and terms and conditions of employment implemented on May 17, 1982; and to make all affected unit employees whole for losses they incurred by virtue of its unilateral changes to their wages, fringe benefits, and other terms and conditions of employment in accordance with *Ogle Protection Service*, 183 NLRB 682 (1970), with interest as prescribed in *New Horizons for the Retarded*.[25] The Respondent shall remit all payments it owes to the employee benefit funds and reimburse its employees in the manner set forth in *Kraft Plumbing & Heating*, 252 NLRB 891 fn. 2 (1980), enfd. 661 F.2d 940 (9th Cir. 1981), for any expenses resulting from the Respondent's failure to make these payments. Any amounts that the Respondent must pay into the benefit funds shall be determined in the manner set forth in *Merryweather Optical Co.*, 240 NLRB 1213, 1216 fn. 7 (1970).[26] We shall also order the Respondent to offer the 22 unit employees, in writing, immediate and full reinstatement to their former jobs or, if those jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority and other rights or privileges previously enjoyed, dismissing if necessary persons hired on or after May 17, 1982, and to make them whole for any loss of earnings and benefits in accordance with *F. W. Woolworth Co.*, 90 NLRB 289 (1950), and *New Horizons*, supra. We shall also order the Respondent to give written notice to the 22 unit employees that it will recognize and bargain with the Unions as the exclusive representative and that it will no longer condition their hire on their willingness to abandon union representation, to cross the Unions' picket lines, and to sign individual employment contracts. We shall also order that the Respondent remove from its records all references to its refusal to employ the 22 unit employees and notify the employees involved that this has been done. We shall also order the Respondent to rescind the individual employment contracts executed on or after May 17, 1982.

AMENDED CONCLUSIONS OF LAW

1. Delete paragraphs 4, 5, and 6(b) and renumber the remaining paragraphs.

2. Substitute the following for relettered paragraph 4(b).

"(c) Failing and refusing to provide the Unions the information requested on September 13, 1982, which was reasonably necessary to the Unions' responsibilities as exclusive bargaining representative of the Respondent's unit employees."

3. Substitute the following for relettered paragraph 5(e).

"(e) Applying the terms set forth in those contracts rather than the existing terms and conditions of employment to all employees hired on and after May 19."

4. Substitute the following for relettered paragraph 6(b).

"(b) Telling bargaining unit employees that the Respondent's operation after May 17 would be nonunion and that they must be willing to sign individual employment contracts and cross a picket line to keep or get a bargaining unit job and giving them false and misleading information regarding the details of the dealership transfer."

ORDER

The National Labor Relations Board orders that the Respondent, Fremont Ford Sales, Inc., d/b/a Fremont Ford, Fremont, California, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Refusing to recognize and bargain in good faith with The East Bay Automotive Council and Its Affiliated Local Unions (the Unions) as the exclusive bargaining representative of the employees in the bargaining unit described below by

(i) Failing and refusing to supply the Unions, on their request, relevant information reasonably necessary for the proper performance of their duties as the exclusive bargaining representative of the employees in the bargaining unit.

(ii) Failing to notify the Unions sufficiently in advance of implementing changes affecting the wages, hours, and other terms and conditions of employment of the bargaining unit employees to permit a reasonable opportunity for good-faith collective bargaining about such changes with the Unions;

(iii) Unilaterally changing wages, hours, and other terms and conditions of employment for bargaining unit employees.

(iv) Bypassing the Unions and dealing directly with bargaining unit employees regarding their wages, hours, and other terms and conditions of employment by implementing individual employment contracts.

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[25] 283 NLRB 1173 (1987). Interest on and after January 1, 1987, shall be computed at the "short-term Federal rate" for the underpayment of taxes as set out in the 1986 amendment to 26 U.S.C. § 6621. Interest on amounts accrued prior to January 1, 1987 (the effective date of the 1986 amendment to 26 U.S.C. § 6621), shall be computed in accordance with *Florida Steel Corp.*, 231 NLRB 651 (1977).

[26] Because the provisions of employee benefit fund agreements are variable and complex, the Board does not provide at the adjudicatory stage of the proceeding for the addition of interest at a fixed rate on unlawfully withheld fund payments. It is, therefore, left to the compliance stage the question of whether the Respondent must pay any additional amounts into the benefit funds in order to satisfy the "make-whole" remedy. These additional amounts may be determined, depending on the circumstances of each case, by reference to provisions in the documents governing the funds at issue and, where there are no governing provisions, to evidence of any loss directly attributable to the unlawful withholding action, which might include the loss of return on investment of the portion of funds withheld, additional administrative costs, etc., but not collateral losses.

(b) Discriminating against its unit employees by

(i) Refusing to employ them to defeat the Unions' exclusive representative status.

(ii) Conditioning their hire on their willingness to abandon union representation, to cross the Unions' picket lines, and to sign individual employment contracts.

(iii) Any other manner with respect to their hire, tenure, or other terms and conditions of employment in order to discourage support for union representation.

(c) Refusing to employ nonbargaining unit employees and requiring them to apply for work as part of an unlawful plan to defeat the Unions' status as the exclusive representative of the bargaining unit employees.

(d) Telling employees that its previously represented shop and service departments will be nonunion and that any employee wishing to work in those departments must sign an individual employment contract and cross the Unions' picket lines as a condition of hire and giving them false and misleading information regarding the details of the dealership transfer.

(e) In any other manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) On request, bargain with the Unions as the exclusive representative of the employees in the following appropriate unit concerning terms and conditions of employment and, if an understanding is reached, embody the understanding in a signed agreement:

> All full-time and regular part-time employees employed by [the Respondent], excluding office clerical employees, salesmen, guards and supervisors as defined in the Act.

(b) Furnish to the Unions, on request and in a timely fashion, the information requested by their letter of September 13, 1982.

(c) On request of the Unions, rescind the unilateral changes in the unit employees' wages, hours, and terms and conditions of employment that were implemented on May 17, 1982, and make affected employees whole for losses they incurred by virtue of its unilateral changes to their wages, fringe benefits, and other terms and conditions of employment from May 17, 1982, until it negotiates in good faith with the Unions to agreement or to impasse, in the manner set forth in the remedy section of the Decision.

(d) Offer, in writing, to the extent it has not already done so, immediate and full reinstatement to all 22 employees named below to their former jobs or, if those jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority or any other rights or privileges previously enjoyed, while working for its predecessor, and make them whole for any loss of earnings and other benefits suffered as a result of the discrimination against them, discharging if necessary the persons hired into bargaining unit positions on and after May 17, 1982, in the manner set forth in the remedy section of the decision. With the reinstatement offers, the Respondent shall notify the employees that it will recognize and bargain with the Unions as their exclusive representative and that it will no longer condition their hire on their willingness to abandon union representation, to cross the Unions' picket lines, and to sign individual employment contracts.

Shop and Service Department:
Steve Kirkendall
Virgil Bilbrey
Dan Burkhardt
Darryl (Darrel) Cooper
Mel Fosen
Mohammed Khan
John Lawson
David Rabing
Charles Rudnick
John Pack
Marvin Wiggins
Fred Huffstetler

Body Shop Department:
Dan Clark
William Deetz
Robert Gonzales
Charles Kiesling
Manuel Rodilez

Parts Department:
David Lawson
Terry Evans
Charles Ross

Combination Departments:
Robert Hernandez
Epifano (Beaver) Reyna

(e) Remove from its files any reference to the unlawful refusal to employ the 22 unit employees and notify these employees in writing that this has been done and that this unlawful conduct will not be used against them in any way.

(f) Rescind the individual employment contracts executed on or after May 17, 1982.

(g) Preserve and, on request, make available to the Board or its agents for examination and copying, all payroll records, social security payment records, timecards, personnel records and reports, and all other records necessary to analyze the amount of backpay due under the terms of this Order.

(h) Post at its facility in Fremont, California, copies of the attached notice marked "Appendix."[27] Copies of the notice, on forms provided by

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[27] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the Nation-

Continued

the Regional Director for Region 32, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. The Respondent shall also mail copies of the notices to the 22 employees named above.

(i) Notify the Regional Director in writing within 20 days from the date of this Order what steps the Respondent has taken to comply.

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

Section 7 of the Act gives employees these rights.

To organize

To form, join, or assist any union

To bargain collectively through representatives of their own choice

To act together for other mutual aid or protection

To choose not to engage in any of these protected concerted activities.

WE WILL NOT refuse to recognize and bargain in good faith with The East Bay Automotive Council and Its Affiliated Local Unions as the exclusive bargaining representative of employees in the bargaining unit described below.

WE WILL NOT fail and refuse to supply the Unions, on their request, relevant information reasonably necessary for the proper performance of their duties as the exclusive bargaining representative of the employees in the bargaining unit.

WE WILL NOT fail to notify the Unions sufficiently in advance of implementing changes affecting the wages, hours, and other terms and conditions of employment of our bargaining unit employees to permit a reasonable opportunity for good-faith collective bargaining about such changes with the Unions.

WE WILL NOT unilaterally change wages, hours, and other terms and conditions of employment for bargaining unit employees.

WE WILL NOT bypass the Unions and deal directly with our bargaining unit employees regarding their wages, hours, and other terms and conditions of employment by implementing individual employment contracts.

WE WILL NOT discriminate against our unit employees by refusing to employ them to defeat the Unions' exclusive representative status; by conditioning their hire on their willingness to abandon union representation, to cross the Unions' picket lines, and to sign individual employment contracts; or by any other manner with respect to our employees' hire, tenure, or other terms and conditions of employment in order to discourage support for union representation.

WE WILL NOT refuse to employ nonbargaining unit employees and then require them to reapply for work as part of an unlawful plan to defeat the Unions' status as the exclusive representative of our bargaining unit employees.

WE WILL NOT tell our employees that our previously represented shop and service departments will be nonunion and that any employee wishing to work in those departments must sign an individual employment contract and cross the Unions' picket lines as a condition of hire and WE WILL NOT give our employees false and misleading information regarding the details of the dealership transfer.

WE WILL NOT in any other manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL, on request, bargain with the Unions and put in writing and sign any agreement reached on terms and conditions of employment for our employees in the bargaining unit:

> All full-time and regular part-time employees employed by us, excluding office clerical employees, salesmen, guards, and supervisors as defined in the Act.

WE WILL furnish to the Unions, on request and in a timely fashion, the information requested by their letter of September 13, 1982.

WE WILL, on request of the Unions, rescind the unilateral changes in our unit employees' wages, hours, and terms and conditions of employment that were implemented on May 17, 1982, and WE WILL make affected employees whole for losses they incurred by virtue of our unilateral changes to their wages, fringe benefits, and other terms and conditions of employment.

WE WILL offer, in writing, to the extent we have not already done so, immediate and full reinstate-

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al Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

ment to all 22 employees named below to their former jobs or, if those jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority or other rights and privileges previously enjoyed while working for our predecessor. WE WILL also make them whole for any loss of earnings and other benefits resulting from our discrimination against them, discharging if necessary the person hired into bargaining unit positions on or after May 17, 1982. With the reinstatement offers, WE WILL notify the employees that we will recognize and bargain with the Unions as their exclusive representative and that WE WILL no longer condition their hire on their willingness to abandon union representation, to cross the Unions' picket lines, and to sign individual employment contracts.

Shop and Service Department:

Steve Kirkendall
Virgil Bilbrey
Dan Burkhardt
Darryl (Darrel) Cooper
Mel Fosen
Mohammed Khan
John Lawson
David Rabing
Charles Rudnick
John Pack
Marvin Wiggins
Fred Huffstetler

Body Shop Department:

Dan Clark
William Deetz
Robert Gonzales
Charles Kiesling
Manuel Rodilez

Parts Department:

David Lawson
Terry Evans
Charles Ross

Combination Departments:

Robert Hernandez
Epifano (Beaver) Reyna

WE WILL notify each of the above 22 employees that we have removed from our files any reference to our refusal to employ them and that WE WILL NOT use it against him in any way.

WE WILL rescind the individual employment contracts executed on or after May 17, 1982.

FREMONT FORD SALES, INC. D/B/A
FREMONT FORD

Kenneth Ko and *Charles H. Pernal Jr., Esqs.*, for the General Counsel.

Ralph B. Hoyt, Marcia Hoyt, and *Glen Walling, Esqs. (Hoyt & Goforth)*, of Walnut Creek, California, for the Respondent.

Burton F. Boltuch, Esq. (Boltuch & Siegel), of Oakland, California, for the Charging Parties.

DECISION

STATEMENT OF THE CASE

TIMOTHY D. NELSON, Administrative Law Judge. I heard this case in 7 days of trial proceedings[1] in Oakland, California, between May 3 and 11, 1983. It arose when unfair labor practice charges were filed on September 15, 1982 against Fremont Ford Sales, Inc. d/b/a Fremont Ford (Respondent) by East Bay Automotive Council (Council) and its Affiliated Local Unions (generally the Unions; or by local name and number, e.g., Machinists 1546). On December 7, 1982, after investigating those charges, the Regional Director for Region 32 of the National Labor Relations Board (Board) issued an order consolidating cases, consolidated complaint and notice of hearing.[2]

The complaint alleges in alternative ways that Respondent, a legal successor in the operation of a union-represented auto dealership, committed unfair labor practices by ignoring or refusing to perform certain obligations imposed on it by Section 8(d) of the National Labor Relations Act (Act) to recognize and bargain in good faith with the Unions as the exclusive joint representatives of certain employees of the dealership, thus violating Section 8(a)(5) of the Act; by discriminating for union-hostile reasons in discharging and hiring the dealership's employees, thus violating Section 8(a)(3) of the Act; and by certain statements and acts of agents tending to interfere with, restrain, or coerce employees in the exercise of rights protected by the Act, thus violating Section 8(a)(1) of the Act.

Respondent duly answered, denying all wrongdoing. By refinements of position in the form of amendments, stipulations, and admissions, Respondent has finally put into issue only ultimate questions of its legal liability in a mostly undisputed factual setting.

Issues

The most important questions are:

1. Did Respondent ever acquire the status of legal successor for collective-bargaining purposes? If not, the complaint is severely crippled; but if so:

2. When did that status attach? The answer here will influence the resolutions of subordinate questions:

> a. Did Respondent become bound to the labor agreement that bound its predecessor? Alternatively,
>
> b. What, if any, changes in employees' wages and working conditions was Respondent free to make unilaterally?

3. Did Respondent unlawfully discriminate—either systematically or in specific cases—in its termination/hiring processes?

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[1] The 1600 page trial transcript contains many errors. The General Counsel has moved to correct the transcript in a large number of particulars; Respondent opposes this in only a few cases. I grant the unopposed portions of the motion to correct, but deny it with respect to proposed corrections at Tr. 368, L. 16; Tr. 374, L. 4; Tr. 1049, L. 22; and Tr. 1120, L. 7.

[2] The consolidated complaint also originally included allegations against Respondent's predecessor, Fremont Ford, Inc. The allegations against the predecessor derived from charges filed in Case 32-CA-4801 and they were withdrawn on motion of the General Counsel at the outset of the trial, effectively mooting Case 32-CA-4801 and terminating proceedings against that party. I have omitted reference to that case in the caption of this decision and, on the unopposed motion in the General Counsel's posttrial brief, I sever Case 32-CA-4801 from these proceedings and remand that case to the Regional Director for Region 32 for appropriate disposition.

4. Did Respondent's agents make unlawfully coercive statements during interviews and other discussions with employees relating to the terms and conditions under which they might be hired?

On the whole record and with the assistance of excellent posttrial briefs, I make these

FINDINGS OF FACT

I. INTRODUCTION AND OVERVIEW

At the center of this case are the activities and intentions of Donald M. (Dee) Barnes in a 10-month period during which he managed and eventually became the full owner of a car and pickup truck dealership in Fremont, California, a city located in the continuous urban belt on the east side of San Francisco Bay. The dealership has been commonly known as Fremont Ford during all times that concern us.[3]

Everyone agrees that Barnes had fully acquired ownership and control of Fremont Ford by no later than May 17, 1982,[4] doing so with the backing of Ford Motor Company (Ford) through a "Dealer Development Program," essentially a financing arrangement which is described more fully within. But the General Counsel and Charging Party jointly maintain[5] that the effective takeover and successorship by Barnes really took place much earlier, perhaps in 1981, but definitely by March 19, 1982. The General Counsel also points to certain documents and to the conduct and admissions of Respondent's agents assertedly showing that even the parties to the sale deemed the takeover to be effective by no later than May 7, 1982.

Respondent argues that Barnes did not take title to the assets of Fremont Ford until May 17, and did not begin running Fremont Ford for his own "benefit" until it reopened on May 19. At this point, Respondent says, its status as a labor relations successor was still in doubt; a doubt that was not resolved until an asserted "full complement" was eventually hired more than 4 months later, which proved to contain less than a majority from the pre-May 17 complement.

The General Counsel also contends that Respondent owed—and violated—a duty to bargain with the Unions even if legal succession did not happen until May 17 (or 19), 1982. But the questions whether Respondent, through Barnes, took over effective control of the dealership at some point before that date and, if so, when this occurred, will have significance to remaining issues and to Respondent's potential remedial liability, and they were more closely litigated and briefed than any other matters.

These questions necessarily require attention to the details attending Barnes' managership and eventual ownership of Fremont Ford's assets. A close review of the extensive documentary and testimonial evidence on these points persuades me that the facts are not so much in dispute as are questions of their proper characterization and legal import. Indeed, my findings below relating to the management and eventual sale of the dealership derive, except where noted, from records and from credible portions of the testimony of Barnes and other agents of Respondent[6] and that of the former principals in the dealership. To avoid extensive factual recapitulations in the eventual analysis, I join my findings with some running observations and interpretations relevant to my ultimate disposition of the main issues.

Before Barnes came on the scene and until May 17, 1982, the Unions were recognized as the joint bargaining representatives of Fremont Ford's nonsupervisory service mechanics (or technicians), service writers, parts department and body shop employees, and related helpers and utility people.[7] Those employees had been thus represented since before 1978, when the dealership was acquired by Respondent's corporate predecessor, Fremont Ford, Inc. (FFI).

On takeover, FFI adopted and applied the labor agreement that then bound the Unions and the employer-members of United Employers, a multiemployer bargaining agency which FFI formally joined in August 1980. A more recent multiemployer contract, effective August 20, 1980, through August 20, 1983, was admittedly applied to unit employees at Fremont Ford through May 17, 1982.

Since the point of its admitted takeover, Respondent has admittedly refused to recognize or bargain with the Unions or to apply the labor agreement, concededly making many unilateral changes after that date in the wages, hours, and other terms and conditions of employment of employees in the bargaining unit.

A. *Barnes Arrives at Fremont Ford, Advertises Himself as its "New Owners" and Begins to Make Changes*

In July 1981 Barnes accepted the invitations of Fremont Ford's then principal owners, Paul Brinkman and Leon Pettitt, to buy a 20-percent share of FFI, to become its corporate president, and to take over as the general manager of the dealership. These arrangements had followed a series of efforts by Brinkman and Pettitt in the preceding months to rid themselves of Fremont Ford, which they viewed as an unprofitable investment; indeed, they saw it as a significant cash drain.

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[3] This includes periods when Fremont Ford, Inc., the owner of the predecessor operation, also sold and serviced Fiats and Lancias, apparently a sideline to its Ford business. It was then doing business alternately as Fremont Ford or Fremont Fiat-Lancia.

[4] Respondent amended its answer at trial to admit that its projected gross income would exceed $500,000 in the 12-month period ending on May 17, 1983, and that it would purchase and receive directly from outside California during that period goods worth more than $5000. Respondent also admitted the conclusion that it is and has been at material times an "employer engaged in commerce" within the jurisdictional reach of the Act.

[5] References below to the General Counsel's position shall refer as well to that taken by the Charging Party, there appearing to be harmony between them on all factual and legal questions.

[6] Respondent has stipulated that certain persons with managerial or supervisory titles referred to below were, after May 17, 1982, its supervisors within the meaning of Sec. 2(11) of the Act and its agents. The record incidentally contains ample evidence to support the conclusion that those persons were also statutory supervisors throughout their employment at Fremont Ford during all periods described below.II. LABOR RELATIONS HISTORY

[7] These terms are merely descriptive of the unit generally. The precise scope of the historical unit requires attention to certain general recognition language in the multiemployer-multiunion labor agreement referred to below, as well as to the practices among the parties to that relationship.

Brinkman-Pettitt had tried first to sell the dealership to Joseph Tigue, then the general manager and a 20-percent shareholder in FFI; but while Tigue was still trying to put together a financing plan, a better buyout offer was made by another party, Valente. The Tigue deal was then put aside and Valente's proposal was pursued. That plan did not work out, however, when Ford headquarters in Detroit (Ford-Detroit) balked at transferring the franchise, acting out of dissatisfaction with Valente's arrangements for the general managership. In the meantime Tigue had lost interest, leaving Brinkman-Pettitt where they had started, in search of a buyer.

Brinkman saw the dealership as "terminal" by that time. Barnes was approached in late June 1981 in part because both Brinkman and Pettitt believed that he was an able manager. Barnes had previously worked for Brinkman as general manager in one of Brinkman's other Ford dealerships. Both Pettitt and Brinkman owned other Ford and Lincoln-Mercury dealerships in the greater San Francisco Bay area and, since 1981 at least, their principal day-to-day attentions had been directed to these other operations.

Brinkman also acknowledged, without conceding that this affected their decision to seek out Barnes, that he and Pettitt knew from their prior associations that Barnes had been interested for some time in becoming the owner-operator of a dealership. Barnes admittedly knew at the time of his arrival at Fremont Ford that Brinkman-Pettitt had been trying to sell the business.

The parties disagree whether there was an understanding from the start between Barnes and Brinkman-Pettitt that Barnes would eventually buy Fremont Ford. I find from the history just summarized, and from the fact that Barnes was a good candidate for Ford-Detroit approval under its Dealer Development Program,[8] that the July 1981 association of the three men was influenced by the prospect that Barnes would eventually buy out the business. Various denials by them that anything was said aloud among them about this were somewhat beside the point. All three men testified in a generally guarded way in any case, and their denials on this matter struck me as having been tailored to suit Respondent's litigation posture and as inconsistent with the probabilities.[9]

Setting aside the question of specific intentions in July 1981, when Barnes became a shareholder and president of FFI and took over the general management of Fremont Ford, it is at least clear that Barnes personally appeared in a series of Bay area television commercials in the period around September 1981 calling himself the "new owner" of Fremont Ford. Barnes explained that this was done to promote the business through an advertising campaign centered on the slogan "New dealer, new deal." It is therefore clear that Barnes then believed it would be helpful to portray himself to the public as having succeeded to the ownership of Fremont Ford. By contrast, Barnes admittedly did not conduct any "new owner" advertising campaign after May 19, 1982, when, Respondent now insists, the business officially reopened under "new ownership."

It is equally clear that before the end of 1981 Barnes had already begun to effect significant operational and management changes. These included reductions in the numbers of mechanics and bodyshop workers and the installation of a new service manager, Robert Radcliffe, a new bodyshop manager, Robert Bold, and a new general sales manager, Kenneth Barnes (Barnes' brother who was later replaced, ultimately by Pat Doyle).[10]

There is summary testimony by Barnes that he consulted in some manner with Pettitt about some or all of these choices. But Pettitt's description of his own role in these hirings shows that Pettitt relied entirely on Barnes' judgment (e.g., Pettitt's admitted response to Barnes' recommendation of Doyle: "Go ahead, if you think the guy's right. Do it").

By December, Barnes had decided to implement a physical and supervisory reorganization of the parts and service departments under the overall supervision of a "parts and service director" (or "coordinator")—a position that had not previously existed in the managerial hierarchy. To fill this new job, Barnes recruited and hired Larry Smith, a former associate at a Monterey dealership that Barnes had managed. To get Smith to accept the job, Barnes first flew to Idaho, where Smith was by then living, and agreed to pay approximately $2500 to cover Smith's moving expenses back to California. Barnes' Idaho trip and Smith's moving costs were paid for by FFI funds and, if these arrangements were "approved" at all, it was done after-the-fact, under unclear circumstances.[11]

After Smith's arrival in January, there were further managerial shifts implemented by Barnes (or by Smith, with Barnes' approval). Ken Collins was hired to run the bodyshop, replacing Bold. Collins was, in turn, discharged and Charles Edmonds was hired in his place in late April, following a hiatus during which Barnes thought about whether to continue a bodyshop operation. Robert Alderson had also been hired by then to replace the used-car sales manager. The parts manager was fired in April and was replaced by Lyle Fleming, another of Barnes' former associates from the period when Barnes had managed the Monterey dealership.

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[8] Barnes said unqualifiedly in a pretrial affidavit that he had been approved in 1978 by Ford-Detroit as a potential Dealer Development Program operator in a deal that was never consummated. He hedged on the point during his trial testimony, but acknowledged that he believed in 1981 that he had a "good opportunity" to be approved as a Dealer Development Program operator at Fremont Ford.

[9] Respondent cites testimony by Brinkman that he had sought a $450,000 bank loan in the period August-September 1981 to provide necessary additional capitalization to the dealership as evidence that Brinkman-Pettitt had not planned initially for Barnes to buy out the business. I do not find such testimony, if true, to be necessarily supportive of Respondent's conclusion, and Brinkman's testimony on the point is confusing. Thus, Brinkman conceded that he actually obtained a loan commitment for the $450,000 amount but turned it down, claiming that he by then believed even more working capital was required and that the bank would lend no more than $450,000.

[10] Dee Barnes admittedly decided to replace the incumbent general sales manager when he took over management in July 1981, bringing Kenneth Barnes with him to take the sales job. Kenneth, in turn, resigned 2 months later and Dee again selected another individual, Dick Estes, for that position. Estes, in turn, quit after 1 month and Barnes finally located Pat Doyle for the position in September or October 1981.

[11] Brinkman was the only witness who testified that there was some unspecified "approval" process in Barnes' recruitment of Smith. Barnes and Pettitt seem to contradict this in their testimony.

All of these supervisory people were retained when Barnes admittedly became the "full" owner in May 1982. Thus, I find that Barnes had already assembled and installed his own management team in advance of the date of his acquisition of the dealership's assets.

The changes instituted by Barnes during the July 1981-May 1982 period may have been nominally subject to Brinkman's and Pettitt's approval, but the record suggests that such approval was readily forthcoming if it was sought. As noted above, Barnes did not always seek advance approval. With respect to the "new dealer-new deal" advertisements in September, for example, there is no dispute that Barnes did this without prior consultation with Brinkman-Pettitt (although they learned about and did not disavow those actions). The same is true of Barnes' reorganization of the storage system and general layout of the parts department.

It is not disputed that in his role as general manager of Fremont Ford, Barnes was in effective day-to-day control of the dealership from the outset, exercising at least the same degree of authority that Tigue, his predecessor in that position, had exercised, including over labor relations matters.[12] Respondent would insist, however, that there were "limits" placed on Barnes in his pre-May 17, 1982 management of Fremont Ford. The testimony of Brinkman and Pettitt contains many such general statements, but few specific examples. These were the matters of advertising budgets during certain periods and the alleged requirement that Barnes "consult" before spending above-existing levels for "nonproductive" personnel—a term used by Pettitt to refer to persons who create "overhead" costs (supervisors, for example) but do not directly draw customer dollars by their labor (as do, for example, mechanics).

The specific matters just noted may arguably be described as "limits" that Brinkman-Pettitt placed on Barnes, but on this record they must be seen as a function of the badly undercapitalized state of the business at the time, a state of affairs admittedly linked to the "limits" which Brinkman-Pettitt placed on themselves in their regular financial contributions to keep the operation going. As such, these limits did not reflect reservation of operational authority to Brinkman-Pettitt, nor second-guessing by them of Barnes' operational decisions; they amounted simply to investment limits. Moreover, the unilateral creation by Barnes of a wholly new supermanagerial position for Smith, and the related measures and expenditures associated with Smith's taking that job, tend to undermine Pettitt's claim that he placed any real limits on Barnes' authority to spend for "nonproductive" personnel.[13] In any case, Pettitt said that Barnes was free to augment or shrink the numbers of persons in "productive" classifications (including virtually all nonsupervisory employees) as he saw fit. Thus, the generalized "limits" on Barnes' authority were not shown to be more than vague understandings, never memorialized in writing, and applied, if at all, in an "informal" process (Brinkman's term) of review by Brinkman or Pettitt (mostly Pettitt) of monthly spending projections and periodic accountings. Finally, while there had been a written management agreement between FFI and Tigue as general manager, there was no such agreement with Barnes, after he took over from Tigue as general manager.

It clearly seems that the process of "approval" by Brinkman and Pettitt of Barnes' management was, at best, routine and perfunctory. Indeed, the specific instances in this record appear to have involved after-the-fact approval, if at all. I therefore find that Barnes was, immediately on his arrival at Fremont Ford, the effective day-to-day operator[14] of the business in all its normal activities; and, although he may have engaged in some occasional consultations with Brinkman-Pettitt, the restraints that this process imposed on his overall control were more theoretical than actual. This is most clearly revealed by the fact that he felt free to identify himself publicly as the "new owner" and by the fact that he was allowed to run the business as he thought best, including by resort to such "out of the ordinary" expenditures (Brinkman's expression) and arrangements as those required to recruit and relocate the new parts and service director, Larry Smith, and by other measures detailed above and elsewhere within.

B. *January 1982: Formal Agreement is Reached to Sell Fremont Ford to Barnes Under Dealer Development Program*

By early January 1982, coinciding roughly with Larry Smith's arrival and assumption of his new position within the dealership, Barnes and Brinkman-Pettitt admittedly reached agreement that Barnes would buy out the dealership. The mutual plan was for Barnes to get financial backing under Ford's Dealer Development Program (DD Program).

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[12] Brinkman admitted, incidentally, that Tigue had formally enrolled FFI in United Employers in 1980, signing as vice president and general manager, and had done so without Brinkman's prior knowledge. Pettitt expressly acknowledged that Barnes had "responsibility" for labor relations matters affecting the "hourly" employees.

[13] Pettitt unconvincingly sought to rationalize Barnes' pre-"consultation" creation of an additional managerial position for Smith as not having truly created additional "overhead" costs, claiming that this would simply free the department managers to do "productive" work, without any net increase in operating expense. There was no showing, however, that those managers did, in fact, begin to perform "productive" (i.e., bargaining unit) work after Smith's arrival, and there seem to have been obstacles to such a practice while the labor agreement was in effect (see, e.g., art. II, sec. 5, and art. XVI, sec. 5 seeming to place limits on, or prohibiting, such practices, with special provision for the writing of service orders).

[14] The term "operator" may be one of art within the auto sales industry; if so, a precise definition cannot be obtained from this record. I infer from the context within which it was used by Respondent's managerial witnesses and from the Ford-generated documents received into evidence, that it refers to the person actually in charge of day-to-day operations in a dealership, as distinct from its equity owners. It was in this context that Pettitt, for example, had no difficulty in saying that Barnes, like Tigue before him, was the "operator" of Fremont Ford.

Functionally, Ford's DD Program is a system designed to aid would-be owner-operators otherwise acceptable to Ford as franchisees but who are without independent resources to buy and provide necessary working capital for a dealership. It is, essentially, a financing plan. The system contemplates the setting up by Ford of a "Dealer Development Corporation" (DD Corp.) into which Ford will infuse an 80-percent share of the funding necessary to buy and capitalize the dealership, using standard Ford criteria for determining capitalization minimums. The prospective operator will contribute the 20-percent balance to the DD Corp. and will become its president. In the lexicon of the DD Program, the "president-operator" is also termed a "partial equity owner" in the DD Corp.[15]

The system does not contemplate long-term involvement by Ford in a DD Corp. It is part of the program that the president-operator must apply all of his stock dividends and a minimum of 50 percent of his annual operator's bonus towards an eventual buyout of Ford's interest. For this reason, while mindful of the corporate arrangement, I have deemed it reasonable both for shorthand purposes and as a matter of substantive fact to refer above and below to the eventual sale of Fremont Ford as being, essentially, a sale to Barnes.

Procedurally, following preliminary approval by Ford-Detroit of the application filed by the prospective operator, a DD Program specialist from Ford-Detroit (an investment representative) takes over and directs the course of things thereafter. He first prepares scores of forms and documents that must be completed and executed before Ford-Detroit will authorize the creation and 80-percent funding of the new DD Corp. These include necessary corporate authorizations for the selling corporation to grant "options" to the Ford representative to buy the business and to sublease the premises (assuming, as here, a leasehold), as well as a buy-sell agreement and a sublease instrument setting forth the substantive arrangements between buyer and seller if and when the options are exercised.[16]

Having made these preparations, Ford's investment representative will travel to the dealership and will conduct there a detailed inventory and valuation of the various properties to be acquired. He will then arrange for completion and signing of the voluminous paperwork necessary to be in place for a quick conclusion of the transaction once it receives final authorization from Ford-Detroit.[17]

On final authorization from Ford-Detroit, the investment representative will order the filing of instruments of incorporation in Delaware and the filing of bulk sales notices and other qualifying papers in the State and locality of the dealership. He will also prepare in advance a large new package of formal corporate papers for the DD Corp., including waivers of notice of meeting and canned "minutes" in which directors are named and various resolutions are passed authorizing or (in many cases) ratifying all the minutiae of activity legally associated with the sale of an ongoing auto dealership by a corporation to a corporation.

C. *January–May 1982: Steps to Conclusion of the Sale*

1. Introduction

The bulky exhibit files in this case contain the detailed trail of formal, written dealings leading to what Respondent believes were the critical closing transactions between the DD Corp. and Brinkman—Pettitt on May 17, 1982. That paper trail does not always conform to the precise sequence of events found to have occurred; neither does it normally matter to record or discuss the discrepancy. It is also best to read these documents with the recognition that the transaction involved desperate, "absentee" sellers[18] and a buyer-in-place. And that same set of circumstances requires the preliminary caution that the paper trail does not always accurately reflect the realities of the underlying relationship between Barnes and Brinkman-Pettitt, nor the realities of actual control of the dealership.

I summarize below what seems to me to be the transitional highlights between early January, when the admitted deal was made to sell Fremont Ford to Barnes through a DD Program, and May 17, when money changed hands and the corporate "minutes" reflect that the deal was corporately authorized and consummated.

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[15] Ford's security is ensured by its ownership of all preferred and voting stock (the partial equity owner having only common stock) and by its right to designate a majority of the directors (two of three in this case) who are normally management agents of Ford-Detroit and of a Ford regional office.

[16] Since formal "exercise" of these options does not take place until final closing, and since the substantive buy-sell agreement contains detailed provision for operation of the dealership in the period before closing (including for advance "takeover" by the buyer, as set forth below), the buy-sell agreement, while in some senses a "contingent" one, must also be seen as having independent vitality on the grant of the option itself. So long as this is kept in mind it is harmless to indulge for description's sake the fiction that the substantive buy-sell agreement does not "take effect" until "exercise" of the buy-sell option.

[17] It may be that it is not always as mechanically routine as the foregoing summary might suggest, but the record indicates that the process was virtually this routine in this case (the only exception being evidence that there were some substantive discussions about the duration of fixed rental fees for the sublease). Also, nothing in the testimony of D. M. Coleman (Ford's investment representative) about his 25 years of experience in "buying and selling dealerships" disturbs the impression that the process, while requiring professional energy, judgment, sophistication, and attention to detail, is one that Ford has gotten down to something of a routine. When, as here, the sellers are desperate (see fn. 18), Ford appears to be in a position at least to draw the overall form, if not to define the substance, of the transaction.

[18] In addition to findings above that Brinkman viewed Fremont Ford's condition as "terminal" as early as June-July 1981, I note here that there was a devastating yearend accounting report weighing on Brinkman-Pettitt. When the proposal was made in January 1982 to sell to Barnes through the DD Program, Pettitt admittedly responded, "Let's get out, the quicker the better, now." When money changed hands on May 17, Pettitt viewed this as "the end of the hemorrhage." See also findings below about Brinkman-Pettitt's agreement by early January 1982 to value Barnes' share in this "terminal" business at $160,000 even though he had paid only $132,500 for that share when he had bought into FFI 6 months earlier.

2. January to March 19: Preparation and preliminary approval of a DD Program package for Fremont Ford

By no later than January 11, Barnes and Brinkman-Pettitt had reached an agreement to buy Barnes' share in FFI for $160,000—an increase of roughly 21 percent over its cost to Barnes 6 months earlier. This is reflected in Barnes' application for materials for the DD Program that he completed on January 11 and then submitted to Ford's San Jose district sales office, the first stop on the application's progress toward eventual Ford-Detroit approval. Brinkman separately acknowledged the valuation of "approximately $160,000" in a letter to the same Ford district office the same day in which he "confirm[ed] previous conversations" with that office "regarding the intentions of Leon Pettitt and myself to divest our interests in [Fremont Ford]."

The principals substantially concede—and I find—that the $160,000 valuation was not so much influenced by some judgment about the market value of Barnes' share in this "terminal" business as it was by the fact—recognized by all parties—that this was the amount that Barnes would need under Ford's capitalization requirements for his 20-percent initial participation in the prospective DD Corp.[19] Respondent says as much on brief, observing that "it was worth that additional sum to be out from under the financial burden."

By February 10, Barnes' application had been processed regionally and was being forwarded to Ford-Detroit by L. E. Otto of Ford's "San Francisco Dealer Development Branch." Otto summarized the financial condition and sales prospects of the dealership in a covering memorandum of that date and Otto categorically "recommend[ed] this investment in Fremont, California, with Mr. Dee Barnes as the operator," confirming, incidentally, that "Mr. Dee Barnes' investment funds of $160,000 will come from the purchase of his interest in Fremont Ford by Messrs. Brinkman and Pettitt." Otto also summarized certain understandings that had been reached between Brinkman-Pettitt and Barnes regarding some transitional details and stated that "a monthly salary . . . has been agreed upon with Mr. Dee Barnes."[20] Otto also recommended, "To maintain continuity of operation and management, a name as close as possible to Fremont Ford is proposed, i.e., Fremont Ford Sales or Fremont Ford Motors, Inc."

After receipt by Ford-Detroit of Barnes' application and Otto's forwarding recommendations, the file received review and "tentative approval" by the required officials. These included D. M. Coleman, the Ford-Detroit investment representative who would take care of all matters after that and who, along with Otto, would be Ford's other designee on the board of the new DD Corp. Coleman then prepared the numerous documents and other forms and paperwork needed to be signed, completed, or filed by Brinkman-Pettitt and Barnes before Ford-Detroit would authorize the final step, the creation and funding of the DD Corp.

According to prearrangement, Coleman traveled to Fremont and spent the business week of March 15 in meetings with Barnes, Brinkman-Pettitt, and others, obtaining the necessary signatures on all the paperwork and conducting the extensive preliminary inventory and valuation of assets then on hand which would be subject to the prospective sale.[21] The paperwork details accomplished that week included the following:

1. Barnes' signature on a prepared document of resignation from his presidency and other corporate positions in FFI; this admittedly done at the beginning of the week to avoid the appearance of self-dealing between FFI and Barnes in the formal transactions that ensued.

2. The execution by FFI's newly constituted directors of a resolution authorizing the corporate purchase of Barnes' share in FFI for $160,000.

3. The execution by FFI's officers of resolutions authorizing the corporation to grant a buy-sell option to Coleman and the execution by Brinkman-Pettitt in their individual capacities of a sublease option and a sublease itself (the leasehold apparently being in their own names).

4. The submission by Brinkman for FFI of a formal "resignation" from the "Ford Sales and Service Agreement" (the essential franchise agreement with Ford) and from other, similar agreements with Ford, all conditioned on Ford's grant of the same to the prospective DD Corp.

The buy-sell agreement, attached to the buy-sell option and incorporated by reference therein, is itself a 25-page basic document containing essentially all terms and rights and obligations of the parties throughout the ensuing period until closing. It contains, inter alia, provisions for the taking of final inventories, formulas for the liquidation of a net purchase price, and a provision for the creation of a bill of sale as of the "Closing Date." This, incidentally, is a term of art to be distinguished from the "Takeover Date," which is contemplated by the agreement to occur *before* the "Closing Date." By its terms (emphasis added):

> SELLER . . . requests that BUYER *take possession* of the operating assets and premises *on a date specified by BUYER (Takeover Date)* approximately *five (5) days before Closing Date* to assist SELLER in the taking of inventories and preparation of schedules contemplated by this Agreement and *to conduct the business until the Closing Date* to the same extent *as though the transactions . . . had been consummated effective with the Takeover Date. In operating* the business *from the Takeover Date to the Closing Date, all profits and/or losses* incurred *shall accrue to the BUYER.*

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[19] The necessary capitalization amounts may have been derivable from published Ford criteria. In any case, Barnes admitted that the amounts involved here had been specifically established by Ford for the Fremont dealership when Tigue had explored buyout possibilities in 1981.

[20] Presumably, Otto, who would become a director in the DD Corp. when it was formed, was the party who "agreed" with Barnes on the salary Barnes would receive under the proposed DD Corp.

[21] This did not include the inventory of Fiat and Lancia products and parts (see fn. 3), which was physically segregated and eventually removed from the premises.

The buy-sell and sublease options each ran to Coleman, but the DD Corp. was the acquiring party named in the attached buy-sell agreement as BUYER and was the sublessee named as TENANT in the sublease attached to the sublease option. Barnes was identified as the subscribing and initialing party, respectively, on those basic instruments, in his capacity as president of the DD Corp., which by then had been christened "Fremont Ford Sales, Inc." (FFSI), the Respondent. Also signing for FFSI on the sublease instrument was Frances Baker, as secretary-treasurer. Baker was then the office business manager at Fremont Ford and was Barnes' personal selection for the corporate position in FFSI. She would continue after May 17 also to function as the office business manager for the dealership.

I will return in my analysis to the significance of Barnes' formal stepover from president of FFI to president of FFSI in mid-March and of the formal provisions which seemingly bound him to take over and become responsible for the business before closing was perfected (and to treat the closing, nunc pro tunc, as having occurred simultaneous with the takeover). For now, I believe it fair simply to observe in summary that these formal dealings alone dictate a finding that Barnes was no longer being treated as a representative of FFI, but rather, was regarded as the authorized corporate agent of FFSI, the entity which it was contemplated, would take formal possession and control of the assets and operations of the dealership at some point before closing. Since it was also contemplated that FFSI would have the right to "specif[y]" the takeover date, and since FFSI (through Coleman's holding of the 80-percent funding) held the key to the timing of closing, this left very little discretion in the hands of FFI, the nominal owner, to control the timing and substance of key events at the dealership thereafter.

It may also be observed that while Brinkman-Pettitt, through FFI, retained some formal right to control the business after March 19, they were bound by many restraints set forth in the buy-sell agreement, inter alia, to "cause [the] dealership to function in the ordinary course . . . of business and in a good and efficient manner" and to "afford BUYER . . . at all reasonable times, access and facilities to use with respect to all properties of SELLER . . . books, files, records . . . for the purpose of audit, inspection and examination thereof" and to keep current properties free of "lien or other encumbrance" and not to "acquire or dispose . . . or in anywise obligate itself to do so" with respect to its current property.

There were thus numerous formal steps taken by which, as of the March 19 option grants, FFSI had already secured rights of supervision and control of the dealership. Since FFSI existed only in contemplation at that time, and since Barnes was its official representative and was in place as general manager, it is also fair to observe that FFSI, through Barnes, was already in the driver's seat for many important purposes as of March 19.

Although Respondent maintains that Barnes was still acting for FFI's "benefit" at that time and until May 17 in his capacity as general manager, there are many indications in findings above and below that Barnes and other FFI personnel and processes were used in ways more directly traceable to FFSI's interests. That aside, it is worth pausing to consider who would win as between Barnes and Brinkman-Pettitt in a contest of wills over the management of the business in the period between March 19 and closing. Clearly, with FFSI having broad rights of access and review, and exclusive control over the timing of takeover and closing, and with FFSI's recognized president, Barnes, already in place as the general manager, it was Barnes who held practical power. For to dispute with him over managerial matters was to risk at least a delay in concluding the deal that Brinkman-Pettitt yearned to close.

Ford's representative Coleman acknowledged that by March 19, with the signing of the necessary papers behind them, there were no apparent obstacles to the conclusion of the sale, even though he still needed to obtain authorization from various officials within the Ford-Detroit hierarchy. Thus, listing typical potential obstacles, Coleman acknowledged that with Barnes in place there would be no problems with last-minute "inventory-switches" by the seller, nor with Ford-Detroit approval of Barnes personally as the operator, nor would there be problems with Barnes' obtaining his share of the financing for the DD Corp. in the light of FFI's commitment, formally executed by March 19, to buy Barnes' share in FFI for the required $160,000. From there, the consummating details did fall into place, as I find next.

3. March 19–May 17: The package gets final approval and money changes hands

On his return to Detroit, Coleman prepared a "request" for authorization to create and fund the proposed DD Corp. By March 25, this was being routed through the required layers of Ford-Detroit management. It received what Coleman called "final approval" on April 22. Coleman called Barnes and Brinkman-Pettitt with the news on the same day.

There are strong indications that Coleman knew before April 22 that the investment would be approved. A 10-page certificate of FFSI's incorporation was filed in Delaware on April 23, on Coleman's telephoned authorization to go forward with the filing. Other corporate resolutions and bylaws were also ready for signing on that date. It is doubtful that so much paperwork would have been prepared in time for an April 23 filing if there had not been some prior assurance that authorization to create the DD Corp. would be forthcoming. The same is true regarding the signing by local counsel on April 23 of local notices of an intended bulk sale. Similarly, Coleman had made advance contact with a local firm, Pacific Coast Inventory Co. By letter of April 23, Coleman "confirm[ed]" that Pacific was to conclude an inventory no later than May 19 and that it would begin conducting the inventory in the "preceding week." Coleman also stated in the April 23 letter that Barnes should be contacted before the inventory process began. As Coleman explained from the witness stand, Barnes would act as FFSI's agent in supervising the process.

L. E. Otto, who would become an officer and director in the DD Corp., also clearly anticipated that Ford-Detroit would give final approval for its creation and funding. On April 16, Otto wrote to Barnes as "President and General Manager" of FFSI to discuss certain financing matters for which Barnes was already deemed responsible. The conclusion is therefore warranted, despite Respondent's contrary contention, that even before Ford-Detroit gave its final approval the key actors believed that nothing but formalities remained to be accomplished before the DD Corp. would be created and funded and title to Fremont Ford's assets would pass to the new corporate owner. Indeed, those actors had begun to behave as if the DD Corp., with Barnes as its president, was already a viable entity.

Any contention that Barnes viewed himself as merely the steward for FFI in operating the business between April 22 and May 17 is undermined by the actions of Barnes and those of his subordinates and other agents of FFSI. In late April and early May, Frances Baker began making application for various licenses and tax numbers in FFSI's name, arranging for the substitution of FFSI for FFI on telephone service and other billing accounts, researching insurance programs, and doing similar preparatory work. Her filings reflect some inconsistency as to the date on which FFSI would "officially" begin operating Fremont Ford—a sign that the precise date had little real meaning. Baker also opened a checking account in FFSI's name at some undisclosed point before May 5, the checks already having been printed and the first deposit having been made by that date. All of these activities, although clearly done for FFSI, were done at Barnes' instruction, while Baker was still on FFI's payroll.

On April 27, Brinkman, on behalf of FFI, tendered a written "resignation"—this one being unconditional—from the Ford Sales and Service and related agreements between Ford and FFI. The resignation, by its terms, was to be effective upon its acceptance by Ford.

On May 7, Ford-Detroit wrote to Brinkman, stating that the resignations had "become effective." That same day, Barnes, acting for FFSI, and Ford entered into new Sales and Service franchise and related agreements. Also that same day, Coleman drafted a check payable to FFSI for $640,000 representing Ford's 80-percent funding of the new DD Corp. By this time, Coleman had already authorized the filing of necessary instruments for FFSI to qualify to do business in California and FFSI was, in fact, so qualified, effective May 5.

On May 17, a Monday, Coleman appeared in Fremont bearing the 80-percent funding check for the DD Corp. The principals in the sale met that day to sign off on the necessary prepared "minutes" and other documents and to exchange moneys. That same day Smith and service and parts supervisors conducted employment interviews with current bargaining unit employees as described, infra.

On May 18, the dealership was closed to the public (or, at least, the shop and service operation was closed). "Outside" applicants were interviewed that day for bargaining unit positions.

On May 19, Fremont Ford reopened for business with a reduced unit employee complement, as described further below, but one that was composed exclusively of former unit employees.

4. Miscellaneous findings and comments on the question when the takeover occurred

I have noted provisions in the buy-sell agreement that allow the conclusion that FFI and FFSI themselves intended that formal "takeover" of the dealership by the latter would occur before closing (the written instrument indicating that takeover would occur "approximately" 5 days before the closing). I have noted that the actual substitution of FFSI for FFI as the signatory to the necessary franchise agreements and licenses from Ford occurred on May 7 and that FFSI was by then officially qualified to do business in California. This combination of facts invites the conclusion that the parties themselves intended to make FFSI legally responsible for the operation of the dealership by May 7.[22] Thus from a practical standpoint, considering Barnes' actual control, and seemingly from a contractual standpoint as well, it was FFSI that was in place and operating the business by no later than May 7.

Although the foregoing considerations persuade me that both buyers and sellers had begun to treat the takeover as having been accomplished at least by May 7, it is true that some expenses, rental amounts, and certain taxes were pro-rated at closing using May 17 as the cutoff date. Such arrangements, however, do not directly answer the question who was in operational control of the dealership before May 17. At best, they are indirectly probative on that point and are not as weighty as those indications set forth next that also point to the conclusion that the parties to the transaction viewed FFSI's takeover as an accomplished fact well before May 17.

A letter from Brinkman to the Unions dated April 20 makes it reasonably clear that FFI's principals viewed the transaction as having been effectively completed by that date. Thus, Brinkman, writing as FFI's president, told the Unions (emphasis added):

> Certain assets of Fremont Ford, Inc. *have been sold* to Fremont Ford Sales, Inc. Our ownership . . . terminates as of the close of business on or about *May 1, 1982*. When the buy-sell agreement is totally consummated, you will be notified of the exact date.

I note, incidentally, that this is further indication that the parties were confident that Ford-Detroit would give final authorization for the creation of the DD Corp., for Brinkman's letter was written 2 days before Coleman says that such authorization was given.

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[22] I recognize, but discount, Coleman's comment while testifying that there was still some process of "approval" of the franchise transfer by Ford-Detroit that had to take place after the May 7 date when FFSI became signatory to the franchise and related agreements with Ford. Coleman was particularly unconvincing when he said this and it is difficult to understand how it could be that the ongoing dealership could operate after May 7 without *someone* being licensed or franchised to sell Ford products. Since FFI's right to do so was admittedly extinguished as of May 7 when Ford-Detroit accepted its resignation, I conclude that Coleman's vague testimony about some necessary further "approval" process by Ford-Detroit with respect to FFSI's franchise was, essentially, an improvisational fiction.

Although the reasons for it are not well explained, Brinkman amended his April 20 announcement in another letter to the Unions dated May 3. There, Brinkman said (emphasis added):

> Certain assets of Fremont Ford, Inc. . . . *have been sold* to Fremont Ford Sales, Inc.
>
> *Our ownership . . . terminates* as of the close of business *on or about May 17 . . . and our collective bargaining relationship* with you *will cease as of that date.*
>
> When the buy-sell agreement is totally consummated, you will be notified of the exact date.

Here, there is the suggestion that the parties to the sale intended *for collective-bargaining purposes* to treat the date of *closing* as the critical takeover date, despite the evidence already discussed that for other purposes the substantive takeover was intended to occur earlier.

To make matters necessarily more confusing to the employees and to their collective representative, Brinkman wrote another letter the next day, May 4, this one directly to employees in the unit. There, Brinkman stated (emphasis added):

> Certain assets of Fremont Ford, Inc. . . . *have been sold* to Fremont Ford Sales, Inc., a new corporation.
>
> It is anticipated that the existing Ford Sales Agreement . . . will terminate during the week of May 17, and a new . . . Agreement will be issued to the new owners at that time.
>
> *Your employment* with Fremont Ford, Inc. *will terminate on the date of termination of our Ford Sales Agreement*, and you will be paid all the monies due you.
>
> We will keep you informed of the effective date of the Buy-Sell Agreement with the new corporation.
>
> *Application for employment with the new ownership may be obtained from your department manager.*[23]

It seems here that Brinkman (with Barnes' apparent knowledge and acquiescence—see fn. 23) contemplated that *for duration-of-employment purposes* the critical date would be the date that the various Ford franchise agreements were reissued to FFSI. This understanding is, of course, consistent with the specific requirement in the buy-sell agreement that "takeover" would precede "closing."

There are at least three additional and undisputed circumstances tending to show that the parties to the sale privately intended that FFSI would take over formal operational and financial responsibility at some point in early May well before May 17. Thus, Barnes acknowledged that the initial deposit in FFSI's local bank account on May 5 came from insurance payments for damage done to the dealership building in an accident that had occurred shortly before that date. As Barnes explained, it had been agreed that the insurance payment would go directly to FFSI, with the understanding that FFSI would be responsible for repairing the damage to the building despite the fact that leasehold rights had not yet formally passed to FFSI and were still held by FFI. Similarly, Barnes acknowledged that he had placed a newspaper advertisement on an unspecified date in "early May" for a "service special" scheduled to run until May 31, a period spanning the official closing date of May 17, therefore suggesting Barnes' view in "early May" that the takeover was already a fait accompli. Finally, as detailed below, Barnes wrote to the Unions on May 3, offering to discuss the "effects" of the sale of assets on "employees represented by your Union," a seeming admission that he was then in a position to control the future.

D. *The Alleged Unfair Labor Practices*

1. Introduction and comments on credibility

The behavior of Barnes and his agents in the days shortly before and after May 17 is the focus of findings in this section, although some additional background will be narrated. It deserves mention that Barnes and his supervisory agents gave the impression of trying to adhere to a predetermined, generalized line, and they were often evasive, grudging, incomplete, and given to sanitizing when called on to furnish details about their own statements and conduct. Although their ultimate accounts after many rounds of adverse examination are not seriously at variance with those of the nonadverse witnesses called by the General Counsel (employees and agents of the Union), I found the latter to be more candid, sincere, and forthcoming in testifying about some transactions, particularly the conversations within the dealership between and among supervisors and unit employees about their prospects for retention.

2. Evidence of Barnes' intentions to operate "flat-rate" and "nonunion"

In January, Barnes appeared before an industry "Board of Adjustment" called to resolve a grievance over his discharge of a service technician. When the Board of Adjustment ruled against him, Barnes said to the Unions' representatives in attendance, including Machinists 1546 Business Representative Nick Antone, whom I credit: "You guys are not going to be around here. There's no union going to run my store. . . . I'll take care of that when I become the sole owner." Shortly after that service coordinator Smith echoed this, saying to employee Darrell Cooper that Barnes was "mad enough to blow the whole union out of the water."

At some point after plans were set in motion for him to buy the business, Barnes admittedly decided that he would run the service department on a "flat-rate" basis. In contrast to the hourly pay requirement in the labor agreement, mechanics working flat-rate would receive a fixed sum for a specific type of service or repair work, no matter how much time they spent on the work.

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[23] This message was admittedly inserted by Brinkman at Barnes' urging. Against the argument that Respondent is not otherwise bound by Brinkman's "understandings" regarding the timing of takeover, I would observe from this that Barnes was involved in—and influenced—preclosing announcements signed by Brinkman.

Unions in this industry are notoriously opposed to flat-rate arrangements. Barnes agreed with the characterization of "flat-rate" as being a "code word" for "nonunion"—at least in the Bay area. In any case, the record amply shows elsewhere—and Barnes does not seriously dispute—that his intention to operate flat-rate was accompanied by an express decision to operate nonunion.[24] Indeed, as events unrolled, the term "nonunion" was used both consecutively and interchangeably with "flat-rate" by Barnes and his agents in discussions about Barnes' operating intentions after his formal takeover.

3. Dealings with the Unions and the unit employees as May 17 approached

I have noted that Brinkman issued a series of letters to the Unions and to all the employees of Fremont Ford containing conflicting messages about the dates when FFI's bargaining relationship with the Unions would end and when the employees of FFI would be terminated. I have inferred from Barnes' admitted involvement in the drafting of at least one such letter and from other factors cited above that Barnes was at least knowledgeable—if not influential—in the timing and content of all of them. If nothing else, the fact that FFSI had control over the timing of the closing transactions recommends a finding that Barnes, FFSI's operator-in-place, was the source of whatever confusion there existed about the timing of things.

In any case, Barnes clearly added to the confusion when he announced to the Unions yet another date as the real date on which he would become the "owner." In a letter dated May 3 Barnes, as "President" of FFSI, wrote to the Unions in pertinent part as follows (emphasis added):

> This letter will notify [you] *that effective as of May 20,* Fremont Ford Sales, Inc. . . . *will become the owner* of certain assets of Fremont Ford, Inc. . . .
>
> Please be advised that Fremont Ford Sales, Inc. stands ready to meet and confer with [you] *to discuss the effects this sale may have on the employees represented by your union.*

Consistent with findings above that the parties privately viewed the "takeover" as effective in early May, this letter makes it sound as if Barnes saw himself by then as positioned and empowered to deal on FFSI's behalf with the Unions about future employment terms. It also appears from Barnes' willingness to discuss the "effects" on unit employees of the sale that he had reasonably clear expectations or intentions about the job future of the unit employees. This implicitly suggests that Barnes had an expectation that, at whatever point he might formally be labeled the "owner" of Fremont Ford, his unit employee complement would be composed mostly of current employees.

Similar inferences flow from Barnes' first meeting with a representative of the Unions. On May 6, Machinists 1546 Business Representative Joe Bobo met with Barnes by appointment in Fremont Ford offices. Synthesizing the credible portions of their testimony about this meeting I find that Bobo told Barnes that he hoped to head off a problem before it started and asked Barnes what it would take "to keep this a union store." Barnes then mentioned three "problem" areas to Bobo. He first referred to the subject of seniority for vacation purposes. Bobo reminded Barnes of an arrangement that the Unions had made with FFI when it had bought the dealership that effectively ceded to that successor the right to treat a retained employee's seniority for vacation purposes as starting from the date of business takeover while continuing to treat the employee's original hire date in the operation as the key date for purposes of layoff and recall. Barnes then said that there were "some" employees whom he did not want to retain, not mentioning names, but suggesting that there were "three or four" such unwanted workers. Bobo replied that he had known of an instance where the Unions had agreed to treat the first 30 days after takeover as "probationary" and during which the employer could discharge without recourse under the grievance procedure.

Finally, and obliquely, Barnes raised the matter of a possible flat-rate system by asking if the Unions had any flat-rate shops. Barnes says that Bobo answered abruptly that there were none, whereupon the subject was dropped. Bobo said, more convincingly, that he replied to Barnes' overture by saying that he was "not interested in blazing any new trails, but, you know, everything is open for negotiations."[25]

The meeting ended this way: Barnes said that the sale had not yet closed and he could not make any "commitments" but that he "would be getting back" to Bobo when he became the "total" owner. Bobo said that this would be "fine," and proposed to set up a meeting between Barnes and Bobo's own "supervisor" in the hopes that "maybe they could work something out."

Barnes never did "get back" to Bobo, but there is reason to pause for additional comment about this stage in Barnes' behavior. It is implicit in their credited accounts—and I find—that Bobo was here seeking to prevent terminations of existing employees and thereby a preservation of the continuity of the bargaining unit through the period of closing, however it might be defined. His remarks show his willingness to make concessions that would lessen any incentive that might otherwise prompt Barnes to engage in wholesale terminations before Barnes emerged as the "total" owner. Barnes' admissions reflect that he so apprehended this approach. Thus, Barnes showed successive concerns; first about how seniority would be treated (presumably, if he were to retain everyone); then, after Bobo made reassuring remarks on that score about how he might deal with some three or four disfavored employees. It was only after Barnes had received an expression of the Unions' flexibility in areas that might otherwise deter him from retaining certain employees that Barnes obliquely raised the question of the Union's flexibility towards a flat-rate operation in the future.

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[24] Barnes equivocated in testimony about this. His pretrial affidavit contains admissions that he wished to operate "flat rate" *and* "nonunion" and so informed Smith. Smith testified that Barnes used both terms in their meetings on the subject of his future plans. Coleman testified similarly that he and Barnes talked about "flat-rate" in its code word sense during their March discussions about "labor problems" that could be expected.

[25] In finding that Bobo expressly left the door open for further negotiations on this subject, I am mindful that it was not a welcome subject for the Unions. I would nevertheless infer from the undisputed willingness expressed by Bobo to be flexible in the other "problem" areas raised by Barnes that Bobo was doing everything he could to obtain Barnes' continued recognition of the Unions on a voluntary basis. While he may have had to swallow hard before saying it, I fully credit Bobo's testimony that he effectively told Barnes that he was willing to negotiate on the subject of a flat-rate system.

This all has the air of collective bargaining. Barnes' willingness to meet with the Unions at this stage may be interpreted as a concession by Barnes that he preferred to staff his ultimate work force mostly with current employees and thus recognized that the Unions would continue to be their bargaining representative. Certainly, his remarks to Bobo that only "some" of those current employees were unwanted was a tacit admission that he was prepared to retain the majority of them. Barnes' testimony elsewhere reveals that he had specific concerns about the suitability of only a few current employees, having had almost a year by then to reduce the work force to acceptable dimensions and to remove the obviously undesirable help.[26]

Barnes' willingness to meet with the Unions before May 17 must nevertheless be seen as a kind of pose; for he had already decided to operate nonunion. Indeed, as findings below make clear, he had already put together detailed plans for a hiring process which presumed in advance that there would be no union in the picture and which was apparently calculated to ensure that result. Rather, Barnes' meeting with Bobo seems to have been part of a more general pattern of conduct suggested above and revealed more plainly below—a pattern in which Barnes and his agents sought to conceal Barnes' future operating intentions from the Unions and from the unit employees until the last minute, while encouraging them in the belief that they would remain part of the picture.

From Barnes' and Coleman's sketchy and elliptical disclosures about their conversations on this subject during the week of March 15, it is at least clear that Barnes had then informed Coleman that he planned to run the dealership on a flat-rate/nonunion basis. Coleman voiced no objection from Ford's standpoint, saying that it was up to Barnes how to proceed. The two prospective DD Corp. officers also clearly discussed the subject tactically, admittedly anticipating that "labor problems" would attend Barnes' attempt to operate flat-rate/nonunion. Coleman also told Barnes about another dealership that had been unsuccessful in an NLRB proceeding (apparently involving successorship issues) because its owner had failed to demonstrate a "clear, defined break in ownership." This information admittedly caused Barnes to insist later that every existing employee complete new application forms for work with FFSI. Barnes and Coleman also admittedly discussed the likelihood that the dealership would be picketed at the point when Barnes announced or acted on his intentions.

When, in late April, Barnes confided his intentions to Smith, he also admittedly told Smith to profess ignorance (not only about the intended flat-rate/nonunion changes, but also that a sale was pending) if he were asked about them by any of the unit employees. He gave similar instructions to other shop foremen and managers. When Smith asked why Barnes wanted the current employees to file formal applications (which would contain the background and current employment information already known to the managers or available in the dealership's existing personnel files), Barnes simply said that "it was procedure for dealer development that all prospective employees fill out applications."

Every person working at Fremont Ford was required to complete such applications, including the sales force and the managers and supervisors whom Barnes admittedly intended without reservation to retain. Barnes himself went through the formality of "applying" for employment with FFSI, simply to be consistent with the portrayal of a "clear, defined break."

In fact, the applications that everyone completed were not even consulted during the interviewing and hiring process that ensued on May 17-18. This and the other features already noted cause me to find that the termination/application process was for no independent business purpose, but was purely cosmetic; a process calculated solely to dramatize what was, from the employees' perspective at least, an otherwise hard-to-spot transfer of Fremont Ford's assets into new corporate hands.

Around the first of May, as Barnes admits, he had already drafted for use in the hiring process a highly detailed document, 14 pages in length, captioned "Terms of Employment." This laid out the precise terms that Barnes intended to impose (including specific job-by-job rates under the flat-rate system). It contained a line for employee signatures.[27]

That conduct is further indication that Barnes did not approach or conduct discussions with Bobo on May 6 with any genuine open-mindedness about the possibility that he might continue to recognize the Unions. His preparation by about May 14 of want-ads soliciting outside applicants likewise signals a fixed intention to operate nonunion. Those advertisements that began running on May 16, stated, inter alia:

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[26] Barnes testified somewhat inconsistently about his intentions regarding the suitability of existing employees. He explained finally that the reason that he had not already gotten rid of *all* undesired employees was that there remained some who were admittedly "marginal" enough to be able to win their jobs back through exercise of the grievance procedure in the union contract. Elsewhere, he also admitted that he left hiring decisions on and after May 17 to Smith and his departmental subordinates and that he did not prohibit the retention of any current employees. Smith said at one point that *all* the employes were "good" and that there was not "anything wrong" with any of them. See also my analysis of 8(a)(3) issues, infra, in which I conclude that Respondent's agents offered conflicting, inconsistent, and otherwise unbelievable reasons for the nonretention of certain employees.

[27] These are not inappropriately called "individual employment contracts" by the General Counsel, who attacks their legality. When Barnes drafted them, he used the same format as that in the current union contract, although the resemblance ends there. Barnes' intended changes as reflected in his "terms" were far more sweeping than those hinted at in discussions between Barnes and Bobo on May 6.

> Fremont Ford is under new ownership.
>
> . . . .
>
> This is a flat rate house shop.

It was in the specific context of adverse questioning about this advertisement that Barnes conceded that the term "flat rate" was a "code word for 'nonunion'" within the greater Bay-area labor market.

In the period after Smith learned in late April of Barnes' intentions to operate flat-rate/nonunion, Smith was regularly confronted by bargaining unit employees who asked him about Barnes' plans, their own employment prospects, "rumors" that Barnes was going nonunion, and similar, predictable inquiries. Smith admits that he consistently "followed instructions" by claiming ignorance of Barnes' intentions. I also find from the accounts of several employees that Smith sometimes compounded the deception. For example, Smith told shop steward Fred Huffstetler, "Don't worry about it. The Union is going to stay. . . . The only thing you have to worry is you're going to lose your vacation time and be put on 30-day probation."[28] I note the similarity of these statements to the message suggested in Barnes' meeting with Bobo on May 6, reinforcing the inference that Barnes was working a calculated deception until the last minute, that he could live with the Unions provided he could get concessions in certain limited "problem" areas.

I also credit the testimony of service writer Marvin Wiggins that both Smith and Radcliff told him, respectively, that he was "guaranteed" a job in the "new" operation, and that he had nothing to worry about. Smith also told Wiggins that the new application was simply a "formality." Similarly, when Smith passed a new job application to Darrell Cooper in early May, he said, "Don't get panicked, nothing is going to change." Cooper asked, "Are we going to be a union shop?" and Smith said "Probably," causing Cooper to pursue the question until Smith said "Yes, we are." There are other examples, merely cumulative on the point that between late April and May 17, Barnes and his agents were concealing—and, at times, inventing—facts pertaining to Barnes' fixed plans.

4. May 17–19: Barnes denies recognition to the Unions, begins interviewing and hiring current employees and outsiders

May 17 was a busy day, with precise sequences in doubt, but it included these events: Barnes told supervisors that morning to tell unit employees to clear personal tools and belongings from the premises before 5 p.m. quitting time. Later (it is not clear whether before or after the meeting of principals where buyout moneys traded hands), Barnes was visited by the Union Representatives Bobo and Day. The meeting was short. Day said they had come to get a contract signed. Barnes said he "had no evidence that [the Unions] represented any of my employees," then added that "it would be a couple of days" before he would be "in operation." Bobo and Day then left, pausing to confer briefly with shop steward Huffstetler and to mention the possibility of an "informational" picket line when the shop reopened for business. This potential picket threat somehow filtered back to Barnes that day. As noted above, it had been anticipated for months by Barnes and Coleman.

At a later point on May 17 Barnes had one or more meetings with Smith and some supervisors where he laid down basic instructions for interviewing and hiring. Smith, who conducted most of the interviews, and Fleming, who helped out, gave testimony from which I find that Barnes told them both that he intended to be a "nonunionized organization," and that applicants should be told this. Barnes also directed that employees should go over the 14-page package of "terms" prepared by Barnes, with the understanding that they would sign it as a condition of hire. Finally, Barnes told them that he was "looking for skilled people who would be willing to cross a picket line" and authorized his interviewers to promise such candidates that they would be guaranteed 40 hours' pay each week as a hedge against any lack of work due to the possible picketing.

Smith said he participated in most of the interviews to be sure that Barnes' instructions were followed and especially to go through the written employment terms with each applicant. Although Smith says that Barnes also told his interviewers not to "discriminate" on the basis of "union activity," Smith admittedly took Barnes' overall instructions to mean, inter alia, that Barnes would need employees "sympathetic" to his intended nonunion status.

Smith also readily admitted that many employees interviewed on May 17 were ruled out from further employment consideration based on their declared refusals to work in a nonunion shop or to cross a picket line.[29] Fleming also admits as much, although his admissions were not as candid and only followed transparent and unworthy attempts to convince listeners that applicants' responses in this area had no bearing on their suitability for hire in the post-May 17 operation.

Accordingly, while more might be said, case by case, about the details of some of the May 17 interviews, one central feature is clear; they were not conducted for the purposes that one normally supposes an employer has in mind (e.g., to ascertain an applicant's employment history or communications skills or technical specialities). These were admittedly known factors in the case of the current employees at Fremont Ford. Rather, as Smith admitted, the "only thing" that he did with each applicant on May 17 was "to go over what the new contract would be that [Barnes] would want them to enter into"; and the "only thing" that Smith "really didn't know about them was . . . whether or not they wanted to cross a picket line and work in a non-Union shop."

The May 17 interviews are thus more properly understood as a kind of particularly coercive polling process where, as a condition of further consideration, current employees must express "willingness" to work in a nonunion setting, according to terms set forth in individual employment "contracts," and in the face of probable picketing. Although Barnes may have issued formal instructions to Smith and to his other interviewers not to "discriminate" based on "union activities" in their eventual hiring choices, it is plain that Barnes' instructions necessarily required that discriminations be made by his hiring agents linked to the current employee/applicant's willingness to forgo union representation as a condition of his continued employment at Fremont Ford. Smith so understood them, as evidenced by his conclusion that he must select for retention only those "sympathetic" to Barnes' plans.

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[28] Service Manager Radcliff also told Huffstetler and others roughly the same thing ("No problem. Don't worry about it. We're going to stay union").

[29] In testimony on May 6, Smith specifically named six employees ruled out in this connection: S. Kirkendall, D. Burkhardt, D. Cooper, W. Deetz, F. Huffstetler and J. Lawson. Smith's testimony elsewhere suggests that the list should be larger by at least one name, Marvin Wiggins. See also, Analysis, infra, dealing with the case of David Lawson.

The May 18 interviews with the outside applicants differed in certain respects from those on May 17. More than one hundred outsiders filed through and were hurriedly interviewed, two-by-two, to determine their threshold qualifications. A relative few of them were deemed sufficiently qualified to warrant protracted discussions. It was only in those latter cases that Smith, Fleming, and Radcliff took the trouble to go over in detail Barnes' nonunion, flat-rate intentions and to ascertain the candidates' willingness to go along with that program and to cross a picket line, if need be.

It requires no squinting to see that the interview process as a whole was really a means by which to deliver ultimatums to prospective employees; that they either forgo union representation and be willing to cross a picket line and work flat rate, or that they look elsewhere for work. The unit employees who were allowed to come to work on Wednesday morning, May 19, were necessarily persons who had convinced Smith and the other hiring agents that they would abandon union representation if that was required to keep a job in the "reopened" Fremont Ford operation.

5. The unit complement before and after the May 19 reopening; observations about the shrinkage

There were 22 unit employees at Fremont Ford on May 17; there were 10 when the doors opened again on May 19. All 10 employees in the May 19 complement had been unit employees in the May 17 complement.[30] Barnes and Smith offer inconsistent testimony about the precise reasons for the shrinkage in the unit complement and the precise numerical limits Barnes imposed on hiring for a May 19 complement. There is a consistent strain in their testimony that Barnes intentionally limited the unit complement because of anticipated drops in service business from expected picketing. But, curiously, there were no corresponding reductions in the sales force (which was retained largely intact; i.e., all but 2 of about 18 salespersons, if Barnes' vague recollection can be credited). Barnes' explanations—particularly about the latter anomaly—seemed improvised and half-hearted.

Smith's testimony did not clarify the picture. He said at one point, seemingly trying to rationalize the size of the unit complement on reopening, that 10 employees was "normal" considering the available work in the period immediately preceding the takeover.

Adding to doubt about the adequacy of explanations for Barnes' alleged imposition of a starting ceiling no higher than 10 employees is the fact that in the following week Supervisors Fleming and Radcliff continued to call former unit employees to sound them out about their willingness to accept Barnes' terms. Here I rely on admissions made by Fleming and Radcliff and, where there may be conflict, on the more specific testimony of employees Cooper, Evans, and Huffstetler. See, for example, Huffstetler's testimony that Radcliff called him and asked if he would come back if Smith were no longer in the picture. Huffstetler said he might, if the shop were "union." Radcliff asked: "What if it is not union?" Huffstetler replied: "Well, I don't think so." In addition, three more employees from the complement (J. Lawson, S. Kirkendall, and V. Bilbrey) were back to work within 2 weeks of May 19.

All of this makes it sound as if Barnes was prepared to reopen with an even larger unit complement, i.e., as many as he could find provided they had purged themselves of any notion that there would be any continued union presence. In any case, I conclude that the haltingly uttered and inconsistent explanations advanced by Barnes and Smith for the May 19 shrinkage in the work force do not illuminate Barnes' underlying rationale except—indirectly—as they suggest concealment of purposes which Respondent found it to be not in its interests to disclose.[31]

To penetrate more deeply into Barnes' tactical judgments on a record where Barnes seemed to try his best to conceal them would require speculation about the details of his reasoning processes and an assessment of the adequacy of his understanding of the law of successorship—otherwise academic points. The credible record nevertheless preponderates on the side of these broad conclusions: First, through concealment of his intentions and by the broadcasting of false signals before May 17,

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[30] The table below adapts a stipulated list of the 22 unit employees on May 17, with asterisk indicating the 10 carryovers as of May 19. As noted separately, some additional May 17 employees later returned to work across the picket line. Others were later sounded out but indicated unwillingness to return on Barnes' terms. The examination of Smith at Tr. 741-751 about the specific duties and departmental status of each individual is relied on for general classification purposes.

Shop and service department:	*Body shop department:*
Steve Kirkendall	Dan Clark*
Virgil Bilbrey	William Deetz
Dan Burkhardt	Robert Gonzales*
Darryl (Darrel) Cooper	Charles Kiesling
Mel Fosen	Manuel Rodilez*
Mohammed Khan*	*Parts Department:*
John Lawson	David Lawson
David Rabing*	Terry Evans
Charles Rudnick*	Charles Ross*
John Pack*	*Combination departments:*
Marvin Wiggins	Robert Hernandez*
Fred Huffstetler	Epifano (Beaver) Reyna*

[31] *Shattuck Denn Mining Corp.*, 151 NLRB 1328, 1336 (1965), enfd. 362 F.2d 466, 470 (9th Cir. 1966).

Barnes was trying to postpone the point of reckoning with the Unions until the asset transfer, even though his plans were fixed before then. Second, by a contrived and coercive process resulting in a "reopening" with a complement reduced by more than 50 percent, Barnes was trying to blur the legal picture from a "majority" standpoint, thereby further postponing the day of reckoning and perhaps guaranteeing that the eventual "full" complement would consist mostly of newcomers.

6. The picketing and its aftermath

The Unions picketed Fremont Ford for about 2 months after May 19. There was an exchange of correspondence between counsel for the Unions and for Respondent in September in which legal positions are set forth that do not need to be recorded here. During that period, there were additional hires.[32]

III. ANALYSIS, CONCLUSIONS OF LAW

A. *Bargaining Duty and 8(a)(5) Issues*

1. General legal setting

"The subject of successorship is shrouded in somewhat impressionistic approaches." *Machinists Lodge 94 (Lou Ehlers Cadillac) v. NLRB*, 414 F.2d 1135, 1139 (D.C. Cir. 1969). "There is no fixed definition of 'successor,' nor is there a uniformly accepted set of obligations which flow from the determination that, in certain circumstances, a party is a 'successor.'" 1 Morris, *The Developing Labor Law* 795 (2d ed. 1983).

Whatever may be said about Respondent's potential legal duty to continue a bargaining relationship with the Unions it is not disputed that Respondent is a "successor" in the nontechnical sense that it always intended to, and did, "continue" virtually intact the car sales and service operation which has at all times done business under the name "Fremont Ford." Indeed, "continuity" in operations was deemed sufficiently important to affect even the choice of Respondent's corporate name when the plans were made to set up a DD Corp. through which Barnes might buy the Fremont Ford assets formerly held by the predecessor, FFI. I do not dwell further on the obvious operational "continuity" associated with Respondent's acquisition of Fremont Ford.

The more important question here (and in virtually all successorship cases arising under the NLRA) is whether there can be said to have been sufficient continuity in the complement of employees employed by the otherwise continuing employing enterprise. More specifically, the question of legal successorship has devolved, for better or worse, to an inquiry into whether a "majority" of employees in the successor operation (at an appropriate time for counting) were carried over from the predecessor operation.[33]

These are some additional considerations that the Supreme Court has held may properly influence the questions whether a successor in the operation of a business may be treated as having acquired in the process some or all the labor relations obligations which bound his predecessor.

The Court said in *Wiley*:[34]

> Employees, and the union which represents them, ordinarily do not take part in negotiations leading to a change in corporate ownership. The negotiations will ordinarily not concern the well being of the employees, whose advantage or disadvantage, potentially great, will inevitably be incidental to the main considerations. The objectives of national labor policy, reflected in established principles of federal law, require that the rightful prerogative of owners independently to rearrange their businesses and even eliminate themselves as employers be balanced by some protection to the employees from a sudden change in the employment relationship . . . . [376 U.S. at 549.]

And the Court said in *Burns*:[35]

> It has been consistently held that a mere change of employers or of ownership in the employing industry is not such an "unusual circumstance" as to affect the force of the Board's certification within the normal operative period if a majority of employees after the change of ownership or management were employed by the preceding employer. [406 U.S. at 279]
>
> . . . .
>
> . . . where a bargaining unit remains unchanged and a majority of the employees hired by the new employer are represented by a recently certified bargaining agent[36] there is little basis for faulting the Board's implementation of the express mandates of Sec. 8(a)(5) and Sec. 9(a) by ordering the employer to bargain with the incumbent union. [Id at 281.]

The *Burns* Court left no doubt that a labor relations successor will not normally inherit his predecessor's labor agreement unless he adopts or tacitly assumes it. 406 U.S. at 281–91. See also, e.g., *World Evangelism*, 248 NLRB 909 (1980), enfd. 656 F.2d 1349 (9th Cir. 1981); *Audit Services v. Rolfson*, 641 F.2d 757, 763 (9th Cir. 1981).

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[32] Respondent contends that there were 28 employees in the unit complement as of September 27—a date deemed significant by Respondent for "majority" counting purposes, a minority of whom were unit employees on May 17. (See R. Br. 55-56, including table of hires totaling only 13.) Respondent has not indicated with any clarity the sources in the record (generally omitting citations), nor the reasoning underlying its assertions in this regard—a matter of no ultimate moment (see sec. III).

[33] Thus, while the Board has at times set forth a kind of checklist containing a variety of factors for determining whether an employer is a "successor" in the technical sense of having acquired labor relations obligations (see, e.g., *Stewart Granite Enterprises*, 255 NLRB 569, 572 (1980), one must resist the implication that factors other than the majority factor carry any real weight in the ultimate determinations. See, e.g., *Zim's Foodliner v. NLRB*, 495 F.2d 1131, 1140 (7th Cir. 1974). Accord: *Saks & Co. v. NLRB*, 634 F.2d 681 (2d Cir. 1980).

[34] *John Wiley & Sons, Inc. v. Livingston*, 376 U.S. 543 (1964).

[35] *NLRB v. Burns Security Services*, 406 U.S. 272 (1972).

[36] Although the Court here alluded to the "recent certification" of the union involved in Burns, it has been repeatedly held that when other factors favoring treating an employee as a successor are present, it is of no significance, as in this case, that the union may not have been "recently" certified, or that it may owe its exclusive representative status to some lawful process other than a Board certification. *Stewart Granite Enterprises*, supra, at 572, fn. 16, and authorities cited.

There is greater doubt regarding precisely when a successor must recognize and bargain with the incumbent union when he has not adopted or assumed the predecessor's union contract. In dicta, the *Burns* Court suggested two paradigms. In one, where it is "perfectly clear" that the successor's complement of employees will be composed in the main of the bargaining unit employees of his predecessor, the Court said that the successor must "initially consult" with the incumbent union before making any changes in the predecessor's terms and conditions of employment. 406 U.S. at 294–295. The Court also envisioned a category of cases at the other end of the continuum where it would not be until after the successor has hired a "full complement" that it will be apparent whether a majority of the employees will be from the predecessor unit and, therefore, it will not be until such full complement is hired that a duty to bargain may arise. Ibid. In the meantime, the Court said, such employers are free to set "initial terms" of employment without consulting with the predecessor union. Ibid.

The *Burns* Court did not purport to define with precision the circumstances that would make it "perfectly clear" that a prospective employer intended to use mostly predecessor employees in his new operation; neither did the Court elaborate on the conditions that must obtain before a successor might claim the right to "wait and see" how the hiring shook out before dealing with the questions of recognition and bargaining with the union representative of the predecessor complement. The Board has said that "the precise meaning and application of the Court's [perfectly clear] caveat is not easy to discern." *Spruce Up Corp.*, 209 NLRB 194 at 195 (1974). And it is well to recall the general admonition of the Court in *Howard Johnson Co. v. Detroit Local Joint Executive Board*, 417 U.S. 249, 256 (1974) that:

> Particularly in light of the difficulty of the successorship question, the myriad factual circumstances and legal contexts in which it can arise, and the absence of congressional guidance as to its evolution, emphasis on the facts of each case as it arises is especially appropriate.

Mindful of these general principles and considerations, I turn next to their appropriate application herein.

2. Did Respondent ever become a successor for labor relations purposes?

Respondent claims under *Burns* that it was entitled on May 17–19 to impose "initial terms" on prospective employees and then to wait until a "full complement" was on board before making the head count that would determine whether it owed a duty to recognize the Unions. Respondent argues that it was not until September 27, more than 4 months after its admitted acquisition of the assets of the business, that such a complement was achieved, which September 27 complement proved to include only a minority of "predecessor" employees. This configuration, Respondent argues, left it free to ignore the Unions.

I set aside doubts expressed earlier about the adequacy of Respondent's proof regarding the eventual composition of the unit on September 27 and whether, as Respondent asserts, 28 is a "full complement."[37] Assuming that Respondent's assertions on that subject are supported by this record, I conclude that they are irrelevant. Rather, I conclude below that Respondent owed a duty to recognize the Unions much earlier, but in any case by no later than May 19, in the light of the "majority" configuration of the unit on that latter date.

a. *Successorship by takeover before asset transfer*

An employer in a business takeover need not have acquired title to the assets of the business before he may be treated in law as the successor for collective-bargaining purposes. *East Belden Corp.*, 239 NLRB 776, 791 (1978); *Sorrento Hotel*, 266 NLRB 350, 356–357 (1983), and authorities cited. See also, e.g., *Carlton's Market*, 243 NLRB 837, 845 (1979). Rather, where a prospective buyer steps into the management of a union-represented business pending a conclusion of the sale of assets and does not then substantially alter the composition or appropriateness of the bargaining unit, he will be treated as a successor fitting within the "perfectly clear" exception suggested in *Burns* as triggering a duty to recognize and bargain with the incumbent union before making any subsequent changes affecting employment in the bargaining unit. *Sorrento Hotel*, supra at fn. 23.

In essential agreement with the principal position urged by the General Counsel, I conclude that for many months before May 17 Respondent occupied the same status as the pre-asset-transfer successors in the cited cases, with the legal consequence that Respondent was not free unilaterally to change at a later date the conditions of employment that were maintained in effect when it took over the management of Fremont Ford. Accordingly, and without regard to questions of the "majority" configuration as of May 19 (or September 27, or any other post-May 17 date) I conclude that Respondent violated Section 8(a)(5) and (1) of the Act by all complained-of actions on and after May 17, and by some actions before that, as well.

Respondent devotes considerable attention on brief to attempts to distinguish this case from the *East Belden* line of cases, supra, citing some factors present in one or more of them that do not appear in this case (or vice-versa). This is an essentially sterile approach, however, for comparison among the factual settings of this and the cited cases discloses hundreds of factual differences but few, if any, legally significant ones.[38] The *East Belden* cases have materially in common that they each involve a buyer who has already taken over substantial control of the employing enterprise under circumstances where both buyer and seller have every expectation that the sales transaction will close.[39]

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[37] See fn. 32.

[38] An example of a potentially significant difference: This case shows more strongly than some of the cited cases that the actual control of the business had been in Barnes' hands for at least several months before the May 17 closing transactions.

Respondent also argues ultimately regarding the *East Belden* cases that "the crucial factor is when the succeeding enterprise took over from the predecessor for its own benefit." I do not agree that those cases may be properly interpreted as setting forth a test for legal successorship that requires an analysis as to whose "benefit" is being served by the interim management of a business by a buyer-in-place. At best, those cases merely depict a uniform rejection by the Board of the claims by the respective successors that their interim management was merely a kind of "caretaking" for the "benefit" of the seller. To that extent, if anything, those cases seem to apply something close to a presumption that the buyer-in-place is operating for his *own* "benefit." *East Belden*, supra at 791; *Sorrento Hotel*, supra at 356–357; *Carlton's Market*, supra at 845; see also *Ethan Allen, Inc.*, 218 NLRB 208, 217 (1975), enfd. in pertinent part 544 F.2d 742 (4th Cir. 1976).

I also believe that a "benefit" test could not reasonably be a useful guide for determining questions of employees' rights under the Act in a successorship setting involving a buyer-in-place. For one thing, such takeovers as are presented here and in the *East Belden* line inevitably serve the "benefit" of both buyer and seller in some sense, and it is not at all clear in most instances how one might allocate between buyer and seller the "benefit" to be derived from any given management action of the buyer-in- place.

In any case, for reasons discussed above, it is evident that Barnes took actions in the management and operation of Fremont Ford before May 17 which served his ultimate "benefit" as buyer more than it served any identifiable interim interests of Brinkman-Pettitt. I have in mind here Barnes' wholesale management reshufflings, and his extraordinary expenditures such as those involved in the reorganization of the service department hierarchy, especially the costs of bringing Smith into the operation from Idaho. Even more clearly, Barnes' use of his own business time and that of his subordinates (particularly Frances Baker) in laying the groundwork for his own purchase of the business, all done while those persons were still on FFI's payroll, shows that Barnes was using the dealership and its personnel for the benefit of Barnes/FFSI well before Respondent would concede that FFSI had taken over for its own benefit.[40]

Accordingly, a "benefit" analysis leads either to a deadend or, as applied herein, it does not truly enhance Respondent's case.

Exactly when Respondent might be said to have "taken over" Fremont Ford is admittedly a matter for reasonable debate. The general public in the Bay area (necessarily including the Unions and the bargaining unit employees of Fremont Ford) could be forgiven for believing that the takeover occurred when Barnes depicted himself as the "new owner" in September 1981, and began conducting his advertising campaign based on the theme, "new dealer—new deal." But, while I have found that Barnes and Brinkman-Pettitt's association in July 1981 was "influenced" by the prospect that Barnes would eventually buy out the business, I have no record basis for finding that there were any clear plans at that time for a sale to Barnes. Because of this, and because there is no evidence that Respondent (i.e., FFSI) existed even inchoately at that time, I do not find any clear warrant for treating Barnes as having acquired any significant status as a successor at that early date. Neither would such a finding affect my recommended disposition of this case.

I would reject even more quickly the May 17 (or 19), 1982 dates posited by Respondent as the true date(s) on which Respondent "took over" the operation. Respondent's takeover clearly was contractually perfected no later than May 7. Among other factors noted above, I have found that it was on that date that Ford treated Respondent as the new operator with exclusive rights to the franchise, it was on that date that Ford drafted the funding check for the DD Corp., and, it was on "approximately" that date that the formal "takeover" specified in the buy-sell agreement would take place. By this time, Barnes, acting as president of FFSI, had already invited bargaining with the Unions and had even engaged in one "bargaining" session with the Unions' representative, Bobo, on the subject of the effects of the sale on unit employees. Moreover, Respondent expressly admits (Br. 13) that Respondent "began operations in early May," a concession that cannot be squared with its position elsewhere that its takeover of the business did not occur until on or after May 17.

In the final reckoning, however, the question when Respondent succeeded to the operation of Fremont Ford is not answered simply by relying on formal agreements, or records reflecting the subjective beliefs of parties to the sale about who actually had the "rights" to the franchise on a given day, nor by other subjective (and often inconsistent and self-serving) understandings or statements of the parties to the sale as to when the transaction would be deemed to be complete. Rather, the *East Belden* cases suggest that the "takeover" is more properly understood as the act of managing the business by the buyer after the agreement to sell has been reached.

Judged from that perspective I have no difficulty in concluding that the takeover occurred in January 1982 when the key parties agreed that Barnes, already the "operator," would become the buyer of the business as soon as a DD Program package could be put together. It was at this point that Barnes acquired a new status, that of buyer-in-place; and it was from that point onward that his operation of the business may be seen as a "succession" in the same sense in which the prospective buyers in the *East Belden* cases were deemed to have become the successors by virtue of their entry into the operation of businesses that they intended to buy.

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[39] E.g., *Sorrento Hotel*, supra at 352, in which the successor took over interim management of the business expressly "in anticipation of a successful conclusion of negotiations."

[40] Of course it could be argued by Respondent that these actions also worked to the "benefit" of FFI since it was in FFI's interest as well that there be a prompt closing of the sale, free of any hitches that might otherwise be present if Barnes and Baker, et al., had not taken those "anticipatory" steps. But this merely brings us back to the first point; that in situations like this it is not legally productive to attempt to sort out whose "benefit" is really being served when a prospective buyer has already taken over the basic operation of the business while waiting for the sale to close.

However much Respondent might insist that the January arrangements were still tentative and technically subject to repudiation until May 17, it is clear from the findings above that Brinkman-Pettitt and Barnes (experts in the business with a long history of Ford dealership experience behind them) clearly counted on and fully expected that the deal would go through without substantial hitch. Rather than closing the doors, Brinkman-Pettitt committed themselves for the next several months to financial participation in a dealership that they had pronounced nearly dead 6 months earlier and that had continued by their own account to be a hemorrhagic drain on their resources. So far as this record shows, they had no other takers for the business when they decided to sell to Barnes. For his part, Barnes clearly felt that the DD Program application would be approved, despite his testimonial hedging. This record contains no indication of any other reason why Barnes would stay on as Fremont Ford's general manager after it was declared in January to be in such bad shape that it was "30 days from closing." Neither does the record suggest that Barnes had any backup plans to support himself if the sale via the DD Program were to fall through.

I am thus more influenced by the actions in detrimental reliance taken by these experienced gentlemen in January than by any abstract arguments about the technical legal defeasability of their agreement when I reach this conclusion: January marked a clear point at which Brinkman-Pettitt effectively turned the operation over to Barnes, certain that he would buy it under a program familiar to all of them. By then Brinkman-Pettitt clearly knew they could not get their money out of the business unless and until the DD Program application could be perfected and the necessary arrangements for the creation of a DD Corp. could be made. They had to cooperate to close the sale, and they must have appreciated as well that Barnes, as buyer and as current operator, would have the greater leverage in any contest over management decisions in the meantime.

If, despite the detrimental reliance of the parties to the sale, the January agreement between Barnes and Brinkman-Pettitt is not a clear enough point of demarcation for concluding that an *East Belden* type of successorship then occurred, there can be no doubt that by March 19 Respondent's status as such a successor was clearly fixed. By then a specific DD Corp. had been conceived and named. By then there had been formal recognition that Barnes could no longer appropriately act as an agent of FFI, hence his resignation from the presidency of that corporation; and there was formal recognition as well of his status as the agent for the prospective DD Corp. There were no apparent obstacles to the conclusion of the transaction. Coleman had been thorough in preparing papers and getting necessary signatures. Specific, detailed understandings had been reached regarding the precise terms and conditions under which the assets would change hands, and similarly specific provisions had been made to ensure that Respondent would have control over the operation pending the closing and transfer of assets.[41] As in *Sorrento Hotel,* supra at 357, "By the time of Respondent's . . . assumption of management responsibility, its prolonged continuation in that role was a virtual certainty, the 'basic terms' of the long-term . . . agreement previously having been worked out."

Accordingly, by March 19 at the latest, Respondent's status was so clearly fixed that its continuation of the operation with the same employees thereafter rendered it the legal successor to the relationship previously maintained between the owners of Fremont Ford and the Unions. Also, consistent with the analysis in the *East Belden* cases, Respondent then owed a duty to bargain collectively with respect to any future changes having an impact on unit employees' terms and conditions of employment. This included, inter alia, a duty to notify and bargain about intended en masse terminations in the unit and the standards for selecting who would be retained in a shrunken complement. See, e.g., *Sorrento Hotel,* supra at 358. See also, e.g., *Valley Iron & Steel Co.,* 224 NLRB 866, 877 (1976) (selection of employees for layoff an important condition of employment and proper subject for collective bargaining).

b. *Did Respondent become bound to the contract*

Consistent with conclusions above that Respondent's legal successorship attached in January, it is evident that Respondent's admitted honoring and applying of the Union contract for roughly 5 additional months amounted to an assumption of that contract. *Burns,* supra, 407 U.S. at 272; see also, e.g., *Audit Services,* supra, 641 F.2d at 763. The same conclusion would hold if Respondent's legal successorship did not attach until March 19, there still being a substantial period after that during which Respondent honored and applied the labor agreement in all respects.

There are at least three other distinct bases for treating Respondent as having acquired a successor's obligation to recognize and bargain with the Unions herein, although each theory carries with it a somewhat different mix of remedial obligations.[42] I summarize below the alternative bases on which it may be found that Respondent violated Section 8(a)(5) by refusing to recognize the Unions as its employees' representative.

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[41] I refer here not only to the formal provisions in the buy-sell agreement ensuring that the status quo would be preserved for Respondent's benefit pending the closing, but also to the more fundamentally important fact that Barnes, FFSI's acknowledged agent, was already running things. Indeed, although the formal provisions in the buy-sell agreement assume a situation where the buyer is an outsider needing rights of access and supervision to ensure that the seller does not waste or otherwise devalue the subject business, the real situation here was essentially the reverse. By then, it was the *sellers* who were on the outside looking in, so complete had been their surrender of operational control to Barnes.

[42] Since I am persuaded that the most appropriate and comprehensive remedy for the violations of Sec. 8(a)(5) that I have found under an *East Belden* analysis is to require Respondent to restore the overall status quo ante May 17, I do not address the potential variances in remedy for violations found under alternate theories set out below.

c. *Alternative grounds for finding successorship*

1. Voluntary recognition before May 17

Even ignoring that Respondent was a buyer-in-place before the asset transfer, it may be found alternatively herein that Barnes planned to operate after May 17 with a substantially unchanged complement; or at least that such was his plan through May 6. When Barnes invited bargaining with the Unions over the effects of the sale of Fremont Ford on unit employees and when he met with Bobo on May 6 and expressly told Bobo that he had doubts about the suitability of only "some" of the employees, it was "perfectly clear" from that conduct that a majority of employees would be retained. Indeed, Barnes implicitly and properly conferred recognition on the Unions by that conduct. His later change of heart and disavowal of a relationship was therefore unlawful. See, e.g., *Bellingham Frozen Foods*, 237 NLRB 1450, 1463-1464 (1978), enfd. in pertinent part 626 F.2d 674 (9th Cir. 1980), cert. denied 449 U.S. 1125 (1980).

2. Section 8(a)(3) "but for" theory

The complaint alleges, and I agree (see sec. IV, (B), infra) that Respondent's action in terminating employees en masse and in failing thereafter to rehire some of them independently violated Section 8(a)(3) and (1).

If those acts of discrimination had not taken place, Respondent would have employed on May 19 those additional 12 employees found below to have been unlawfully denied rehire. Adding their numbers to the employees who were retained on the May 19 "reopening" date clearly yields a majority in what Respondent conceded is a typical "full complement" in the reopened operation (i.e., 22 of 28). Where, but for unlawful discrimination in the retention of predecessor employees, a successor would have retained enough of them to constitute a majority of employees in his new complement, the successor will be deemed to have owed a duty to bargain with the predecessor union—indeed the duty will be deemed to have attached before the point at which he might otherwise lawfully impose "initial terms" on a unilateral basis. See, e.g., *Potters Drug Enterprises*, 233 NLRB 15, 20 (1977), enfd. mem. 584 F.2d 980 (9th Cir. 1978).

Accordingly, even if Respondent had never set foot inside Fremont Ford's doors before taking it over, its inherently discriminatory hiring process warrants treating it in law as a successor who owed a duty to recognize and bargain with the Unions before making any changes in bargaining unit working conditions.

3. "Representative complement" theory

Since *Burns*, the Board, with the approval of the courts of appeal, has interpreted a potential successor's duty to bargain with the predecessor union as being perfected as soon as it has hired a "representative complement" a majority of whom are from the predecessor unit, and even though, in some sense, the successor's "full" complement might not be reached until some indefinite future point. *Hudson River Aggregates*, 246 NLRB 192 (1979), and authorities at fn. 3, enfd. 639 F.2d 865, 870 (2d Cir. 1981); *Pre-Engineered Building Products*, 228 NLRB 841 (1977), enfd. 603 F.2d 134, 136 (10th Cir. 1979); *Premium Foods*, 260 NLRB 708 (1982), enfd. 709 F.2d 623, 628 (9th Cir. 1983) ("The count need not be delayed until the employer has completed the hiring of all employees in the bargaining unit").

Searches for an elusive "majority" in cases like this can be attenuated. But it is at least clear that when the doors of Fremont Ford opened on May 19, the complement of 10 employees then on hand was "substantial and representative" in the sense in which the cited authorities use the term. See, e.g., *Premium Foods v. NLRB*, supra at 630. The May 19 complement would also meet the tests enunciated in *General Extrusion Co.*, 121 NLRB 1165, 1167 (1958).[43]

Accordingly, even under the interpretation of these events most favorable to Respondent, and ignoring Respondent's pre-May 17 takeover of the operation, Respondent's bargaining duty clearly attached when it opened its doors on May 19 with a representative complement of employees who had all come from the ranks of the predecessor operation. Respondent was not entitled to "wait and see" for 4 months more how the "majority" picture might change.

B. *Independent 8(a)(3) and (1) Issues*

Here I address only the discrimination and related coercion visited on members of the bargaining unit by Respondent's mass terminations and subsequent tainted interview and rehire processes.[44]

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[43] In *General Extrusion*, the Board held that at least 30 percent of the ultimate complement and 50 percent of the job classifications must be in existence at the time a labor agreement is signed in order for the labor agreement to bar a representation election in the unit. Assuming without deciding that the same tests would apply here, it is clear from findings above (at fn. 30) that the May 19 complement was "representative" in the *General Extrusion* sense. Thus, the exact size of the unit complement on September 27 (when Respondent says the count should have been made) is alleged by Respondent to have been 28. Assuming this to be the case (but see fn. 32), the startup complement of 10 employees on May 19 was clearly sufficient to meet the *General Extrusion* "30 percent-of-complement test. Since all or virtually all the job classifications in Respondent's "ultimate" (i.e., September) complement likewise existed as of May 19, this satisfied the "50 percent-of-classifications" test

[44] The complaint alleges (at par. 34) that 47 named persons were terminated on May 17 and (at par. 38) that those terminations violated Sec. 8(a)(3) and (1). Those 47 named individuals include not only the 22 bargaining unit employees on hand on May 17, but also (apparently) all other persons in Fremont Ford's employ on that date (sales, clerical, supervisory, managerial, etc.). The complaint elsewhere alleges that Respondent independently discriminated against 13 named bargaining unit employees by failing to rehire them upon the May 19 reopening. The latter list is at minor variance with the proof (see discussion, infra, in main text).

The General Counsel has apparently abandoned the allegation that the termination on May 17 of nonbargaining unit personnel constituted independently unlawful discrimination under Sec. 8(a)(3). The record does not systematically show whether the names of nonunit personnel in par. 34 were, in fact, the ones terminated on May 17. The matter received no attention in the General Counsel's posttrial brief (nor in those of the other parties). I assume that the General Counsel's par. 34 allegation was grounded on the legally defensible proposition that employees who are not the direct targets of an unlawfully discriminatory plan may nevertheless be coerced in the exercise of Sec. 7 rights when they are incidentally harmed by discriminatory actions against the target group. I would agree that violations of Sec. 8(a)(1) necessarily occurred when nonunit employees underwent the meaningless ritual of being terminated and being required to resubmit employment "applications." I would not find in the

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The operative complaint paragraph names 13 unit employees from the May 17 unit complement as having been wrongly denied rehire. That allegation is at variance with the otherwise agreed-on proof as to the hiring shakeout on May 19 that 12 employees from the May 17 complement were no longer on board on May 19.[45]

I have found that Respondent owed a duty to bargain over such matters as intended mass terminations and rehire terms for unit employees and I provide a recommended make-whole remedy below that would require offers of reinstatement and backpay to all employees in the unit on May 17. It is therefore arguably superfluous to consider the independent discrimination issues. But because the individual cases have common aspects of discriminatory character, and because Respondent's defenses are susceptible of summary treatment, I deal with the discrimination counts if for no other reason than to demonstrate the existence of alternative grounds for imposing an essentially similar status quo ante remedy.

1. Prima facie case

The overall patterns of Barnes' admitted behavior and motivations constitute the prima facie elements in the discrimination cases. First, of course, is Barnes' declared intention to switch to a nonunion operation. See, e.g., *Love's Barbecue Restaurant*, 245 NLRB 78, 80 (1979) ("Kallman's conceded intention not to allow the employees to be unionized itself supports a conclusion of illegal motive"), enfd. in pertinent part 640 F.2d 1094, 1097 (9th Cir. 1981). The mass firings and the rehiring process in which employees were handed ultimatums which expressly included statements that the reopened operation would be nonunion were clearly parts of Barnes' final solution—essentially to blast through to nonunion status.

It is also clear in all the circumstances detailed in findings, supra, that requiring prospective employees to express a willingness to cross a picket line and to work "nonunion" as a condition of their retention violates Section 8(a)(3) of the Act. See, generally, *East Belden*, supra, 239 NLRB at 1794–1795. See also, e.g., *Love's Barbecue*, supra, 245 NLRB at 79. I would reach a similar conclusion with respect to Barnes' insistence that prospective employees sign individual employment contracts where it is clear that this was part of his program to drive home the point that employees must forfeit union representation as a condition of retention. See, e.g., *J. M. Tanaka Construction*, 249 NLRB 238 (1980), enfd. 675 F.2d 1029, 1036 (9th Cir. 1982).

With the hiring process thus tainted a prima facie case was made that the Fremont Ford employees who were not retained were the victims of unlawful discrimination. Smith independently conceded that six named individuals were ruled out from consideration based on nothing more than their expressed unwillingness to go along with Respondent's ultimatums. I also find that there are others whom Smith failed to list whom Respondent would have put to work immediately on reopening or within a few days thereafter had it not been for their continued expressions of unwillingness to accept Barnes' unlawful package of terms. As I find below, Respondent failed in each instance to meet its burden under *Wright Line*, 251 NLRB 1083, 1089 (1980), enfd. 662 F.2d 899 (1st Cir. 1981), of demonstrating that those employees would have been terminated even if they had never engaged in protected conduct.

2. Respondent's defenses

In the cases of *Steve Kirkendall, John Lawson*, and *Virgil Bilbrey*, any evidence that Respondent may have put into the record with respect to their potential unfitness (and I detect none) does not outweigh the admitted fact that they were returned to work within 2 weeks of May 19, making it difficult for Respondent to argue seriously—let alone meet its *Wright Line* burden of demonstrating—that those employees would have been fired even absent their initial (protected) unwillingness to work on Barnes' unlawful terms.[46]

A similar analysis is warranted with respect to employees *Darrell Cooper, Terry Evans*, and *Fred Huffstetler*. While there is vacillating, inconclusive, and sometimes deprecating testimony by Smith and others about the work performance of those employees, Smith and others also admitted that they had had no pre-May 17 intentions to discharge them; neither had these employees been warned or disciplined for alleged shortcomings. Even more significant, each was later called by supervisors Fleming or Radcliff who sought to induce them to return—clearly undermining any suggestion that Respondent found them so unfit that they would not have

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circumstances that any identifiable nonunit employee suffered independently unlawful discrimination under Sec. 8(a)(3). Neither in the circumstances would I impose upon the Board's compliance processes the task of attempting to figure "lost" earnings for nonunit personnel. This could conceivably involve, for example, attempts to divine how many cars a salesman might have sold but for the May 18 shutdown of operations (the only date on which it might be argued that the "terminated" nonunit employees suffered a loss of work opportunity). My recommended remedy does, however, address the matter of incidental damage done to nonunit employees' rights by Respondent's violations.

[45] See and compare complaint par. 53 with findings at fn. 30. The complaint erroneously suggests that Charles Ross and John Pack did not carry over to May 19. The complaint omits John Lawson from the group of those who were not immediately returned to work on May 19.

[46] In these and some other cases under discussion there is the potential argument that even if Barnes had imposed only "lawful" terms, some of the alleged discriminatees might have refused to come to work anyway. This defense ignores conclusions under Sec. 8(a)(5) above that Barnes was not free to impose *any* unit-applicable terms on a unilateral basis as of May 17. In addition, it was Barnes' unlawful conduct that made it impossible to know whether employees were deterred from accepting his package because they did not like the flat-rate or other kinds of terms which he *might* lawfully impose if he were a "Spruce Up" successor, or whether employees were simply deterred by the plainly unlawful features of his package of overall terms, i.e., that the shop would be "nonunion" and that employees wanting jobs would have to reconcile themselves to that fact. As the Board said in *Spruce Up* supra at 197:

> We believe we are entitled to resolve doubts against the wrongdoer. . . . We cannot say with absolute certainty how many of the claimants would have accepted employment had . . . [the successor employer] consented to recognize the Union and commence bargaining on that date. It seems reasonable to us that they might have.
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> . . . .
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> It is clear that they cherished that right to representation, and that Respondent's refusal to grant it was a significant motivating factor in their unwillingness to accept employment

been retained even if they had not refused Barnes' unlawful terms.

The six remaining discriminatees were never offered jobs in the post-May 19 operation. Of them, *William Deetz, Marvin Wiggins*, and *Dan Burkhardt* were among those named by Smith as having been "ruled out" from further consideration by virtue of their declared refusals during May 17 interviews to accept Barnes' unlawful terms. Two of them (Deetz and Wiggins) credibly testified that each had been told before May 17 by supervisors that he would be retained after May 19. As their respective supervisors and Smith admitted, none of the three had been warned, disciplined, or otherwise singled out for removal before May 17, factors that are persuasive in concluding that Respondent failed under *Wright Line* to demonstrate that they would have been terminated even absent their privileged refusals to accept unlawful terms. But I do not believe that a *Wright Line* "mixed motive" analysis even applies to them. Smith admittedly "ruled them out" at a time when he had not otherwise made a determination as to who would stay on and thus failed to rehire them based on a single, unlawful, motive.

As to *Charles Kiesling, Mel Fosen*, and *David Lawson* (the last of the May 17 discriminatees), I conclude that Respondent failed in its *Wright Line* burden by failing to make a credible showing that there were plans before May 17 to terminate them or even to take action to correct the alleged shortcomings which they may have displayed. Indeed, as Smith admitted, describing the entire class of employees in the May 17 complement, some were better than others, but there was not "anything wrong" with any of them; they were all "good" employees.

As to Fosen, moreover, Respondent concedes (Br. at 64) that he "performed adequately." Respondent adds, however: "More importantly, Larry Smith testified that at the time of the sale there was no opening for Mr. Fosen."

If "no opening for Mr. Fosen" is Respondent's ultimate fall-back position, it may be treated summarily: If, arguendo, there was "no opening" it was for a number of reasons directly traceable to Barnes' unlawful behavior independently found elsewhere—most obviously in the failure to remain bound by the union contract and in the failure to notify and bargain in good faith with the Unions before implementing any of the wholesale changes imposed at and around the time of the asset transfer (including the "terminations" themselves). Barnes cannot credibly rely on any supposed May 17 doubts about bargaining unit needs (therefore "no opening") linked to picketing where he and Coleman had been anticipating (perhaps even counting on) for months the certainty of picketing by the Unions as soon as he showed his hand.

The General Counsel acknowledges on brief that there is credible evidence that bodyshop employee Charles Kiesling may be alcoholic. The record also shows that this information was known before May 17. Arguably, Barnes may have preferred to wait until the point when he (wrongly) believed he could ease out Kiesling without having to defend himself in a grievance proceeding. Respondent's burden under *Wright Line* requires more—a demonstration that Kiesling would not have been part of the post-May 17 picture in any nondiscriminatory case. Specifically, Respondent failed to rebut the presumption that had Barnes continued to recognize the Unions and to honor the contract during the asset transfer period Kiesling would have remained. His ultimate future may have been in doubt, given this record, but Barnes' unlawful conduct has made it impossible to know what the processes of good faith collective bargaining might have produced in Kiesling's case.

There is this additionally to be said about Respondent's defense to David Lawson's nonhire: Respondent does not ultimately rely on any alleged shortcomings in Lawson; rather it rests on a claim (Br. 62) that Lawson was one of "numerous people" "who received" "job offers," but "who had stated they would not cross [the picket line]." This is not an attempt to carry Respondent's burden under *Wright Line*; it is simply a challenge to the conclusion above that, in the circumstances, Respondent could not lawfully insist, inter alia, that unit employees cross picket lines to keep their jobs after May 17. Respondent thus underscores what was a prima facie element in the General Counsel's case as to David Lawson and all other May 17 unit employees who were not permitted to stay on.

I conclude in summary that, in addition to being the victims of unilateral changes violating Section 8(a)(5), each employee in the unit on May 17 was independently the victim of discriminatory treatment violating Section 8(a)(3) of the Act.

On the foregoing analyses and on the whole record, I reach these ultimate

CONCLUSIONS OF LAW

1. Respondent is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

2. The Unions are, jointly and severally, labor organizations within the meaning of Section 2(5) of the Act.

3. At all times material including on and after May 17, 1982, the Unions have been the exclusive joint collective-bargaining representatives of Respondent's auto service, parts, and bodyshop employees in an appropriate collective-bargaining unit more specifically defined as the multiemployer collective-bargaining unit covered by the collective-bargaining agreement, which was admittedly honored, applied, and implemented by Respondent until on or about May 17.

4. By effectively succeeding to the operation of Fremont Ford in January 1982 (and in no case later than March 19, 1982), without significant change in the operation nor in the unit employee complement, Respondent then became bound to existing the collective-bargaining relationship with the Unions.

5. By admittedly honoring the existing collective-bargaining agreement and applying its terms for a substantial period to employees in the unit on and after the date of its succession found above Respondent assumed the obligations of that contract and became bound to it.

6. By the totality of acts below, and by each of them, Respondent has failed and refused to bargain collectively in good faith with the Unions as the exclusive represent-

ative of employees in the unit, and thereby has engaged in and is engaging in unfair labor practices within the meaning of Section 8(a)(5) and, derivatively, Section 8(a)(1), of the Act.

(a) Failing to give the Unions adequate advance notice of Barnes' fixed intentions to engage in wholesale changes affecting terms and conditions of employment in the bargaining unit after the transfer of assets to Respondent, thereby frustrating the Unions' statutory right to bargain collectively about those intended changes.

(b) Affirmatively dispersing false and misleading information to the Unions and to unit employees regarding Barnes' plans for changes affecting the bargaining unit, including refusing to talk candidly with the Union's representative Bobo during a May 6, 1982 meeting and by falsely extending recognition and promising to "get back" to Bobo.

(c) Repudiating the union contract on May 17, 1982, and thereafter refusing to apply it to employees in the unit.

(d) Admittedly refusing in general to recognize the Unions as the unit employees' collective representative on and after May 17, as well as by the discrete acts of unilaterally imposing a flat-rate system and otherwise changing wages, hours of work, and other terms and conditions of employment prevailing until May 17 in the unit.

(e) By direct dealing with unit employees and bypassing the Unions by tendering to applicants on and after May 17 certain written "terms of employment."

7. By the totality of the acts below, and by each of them, Respondent has discriminated with respect to the hire, tenure, and other terms and conditions of employment of employees in order to discourage membership in and activities on behalf of the Unions, and thereby has engaged in and is engaging in unfair labor practices affecting commerce within the meaning of Section 8(a)(3) and, derivatively, Section 8(a)(1) of the Act:

(a) Terminating all 22 employees named in fn. 30, effective May 17, 1982, and requiring them to submit new written applications for continued employment.

(b) Requiring as a condition for consideration for reemployment in the bargaining unit after May 17 that employees affirmatively state their willingness to accept nonunion status, to sign individual employment contracts and to cross a picket line.

(c) Failing immediately to recall the 12 employees indicated in fn. 30 by the absence of asterisks.

(d) Imposing on all unit employees permitted to return on May 19 or hired thereafter the requirement that they sign individual employment contracts.

(e) Applying the terms set forth in those contracts rather than the terms in the existing labor agreement to all employees hired on and after May 19.

8. By the totality of the acts below, and by each of them, Respondent has independently interfered with, restrained, and coerced employees in the exercise of the rights guaranteed in Section 7 of the Act and thereby has engaged in and is engaging in unfair labor practices within the meaning of Section 8(a)(1) of the Act.

(a) Terminating employees of Fremont Ford other than those in the bargaining unit on May 17 and requiring them to submit written applications for reemployment.

(b) Telling bargaining unit employees that Respondent's operation after May 17 would be nonunion, and that they must be willing to sign individual employment contracts and cross a picket line to keep or get a bargaining unit job.

THE REMEDY

The foregoing analysis and ultimate conclusions of law show that this is a case involving fundamental violations susceptible of various legal characterizations. The violations have in common, however, that they involved a trampling on bargaining unit employees' rights to the various statutory protections generally referred to by the Court in *Wiley*, supra, as providing "protection . . . from a sudden change in the employment relationship." Whether analyzed as 8(a)(5), (3), or (1) violations, the actions of Barnes in first hiding his unlawful plans from the employees and from their union representatives and then implementing them with unit-shaking consequences require the customary and presumptively appropriate remedy; the reestablishment of the status quo ante the central violations which occurred on May 17, 1982.

It is not only most appropriate to reestablish the conditions and employment complement ante May 17; it is virtually impossible to envision how anything short would suffice to prevent Respondent from deriving advantage from the May 17 blitz and its aftermath. Where it has been concluded that Respondent assumed the existing labor agreement and became bound to it before May 17, Respondent must reinstate that agreement as the governing instrument and apply the same to all unit employees, retroactive to May 17. To the extent that the agreement requires contributions to pension trusts, these trusts must be made whole for any lapses due to Respondent's May 17 repudiation of the labor agreement and underlying labor relationship *Merryweather Optical Co.*, 240 NLRB 1213 (1979).[47]

Most importantly, to reestablish conditions ante May 17 Respondent must offer reinstatement to their pre-May 17 jobs to all 22 unit employees terminated effective May 17, without prejudice to their seniority or other rights and privileges established *per* the labor agreement or otherwise, discharging, if necessary to make room for them, any "outside" employees hired after May 17, and make those 22 employees whole in the manner generally provided in *F. W. Woolworth Co.*, 90 NLRB 289 (1950), with interest as provided in *Florida Steel Corp.*, 231 NLRB 651 (1977). See generally *Isis Plumbing Co.*, 138 NLRB 716 (1962).

I also provide in my recommended Order for "broad" cease-and-desist language, Respondent's unlawful conduct having been blatant, pervasive, and destructive of fundamental employee rights.[48]

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[47] Whether that agreement automatically renewed itself after its stated expiration date, or whether a successor agreement bound Respondent, are matters for the compliance stage. The pertinent facts were not litigated herein.

[48] Cf. *Hickmott Foods*, 242 NLRB 1357 (1979).

Finally, I provide for posting of appropriate remedial notices in a manner ensuring that the nonunit employees incidentally harassed with pro forma terminations and reapplication requirements will be assured against future victimization.

[Recommended Order omitted from publication.]

Dold Foods, Inc. *and* **United Food and Commercial Workers International Union, AFL-CIO & CLC, District Local 340.** Cases 17-CA-11309 and 17-CA-11309-2

July 28, 1988

DECISION AND ORDER

BY CHAIRMAN STEPHENS AND MEMBERS JOHANSEN AND BABSON

On November 9, 1983, Administrative Law Judge Stephen J. Gross issued the attached decision. The General Counsel and the Respondent filed exceptions and supporting briefs, and the Charging Party filed exceptions adopting the General Counsel's exceptions.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings, and conclusions only to the extent consistent with this Decision and Order.

The judge found that on November 2, 1982, when the Respondent withdrew recognition of the Union, it possessed the requisite objective considerations for a good-faith doubt of the Union's majority status. In so doing, the judge found that in calculating union support, the Respondent was justified in including the strike replacements among those employees who opposed representation by the Union. We disagree.[1]

As a preliminary matter we note that in *Station KKHI*, 284 NLRB 1339 (1987), we overruled the presumption set forth in *Pennco, Inc.*[2] that "permanent strike replacements hired during a strike support the union."[3] In overruling *Pennco*, however, we declined to adopt the contrary presumption that permanent strike replacements who cross a picket line repudiate the union as a collective-bargaining representative.[4] We noted that "adoption of this presumption would disrupt the balance of competing economic weapons long established in strike situations and substantially impair the employees' right to strike by adding to the risk of replacement the risk of loss of the bargaining representative as soon as replacements equal in number to the strikers are willing to cross the picket line."[5] Thus, we declined "to maintain or create any presumptions" concerning the union sentiments of strike replacements, stating that we would "review the facts of each case, but [would] require 'some further evidence of union non-support' before concluding that an employer's claim of good-faith doubt of the union's majority is sufficient to rebut the overall presumption of continuing majority status."[6]

The judge found the *Pennco* presumption rebutted here by evidence that: (1) the replacements were aware that the Union was "not bargaining for them" and that the Union was seeking their discharge; (2) some employees had approached the Respondent's president about how to get rid of the Union; and (3) there were some flat tires and incidents of verbal abuse of replacements crossing the picket lines. Even in the absence of the now rejected *Pennco* presumption, however, those factors are insufficient to support the Respondent's asserted good-faith doubt.

Admittedly, in *Station KKHI* one of the factors that the Board relied on in overruling *Pennco* was that

> . . . replacements' attitude towards union representation may be influenced by [the awareness of the union's primary concern for the strikers' welfare rather than that of the replacements], which in turn undermines the basis for an evidentiary presumption of support for the union.[7]

Nevertheless, as noted, we declined to adopt a presumption that these replacements oppose union representation. In this regard, unions often demand, at least in the first instance, that the replacements be discharged and the strikers rehired. Frequently, as in the instant case, the union's position may be modified in the course of the negotiations on the issues underlying the strike.[8] Indeed, in the instant case, as the strike wore on, the Union took a progressively weaker position until, at the bargaining session of October 23, it requested only that the Respondent discharge those replacements (about 32 out of 201 total replacements) who had not yet completed the probationary period. Moreover, here the replacements' knowledge of the Union's position was based on statements made by the Respondent's representatives at meetings held between the Respondent and nonstriking employees

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[1] The judge also found that the Respondent, in concluding that the antiunion employees outnumbered the prounion employees, properly relied on a statement by the union representative that of the striking employees "approximately 30 percent" would not seek reinstatement. We find it unnecessary to rely on this finding of the judge since even assuming that "approximately 30 percent" of the strikers did not support union representation, as set forth below, the Respondent has not established a good-faith doubt that a majority of all the employees were of that view.

[2] 250 NLRB 716 (1980), enfd. 684 F.2d 340 (6th Cir. 1982), cert. denied 459 U.S. 994 (1982).

[3] *Station KKHI*, supra at 1340.

[4] Id. at 1344.

[5] Id. at 1344.

[6] Id. at 1344-1345.

[7] Id. at 1344.

[8] See *Johns-Manville Sales Corp.*, 289 NLRB 358, 362 (1988).

289 NLRB No. 156

and on occasional letters to the employees from the Respondent's president. In a letter following the October 23 bargaining session, the Respondent stated that the session had been taken up primarily with a dispute over the right to the 217 jobs in the bargaining unit. The letter thus did not accurately reflect the position of the Union, which by that time had conceded most of the unit jobs to the replacements. Particularly inasmuch as the Respondent's letter misstated the Union's position in a manner likely to influence replacements against the Union, we do not rely on the replacement employees' purported awareness of the Union's position on reinstatement in assessing the Respondent's asserted good-faith doubt.

Concerning the expression of replacement employee opposition to the Union, the judge noted that this consideration is supported only by the Respondent's president's testimony that some employees had voiced antiunion sentiments. The judge himself properly concluded (JD at fn. 26) that such "[u]nqualified, nonspecific testimony . . . has been rejected as valueless." In any event, the testimony did little to further the argument that the Respondent had an objective basis for counting all of the replacements in the antiunion camp.[9]

Finally, the judge properly noted that the picket line misconduct and harassment here was "much less extreme" than that in *I T Services*[10] and that no one had shown that the Union was "in any way responsible." The misconduct alleged here consisted of 12 nails found in the Respondent's driveway, 425 dollars' worth of damage to the tires of nonstriking employees and some undefined picket line incidents that the Respondent's president testified had been reported to supervisors by nonstriking employees. No employee testified in this regard. These incidents of picket line misconduct cannot be equated to the "pervasive" violence present in *I T Services* and are insufficient to justify the conclusion that the 201 replacements opposed the Union.

In view of the foregoing, we find that the Respondent did not possess objective considerations when it concededly withdrew recognition of the Union and, accordingly, that the Respondent violated Section 8(a)(1) and (5) of the Act. Furthermore, because the Respondent's subsequent refusal to execute the collective-bargaining agreement it had negotiated with the Union was premised on its withdrawal of recognition, we find that the Respondent violated Section 8(a)(1) and (5) of the Act in refusing to execute that agreement.

AMENDED CONCLUSIONS OF LAW

Substitute the following for the judge's Conclusion of Law 2 and add Conclusion of Law 3.

"2. Dold violated Section 8(a)(1) and (5) of the Act when it withdrew recognition of Local 340 on November 2, 1982.

"3. Dold violated Section 8(a)(1) and (5) of the Act when, on or after November 4, 1982, it refused to execute the collective-bargaining agreement it had negotiated with Local 340."

AMENDED REMEDY

Having found that the Respondent violated Section 8(a)(1) and (5) by withdrawing recognition from the Union and refusing to execute the agreed-on collective-bargaining agreement, we shall order the Respondent, in addition to adopting those remedies provided in the remedy section of the judge's decision, to cease and desist from the unfair labor practices found, and to take the following affirmative action designed to effectuate the policies of the Act. The Respondent shall be ordered to recognize and, on request, bargain with Local 340 as the exclusive collective-bargaining representative of its employees. The Respondent shall also be ordered to execute the collective-bargaining agreement negotiated with Local 340. We shall also order the Respondent to make all affected unit employees whole for losses they may have incurred by virtue of the Respondent's unlawful conduct in the manner set forth in *F. W. Woolworth Co.*, 90 NLRB 289 (1950), plus interest on any amount due paid in the manner prescribed in *New Horizons for the Retarded.*[11] Further, the Respondent shall make whole employees for any losses they may have suffered by its failure to execute the collective-bargaining agreement with backpay, if any, computed in accordance with *Ogle Protection Service*, 183 NLRB 682 (1970), with interest computed in accordance with *New Horizons for the Retarded*, supra.

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[9] See, e.g., *Cail's Generators & Armature Co.*, 237 NLRB 1198, 1199 fn. 7, and 1201 (1978). With respect to the union's request for the discharge of replacements and asserted antiunion sentiments voiced by unidentified employees, we find, as did the judge, that the facts here are less compelling than those in *I T Services*, 263 NLRB 1183 (1982). In any event, as noted in *Johns-Manville Sales Corp.*, supra at fn. 10, we would weigh these factors differently than did the judge in *I T Services.*

[10] The judge in *I T Services* set forth in detail the violence which occurred there, noting the apparently racial character of some of the invective, and found that some of the violence occurred in the presence of the union president or was committed by union picket captains.

[11] In accordance with our decision in *New Horizons for the Retarded*, 283 NLRB 1173 (1987), interest on and after January 1, 1987, shall be computed at the "short-term Federal rate" for the underpayment of taxes as set out in the 1986 amendment to 26 U.S.C. § 6621. Interest on amounts accrued prior to January 1, 1987 (the effective date of the 1986 amendment to 26 U.S.C. § 6621), shall be computed in accordance with *Florida Steel Corp.*, 231 NLRB 651 (1977).

ORDER

The National Labor Relations Board orders that the Respondent, Dold Foods, Inc., Wichita, Kansas, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Discouraging membership in or lawful strike activity on behalf of United Food and Commercial Workers International Union, AFL–CIO & CLC, District Local 340, or any other labor organization, by unlawfully failing to recall striking employees to existing vacancies on the labor organization's unconditional offer, on behalf of such employees, to return to work.

(b) Failing and refusing to recognize and bargain with Local 340, on its request, as the exclusive representative of the employees in the appropriate unit.

(c) Refusing to execute the collective-bargaining agreement negotiated with Local 340 as the exclusive representative of the employees in the appropriate unit.

(d) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Make whole, with interest, any employee whose recall was delayed by reason of Dold's unlawful acts.

(b) Recognize and, on request, bargain with Local 340 as the exclusive representative of the employees in the appropriate unit.

(c) Execute the collective-bargaining agreement negotiated with Local 340 as the exclusive representative of the employees in the appropriate unit and give it retroactive effect.

(d) Make whole employees for any loss of wages or other employment benefits they may have suffered by reason of its refusal to execute the collective-bargaining agreement in the manner and with interest as described in the remedy section of the decision.

(e) Preserve and, on request, make available to the Board or its agents for examination and copying, all payroll records, social security payment records, timecards, personnel records and reports, and all other records necessary to analyze the amount of backpay due under the terms of this Order.

(f) Post at its facility in Wichita, Kansas, copies of the attached notice marked "Appendix."[12] Copies of the notice, on forms provided by the Regional Director for Region 17, after being signed by Dold's authorized representative, shall be posted by Dold immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by Dold to ensure that the notices are not altered, defaced, or covered by any other material.

(g) Notify the Regional Director in writing within 20 days from the date of this Order what steps the Respondent has taken to comply.

IT IS FURTHER ORDERED that the complaint is dismissed insofar as it alleges violations of the Act not specifically found.

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

Section 7 of the Act gives employees these rights.

To organize

To form, join, or assist any union

To bargain collectively through representatives of their own choice

To act together for other mutual aid or protection

To choose not to engage in any of these protected concerted activities.

WE WILL NOT discourage you from membership in, or participating in lawful strike activity on behalf of, United Food and Commercial Workers International Union, AFL–CIO & CLC, District Local 340, or any other labor organization, by unlawfully refusing to recall striking employees to existing vacancies in accordance with their Union's unconditional offer, made on their behalf, to return to work.

WE WILL NOT refuse to recognize and bargain with Local 340 as the exclusive representative of the employees in the appropriate unit.

WE WILL NOT refuse to execute the collective-bargaining agreement negotiated with Local 340 as the exclusive representative of the employees in the appropriate unit.

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[12] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

We will not in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

We will make whole those employees who engaged in the March 1 through November 8, 1982 strike against us and whose recalls were delayed by reason of our unlawful acts by reimbursing them for any loss of earnings and other benefits resulting from the delay in recall, less any net interim earnings, plus interest.

We will, on request, bargain with Local 340 as the exclusive representative of our employees in the bargaining unit.

We will execute the collective-bargaining agreement negotiated with Local 340 as the exclusive representative of our employees in the appropriate unit and give it retroactive effect.

We will make whole, with interest, employees for any loss of wages or other employment benefits they may have suffered by reason or our refusal to execute the collective-bargaining agreement.

Dold Foods, Inc.

Stephen E. Wamser, Esq., for the General Counsel.
Joseph P. Carey, Esq., of White Plains, New York, for the Respondent.

DECISION

Statement of the Case

Stephen J. Gross, Administrative Law Judge. Respondent Dold Foods, Inc. operates a food processing plant in Wichita, Kansas. Dold and United Food and Commercial Workers International Union, AFL-CIO & CLC, District Local 340, as representative of Dold's production, distribution, and maintenance employees, were parties to a collective-bargaining agreement that expired in November 1981. Bargaining toward a new contract began in October 1981. But the employees became dissatisfied with the results of the bargaining, and in March 1982 most of Dold's employees went out on strike. Bargaining between Dold and Local 340 continued. Meanwhile Dold replaced the striking workers with new employees.

About 8 months after the strike began Local 340 concluded that the strike was lost. It thereupon offered to accept the Company's remaining contract terms and, on behalf of the strikers, offered to have the striking employees return to work. At issue here are the nature and timing of those offers by the Union and of Dold's responses to the offers.[1] Specifically:

(1) According to the General Counsel, on October 23 and then again in early November, the Union agreed to all terms of the Company's proposed collective-bargaining agreement. (Unless otherwise specified, all events referred to in this decision occurred in 1982.) Given that agreement, claims the General Counsel, Dold was obligated to execute a written contract with the Union embodying its terms. Dold has refused to do so.

(2) If the Union unconditionally offered to return the strikers to work, Dold came under an obligation to fill job openings with the employees who had been striking, and to do so in order of seniority. The General Counsel contends that Local 340 did make that kind of unconditional offer and that Dold failed to respond appropriately.

My conclusions about these contentions are that Local 340 did not in fact accept Dold's contract proposals on October 23; and that while the Union subsequently did purport to accept Dold's proposals, Dold was not required to respond to the Union's acceptance because by then Dold had come to believe, based on appropriate considerations, that Local 340 did not represent a majority of Dold's employees. On the other hand, in early November Dold did wrongfully fail to honor the Union's bona fide offer to return the striking employees to work.[2]

A. *Did the Union Accept Dold's Contract Offer on October 23*

Attorney Frank Hylton represents Local 340 in its dealings with Dold. Joseph Carey, also an attorney, represents Dold on labor matters. Hylton and Carey met privately on October 23 at a hotel in Wichita. Five Dold officials—all members of Dold's negotiating committee—were also present in the hotel. From time to time Carey would report back to that committee about his conversations with Hylton and would receive instructions from the committee. After the completion of Hylton and Carey's private discussions, Hylton and Union Business Agent Phillip Immesote met with Carey and Dold's negotiating committee.

A couple of things about the events of October 23 are clear. One has to do with a Dold contract proposal regarding an employee pension plan. Dold had earlier proposed that its employee pension plan be changed in various ways. Hylton had expressed concern that such changes might be unlawful and might therefore open both Dold and Local 340 to legal action by employees. Hylton had said he would look into the matter. At the October 23 meeting Hylton told Dold's representatives that he had not yet satisfied his concerns about the pension problems, but that he would do so soon and advise Carey of his conclusion.

It is also clear that in the course of the meeting Hylton asked that the parties meet again as soon as possible. In response to that request the parties agreed to hold a meeting on November 3.

What is less clear is whether at any time during the course of the October 23 meeting, or during the telephone calls setting up the meeting, any representative of the Union agreed to accept the Company's terms for the collective-bargaining agreement. Hylton testified that he said that the Union was accepting the last proposal by the Company, first in the premeeting telephone conversations and then privately to Carey during the October 23 meeting. Carey flatly denied Hylton's contention. All the members of Dold's committee testified. In no case does their description of the October 23 negotiations refer to any acceptance by the Union of Dold's contract proposals. Immesote (the union official) did not testify.

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[1] This proceeding began on November 8, 1982, with the filing of a charge by Local 340 in Case 17-CA-11309. The Union filed a second charge, Case 17-CA-11309-2, on December 1 and then amended it on December 7. A complaint and order consolidating cases were issued on December 23.

[2] Certain errors in the transcript have been noted and corrected.

As will be discussed more fully below, my conclusion is that no representative of Local 340 stated to Dold that the Union accepted Dold's contract proposals. Assuming that a union representative had made such a statement, it is evident that no contract existed when the October 23 meeting closed. The point is that Hylton had previously, specifically voiced concern about Dold's pension plan proposal and then, on October 23, said that he had not yet looked into the matter, that his concerns remained, that he would undertake to resolve the matter soon, and that he would call Carey as soon as it was resolved. There is simply no way to square that kind of behavior with a purported acceptance of all of Dold's terms. That is particularly obvious since on October 23 there were only two Dold proposals left to discuss: One involving medical insurance, and the pension plan proposal that Hylton said he wanted to consider further. All other contract provisions had either already been agreed to or had been unilaterally implemented by Dold on the ground that impasse had been reached.

B. *Did a Union-Dold Contract Come into Being on October 26*

Hylton telephoned Carey on October 26 to say that he had determined that Dold's adoption of its pension plan proposal would be unobjectionable. That raises the question of whether Hylton had ever said that Local 340 accepted Dold's most recent contract proposals. If Hylton had said that, arguably a contract between Dold and Local 340 would have come into being when Hylton told Dold that he no longer objected to the pension plan change. As I add up the evidence, as late as October 26 Hylton had never told Dold that Local 340 accepted Dold's contract proposals. (In November Local 340 did communicate just such a message to Dold, which will be covered later in this decision.)

First, nothing in the record suggests that Hylton should be credited over Carey in the case of conflicts in their testimony. Rather, Carey was more credible than Hylton. Hylton had significant memory lapses; Carey did not. Carey's version of events was often supported by other witnesses; Hylton's was not.

Second, if Hylton, on behalf of Local 340, had told Carey that the Union accepted Dold's contract proposals, one would expect Hylton to have asked for confirmation that a contract had been agreed on—first from Carey during the premeeting telephone calls; then from Carey at the meeting on October 23; then from Dold's committee on October 23; and finally from Carey during the telephone conversation of October 26—but Hylton never did so.

Third, the Union at no point provided Dold with a written contract to execute.

Fourth, during the course of the October 23 meeting the parties agreed, at the Union's request, to hold another meeting on November 3. The Union did not indicate why it wanted that meeting; however, the request for the meeting suggests that the union representatives thought that there was more to be accomplished before a contract could be signed.

C. *Was Dold Justified in Doubting That Local 340 Represented a Majority of the Bargaining Unit Employees*

On November 2 Dold called the Union to cancel the November 3 meeting. Dold has continued to refuse to meet with Local 340 and has refused to enter into a collective-bargaining agreement with the Union even though the Union sent a telegram to Dold on November 4 specifically accepting all of Dold's contract proposals. The General Counsel argues that Dold has thereby failed to satisfy its obligation to bargain with the Union and has accordingly violated Section 8(a)(5) of the Act. Dold, however, contends that since at least as far back as November 2 it has had good reason to believe that Local 340 does not represent a majority of Dold's bargaining unit employees. If Dold did believe, in good faith, that Local 340 had lost its majority status and, further, if that belief was based on "sufficient objective considerations," Dold was under no obligation to enter into a collective-bargaining agreement with the Union or to bargain with the Union at all.[3] The burden is on Dold to prove such "objective considerations," and "the burden is a heavy one."[4]

Employee categories—strikers, union members who did not strike, returned strikers, and replacements: As of early November, 229 Dold employees were working in bargaining unit jobs, as follows:

> Members of the bargaining unit at the time the strike began but who continued to work—12 employees
>
> Members of the bargaining unit who went out on strike but who subsequently abandoned the strike and returned to work—16 employees
>
> Employees hired by Dold after the strike began as permanent replacements for the strikers—201 employees

In March 1982, 221 employees had gone out on strike.[5] As indicated in the table above, however, 16 of the strik-

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[3] *Windham Community Memorial Hospital*, 230 NLRB 1070, 1073 (1977), enfd. 577 F.2d 805 (2d Cir. 1978). Other cases refer to "a sufficient objective basis for a reasonable doubt of the union's majority status" (*Pennco, Inc.*, 250 NLRB 716 (1980), enfd. 684 F.2d 340 (6th Cir.), cert. denied 459 U.S. 994 (1982)); the need for the "employer's good faith belief" to "be supported by objective considerations which are clear, cogent, and convincing" (*Pennco*, supra, 684 F.2d at 342); and the need for the employer to "present clear and convincing evidence of loss of union support capable of raising a reasonable doubt of the union's continuing majority" (*Windham*, supra, 577 F.2d at 811).

[4] *Pennco*, supra, 250 NLRB at 717.

[5] As of March 1, 1982, Dold employed 233 bargaining unit employees. As noted above, 12 of those employees never participated in the strike.

Continued

ing employees later abandoned the strike. That meant that as of early November there were a maximum of 205 strikers; however, according to Dold's president, Steven Ritter, far fewer then 205 employees then remained on strike. Ritter based that view on an assertion made by Union Business Agent Immesote. As of September, Immesote reported, 30 percent of the Dold employees then out on strike had abandoned any interest in their jobs at Dold.

Ritter testified that not long after Immesote made that remark, he began to focus on whether the Union represented a majority of the Company's employees. Ritter proceeded on the following assumptions.

1. The striking employees remained members of Dold's bargaining unit, but only if they intended to return to work at Dold.[6]

2. Given Immesote's statement, only 144 strikers (70 percent of 205) ought to be deemed to be part of the bargaining unit.

3. All of those 144 strikers could be assumed to be in favor of representation by Local 340.[7]

4. The 12 employees who, though members of the bargaining unit on March 1, never went out on strike, should also be deemed to support Local 340.[8]

5. Similarly, the 16 strikers who subsequently abandoned the strike had to be deemed supporters of Local 340.[9]

6. As for the 201 employees hired since the beginning of the strike as permanent replacements, on the other hand, Ritter took the position that all could be assumed to oppose representation by Local 340.

Under those assumptions, while 172 members of the bargaining unit still favored representation by Local 340, 201 employees—a clear majority—opposed representation by Local 340. Thus, if the assumptions that Ritter made on the way to arriving at his totals were appropriate ones, Dold did not violate Section 8(a)(5). Two of those assumptions merit scrutiny: First, the assumption that 30 percent of the strikers could be deemed not part of the bargaining unit on the basis of Immesote's remark; and second, the assumption that all 201 replacement employees opposed representation by Local 340.

Immesote's 30-percent figure: A striker loses his membership in the bargaining unit if he abandons his interest in returning to his former job.[10] Strikers are presumed to retain an interest in returning to their jobs unless there is evidence to the contrary.[11] The question is whether Dold had sufficient grounds to reasonably conclude that, as of early November, 30 percent of the strikers no longer wanted to return to work at Dold.

As noted earlier, Ritter concluded that over 60 strikers had abandoned any intention to return to Dold. That conclusion was based on a remark that Union Business Agent Immesote made to Ritter in September during the course of a telephone conversation. Immesote did not testify; however, according to Ritter's undisputed testimony, Immesote—

> reported 30 percent of the people will not return to work for one reason or another. I think he mentioned that some had retired and some had moved out of the state, some had taken other jobs, and some had no intention of returning to Dold Foods.[12]

It is not altogether clear that Dold had the right to rely on Immesote's statement in determining whether Local 340 represented a majority of the bargaining unit employees. For one thing, Immesote made it clear to Ritter that the 30-percent figure was an approximate one.[13] For another, given the context of the conversation, it is possible that Immesote deliberately used an inflated figure. (Immesote wanted Ritter to agree to recall the striking employees, even if that meant displacing the replacement employees. Immesote's purpose in reporting that many strikers would not be returning to Dold was to indicate to Ritter that even if Dold did recall all the striking employees, not all the replacement employees would have to be laid off.)

Nonetheless I think Ritter made appropriate use of Immesote's remark. Immesote represented the striking employees and could be expected to be in a better position than anyone else to know about the individual strikers' circumstances and future plans. Moreover at the time Immesote made the remark the strike had lasted 7 months, it had been unsuccessful at shutting Dold down, and all or nearly all the strikers had been replaced. Given that situation one would expect that some of the strikers would have chosen to leave Dold permanently.

(The above numbers are taken from the testimony of a Dold witness. Other evidence provides somewhat different numbers. See, e.g., Jt. Exh. 15. But the differences are immaterial.)

[6] Striking employees remain members of the bargaining unit, whether they have been replaced, as do replaced exstrikers who are awaiting job openings in order to return to their former employment. See, e.g., *Bio-Science Laboratories v. NLRB*, 542 F.2d 505 (9th Cir. 1976), enfg. 213 NLRB 171 (1974). As will be discussed in more detail below, however, strikers who abandon interest in returning to their former jobs thereby lose their membership in the bargaining unit.

[7] "There is a presumption that . . . strikers . . . being union members, continued to support the Union." *Surface Industries*, 224 NLRB 155, 163 (1976).

[8] The "mere failure of employees to support a strike . . . does not give rise to the presumption that these employees have repudiated the Union as their bargaining representative." *Seeburg Corp.*, 192 NLRB 290, 305 (1971). Accord: *Mobile Home Estates*, 259 NLRB 1384, 1404 (1982), enfd. in pertinent part 707 F.2d 264 (6th Cir. 1983).

[9] See *Cutten Supermarkets*, 220 NLRB 507 (1975); *Seeburg*, supra; *Mobile Home Estates*, supra.

[10] E.g., *Belt Supermarket*, 260 NLRB 118 (1982); *P.B.R. Co.*, 216 NLRB 602 (1975).

[11] *Bio-Science Laboratories*, supra; *P.B.R. Co.*, supra.

[12] The question of whether an employee has abandoned his job (for purposes of determining bargaining unit status) hinges on the employee's intent. Evidence of actions such as moving beyond commuting distance, retirement, and accepting a permanent position elsewhere is commonly found to show the requisite intent: See, e.g., *Belt Supermarket*, supra.

[13] In *Randle-Eastern Ambulance Service*, 230 NLRB 542 (1977), enfd. in part 584 F.2d 720 (5th Cir. 1978), a union official had told the employer that "50 to 25 or 20 percent" of the strikers would not be returning to work. The Board refused to take that statement into account in determining whether the employer had a reasonable basis for doubting the union's majority status. That ruling was based at least in part on factors not present here (such as the fact that some of the strikers who purportedly abandoned their employment at the employer might have done so because of the employer's unfair labor practices). See 230 NLRB at 552, reversed on this point 584 F.2d at 728–729.

Immesote's figure merely provided a specific—and not surprising—figure for Ritter to work with.[14]

The union views of the replacement employees: To recapitulate, Dold President Ritter assumed that, as of the end of October 1982, all persons who had been employed by the Company just as the strike began and who remained members of the bargaining unit—172 in all—remained in favor of representation by Local 340. All 201 replacement employees, said Ritter, could be assumed to oppose representation by that Union. Dold's defense, therefore, hinges on Ritter's assumption about the replacement employees' views concerning representation by Local 340.

D. *Current Board Law*

The most clear-cut striker replacement situation is where the employer claims that employees hired to replace strikers, and who had to cross a picket line to get to work, should be assumed, *without any further information*, to be opposed to representation by the incumbent union. Given those bare facts, the Board will reject the employer's claim and instead presume that the replacement employees "support the [incumbent union] in the same ratio as those whom they have replaced."[15] Moreover, the Board has adopted the same position even where additional facts increase the possibility that the replacement employees do not favor representation by the incumbent union. In *Pennco*, for example, the replacements not only had to cross a picket line, on occasion they were met by violence from the strikers. According to the Board, however, "the occurrence of some violence on the picket line is, at best, one factor weakening the presumption of majority status but not alone rebutting it."[16]

In *Randle-Eastern* some of the striker replacements encountered violence at the picket line and, in addition, at the bargaining table the union demanded that the replacements be laid off to make room for the strikers. Yet there too the Board concluded that the replacements "are presumed to support the union in the same ratio as those whom they have replaced."[17]

In *I T Services*, however, the Board ruled in the employer's favor. The issue again was whether the employer could presume that replacement employees opposed representation by the incumbent union. In *I T Services*, apart from the fact that the replacement employees had to cross a picket line to get to work: (1) the union demanded that the replacements be discharged, the replacement employees knew of that demand, and the union made the demand even though "[T]here was room for the strikers even if no replacements were let go";[18] (2) a company dispatcher testified that with minor exception "each of the strike[r] replacements . . . told him that they did not want the union to represent them";[19] and (3) "almost on a daily basis" the replacement employees were subjected to threats, racially oriented taunts, and violence by strikers, sometimes under circumstances indicating that the union supported those acts.

The Board concluded that, given all these circumstances, the employer "had an adequate objective basis to support a good-faith doubt of the Union's majority."

E. *The Facts at Hand*

Dold does not take issue with cases such as *Windham* and *Pennco*. Rather, the Company argues that Ritter's conclusions about the anti-Local 340 views of the replacement employees was warranted given the facts at hand and the Board's view as expressed in *I T Services*.

Local 340's demand that replacement employees be fired. About 10 weeks into the strike (in May 1982) the Union demanded that "all permanent replacement employees be fired to make room for striking employees if a contract is ever signed."[20] Dold advised all of its employees—strikers and nonstrikers—of that position.

As touched on earlier, by September the Union had changed its position. It then asked only that sufficient replacement employees be displaced to make room for the 144 or so strikers still interested in returning to Dold. Finally, during the last bargaining session (on October 23), the Union again asked that sufficient replacement employees be let go to make room for the strikers.[21] That, however, was merely a pro forma request. Local 340's main argument at that bargaining session was that Dold should displace the 32 replacement employees who were still in a probationary status to make room for a like number of strikers.

Dold's subsequent letter to employees stated:

> At the October 23 Session most of the time was spent . . . on the subject of who has the legal right to hold the 217 jobs in the bargaining unit. *Manage-*

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[14] Ritter testified that, once the Company did begin recalling strikers, 34 percent failed to return to work as they were recalled. That, suggested Ritter, confirmed Immesote's 30-percent estimate. But that 34-percent figure was developed considerably after Dold stopped bargaining with Local 340. It accordingly sheds no light on whether Dold based its refusal to bargain on appropriate grounds. See *I T Services*, 263 NLRB 1183 (1982); *Pennco, Inc.*, supra, 250 NLRB at 718 fn. 16.

[15] *Windham Community Memorial Hospital*, supra. Accord: *National Car Rental System*, 237 NLRB 172 (1978), enf. denied 594 F.2d 1203, 1206 (8th Cir. 1979). The Board did not always hold this view. See *S & M Mfg. Co.*, 172 NLRB 1008 (1968). ("As the only employees then working were . . . newly hired employees who had crossed the picket line to go to work and who are not shown to have manifested their support for the Union, it cannot be found that there were any union adherents among the employees working [on the date in issue]"); *Titan Metal Mfg. Co.*, 135 NLRB 196, 215 (1962) (replacements presumed not to favor representation by the incumbent union "[absent] evidence that any of the replacements had authorized the Union to represent them"); and *Jackson Mfg. Co.*, 129 NLRB 460, 478 (1960) ("most improbable" that striker replacements favored representation by the incumbent union). For a discussion of the views of various circuit courts on the matter see the opinion of Justice White (joined in by Justices Blackmun and Rehnquist) dissenting from the Supreme Court's denial of the certiorari petition in *Pennco*, supra, 459 U.S. 994 (1982).

[16] 250 NLRB at 718 fn. 16.

[17] 230 NLRB at 552.

[18] *I T Services*, supra, 263 NLRB 1183, 1185. (In *Randle-Eastern*, in contrast, there is no indication that the replacement employees knew of the union's demand that they be laid off to make room for the strikers.)

[19] Id. at 1186.

[20] The quote is from a letter from Dold's chairman of the board to all Dold employees, dated May 13, 1982 (Jt. Exh. 19). No one disputes the accuracy of that letter.

[21] Union negotiator Hylton denied making that request. I credit Dold Attorney Carey in that regard.

> *ment, once again, repeated that no permanent replacement employees will lose their jobs to returning strikers.*[22]

Statements by employees: According to Ritter, nonstriking employees repeatedly asked "how do we get rid of the union and how do we have a vote."[23] Ritter did not specify how many employees made such comments nor, with one exception, did he identify the employees involved. No employees testified on this (or any other) subject.[24]

Violence. On 12 separate occasions Dold officials found nails on the company driveways near the picket line. Dold reimbursed various nonstriking employees a total of $425 for damage to tires resulting from picket line actions. Dold received 47 or 48 reports of strikers doing minor damage to nonstriking employees' automobiles, and of threats and verbal abuse by strikers.

Statements by the Union about whom it represented: At a bargaining session on October 13, a union official said that "they [the union negotiators] do not care about the permanent replacement employees and that they are not bargaining for them."[25] Dold told all of its employees about that statement.

F. *Conclusion—Dold's Belief About the Views of the Replacement Employees*

How the facts here compare to I T Services: In *I T Services*, the strikers' attempt to intimidate the replacement employees and the violence the strikers directed against them was pervasive. And the Union itself supported at least some of that activity. At Dold the manifestations of striker hostility were much less extreme, and no one has shown that Local 340 was in any way responsible for any acts of striker violence.

In *I T Services* the union never relented in its demand that all replacement employees be terminated. Local 340 at first demanded the same of Dold. Then, as the strike drew to an end, the Union virtually suggested that 30 percent of the replacement employees be kept on. The Union ultimately retreated to the position that the Company need discharge only those 32 replacement employees who were so new at Dold as to still be in a probationary status.

Finally, in *I T Services* an employee credibly testified that almost all the replacement employees had said that they opposed representation by the Union. Here we have only Ritter's testimony that some unspecified number of Dold employees had asked how they might get rid of the Union.[26]

In sum, *I T Services* in no way compels the conclusion that Dold had sufficient basis to warrant the conclusion that Local 340 lacked a majority support. Nonetheless, I think that the facts add up to so high a probability that Dold's replacement employees opposed representation by Local 340 that Dold's position on the matter should be upheld.

The Factual Issue: Dold's contentions raise two broad questions. First, purely as a factual matter is it likely that the replacement employees opposed Local 340. Second, even assuming that the replacement employees did oppose representation by the Union, should the Board nonetheless reject Dold's contention on the ground that accepting them would conflict with the purposes of the Act.

Turning to the factual issue, because only a scattering of employees expressed their views on the subject to Dold officials, Dold had no direct evidence of how the replacement employees as a whole felt about representation by Local 340. But given the facts of the strike, it clearly is more likely that the replacement employees opposed representation by Local 340 more than they favored it.

The Policies Underlying the Act: As touched on above, however, that is not the end of the matter. In cases such as *Pennco*, the Board's rejection of employer contentions about the views of replacement employees did not rest exclusively, or even primarily, on a determination that the replacement employees in fact probably preferred representation by the incumbent union. Rather, the Board's decisions focus on what kind of rule would best further the policies of the Act. Specifically, in *Pennco* the Board pointed out that permitting an employer to question union majority support on the ground that replacements for strikers can be assumed to oppose union representation "would effectively impair" the right to strike and would "disturb the delicate balance of competing weapons which the Board and the courts have recognized in the labor relations arena."[27] Similarly, in *Mobile Home Estates* the Board concluded that it would "not presume the replacements do not support a strike" because "to do so would be to overburden the right to strike because, if that were the guide, . . . an employer could refuse to recognize the union any time there was a strike and replacements."[28]

Given the policies expressed in *Pennco*, it may be that employers should be permitted to act on the belief that all of their replacement employees oppose the incumbent union only if each of the replacements has said so. If that is the law then, of course, Dold did not have an adequate basis on which to found its position about the minority status of Local 340.

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[22] Letter dated October 25, 1982, Jt. Exh. 19 (emphasis in original). The letter is wrong in stating that the Union contended that the strikers had "the legal right" to all 217 bargaining unit jobs. That contention was made only in respect to the 32 positions held by the probationary employees. Given the Union's request that sufficient replacement employees be displaced to make room for all strikers who wanted to return, the error is insubstantial.

[23] Tr. 185; see also Tr. 200.

[24] Dold employees filed a decertification petition on November 19, 1982. That occurred after Dold refused to bargain with Local 340 and accordingly is irrelevant to whether Dold had sufficient basis to doubt Local 340's majority status. See *I T Services*, supra. Moreover a decertification petition does not, in itself, provide a basis for doubting a union's majority status. *Walker Die Casting v. NLRB*, 682 F.2d 592 (6th Cir. 1982); *Taurus Waste Disposal*, 263 NLRB 309 (1982).

[25] The quote is from Dold's October 25 letter to employees, supra. Ritter testified that union officials repeatedly made such statements. No party denies the accuracy of the statement in the letter or of Ritter's testimony on the subject.

[26] Unquantified, nonspecific testimony about employees' statements opposing union representation has been rejected as valueless. *Seeburg Corp.*, supra. (*Seeburg* involved union members who refused to participate in a strike, or who abandoned it. It did not involve replacement employees. For purposes of evaluating Ritter's testimony about employee comments, the difference is inconsequential.)

[27] 250 NLRB at 717.

[28] 259 NLRB at 1404.

I read cases such as *Pennco* and *I T Services* as holding only that: (1) as noted earlier, the burden on an employer to prove its claims about the antiunion views of replacement employees "is a heavy one,"[29] so that such claims should be considered with caution and perhaps, skepticism; and (2) for the employer to prevail, the facts of the case must virtually compel the conclusion that the replacement employees oppose the incumbent union. My conclusion is that Dold meets this test—but only barely. The closeness of the question hinges on the fact that there were only 201 replacement employees, during the time in question, versus 172 employees who, under the requisite presumptions, must be considered to have supported Local 340. That means that if only 15 replacement employees favored representation by Local 340, the Union had the support of a majority of the employees.

Here we have a statement by the incumbent union that it does "not care about the permanent replacement employees" and that it is "not bargaining for them." Given the emotions generated by strikes, that viewpoint on the part of Local 340's officials is understandable and, perhaps, inevitable. That, however, does not make the statement less offensive to replacement employees who had to have reacted bitterly to it. In sum, here we have an announced union position calculated to make an enemy of each of the replacement employees, together with union demands that the replacements be displaced to make way for the strikers plus property damage and other unpleasantness suffered by the replacements as they crossed the picket line. Even taking into account the policies expressed in *Pennco*, that, as I see it, adds up to a showing by Dold that its doubt about Local 340's status was based on convincing objective considerations.

G. *Other Matters Pertaining to Dold's Refusal to Bargain*

Dold's Good Faith: Dold first announced its doubt about Local 340's majority status in early November. Yet nothing had occurred at or near that time that was relevant to the issue of the extent of employee support for the Union. I accordingly have considered whether Dold in fact had a good-faith doubt about Local 340's status. Having considered the matter, I find that Dold did. Dold was not required to announce its doubt at its earliest opportunity. I credit Ritter's testimony that at the time Dold announced its doubt, and at all relevant times thereafter, Ritter believed that Local 340 was not supported by a majority of the bargaining unit.

Did Dold's representation petition temporarily relieve Dold of the duty to bargain?: On November 3 Dold petitioned the Board for an election on the ground that it doubted the majority status of Local 340. (The Board's decision in that matter will be discussed below.) On November 4 Dold wrote Local 340 to say that "it is the employer's position that from the filing of any petition with the NLRB under Section 9 of the Act, further acts of collective bargaining are inappropriate pending resolution of the question concerning representation raised by such petition." Dold's pleadings present a similar claim—that the pendency of its representation petition freed it from any obligation it otherwise would have had to bargain with Local 340.

The short answer to Dold's contention is that the pendency of an employer's representation petition is irrelevant to the employer's duty to bargain. *N. T. Enloe Memorial Hospital*, 682 F.2d 790 (9th Cir. 1982), enfg. 250 NLRB 583, 587–588 (1980); *Cornell of California*, 222 NLRB 303, 307 (1976). Until July 1982 the filing of a representation petition by an outside union required the employer to cease bargaining with the incumbent. *Shea Chemical Corp.*, 121 NLRB 1027 (1958); however, that changed in July 1982. Since then the filing of such a petition has not relieved an employer of its duty to bargain. *RCA Del Caribe*, 262 NLRB 963 (1982). Similarly, before September 30, 1982, the filing by employees of a decertification petition stayed an employer's duty to bargain. *Telautograph Corp.*, 199 NLRB 892 (1972). Since that date employers have been required to bargain with the incumbent union notwithstanding the pendency of a decertification petition. *Dresser Industries*, 264 NLRB 1088 (1982). Thus, even if an employer's representation petition were to be considered similar, for present purposes, to a representation petition filed by employees or by a rival union, Dold's petition itself would not have relieved Dold of its bargaining duties.

Res judicata questions: An employer has two ways in which to test the validity of its belief that the incumbent union has lost majority support. One is to refuse to bargain and await the unfair labor practice proceeding that is likely to follow. Dold did that and that is what this case is about. The second is to file a representation petition. As just noted, Dold also did that.

The standards in the two kinds of proceedings are the same.[30] That is: (1) if an employer has an adequate basis for believing that the Union has lost its majority status, then the employer also has an adequate basis for obtaining a Board order requiring an election (and vice versa); and (2) if an employer's claimed basis for refusing to bargain is insufficient to avoid a finding that the employer has violated the Act then, similarly, there are insufficient grounds to grant the employer's election petition (and vice versa).

Dold supported its election petition with many of the documents and factual allegations it presented here—including the fact that Dold had hired numerous replacement employees and that 30 percent of the employees who had gone out on strike no longer were interested in returning to Dold.

The Board's Regional Director for Region 17 dismissed Dold's petition on November 16. According to the Regional Director:

> . . . it does not appear that further processing of this petition is warranted. The evidence relied upon by the Employer as objective considerations is in-

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[29] See text at fn. 4, supra.

[30] *United Aircraft Corp.*, 168 NLRB 480, 486–487 (1967).

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> sufficient to establish that a question concerning representation exists. Thus, barring evidence to the contrary, new employees, including striker replacements, are presumed to support the Union in the same ratio as those whom they have replaced. See, e.g., *Windham Community Memorial Hospital*, 230 NLRB 1070.

After unsuccessfully seeking reconsideration of that Order by the Regional Director, Dold appealed to the Board. But the Board affirmed the dismissal:

> Having duly considered the matter, the Board concluded that the allegations in Employer-Petitioner's request for review of the Regional Director's administrative dismissal of the instant petition are insufficient to warrant reversal of the Regional Director's action. Accordingly, dismissal of the petition is hereby affirmed.

Given these circumstances, I have focused on whether I should refuse to consider any of the evidence in this proceeding and, instead, rely on the outcome of the representation proceeding to conclude that Dold's refusal to bargain was unlawful. On the face of it, after all, Dold had its opportunity in the representation proceeding to present its case about Local 340's status and accordingly should be precluded from litigating here anything it claimed, or could have claimed, in that proceeding. At least one Board decision arguably supports that approach. *General Marine Transport Corp.*, 238 NLRB 1372 (1978), enf. denied on other grounds 619 F.2d 180 (2d Cir. 1980).

The difficulty with finding against Dold on res judicata grounds is that that issue has not been litigated: None of the parties opted to argue the question (or even mention it) either in their prehearing pleadings, or at the hearing, or on brief. And beyond that, it is not entirely clear that the Board should preclude an employer from fully litigating an unfair labor practice claim of the kind here under consideration solely because of an earlier representation proceeding. *Clothing Workers v. NLRB*, 365 F.2d 898 (D.C. Cir. 1966).

For these reasons—the issue was not litigated and the outcome of cases such as *Clothing Workers*—I have refrained from passing on the impact here of the Board's ruling on Dold's representation petition.

H. *Dold's Refusal to Honor the Union's Offer to Return the Strikers to Work*

An economic striker is entitled to full reinstatement to his former job or to a substantially equivalent job on his, or his representative's, unconditional offer to return to work. If an employer has hired permanent replacements for the strikers, the employer need not discharge the replacements to make room for the returning strikers. But the employer must, when and if a job becomes available for which the striker is qualified, offer him that job.[31] A union is a representative of striking employees for such purposes, and accordingly an employer must honor an unconditional offer to return to work made on behalf of strikers by their union.

According to the General Counsel, on three separate occasions Local 340 made an unconditional offer, on behalf of the strikers, for their return to work. The dates: October 23, and November 4 and 11. The General Counsel claims that Dold failed to respond appropriately to those offers and that Dold thereby violated Section 8(a)(1) and (3) of the Act. Dold agrees that it did not reinstate any employee in response to any offer by Local 340. But according to Dold, the Union at no time made an unconditional offer for the return of the striking employees.

The period October 23 to November 4: The General Counsel argues that at the October 23 meeting representatives of Local 340 made an unconditional offer to return to work on behalf of the striking employees. Dold denies that the Union made any such offer during that meeting. The evidence supports Dold.

To begin with, even if the testimony of the General Counsel's witness—Hylton—is taken at face value, the Union made no unconditional offer at that October 23 meeting. Hylton repeatedly testified that he was the only one to speak for the Union on the subject at the meeting, and the only words he used that could be construed to be such an offer were, "We are going to put the people back to work."[32]

As of October 23 the strike was still in progress, with pickets maintaining an around-the-clock vigil outside Dold's plant; the Union had not agreed to Dold's contract terms; and another bargaining session had been set (for November 3). In those circumstances, Hylton's comment, couched in the future tense, and with the word "unconditional" conspicuously absent, would not have amounted to an unconditional offer to return to work, even if Hylton's testimony on the subject was accurate.[33]

In any case, I do not think that any union representative said anything about returning the employees to work either at the October 23 meeting itself or during the telephone conversations setting up the meeting. Carey flatly denied hearing any such statement. None of the members of Dold's negotiating team testified that Hylton (or Union Business Agent Immesote) said anything about returning the employees to work. Hylton's memory was spotty. Nothing about the circumstances of the meeting and its aftermath, taken as a whole, suggest that Local 340 made an unconditional offer during the course of the October 23 meeting to return the strikers to work.

The period subsequent to November 4: On November 4 Local 340 sent the following telegram to Dold:

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[31] *Laidlaw Corp.*, 171 NLRB 1366 (1968), enfd. 414 F.2d 99 (7th Cir. 1969), cert. denied 397 U.S. 920 (1970).

[32] Tr. 88-89. See also Tr. 49, "We were going to . . . put the people back to work," and Tr. 37, "We were going to return the people back to work."

[33] At one place in his testimony Hylton did say that he had told Carey, during the course of an October 20 telephone conversation, that "we're going to return the employees unconditionally to work." Tr. 28. But that claim about the use of the word "unconditionally" is particularly hard to credit, if only because it is so badly outnumbered by Hylton's other statements about what he said.

> [Local 340] accepts the employer's most recent proposals. The strikers hereby officially offer to return to work unconditionally. Your immediate response is expected and requested.

Dold responded, by telegram, that same day, indicating that it would recall strikers as vacancies arose. Despite that telegram, Dold did not treat the Union's November 4 telegram as an unconditional offer to return the strikers to work. The reason for that refusal, says Dold, is that the employees remained on strike until the morning of November 8. Dold claims that that rendered the Union's offer invalid.

A "strike" is the concerted voluntary withholding of services.[34] Accordingly an unconditional offer to return to work and a strike's continuation after the offer are inconsistent with one another.

Dold nonetheless violated the Act when it failed to honor the Union's November 4 offer to return the strikers to work. There is no doubt that picketing continued until November 8; however, picketing does not necessarily mean that the employees refuse to work.[35] Apart from the picketing, Dold had no reason to believe that the Union's unconditional offer to return the strikers to work was less than bona fide. Under the circumstances if, because of the picketing, Dold was unsure of the meaning of Local 340's offer to return the strikers to work, Dold was obligated to clarify the situation by promptly communicating with the Union. *Home Insulation Service*, 255 NLRB 311 (1981); *Soule Glass & Glazing Co. v. NLRB*, 652 F.2d 1055 (1st Cir. 1981). Dold, however, did not advise the Union of its concerns until November 11—a week after the Union's offer and 3 days after the picketing stopped. That is too long a delay. In any case, in response to Dold's November 11 message the Union immediately confirmed it's unconditional offer. Yet Dold continued to disregard the Union's offer. (During this proceeding a representative of the Union (Hylton) and the General Counsel (on brief) referred to the "strike" as continuing until November 8. Even treating that as an admission that the work stoppage continued after November 4, I think Dold was still under obligation at least to check with the Union before assuming that the Union's offer was not unconditional. *W. C. McQuaide*, supra; *Harris-Teeter*, supra. Moreover, although a Dold representative also referred to the "strike" continuing until November 8, he indicated that he meant only that the picketing continued until then: Tr. 202-203.)

Dold puts forth a second reason why, it claims, it properly treated as conditional Local 340's offer to return the strikers to work: The unfair labor practice charge filed against Dold by Local 340 on November 8.

The charge in question states, in part, that Dold violated the Act because Dold "refuses to return to work former economic strikers who have offered to return unconditionally." Dold claims that were it allowed access to the General Counsel's investigative files in the matter, it would be able to show that by the quoted phrase the Union intended to claim that once the Union made an unconditional offer to return the strikers to work, Dold came under a duty to fire any replacement employees who were still in their probationary period in order to make way for the strikers. (Dold did seek access to the relevant General Counsel files but the General Counsel denied the Company's requests.) Dold goes on from there to argue that a claim of that nature is inconsistent with an unconditional offer to return to work.

I will assume, for present purposes, that Dold's reading of Local 340's unfair labor practice charge is accurate. That is, the charge was the embodiment of a union contention that the Act required Dold to lay off the probationary employees to make room for returning strikers. That assumption, however, is of no assistance to Dold. It is true, as Dold points out, that Dold could have lawfully ignored Local 340's offer if the Union had conditioned its cessation of the strike on the displacement by Dold of any group of replacement employees; however, that has no relationship to the filing of a charge with the Board. Local 340 attached no conditions whatever to its cessation of the strike. As for the charge, a union has the right to test the lawfulness of an employer's recall procedures, and to do so by filing a charge with the Board, without thereby entitling the employer to refrain from recalling the ex-strikers. Indeed had the matter been litigated I would be obligated to find that, by failing to recall striking employees because of the Union's charge, Dold violated Section 8(a)(1) and (4). See, e.g., *NLRB v. Scrivener*, 405 U.S. 117 (1972); *NLRB v. Globe Mfg. Co.*, 580 F.2d 18 (1st Cir. 1978); *Vulcan-Hart Corp.*, 248 NLRB 1197 (1980), enfd. in part 642 F.2d 255 (8th Cir. 1981).

CONCLUSIONS OF LAW

1. Dold violated Section 8(a)(1) and (3) of the Act when it failed to reinstate employees who had engaged in the strike pursuant to the unconditional offer to return to work made on November 4, 1982, by the striking employees through their representative, Local 340.

2. Dold has not otherwise been shown to have violated the Act.

THE REMEDY

As just stated, Dold wrongfully failed to treat as valid Local 340's unconditional offer of November 4 to have the strikers return to work. If Dold had treated the Union's November 4 offer as valid, some of the striking employees would have been recalled sooner than they in fact were. (Issues such as the number of such employees, their identity, and the extent of the delay of their recall shall be left for resolution in the compliance stage.) Dold will be required to make the affected employees whole for any loss of earnings and other benefits they may have suffered by reason of the Company's discrimination against them. Backpay will be computed as prescribed in *F. W. Woolworth Co.*, 90 NLRB 289 (1950), plus interest as computed in *Florida Steel Corp.*, 231 NLRB 651 (1977). The Company will also be required to cease and desist from its unlawful acts, to notify its employees of the Board's Order, and to take various other actions related to the above requirements.

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[34] *Shelly & Anderson Furniture Mfg. Co.*, 199 NLRB 250, 263 (1972), enfd. 497 F.2d 1200 (9th Cir. 1974). See also *American Ship Building Co. v. NLRB*, 380 U.S. 300, 310 (1965); *Jones & Laughlin Steel Corp. v. Mine Workers*, 519 F.2d 1155, 1158 (3d Cir. 1975).

[35] *W. C. McQuaide, Inc.*, 220 NLRB 593 (1975), enfd. in part 552 F.2d 519 (3d Cir. 1977); *Harris-Teeter Super Markets*, 242 NLRB 132 (1979), enfd. mem. 644 F.2d 39 (D.C. Cir. 1981).

[Recommended Order omitted from publication.]

Geo. V. Hamilton, Inc., and/or CMD, Inc. *and* General Teamsters, Chauffeurs and Helpers Local 249 a/w International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, AFL-CIO.[1] Case 6-CA-17619

July 28, 1988

DECISION AND ORDER

BY CHAIRMAN STEPHENS AND MEMBERS JOHANSEN, BABSON, AND CRACRAFT

On March 29, 1985, Administrative Law Judge Russell M. King Jr. issued the attached decision. The General Counsel filed exceptions and a supporting brief.

The Board has considered the decision and the record in light of the exceptions and brief and has decided to affirm the judge's rulings, findings, and conclusions as modified and to adopt the recommended Order.

The complaint alleges (1) that Geo. V. Hamilton, Inc. and CMD, Inc. are a single employer;[2] (2) that the Respondent, a single employer, has unlawfully refused to recognize and bargain with the Union as the exclusive representative of the Respondent's warehouse employees at both its Hamilton and CMD facilities; (3) that the Respondent has refused to apply the collective-bargaining agreement between Hamilton and the Union (covering the Respondent's Hamilton warehouse employees) to the Respondent's CMD warehouse employees; (4) that the Respondent unlawfully laid off employee Joseph Welsh; and (5) that the Respondent unlawfully refused to provide the Union with requested information assertedly necessary for and relevant to the Union's performance of its function as exclusive collective-bargaining representative of the employees in question.

The judge found that Geo. V. Hamilton, Inc. and CMD, Inc. are not a single employer; that the Union was not unlawfully denied recognition or deprived of information; and that employee Welsh was not unlawfully laid off. Thus, the judge dismissed the complaint in its entirety.

For the reasons set forth below, we find, contrary to the judge, that Geo. V. Hamilton, Inc. and CMD, Inc. are a single employer. Also for the reasons set forth below, however, and notwithstanding our finding of single-employer status, we affirm the judge's conclusion that the Respondent did not unlawfully refuse to recognize and bargain with the Union regarding a unit of warehouse employees at both the Hamilton and CMD facilities. We further find that the Respondent did not unlawfully refuse to provide information to the Union. Finally, we agree with the judge, for the reasons set forth below, that the Respondent did not unlawfully lay off employee Welsh.

I. FACTS

Respondent Hamilton sells, distributes, and installs insulation. The Union has represented Hamilton's warehouse employees since 1973. The Hamilton warehouse employees were covered by a collective-bargaining agreement between Respondent Hamilton and the Union for the period August 1, 1982, through July 31, 1986. During the time of the 1984 events, there were two employees in the warehouse unit: Donald Martin, who worked primarily at the Hamilton facility itself, and Joseph Welsh, who worked primarily in the Shovel warehouse, a public commercial warehouse about a quarter of a mile from the Hamilton facility, in which Hamilton rented space.[3] About twice a month, Welsh went to the Hamilton facility to assist Martin in his warehousing duties; about twice a week, Martin went to the Shovel warehouse to assist Welsh in his warehousing duties. When either Martin or Welsh was on vacation, the other would cover the warehousing requirements at both locations.

Carl Geier is Respondent Hamilton's president, chief executive officer, and majority owner. In April 1984,[4] Carl Geier, his wife Marlene, and Doug Anderson, a Hamilton salesman, formed CMD, Inc., each as one-third owner, and purchased the Shovel warehouse. Carl Geier took no formal management title in CMD. Doug Anderson was named president and Marlene Geier was named secretary-treasurer. Although Anderson was nominally CMD's chief executive officer, most of his time was taken up by his job as salesman for Hamilton. Thus, according to Carl Geier, he functioned as "manager of sorts" at CMD, at least during the early months of CMD's existence, dividing his time equally between Hamilton and CMD.

CMD operated its warehouse the same way that Shovel, its previous owner, had operated it, as a public commercial warehouse, renting space to several long-term and numerous short-term tenants.

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[1] On November 2, 1987, the Teamsters International Union was readmitted to the AFL-CIO. Accordingly, the caption has been amended to reflect that change.

[2] A "single employer" relationship exists when two nominally separate entities are actually part of a single-integrated enterprise so that, for all purposes, including liability for actions alleged to be in violation of the National Labor Relations Act, there is in fact only a "single employer." See *NLRB v. Browning-Ferris Industries*, 691 F.2d 1117 (3d Cir. 1982).

[3] Initially, this public warehouse was owned by the Shovel family. Subsequently, as discussed, infra, it was purchased by Respondent CMD.

[4] All dates are 1984 unless otherwise indicated.

289 NLRB No. 165

Hamilton continued as a long-term tenant of the Shovel (now CMD) warehouse, renting about one-quarter of the warehouse space. Indeed, Hamilton warehouse employee Welsh continued to spend most of his time in Hamilton's rented portion of the CMD warehouse. Prior to CMD's purchase of the Shovel warehouse, Shovel warehouse employees John and Dave Shovel and Hamilton warehouse employee Welsh had occasionally assisted each other in their respective tasks, primarily in unloading trucks as quickly as possible, regardless of whose customer (i.e., Hamilton's or Shovel's), in the mutual Hamilton-Shovel interest of keeping the docks open, to accommodate other trucks that were waiting to load or unload warehouse material. Following CMD's purchase of the Shovel warehouse, however, Welsh and the Shovel brothers (now CMD employees) routinely and normally worked together in servicing the entire CMD warehouse, without regard to any Hamilton-CMD space boundaries. Between the time of the April purchase and the following September, neither Hamilton nor CMD billed each other for these services; starting in September, they began to do so.

On September 10, Hamilton laid off Welsh. Carl Geier told Welsh that he was being laid off because Hamilton was subletting all its warehouse work to CMD, eliminating Welsh's job. The other Hamilton warehouse employee, Martin, continued to perform his normal warehousing duties at the Hamilton facility, apparently unaffected by this subletting.

Welsh and Union Business Agent William Barker protested Welsh's layoff to Geier. Barker argued that since the Shovel brothers were doing the same work as Welsh at the CMD warehouse, they should be considered part of the warehouse bargaining unit, in which case Welsh's seniority would preclude his being laid off ahead of either John or Dave Shovel. Barker also asked Geier for documentation of Hamilton's purported subletting of its warehouse function to CMD. Barker further asked Geier for the names of the principal officers of CMD. According to Barker, Geier "short[ly] and politely told me that it was none of my business."

On September 11, Welsh submitted his written grievance over his layoff. On September 14, Barker notified Geier by letter that the Union was giving "official written notice" of the grievance, and that it was proceeding in accordance with the grievance-arbitration provisions of the collective-bargaining agreement to the next step in the procedure—arbitration. In this context, on September 24, Barker requested in writing that Geier provide the Union with the names of the principal officers of CMD and copies of all written agreements between Hamilton and CMD. On September 26, the Union's attorney wrote to Geier requesting, in the context of Welsh's grievance over his layoff, "all documents, including contracts, entered into between [Hamilton] and CMD between August 1, 1982, and the present time for the performance of any work or services either by [Hamilton] for CMD or by CMD for [Hamilton]." This letter also requested information about the officers, stockholders, and directors of both Hamilton and CMD, "it being the Union's understanding that these are the same people or virtually the same people." The letter stated that the requested information was needed to enable the Union to process Welsh's layoff grievance because (1) it was the Union's understanding that Welsh was laid off ostensibly because Hamilton was now able to have Welsh's work done by CMD, and (2) it was the Union's contention that Hamilton and CMD were a "joint employer" of Welsh, or were "otherwise allied" with each other. The Respondent did not give the Union the information requested in these September 24 and 26 letters.

The Union continued to press for arbitration of Welsh's layoff grievance. On October 15, however, Geier notified the Federal Mediation and Conciliation Service (FMCS) that Welsh's grievance was "not subject to arbitration" because (1) Welsh had been offered another job with Hamilton, which he declined, and (2) Welsh's warehouse job with Hamilton had been eliminated, "all work being sublet to CMD, Inc."

The complaint alleges that Welsh's layoff was discriminatorily motivated by his activities in support of the Union. Barker, Welsh, and Martin had been the union negotiators in the protracted (15 months) bargaining in 1982–1983, leading up to the current contract. During these negotiations, the Union filed unfair labor practice charges, and a complaint was issued alleging that Hamilton, through Geier, had failed to bargain in good faith. A settlement was reached, and the current contract was finalized in October 1983 and made retroactive to August 1, 1982. In July or August 1984, subsequent to CMD's formation and purchase of Shovel, Geier offered Welsh a change in jobs, to inventory/recordkeeping. This job was not in the bargaining unit. According to Welsh, Geier told him that, if he took this job, he would have to leave the Union, accept "company benefits," and work under a different pay scale. Welsh ultimately declined the new job. Martin and Barker also testified that at a contract negotiating session in January 1983 Geier stated that the Union had done nothing for the employees, that they should try to better themselves by moving up in the Company, and that once the

Union was out he could do what he wanted. Geier denied that he threatened any employees that their advancement in the Company would be curtailed because of the Union.

II. ANALYSIS AND CONCLUSIONS

1. The judge concluded that Hamilton and CMD are not a single employer. We do not agree. In analyzing the instant single-employer issue, the judge applied "a conceptual approach, relying more on economic realities." The judge concluded, in effect, that Hamilton and CMD are not a single employer because it was unlikely that Geier formed CMD and had CMD purchase the Shovel warehouse merely as a means to rid Hamilton of its obligation to bargain with the Union about the Hamilton warehouse employees. In essence, then, the judge has found that Hamilton and CMD are not a single employer because CMD was not formed and operated for an unlawful purpose. Although we agree with the judge that CMD was not formed or operated for an unlawful purpose, we do not agree with the judge that Hamilton and CMD are not a single employer. In this regard, we do not agree with the judge's application of this "conceptual approach" to the instant single-employer issue.[5]

The standards for determining the existence of a single-employer relationship are well settled and are concisely summarized in *Central Mack Sales*, 273 NLRB 1268, 1271–1272 (1984), as follows:

> In determining whether two or more businesses are sufficiently integrated so that they may be fairly treated, for jurisdictional and other purposes, as a single enterprise, the Board looks to four principal factors: (1) common management; (2) centralized control of labor relations; (3) interrelation of operations; and (4) common ownership or financial control. *Radio and Television Broadcast Technicians Local Union 1264 v. Broadcast Service of Mobile, Inc.*, 380 U.S. 255, 256 (1965); *Sakrete of Northern California, Inc. v. N.L.R.B.*, 332 F.2d 902, 905, fn. 4 (9th Cir. 1964). "The Board has determined that no single criterion is controlling, although it considers the first three, which evidence operational integration, more critical than the fourth, common ownership." *N.L.R.B. v. Triumph Curing Center and M. F. Lee d/b/a Lee's Sewing Company, Inc.*, 571 F.2d 462, 468 (9th Cir. 1978), enfg. 222 NLRB 627 (1976).

Of the above-mentioned first three criteria relating to operational integration, particular emphasis has been placed on centralized control of labor relations. *Stoll Industries*, 223 NLRB 51, 54 (1976). Analyzing the facts in this case in light of the above standards, we find that Hamilton and CMD are a single employer.

Regarding common management of both Hamilton and CMD, the record establishes that Carl Geier, as president, chief executive officer, and majority owner of Hamilton, fully and closely manages that Company. Notwithstanding his lack of an official title with CMD, the record also establishes that, as one-third co-owner with his wife and Doug Anderson, Geier also effectively controls and manages CMD. Anderson's position as president of CMD appears to be no more than titular. Although neither Anderson nor CMD's secretary/treasurer, Marlene Geier, testified at the hearing,[6] the testimony of Carl Geier makes it clear that most of Anderson's time is spent on the road in his capacity as an outside salesman for Hamilton. During the 6-month period following CMD's April purchase of the Shovel warehouse, Geier divided his time equally between Hamilton and CMD.[7]

Carl Geier manages and controls all labor relations matters for both Hamilton and CMD. He has personally negotiated all labor contracts for Hamilton since 1973.

Regarding common ownership of Hamilton and CMD, Geier testified that he is the "substantial majority" owner of Hamilton (he did not disclose his exact percentage of ownership). Hamilton's vice president, Paul Heil, and secretary/treasurer, Edward Koller, also own an unspecified number of shares of Hamilton. As seen, Carl Geier, his wife Marlene, and Hamilton's salesman, Doug Anderson, are each one-third owners of CMD.

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[5] The judge stated that this approach was approved by the Board in *Parklane Hosiery*, 203 NLRB 597 (1973). We find the judge's reliance on *Parklane* in this regard to be misplaced. In that case, the two respondent employers were alleged to be a single or joint employer, or (alternatively) alter egos. The judge in that case found that the evidence did not establish single or joint employer status. Neither the General Counsel nor the charging party filed exceptions to the judge's finding. Thus, the question of single or joint employer status was not before the Board in *Parklane*. In any event, in analyzing the single or joint employer issue in *Parklane*, the judge employed essentially the well-established, four-factor analysis, discussed below, normally applied to a single-employer issue. 203 NLRB at 612–614. It was on the separate, analytically distinct question whether there was an alter ego relationship in *Parklane* that the judge applied the type of motive/purpose analysis that the judge in the instant case implicitly applied to the single-employer issue. 203 NLRB at 614-619. Although we do not question the application of a motive/purpose analysis to the alter ego issue in *Parklane*, we note, as did the judge in the instant case (at fn. 27 of the attached decision), that no alter ego issue has been raised in this case and, thus, there is no proper basis for application of *Parklane*'s "conceptual approach."

[6] Carl Geier was the only official of Hamilton or CMD to testify in this proceeding. Indeed, although not an attorney, Geier represented both Hamilton and CMD throughout the hearing.

[7] According to Geier, he is still the "manager of sorts" of CMD, although he was "trying to make a manager out of John Shovel."

Finally, regarding interrelation of operations, we note that during the 5-month period between CMD's purchase of the Shovel warehouse and Hamilton's layoff of warehouseman Welsh, the Shovel brothers (employed by CMD) and Welsh (employed by Hamilton) worked together and interchangeably in servicing the entire CMD warehouse, without regard to any Hamilton-CMD space boundaries. Additionally, following CMD's purchase of the Shovel warehouse, Welsh continued to assist Martin in the Hamilton warehouse facility about twice a month (although Martin no longer came to the Shovel warehouse to help Welsh after CMD purchased the Shovel warehouse and Welsh and the Shovel brothers began to work together in servicing the needs of the entire CMD warehouse).[8]

In light of (1) common management of Hamilton and CMD by Carl Geier; (2) Geier's common control over the labor relations matters of both Companies; (3) the "substantial majority" ownership of Hamilton by Carl Geier and the (combined) two-thirds ownership of CMD by Carl and Marlene Geier; and (4) the close interrelationship of warehouse operations between Hamilton and CMD, we find that Hamilton and CMD are a single employer.

2. However, notwithstanding our finding that Hamilton and CMD are a single employer, we find, under the circumstances of this case, that the Respondent did not unlawfully refuse to recognize and bargain with the Union with regard to, or apply the terms of the Hamilton-Union collective-bargaining agreement to, a unit of warehouse employees at both the Hamilton and CMD facilities.

The issue here is whether the two-employee CMD group constitutes an accretion to the two-employee Hamilton bargaining unit. If so, the Respondent would be obligated to bargain with the Union about, and apply the collective-bargaining agreement to, the CMD employees; if not, the Respondent would be under no such obligation.

In *Central Soya Co.*, 281 NLRB 1308 (1986), the Board addressed the question whether an historically unrepresented unit of 13 feed mill employees at a newly acquired location constituted an accretion to a represented unit of 15 feed mill employees from another location, following consolidation of feed mill operations at the newly acquired, historically unrepresented location. The Board found an accretion and a consequent obligation on the part of the employer to recognize and bargain with the union as the exclusive bargaining representative of the new 28-employee unit of feed mill employees at the newly acquired location, and an obligation to apply the existing collective-bargaining agreement covering the former 15-employee unit to this new 28-employee unit. In so finding, the Board relied expressly on (1) the absence of any substantial change in overall operations following the consolidation of the two feed mills and (2) the fact that the represented employees constituted a majority (i.e., 15 of 28) of the newly combined work force. With particular regard to the latter factor, the Board noted that it had never held that an accretion *cannot* be found when the two groups of employees in question are of approximately equal size: "In fact, the Board has effectively found valid accretions in cases involving approximately equal size groups *even when the represented employees barely constituted a majority of the combined work force*." 281 NLRB 1308 (emphasis added). In the same part of its decision the Board describes such majority status as "the key fact." Id. Finally, the Board found that the balance between the sometimes conflicting goals of (1) assuring employees their choice of whether and by whom to be represented, and (2) fostering established bargaining relationships, should be struck in that case in favor of the existing bargaining relationship covering the represented employees, "who constitute a clear majority of the combined work force."

In the instant case, as in *Central Soya*, there is full operational integration of the previously separate Hamilton and CMD (formerly Shovel) warehouse operations, with no substantial change in those operations. However, unlike the circumstances in *Central Soya*, the represented Hamilton warehouse employees do *not* constitute a majority of the employees in the assertedly appropriate unit of Hamilton and CMD warehouse employees. Rather, from the time of CMD's April acquisition of the Shovel warehouse and the resultant combining of Hamilton and CMD work at the (now) CMD warehouse, through the allegedly unlawful September layoff of Hamilton warehouseman Welsh, there were an equal number of represente employees (Hamilton warehousemen Martin and Welsh) and unrepresented employees (CMD warehousemen John and Dave Shovel). Thus, a crucia factor in the finding of an accretion in *Centra Soya*—union majority status—is not present here Consistent with the rationale in *Central Soya*, w conclude that the CMD warehouse employees d not constitute an accretion to the Hamilton warehouse unit, and that the Respondent did not unlawfully refuse to recognize and bargain with th

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[8] We also note in this context that two part-time clerical employees of Hamilton have been trained to work at CMD in the event of a "crisis" and that three CMD employees (the Shovel brothers and a clerk) are covered under Hamilton's group health insurance plan (for which coverage Hamilton bills CMD).

Union regarding a unit of Hamilton and CMD warehouse employees, or unlawfully refuse to apply the terms of the Hamilton-Union collective-bargaining agreement to such a unit.[9]

3. As noted above, in September, about 5 months after CMD's acquisition of the Shovel warehouse and the resultant integration of Hamilton and CMD warehouse operations, Hamilton warehouseman Welsh was laid off. He filed a grievance and the Union requested the Respondent to provide it with certain information assertedly relevant to and necessary for the Union's processing of the grievance. The Respondent is alleged to have violated Section 8(a)(5) and (1) of the Act by its failure and refusal to provide the requested information.

The issue here is whether, following the operational integration of the Hamilton and CMD warehouse functions, but where we have found no accretion of the CMD employees to the Hamilton unit, the Respondent remained under an obligation to continue to bargain with the Union regarding the Hamilton employees. For the reasons discussed below, we find that the Respondent no longer remained under such an obligation.

The Board has held that an employer is not obligated to continue to recognize and bargain with a union as the exclusive bargaining representative of one group of its employees when that represented group is merged with an unrepresented group in such a manner that an accretion cannot be found and the original represented group is no longer identifiable. Thus, in *Abbott-Northwestern Hospital*, 274 NLRB 1063 (1985), there was a collective-bargaining agreement covering the separate Northwestern and Abbott divisions. The contract expressly included psychiatric assistants at the Northwestern division, but expressly excluded psychiatric assistants at the Abbott division; the union had never been recognized as the representative of the psychiatric assistants at the Abbott division. During the term of the contract, the employer consolidated the Northwestern and Abbott divisions into one mental health function, at Northwestern, and transferred the approximately 63 unrepresented Abbott psychiatric assistants to Northwestern, where they were fully integrated with the approximately 9 represented Northwestern psychiatric assistants. Thereafter, this integrated staff of psychiatric assistants performed the same basic duties and functions under common supervision at Northwestern.

The employer initially attempted to apply the terms of the collective-bargaining agreement to the 9 psychiatric assistant positions identified as "Northwestern" positions, and attempted to apply the terms of its policies applicable to unrepresented employees to the 63 psychiatric assistant positions identified as "Abbott" positions. However, the employer ultimately found this to be unworkable and notified the union that it was withdrawing recognition of the union as the bargaining representative of "any of the psychiatric assistants" in question. Thereafter, the employer treated all its psychiatric assistants, including the formerly represented Northwestern psychiatric assistants, as being unrepresented.

The complaint in *Abbott-Northwestern* alleged (1) that *all* the psychiatric assistants employed at the recently integrated Northwestern facility were properly included in the unit in question, but (2) that the employer actually violated the Act only by withdrawing recognition of the union as the representative of the nine psychiatric assistants who had worked and been represented by the union at Northwestern prior to the integration of the Abbott and Northwestern mental health functions.

The Board dismissed the complaint. The Board noted that, after the consolidation at Northwestern of the formerly separate Northwestern and Abbott mental health functions, the employer was faced with having to apply different terms and conditions of employment to "a small portion of a larger group of employees, even though all of them performed the same tasks under common supervision at the same facility." 274 NLRB at 1064. The Board found that a unit including some of, but not all, the psychiatric assistants was inappropriate. According to the Board: "In our view, no unit is appropriate with respect to the Respondent's psychiatric assistants which fails to include all of them."[10] The Board dismissed the complaint inasmuch as the unit from which the respondent withdrew recognition on a limited basis was inappropriate.

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[9] Cf. *Special Machine & Engineering*, 282 NLRB 1410 (1987), discussing and directly applying *Central Soya* in finding that a unit of 28 unrepresented production employees was, under the circumstances, an accretion to a unit of 50 represented production and maintenance employees.

In reaching our conclusion here, we note that in the *Central Soya* discussion of accretions involving "approximately equal" groups of represented and unrepresented employees, the Board cited *Public Service Co. of New Hampshire*, 190 NLRB 350 (1971), a case that appears to be inconsistent with the principal rationale of *Central Soya* and with our holding in the instant case. In *Public Service Co. of New Hampshire*, the majority of a three-member Board panel found that five unrepresented employees constituted an accretion to a unit of five represented employees. The panel majority did not refer to or discuss the absence of a majority of represented employees, although a dissent emphasized the absence. Despite the citation of *Public Service Co. of New Hampshire*, it is clear from the Board's analysis in *Central Soya* and in the instant case that to find an accretion, even when the two groups in question are of approximately equal size, there must be a showing, inter alia, that the employees in the represented group outnumber the employees in the unrepresented group. Accordingly, *Public Service Co. of New Hampshire* is overruled.

[10] Id. at 1064. The Board also found that the 63 historically unrepresented psychiatric assistants for Abbott could not properly be found to be an accretion to the 9-member historically represented unit of Northwestern psychiatric assistants.

Similarly, the Board has refused to find that a certified union continued to be the exclusive representative when the unit for which it was certified has been integrated with an unrepresented group such that the separate identity of the certified unit has been completely obscured. In *Renaissance Center Partnership*, 239 NLRB 1247 (1979), the employer owned and operated the Renaissance Center (the Center), an urban commercial development that included, inter alia, the Detroit Plaza Hotel (the Hotel). In November 1977, the union became the certified representative of the Center's approximately 59 security guards; the Hotel's approximately 67 security guards were unrepresented. In April 1978, the Center and the Hotel operationally and administratively consolidated the two security guard groups under (and as employees of) the Center.[11] Following the integration of these two groups, the security guards were all placed under control of the Center, with common supervision, identical terms and conditions of employment, and complete interchangeability of duties: the former Hotel security guards were completely integrated with the Center's guards.

The union filed a unit clarification (UC) petition, asserting that the approximately 67 unrepresented former Hotel guards constituted an accretion to the represented unit of approximately 59 Center guards. The Center, on the other hand, filed a representation (RM) petition, asserting that the consolidation of the (unrepresented) Hotel guards with the (represented) Center guards raised a question concerning representation as to the overall integrated guard unit.

The Board found that a question concerning representation existed, even though the initial certification year had not yet expired.[12] The Board reasoned as follows:

> The consolidation of the two groups has precipitously increased the size of the Employer's security force and has *completely obscured the separate identity of the certified bargaining unit which existed prior to the consolidation*. It is the kind of unusual circumstance which justifies an exception to the certification-year rule.
>
> We therefore find that the Regional Director's decision finding an accretion improperly disenfranchises the former hotel employees and that *the certified unit is no longer appropriate because of the merger of the two security groups and resultant intermixing of the represented and the larger unrepresented work forces. Rather, only the overall security force of the Employer is now appropriate*. Because the Union claims to represent all of the Employer's guards and security officers, a question concerning representation exists in the overall unit.[13]

The Board directed an election in the overall unit it found appropriate.

As in the cases discussed above, in the instant case there also was a complete operational and administrative integration of a union-represented unit with a nonrepresented work group. Thus, in April, the two-location Hamilton warehouse function was fully integrated with the single-location CMD warehouse operation, under the complete operational and administrative control of the Respondent single employer. The represented two-employee Hamilton warehouse unit was fully integrated with the unrepresented two-employee CMD warehouse work force. In light of the full operational and administrative integration of the Hamilton and CMD warehouse functions and work forces under the Respondent single employer, we find, consistent with *Abbott-Northwestern*, supra, and *Renaissance Center*, supra, that a unit of only Hamilton warehouse employees ceased to be an appropriate unit when the Hamilton and CMD warehouse function and work forces became integrated in April. Rather, we find that as of April the only appropriate unit was an overall unit comprised of all warehouse employees employed by the Respondent single employer Hamilton and CMD, about which overall unit a question concerning representation existed. Accordingly, we find that as of the time of the Union's September requests for information related to the grievance over the layoff of Hamilton employee Welsh, the Hamilton unit had already been rendered inappropriate; that a question concerning representation existed regarding the appropriate overall unit of Hamilton and CMD warehouse employees; that the Respondent was, therefore, no longer under an obligation in September to bargain with the Union about the Hamilton employees; and that the Respondent was particularly under no obligation in September to provide the Union with information related to the grievance over the layoff of Hamilton employee Welsh. Consequently, we shall dismiss this allegation of the complaint.

4. Finally, we agree with the judge's dismissal of the allegation that the Respondent unlawfully laid

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[11] The Center and the union had not reached a collective-bargaining agreement.

[12] As the Board explained, the certification year rule requires a certified union's majority status to be honored for 1 year and representation petitions are usually barred during this 1-year period.

[13] 239 NLRB at 1248 (emphasis added). The Board rejected the union's accretion argument on the grounds that the unrepresented group outnumbered the represented group. Id. at 1247–1248.

off Joseph Welsh. More specifically, we find that the General Counsel has not met her burden of making a prima facie showing sufficient to support the inference that union or other protected conduct was a motivating factor in the Respondent's decision to lay off Welsh.[14]

Welsh's layoff occurred on September 10. The General Counsel's evidence of Welsh's union activity consists of his membership in the Union and his participation as part of the Union's three-man contract negotiating team over a 15-month period ending in October 1983. The General Counsel also relies on the Respondent's unwillingness to recognize the Union as the representative of employees in the Hamilton and CMD warehouses and the animus exhibited in the remarks made by Carl Geier to employees Martin and Welsh and Union Business Agent Barker in a negotiating session during January 1983. In those remarks, set out in section I, above, Geier essentially stated that the Union had done nothing for the employees, that they would do better by seeking to rise in the Company, and that once the Union was out he would be able to do what he wanted.

To the extent that the General Counsel contends that the Respondent was retaliating against Welsh for his union activity, we note that Welsh's membership in the Union was longstanding and we find that, insofar as his activity consisted of more than mere membership, it was too remote in time to be linked to the September 1984 layoff. For the same reason, we find Geier's January 1983 comments an inadequate basis for drawing an inference of unlawful motive in the September 1984 layoff. To the extent that the General Counsel's 8(a)(3) argument regarding Welsh derives from her allegation that his layoff was the result of the Respondent's failure to apply the bargaining agreement to all the warehouse employees and, accordingly, its failure to lay off a less senior employee rather than Welsh, her argument fails because we have concluded that the Respondent was not obligated under the Act to apply the agreement to all those employees.

ORDER

The recommended Order of the administrative law judge is adopted and the complaint is dismissed.

Sandra Beck Levine, Esq., for the General Counsel.

Carl H. Geier, pro se, of McKees Rocks, Pennsylvania, for the Respondent Employer.

DECISION

STATEMENT OF THE CASE

RUSSELL M. KING JR., Administrative Law Judge. This case was heard by me in Pittsburgh, Pennsylvania, on January 16, 1985. The original charge was filed by the General Teamsters, Chauffeurs and Helpers Local 249 a/w International Brotherhood of Teamsters Chauffeurs, Warehousemen and Helpers of America (Union) on September 12, 1984, and the complaint was issued on October 26, 1984, by the Regional Director for Region 6 of the National Labor Relations Board (the Board) on behalf of the Board's General Counsel.[1] The complaint alleges that sometime in the spring of 1984 Geo. V. Hamilton, Inc. (Hamilton) and CMD, Inc. (CMD) became a single employer.[2] The Union had represented the warehouse employees of Hamilton under a collective-bargaining agreement that expires July 31, 1986. The complaint alleges that commencing in September Hamilton and CMD refused to recognize and bargain collectively with the Union as the exclusive collective-bargaining representative of the warehouse employees and has refused to furnish the Union with certain information needed to perform its duties, in violation of Section 8(a)(1) and (5) of the Act. Lastly, the complaint alleges the unlawful layoff of employee Joseph Welsh on September 10 because of his union and protected, concerted activities, in violation of Section 8(a)(3) and (1) of the Act.[3] Both Hamilton and CMD deny that they are a single or joint employer and allege that since CMD is separate from Hamilton, CMD has no obligation to recognize and bargain with the union or to furnish the requested information. Regarding employee Welsh, Hamilton's president Carl H. Geier maintains that Welsh was terminated because his job was eliminated and he failed to accept an alternative job offer.

On the entire record, including my observation of the demeanor of the witnesses, and after due consideration of the brief filed by the General Counsel, I make the following

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[14] See generally *Wright Line*, 251 NLRB 1083, 1089 (1980), enfd. 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982), approved in *NLRB v. Transportation Management Corp.*, 462 U.S. 393 (1983).

[1] The term "General Counsel," when used, will normally refer to the attorney in the case acting on behalf of the General Counsel of the Board, through the Regional Director.

[2] All dates will be in 1984 unless otherwise indicated.

[3] The pertinent parts of the Act (29 U.S.C. § 151 et seq.) as follows:

> Sec. 8. (a) It shall be an unfair labor practice for an employer—(1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in Section 7; . . . .
>
> . . . .
>
> (3) by discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization; . . . .
>
> (5) to refuse to bargain collectively with the representative of employees . . . .
>
> . . . .
>
> Sec. 7. Employees shall have the right to self-organization, to form, join or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection . . . .

Findings of Fact[4]

I. JURISDICTION

The pleadings, admissions, and evidence reflect the following regarding jurisdiction. At all times material, Respondent Hamilton, a Pennsylvania corporation with its office and place of business in McKees Rocks, Pennsylvania, has been engaged in the wholesale sale, distribution, and installation of insulation materials and related products. During the 12-month period ending September 30, 1984, Respondent Hamilton, in the course and conduct of its operations, described above, purchased and received at its Pennsylvania facility products, goods, and materials valued in excess of $50,000 from points located outside the Commonwealth of Pennsylvania.

At all times material, Respondent CMD, a Pennsylvania corporation with an office and place of business in McKees Rock, Pennsylvania, has been engaged in the operation of a warehouse facility.

Thus I find, as admitted, that the Respondent Hamilton has been at all times material, an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act. I also find that the Union is now and has been at all times material a labor organization within the meaning of Section 2(5) of the Act.[5]

The jurisdictional allegations of the complaint in this case also allege that Hamilton and CMD constitute a single integrated business enterprise and a single employer within the meaning of the Act, and that collectively both Hamilton and CMD, together, meet the monetary amount found above regarding only Hamilton. Since these facts were vigorously contested in this case, any finding that Hamilton and CMD constitute a single employer or that CMD itself meets the jurisdictional standard will be delayed until later in this Decision.

II. ALLEGED UNFAIR LABOR PRACTICES

A. *Testimony and Evidence*[6]

William Barker testified as the Union's business agent, a position he had held since 1979.[7] The Union has represented Hamilton's warehouse employees since 1973, with successive contracts.[8] The most recent Hamilton contract ran from August 1, 1982, to July 31, 1986. That contract was negotiated by Barker and employees Joseph Welsh and Donald Martin, and with Geier. Prior to October 20, 1983,[9] there had not been a contract in effect for a period in excess of a year, and Barker testified that at a point in the negotiations he filed a charge with the Board, apparently alleging that Hamilton had not been bargaining in good faith. Subsequently, a complaint was issued by the Regional Director, and Barker testified that a settlement was ultimately reached regarding the complaint and that thereafter the current contract was entered into. The evidence in this case reflects that CMD was formed and, in April, purchased a warehousing facility where some of Hamilton's warehousing activity had been carried on, and eventually Hamilton's warehousing for its own products ceased and it was turned over to CMD. Employee Welsh had worked as a warehouseman for Hamilton at the CMD site and was laid off September 10. Hamilton alleges that the reason for Welsh's layoff was that his position was eliminated by virtue of CMD assuming Hamilton's warehouse activities. Barker testified that he first became aware of the warehousing changeover on September 10 when employee Welsh informed him that he had been laid off. The following day, September 11, Barker and Welsh met with Geier and Barker complained to Geier that Welsh was the most senior of the three warehousemen in the bargaining unit and should remain.[10] Barker testified that he also asked Geier for "documents or subcontracting lease or any paper" regarding the changeover, together with any subcontracting agreement that may exist. Barker further indicated that he asked Geier for the names of the principal officers of CMD, and that Geier's response to all his requests was short, but polite, "none of his business." Welsh's formal and written grievances were also submitted to Hamilton on September 11, and on September 14, Barker wrote to Geier about the grievance, indicating that they would now proceed to the arbitration step of the grievance procedure in the contract. Barker also indicated that Geier could contact the Union's attorney, Samuel J. Pasquarelli, for the selection of a Federal mediator from the Federal Mediation and Conciliation Service. On September 24 Barker again wrote to Geier and requested the names of the principal officers of CMD and copies of all written agreements between Hamilton and CMD. Barker never received the requested information.

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[4] The facts found are based on the record as a whole and on my observation of the witnesses. The credibility resolutions have been derived from a review of the *entire* testimonial record and exhibits with due regard for the logic of probability, the demeanor of the witnesses and the teaching of *NLRB v. Walton Mfg. Co.*, 369 U.S. 404, 408 (1982). Regarding those testifying in contradiction of the findings, their testimony has been discredited either as having been in conflict with the testimony of credible witnesses or because it was in and of itself incredible and unworthy of belief. *All* testimony and evidence, regardless of whether mentioned or alluded to, has been reviewed and weighed in light of the *entire* record.

[5] Carl H. Geier appeared in this case on behalf of Hamilton and CMD and also gave extensive testimony. Geier is not an attorney, but is president and the majority stockholder of Hamilton. He filed an answer to the complaint on Hamilton's letterhead and, regarding the alleged status of the Union as a labor organization under the Act, Geier's answer stated, "Assumed correct (not familiar with Sec. 2(5) of the Act)." The evidence and testimony in the case supports the finding that the Union is a labor organization as defined by Sec. 2(5) of the Act. Geier had negotiated and entered into successive collective-bargaining agreements (contracts) with the Union since 1973.

[6] The following includes a summary of a testimony of the witnesses appearing in the case. The testimony will appear normally in narrative form, although on occasion some testimony will appear as actual quotes from the transcript. The narrative only and merely represents a summary of what the witnesses themselves stated or related, without credibility determinations unless indicated, and does not reflect my ultimate findings and conclusions in this case unless so indicated.

[7] Barker was present throughout the case.

[8] The Union also represents a separate unit of Hamilton's truck drivers.

[9] The contract was actually signed on October 20, 1983, but its effective date was backdated to August 1, 1982.

[10] The three employees in the warehouse unit were originally Ott, Martin, and Welsh. Ott and Martin worked at Hamilton's own facility and Welsh worked at Hamilton's rented space at the CMD site, then known as the Shovel warehouse, which was owned and operated by the Shovel family prior to its purchase by CMD. When CMD purchased the warehouse, John Shovel and Dave Shovel were kept on as warehousemen for CMD. Ott had retired in January. When Barker talked of seniority, he was apparently referring to Welsh and the two Shovels.

Attorney Samuel J. Pasquarelli testified in the case and identified various correspondence that he was familiar with regarding the matter.[11] On September 26 Pasquarelli wrote Geier requesting copies of all documents and contracts that had been entered into by Hamilton and CMD between August 1, 1982, to date regarding the performance of work for Hamilton by CMD. Pasquarelli also requested in that letter information concerning the officers, stockholders, and directors of both Hamilton and CMD, adding in the letter that the information he requested dealt with employee Welsh's grievance and that it was the Union's contention that CMD and Hamilton were joint employers. Also on September 22, Pasquarelli filed a request for an arbitration panel with the Federal Mediation and Conciliation Service (FMCS), sending a copy of that request to Geier. The FMCS replied to Pasquarelli's request on October 8 and sent a copy of that reply to Geier. On October 15 Geier, apparently on behalf of Hamilton, wrote to FMCS indicating that the matter was not subject to arbitration and stating that Welsh's job had been eliminated due to "all work being sublet" to CMD. That letter also stated that Welsh had been offered another position with Hamilton and had declined.[12] A copy of the letter from Geier was also sent to Attorney Pasquarelli. Geier never replied to any of Pasquarelli's letters.

Carl H. Geier testified as the president and majority stockholder of Hamilton.[13] The other officers of Hamilton were Paul Heil, vice president, and Edward Kollar, secretary/treasurer; both of these individuals also own stock. Geier, on behalf of Hamilton, negotiated the existing agreement and signed the same. Geier indicated he was chief operating officer of Hamilton and, as such, is involved in the day-to-day operations at Hamilton. In addition to Geier, the other officers of Hamilton (Heil and Kollar) had the authority to hire and fire employees, as did Officer Manager Gorski. According to Geier, until January Bob Ott had been the warehouse supervisor at Hamilton's facility, and then Ott retired and Donald Martin, who also had worked with Ott, took his place.[14] Geier related that prior to Ott's retirement, Ott himself, together with Don Martin and Joseph Welsh composed the three employees who were in the warehouse unit and represented by the Union. Hamilton used two separate facilities for warehousing purposes. One of the facilities was located at Hamilton's main office on River Avenue, where Martin normally worked. The other warehousing site was known as the Shovel warehouse, located approximately a quarter of a mile from the River Avenue site. It was this site that CMD purchased. Geier testified that when Ott retired in January and employee Martin took his place, no replacement was hired for Martin. According to Geier, Martin's duties mainly included loading and unloading trucks, and completing the relevant paperwork. He was and is paid hourly, but Geier indicated his pay is "something above" the union-contract rate for warehouse employees. Geier added that Martin received time and a half for overtime and kept and the time sheet, which he turned in to Secretary/Treasurer Kollar, who also kept track of the vacation requests of employees. Geier further added that employee Welsh would also follow the same procedure.[15] When either Welsh or Martin was on vacation, one would cover for the other at both warehousing locations.[16]

Geier testified that in the spring of 1984 CMD, Inc. came into existence and that CMD stood for the initials of the first name of the three owners including himself, his wife, Marlene, and Doug Anderson, who was also a salesman at Hamilton. The three owned equal shares and, along with one Larry Niemann, constituted the board of directors. Anderson was the president of the CMD and Geier's wife, Marlene, was the secretary/treasurer. Geier testified that there was no vice president and that the chief operating officer responsible for CMD's day-to-day operations was Anderson. Geier added that he was the manager "of sorts," initially splitting his time between the Shovel warehouse, where CMD was located, and Hamilton's main office on River Avenue. The name "Shovel" is a family name and the warehouse was owned by John Shovel Sr. The Shovel family conducted a public warehousing business out of the Shovel warehouse and approximately one fourth of the space in that warehouse was rented and used by Hamilton for warehousing activities and a "fabric shop." Employee Welsh generally worked at the Shovel warehouse for Hamilton. Also working at the Shovel warehouse were brothers John and Dave Shovel and their sister Joan Shovel, who worked in the office and was assisted by one Susan Mann. The space occupied by Hamilton at the Shovel warehouse was through a written lease for an unknown amount per month.[17] The period of the lease was from March 7, 1982, through March 6, 1985. After CMD came into existence in the spring of 1984, it purchased the Shovel warehouse and its business, but John, Dave, and Joan Shovel continued to work at the warehouse. CMD part owner Anderson did not spend much time at the Shovel warehouse because his main job was that of an outside salesman for Hamilton. Both Geier and his wife, however, did spend some time at the warehouse and his wife, as CMD's secretary/treasurer, would count money and sign checks at the warehouse. Others having the authority to sign CMD checks included Geier himself, Anderson, and Joan Shovel. Geier testified that after CMD purchased the warehouse, it maintained the operation as a public warehouse, and was used by several steady or permanent businesses and some half dozen that "come in and go," including Fisher Body (General Motors), who was "sporadic" but a big customer. Geier indicated that prior to CMD's Shovel warehouse purchase, the Shovels and Hamilton employees would help each other out on occasion, adding that the only change that took place after the CMD purchase was that both Company's billed each other for the services they furnished to one another. Geier testified that some time in April or May, CMD hired one Martin Busch for general warehousing work on the recommendation of John Shovel, and that he (Geier) approved the hiring of Busch, who was paid the same as "casual help." Geier added, however, that Busch was hired because of a sudden rush in business from a particular company and that the business received from that company ended about a month and a half later and thereafter Busch became a Hamilton employee. According to Geier, one additional CMD employee was also hired on a part-time basis to help handle a Fisher Body rush in the late fall and to also occasionally clean the warehouse. Geier testified that the warehousing work at CMD, including that work done for Hamilton, is now handled by Dave and John Shovel, who are assisted on a "few" occasions by Hamilton employee Busch. Geier testified that CMD's office is at the Shovel warehouse, and that Hamilton still occupies the same rented space at that warehouse, adding that eventually he personally only spent a few hours a week at the warehouse. As of the date of the hearing in this case, the old lease between Hamilton and the Shovel family was still in existence, but Geier testified that when it expires (March 6, 1985), a new lease would be entered into between Hamilton and CMD for Hamilton's space at the CMD warehouse. Geier indicated that during the spring and summer Hamilton and CMD did not invoice each other for labor performed by the other employees, but after Welsh left in September, a rate schedule was agreed on and CMD commenced to invoice Hamilton every week. Geier testified that at the time employee Welsh was laid off, Hamilton "sublet" or subcontracted all of its loading and unloading warehousing activities to CMD, but that there was no written document or written understanding of this arrangement at that time, except for the so-called rate schedule, and that they decided to wait on formalizing the arrangement until the Hamilton-Shovel lease expired in March. Geier testified that Hamilton has provided virtually no services to CMD from April to the present time, although he indicated that one of Hamilton's secretaries worked at CMD for a couple of weeks as a training period, and then she came to Hamilton. Geier added that the CMD employees are paid the same wage rate that was established by the Shovel family, and that although John Shovel is paid hourly, he is "probably in the process of becoming a salaried employee." Geier indicated that the CMD employees are "attached" to the Hamilton Blue-Cross and Blue-Shield Hospitalization plan because of the cheaper group rate, and that CMD pays Hamilton its share of the cost on behalf of its employees.

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[11] Pasquarelli appeared only as a witness and not as counsel for the Union.

[12] Geier had offered Welsh another position with Hamilton, apparently dealing with inventory and accounting. Welsh had declined that position and among the reasons he gave was that it would take him out of the bargaining unit and it would necessitate his dropping his union membership. This matter will be the subject of further testimony and comment later.

[13] Geier was called by the General Counsel during her case-in-chief, and gave the vast majority of his testimony at that time.

[14] Martin indicated during his testimony that he considered his position was that of "shipper" after Ott left.

[15] The supervisory status of Martin, who replaced Ott, was a potential side issue in this case in that one of Hamilton's defenses alleges that when Ott left, Martin became a supervisor, leaving no warehousemen at Hamilton's facility.

[16] Hamilton employed a total of 20 individuals in various jobs, including warehousemen, truckdrivers, office employees, and an accountant. The insulation was actually installed by independent contractors, hired on a day-to-day basis. Hamilton also employed salesmen, some of whom were "outside" salesmen and some of whom were "inside" salesmen.

[17] Although the lease itself was admitted into evidence, the monthly amount had been excised. Geier was very guarded about monetary amounts throughout this case.

Joseph M. Welsh was the employee whose job terminated after the formation of CMD. He had worked as a warehouseman with Hamilton for 12 years, most recently in the Shovel warehouse. Welsh described the warehouse as having two floors on the "Hamilton side" and three floors on the "Shovels' side,' with three dock doors. According to Welsh, the "dock area" separated the two companies (Hamilton and the Shovel family). Welsh's duties were loading, unloading, inventory, storage, and taking care of customers. Welsh testified that, on occasion he would work in the Hamilton fabricating shop at the Shovel warehouse when things got "a little slow" in the warehouse, and that "a couple of times a month" he would go to Hamilton's River Avenue facility and assist employee Don Martin with warehouse work there. Welsh added that "a couple of times a week" Martin would also come to the Shovel warehouse and assist him before CMD was formed, and after CMD came into being, he continued to help Martin at the River Avenue facility. Welsh testified that he would also help John and Dave Shovel with their work "a couple of times a week," but that after CMD took over the entire warehouse he, John, and Dave Shovel would work together in servicing the entire Shovel warehouse, adding that although he knew CMD had taken over the warehouse he was never informed of any change in his duties or responsibilities by Geier or any other supervisor of Hamilton. After CMD took over the Shovel warehouse, Welsh related that Martin's duties at River Avenue remained the same as his at the Shovel warehouse, although he did have "a little bit more paper work," adding that when Martin was on vacation or sick he would perform Martin's duties at the River Avenue facility. According to Welsh, Martin had no employees working under him and did not direct his (Welsh's) work, adding that he was never told that Martin was his immediate supervisor. Welsh testified that, on occasion, Dave Shovel would also work in the Hamilton fabrication shop when it was slow. Welsh related that in April or May an individual named Busch was hired to work in the Shovel warehouse and remained only a "few weeks," during which time he too would work in the fabrication shop when things were slow in the warehouse.

Welsh testified that he was on vacation September 3 to 10, and when he reported back to work he was told by Geier that his job had been eliminated. The following morning (September 11) he and Union Agent Barker met with Geier, who again stated that Welsh's job "was terminated and [that] he was subcontracting the work out to the Shovel warehouse." According to Welsh, Barker asked to see a document or agreement reflecting the subcontracting, and Geier responded that it was none of his business, to which Barker responded by indicating that John and Dave Shovel were doing the same work that Welsh was doing and thus should be part of the bargaining unit, adding that Welsh had seniority over both

Shovels and should not have been terminated at that time. According to Welsh, Geier made no specific response to Barker's remarks, but did state that he (Welsh) had been "sitting on a job offer for 6 to 8 weeks" and had not responded. Welsh conceded that he did receive a job offer from Geier sometime in July or August to work on inventory books and records, but Welsh testified that Geier also had told him that he would have to get out of the Union and accept "company benefits" and a different "pay scale" if he accepted the inventory job. Welsh added that he subsequently told Paul Heil that he "had to decline the job." Welsh also testified that he declined the job because he was happy with his position as a warehouseman and happy with the union benefits. Welsh and Barker represented the Union in the contract negotiations and Welsh testified that it took "at least 15 months" before the new contract was entered into.[18] Welsh indicated that he thought he had been treated "unfairly" because he was in the Union and the contract took so long to finalize when there "was nothing to negotiate." Welsh conceded that when Geier offered him another job in July or August he reacted with a positive attitude "at first," and he further conceded that he never talked to Geier about the matter nor did he inform him personally of his decision to decline the offer.

Donald Martin testified as a present employee of Hamilton in the Hamilton facility on River Avenue, where the main Hamilton office is located. Martin described his duties, before Ott left in January, included loading and unloading trucks, filling orders, and filling out paperwork, including bills of lading. Martin had worked with Ott some 13 years. Martin testified that before January (1984) he worked at both the River Avenue warehouse facility and the Shovel warehouse, adding that he would travel to the Shovel warehouse in a company car "almost every day."[19] Martin indicated that in January or February Geier offered him the job as the "shipper" at the River Avenue warehouse, but that even though Geier did not explain what the job entailed, he accepted it. Martin testified that prior to being offered the "shipper" job, he was covered under the union contract with Hamilton, adding that he had in the past participated in "more than one set of negotiations." As the "shipper," Martin related that he was still an hourly rated employee, but did not receive any raise until May or June. Martin indicated prior to January, Welsh would help him in the warehouse at River Avenue "about twice a month."[20] After January, Martin indicated that Welsh replaced him at River Avenue when he was sick or on vacation. Regarding his duties as a shipper at River Avenue, Martin in effect testified that he had no supervisory duties.[21] Martin testified that after he was made a shipper, no warehousemen worked at the River Avenue facility, and that he called Union Agent Barker and told him about the job, adding that he would have to withdraw from the Union. Martin did not recall or "remember" whether he told Barker in that conversation that he did not think the Union would last very long at Hamilton. Martin also testified about a negotiating session he attended in January 1983. He indicated that present were also Union Agen Barker, Geier, and Paul Heil (Hamilton's vice president). According to Martin, Geier stated at that meeting "that the union has done nothing for us . . . that we should try to better ourselves by moving up in the company . . . once the union was out he could do what he wants."[22]

B. *Analysis of Law and Evidence and Initial Conclusions*

The General Counsel's case relies solely on the conclusions that Hamilton and CMD are the single or joint employer, and thus they both had continuing and legal responsibilities involving the Union and the contract then in force. The subject of "subcontracting," which appears frequently in testimony, and any duty to bargain over a potential decision by Hamilton to subcontract its warehousing activities to CMD, plays no roll in the General Counsel's theory of the case, and well it should not for if that were urged here, there would be no question about the Union's loss of its warehousemen's unit completely and there would not have been any duty to bargain over the subcontracting decision.[23] There is scant, if any, evidence that CMD was established and then took over Hamilton's warehousing functions to save labor costs, a prerequisite for a duty to bargain over such decisions, much less to furnish information about the same. *Otis Elevator Co.*, 269 NLRB 891 (1984).

The Board's "joint" or "single" employer concept, judicially established in a significant number of cases, normally reflects a judgment that two or more nominally separate business entities may properly be considered sufficiently integrated to warrant their unitary treatment for various statutory purposes, usually in the context of a franchise situation or one that involves combining the business in order to meet minimum required gross receipts enabling the Board to assert jurisdiction. *Parklane Hosiery*, 203 NLRB 597 (1973);[24] *Radio Union Local 1264 v. Broadcast Service*, 380 U.S. 255 (1965); *Sakrete of Northern California*, 137 NLRB 1220 (1962), enfd. 332 F.2d 902 (9th Cir. 1964), cert. denied 379 U.S. 961 (1965). Some of the principal factors that have been considered relevant in determining the extent of integration are (1) interrelation of operations, (2) centralized control of labor relations, (3) common management, and (4) common ownership or financial control. *Sakrete of Northern California*, above. To put the test another way, when the answer is not black and white, "we are remitted to the test of honesty and justice." Cardozo, J., in *Berkey v. Third Avenue R. Co., 244 N.Y. 84, 95, 155 N.E. 58, 61, cited in NLRB v. Deena Artware, Inc.*, 361 U.S. 398, 402–403 (1960). And yet another way, whether in fact the economic enterprise is one, the corporate forms being largely paper arrangements that do not reflect the business realities. *NLRB v. Deena Artware, Inc.*, above, all cited in *Parklane Hosiery*, above.

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[18] Martin later testified that he also was involved in the negotiations.

[19] Martin's testimony in this regard is at some variance with that of Welsh. Welsh testified that Martin would come to the Shovel warehouse "a couple of times a week."

[20] Here, again, there is a variance in Martin's and Welsh's testimony. Welsh testified that he helped Martin at River Avenue "a couple of times a week."

[21] The term "supervisor" is defined in Sec. 2(11) of the Act. When Martin was questioned by the General Counsel on the subject, each of the some 12 supervisory responsibilities set forth in Sec. 2(11) were individually and specifically set forth to Martin, who replied "No" when he was asked whether he performed the particular function.

[22] After Martin completed his testimony, the General Counsel recalled Union Agent Barker, who essentially corroborated Martin's testimony concerning Geier's remarks. Barker added that Geier "felt that he could better them people with the Union out of there and than I could protecting them people." Geier, at least outwardly, appeared to be upset about this testimony and his spontaneous remarks on the record included, "I never threatened anybody that they could get along better with me than with the Union . . . That is an absolute lie . . . And I don't know how to bring that out." At the time, Geier was not a witness and thus I do not accept these remarks on the record as evidence or testimony in the case. However, Geier later took the witness stand on his own behalf and testified, "it is alleged that I threatened one or both of these two employees at a negotiating meeting which I have never done." In cross-examination of Martin by Geier, Martin conceded in effect that he did not consider any remarks that Geier made at the January negotiating session threatening. Geier, himself, testified that he interpreted Martin and Barker's testimony to mean or indicate that he threatened Welsh "about advancement in the company" because of the Union, and he denied that he ever made any such threat to anyone during any negotiation session.

[23] The General Counsel completely avoids the use of the term "subcontracting" in her brief, calling the actions of Hamilton regarding its warehousing work, an "assignment" to CMD.

This case was difficult for me. I started out by using the "legal" approach, that is, listing in columns certain facts in evidence that were for and against a single employer conclusion, primarily using the four basic factors mentioned above and in *Sakrete of Northern California*, above. This resulted in only uncertainty and indecision on my part. I then used the "conceptual" approach, relying more on economic realities.[25] After using both approaches, a few dominant and important realities emerged. Hamilton and CMD were really not parallel businesses. Hamilton is in the business of the sale and installation of insulation materials. CMD is in the business of owning and operating a public warehouse. In these regards, the separation was considerably more than nominal. Only a small part of Hamilton's needs involved warehousing, and none of CMD's needs involved insulation. Each could exist with or without the other. The sale of either CMD or Hamilton immediately would have little or no affect on the other. If IT&T owned Sunbeam Bread, they surely would not be considered a single employer, even if there were similar (or even common) labor policy followed by all IT&T subsidiaries. When John Shovel Sr. decided to retire and sell his warehouse, it was not surprising that Geier became interested in owning part of it, having been an eyewitness to its economic and business value and also having a need for the use of one-fourth of its space. In this case the General Counsel, in my opinion, is in the awkward position of, in effect, alleging that Geier participated in the purchase of a whole public warehouse to rid Hamilton of a three-man unit of warehouse employees.[26] In fact, Geier invested in a wholly different business and subcontracted a small portion of Hamilton's business to that new business.[27] The operation of both Hamilton and CMD was a bit ragged, and as the General Counsel ably pointed out, there was some integration and common management and control. Also, the outcome was severe regarding the Union and, no doubt, Geier knew what the outcome would be and was pleased. I perceive that the Board, however, which I am duty bound to follow, has allowed for such results under the facts in this case.

In my opinion, if this case falls within any legal nitch, it is that of *Otis Elevator*, above, under which guidelines the complaint in this case fails. I shall thus recommend that the complaint be dismissed.

CONCLUSIONS OF LAW

1. That the Respondent, Geo. V. Hamilton, Inc. is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

2. That the Charging Union is a labor organization within the meaning of Section 2(5) of the Act.

3. That Geo. V. Hamilton, Inc. and CMD, Inc. are not joint employers, and do not constitute a single employer within the terms of this case and within the meaning of the Act.

4. That the permanent lay off or termination of employee Joseph Welsh on September 10, 1984, did not violate Section 8(a)(3) and (1) of the Act.

5. That Geo. V. Hamilton, Inc. and CMD, Inc. have not otherwise violated the Act.

On these findings of fact and conclusions of law, and on the entire record, I issue the following recommended[28]

ORDER

It is recommended that the complaint be dismissed.

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[24] In this case, the Board adopted completely the decision of Administrative Law Judge Maurice M. Miller.

[25] This approach was also approved by the Board in *Parklane Hosiery*, above.

[26] The Union still represented another unit at Hamilton. However, the General Counsel argues in this case that certain events surrounding the contract negotiations, mainly in 1983, demonstrate Geier's union animus. I disagree, although I am not convinced that even if there was union animus, the outcome of this case would be affected.

[27] Union Business Agent Barker correctly labeled the situation as one of subcontracting from the beginning. Other issues such as successors business, alter ego, or unit accretion were correctly not raised in this case.

[28] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

Rocky Mountain Hospital ***and*** **Rocky Mountain Federation of Nurses and Health Professionals, Local 5016, AFT, CFT, AFL–CIO**

Rocky Mountain Hospital ***and*** **Patricia E. Eich, Petitioner and Rocky Mountain Federation of Nurses and Health Professionals, Local 5016, AFT, CFT, AFL–CIO.** Cases 27–CA–7682, 27–CA–7694, and 27–RD–587

July 29, 1988

DECISION AND ORDER

BY CHAIRMAN STEPHENS AND MEMBERS BABSON AND CRACRAFT

On December 15, 1983, Administrative Law Judge Burton Litvack issued the attached decision. The Respondent filed exceptions, the Charging Party filed cross-exceptions, and the Respondent, the Charging Party, and the General Counsel filed answering briefs.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and briefs[1] and has decided to affirm the judge's rulings, findings,[2] and conclusions as modified[3] and to adopt the recommended Order as modified.

1. The judge found that the Respondent violated Section 8(a)(5) of the Act by refusing to bargain about union security, a mandatory bargaining subject. The Respondent excepts, contending, inter alia, that the record contains no evidence that the Union requested or the Company refused to bargain about union security within the 10(b) period. The Respondent's exception is without merit.

The Union was certified as the bargaining agent for an RN unit in January 1980 and for an LPN-technical unit in January 1981. During RN unit bargaining between May 1980 and September 1981, the Respondent refused to discuss the Union's proposed union-security clause until employees voted whether they would accept a union-security provision. LPN-technical unit bargaining began in September 1981. Evidence about LPN-technical negotiations includes a document pertaining to RN bargaining topics that the Respondent admits accurately reflects the items discussed during LPN-technical unit bargaining. Union security is the second topic listed. The Respondent further admits that, throughout both sets of negotiations, it maintained employees had to vote approval of a union-security provision before the Company would negotiate about union security.

The Respondent concedes that the 10(b) period commenced in July 1981. Based on the Respondent's admissions, we find the record shows that the Union attempted to discuss and the Company refused to consider union security during LPN-technical unit bargaining. Thus, contrary to the Respondent's contention, Section 10(b) does not preclude finding the Respondent refused to negotiate about union security.

2. We clarify the judge's findings that the Respondent violated Section 8(a)(5) and (1) of the Act through its December 30, 1981 announcement of a wage increase for employees excluding those in the LPN-technical bargaining unit.

The Respondent had an established practice of granting a wage increase around the beginning of each year, and the amount of this annual increase had been set at the Respondent's discretion. In De-

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[1] The Charging Party's motion to strike the Respondent's exceptions and brief is denied. The Respondent's request for oral argument is denied as the record, exceptions, cross-exceptions, and briefs adequately present the issues and the positions of the parties.

[2] Because we agree with the judge's finding that the Respondent violated Sec. 8(a)(5) by refusing to bargain about a mandatory bargaining subject, and because the remedy for the violation is an order to bargain in good faith, we find it unnecessary to pass on the judge's finding that the Respondent also violated Sec. 8(a)(5) by engaging in dilatory bargaining tactics.

Chairman Stephens concurs in the deletion of the "dilatory bargaining" language from the cease-and-desist section of the Order, but he does so on the ground that the General Counsel did not prove, by a preponderance of the evidence, that the Respondent engaged in dilatory bargaining during the 10(b) period (i.e., beginning in July 1981), even allowing for consideration of prior conduct as "background" evidence. From September 17, 1981, when formal bargaining sessions for the LPN-technical unit began, through January 8, 1982, when the last such session took place, the parties met nine times. The Respondent's witnesses testified that the dates of meetings were worked out by mutual agreement and that the length of meetings was dictated by the particular agenda set for each meeting, an agenda usually prepared by the union negotiators. Although the Union's principal negotiator could recall specifically only one proposed date when he was unavailable for a meeting, he did not deny that there might have been others. Furthermore, he did not specifically deny the testimony of the Respondent's witnesses concerning how the scheduling and length of the meetings were determined. On this record, Chairman Stephens does not find that a case of dilatory bargaining is made out.

[3] We agree with the judge that the Respondent's withdrawal of recognition occurred in the context of serious unfair labor practices and, therefore, violated Sec. 8(a)(5). The unfair labor practices (refusing to bargain about a mandatory bargaining subject and announcing a unilateral change in terms and conditions of employment) are the type of conduct that would cause employee disaffection with the Union. To remedy the Respondent's refusal to bargain, we shall adopt the judge's proposed remedy extending the Union's certification 6 months. See *Colfor, Inc.*, 282 NLRB 1173 (1987).

The Respondent has moved to reopen the record to submit evidence the Respondent claims shows employees had indicated lack of support for the Union in May 1981, before any of the unfair labor practices occurred. We deny the Respondent's motion for the following reasons. The Respondent has failed to show that the evidence, from an employee who testified at the hearing, is newly discovered. Further, whether employees were dissatisfied in May 1981 is irrelevant, as a union enjoys an irrebutable presumption during the certification year; and evidence about employee dissatisfaction in May 1981 does not affect the judge's finding that the unfair labor practices occurred before and during the gathering of signatures supporting the decertification petition and are the type that would cause employee disaffection with the Union.

289 NLRB No. 138

cember 1981, around the time it would be customary for the Respondent to announce the amount of the annual increase, the Respondent's contract negotiations with the Union had produced the Union's proposal that the LPN-technical unit receive an immediate 14-1/2-percent increase and a counteroffer of 3.5 percent from the Respondent. Notwithstanding that the Union had reason to believe that an increase of *some* amount was contemplated for these employees, the Respondent issued an announcement to employees on December 30 stating that nonmanagerial employees other than those in the LPN-technical unit would receive an 8.5-percent raise, and it explained the exclusion of the unit employees with the following footnote statement: "By law, all changes in wage benefits and working conditions for members of the bargaining unit are subject to negotiations with the AFT, F.N.H.P. (AFL-CIO)." We agree with the judge that unit employees could reasonably have concluded from this announcement that because they were being represented by the Union in bargaining, a general wage increase was being withheld from them.

An employer has a duty not to change past practices for employees who are represented by a union until it has bargained to impasse on that subject with the union. *NLRB v. Katz*, 369 U.S. 736, 745–747 (1962).[4] The Respondent had not bargained to impasse on the question whether it would give an increase to the LPN-technical employees. By effectively announcing to them that they would be excluded from any increase, the Respondent not only advised the employees of an action it could not lawfully take at that point, but it also, as the judge found, "discredited and disparaged the Union in the eyes of its members." Further, as it turned out, the Respondent was willing and able to grant the LPN-technical unit the same 8.5-percent increase it granted the other employees, but it waited until after the others had received it, and after the time at which the increase would normally have been given, to make the offer to the Union. We agree with the judge that this constituted bargaining in bad faith.[5]

AMENDED CONCLUSION OF LAW

Substitute the following for Conclusion of Law 6.

"6. By refusing to bargain over union security, a mandatory bargaining subject, and unilaterally changing terms and conditions of employment, the Respondent engaged in unfair labor practices within the meaning of Section 8(a)(5) and (1) of the Act."

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge as modified below and orders that the Respondent, Rocky Mountain Hospital, Denver, Colorado, its officers, agents, successors, and assigns, shall take the action set forth in the Order as modified.

1. Substitute the following for paragraph 1(b).

"(b) Refusing to bargain over union security, a mandatory bargaining subject, and demeaning the collective-bargaining representative in the eyes of the unit employees through announcements that imply unilateral withdrawal of existing benefits."

2. Substitute the attached notice for that of the administrative law judge.

IT IS FURTHER ORDERED that the petition in Case 27–RD–587 is dismissed.

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

WE WILL NOT fail and refuse to continue to recognize and bargain with Rocky Mountain Federation of Nurses and Health Professionals, Local 5016, AFT, CFT, AFL–CIO as the exclusive collective-bargaining representative of the employees in the following appropriate unit:

> All full-time and regular part-time technical employees, including licensed practical nurses, radiology technicians, medical laboratory technicians, and EKG-IT-EEG-EMG technicians employed at our hospital; excluding office clerical employees, professional employees, guards and supervisors as defined in the Act, and all other employees.

WE WILL NOT bargain in bad faith with the Union by refusing to negotiate on the issue of union security, a mandatory subject of bargaining, and demeaning the collective-bargaining representative in the eyes of the unit employees through announcements that imply withdrawal of existing benefits.

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[4] To the extent that the judge's reference to a "duty not to depart from past practice" suggests that an employer is not free to change such practices after good-faith bargaining, we disavow it. The principles applicable here are entirely different from those applicable to an employer's duty regarding maintaining existing conditions of employment during the pendency of a petition for a representation election in which an employee bargaining representative may be chosen. Compare *Associated Milk Producers*, 255 NLRB 750, 754–755 (1981).

[5] Member Babson, in agreeing that the Respondent engaged in bad-faith bargaining, does not rely on the finding that the Respondent's announcement discredited and disparaged the Union.

WE WILL NOT bargain in bad faith by unilaterally changing terms and conditions of employment by announcing a raise for nonunion employees and, at the same time, announcing that employees in the above appropriate unit are excluded from receiving a raise.

WE WILL NOT maintain in force and effect our present no-solicitation/no-distribution policy insofar as the policy prohibits employees from soliciting at all times in nursing stations, permits employees to distribute literature *only* in breakrooms, restrooms, and parking lots, and prohibits off-duty employees from entering *any* area not open to the public during reasonable periods before and after work.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL restate our recognition of and, on request, resume bargaining in good faith for 6 months as if the initial certification year had not expired and bargain in good faith with the Union as the exclusive bargaining representative of our employees in the appropriate bargaining unit described above and, if an agreement is reached, embody it in a signed contract.

ROCKY MOUNTAIN HOSPITAL

Barbara E. Young, Esq. and *Michael Pennington, Esq.*, for the General Counsel.

Melvin B. Sabey, Esq. and *Robert E. Schween, Esq. (Saunders, Snyder, Ross & Dickson, P.C.)*, of Denver, Colorado, for the Respondent.

David H. Schnabel, of Washington, D.C. and *Jerry Richardson*, of Denver, Colorado, for the Charging Party.

Patricia A. Eich, of Aurora, Colorado, appearing per se.

DECISION

STATEMENT OF THE CASE

BURTON LITVACK, Administrative Law Judge. These matters were heard by me on June 7 through 9, 1983, in Denver, Colorado. On February 3, 1983, the Regional Director for Region 27 of the National Labor Relations Board (the Board) issued an order consolidating cases and consolidated amended complaint, based on an unfair labor practice charge in Case 27-CA-7682 filed on January 7, 1982, by Rocky Mountain Federation of Nurses and Health Professionals, Local 5016, AFT, CFT, AFL-CIO[1] (the Union), and an original and first amended unfair labor practice charges in Case 27-CA-7694 filed on January 20, 1982, and January 5, 1983, respectively, by the Union, alleging that Rocky Mountain Hospital (Respondent) engaged in acts and conduct violative of Section 8(a)(1) and (5) of the National Labor Relations Act (the Act).[2] Respondent timely filed an answer, essentially denying the commission of any unfair labor practices and raising affirmative defenses. Regarding Case 27-RC-587, by order of the Board, the matter was consolidated with the aforementioned unfair labor practice proceedings on February 3, 1983. At the hearing, all parties were afforded the opportunity to examine and cross-examine witnesses, offer relevant evidence, and argue their legal positions, on various points, orally. Also, all parties were permitted to, and did, file posthearing briefs, which were carefully examined. Accordingly, based on the entire record, the posthearing briefs, and my observation of the demeanor of the several witnesses, I make the following

FINDINGS OF FACT

I. JURISDICTION

Respondent, a state of Colorado corporation, maintains and operates[3] an acute care health care institution, accredited by the American Osteopathic Association, located in Denver, Colorado. Respondent, in the normal course and conduct of its business operations, annually purchases and receives goods and materials valued in excess of $50,000 directly from points located outside the State of Colorado and annually has a gross volume of revenue in excess of $250,000. Respondent admits that at all times material it has been, and is now, an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act and a health care institution within the meaning of Section 2(14) of the Act.

II. LABOR ORGANIZATION

In its answer, Respondent denied the status of the Union as a labor organization within the meaning of Section 2(5) of the Act. It is well settled that in the absence of newly discovered or previously unavailable evidence or special circumstances, a respondent in an 8(a)(1) and (5) proceeding is not entitled to relitigate issues that were, or could have been, litigated in a prior representation proceeding. *Pittsburgh Plate Glass Co. v. NLRB*, 313 U.S. 146, 162 (1941). The parties stipulated that in Case 27-RC-5926 the Union was certified by the Board as the exclusive representative for purposes of collective bargaining of an appropriate unit of certain of Respondent's employees. The record establishes that the Union comprises a chapter of Denver Federation of Nurses and Health Professionals, Local 5016 which, in turn, is an affiliate of the American Federation of Teachers[4] and that the Union exists for purposes of collective bargaining and has engaged in such with Respondent, represents employees regarding wages, hours, and working conditions, and is an organization in which employees participate. During cross-examination of witness Gerald Richardson, a national representative of the American Federation of Teachers, counsel for Respondent adduced the information that, currently, the Union neither operates as a chapter, holds employee meetings, nor issues communications. Other than the foregoing evidence, counsel for Respondent offered no legal argument for the denial of the Union's status as a labor organization at the hearing or in the posthearing brief. Presumably, counsel endeavored to establish that the Union has become defunct: however, a bargaining representative is considered defunct "only if it is unable or unwilling to represent the employees." *Yates Industries*, 264 NLRB 1237, 1250 (1982); *Hershey Chocolate Corp.*, 121 NLRB 901, 911 (1958). There has been no such showing in this case, and it appears that the Union meets the long-established definition of a labor organization inasmuch as it was formed to, and did, represent health care employees regarding wages, hours, and other conditions of employment. *French Hospital Medical Center*, 254 NLRB 711, 712 (1981).

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[1] The name of the Charging Party appears as amended at the hearing.

[2] The General Counsel sought and was granted permission to amend the consolidated amended complaint to include an additional allegation that Respondent violated Sec. 8(a)(1) and (5) of the Act.

[3] On or about April 27, 1982, Respondent and Colorado Health Services Corporation and Adventist Health System/Eastern and Middle America, Inc. entered into an agreement whereby the latter was given management control over Respondent's facility. Neither at the hearing nor in its posthearing brief did Respondent make any assertions regarding this fact.

III. ISSUES

1. Did Respondent bargain in bad faith with the Union in violation of Section 8(a)(1) and (5) of the Act by engaging in mere surface bargaining?

2. Did Respondent bargain in bad faith with the Union in violation of Section 8(a)(1) and (5) of the Act by the following conduct:

(a) Rigidly insisting on contractual provisions whereby the Union's involvement in Respondent's operations would be eliminated.

(b) Insisting on proposals by which the Union would waive its right to bargain on new issues.

(c) Refusing to negotiate on arbitration of grievances.

(d) Having no position on contract duration at the last negotiating session.

(e) Announcing a wage increase for unrepresented employees and, although authorized to do likewise, offering a lesser amount to its represented employees?

3. Did Respondent violate Section 8(a)(1) of the Act by announcing a wage increase for unrepresented employees and, although authorized to do otherwise, offering a lesser amount to its represented employees?

4. Did Respondent violate Section 8(a)(1) of the Act by maintaining in effect overly broad no-solicitation/no-distribution rules?

IV. THE ALLEGED UNFAIR LABOR PRACTICES

A. *The Facts*

1. Bargaining history

At all times material, at least through April 27, 1982, Respondent maintained and operated an acute care hospital in Denver, Colorado. Robert H. Pierce was the administrator until replaced by Gladys Duran in May 1982. Larry Gnuse was the assistant administrator and personnel director from January 1981 until March 1982; he was replaced by Tycho Christensen as personnel director in March 1982. In January 1980, the Union was certified by the Board as the exclusive representative for purposes of collective bargaining of Respondent's registered nurses, and negotiations for an initial collective-bargaining agreement commenced in May of that year. Gerald Richardson was the chief spokesman for the Union, and Walter V. Siebert, an attorney for the Mountain States Employers Council, represented the hospital during the negotiations. Besides these two individuals various employees and management representatives attended the several bargaining sessions as members of the respective union and management negotiating teams. While these discussions were ongoing, the parties were also involved in Case 27-RC-5926, proceedings involving the Union's petition seeking to represent Respondent's licensed practical nurses and technical employees. In that case, the Regional Director for Region 27, on October 17, 1980, directed that a prior election be set aside and that a rerun election be held. This election was conducted by the aforementioned Regional Director on November 25, 1980, with a majority of the voters casting ballots in favor of representation by the Union. Thereafter, on January 9, 1981, the Union was certified as the exclusive collective-bargaining representative of the following appropriate unit of Respondent's employees:

> All full-time and regular part-time technical employees, including licensed practical nurses, radiology technicians, medical laboratory technicians, and EKG-IT-EEG-EMG technicians; excluding office clerical employees, professional employees, guards and supervisors as defined by the Act, and all other employees.

Negotiations between Respondent and the Union regarding an initial contract covering the registered nurses (RNs) continued into 1981.[5] The record reveals that between January and September of that year, the parties held 21 bargaining sessions, all of which related solely to the RN unit, with the exception of January, August, and September, when 1 meeting each month took place, 3 meetings a month occurred, that the time periods between meetings were normally never less than 1 week and occasionally 3 weeks or more, and that bargaining sessions rarely lasted more than 3 hours. Regarding the lengthy intervals between meetings, Richardson testified, and the record discloses, that he complained on several occasions to Siebert,[6] and, regarding the length of the sessions, he quoted Siebert as saying, "[W]hen it's productive, we'll meet longer." Within this framework, 3 days after certification in the licensed practical nurse-technical employee bargaining unit (LPN-Tech unit), on January 12, Richardson mailed the following letter, proposing joint negotiations for the two bargaining units to Administrator Pierce:

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[4] There are four chapters, which together comprise Local 501. Each chapter encompasses the employees of a particular hospital in the Denver area, including Respondent.

[5] In calendar year 1980, the parties held 12 bargaining sessions during the time period May 15 through December 10. Two such meetings occurred each month, except during June, when only one session occurred, and in September when three took place.

> Since the Rocky Mountain Federation of Nurses and Health Professionals, AFT, AFL-CIO is now certified by the National Labor Relations Board to represent both the bargaining unit comprised of registered nurses and the bargaining unit comprised of licensed practical nurses and technical employees, the Union hereby proposes that contract negotiations for the two bargaining units be consolidated.
>
> The Union recognizes that the proposed consolidation of the bargaining units for purposes of negotiation is not a mandatory subject of bargaining. However, the Union believes that the proposal has a great deal of merit and, in the interests of expediency and efficiency, should be given serious consideration by the Hospital.
>
> The act of consolidation would not necessarily preclude the negotiating of separate agreements for the two bargaining units.
>
> In any event the Union has consolidated its negotiating team.
>
> Thank you for your time and attention in this matter. The Union looks forward to your response.

Pierce failed to respond; 2 months later Richardson restated his bargaining demand. In another letter, dated March 2, to Pierce, Richardson formally renewed "our request to commence contract negotiations for licensed practical nurses and technical employees at the earliest available date" and requested information pertaining to the LPN-Tech unit's size, wages, positions, hours, and other working conditions. Approximately 10 weeks later (May 13), and over 5 months from the Union's initial letter, Siebert sent the following letter to Richardson:

> Please be advised that the undersigned will be representing Rocky Mountain Hospital in negotiations with your union.
>
> The Employer stands ready to commence negotiations at a mutually agreeable time and place.
>
> It should be noted, however, that these negotiations will be separate and distinct from negotiations involving any other unit. Consequently any items of agreement made with one unit may not necessarily constitute agreement with the other.

Regarding the matter of joint negotiations, Richardson testified that "we made it clear that we saw many of the proposals being identical and pointed those out that we thought would be applicable to the LPN-Tech unit." In a point conceded by Siebert, Richardson added "that the hospital maintained a posture of separate negotiations."

In all, negotiations for a collective-bargaining agreement covering the registered nurses consumed 15 months and 33 bargaining sessions, with the last one occurring on September 1, 1981. According to Richardson, Respondent abruptly broke off these negotiations, after the filing of a decertification petition, on or about September 9. There is no record evidence that the negotiations were at impasse; in fact, the record discloses that the parties had reached agreement on several points and were actively discussing several others. Thus, Richardson testified that he and Siebert bargained about and agreed on the following RN unit contract provisions: recognition, dues deduction, no discrimination, seniority, hours of work, overtime and premium pay, union activity, access to personnel files, job postings, discipline and discharge, orientation, ethical practices, evaluations, a professional performance committee, termination notice, safety, existing benefits, change of ownership, savings clause, bargaining unit work, bereavement leave, jury duty, educational leaves, in-service education, life insurance, unpaid leaves of absence, unemployment compensation, a bulletin board, and health insurance. Remaining unresolved were significant areas[7] about which there was substantial disagreement and which, assert the General Counsel and the Union, form the basis for bad-faith bargaining by Respondent during the subsequent LPN-Tech negotiations.

Whether previously scheduled as an RN unit negotiating session, the parties next met on September 17, and Richardson and Siebert immediately commenced discussing the LPN-Tech unit collective-bargaining agreement. There is no dispute that, prior to this session, neither had the parties bargained specifically about matters relating to the latter bargaining unit nor had they reached any agreement on any matters pertaining to this projected contract. Subsequent to this session, Richardson and Siebert met seven more times,[8] with the final negotiating session held on January 8, 1982.[9] Siebert testified that, during these contract negotiations, four different types of contract provisions were discernible: clauses of "universal applicability" to both the RN and LPN-Tech bargaining units; clauses requiring slight modification for applicability to the latter group; clauses that were totally dissimilar; and clauses for which there had been no meaningful negotiations during the RN unit bargaining, but for which there were extensive negotiations during the LPN-Tech unit bargaining. Regarding the provisions of "universal applicability," the record discloses that during the September 17 meeting, Richardson and Siebert quickly agreed that certain agreed-on RN unit contract provisions would apply to the LPN-Tech unit agreement. These included: no discrimination, access to personnel files, termination notice, safety, a savings clause, bereavement leave, jury duty, group life insurance, health and welfare, and an employee bulletin board. Further, during the next meeting, October 28, the parties agreed on the following contract provisions, the language for which was either identical to or similar to that agreed on for the registered nurses: seniority, change of ownership, dues deduction, union access, union activity, evaluations, unpaid leaves of absence, ethical practices, and discipline and discharge. According to Richardson, there were other areas (such as hours of work, posting of vacancies, educational leave, vacations, holidays, sick leave, and educational leave) for which he believed the proposed RN unit contract language would also apply to the LPN-Tech unit employees; "beyond wanting to look at it further or wanting to talk with the director of nursing services," Siebert offered no reason to Richardson for refusing to agree that the same language would apply in those areas.

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[6] Richardson could not recall Siebert's replies, but did place the onus on the latter for any delays. Larry Gnuse, who was largely responsible for drafting Respondent's contract proposals and who attended almost all negotiating sessions, stated that both Richardson and Siebert had "tight schedules," that the former was unavailable on at least a dozen occasions, and that "there was really no disagreement in terms of how frequently we were meeting." Siebert testified that on one occasion during the RN negotiations, the Union requested that "multiple days" be set aside for bargaining, but that he refused, citing a lack of "flexibility." Further, he testified both he and Richardson often had out-of-state commitments and "there really wasn't much of a push." Finally, in this regard, I note an August 4, 1980 letter from Richardson to Siebert (G.C. Exh. 18) in which the former complained that "meeting only once a week is not acceptable." I further note that in the Union's "negotiation news" newsletters (R. Exhs. 7(a)-(aa)), which were distributed to employees subsequent to a bargaining session and in which the Union discussed the events of that meeting, there is never mention of the frequency (or lack thereof) of the bargaining sessions or their length.

[7] There was no agreement in the following areas: union security, employee classifications, grievance arbitration, entire agreement clause, no-strike/no-lockout, staffing, role of the registered nurse, fringe benefit improvement guarantee, wages, sick leave, holidays, retirement, disability insurance, uniform allowance, and management rights.

[8] The remaining meetings on the LPN-Tech unit contract occurred on September 29, October 28, November 11, December 2, 15, and 17, and January 8, 1982.

As previously stated, it is alleged that Respondent's positions and/or style of bargaining over several contractual proposals during the entire course of bargaining demonstrate its bad faith during the LPN-Tech negotiations. The first such area involves the subject of union secruity. On this, the Union's proposal was consistent from the commencement of the RN negotiations—a union-shop provision requiring membership in the Union within 31 days of employment by Respondent. Counterproposing on July 17, 1980, an open-shop clause, Siebert, according to Richardson, would not even discuss any form of union-security clause. There is no dispute on this point. According to Respondent's chief spokesman, his position to Richardson on this subject was that the Union must first fulfill the requirements of the Colorado Labor Peace Act (8-3-101-CRS 1973), which requires the holding of a "collective-bargaining unit" election in order "to authorize" the inclusion of an "all-union" provision[10] in any collective-bargaining agreement entered into in Colorado subsequent to July 1, 1977, before substantive negotiations on it can be held. In his meetings with Richardson, Siebert interpreted the statute to mean that the mandated election "merely gives the union the right to bargain over that issue." Therefore, the latter testified, "you're really preempted from having a meaningful discussion on that topic until the election is held." Richardson countered that Siebert's interpretation was incorrect and that a union-security clause may be negotiated, but employees must vote on and ratify the provision before such can become effective. Accordingly, he believed bargaining would have been meaningful.[11] Siebert maintained this position through the LPN-Tech negotiations, forestalling any bargaining on union security.

The Union's original contract proposals concerning the RN unit not unexpectedly contained no management-rights provision. In July 1980, Respondent proposed a two-page management-rights article, which set forth, in detail, the reserved rights of management, but did not make such list all inclusive. These included scheduling hours, directing work, hiring, promoting, transferring, suspending, demoting, selecting supervisors and utilizing such individuals to "perform any work when deemed necessary by [Respondent]," limiting union activities so as not to interfere with hospital work, and determining employee competency. On September 28, 1980, and August 18, 1981, respectively, the Union offered two shorter and less detailed counterproposals. The first, a single sentence, recognized that the parties retained rights held prior to the contract, and the latter, one paragraph in length, recognized that the agreement should not be construed to limit the hospital's operation of its business and specifying certain rights retained by Respondent, including the rights to hire, transfer, promote, lay off, discipline, and discharge employees. Richardson testified that Siebert would not accept either counterproposal, saying the changes of such were "slim and zero." The latter testified that there was no lengthy discussion of Respondent's management-rights proposal during the RN negotiations because the Union had other priorities and conceded that, having rejected the union counterproposals, he may have stated that the parties were "miles apart" on that issue. Further, according to Siebert, Respondent insisted on inclusion of its proposal during the LPN-Tech unit negotiations; however, except for brief position statements and agreement to reserve discussion, there apparently was no meaningful bargaining on the issue until January 8, 1982.

Prior to the commencement of the RN unit contract negotiations, Respondent did not have a grievance procedure for its employees. The Union's initial contract proposal included a detailed four-step grievance procedure, with the last step being arbitration. During the RN negotiations, Respondent submitted and bargained about three counterproposals on a grievance procedure. The initial one, presented with several others on June 25, 1980, set forth a rather simplified two-step process. The second, dated February 26, 1981, recognized prior steps and proposed as the final step submission of any unresolved grievance to a labor-management grievance committee that would be authorized to decide grievances pertaining to discipline, discharge, or interpretation of the contract. The second, offered July 21, 1981, was significantly more elaborate, encompassing four steps, with the last recognizing the Union's right to strike if no satisfactory settlement was reached. Regarding arbitration, there is no dispute that Respondent adamantly refused to consider it. Richardson quoted Siebert as saying Respondent considered arbitration to be "an abhorrent process" as it "did not want to delegate authority to third party." Siebert testified that "Mr. Richardson and I had, I guess, what you might call a philosophical difference on the question which we discussed at some length on a number of occasions." The witness continued, saying that "the hospital really wasn't interested in having some third party outsider who was unfamiliar with the [contract and industry] . . . second guessing what the parties had negotiated."[12] Whatever negotiations were had by the parties on a grievance procedure and arbitration were carried over and resumed by them in discussing the LPN-Tech unit contract. Although it is unclear at which meeting, according to Richardson, ultimately "we arrived at a very workable grievance procedure, absent any arbitration or third party review." Analysis of it discloses that Respondent accepted an involved, four-step procedure and that the Union reserved the right to strike if not satisfied with the result of a grievance. Further, it does not appear that any other provisions, including management rights, of the projected contract were rendered beyond the reach of the grievance procedure. On the matter of the entire agreement, or "zipper" clause, the record establishes that Respondent proposed this provision in July 1980 and insisted on its inclusion in both the RN and the LPN-Tech collective-bargaining agreements. The language of the article had each contracting party waiving its right to bargain over matters not covered by the entire agreement and acknowledging that the terms of the contract represented their entire agreement, excluding from consideration any past practices or understandings that may alter or amend the contract's express terms. Another controversial provision was the no-strike/no-lockout clause. Although both Respondent and the Union apparently desired such language, that of the former was considerably more detailed. Specifically, Respondent's proposal subjected any violator to discipline and prohibited sympathy strikes or picketing. On the other hand, Respondent limited the prohibition against strikes by recognizing the Union's rights under other contractual articles.

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[9] Both the General Counsel and the Union contend that the drawn-out negotiations were caused, as during the RN unit negotiations, by Siebert's inability to meet more frequently. Thus, Richardson testified that Siebert was too busy to meet during the weeks immediately subsequent to the October 28 and November 11 meetings, and Norma McAdams, who had been an LPN for Respondent for 7 years and who attended the bargaining, corroborated that Siebert was unavailable during the week following the October 28 meeting as he had "other things" scheduled away from Denver.

[10] The term "all-union" encompasses the type of union shop clause involved. *Communications Workers v. Western Electric Co.*, 93 LRRM 2176, 2182, 2183 (1976).

[11] Richardson asserted that Siebert took the same position on dues deduction—that employees would have to vote on whether they would accept such a clause before he would bargain about it. However, Siebert soon dropped this demand and agreed to such a provision both in the RN unit and, later, the LPN-Tech unit contract.

In addition to the foregoing, it is asserted that by its methods and means of negotiating other provisions, Respondent unnecessarily delayed negotiations, thereby exhibiting bad-faith bargaining. In its original RN unit contract proposal, the Union set forth an article on staffing, which provision concerned the numbers of RNs required for a shift and their assignments. Included within this proposal was a detailed point system that was designed to determine when additional nurses in excess of the scheduled staff are required. Also, the Union proposed a professional performance committee, whose role would be to recommend methods to improve patient care. Respondent counterproposed a less detailed staffing article on June 16, 1981, approximately 1 year later. Asked whether bargaining on the Union's original proposal occurred during the interim period, Richardson testified, "We tried on numerous occasions when the Employer responded by saying that he wasn't prepared to discuss it at this time for one reason or another." He later added that Siebert's standard excuse for his lack of preparedness was "he claimed he didn't have an understanding of the complexities and the nuances of the nursing profession and . . . he would always have to get back with some member of management to be responsive."[13] The Union submitted a counterproposal on September 1 that solely related to the RN unit staffing matter. Richardson further testified that staffing continued to be an area of disagreement between Siebert and himself as it concerned the LPN-Tech unit negotiations—"as it related primarily to the LPNs, not so much with the other technical employees . . . we did convey to [the hospital] that we wanted something in the form of a professional performance committee for the LPNs as well . . . we basically consolidated the concept of . . . staffing with the professional performance committee." According to Richardson, what was conveyed to Siebert on September 17 was different than what had been discussed during their prior bargaining; "we wanted to make proposals that related to the LPNs." Siebert had no immediate response; however, the record establishes that the matter was discussed on October 28 (Siebert expressed doubt that Respondent would accept a separate performance committee for the LPNs), on November 11 (Richardson and Siebert discussed the makeup of a professional performance committee in substantive terms), and on December 15 (Richardson informed Siebert that the Union would accept a less formalized staffing system for the LPNs if Respondent "guaranteed" LPN input on decisions).

Another area of alleged delay concerned the matter of retirement coverage. Pursuant to its nonprofit status, Respondent was permitted to, and did, remove its employees from the coverage of the social security system and, under law, was given 18 months to arrange for and implement replacement coverage. Although such action was undertaken in 1980, it was not until March 1981, during an RN unit negotiating session, that Siebert announced what had been done, stating that new coverage was mandated to be effective August 1. The difficulty was that Respondent was still in the process of investigating various alternatives. It is asserted by the General Counsel that Respondent's conduct left little time for bargaining. In this regard, Richardson asserted that Siebert became "evasive" on this subject and "never very definite" concerning options or other types of retirement plans. Despite the above deadline, selection of a retirement carrier remained an unresolved matter when the LPN-Tech unit contract discussions began. On or about November 30, Respondent finally made a proposal of a retirement plan funded by several insurance carriers. Regarding the proposal, Siebert averred that he did not believe that the identity of the insurance carrier was even a bargainable subject. Finally, negotiations of this important subject, according to Richard, "consumed" the entire December 17 bargaining session. Yet another area of delay is alleged to be wages. The Union's original, and constant, demand during the RN unit bargaining was for an immediate increase of 19-1/2 percent; as a counterproposal, Respondent initially offered a wage freeze, maintained this through the spring of 1981 despite the Union's arguments that the hospital would not remain competitive with such a posture, and ultimately proposed a 3-1/2-percent wage rate increase for the RNs, to be effective January 1982. Regarding the LPN-Tech unit negotiations, it does not appear that any formal wage rate discussions occurred prior to December 15. On that date Richardson proposed an immediate 14-1/2-percent wage increase for the technical unit. Siebert counterproposed what he characterized as a "semi-serious" offer of a 3-1/2-percent wage increase for the duration of the agreement.[14]

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[12] Siebert testified that, other than engaging in a strike, the Union's only other recourse to protest an adverse grievance adjustment was to file a lawsuit purusant to Sec. 301 of the Act. In such a case, he acknowledged, a Federal district court judge, an outside third party, would render a decision that conceivably could involve interpretation of the collective-bargaining agreement. Siebert left unexplained how this would differ from the role of an arbitrator selected by the parties.

[13] In this regard, I note the testimony of Larry Gnuse that the assistant director of nursing, who had been assigned the task of coordinating all matters concerning staffing both for the RN unit and the LPN-Tech unit negotiations, regularly attended the bargaining.

In summation, after their bargaining session of December 17, Respondent and the Union had agreed on several items inclusive in the projected LPN-Tech unit contract but were apart on others, including wages, vacations, sick leave, holidays, staffing, management rights, the "entire agreement" clause, the social security alternative, and other items. With matters in this posture, and after just 3 months of bargaining and seven bargaining sessions, the Union's certification year had less than a month remaining.

2. The December 30, 1981 raise announcement

There is no dispute that on December 30, 1981, Respondent distributed the following written announcement to its employees:

> To: All Rocky Mountain Hospital Employees
> From: Mr. Robert Pierce, Administrator
> Date: December 30, 1981
> Subject: Annual Wage Increases
>
> Because of extraordinary expenses from this year's events, low census, and cutting back of federal grant money, Rocky Mountain Hospital is ending the year in a loss situation. Nevertheless, we are optimistic that by vigorous marketing and new outreach programs, and with some increase in charges, our financial situation will improve. Although it will be necessary to put new equipment acquisitions and other capital improvements on hold for a while, the Board of Directors feel it is an important priority to grant wage increases at this time, commensurate with other metro Denver hospitals. We believe Rocky Mountain Hospital can proudly call itself, "the little hospital with the big heart" because of the dedication and competence of our employees. Your needs and the needs of our patients come first.
>
> Therefore, beginning with the first pay period on January 8, 1982, all employees except those who are exempt status, management or in the LPN-Technician bargaining unit,* will receive an 8.5% increase. This will be in addition to the usual merit increases for those eligible. The above increase will be reflected in your paycheck to be received on January 29, 1982.
>
> As of January 1, 1982, the hospital and its staff will contribute towards a Social Security Alternative Plan rather than Social Security.** Those eligible for Social Security benefits in 1981 will continue to be eligible for the same Social Security benefits in 1982, because of past contributions.
>
> The Alternative Program will provide protection on January 1, 1982, for those not yet eligible for Social Security benefits, and additional benefits for those with continued Social Security benefit eligibility. The hospital's contribution will be 6.7%, the same as would have been paid into Social Security. The employee contribution will be 6.0%, .7% less than the 1982 Social Security rate. Full details of this plan will be announced shortly. This reduced employee contribution, plus additional tax savings, plus the 8.5% pay increase should result in greater employee financial security in 1982.
>
> We wish you and your loved ones a very Happy and Prosperous New Year!
>
> ---
>
> * By law, all changes in wage benefits and working conditions for members of the bargaining unit are subject to negotiations with the AFT, F.N.H.P. (AFL-CIO).
>
> ** The Alternative Plan is a continuing subject of negotiations with the Union. Details applicable to bargaining unit employees will be finalized through the negotiations process.

Regarding the annual nature of this type cost-of-living raise, Judith Boyce, who had been a nurse with Respondent for 6 years, and Norma McAdams testified that cost-of-living raises were given to Respondent's employees every January. Regarding the above-announced raise,

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[14] Regarding how Respondent arrived at its proposed raise, Siebert stated that he most likely made such an offer without consultations with either the administrator, Pierce, or the negotiating committee "because that was not a figure where realistically the parties would end up." Larry Gnuse testified that although Siebert would not normally make a wage proposal without prior consultation, regarding the 3.5-percent wage offer, "it's my recollection that because it was proposed earlier to the RNs, that it would have been acceptable under the way the team was operating to go ahead and do that in the LPN-Tech unit also." Nevertheless, he did recall discussing the proposal with Siebert before offering it to the Union.

Larry Gnuse testified that in late 1981 Respondent was in a tough financial position and the decision was made to delay any cost-of-living adjustment until a survey of what competing hospitals were paying was completed. In this regard, explained Gnuse, there was intense competition for nurses, and Respondent felt it could afford to pay only what was necessary to retain its staff. Accordingly, it was Gnuse's responsibility to gather data and make a recommendation to the hospital board of directors' executive council, which, in turn, was charged with making a recommendation to the full board. A recommendation was made, and on December 7, 1981, 8 days before the 3.5-percent raise counteroffer was made to the Union by Siebert, the executive board approved a hospital administration proposal that "beginning in January an average of 8.5% increase will be given to all non-exempt employees." The executive board's approved proposal was given to the board of directors on December 21. Its minutes regarding the raise read as follows: "Salary increases must be implemented, and Mr. Pierce stated that the Executive Committee did approve the 8.5% increase. . . . The 8.5% increase was ratified for all non-managerial employees, and will be presented by the negotiating committee to the union at its next session."

The board of directors having approved the cost-of-living raise, Gnuse informed Siebert "that the wage proposal . . . that that is what we were supposed to offer to the Union on the next available negotiating session after it was passed." Gnuse denied that Siebert played any role in establishing this figure—"Mr. Siebert was directed to make an 8.5 percent offer." The announcement of the raise was made 9 days before the next scheduled meeting with the Union, January 8, 1982. Gnuse explained that the timing of the announcement was based on competitive factors and rumors that no raise would be given, testifying, "I had to get it out as soon as possible to squelch those rumors . . . . We couldn't afford to delay." Regarding why the LPN-Tech bargaining unit employees were not given the raise at the same time it was announced for the other employees, Gnuse listed four reasons: the hospital could not lawfully alter or modify the wages of represented employees except through negotiations; the announcement had to be immediate to avoid losing staff; "We also realized that the announcement of an 8.5 percent increase would put economic and political pressure on the union to accept maybe an 8.5 percent increase like everybody else. Up to this point they had steadfastly clung to . . . a fourteen and a half percent increase and the hospital could not afford that"; and Respondent was accommodating previous objections from the Union over wage increase announcements.[15] Walter Siebert gave a slightly different explanation for Respondent's conduct, "I think the rationale there was that historically the hospital had announced in December . . . wage increases effective in January . . . . My thought was that I didn't want to preempt the union from collective bargaining over the issue of wages. So rather than announce that the wage increase unilaterally would be applicable to the persons for whom we were . . . bargaining, we would discuss that with the union, modify our offer and tell them that we would make it effective on the same day."

3. The last bargaining session

At the conclusion of the December 17 bargaining session, the parties scheduled their next meeting for January 8, 1982, and compiled an agenda[16] for discussion during it. Union spokesman Richardson described his attitude prior to the meeting as follows: "Recognizing that we had been at negotiations for a long period of time over items that at least from my experience have never faced such opposition to . . . that the certification year was soon to be up, my attitude was to try to reach agreement on all outstanding items, recognizing that we had the best that we thought we could do and that the Employer wasn't going to move any further." The record discloses that during this session there was serious discussion of all the unresolved contractual provisions, with substantial movement by both parties. More specifically, regarding a wage increase for the LPN-Tech employees, Siebert, in accord with his instructions, offered to the Union an immediate 8.5-percent across-the-board pay raise, identical to that announced for the other hospital employees, and said, "But that certainly did not preclude them from further bargaining on the issue." Richardson announced his acceptance of the offer. Regarding Respondent's proposed management-rights clause, there was substantial discussion that resulted in an agreed-on revised version. Thus, several points were removed, including the language reserving to Respondent, the exclusive rights to have supervisors perform any work deemed necessary, to limit union activity on hospital property, to schedule operations and determine the number of and duration of shifts, to terminate employees who are laid off or transferred because of "process or technique, and to transfer employees from job to job or from shift to shift, and several reserved rights were modified by the inclusion of the changing of certain words." Also, Respondent withdrew its insistence that the "zipper" clause be included in the projected contract, and Siebert accepted, with some modification, the Union's September 1 staffing counterproposal. For his part, true to his convictions, Richardson accepted Respondent's offers concerning holidays, sick leave, vacations, hours of work, the basic social security alternative proposal, uniforms, and employee discounts.

There is no dispute that agreement was reached in the above areas, and there is also no dispute that certain matters were left unresolved. The most significant of these was contract duration. Regarding this issue, Richardson testified that, at the start of the RN unit negotiations, he proposed a 1-year contract "because of the novelty of the relationship." Siebert opined that this would be reasonable, but there was no definite acceptance. He further testified that his preference for a 1-year term was mentioned on two other occasions during the RN unit negotiations. On one occasion, when Siebert proposed a wage freeze in lieu of a raise in wages, Richardson objected, saying that in a year Respondent would no longer be competitive; Siebert disagreed. Also, according to Richardson, during a meeting on May 13, 1981, while he and Siebert were discussing health and welfare, "as [contract term] applied to [that subject], we had a brief discussion on the length of the agreement. I am asking him if it is acceptable to approach health and welfare as we have with regard to the RNs and the LPNs together, and he responds by saying depending on the length of contract." Regarding discussions of the term of the LPN-Tech unit contract prior to January 8, 1982, Richardson admitted that there had been no specific negotiations on that issue. Richardson insisted, however, that on September 17 he went through the Union's RN unit proposal "item by item"—"We gave them the same package for the technical unit. They were the proposals that we worked from."—and included was his proposal for a 1-year contract.[17] Ultimately, Richardson conceded regarding when the contract term was raised during the LPN-Tech unit negotiations, "I think it wasn't until the last day," and admitted he could not say with certainty that Siebert knew what he had in mind regarding that issue. Siebert testified that contract duration was only discussed at the final bargaining session—"that was the only time that I recall it was discussed." He continued, stating that duration was never mentioned as a topic to be discussed at a future meeting; consequently, the hospital never prepared a position on it. Further, he averred, duration is usually the last item for agreement inasmuch as economic decisions must be made before, and only then can you determine how long the contract should be effective. Finally, he denied having any discussion on duration during the RN unit negotiations or any inkling regarding how long the Union desired the LPN-Tech unit contract to be. Larry Gnuse, who attended most of the RN unit and LPN-Tech unit negotiations, stated that contract duration "was brought up in earnest . . . in the final negotiations day," and conceded, regarding earlier discussion, "it may have been mentioned in passing." In any event, there is no dispute concerning what was said about the issue at the January 8 meeting. Richardson stated that it arose on presentation by Siebert, of the hospital's pay raise offer. The former inquired regarding whether such was just for 1982, and Siebert responded, "it depends on the length of the agreement." Richardson replied that the Union wanted a 1-year contract. Siebert said that he would like to leave the matter open and suggest an extra year with a wage reopener. To this, Richardson said, "we would be agreeable to more than one year with reopeners that deal with compensation." At the conclusion of the session, according to Richardson, "I give him complete discretion or convey our ability to live with the hospital's complete discretion . . . a single year or pick a multi-year with reopeners or a multi-year with wage adjustments agreed to at this time"; Siebert said he would draft something.[18] The latter did not controvert this testimony, and he corroborated Richardson concerning the options discussed.

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[15] In July 1980 and January 1981, the hospital announced cost-of-living raises for all staff nurses, team leaders, and charge nurses and advised the Union of such by letter. Presumably the announcements and the implementation of these raises formed the basis for alleged "unilateral change" 8(a)(1) and (5) violations, matters that were remedied by a settlement agreement, containing a nonadmission clause, in Cases 27-CA-7092, 27-CA-7092-2, 27-CA-6781, and 27-CA-6819. Inasmuch as the Regional Director for Region 27 has not revoked his approval of the settlement agreement, I am precluded from examining the merits of the allegations and from considering the underlying conduct as unfair labor practices.

[16] At the end of each bargaining session, the parties would draw up a list of items for discussion at the next session. Siebert admitted that this did not mean that he and Richardson could not discuss other matters as they arose at the next meeting. The items on the agenda for discussion on January 8 were wages, holidays, and shift differential.

Other items as well remained open. Richardson testified that the matter of short-term disability and whether this was covered under the social security alternative plan was unresolved. Also, on September 17 while the parties discussed the proposed recognition clause, a problem developed when it was observed that the job classification "bio-med tech" had apparently been inadvertently omitted from the LPN-Tech unit certification. This resulted in a further complication, with no wage rate applicable to the position. According to Richardson, he attempted to resolve the matter by stating to Siebert on January 8 that the Union only desired recognition in the certified unit. However, he admitted no agreement was reached. Further, Richardson stated that there remained lack of agreement concerning shift differential pay and that Siebert "suggested" that they leave that issue open because "he may be able to add a little more in that area." Finally, it appears that also unresolved was the issue of vesting in the contractual retirement program, for, in a newsletter that was distributed to employees subsequent to the January 8 session, the Union listed as unresolved three benefit items: shift differentials, vesting in the retirement program, and short-term disability.

4. The decertification petition and Respondent's withdrawal for bargaining

The petition in Case 27-RD-587 was filed by Patricia Eich on January 11, 1982. The record discloses that the individual who commenced obtaining signatures for the decertification was Jack White, who, at the time, was a tech in the engineering department. He testified that, during December 1981 and early January 1982, he collected signatures from 35 LPN-Tech bargaining unit employees. He was assisted in collecting the signatures by Eich, an x-ray technician. She was given the petition papers by White, observed each employee sign, and, in all, was able to obtain approximately 12 signatures. White estimated that at least 60 employees were in the LPN-Tech bargaining unit; they knew those employees who signed to be unit members. Sometime on January 11 both White and Eich went to the offices of Region 27 of the Board, filed the aforementioned petition, and returned to the hospital. Thereupon, they went to Administrator Pierce's office and spoke to him there. White estimated the time of day as between 12 and 1 p.m.; Eich placed it as prior to 3:30 p.m. ("But I'm not sure.") According to White, "We told him that we had just been at the National Labor Relations Board office and we had filed a petition for the decertification of the union and I believe we also told him that probably about 60 percent of the employees had signed the petition. And he said, 'Thank you.' And that's about it." According to Eich, "We just told him that we had come back from the Labor Board and filed a petition with a majority—with 60 percent of the votes—the people that signed it." There is no record evidence that Respondent was either aware of or participated in the decertification petition process.

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[17] Scrutiny of G.C. Exh. 13, the table of contents, and compilation of union proposals made to Respondent during the RN unit contract negotiations and the document from which the parties worked on September 17, 1981, establishes that contract terms are *not* included as a proposal.

[18] Both counsel for the General Counsel and the Union attach significance to the failure of Siebert to accept one of the contract duration options. Regarding the extent of his authority to agree to anything during bargaining, Siebert testified that he had "full authority" to bargain with two exceptions—all agreements were tentative until a final agreement was reached and whatever was negotiated had to be approved by the hospital board of directors. Also his authority was limited "in terms of direction . . . from my client." Siebert denied receiving any direction on contract duration.

Larry Gnuse testified regarding Siebert's authority: "Our counsel . . . was more—was directed once—was basically fed information from myself and from the negotiating committee in terms of what is . . . workable language. His job was to put that into proposals. He also got direction directly from the hospital administrator." Regarding the latter, Siebert portrayed his contacts with Pierce as irregular and sporadic. Gnuse corroborated this, stating that Siebert was not in "constant contact" with Pierce because he dealt primarily through the negotiating committee.

At 1:26 p.m. (MST) on January 11, Siebert sent the following mailgram to Richardson:

> WE HAVE BEEN INFORMED THAT A PETITION HAS BEEN FILED WITH THE NLRB FOR A DECERTIFICATION ELECTION. IT IS OUR UNDERSTANDING THAT THE PETITION WAS SUPPORTED BY MORE THAN A MAJORITY OF THE EMPLOYEES IN THE LPN TECH UNIT. CONSEQUENTLY AT THIS TIME WE ARE SUSPENDING BARGAINING AND WITHDRAWING OUR PROPOSALS ON THE INFORMATION AND BELIEF THAT YOU NO LONGER REPRESENT A MAJORITY OF EMPLOYEES IN THE UNIT.

Regarding how Siebert learned of both the filing of the decertification petition and the contents of the conversation among Pierce, White, and Eich, Larry Gnuse testified that he spoke to Pierce on the afternoon of January 11 and informed him of the filing of the decertification petition supported by 60 percent of the LPN-Tech unit employees. Shortly thereafter, Gnuse telephoned Siebert and informed him of what had occurred. In any event, subsequent to January 11, the Union has demanded that Respondent resume bargaining, and the latter has continually refused, citing a belief that the Union no longer represents a majority of employees in the above unit.

Other than the statements by employees White and Eich, there exists no other record evidence to support Respondent's asserted belief. Further, at the hearing, Respondent's counsel stated that the January 11 mailgram was also intended as a withdrawal of recognition from the Union as the majority representative of the LPN-Tech bargaining unit employees. For purposes of discussion, I will consider the January 11 telegram as both suspending negotiations and withdrawing recognition.

5. The no-solicitation/no-distribution rules

Although unclear in the record, Respondent, during calendar year 1980, maintained in effect a no-solicitation/no-distribution rule that was printed on page 53 of its personnel policies manual, a document distributed to all employees. The rule, General Counsel's Exhibit 30, reads as follows:

> *SOLICITING*
>
> *Solicitations by Employees*
>
> No materials shall be distributed to and no solicitation shall be made of any employee in any public area within the premises. Any solicitation must be confined to non-work, non-public and non-patient areas and during non-working time.
>
> *Solicitations by Non-Employees*
>
> Non-employees may not solicit on the Hospital premises for any reason whatsoever.

The rule was one basis for the Union's objections to the initial representation election, involving the LPN-Tech unit employees, in Case 27-RC-5926. The objection was deemed meritorious. In addition, the rule was also considered as an allegation of the unfair labor practice charges that eventually resulted in the settlement agreement, discussed in footnote 15, supra.

LPN Norma McAdams testified that she observed a notice, General Counsel's Exhibit 31, posted for approximately 1 week sometime during the spring of 1982 on the bulletin board of the nurses station, Three North, and possibly on the bulletin board located outside the personnel office. The notice reads as follows:

> March 17, 1982
>
> To: All Employees
> From: Larry Gnuse, Assistant Administrator/ Special Projects
> Re: Solicitation–A Reminder
>
> Due to a recent rash of solicitors in the hospital, the Rocky Mountain Hospital solicitation policy has been reproduced below. The policy applies to all solicitations.
>
> If you are solicited in violation of the policy, please remind the person(s) of the policy and/or, if necessary, contact the Personnel Department.
>
> "In order to prevent interference with the hospital's patient care responsibilities, the rules below must be observed:
>
> 1. *Nonemployees*: Persons who are not employed by the hospital are not permitted to distribute material or to solicit employees for any purpose whatever on hospital grounds or inside the hospital building, at any time.
>
> 2. *Employees*: Every employee's work deserves his or her full attention during scheduled working time. Therefore, employees may not solicit other employees for any purpose, at any time, in an area strictly devoted to patient care, such as patient's rooms, operating rooms, and patient treatment areas, such as X-ray and therapy areas.

> An employee who is on his/her free time or break time, may not solicit or distribute literature to employees who are working."

Larry Gnuse testified that when he was hired in January 1981, Kay Beavers, the former personnel director, told him that the solicitation/distribution policy printed in the personnel manual (G.C. Exh. 30) was no longer in effect and had been superseded by the policy set forth in the March 1982 notice. According to Gnuse, he affixed the revised rule to page 53 of his master copy of the personnel manual but did not, at that time, distribute the revised rule to the hospital employees because he was informed this had previously been done. Subsequently whenever copies of the manual were given to new employees or, on request, to present employees, a folded copy of the revised rule would be inserted.[19] The witness further testified that the March 17 notice was posted because the hospital, at that time, had been encountering problems including a lawsuit, solicitations by a private detective during worktime for information, and selling activities on hospital property by nonemployees.

Tycho Christensen, Respondent's present personnel director, testified that at the time of his hire (March 29, 1982), he observed the March 17 notice posted on bulletin boards inside and outside the personnel office, was told that it had replaced the no-solicitation/no-distribution policy, printed on page 53 of the personnel manual, and believed it had been distributed to all employees. In any event, he commenced ripping page 53 out of the booklets and replacing it with an insert of the new rule whenever the manual was given out. According to Christensen, during April 1982 he discussed with Respondent's attorney possible updating of the entire personnel manual, including the no-solicitation/no-distribution rule. The latter was of the view that the language was adequate, but suggested some modifications. Accordingly, in late April 1982, General Counsel's Exhibit 33, Respondent's revised no-solicitation/no-distribution policy, was posted on the bulletin board located outside the personnel office.[20] Christensen testified that this represents Respondent's current solicitation/distribution policy, that copies were distributed only to new employees on receipt of the personnel manual, and that he considered the posting sufficient to place current employees on notice of the revised policy. The rule reads as follows:

> ROCKY MOUNTAIN HOSPITAL
>
> *NO SOLICITATION RULE*
>
> Solicitations are not permitted by employees for any purpose during working time or in immediate patient care areas. An employee may not engage in solicitation of other employees during their working time.
>
> Distribution of literature by employees is not permitted for any purpose during working time or at any time in working areas.
>
> Working time does not include meal, break, or rest periods or other specified times during the workshift when employees are not properly engaged in performing their work tasks. Immediate patient care areas include: Patient rooms, therapy rooms, nursing stations, x-ray and other patient-treatment rooms. Work areas are defined as areas of the premises where employees perform their work tasks, but do not include break rooms, restrooms, or parking lots.
>
> Off-duty employees are prohibited from entering any area not open to the public, and are prohibited from interfering with an on-duty employee's performance of his work tasks.
>
> Non-employees may not solicit for any purpose or engage in distribution of literature of any kind on the hospital premises at any time, except that non-employees, as members of the general public, are free to utilize the public cafeteria in a manner consistent with its purpose.
>
> Solicitation of or distribution of literature to non-employees on the facilities' premises is prohibited.[21]

Norma McAdams testified that she observed the new rule posted on the personnel office bulletin board in January 1983.[22] Finally, regarding the no-solicitation/no-

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[19] McAdams testified that she went to the personnel office on March 15, 1982, to obtain a personnel manual. She did so because the previous evening a fellow employee asked her a question about Respondent's sick leave policy and she did not have a copy of the personnel manual. Inside the office, she asked the assistant personnel director for a copy of the manual, observed either the assistant or Gnuse reach up to a shelf for it, was handed the manual, and as she was aware that there were supposed to be inserts, including possibly new personnel policy, inquired whether there were inserts. The assistant said there were none.

[20] Christensen stated that the bulletin board is utilized for the posting of all important employee literature because it is located near the timeclocks and almost all employees pass by it going to or coming from the parking area.

[21] In the third paragraph of the current policy, immediate patient care areas are defined as including nursing stations. There is rather scant evidence regarding areas in the record, and all the evidence comes from the testimony of Norma McAdams. In responding to questions regarding her understanding of the meaning and reach of G.C. Exh. 31, she included nurses stations as being areas in which patient care is administered or in which solicitations would not be allowed. There is no evidence regarding patient access to the areas or what is done by nurses therein. Finally, asked whether "charting" is an essential element of patient care, she answered affirmatively.

Regarding the last sentence of the rule, the record discloses that, other than clericals, management, and some laboratory employees, all employees wear uniforms at work, not all employees wear their uniforms to work and, although name tags are required, employees occasionally forgot to affix them to their uniforms.

[22] McAdams identified G.C. Exh. 32 as a document that she observed posted on the bulleton board of the nurses station in wing, Three North, during the spring of 1982. It reads:

> TO: All RMH Employees
> FROM: Robert H. Pierce, Administrator
> SUBJECT: Unauthorized Inquires[sic]
> DATE: January 18, 1982
>
> It has come to the attention of Administration that certain unauthorized people have been conducting inquires[sic] on hospital personnel matters. Individual employees should not try to answer such questions, such persons should be referred to Administration.
>
> Your cooperation will be greatly appreciated.

Continued

distribution rules set forth in General Counsel's Exhibits 30 and 31, there is no record evidence of enforcement of either against any employee or nonemployee of Respondent.

B. *Analysis*

1. The alleged unlawful no-solicitation/no-distribution rules

Paragraphs 5(c) and (d), respectively, of the consolidated amended complaint allege that the no-solicitation/no-distribution rules set forth in General Counsel's Exhibits 30 and 31 are overly broad and, therefore, violative of Section 8(a)(1) of the Act. Without regard for the merits of either allegation, I will recommend dismissal of both paragraphs for the following reasons: First, I believe the paragraphs involve conduct that occurred outside the Section 10(b) of the Act 6-month statute of limitations period. Thus, there is no dispute that the original rule existed in, at least, 1980 and was the subject of objections to the conduct of the representation election in Case 27-RC-5962. Larry Gnuse, who testified in an honest and forthright manner and is credited in most instances, stated that the no-solicitation/no-distribution rule, set forth in General Counsel's Exhibit 31, was in effect on his hire in January 1981 and was intended to supersede the prior rule. Notwithstanding that each may have been republished in 1982 (the original rule in the employee manual given to Norma McAdams on March 15[23] and the other when posted on bulletin boards on March 17), such conduct was more than 6 months prior to the filing of the charge in Case 27-CA-7694, and there is no evidence that the rules were enforced during this period of time.[24] Contrary to the General Counsel, the 10(b) 6-month statute of limitations period does apply, and the date for its consideration is that of the amended charge. Thus, I do not believe that the latter can be said to relate back to the date of the original charge, January 20, 1982, noting that the events of the amended charge (no-solicitation/no-distribution rules) cannot be said to have arisen out of the same course of conduct, engaged in by Respondent (bargaining in bad faith and canceling bargaining sessions), as set forth in the original charge. Cf. *Michigan Consolidated Gas Co.*, supra; *Air Express International*, supra. Rather, the amended charge and the original charge appear to constitute separate and distinct unfair labor practices, resulting in a new statute of limitations period for the former. *Industrial Workers ATW*, supra. Further, it is clear, and I so find, that the current no-solicitation/no-distribution rule superseded and revised both of the predecessor policies in that regard. Regarding this, it was uncontroverted that the new rule (G.C. Exh. 33) was published in April 1982, having been posted on the personnel department bulletin boards and observed there by Norma McAdams in January 1983. Tycho Christensen testified that the rule was intended to supplant that set forth in General Counsel's Exhibit 31, and there is no evidence to the contrary. Relying on *Sunnyland Packing Co.*, 227 NLRB 590, 595 (1976), the General Counsel argues that the existence of a third no-solicitation/no-distribution rule does not foreclose findings regarding prior rules when there has been no disclaimer about them, and when the manuals containing the prior rules have not been recalled. I find *Sunnyland Packing*, however, inapposite inasmuch as the respondent, who published an employee booklet containing a no-solicitation/no-distribution rule accompanied by language which, in effect, required employees to inform the company if anyone solicited employees to engage in union activities, sought to establish that the unlawful passage had been removed from new editions of the pamphlet and was no longer meant to be effective, but with the above factors casting doubt about that assertion. Respondent merely asserts that the disputed no-solicitation/no-distribution rule language has been revised and that, so modified, the rule remains in effect. That no employee handbooks were recalled or that Respondent did not specify that all prior rules were no longer valid are hardly relevant considerations inasmuch as General Counsel's Exhibit 33 was posted on the bulletin board on which all significant personnel documents are placed. There is no record evidence, and it would be insulting the intelligence of the skilled hospital staff, to assert that they did not understand that the effect of the posting was to establish that rule as Respondent's current policy on solicitations and distributions.[25]

The relevant issue, then, is the facial validity of the latter and current policy, the legality of which is the subject of amended consolidated complaint paragraph 5(e), an amendment to the complaint at the hearing. Regarding such rules at a hospital facility, the Board, with court approval, has permitted broader applicability than in the more standard industrial setting. Thus, in *St. John's Hospital*, 222 NLRB 1150 (1976), enfd. in part 557 F.2d 1368 (10th Cir. 1977),[26] the Board referred to its general rule,

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On a motion by counsel for the Respondent, I ordered that par. 5(b) of the consolidated amended complaint, which alleges the foregoing notice as violative of Sec. 8(a)(1) of the Act, be stricken as involving conduct outside the 10(b) statute of limitations period. I reaffirm that ruling, noting that the date of the notice and its observation by McAdams occurred more than 6 months prior to the filing of the amended charge in Case 27-CA-7694 and that the amendment (allegation of an overly broad no-solicitation/no-distribution rule) does not, at all, arise out of the same course of conduct by Respondent (bad-faith bargaining) as set forth in the original charge so as to relate to it. Cf. *Michigan Consolidated Gas Co.*, 261 NLRB 555 fn. 1 (1982); *Air Express International Corp.*, 245 NLRB 478, 487 (1979). Rather, although properly filed, the amended charge alleges a separate and distinct violation of the Act; therefore, to be unlawful, conduct must have occurred within 6 months of its filing. *Industrial Workers AIW Local 594 (Warren Plastics)*, 227 NLRB 1541 (1977).

[23] Although I credit McAdams on this, I believe her testimony establishes that she knew full well that there should have been an insert, setting forth a revised no-solicitation/no-distribution policy.

[24] Contrary to both the General Counsel and the Union's representative, the burden was on the General Counsel to show that the rules were effective during the statutory 10(b) period and not on Respondent to show each was no longer in effect.

[25] Unlike *Sunnyland Packing*, in which the respondent sought to establish that language no longer was in existence and that it intended that such should be the case, Respondent would hardly have intended that three conflicting policies remain in effect. It seems reasonable, and I find, that Respondent, at all times, intended that the rule, posted in April 1982, be taken as its only no-solicitation/no-distribution policy.

[26] That hospital's rule prohibited solicitations during working time in working areas and in all areas to which patients and visitors have access and distribution of literature in any area except nonworking areas where patients and visitors do not have access.

that no-solicitation rules are presumed unlawful if extended to this conduct during nonworking time, irrespective of whether this occurs in a work or nonwork area, and that no-distribution rules are presumed valid unless they extend to activities during nonworking times in nonworking areas, and stated that "hospitals may be justified in imposing somewhat more stringent prohibitions on solicitation than are generally permitted . . . a hospital may be warranted in prohibiting solicitation even on nonworking time in strictly patient care areas, such as the patients' rooms, operating rooms, and places where patients receive treatment, such as x-ray and therapy areas." The Board concluded that the respondent's rule was invalid to the extent that it prohibited solicitation and distribution in all areas where patients and visitors have access, "other than immediate patient care areas." Id. at 115. The Board appeared to establish a presumption regarding the foregoing and place the burden of proof on hospitals to establish that solicitations and distributions would disrupt patient care in other hospital areas. This theme was picked up by the Supreme Court in *Beth Israel Hospital v. NLRB*, 437 U.S. 483 (1978), and *NLRB v. Baptist Hospital*, 442 U.S. 773 (1979). In the former, the Court wrote approvingly of *St. John's Hospital* and interpreted the Board to mean that employees' Section 7 rights are presumptively restrained and coerced by prohibitions against solicitations and distributions in other than immediate hospital patient care areas (such as lounges and cafeterias) unless "the facility has . . . justified the prohibitions as necessary to avoid disruption of health care operations or disturbance of patients." *Beth Israel Hospital*, supra at 507.[27] Therein, the hospital failed to establish that patient care was adversely impacted on by union solicitations in its cafeteria. In *Baptist Hospital*, the court concluded that the hospital had presented compelling evidence that patient care tended to be disrupted by union-solicitation activities in its corridors and sitting rooms on floors of the facility containing patients' rooms or operation and therapy rooms, but that the hospital had not justified its prohibition against these activities in the first floor cafeteria, lobby, or gift shop. Subsequent Board decisions indicate that it closely scrutinizes the record in order to ascertain whether a hospital has offered sufficient evidence to prove that a prohibition against solicitations and/or distributions in other than immediate patient care areas[28] is necessary to prevent disruptions of health care operations or disturbances of patient care. *Baylor University Medical Center*, 247 NLRB 1323 (1980); *Medical Center Hospitals*, 244 NLRB 742 (1979).

Turning now to examination of General Counsel's Exhibit 33, Respondent's current no-solicitation/no-distribution policy, the initial sentence prohibits solicitations "during working time or in immediate patient care areas," and these latter areas are later defined as including the nursing stations. Apparently, then, solicitation in the nursing stations is prohibited at all times and not just on working time. As discussed in footnote 28, supra, the Board has never extended its listing of those areas of, what it considers to be, immediate patient care to include nursing stations, and I will not do so. Thus, this aspect of Respondent's rule is "presumptively invalid." *Baptist Hospital*, supra at 780. Whether Respondent's nursing stations should be included in those "other" hospital areas in which solicitations may adversely impact on patient care or disrupt health care operations to permit prohibitions on such activity depends on the record evidence. In this regard, there is no record evidence of the type of work performed in the nurses stations, whether patients ever enter these locations, or whether, as in *Baptist Hospital*, these areas are physically separated from immediate patient care areas or are utilized by employees on breaks from work. Id. at 785 fn. 15. It may well be that solicitations in these locations would disturb patients or disrupt health care operations;[29] however, the burden of proof on these points was on Respondent. It failed to offer such evidence, and I shall not speculate. That Norma McAdams considered the nursing stations as being areas of "patient care" is not, I believe, enough to overcome the Board's presumption that a ban on solicitations in such areas interferes with employees' Section 7 rights. The second paragraph of the current rule prohibits distribution of literature "at any time in working areas," and defines such areas as specifically excluding breakrooms, restrooms, and parking lots. Counsel for the General Counsel argues that the specified exclusions leave the clear impression that they are the *only* areas so excluded and that such normally nonpatient care areas as the cafeteria, the gift shop, and the first floor lobby seem to be considered "work areas" by Respondent. Accordingly, it is argued, the policy is ambiguous in this regard and, therefore, unlawfully broad. Arguing to the contrary, counsel for Respondent asserts that "reasonable employees" should "understand which areas are included" and that the specified exclusions were merely illustrative of the hospital's nonwork areas. Although not free from doubt, as we are dealing with prohibitions on time-honored Section 7 activities, I believe that in drafting a no-solicitation/no-distribution rule *any* employer has an obligation to its employees to specify what is and what is not prohibited, thereby not leaving to an employee's interpretation whether particular conduct would violate the rule. The definition of "working areas" could potentially inhibit the distribution of materials in clear nonwork areas (*J. H. Block & Co.*, 247 NLRB 262 (1980)), and "Respondent must assume the burden of ambiguity." *Continental Bus System*, 229 NLRB 1262 (1977).

The fourth paragraph of the no-solicitation/no-distribution policy prohibits "off-duty" employees from entering any nonpublic areas of the hospital and "from interfering with an on-duty employee's performance of his work tasks." Counsel for the General Counsel, citing

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[27] The distribution between disruption of health care operations and disturbance of patients is significant inasmuch as the former may occur *not* in the presence of patients where doctors, nurses, and a hospital's staff are performing their normal work. *Baptist Hospital*, supra at 781 fn. 11.

[28] As noted by the Court in *Baptist Hospital*, supra, "nothing in its subsequent opinions to [*St. John's Hospital*] has suggested that the Board views areas other than patients' rooms, operating rooms, and treatment rooms as areas of immediate patient care." Id. at 781 fn. 10.

[29] It is unclear whether such patient care work as "charting" is done in the nursing stations.

Eastern Maine Medical Center, 253 NLRB 224 (1980), affd. 658 F.2d 1 (1st Cir. 1981), argues that this provision is unlawfully broad on its face as employee solicitations or distributions before or after work are prohibited. In *Eastern Maine*, both the Board and the court found a no-solicitation/no-distribution policy unlawfully broad partly because this rule could be interpreted as prohibiting such conduct during "reasonable periods" before and after work. In support, the Union points to *Republic Aviation Corp. v. NLRB*, 324 U.S. 793 (1945), in which the Supreme Court stated, "it is therefore not within the province of an employer to promulgate and enforce a rule prohibiting union solicitation by an employee outside of working hours, although on company property." Id. at 803–804 fn. 10. Arguing that the phrase is permissible, counsel for Respondent points to the Board decisions in *Tri-County Medical Center*, 222 NLRB 1089 (1976), and *GTE Lenkurt, Inc.*, 204 NLRB 921 (1973). In *Tri-County*, the Board upheld a rule denying off-duty employees access to a hospital, stating such a provision would be presumptively lawful if it limits access solely concerning the interior of the facility and other working areas, is "clearly disseminated" among all the employees, and applies to off-duty employees seeking access for any purpose. Id. at 1089. Analysis of this provision convinces me that it is unclear whether it refers to off-duty employees who remain at the hospital (the *Eastern Maine* situation) or off-duty employees who leave and then come back to the hospital (the *Tri-County* situation). In any event, under either analysis, the paragraph is overly broad. Thus, if it refers to off-duty employees inside the hospital, the rule could be interpreted as prohibiting solicitations by off-duty employees of other off-duty employees in nonpublic areas during "reasonable periods" before and after work and, therefore, it is unlawfully restrictive. *Republic Aviation*, supra; *Eastern Maine*, supra. If the rule refers to off-duty employees who are away from the hospital, but who wish to return to be within the *Tri-County* guidelines, I note that, to be considered as not unduly restrictive of Section 7 rights, such a provision must apparently, *on its face*, be limited to access to the *interior* of a facility. Respondent's rule contains no such limitation and, contrary to its counsel, as there is no record evidence that no nonpublic areas exist in the exterior areas of the hospital, it clearly has the potential of being interpreted as being applicable to outside areas. As stated above, given the conflict between this type of rule and employees' Section 7 rights, there can be no opportunity for an overly broad interpretation if such a rule is to be found lawful. Finally, counsel for the General Counsel and the Union attack the last paragraph of Respondent's no-solicitation/no-distribution policy by which "solicitation of or distribution of literature to non-employees on the facilities' premises is prohibited." They argue that given the large number of employees, the fact that not all employees wear uniforms to work, and the fact that conceivably an employee might not be wearing a name tag, the provision might inhibit employees exercising their Section 7 rights. In both *Republic Aviation*, supra, and *NLRB v. Babcock & Wilcox Co.*, 351 U.S. 105 (1956), the Supreme Court reasoned that, in deciding on the validity of rules restricting solicitations and distributions of literature on plant premises, an adjustment between employees' Section 7 rights and employees' property rights was required—an accommodation "with as little destruction of the one as is consistent with the maintenance of the other." *Babcock & Wilcox*, supra at 112. With the foregoing in mind, certain factors convince me of the facial validity of the instant provision. Initially, Respondent's rule does not prohibit solicitations or distributions to employees, but rather to "non-employees," and I am aware of no Board or court decision limiting or curtailing an employer's exercise of its property rights in such a manner. Next, the rule appears to be, in part, designed to protect the hospital's patients[30] from such activities. In this regard, the Supreme Court and the Board recognize that patients "need a restful, uncluttered, relaxing, and helpful atmosphere, rather than one remindful of the tensions of the marketplace in addition to the tensions of the sick bed." *Beth Israel Hospital*, supra at 509 (Justice Blackman concurring); *Eastern Maine Medical Center*, supra at 227 (Board decision).[31] Regarding this, I note that, within the hospital, patients may not be wearing normal patient attire, such as when checking in or when present as outpatients; Respondent's rule clearly protects them and serves a legitimate business purpose. Finally, weighing the above concerns of the General Counsel and the Union against Respondent's property rights establishes only a minimal risk of interference with employees' Section 7 rights. Thus, there appears to be relatively few employees who do not wear uniforms to work or while working or who do not wear name tags, and there are ample locations, both inside and outside the facility, where solicitation and distribution activities can occur.

In conclusion, regarding General Counsel's Exhibit 33, Respondent's current no-solicitation/no-distribution policy, I find it to be overly broad and violative of Section 8(a)(1) of the Act insofar as it prohibits solicitations, at any time, in nursing stations, as it too broadly defines "work areas" so as to prohibit distribution of literature in such public areas as the cafeteria and the gift shop, and as it prohibits off-duty employees from entering *any* area not open to the public during reasonable periods before and after work. In other aspects, it fully comports with the Board and court guidelines in this area of the law.

2. Alleged specific acts of bad-faith bargaining

The complaint sets forth several specified actions by which Respondent allegedly bargained with the Union in bad faith—in violation of Section 8(a)(1) and (5) of the Act. Initially, although not so alleged, I consider whether Respondent demonstrated bad faith by engaging in dilatory actions regarding not only the scheduling of bargaining sessions, but also the entire range of bargaining with the Union.[32] In this regard, the record establishes that, notwithstanding the Board's certification of the Union on January 9, 1981, as the bargaining representative of Respondent's LPN-Tech employees, more than 8 months passed until the parties commenced contract negotiations on September 17; that, during the next 18-week period and despite the end of the Union's initial certification year in early January 1982, the parties held just eight bargaining sessions, none of which lasted more than 3 hours as Respondent found them not productive; that, except for meetings on December 15 and 17, the time period between each meeting was no less than 12 days; and that after one session, Respondent's spokesman Siebert informed the Union that he would be unavailable for a 2-week period due to other commitments elsewhere. As background[33] evidence regarding what appears to be rather unduly delayed and lethargic bargaining during this 4-1/2 month period, I note that, while the Union received its certification in the midst of bargaining for a contract covering the RN unit employees, the Union's spokesman Richardson twice (on January 12 and March 2) wrote to Respondent's administrator Pierce demanding the start of negotiations for a contract covering the LPN-Tech unit employees; that not until May 13, 5 months after the certification, did Siebert formally notify Richardson that he would be the bargaining representative for Respondent in the LPN-Tech contract negotiations; and that Siebert continually refused Richardson's request that the parties facilitate the LPN-Tech unit negotiations by combining them with the ongoing RN unit discussions. Regarding this latter point, I note that most, if not all, of Respondent's positions on specific contractual provisions during the LPN-Tech negotiations were identical, or at least similar, to those taken during the RN negotiations, and Siebert never offered an explanation for his refusal to agree to consolidate the bargaining or to, at least, permit RN unit contract agreements to immediately apply to the projected LPN-Tech unit contract. The foregoing background suggests that the blame for the almost leisurely approach to bargaining during the period September 17, 1981, through January 8, 1982, falls on Respondent. *Continental Insurance Co.*, 204 NLRB 1013, 1013–1014 (1973), enfd. 495 F.2d 44 (2d Cir. 1974). This must be so because it strains credulity to believe that the Union, with its certification year due to expire and with bargaining finally commencing after an 8-month delay,[34] would deliberately have prolonged the negotiations. Inherent in the duty to bargain collectively, as defined by Section 8(d) of the Act, is the obligation to meet at reasonable times and places. *St. Louis Comprehensive Neighborhood Health Center*, 248 NLRB 1078 (1980). Eight sessions over an 18-week period, after an 8-month delay in the start, hardly meets this requirement; rather, it means that, at most, Respondent engaged in calculated "foot-dragging" designed to avoid or frustrate the bargaining process until the expiration of the Union's certification year (*NLRB v. Cable Vision*, 660 F.2d 1 (1st Cir. 1981); *Woody Pontiac Sales*, 174 NLRB 507 (1969)) or, at the very least, entered the LPN-Tech unit negotiations with a total lack of regard for its bargaining obligations under the Act.[35] In either case, I have no doubt that Respondent engaged in dilatory action regarding the scheduling and conduct of the bargaining in the period September 17, 1981, through January 8, 1982, and, therefore, engaged in bad-faith bargaining, violative of Section 8(a)(1) and (5) of the Act. *St. Louis Health Center*, supra; *O & F Machine Products*, supra.

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[30] In his brief, counsel for Respondent states that the rule was meant to protect both patients and visitors and that Respondent has a compelling and valid business justification for protecting both classes of individuals from unwanted union solicitations or distributions.

[31] Regarding visitors, the Board is less charitable: "We are not persuaded . . . that the special concern for patient welfare . . . which we share with the Court, compels that a similar protection from organizational solicitation be afforded members of the public who are not themselves patients in the hospital environment." *Eastern Maine Medical Center*, supra at 227.

Next, although likewise not specifically alleged as an act of bad-faith bargaining, is the matter of Respondent's admitted refusal to even discuss the Union's proposed union-security clause, which, if included in the projected contract, would have established a union shop with employees required to join the Union within 31 days of employment. Notwithstanding its own proposal for an open-shop clause, this is not a case of mere inflexibility of position, for Respondent steadfastly refused to bargain over the Union's proposal for reasons assertedly having to do with the Colorado Labor Peace Act. At the outset, not only is it settled law that union security is "properly a 'condition of employment'" and, therefore, a mandatory subject of bargaining, but also failure or refusal to bargain on this subject constitutes a violation of Section 8(a)(1) and (5) of the Act. *NLRB v. Andrew Jergens Co.*, 175 F.2d 130, 133 (9th Cir. 1949); *United States Gypsum Co.*, 94 NLRB 112, 114 fn. 9 (1951). Respondent's agent Siebert argued to union spokesman Richardson that there could not be any bargaining on the issue of union security until the employees fulfilled the requirements of the above State of Colorado statute by voting on whether they would accept such a contractual provision and that employee acquiescence to such a provision meant only that a union could lawfully bargain for this type of clause. However, I believe Siebert's assertions in this regard were without any validity and, most likely, disingenuously maintained. Thus, the very wording of the applicable statutory provision, "ratification of an all-union agreement" and petitions for elections covering "agreements entered into" suggests that what the Colorado legislature had in mind were elections to approve previously bargained for contractual union-security clauses and that such clauses could not be enforced prior to such ratification. Support for this view is found in *Communi-*

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[32] The issue was the subject of extensive litigation during the hearing and, thus, may be subject to findings by the Board. *Pay 'N Save Corp.*, 210 NLRB 311, 322 (1974).

[33] Although beyond the 6-month statute of limitations period in Sec. 10(b) of the Act, evidence of the events prior to July 1981 can be utilized to add "meaning to actions or inactions which take place within the period of limitations." *Crane Co.*, 244 NLRB 103, 110 (1979).

[34] Gnuse did not substantiate his assertion that Richardson was unable to meet on at least 12 proposed dates, nor do I believe that out-of-town commitments kept him from being available for meetings. Further, the fact that the Union never publicly complained about Respondent's dilatory tactics may mean nothing more than that the former chose to concentrate on the substantive aspects of the bargaining in its newsletters.

[35] Although the duty to bargain is that of Respondent's, the fact that negotiator Siebert may have legitimately been unavailable to meet on various occasions is no defense to this allegation. He acted as Respondent's agent and Respondent must bear the consequences. *O & F Machine Products Co.*, 239 NLRB 1013, 1019 (1978); *Woody Pontiac Sales*, supra at 511.

cations Workers of America v. Western Electric Co., supra, in which the Colorado Supreme Court concluded that certain contractual union-security clauses were unenforceable as the affected employees had not approved the provisions by the required "referendum." Specifically, it stated that "the union security provisions here in issue [are] invalid and unenforceable because of the lack of employee approval through an all-union referendum." Id. at 2183. Clearly, what is contemplated is a negotiated clause subject to employee approval. If Siebert's asserted interpretation was correct, employees would be asked to approve the general concept of a union-security clause, leaving the parties free to bargain over the specific type of clause. Employees would thus be buying the proverbial "pig in a poke," and it is inconceivable that the Colorado legislature had such a view in mind. I believe that, as one experienced in labor relations, Siebert was well aware of this. Accordingly, I find that Respondent's failure and refusal to bargain concerning the Union's proposed union-security clause, a mandatory subject of bargaining, during the course of the LPN-Tech unit negotiations was a deliberate course of conduct not undertaken by mistaken knowledge of the law and constituted an act of bad-faith bargaining, violative of Section 8(a)(1) and (5) of the Act. *Andrew Jergens Co.*, supra.

The complaint alleges as acts of bad-faith bargaining Respondent's refusal to agree to a clause regarding arbitration of grievances and its insistence on inclusion in a projected LPN-Tech unit contract a management-rights clause and a zipper clause. Notwithstanding being alleged as specific unfair labor practices, these acts are ignored as such by counsel for the General Counsel in her posthearing brief, and each is discussed as a mere indication of surface bargaining, itself an alleged act of bad-faith bargaining. Being somewhat confused by this inconsistency, but aware that it is reflective of the manner in which these matters were presented at trial, I will discuss the three acts as both constituting indicia of surface bargaining and as separate instances of bad-faith bargaining. Regarding Respondent's longstanding rejection of arbitration, counsel for the General Counsel argues that Respondent never deviated from its position, originally taken during the LPN-Tech unit negotiations, that it would not agree to have an outside third party, who was not familiar with the industry, interpret the parties' projected contract, and that the Union's only option, if dissatisfied with the resolution of a grievance, was to strike. On this latter point, according to the General Counsel, the Union's strike option was thwarted by Respondent's proposed all-inclusive no-strike clause. Initially, I note that nothing in the Act requires or compels acceptance of particular contractual language by either negotiating party. *H. K. Porter Co. v. NLRB*, 397 U.S. 99 (1970). I believe it intellectually dishonest to separate the matter of arbitration from the entire range of bargaining over a grievance procedure, of which arbitration was, in the Union's proposals, a major component. The record establishes, and Richardson admitted, that there was extensive bargaining over the subject of a grievance procedure, culminating in what Richardson characterized as a "workable" procedure. Moreover, alternatives to arbitration, such as resolution of grievances by a joint committee or by the administrator as a final grievance procedure step, were proposed and discussed at length by the parties. Further, although a provision of the agreed-on grievance procedure reserved for the Union the right to strike if not satisfied with a grievance result, nothing required the Union to exercise the right. In this regard, although in many contracts the quid pro quo for a no-strike pledge is an arbitration clause, and although the Board normally finds as an indicia of bad-faith bargaining an employer's insistence on a broad no-strike clause while resisting arbitration of grievances, such is not the case because the proposed no-strike clause, broad in other respects, recognized the Union's right to strike under other contractual provisions, such as the grievance procedure. Finally, it does not appear that any other contractual provisions were rendered beyond the reach of the grievance procedure and its strike clause. In these circumstances, contrary to the General Counsel, I find no bad-faith bargaining in Respondent's refusal to agree to an arbitration provision.

Regarding Respondent's demand that a two-page management-rights clause be included in the projected LPN-Tech unit collective-bargaining agreement, the record establishes that throughout the RN unit and the LPN-Tech unit negotiations, up until January 8, 1982, whenever the issue was discussed (and there is scant evidence that management rights were ever discussed in detail except during the last session), Respondent rigidly insisted on its own originally proposed language, rejecting the two shorter, less detailed union counterproposals. Of course, there is no dispute that at the January 8, 1982 session Siebert agreed to substantial changes in Respondent's proposal, modifying and removing numerous words and phrases. This resulted in, I believe, a significantly altered management-rights provision. Arguing that Respondent manifested bad faith with this contract provision, counsel for the General Counsel relies on the longstanding rigidity of Respondent on this clause and the language thereof. At the outset, an employer's insistence on the inclusion of a management-rights clause in a collective-bargaining agreement is not a per se violation of Section 8(a)(1) and (5) of the Act. *NLRB v. American National Insurance Co.*, 343 U.S. 395 (1952); *San Isabel Electric Services*, 225 NLRB 1073, 1078 (1976). Therefore, if bad faith exists, it must be manifested in the language of Respondent's management-rights proposal or in the manner of the bargaining regarding it. Regarding the former, Respondent's proposed language reserved not only standard rights of management, but also the rights to limit union activity on the facility's property, to utilize supervisors to perform any work deemed necessary, and to determine employee competency. Yet, the proposed language does not appear to be as restrictive as in other management-rights clauses that have been scrutinized by the Board. Thus, in *Stuart Radiator Core Mfg. Co.*, 173 NLRB 125 (1968), the proposed contract clause reserved to management, among others, the rights to discontinue part or all of its operations, to transfer or relocate part or all of its operations to other locations, to perform these at the new location, and to subcontract all or any part of its operations. Moreover, the respondent in *Stuart Radia-*

tor proposed language limiting grievances to the express terms of the contract, and none of the reserved management rights were to be amenable to the grievance and arbitration procedure. I can find no language in the agreed-on management-rights clause that renders it immune from the coverage of the grievance procedure. In addition, of course, on January 8, Respondent agreed to alterations of, and deletions from, its management-rights language; among those items deleted were the right to have supervisors perform any necessary work, the right to limit which activity on hospital property, the right to schedule operations and determine the number and duration of shifts, and the right to transfer employees from job to job and shift to shift. Thus, as in *Long Lake Lumber Co.*, 182 NLRB 435 (1970), Respondent did not foreclose bargaining over the elimination of the specific rights enumerated in the proposals, "and any action taken by the employer pursuant to the management rights clause could be challenged through the grievance procedure, after which the union would have the right to take economic action in support of its positions, if necessary." *San Isabel Electric Services*, supra at 1079; *Long Lake Lumber*, supra at 438. In short, I fail to see any bad faith on Respondent's part in either insisting on the inclusion of the management-rights clause or bargaining about it.

On the matter of the insistence by Respondent of the inclusion of an "entire agreement," or zipper clause, there is no dispute that the proffered language was extremely broad and that Respondent ultimately withdrew insistance on any such language at the January 8, 1982 bargaining session. There is little, if any, record evidence regarding specific bargaining on this subject at any prior meeting. In *NLRB v. Tomco Communications*, 567 F.2d 871 (9th Cir. 1978), the court held that such a clause "is nothing but a diluted form of waiver, and so is governed by the same principles that apply to a management functions clause . . . . The Company could rightly insist on [the zipper clause's] inclusion in the contract." Id. at 879. I do not believe the General Counsel has established bad faith on Respondent's part in this regard.

3. The December 30, 1981 raise announcement

The complaint alleges that Respondent violated Section 8(a)(1) and (5) of the Act by its printed announcement on December 30, 1981, announcing a general 8.5-percent wage increase for all employees, but withholding same from the LPN-Tech bargaining unit employees. In support, counsel for the General Counsel argues that the announcement served to demean the Union in the eyes of the employees, misrepresented applicable law, and placed the onus for withholding the raise on the Union. Respondent argues that the announcement constituted no more than lawful economic pressure, enhanced rather than demeaned the Union in employees' eyes, and did not constitute a unilateral change of a condition of employment.

At the outset, it is important to understand that this allegation concerns the published announcement; it is not alleged, nor does the record disclose, that Respondent actually withheld the 8.5-percent wage increase from the LPN-Tech employees. Therefore, contrary to the Union's representative, no discriminatory act was committed, nor was any unilateral change ever implemented. With this said, several significant facts are readily apparent. First, there is no question that Respondent had established a past practice of giving to employees an annual cost-of-living raise, usually in January. Thus, employees McAdams and Boyce testified to this without contradiction, and negotiator Siebert testified "that historically the hospital had announced in December wage raises effective in January." However, it appears that the amounts of the raises varied at the discretion of Respondent. Second, the cost-of-living raise, which would be effective in early January 1982, was decided on after a study by Larry Gnuse by the hospital's board of directors on December 21, 1981, and an 8.5-percent raise was to be given to all employees and announced to the Union at the next scheduled bargaining session on January 8, 1982. Third, on December 30, written notification of the pay raise was given by Respondent to all employees. In pertinent part, it read:

> Therefore, beginning with the first pay period on January 8, 1982, all employees except those who are exempt status, management or in the LPN-Technician unit,* will receive an 8.5% increase. This will be in addition to the usual merit increases for those eligible. The above increase will be reflected in your paycheck to be received on January 29, 1982.
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> . . . .
>
> * By law, all changes in wage benefits and working conditions for members of the bargaining unit are subject to negotiations with the AFT, F.N.H.P. (AFL-CIO).

Finally, the announcement of the wage raise was made at a crucial stage of the LPN-Tech unit contract negotiations, with less than 2 weeks remaining in the Union's certification year.

It is alleged that, by this announcement, Respondent announced the withholding of the annual cost-of-living raise from the LPN-Tech unit members. In his posthearing brief, counsel for Respondent argues that nowhere in the document was it explicitly stated that the general wage increase would be withheld from unit employees—only that the amount of their raise "would necessarily be subject to negotiation with the Union." Contrary to counsel, what he reads into the announcement just does not comport with its plain meaning. Thus, my understanding of the language of the document is that LPN-Tech unit employees were to be excluded from receipt of an across-the-board raise, with the *subject* of a pay raise for them, and not merely the *amount* of a matter for negotiation between Respondent and the Union. Clearly, unit employees could reasonably believe that, due to the status of the Union as their bargaining representative, the general wage increase was to be withheld from them; the onus for Respondent's announced conduct was therefore placed squarely on the Union. Moreover, that the LPN-Tech employees were entitled to, and it would have been unlawful for Respondent to have withheld, the 8.5-percent raise also seems clear. Thus, inasmuch as they had annually received such a cost-of-living raise in the past, it had, in effect, become "an existing form of compensation, and a term and condition of employment regularly expected by the employees." *General Motors Acceptance Corp. v. NLRB*, 476 F.2d 850, 854 (1st Cir. 1973). Accordingly, the footnote, marked by the single asterisk, was a misstatement of the applicable law inasmuch as Respondent was under a duty to not depart from past practice and to continue giving cost-of-living raises to the LPN-Tech unit employees in the same manner as it would absent the Union. *NLRB v. Katz*, 369 U.S. 736, 746 (1962); *General Motors Acceptance Corp.*, supra; *Diamond Motors*, 212 NLRB 820 (1974).[36] Based on the foregoing, I believe Respondent discredited and disparaged the Union in the eyes of its members—thereby weakening its authority as the LPN-Tech unit's bargaining agent at a critical point in negotiations and its ability to function in this capacity. Therefore, Respondent violated its duty to bargain collectively with the Union in good faith and interfered with, restrained, and coerced employees in the exercise of their statutory rights, in violation of Section 8(a)(1) and (5) of the Act. *Circle Import Export Co.*, 244 NLRB 255, 257 (1979); *Tyson's Foods*, 187 NLRB 525, 531 (1970).

In defense, Respondent argues that the announcement itself constituted lawful economic pressure on the Union. Citing *Chevron Oil Co. v. NLRB*, 442 F.2d 1067 (5th Cir. 1971), counsel asserts that an employer may lawfully exert economic pressure on a union to obtain the best possible contract terms as long as it is done in the course of good-faith negotiations. In *Chevron Oil Co.*, the respondent engaged in more drastic conduct than herein involved by, during contract negotiations, actually withholding from the represented employees a wage raise that was given to all other (unrepresented) employees.[37] In the underlying NLRB decision, the Board stated, "It has long been an established Board principle that, in the context of good-faith bargaining, and absent proof of other unlawful motive, an employer is privileged to withhold from organized employees wage increases granted to unorganized employees or to condition their grant on final contract settlement." *Chevron Oil Co.*, 182 NLRB 445, 449 (1970). Accepting this principle of law but, unlike the Board, concluding the withholding of the raise was not done "within a bad faith bargaining context," the court found the conduct not violative of Section 8(a)(1) and (3) of the Act. *Chevron Oil Co.*, 442 F.2d at 1074.[38] The instant case is distinguishiable in two critical respects. First, unlike in *Chevron Oil Co.*, the record establishes, and I found, that Respondent engaged in bad-faith bargaining with the Union during the LPN-Tech negotiations by its dilatory scheduling and conduct of the bargaining sessions and by its failure and refusal to discuss the subject of union security without a prior employee "referendum" on the issue. Therefore, Respondent's announcement of December 30 was made in a context of surrounding unfair labor practices. Next, Respondent's obligation under *NLRB v. Katz*, supra, was to give to the LPN-Tech unit employees a wage increase; unlike *Chevron Oil Co.*, Respondent's December 30 announcement amounted to an announced intention to alter what had become a condition of employment employment. *Eastern Maine Medical Center v. NLRB*, supra at 9; *NLRB v. United Aircraft Corp.*, 490 F.2d 1105, 1110 fn. 4 (2d Cir. 1973). Based on the foregoing, Respondent's defense is without merit.

Next, counsel for the General Counsel and the Union's representative urge a finding of bad-faith bargaining based on the 9-day relay between the granting of the cost-of-living raise to the nonunion employees and the offer of the identical raise at the January 8 bargaining session to the Union for the LPN-Tech unit employees. They argue that this offer presented the Union with a "Hobson's choice"—either accept the offer and, in effect, abdicate its role as the employees' bargaining representative or refuse it and, thereby, deny to the membership benefits enjoyed by all other employees. I find merit in this contention. Thus, Larry Gnuse admitted that an important consideration underlying the timelag between the December 30 announcement and the January 8 offer was Respondent's desire to place maximum "economic and political pressure on the union" to accept as a wage increase the identical amount given to nonunion employees. That this strategy was successful is seen from the fact that Richardson did, indeed, agree to the 8.5-percent raise for the LPN-Tech employees. Given the December 30 written announcement's apparent unlawful withholding of the 8.5-percent cost-of-living raise from the membership and the subsequent 9-day delay until the next bargaining session, during which the pressure to negotiate some sort of equivalent raise must have been intense, the Union's bargaining leverage at the time the offer was communicated at the last negotiations session was nil. Further, I found Gnuse's economic justifications for the timelag utterly unconvincing and believe the only reason for it was his above admission. Considered in this light, that Siebert accompanied his offer with the comment that such would not preclude the Union from seeking more appears to have been a meaningless gesture, mere "window dressing." I believe that the deliberate timing of this offer to the Union, 9 days after the announcement of the identical cost-of-living raise for nonunion employees and its preceived withholding from the LPN-Tech employees, rendered bargaining on the offer virtually impossible and undermined the entire bargaining process as well as demeaning the representative status of the Union. Clearly, such constitutes bad-faith bargaining, in violation of Section 8(a)(1) and (5) of the Act. *J. P. Stevens & Co.*, 239 NLRB 738 (1978).

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[36] On the other hand, had the footnote read as argued by counsel, it would have been a correct statement of the law. The record establishes that Respondent determined the amount of each yearly cost-of-living raise. Thus, while Respondent was under a duty to continue its past practice, it "could not unilaterally determine the size of the increase that each employee would receive; it would be required to bargain over this discretionary element." *NLRB v. Blevins Popcorn Co.*, 659 F.2d 1173, 1189 (D.C. Cir. 1981); *Oneita Knitting Mills*, 205 NLRB 500 fn. 1 (1973).

[37] There was no evidence that, by withholding the raise, the company altered a preexisting condition of employment.

[38] Contrary to the union's representative, to establish unlawful motivation, evidence beyond the announcing of or actual withholding from represented employees of wage increases granted to unrepresented employees itself must be adduced, for, of itself, that disparity is "not so inherently destructive of important employee rights that an unfair labor practice should be found even in the absence of proof of such a motive." *Sun Oil Co.*, 245 NLRB 59 (1979).

4. Surface bargaining

Permission was granted at the hearing for the General Counsel to amend the complaint to allege as further bad-faith bargaining in violation of Section 8(a)(1) and (5) of the Act that Respondent engaged in surface bargaining with the Union. Before considering the merits[39] of the allegation, it is important to understand exactly what that term means; I start by examining Respondent's obligation, pursuant to Section 8(d) of the Act, to "confer in good faith with respect to wages, hours, and other terms and conditions of employment." Such has been interpreted as imposing on a party the duty "to enter into discussion with an open and fair mind and a sincere purpose to find a basis of agreement." *NLRB v. Herman Sausage Co.*, 275 F.2d 229, 231 (5th Cir. 1960). Further, the duty to bargain in good faith prohibits "mere pretense at negotiation . . . without [a] spirit of cooperation." *NLRB v. Wonder State Mfg. Co.*, 344 F.2d 210, 215 (8th Cir. 1965). The above, of course, in most situations is not susceptible of easy analysis, and whether a party has complied with its bargaining duty "generally requires inquiry into [its] state of mind during the bargaining." *Seattle First National Bank v. NLRB*, 638 F.2d 1221, 1225 (9th Cir. 1981). There is no shortcut method of analysis by this. "That determination must be based on reasonable inference drawn from the *totality* of conduct evidencing the state of mind with which the [party] entered into and participated in the bargaining process. All aspects of the Respondent's bargaining and related conduct must be considered in unity, not as separate fragments each to be assessed in isolation." *"M" System, Inc.*, 129 NLRB 527, 547 (1965). Finally, although good-faith bargaining presupposes an effort to resolve differences, "the duty imposed on the parties . . . does not obligate a party to make concessions or yield a position fairly maintained." *Continental Insurance Co. v. NLRB*, 495 F.2d 44, 47 (2d Cir. 1974). Surface bargaining, on the other hand, is the antithesis of good-faith bargaining. This entails merely going through the formalities without any "serious intent to adjust differences and to reach an acceptable common ground." *NLRB v. Insurance Workers*, 361 U.S. 477, 485 (1960). By engaging in surface bargaining, the party's goal is to frustrate, through "shadow-boxing" or a "cat and mouse game," the process rather then enhance the chances of reaching some sort of agreement. *NLRB v. Holmes Tuttle Broadway Form*, 465 F.2d 717, 719 (9th Cir. 1972). The ultimate question is, of course, to distinguish between good-faith bargaining and surface bargaining. "[W]e look to whether the parties' conduct evidences a real desire to reach an agreement—a determination made by examination of the record as a whole, including the course of negotiations as well as contract contract proposals." *Chevron Chemical Co.*, 261 NLRB 44, 45 (1982). Thus, whether Respondent engaged in surface bargaining depends on whether it desired "to reach ultimate agreement to enter into a collective bargaining contract" with the Union. *Insurance Workers*, supra.

The crux of the arguments of the General Counsel and the Union on this issue is that Respondent went through the motions of collective bargaining regarding the LPN-Tech unit employees, delaying such until the expiration of the certification year in the hope—or expectation—of the occurrence of some event that would permit it to withdraw from further bargaining. The following factors are relied on as indicia of surface bargaining: Respondent's dilatory tactics and refusal to discuss union security; Respondent's refusal to concede its positions on management rights, arbitration, a zipper clause, and no-strike/no-lockout; and handling of the December 30, 1981 wage announcement; and the duration of the agreement which matter, the complaint alleges, was raised by Respondent at the last bargaining session and January 8, 1982, in order to make certain that no final agreement could be reached. Initially, I have concluded that Respondent, after having delayed the start of bargaining for 8 months, engaged in unlawful dilatory tactics during the 4 months of actual bargaining with the Union over the LPN-Tech unit contract and that by refusing to discuss a union-security clause, it likewise bargained in bad faith. These, however, are per se violations of Section 8(a)(1) and (5) of the Act and do not involve the matter of Respondent's state of mind, as seems to be involved in a surface bargaining allegation. Standing by themselves, these factors would not necessitate a finding of the latter. I have also previously concluded that Respondent did not engage in bad-faith bargaining regarding the issues of management rights, the entire agreement (zipper) clause, or the no-strike/no-lockout clause. Rather, I believe the record clearly supports a finding that Negotiator Siebert engaged in mere hard bargaining on these issues, eventually compromising on management rights and withdrawing the zipper clause as a proposal. Although he maintained adamant positions on these provisions, there is no evidence that he ever refused to discuss either or that Respondent's positions were anything but honestly taken. Finally, of course, the Act does not compel concessions. *H. K. Porter*, supra. Accordingly, I do not believe such are indicia or surface bargaining. Regarding the matter of Respondent's refusal to accede to an arbitration provision, I agree with Respondent's position that bargaining on this cannot be separated from bargaining over a grievance procedure. Here, the record reveals hard bargaining by both Richardson and Siebert and an agreement that each could accept without undue reservation. Further, various final steps to the grievance process were discussed, and although the Union acquiesced to a right to strike, in lieu of arbitration, if dissatisfied with a grievance result, the Board does not scoff at this significant economic weapon. *Long Lake Lumber Co.*, supra at 438. Bad-faith surface bargaining will not be inferred from this. Regarding the December 30 cost-of-living raise announcement for nonunion employees and the timing, 9 days later, of the identical offer to the Union for the LPN-Tech employees, both the General Counsel and the Union's representative assert that, besides constituting bad-faith bargaining, these indicate that Respondent was engaging in surface bargaining. In support, they argue that such are reflective of Respondent's entire bargaining history over wages, that during the period of the RN unit negotiations it originally offered a wage freeze, and only at a late stage of the bargaining did it offer a 3-1/2-percent wage increase, and that, prior to January 8, the identical small increase was offered to the Union. I disagree. The issue regarding surface bargaining is whether Respondent bargained with no intent to reach a final agreement. Even finding, as I did, that Respondent's handling of the 8.5-percent wage offer constituted bargaining in bad faith, it is a far different matter to conclude that this is also reflective of an attitude not to reach final agreement. Just the opposite is true—that Respondent sought to force an agreement on its own terms, at least regarding the raise in wages.

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[39] Regarding the relationship, if any, between Sec. 10(b) of the Act and counsel for the General Counsel's "continuum of negotiations" theory, I note at the outset that, as mentioned earlier, Sec. 10(b) establishes a statute of limitations for the finding of unfair labor practices of 6 months preceding the date of the filing of a charge. Beyond that period, events cannot be found to have been unfair labor practices. However, as stated by the Supreme Court in *Machinists Local 1424 v. NLRB*, 362 U.S. 411 (1960):

> It is doubtless true that Section 10(b) does not prevent all use of evidence relating to events transpiring more than six months before the filing . . . of an unfair labor practice charge. However . . . due regard for the purpose of Section 10(b) requires that two different kinds of situations be distinguished. The first is one where occurrences within the six-month limitations period in and of themselves may constitute . . . unfair labor practices. There, earlier events may be utilized to shed light on the true character of [such matters] . . . and for that purpose Section 10(b) . . . does not bar such [evidence]. The second situation is that where conduct occurring within the limitations period can be charged to be an unfair labor practice only through reliance on an earlier unfair labor practice. There the use of the earlier unfair labor practice is not merely "evidentiary" . . . . Rather, it serves to cloak with illegality that which was otherwise lawful.

Id. at 416–417. With this in mind, by "continuum of negotiations," the General Counsel apparently means that, despite the separate and distinct bargaining units, Respondent and the Union actually engaged in one long series of negotiations from the spring of 1980 through January 8, 1982. As evidence of this, she points to the existence of the same parties and negotiators and similar, if not identical, proposals for both units. Moreover, I note that the LPN-Tech unit bargaining commenced immediately after the other was broken off by Respondent, and that Negotiator Siebert admitted not having consulted with Administrator Pierce prior to the start of the LPN-Tech discussions. Based on the foregoing, the General Counsel's theory has some validity, and conduct during the RN negotiations is relevant for viewing future events; however, the question remains, how does it comport with the meaning of Sec. 10(b) of the Act? It seems to me that alleged elements of surface bargaining must be present during the LPN-Tech negotiations in order to utilize conduct during the RN negotiations to "shed light upon" the former. If such elements are not susceptible of discovery, then conduct during the RN negotiations, outside the statutory 6-month statute of limitations, cannot be used to establish a violation during the LPN-Tech negotiations.

Concerning conduct duration, it is argued that Respondent's attitude never to reach final agreement is clearly shown by Siebert's conduct on this matter at the January 8 meeting. Essentially, it is argued that the term of the agreement was a nonissue; that, at the least, Siebert should have been aware the Union was seeking a 1-year contract for the LPN-Tech employees, and that, at the most, Siebert had authority to agree to the Union's position without further consultation. Initially, there is nothing in the record to warrant the conclusion that, prior to the last bargaining session, Respondent knew, or should have known, that the Union was seeking a 1-year contract. Thus, contrary to Richardson, the bargaining during the RN contract discussions would not support this conclusion. In this regard, I note that not only did such negotiations involve a different group of employees, but also there was *no* written proposal from the Union for a 1-year RN unit contract. Further, even crediting Richardson regarding RN unit discussions during which the length of the contract was mentioned, the references were vague at best and clearly not specifically directed toward discussion of a 1-year term. Finally, and the most significant point, Richardson admitted that during the entire period of the LPN-Tech unit contract discussions prior to January 8 the subject of contract duration was not discussed in *any* context. Accordingly, to say that Siebert should have known that the Union desired a 1-year LPN-Tech contract is not supported by the record. Next, the record discloses that, at the January 8 session, Siebert and Richardson discussed various alternative proposals regarding contract terms. It does not appear to have been an issue raised by the former merely as an avoidance tactic and, given the options discussed, it is not unreasonable that Respondent should have taken time to consider them. Therefore, it cannot be said that, even if Siebert possessed authority to do so, it was a delaying tactic for him not to have immediately agreed to one of the proposed alternatives. Finally, contrary to the complaint allegation, it is clear that contract duration was *not* the only unresolved issue at the close of the January 8 bargaining session. Thus, remaining for resolution were short-term disability and whether such was covered under the social security alternative plan; the status of the "bio-med tech" job classification; shift differential pay; and vesting in the retirement program. Based on the foregoing, neither can it be said that Respondent made agreement impossible by raising the matter of contract duration so as to have engaged in bad-faith bargaining,[40] nor may such be considered as an indicia of bad-faith surface bargaining.

Notwithstanding the evidence of bad-faith bargaining, concerning dilatory tactics, the refusal to discuss union security, and the December 30, 1981 cost-of-living raise announcement, I do not believe the conclusion is warranted that Respondent's bargaining evinced a desire to avoid reaching ultimate agreement. Rather, based on the record as a whole, there is ample evidence that Respondent engaged in extremely tough bargaining, conceding on some points, modifying other proposals, and dropping other demands. I believe that, at most, Respondent engaged in a pattern of bargaining, elements of which were in bad faith, designed to force the Union to acquiesce to an agreement on the former's terms. I do not believe this constitutes surface bargaining designed to avoid a agreement, and I will recommend dismissal of this allegation.

5. The withdrawal of recognition

It is not in dispute that, based on the filing of the decertification petition in Case 27-RD-587 on January 11, 1982, and with knowledge that the petition was supported by more than a majority of the employees in the LPN-Tech bargaining unit, Respondent, on that same day, suspended further bargaining with the Union thereby, according to its attorney, withdrawing recognition from the Union as the collective-bargaining representative for the employees. It was uncontroverted that immediately following the filing of the petition, employees

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[40] I will recommend dismissal of the complaint in this regard.

White and Eich informed Respondent's administrator Pierce that approximately 60 percent of the bargaining unit employees executed the petition, and that this formed the underlying justification for Respondent's actions—an asserted belief that the Union no longer represented a majority of the LPN-Tech employees. It is well established Board law that, absent unusual circumstances, there is an irrebuttable presumption that the majority status of a certified union continues for 1 year from the date of certification, but that after that initial year the presumption becomes rebuttable by an affirmative showing that the union no longer, in fact, commands a majority or by evidence of a sufficient objective basis for a reasonable doubt of the union's majority status. *Pennco, Inc.*, 250 NLRB 716 (1980): *GAF Corp.*, 195 NLRB 169 (1972). Moreover, the mere filing of a decertification petition, standing alone, neither provides a reasonable ground for an employer to doubt the majority status of a union nor permits an employer to withdraw from bargaining with an incumbent union. *Dresser Industries*, 264 NLRB 1088 (1982). However, "if an employer is presented with a valid decertification petition supported by majority of the unit employees, it may be privileged to withdraw from bargaining" on the basis of a "good-faith doubt as to continued majority status." Id. at 1089 fn. 7. It is asserted by counsel for Respondent that Respondent had such a good-faith doubt based on the statements made to Pierce by White and Eich on January 11 and that, therefore, Respondent had "a duty under the law" to cease bargaining with the Union.

Contrary to counsel, the record establishes that Respondent's actions were taken in the context of serious unfair labor practices, all that occurred either prior to or in the midst of the gathering of the signatures necessary for the filing of the decertification petition. Moreover, these unfair labor practices (dilatory bargaining, refusing to bargain over a mandatory subject of bargaining—union security, and engaging in conduct that demeans a union in the eyes of its members) all possessed the inherent tendency to cause dissatisfaction with the Union, thereby undoubtedly contributing to the majority support for the decertification petition. When an employer's asserted doubt of a union's majority status is tainted by unremedied unfair labor practices, which affect the union's status, cause employee disaffection or improperly affect the bargaining relationship itself, the legality of a cessation of bargaining and/or withdrawal of recognition based on same is negated. *Abbey Medical/Abby Rents*, 264 NLRB 969 (1982); *Chicago Magnesium Castings Co.*, 256 NLRB 668 (1981); *Guerdon Industries*, 218 NLRB 658, 660–661 (1975). Although unalleged in the complaint, the foregoing was fully litigated and briefed by counsel for Respondent and the Union's representative. It is clear that Respondent's conduct, in this regard, was violative of Section 8(a)(1) and (5) of the Act, and I so find.

CONCLUSIONS OF LAW

1. Respondent is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act and a health care institution within the meaning of Section 2(14) of the Act.

2. The Union is an labor organization within the meaning of Section 2(5) of the Act.

3. All full-time and regular part-time technical employees, including licensed practical nurses, radiology technicians, medical laboratory technicians, and EKG-IT-EEG-EMG technicians employed by Respondent; excluding office clerical employees, professional employees, guards and supervisors as defined by the Act, and all other employees constitute a unit appropriate for the purpose of collective bargaining within the meaning of Section 9(b) of the Act.

4. Since January 9, 1981, the Union has been, and is now, the exclusive representative of employees in the above appropriate unit for purposes of collective bargaining within the meaning of Section 9(a) of the Act.

5. By withdrawing recognition from, and suspending bargaining with, the Union as the collective-bargaining representative of its employees in the above-described appropriate unit, Respondent engaged in unfair labor practices within the meaning of Section 8(a)(1) and (5) of the Act.

6. By bargaining in bad faith with the Union as the collective-bargaining representative of its employees in the above-described appropriate unit by engaging in dilatory bargaining tactics; refusing to bargain over union security, a mandatory subject of bargaining; and demeaning the Union in the eyes of the aforesaid employees, Respondent engaged in unfair labor practices within the meaning of Section 8(a)(1) and (5) of the Act.

7. By maintaining in force and in effect an overly broad no-solicitation/no-distribution policy, Respondent has engaged in conduct violative of Section 8(a)(1) of the Act.

8. Respondent engaged in no other unfair labor practices.

REMEDY

Having found that Respondent engaged in certain acts and conduct violative of Section 8(a)(1) and (5) of the Act, I shall recommend that it be ordered to cease and desist and to take certain affirmative actions designed to effectuate the policies and purposes of the Act. I have found that Respondent unlawfully withdrew recognition from and suspended bargaining with the Union as the collective-bargaining representative of its LPN-Tech employees. Therefore, I shall recommend that it be ordered to continue recognizing and, on request, resume bargaining with the Union and to do so in good faith, and in the event that an agreement is reached, embody such understanding in a signed agreement. Further, in recognition of the serious nature of the bad-faith bargaining, particularly the dilatory tactics engaged in by Respondent during the year following the Union's certification by the Board as the collective-bargaining representative of Respondent's LPN-Tech employees, in order to ensure that the employees will be accorded the statutorily prescribed services of the Union for the period provided by law, and on my belief that the remedy for unfair labor practices must be tailored so as to adequately restore the status quo ante, I shall recommend that the initial year of certification be extended for 6 months, this period to commence on the date that Respondent restates its recognition of the Union as its LPN-Tech bargaining unit employees' collective-bargaining representative. *Mar-Jac Poultry Co.*, 136 NLRB 785 (1962). Finally, I shall recommend that Respondent be ordered to post a notice setting forth its obligations.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[41]

ORDER

The Respondent, Rocky Mountain Hospital, Denver, Colorado, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Failing and refusing to continue to recognize and bargain with Rocky Mountain Federation of Nurses and Health Professionals, Local 5016, AFT, CFT, AFL-CIO as the exclusive collective-bargaining representative of the employees in the following appropriate unit:

> All full-time and regular part-time technical employees, including licensed practical nurses, radiology technicians, medical laboratory technicians, and EKG-IT-EEG-EMG technicians employed by Respondent; excluding office clerical employees, professional employees, guards and supervisors as defined in the Act, and all other employees.

(b) Bargaining in bad faith with the Union as the duly designated representative of employees in the above-described appropriate unit by engaging in dilatory bargaining tactics, refusing to bargain over a union-security proposal, a mandatory subject of bargaining, and demeaning the Union in the eyes of the aforesaid unit of employees.

(c) Maintaining in force and effect an overly broad no-solicitation/no-distribution policy insofar as employees are prohibited from soliciting at all times in nursing stations; employees are permitted to distribute literature only in break rooms, restrooms, and parking lots; and off-duty employees are prohibited from entering *any* area not open to the public during reasonable periods before and after work.

(d) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Recognize and, on request, bargain in good faith with Rocky Mountain Federation of Nurses and Health Professionals, Local 5016, AFT, CFT, AFL-CIO, as the exclusive bargaining representative of employees in the appropriate unit described above and, if an agreement is reached, embody it in a signed contract. The certification year shall extend for an additional 6 months from the date Respondent restates its recognition of the Union as the above employees' bargaining representative.

(b) Post at its facility in Denver, Colorado, copies of the attached notice marked "Appendix."[42] Copies of the notice, on forms provided by the Regional Director for Region 27, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material.

(c) Notify the Regional Director in writing within 20 days from the date of this Order what steps the Respondent has taken to comply.

IT IS FURTHER RECOMMENDED that, inasmuch as Respondent has been ordered to continue to recognize and bargain, on request, with the Union, as the initial certification year has been extended for a period of 6 months to accommodate bargaining, and as the Union's irrebuttable presumption of majority status therefore continues, the petition in Case 27-RD-587 is dismissed.

IT IS FURTHER RECOMMENDED that, insofar as the complaint alleges that Respondent violated Section 8(a)(1) and (5) of the Act by bargaining in bad faith by surface bargaining, rigidly insisting on contract provisions whereby the Union's involvement in Respondent's operations would be eliminated, insisting on proposals by which the Union would waive its right to bargain on new issues, and having no position on contract duration at the final bargaining session and Section 8(a)(1) of the Act by maintaining overly broad no-solicitation/no-distribution rules outside the 10(b) statute of limitations period, it is dismissed.

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[41] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

[42] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

Rocky Mountain Hospital *and* Federation of Nurses and Health Professionals, AFT, AFL-CIO. Cases 27-CA-8722 and 27-CA-8722-2

July 22, 1988

DECISION AND ORDER

By Chairman Stephens and Members Babson and Cracraft

On April 18, 1985, Administrative Law Judge David G. Heilbrun issued the attached decision. The Respondent, the Charging Party, and the General Counsel filed exceptions and supporting briefs, and the Respondent filed an answering brief.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings, and conclusions only to the extent consistent with this Decision and Order.

The judge found Federation of Nurses and Health Professionals, AFT, AFL-CIO (the Union)—the labor organization certified to represent the bargaining unit at Rocky Mountain Hospital—was a nonexistent, defunct entity, and therefore the Respondent entertained a good-faith doubt as to the Union's continued representative status. Alternatively, the judge found that the Respondent's change in leave policy and termination of several licensed practical nurses were responses to pressing business necessities and concluded there was no obligation to bargain. We reverse.

1. The judge found that, because the Post Office returned a document the Respondent mailed to the Union and Respondent assertedly had had no contact with the Union in 2 years, the Union was defunct. The judge cited no relevant precedent for his finding, which is not surprising, as his decision is contrary to well-established law. The correct standard for determining defunctness is whether a union is unable or unwilling to represent the employees, regardless of the relative inactivity of the union. See *Kent Corp.*, 272 NLRB 735 (1984); *Pioneer Inn*, 228 NLRB 1263 (1977), enfd. 578 F.2d 835 (9th Cir. 1978); *Hershey Chocolate Corp.*, 121 NLRB 901 (1958).

The Union is one of four chapters comprising the Denver Federation of Nurses and Health Professionals, AFT, AFL-CIO. On January 1981, the Union was certified as the bargaining representative of the Respondent's full-time and regular part-time technical employees including licensed practical nurses and other specified employee categories. After a hearing held in 1983, the Union's labor organization status was established in another unfair labor practice case. See *Rocky Mountain Hospital*, 289 NLRB 1347 (1988). The vice president of the Denver Federation testified during the instant proceeding that the Union continues to be affiliated with the Denver Federation.

Thus, contrary to the judge's finding that it is nonexistent, the record indicates that the Union is an active chapter of the Denver Federation. Further, we find no evidence that the Union is unable or unwilling to represent the employees. We find of no significance that the Post Office, for unexplained reasons, did not deliver one document to the Union, especially in light of the fact that other mail was delivered. Nor, in view of the Respondent's serious unfair labor practices in the related case, 289 NLRB 1347, in which the Respondent rejected its obligation to bargain with the Union,[1] do we find significant the judge's finding that the Respondent has had no contact with the Union for 2 years.[2]

In short, based on the above-cited precedent, we find that the Union is not defunct. We further find that the Union is a labor organization within the meaning of Section 2(5) of the Act. Therefore, we do not adopt the judge's finding that the Respondent entertained a good-faith doubt about the Union's continued representative status on the grounds that the Union is a nonexistent, defunct entity.

2. Nor do we agree with the judge's dismissal of the allegation that the Respondent violated Section 8(a)(5) by unilaterally changing the leave policy and laying off employees.

Before October 1983, the Respondent used a voluntary leave-without-pay system to reduce staffing when the patient census was low. Because the leave policy was voluntary, the number of days taken varied from employee to employee. Due to a decline in patient census, employees were asked with increasing frequency to take leave days. When some licensed practical nurses complained that they were taking more leave days than others, the Respondent in October and November 1983 converted the voluntary system to a mandatory rotating roster leave system. The Respondent instituted this change without consulting the Union.

289 NLRB No. 139

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[1] Because in the related case we dismiss the decertification petition, the Respondent cannot in the instant case rely on the petition to defend its conduct as privileged under *Telautograph Corp.*, 199 NLRB 892 (1972).

[2] As the cited precedent makes clear, the relative inactivity of the Union is not the standard by which defunctness is judged. We observe, however, that the reason for the judge's confusion about the Union's continued existence may be explained by organizational changes in the Union's relationship to the Denver Federation about which former employee Norma McAdams testified. Because nothing in the record about the relationship suggests that the Union is defunct, we find it unnecessary to address the facts further.

On February 17, 1984, the Respondent laid off 17 employees, including 4 licensed practical nurses. The layoffs occurred because the Respondent experienced a drastic decline in patient census in late 1983 and early 1984. The Respondent selected the four licensed practical nurses who were not qualified to dispense medication, considering them less versatile in terms of patient care. The Respondent did not consult with the Union about the layoffs.

The Union is the certified bargaining agent for unit employees. It is well established that absent extenuating circumstances an employer must bargain to impasse before implementing a unilateral change in mandatory bargaining subjects. *NLRB v. Katz*, 369 U.S. 736 (1962).

The Respondent's leave policy concerns a mandatory bargaining subject. Converting to a mandatory leave system caused some employees to suffer a decline in working hours. Thus, contrary to the judge's characterization of the change as a routine adjustment, the change was a substantial change about which the Respondent was obligated to bargain before it could be lawfully implemented.[3] Cf. *San Antonio Portland Cement Co.*, 277 NLRB 309 (1985) (change from oral to written communication of work schedules not substantial, but change from random selection of off-duty employees for emergencies to designated on-call system was substantial change).

The Respondent was also obligated to notify and bargain with the Union concerning the layoffs. See *Laper Foundry & Machine*, 289 NLRB 952 (1988). See also *Advertiser's Mfg. Co.*, 280 NLRB 1185 (1986), enfd. 823 F.2d 1086 (7th Cir. 1987). As the Seventh Circuit stated in *Advertiser's Mfg. Co.*, 823 F.2d at 1090:

> Layoffs are not a management prerogative. They are a mandatory subject of collective bargaining. Until the modalities of layoff are established . . . a company that wants to lay off employees must bargain over the matter with the union.

Contrary to the judge's determination, we do not find that the Respondent's economic circumstances justify suspending the bargaining obligation. The patient census decline cannot fairly be characterized as sudden or unexpected: the decline began in late 1983 and moreover the unilateral change in leave policy (which occurred 3 months before the layoffs) was instituted to handle employee complaints about the impact of a system designed to deal with low patient census.

Accordingly, we find that the Respondent violated Section 8(a)(5) by making unilateral changes in terms and conditions of employment by changing from a voluntary leave days system to a mandatory leave days system and by laying off unit employees.[4]

CONCLUSION OF LAW

The Respondent violated Section 8(a)(5) and (1) of the Act by making the following unilateral changes in terms and conditions of employment of its employees:

(a) Changing from a voluntary leave days system to a mandatory leave days system.

(b) Laying off employees Teresa M. Lucero, Eunice Barnes, Kathleen Gallegos, and Ann Dailey in February 1984.

REMEDY

Having found that the Respondent has violated Section 8(a)(5) and (1) of the Act, we shall order it to cease and desist and to take certain affirmative action designed to effectuate the policies of the Act.

We shall order the Respondent to reinstate Teresa M. Lucero, Eunice Barnes, Kathleen Gallegos, and Ann Dailey and make them whole for any loss of earnings and other benefits resulting from their unlawful layoffs in accordance with *F. W. Woolworth Co.*, 90 NLRB 289 (1950), with interest as prescribed in *New Horizons for the Retarded*.[5] We shall also order that, on the Union's request, the Respondent restore the voluntary leave days system. Finally, we shall order the Respondent to notify the Union and on its request bargain concerning all changes in terms and conditions of employment of unit employees.

ORDER

The National Labor Relations Board orders that the Respondent, Rocky Mountain Hospital, Denver, Colorado, its officers, agents, successors, and assigns, shall

1. Cease and desist from

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[3] The judge also appears to find there was no change in practice in leave policy. We cannot agree with the judge's finding and his reliance on *Woods School*, 270 NLRB 171 (1984). The record shows the leave policy here changed from voluntary to mandatory, and in the case the judge cites for support there were no exceptions filed on the "previously coexisted" finding.

[4] The General Counsel argues the layoffs' unlawfulness is linked to the Respondent's unilateral change in licensed practical nurses' job requirements. Because we find the complaint and the facts support the above theory for finding the layoffs violative, we find it unnecessary to address the manner in which the Respondent chose whom to lay off.

[5] In accordance with our decision in *New Horizons for the Retarded*, 283 NLRB 1173 (1987), interest on and after January 1, 1987, shall be computed at the "short-term Federal rate" for the underpayment of taxes as set out in the 1986 amendment to 26 U.S.C. § 6621. Interest on amounts accrued prior to January 1, 1987 (the effective date of the 1986 amendment to 26 U.S.C. § 6621), shall be computed in accordance with *Florida Steel Corp.*, 231 NLRB 651 (1977).

(a) Refusing to bargain with Federation of Nurses and Health Professionals, AFT, AFL-CIO as the exclusive certified bargaining representative of unit employees by unilaterally making changes in terms and conditions of employment of unit employees without first notifying and bargaining with the Union.

(b) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Offer employees Teresa M. Lucero, Eunice Barnes, Kathleen Gallegos, and Ann Dailey immediate and full reinstatement to their former jobs or, if those jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority or any other rights or privileges previously enjoyed, and make them whole for any loss of earnings and other benefits resulting from their unlawful layoffs, in the manner set forth in the remedy section of the decision.

(b) Remove from its files any reference to the unlawful layoffs and notify them in writing that this has been done and that the layoffs will not be used against them in any way.

(c) On the Union's request, rescind the mandatory leave days system and restore the voluntary leave days system.

(d) On request, bargain with the Union concerning proposed changes in terms and conditions of employment of unit employees.

(e) Preserve and, on request, make available to the Board or its agents for examination and copying, all payroll records, social security payment records, timecards, personnel records and reports, and all other records necessary to analyze the amount of backpay due under the terms of this Order.

(f) Post at its facility in Denver, Colorado, copies of the attached notice marked "Appendix."[6] Copies of the notice, on forms provided by the Regional Director for Region 27, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material.

(g) Notify the Regional Director in writing within 20 days from the date of this Order what steps the Respondent has taken to comply.

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

WE WILL NOT refuse to bargain with Federation of Nurses and Health Professionals, AFT, AFL-CIO as the exclusive certified bargaining representative of unit employees by unilaterally making changes in terms and conditions of employment of unit employees without first notifying and bargaining with the Union.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL offer Teresa M. Lucero, Eunice Barnes, Kathleen Gallegos, and Ann Dailey immediate and full reinstatement to their former jobs or, if those jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority or any other rights or privileges previously enjoyed and WE WILL make them whole for any loss of earnings and other benefits resulting from their layoffs, less any net interim earnings, plus interest.

WE WILL notify each of them that we have removed from our files any reference to the layoff and that the layoff will not be used against her in any way.

WE WILL, on the Union's request, rescind the mandatory leave days system and restore the voluntary leave days system.

WE WILL, on request, bargain with the Union concerning proposed changes in terms and conditions of employment of unit employees.

ROCKY MOUNTAIN HOSPITAL

Barbara E. Young, Esq., for the General Counsel.
Melvin B. Sabey, of Denver, Colorado, for the Respondent.

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[6] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

DECISION

STATEMENT OF THE CASE

DAVID G. HEILBRUN, Administrative Law Judge. These cases were tried at Denver, Colorado, January 8, 1985. The charges were filed by Federation of Nurses and Health Professionals, AFT, AFL-CIO (the National Union) on March 5 and April 9, 1984 (the later charge amended October 17, 1984), and the consolidated complaint was issued October 22, 1984. The primary issue is whether Rocky Mountain Hospital (Respondent) has refused to bargain with the Rocky Mountain Federation of Nurses and Health Professionals (the Rocky Mountain Chapter) and, in that context, unilaterally implemented certain changed terms and conditions of employment resulting in part in the termination from employment of four individuals, and is thus in violation of Section 8(a)(1) and (5) of the National Labor Relations Act.

On the entire record,[1] including my observation of the demeanor of witnesses, and after consideration of briefs filed by the General Counsel and Respondent, I make the following

FINDINGS OF FACT AND RESULTANT CONCLUSION OF LAW

I. JURISDICTION

Respondent is a Colorado corporation engaged in the offering of acute health care services at its hospital facility in Denver, Colorado. In the course and conduct of such business operations, Respondent has an annual gross volume of revenue in excess of $250,000, while annually purchasing and receiving goods and materials valued in excess of $50,000 directly from sources outside Colorado. On these admitted facts, I find that Respondent is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act, and a health care institution within the meaning of Section 2(14).

II. ALLEGED UNFAIR LABOR PRACTICES

A. *Labor Organization*

On January 9, 1981, a Certification of Representative issued to the Rocky Mountain Chapter in Case 27-RC-5926 covering a unit of full-time and regular part-time technical employees including licensed practical nurses (LPNs). The certification stemmed from a rerun election conducted on November 25, 1980, at which 52 employees were eligible to vote and the tally of ballots showed that 47 did so. Following the certification, an extended course of bargaining ensued in which an initial collective-bargaining agreement was not reached between the parties with respect to this unit. Based on unfair labor practice charges, as filed by Rocky Mountain Chapter, he issues of a consolidated complaint were heard in June 1983 and on administrative law judge's decision (JD-SF)-269-83) issued on December 15, 1983, holding that Respondent had violated Section 8(a)(1) and (5) of the Act in several regards. The recommended remedial action was that Respondent continue recognition of Rocky Mountain Chapter as representative of the technical unit employees and that a related RD petition be dismissed. This judge's decision was duly transferred to and continued before the Board, but exceptions taken thereto have not as yet been ruled on. The RD case was one supported by 60 percent of unit employees as of early 1982, and this fact was communicated to Respondent, becoming a principal basis of its withdrawal of recognition at that time.

The instant record establishes that Rocky Mountain Chapter was, and is still considered to be, one of four hospital chapters comprising the Denver Federation of Nurses and Health Professionals, AFT, AFL-CIO (the Denver Federation). Employees of Respondent who are deemed members of Rocky Mountain Chapter continue to attend meetings of the Denver Federation; however, there is no evidence that the chapter itself has officers, collects dues, or publishes any communications in its own right. A document mailed to the last known Denver address of Rocky Mountain Chapter was recently returned as undeliverable, and Respondent has had no contact from the organization in more than 2 years.[2]

The Rocky Mountain Chapter has little residual substance. The consolidated complaint as originally issued did not recognize the distinction between it as an entity and the National Union on whose initiating charges the present proceeding is based. These charges in turn, the latest of which being the amendment of October 1984, refer to the Rocky Mountain Chapter as certified bargaining agent with respect to allegedly unlawful unilateral changes of October 1983 and February 1984; however, evidence of record here does not show any validity for such an entity at these points in time. The presumption of majority status becomes rebuttable after a labor organization's certification year has passed. I therefore find, *independently of and subject to whatever disposition is made concerning the pending judge's decision*, that Rocky Mountain Chapter is a nonexistent, defunct entity, as to which Respondent entertained a good-faith doubt of its continued representative status at all times material to this case. Cf. *Burger Pits*, 273 NLRB 1001 (1984); *Consumat Systems*, 273 NLRB 410 (1984).

Additionally, the announced Board doctrine as of early 1982 provided that the filing of a timely decertification petition raised a real question concerning representation, and consequently an employer's refusal to bargain with an incumbent union after such filing did not violate Section 8(a)(5) of the Act. *Telautograph Corp.*, 199 NLRB 892 (1972). When *Telautograph* was overruled in *Dresser Industries*, 264 NLRB 1088 (1982), the Board exempted the situation of employer "reliance upon then applicable Board law as set forth in *Telautograph*." There is, however, a separate basis to deal with the entire thrust of the consolidated complaint, and that discussion follows.

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[1] Certain errors in the transcript are noted and corrected.

[2] The same Denver address, that of 360 Acoma, Room 216, was used for certified mail service of the consolidated complaint in this proceeding and a postal receipt shows it to have been delivered on October 29, 1984, with the receiving signatory being "Alison Mall." This is the same surname as Dorothy Mall, the current vice president of the Denver Federation and a witness in this proceeding; however, the significance of this similarity in names, if any, was not developed for the record.

B. *Preliminary Matter*

Cecelia Lewis, Respondent's director of nursing and nursing administrator, was an early witness in the case, expressly called by the General Counsel under Federal Rules of Evidence 611(c). In this context, off the record discussion between counsel was confirmed with respect to Respondent examining Lewis first, with the General Counsel's principal examination to follow as though undertaken traditionally (Tr. 42). This procedure was later termed as done "on somewhat experimental grounds" (Tr. 60).

The technique is highlighted and endorsed as an expedient, where appropriate, in Board proceedings; one which draws its essential rationale from comparable situations of the labor arbitration process. In that forum, it has long been recognized that good reason exists to have job terminations initially explained by the party best situated to first advance evidence on the subject. It was illuminatingly described nearly 30 years ago in the following passage:

> Thus, it is quite common, in cases where an employee is questioning the company's right to discharge him, for the union to expect and the arbitrator to look to the company to present its side of the story first. While this may seem revolutionary to a court-trained lawyer who expects the plaintiff to go forward, the reversal of normal court procedures has its advantages. . . . Benetar, *The Trial of a Labor Arbitration*, 2 The Practical Lawyer 34, 38–39 (October 1956).

This quotation enlarged on a still earlier writing to the effect that order of presentation may, at an arbitrator's discretion, be varied by asking at the outset of a hearing that the party in possession of "the basic facts" then "present its evidence first" in application of Voluntary Labor Arbitration Rule 26 of the American Arbitration Association as then in effect. Elkouri, *How Arbitration Works* at 165, The Bureau of National Affairs (BNA), (1952).

Both these teachings were echoed by a nationally prominent arbitrator who later observed how the "moving party" in discharge cases should manifest with an employer proceeding first on the fundamental rationale that any change in "status quo" is knowledge best "within [its] purview." Kagel, *Anatomy of a Labor Arbitration* at 80–81, BNA (1961).

The theme remains current as esteemed symposium contributors recently presumed how discipline or discharge cases signify that the employer "presents its case first" for to initiate an arbitration hearing on such issues "the company counsel will have to proceed." *Proceedings of the Thirty-Fifth Annual Meeting, National Academy Arbitrators—Conduct of the Hearing* at 35, 107, BNA, (1982).

C. *Basis of Analysis*

The consolidated complaint alleges, particularly, that in October 1983 Respondent unilaterally, without notice to or bargaining with the Rocky Mountain Chapter, began requiring mandatory leave days of employees within the unit in contrast with policy up to that point of soliciting voluntary leave days to better align staff with lowered patient needs of a diminishing census. Further, the consolidated complaint alleges that on February 17, 1984, Respondent terminated Teresa Lucero, Eunice Barnes, Kathleen Gallegos, and Ann Dailey as a reflection of its comparably instituted change requiring LPNs to be trained in the dispensation of medications.

It is conceded by Respondent that mandatory leave was required in October 1983 as a final step in avoiding continued overstaffing and the concomitant higher-than-necessary overhead. This was communicated to employees through memoranda of October and November 1983 dates, with a "rotating roster" to be the medium used when there were insufficient requests for time off on voluntary leave for particular days. The effect of this change was to reduce hours worked, as with Gallegos and Dailey who were both on an approximate half-time basis by February 1984.

A program of offering medication-dispensing training had been available to LPNs beginning early in 1981. Approximately 89 percent of those so employed eventually successfully completed the written and clinical phases of this training to become retitled, but without a pay differential, as LPN-1s. Lewis testified that a chief reality at the hospital from late 1983 into early 1984 period was a drastic drop in patient census leading to a search for cost-effectiveness by better employee utilization or the closing of units. This, in turn, resulted in the mandatory leave policy and review of configurations among employees of the entire nursing department. The upshot of Lewis' review was the termination of 17 persons on February 17, 1984, including those named in the consolidated complaint. These four employees of the unit were the only LPNs not retitled as dispensers of medication, and thus in Lewis' view least versatile in terms of patient care. Three of the four named individuals who were terminated from this unit in February 1984 testified that they had chosen not to undertake the extra training because it would not have led to increased compensation for the added responsibility of administering medication. The fourth terminated LPN, Eunice Barnes, had passed the preliminary written examination for LPN-1, but progressed no further because of inopportune unavailability of the nursing educator who facilitated the clinical implementation phase of such training.

The General Counsel's theory of these assertedly unlawful terminations is limited to invoking Section 8(a)(5) of the Act, in consequence of which the theory of discrimination to encourage or discourage union membership is not involved. For this reason, holding that a violation is present insofar as the terminations are concerned must rest on the notion that Respondent was under an obligation to bargain with the Rocky Mountain Chapter as to a modification in duties that formed the contrast between those LPNs retained and those actually terminated. Respondent concedes that notice of the commencement of medication dispensation training was not given to the Rocky Mountain Chapter, and former LPN Norma McAdams testified that she had obtained the LPN-1 classification herself, but only in the context of not receiving full observation and followup as contemplated by the written training outline.

D. *Analysis*

Both parties have cited United States Supreme Court decisions in support of their respective positions. However, *NLRB v. Insurance Agents*, 361 U.S. 477 (1960), alluded to by the General Counsel, contains only dictum with respect to unilateral action by an employer that tends to subvert a union's representative position, while Respondent's reliance on *First National Maintenance Corp. v. NLRB*, 452 U.S. 666 (1981), is misplaced because that holding addresses only the process of making a business decision in contrast to bargaining over effects of that decision. Cf. *Akron General Medical Center*, 232 NLRB 920, 925–926 (1977). However, when employer action is fundamentally a classic matter of exercising managerial prerogatives, coupled with a need for prompt attention to pressing business necessities, the obligation to notify a labor organization and bargain over effects of the action is not present. See *Postal Service*, 203 NLRB 916, 919 (1973), and cases cited. Here the transition from voluntary to mandatory leavetaking was merely to counteract employee dissatisfaction with fairness of the voluntary approach, and to assure that a gross surplus of LPNs did not appear for duty on a given day. The circumstances permit a characterization of this routine change as adjustment "relating to diminishing available hours of work" and not violative of the Act. See *Kal-Die Casting Corp.*, 221 NLRB 1068 (1975). Further, the rotating roster of mandatory leave taking had "previously coexisted" with the voluntary program of the department and was thus "a part of the managerial prerogative." See *Woods School*, 270 NLRB 171 (1984).

The subsequent necessity of terminating LPNs was but an extension of the Employer's reaction to the fact of a continually falling patient census. The actual reduction in force was balanced throughout Lewis' department, and all non-LPN-1s were affected save for one in the specialized function of instrument aid and one regularly assigned to central supply. Additionally, a single male medical attendent was kept on the midnight shift where his physical abilities could be unexpectedly required. The predominant characteristic of the LPN layoff selections was that of retaining more flexible personnel, and this criterion had long manifested insofar as those fully trained in medication dispensation was concerned. Cf. *Markle Mfg. Co.*, 239 NLRB 1142, 1147 (1979). For this reason the Employer's action may not be classified as a change in duties of employees, but merely a recognition of what skills did or did not exist within the targeted group. An equally significant factor is that the initial program of offering and qualifying LPNs in medication dispensation was of settled completion well outside the limitations period defined by Section 10(b) of the Act.

[Recommended Order omitted from publication.]

David Vainio, H. Marie Vainio, Kevin Vainio, and Leonard Vainio, d/b/a Professional Eye Care *and* International Association of Machinists and Aerospace Workers Local Lodge 88, AFL-CIO. Cases 19-CA-17267, 19-CA-17445, 19-CA-17511, 19-CA-17569, 19-CA-17570, 19-CA-17833, and 19-CA-17913

July 29, 1988

DECISION AND ORDER

BY CHAIRMAN STEPHENS AND MEMBERS JOHANSEN AND BABSON

On May 13, 1986, Administrative Law Judge Clifford H. Anderson issued the attached decision.[1] Respondent Kevin Vainio filed exceptions and a supporting brief, and the General Counsel filed limited exceptions, a supporting brief, and a brief in answer to the Respondent's exceptions.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings,[2] and conclusions only to the extent consistent with this Decisionand Order.[3]

1. We agree with the judge that the Respondents violated Section 8(a)(3) and (1) by discharging employee Leonard Dalasera. In adopting the judge's conclusions, however, we observe that the proper standard for determining whether the Respondents could avoid being held liable for a violation notwithstanding their failure to rebut the General Counsel's prima facie case is whether the Respondents established they would have discharged Dalasera even in the absence of his protected conduct. *Wright Line*, 251 NLRB 1083, 1089 (1980), enfd. 662 F.2d 899 (1st Cir. 1981), approved in *NLRB v. Transportation Management Corp.*, 462 U.S. 393, 400 (1983). We agree for the reasons the judge cited that the Respondents failed to meet their burden here.

2. We also agree that the Respondents violated Section 8(a)(5) and (1) by engaging in a course of conduct designed to avoid reaching an agreement with the Union. We find it unnecessary to pass, however, on the judge's following statements:[4] "An important factor . . . was Respondents' technique of rejecting the Union proposals and then counterproposing the terms of employment currently in place," and "Finally, Respondents sought substantial wage concessions without making any concessions on non-economic terms of employment." We rely instead on the other factors the judge cited.

3. We adopt the judge's conclusion that the Respondents violated Section 8(a)(5) and (1) by transferring equipment, personnel, and work from their Butte, Montana facility to Idaho Falls, Idaho, without bargaining with the Union about the transfer. As more fully described by the judge, the primary focus of this allegation was the decision to transfer employee Du Frame and not whether to operate lab services at the Idaho Falls facility in the first

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[1] On May 22, 1986, the judge issued an erratum, correcting certain errors in his decision and recommended Order.

[2] We note the following errors in the judge's decision:

In his heading to sec. III,B,2 of his decision, the judge referred to June 13 rather than January 13.

In sec. III,B,4 of his decision, the judge stated employee Christopher Knutson was hired January 28, 1986. The correct year is 1985.

In sec. III,E,1, par. 1, the judge referred to Drs. Kevin and David Vainio, rather than Drs. Leonard and David Vainio.

In sec. III,E,2, par. 4, the judge stated the Respondents held a meeting with employees March 18, 1983. The correct year is 1985.

In sec. III, fn. 10 of his decision, the judge referred to Mr. Kevin Vainio rather than Dr. Leonard Vainio.

In sec. III,E,2, par. 7, the judge referred to Drs. David and Kevin Vainio rather than Drs. David and Leonard Vainio.

In sec. III, fn. 9, the judge stated the General Counsel alleged the Respondent violated Sec. 8(a)(3) by denying employee Leonard Dalasera a paid vacation day because of his union activities, but did not rule on the allegation. The General Counsel, however, did not except to the judge's failure to make the finding and we therefore do not pass on it.

In the absence of exceptions, we adopt pro forma the judge's finding that the Respondents violated Sec. 8(a)(1) by threatening to close their facility in an April 15, 1985 meeting Respondents David and Leonard Vainio held with employees.

We also adopt pro forma in the absence of exceptions the judge's finding that the Respondents violated Sec. 8(a)(5) and (1) by unilaterally changing their vacation pay practice. That finding was made only in the judge's erratum. See *Wilco Business Forms*, 280 NLRB 1336 fn. 2 (1986).

[3] We amend the remedy to provide that the Respondents shall make their employees whole for the unilateral changes the Respondents unlawfully made in their holiday and vacation benefits in the manner prescribed in *Ogle Protection Service*, 183 NLRB 682 (1970), enfd. 444 F.2d 502 (6th Cir. 1971).

In accordance with our decision in *New Horizons for the Retarded*, 283 NLRB 1173 (1987), interest on and after January 1, 1987, shall be computed at the "short-term Federal rate" for the underpayment of taxes as set out in the 1986 amendment to 26 U.S.C. § 6621. Interest on amounts accrued prior to January 1, 1987 (the effective date of the 1986 amendment to 26 U.S.C. § 6621), shall be computed in accordance with *Florida Steel Corp.*, 231 NLRB 651 (1977).

We amend Conclusion of Law 4 by substituting the words "vacation benefits" for the words "holiday pay" to conform more closely to the judge's findings.

We shall substitute our Order for the judge's recommended Order to conform more closely to the Conclusions of Law and the judge's findings and to add our usual requirement that the Respondents preserve their records and make them available to the Board to analyze the Respondents' backpay liability.

We do not adopt the judge's recommendation that the Respondents be required to bargain a minimum of 15 hours per week and submit to the Regional Director bargaining reports every 15 days. We find it unnecessary at this stage of this proceeding to determine the standards under which the Respondents will be found to have complied with our bargaining Order. Cf. *Leavenworth Times*, 234 NLRB 649 fn. 2 (1978) (rejecting a similar remedy on other grounds); *Eastern Maine Medical Center*, 253 NLRB 224, 228 (1980) (same), enfd. 658 F.2d 1 (1st Cir. 1981).

We shall issue a new notice to conform to the Order.

[4] Sec. III,E,4,a, par. 4 of his decision.

289 NLRB No. 144

place.[5] This allegation implicitly was treated by the parties and analyzed by the judge, under *NLRB v. Katz*, 369 U.S. 736 (1962), on the basis that Du Frame's transfer was a mandatory subject of bargaining. We agree that Du Frame's transfer can be treated as falling within the second category of management decisions, which involve mandatory subjects of bargaining, described in *First National Maintenance Corp. v. NLRB*, 452 U.S. 666, 676-677 (1981), and find *Otis Elevator Co.*, 269 NLRB 891 (1984), inapplicable to the instant situation.

4. The judge concluded that the Respondents did not violate Section 8(a)(5) and (1) by unilaterally closing their laboratory for 3 days beginning June 12, 1985. The judge relied on the fact that the Respondents lawfully discharged lab employees Matt Grigsby and Christopher Knutson immediately before the closing.

Respondent David Vainio, employee Lloyd Tom Patton, and Grigsby all testified that David Vainio initially indicated that the entire lab was closed after an altercation involving Grigsby and employee Knutson on June 12, which led to Grigsby's and Knutson's lawful discharges. Vainio, Patton, and Grigsby also testified, however, that Vainio later clarified the situation. Vainio and Patton testified Vainio returned to the lab and said that the surfacing operation was closed, but the remainder of the lab would remain open. Grigsby testified Vainio later pointed to Grigsby and Knutson and said they were discharged.

Only Grigsby and Knutson worked in the surfacing operation at the time, and the General Counsel does not contend the lab remained closed for more than 3 days. Accordingly, we conclude the Respondents "closed" the surfacing operation only to effect the lawful discharges, making no change in operations over which they had a duty to bargain. We therefore agree with the judge that the Respondents did not violate the Act by this conduct.

ORDER

The National Labor Relations Board orders that the Respondents, David Vainio, H. Marie Vainio, Kevin Vainio, and Leonard Vainio, d/b/a Professional Eye Care, Butte, Montana, their officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Coercively interrogating any employee about union support or union activities.

(b) Attempting to convince any employee that it is unnecessary to vote for the Union, International Association of Machinists and Aerospace Workers Local Lodge 88, AFL-CIO, by soliciting employees' complaints and grievances and promising to remedy those grievances.

(c) Threatening any employee that the Respondents will close their facility or subcontract their employees' work if employees select the Union as their collective-bargaining representative.

(d) Harassing any employee because of the employee's union activities or because the employee gave testimony at a National Labor Relations Board representation hearing.

(e) Informing any employee that it would be futile to select the Union as the collective-bargaining representative.

(f) Threatening any employee that the Respondents will fail to bargain in good faith with the Union.

(g) Changing any employee's shift, or the Respondents' vacation benefits, because of the employee's support for the Union.

(h) Discharging or otherwise discriminating against any employee for supporting International Association of Machinists and Aerospace Workers Local Lodge 88, AFL-CIO, or any other union.

(i) Transferring their equipment, personnel, and work from their Butte, Montana facility to any other facility without notifying the Union of their intent to do so and affording the Union the opportunity to bargain concerning that decision and the effects of that decision.

(j) Changing employees' terms and conditions of employment without first bargaining with the Union in good faith regarding those changes.

(k) Failing to bargain in good faith with the Union as exclusive collective-bargaining representative of their employees in the unit set out below in paragraph 2(e) by engaging in a course of conduct designed to undermine the Union and avoid reaching an agreement.

(l) In any other manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Make Beverly Riley and Leonard Dalasera whole for any loss of earnings and other benefits suffered as a result of the discrimination against them, in the manner set forth in the remedy section of the judge's decision.

(b) Remove from their files any reference to the unlawful discharges and notify the employees in writing that this has been done and that the discharges will not be used against them in any way.

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[5] We note that the Respondents admitted that, prior to the advent of the Union and not when Du Frame's transfer was under consideration, they had already made a threshold decision to have lab services at the Idaho Falls facility. We also note that the Respondents have not argued to us the particular contention concerning the nature of the decision that our dissenting colleague is making.

(c) Restore to their Butte, Montana laboratory facility the laboratory equipment, personnel, and work unlawfully transferred unilaterally to their Idaho Falls, Idaho facility and make their employees whole for any loss of earnings and other benefits suffered as a result of the Respondents' unlawful transfer in the mannner set forth in the remedy section of the judge's decision.

(d) Restore their vacation and holiday benefits and make their employees whole for any benefits unlawfully withheld in the manner set forth in the remedy section of the judge's decision, as amended.

(e) On request, bargain with the Union as the exclusive representative of the employees in the following appropriate unit concerning terms and conditions of employment and, if an understanding is reached, embody the understanding in a signed agreement:

> All laboratory employees employed by the Respondents at their facility located at 225 South Idaho, Butte, Montana; but excluding all office clerical employees, guards and supervisors as defined in the Act.

(f) Preserve and, on request, make available to the Board or its agents for examination and copying, all payroll records, social security payment records, timecards, personnel records and reports, and all other records necessary to analyze the amount of backpay due under the terms of this Order.

(g) Post at their Copper City Optical; Butte, Montana; and Idaho Falls, Idaho facilities copies of the attached notice marked "Appendix."[6] Copies of the notice, on forms provided by the Regional Director for Region 19, after being signed by the Respondents' authorized representative, shall be posted by the Respondents immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondents to ensure that the notices are not altered, defaced, or covered by any other material.

(h) Notify the Regional Director in writing within 20 days from the date of this Order what steps the Respondent has taken to comply.

MEMBER JOHANSEN, dissenting in part.

I dissent only from the majority's conclusion that the Respondents violated Section 8(a)(5) and (1) by transferring equipment, personnel, and work from their Butte, Montana facility to Idaho Falls, Idaho, without bargaining with the Union over the transfer decision.[1] My colleagues reach their conclusion on a record devoid of any evidence regarding the Respondents' economic motivation for the transfer and thus no basis exists on which to determine whether the transfer decision is a mandatory subject of bargaining under Section 8(d) of the Act, pursuant to the Board's decision in *Otis Elevator Co.*, 269 NLRB 891 (1984) (*Otis Elevator II*).

The majority dispose of the problem by focusing on only one element of the Respondents' decision (the transfer of personnel) and then concluding that that element was a mandatory subject of bargaining. In fact, the Respondents' decision also involved the transfer of equipment and work, and all three components must be considered in determining whether the Respondents' decision is a mandatory subject of bargaining.

The facts are not in dispute. Briefly, the Respondents operate retail optical outlets and optical laboratories. In January 1985 the Union began an organizational campaign among the Respondents' Butte, Montana facility's lab employees. The Union's efforts were successful and the Union later attempted to meet with the Respondents to negotiate a collective-bargaining agreement. The Respondents met the Union's organizational campaign and efforts to negotiate a contract with numerous and aggravated unfair labor practices.

Before the union campaign began, however, the Respondents closed a facility in Bozeman, Montana, and intended at some point to open a laboratory facility in Idaho Falls. After closing the Bozeman facility the Respondents stored the laboratory equipment from that facility in the Butte lab.

In April 1985 the Respondents hired employee Keith Du Frame for the Butte lab. Du Frame had wanted to work in the Respondents' Missoula, Montana facility and was told when hired that he would be transferred to Missoula when an opening became available. In May Du Frame asked Respondents David and Leonard Vainion for a transfer out of the Butte lab and they agreed to transfer him to Idaho Falls. They told Du Frame to take equipment from Butte to Idaho Falls to set up a laboratory. Du Frame opened the Idaho Falls lab

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[6] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

[1] I agree that the Respondents violated Sec. 8(a)(1) and (3) by their preand postrepresentation election conduct, and Sec. 8(a)(5) and (1) by the course and conduct of their bargaining and by their unilateral changes in their holiday and vacation benefits practice. I also agree that the Respondents violated Sec. 8(a)(5) and (1) by failing to afford the Union an opportunity to bargain about the effects of their transfer decision. Failing to give the Union clear and timely notice of the decision before it effected the decision necessarily denied the Union that opportunity. *P. J. Hamil Transfer Co.*, 277 NLRB 462, 463 (1985).

May 20.[2] It is undisputed that some unit work was transferred from Butte to Idaho Falls. The Respondents did not notify or bargain with the Union about the transfer of equipment, personnel, and work.

The Board in *Otis Elevator II*, relying on the Supreme Court's decision in *First National Maintenance Corp. v. NLRB*, 452 U.S. 666 (1981), held that managerial decisions that affect the scope, direction, or nature of a business are excluded from the duty to bargain as defined in Section 8(d) of the Act.[3]

Assuming that the managerial decision has something more than an "indirect and attenuated impact on the employment relationship,"[4]

> the critical factor to a determination whether the decision is subject to mandatory bargaining is the essence of the decision itself, i.e., whether it turns upon a change in the nature or direction of the business, or turns upon labor costs.[5]

In the instant case, I find that the decision at issue involved more than just the transfer of one employee. The facts recited above reveal that the transfer of equipment and unit work was also involved. Accordingly, I believe that the Respondents' decision is the kind of managerial decision that must be analyzed under *Otis Elevator* to determine whether it is a mandatory subject of bargaining. Here, however, the General Counsel presented no evidence showing that the Respondents' tranfer decision turned on labor costs. As the General Counsel has failed to make that showing, the Respondents' decision is necessarily excluded from Section 8(d) and the Respondents' refusal to bargain about the decision cannot properly be found to have violated Section 8(a)(5) and (1).

Accordingly, I conclude the Respondents did not violate Section 8(a)(5) and (1) by transferring equipment, personnel, and work from their Butte facility to Idaho without bargaining with the Union.

APPENDIX

Notice To Employees
Posted by Order of the
National Labor Relations Board
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

We will not coercively question you about your union support or activities.

We will not attempt to convince you that it is unnecessary to vote for the Union, International Association of Machinists and Aerospace Workers Local Lodge 88, AFL–CIO by soliciting your complaints and grievances and promising to remedy those grievances.

We will not threaten you that we will close our facilities or subcontract your work if you select the Union as your collective-bargaining representative.

We will not harass you because of your union activities or because you gave testimony at a National Labor Relations Board representation hearing.

We will not inform you that it would be futile to select the Union as your collective-bargaining representative.

We will not threaten that we will fail to bargain in good faith with the Union.

We will not change your shifts, or our vacation benefits, because of your support for the Union or any other union.

We will not discharge or otherwise discriminate against any of you for supporting International Association of Machinists and Aerospace Workers Local Lodge 88, AFL–CIO or any other union.

We will not transfer our equipment, personnel, or work from our Butte, Montana facility to any other facility without notifying the Union of our intent to do so and without affording the Union an opportunity to bargain concerning that decision and the effects of that decision.

We will not change your terms and conditions of employment without bargaining with the Union in good faith.

We will not fail to bargain in good faith with the Union as exclusive collective-bargaining representative of those of you in the unit set out below by engaging in a course of conduct designed to undermine the Union and avoid reaching an agreement.

We will not in any other manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

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[2] The judge did not state what equipment Du Frame took to Idaho. The witnesses consistently testified, however, that the equipment moved to Idaho came mainly from the Bozeman facility equipment stored at Butte. The only significant equipment moved from Butte that had not originally come from Bozeman was a soldering machine, which the Respondents replaced within a month after the transfer. Only some Bozeman hand tools, incidental equipment, and an "edger" were used at Butte while stored there. The edger had been put to use only a few weeks before the move.

[3] 269 NLRB at 893.

[4] *First National Maintenance Corp. v. NLRB*, supra, 452 U.S. at 677.

[5] *Otis Elevator II*, supra, 269 NLRB at 892.

WE WILL make Beverly Riley and Leonard Dalasera whole for any loss of earnings and other benefits resulting from their unlawful discharges, less any net interim earnings, plus interest.

WE WILL notify each of them that we have removed from our files any reference to his or her discharge and that the discharge will not be used against him or her in any way.

WE WILL restore to our Butte, Montana laboratory facility the laboratory equipment, personnel, and work that we unlawfully transferred unilaterally to our Idaho Falls, Idaho facility and WE WILL make you whole for any loss of earnings and other benefits resulting from our unlawful transfer, with interest.

WE WILL restore our vacation and holiday benefits and make you whole for any benefits we unlawfully withheld from you, with interest.

WE WILL, on request, bargain with the Union and put into writing and sign any agreement reached on terms and conditions of employment for those of you in the following bargaining unit:

> All laboratory employees employed by us at our facility located at 225 South Idaho, Butte, Montana; but excluding all office clerical employees, guards and supervisors as defined in the Act.

DAVID VAINIO, H. MARIE VAINIO, KEVIN VAINIO, AND LEONARD VAINIO, D/B/A PROFESSIONAL EYE CARE

Stephanie Contrell, Joseph G. Marra, and *Patricia Hunter, Esqs.*, for the General Counsel.

Dr. David Vainio, pro se, of Butte, Montana, *H. Marie Vainio*, pro se, of Butte, Montana, *Kevin E. Vainio, Esq.*, pro se, of Belgrade, Montana, and *Dr. Leonard Vainio*, pro se, of Butte, Montana, for the Respondents.

Ward M. Johnston, of Portland, Oregon, and *Gary D. Will*, of Portland, Oregon, for the Charging Party.

DECISION

CLIFFORD H. ANDERSON, Administrative Law Judge. I heard these consolidated cases in trial at Butte, Montana, on various days in August 1985 and January 1986. The matter arose as follows.

On 4 February 1985, the International Association of Machinists and Aerospace Workers Local Lodge 88, AFL-CIO (the Charging Party or the Union) filed Case 19-CA-17267 against Professional Eye Care, a business entity owned and operated by Dr. David Vainio, H. Marie Vainio, Dr. Leonard Vainio, and Kevin Vainio (Respondents). The Charging Party amended the charge on 13 February 1985. On 29 March 1985, the Regional Director for Region 19 of the National Labor Relations Board issued a complaint and notice of hearing in the case. On 22 April 1985 the Charging Party filed charge 19-CA-17445 against Respondents and on 21 May 1985, the Regional Director issued an order consolidating cases, consolidated complaint, and notice of hearing, consolidating the above-referenced cases. On 20 May 1985 the Charging Party filed Case 19-CA-17511 against Respondents and on 6 June 1985 the Regional Director issued a second order consolidating cases, amended consolidated complaint, and notice of hearing combining all the above cases. On 14 June 1985 the Charging Party filed Cases 19-CA-17569 and 19-CA-17570 against Respondents and on 27 June 1985 the Regional Director issued a third order consolidating cases, amended consolidating complaint, and notice of hearing joining all the above cases. Respondents filed appropriate answers to the complaints and the matter was tried in Butte, Montana, in August 1985.

On 30 September 1985, the Charging Party filed Case 19-CA-17833 against Respondents, which charge was amended on 4 November 1985. On 6 November 1985 the Regional Director issued a complaint and notice of hearing with respect to this charge. On 4 November 1985 the Charging Party filed Case 19-CA-17913 against Respondents and on 9 December 1985, the Regional Director issued an order consolidating cases, consolidated complaint, and notice of hearing joining these latter two cases. On 29 November 1985 counsel for the General Counsel filed with me a motion to reopen the record in the original consolidated cases and to consolidate those cases with Cases 19-CA-17833 and 19-CA-17913. There being no opposition, the motion was granted on 13 December 1985 reopening the record in the earlier matter, consolidating all the above cases, and scheduling additional hearings. These hearings were held in January 1986. Briefs were submitted on 7 March 1986.

The consolidated complaints alleged a course of conduct by Respondents including violations of Section 8(a)(1) of the National Labor Relations Act (Act), discharges and adverse actions against employees in violation of Section 8(a)(3) of the Act, and a series of acts and conduct in violation of Section 8(a)(5) of the Act. Respondents in part deny the conduct attributed to them and otherwise suggest that the conduct alleged does not rise to the level of a violation of the Act.

All parties were given full opportunity to participate at the hearing, to introduce relevant evidence, to call, examine, and cross-examine witnesses, to argue orally, and to file posthearing briefs.[1]

On the entire record, including oral argument by Respondents and posthearing briefs from the General Counsel and Respondents, and from my observation of the witnesses and their demeanor, I make the following

FINDINGS OF FACT[2]

I. JURISDICTION

The four Respondents have operated affiliated business enterprises with common ownership, directors, manage-

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[1] All four Respondents participated at the hearing, calling witnesses, cross-examining witnesses, and arguing in support of positions taken.

[2] Through the pleadings, written and oral stipulations of fact, and the arguments and concession of the parties at the hearing, the issues in dis-

Continued

ment, and supervision, and formulated and administered a common labor policy affecting employees in such enterprises; have common bank accounts and purchasing accounts; have shared common premises and facilities; have provided services for and made sales to each other; have interchanged personnel, and have held themselves out to the public as a single-integrated business enterprise. These various enterprises, annually in the course and conduct of their business operations, collectively sell and ship goods or provide services from Montana-based facilities to customers outside the State of Montana, and collectively sell and ship goods or provide services to customers within the State of Montana, which customers are themselves engaged in interstate commerce by other than indirect means, of a total volume in excess of $50,000. During the same period, these enterprises collectively purchased and caused to be transferred and delivered to Montana facilities materials valued in excess of $50,000 directly from sources located outside the State of Montana or from suppliers located within the State who in turn obtain such goods and materials directly from sources outside the State. Finally, the collective enterprises annually enjoy a gross volume of business in excess of $500,000. Respondents, and each of them, are employers engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.[3]

II. LABOR ORGANIZATION

The Union is a labor organization within the meaning of Section 2(5) of the Act.

III. ALLEGED UNFAIR LABOR PRACTICES

A. *Background and Summary of Allegations*

At relevant times, Professional Eye Care has been owned and operated by the Vainio Family—mother, H. Marie Vainio, and sons, Drs. David and Leonard Vainio and lawyer Kevin Vainio. Drs. David and Leonard Vainio are practicing optometrists. Kevin Vainio maintains a law practice in Belgrade, Montana. The facility at issue is an optical laboratory (the lab) serving Respondents' retail optical outlets. The lab is located at 225 South Idaho, Butte, Montana. Dr. David Vainio is primarily responsible for the operation of the lab, with Dr. Leonard Vainio assuming additional supervisory responsibilities. Kevin Vainio apparently has no regular role in the operation of the lab save as discussed below. Until 11 January 1985, Becky Hoffman was a statutory supervisor at the lab. She was then transferred to one of Respondents' retail optical facilities where she worked as a statutory employee.

Lab employees initiated contact with the Union in late 1984 and an organizational drive was commenced that culminated with a demand for recognition of the Union served on Respondents on 11 January 1985. Respondents did not elect to recognize the Union and the Union filed a petition seeking to represent lab employees in Case 19–RC–11136. Hearings were held on the Union's representation petition in February and March 1985. An election was held among lab employees on 16 April 1985 with the Union being certified as representative of lab employees on 24 April 1985.

During the period between the demand for recognition and the election, the General Counsel alleges various violations of Section 8(a)(3) and (1) of the Act, including the termination of optical outlet employee Beverly Reilly. The complaint also alleges misconduct after the election violative of Section 8(a)(1) and (3) of the Act including the termination on 17 April of employee Leonard Dalasera and the termination on 12 June 1985 of employees Chris Knutsen and Matt Grigsby.

Following the issuance of the 24 April 1985 certification, the parties engaged in collective bargaining, which is the subject of various allegations of violations of Section 8(a)(5) of the Act. Included in these allegations are contentions that Respondents (1) changed the terms and conditions of employment of unit employees without either notifying the Union or providing it an opportunity to bargain, (2) failed to provide relevant information to the Union, and (3) bargained in bad faith without intention to reach a collective-bargaining agreement.

Respondents at relevant times have had various retail optical outlets in cities within the States of Montana and Idaho. Respondents' operations included an optical laboratory in Bozeman, Montana. That lab was closed about September 1984 and certain of its equipment was transferred to the Butte lab. Respondents' retail facility in Idaho Falls, Idaho, was opened about August 1984. Space was provided at that facility for a laboratory but, until the events discussed here, the Idaho lab was neither equipped nor staffed.

Respondents had been suffering difficult economic circumstances in late 1984 and had been reducing operations, which included layoffs of staff at the Bozeman laboratory and other facilities. The Mountain State Optical facility, a retail facility in Butte, Montana, was closed on 10 January 1986.

For ease of understanding and analysis, the allegations of violations of Section 8(a)(1), (3), and (5) of the Act will be dealt with separately.

B. *Evidence Concerning Allegations of Violations of Section 8(a)(1) of the Act*

1. Events of 11 January

There is no doubt that the Union's letter demanding recognition was received by Respondents on 11 January 1985, and that the receipt of this letter from the Union

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pute were substantially reduced. Where not otherwise noted, these findings are based on such stipulations and concessions or on the unchallenged testimony of credible witnesses.

[3] Respondents did not dispute that the above-described business entities rendered Professional Eye Care's operations, described infra, subject to the Board's statutory and discretionary jurisdiction. Further, each Respondent conceded his or her individual subjection to the Board's jurisdiction. These facts being established, and without objection by the General Counsel, further inquiry into the business structure of Professional Eye Care and its legal status under appropriate state law was deemed irrelevant to a resolution of the issues in the case. Accordingly, with the agreement of all parties, no formal findings were made concerning what type of legal entity Professional Eye Care is beyond the uncontested fact that both Professional Eye Care and Respondents are subject to the provisions of the Act.

was the Vainio family's first knowledge of their employees' union activities.

Longtime employee Leonard Dalasera testified that late in the morning of Friday, 11 January 1985, he was summoned to the office by Dr. David Vainio, who asked about the Union's letter. Dalasera testified that he identified the letter as a letter from Gary Taylor, union representative, saying that the lab employees wished to join the Union. D. Vainio responded, in Dalasera's recollection, "Is this a friend of yours?" Dalasera said yes. D. Vainio continued asserting, "I will not sign a union contract or do anything about this." Five to ten minutes later, in Dalasera's recollection, after he had returned to his work station, D. Vainio came down and changed his shift hours. Dalasera had up to that time alternated his hours with employee Tom Patton. Dalasera recalled that in announcing the change in Dalasera's lunch hour, which was to take effect immediately, D. Vainio asserted the purpose of the change was "so you can not be with your friends." Employee Tom Patton testified that he heard Dalasera summoned into the office on 11 January 1985 and soon after Dalasera's return to his work area, David Vainio came into the area and told Dalasera: "The first thing that will be changed are your hours."

D. Vainio did not specifically deny these conversations with Dalasera. He testified, however, that Dalasera's shift change occurred as a result of the need to keep certain vital equipment operating for a longer period each day. Dalasera's hours were restored some weeks later.

2. The 13 June restaurant incident

On Sunday, 13 January 1985, employees Leonard Dalasera and Tom Patton were having late morning coffee at a Butte restaurant known as "The Restaurant." As was apparently customary after church, Dr. Leonard Vainio and his mother, Helen Marie Vainio, arrived at The Restaurant for breakfast. Employees Dalasera and Patton, as well as L. Vainio, each testified to the occurrences at The Restaurant that morning. There is no dispute that when L. Vainio arrived and saw the two employees already seated at a table he committed: "What is this, a union meeting?" Thereafter, he continued the conversation criticizing the work product of the employees. Both employees Dalasera and Patton specifically recalled that L. Vainio added, after he asked them whether they were engaged in a union meeting, that the employees "were going to need union protection." Patton further recalled that L. Vainio added that Respondents could have its lab work done elsewhere, if necessary. Helen Marie Vainio did not address these events in her testimony. L. Vainio testified that the "union meeting" remark was made by him in an entirely humorous vein and that he did not threaten the employees in any way.

3. The Dalasera harrassment allegations

The following day, Monday, 14 January 1986, Leonard Dalasera testified to a conversation between himself, D. and L. Vainio, and their mother. Dalasera testified that at approximately 6 o'clock in the evening at the lab Vainio interrogated him regarding his motives for joining the Union and started singing derogatory songs about unions. He recalled that D. Vainio then said that he would sign a union contract "over his dead body" and asked Dalasera how much his union dues were. L. Vainio told Dalasera that productivity was down among the lab employees since the advent of union organization.

H. M. Vainio testified that Dalasera is overly sensitive, but did not address the remarks attributed to her by Dalasera. D. Vainio denied making any threats to employees, or statement regarding his opposition to signing a collective-bargaining agreement. L. Vainio denied threatening Dalasera during his employment, but did not otherwise address the specifics of this conversation.

Dalasera testified that following the onset of union organization at the lab his relationship with D. Vainio deteriorated. More specificially, he alleged, and other employees corroborated his testimony, that D. Vainio became verbally abusive about perceived failings by Dalasera and often became loud and violent—throwing items in Dalasera's direction. D. Vainio did not so much as deny the alleged mistreatment of Dalasera during the period. He suggested that if his treatment of Dalasera had been impulsive or subject to fits of temper it did not constitute a change in behavior, but was rather a continuing pattern established long before the onset of union activities at the lab. In so characterizing his temper and activities, D. Vainio was corroborated by his brothers Leonard and Kevin and his mother Helen Marie Vainio.

On 8 February, a representation hearing was conducted. At least one issue in that hearing was whether it was appropriate for the National Labor Relations Board to assert jurisidiction over Respondents' operations.

Dalasera testified at the hearing regarding the amount of work done in the lab. K. Vainio was counsel for Respondents at that hearing. Following the hearing, L. Vainio returned to work. K. Vainio also went to the lab and there had various conversations or a single extended conversation with Dalasera. Dalasera, corroborated by other lab employees, testified that K. Vainio, in high dudgeon, essentially perpetually badgered Dalasera regarding his work speed and the quantity of work he put out. K. Vainio testified that while he did have an ongoing conversation with Leonard Dalasera that afternoon regarding his work output, it was not because of animus towards Dalasera either because of his testimony or his union activities but was rather based on a need to discover in detail the quantity of work output, which formed the basis of Dalasera's testimony earlier that day. K. Vainio described his conduct in interrogating Dalasera as essentially benign if somewhat heated and repetitious.

4. Job interview conduct

Former laboratory employee Christopher Knutson testified that he was hired by Respondents on 28 January 1986, following an employment interview with D. Vainio. During that employment interview, Knutson testified that D. Vainio asked him what he thought about unions. Knutson responded that he had some correspondence from the Union seeking to represent employees in the lab and that he was being required to appear at a hearing in Febuary regarding the matter. Knutson then testified that D. Vainio said "in more or less these exact words—that rather than have the union in the lab, he would just as soon shut it down." D. Vainio denied making this threat.

5. Employee meetings

On 18 March 1985, K. Vainio met with the lab employees. He initially discussed a letter he had received from an optician employee of Respondents complaining of the quality of the lab's workmanship and threatening to resign if it did not improve. K. Vainio asked employees what could be done to address the problem reflected in the letter. Employees responded with suggestions regarding equipment and recommended shifting employee Leonard Dalasera from final inspection to other work or even terminating him. Kevin Vainio informed the employees that he would discuss the suggestions with his brothers. Later some of the requests were honored.

On 15 April, before the scheduled 16 April election,[4] a lab employee meeting was held by D. and L. Vainio. Although there was strong disagreement regarding the specifics of the conversation, it is undisputed that L. Vainio analogized the election campaign to a poker game. Employees testified that L. Vainio told them that, in the nature of guessing the opponent's card hand, the employees should determine the Employer's intentions with respect to the Union. If the employees thought that the Employer would negotitate with the Union and pay higher wages, they should vote for the Union. If the employees guessed wrong, however, and Respondents did not sign a contract, the employees would be out on a picket line the next day. Employees also testified that the Vainios solicited employees' grievances and promised to remedy the grievances they raised.

L. Vainio, generally corroborated by his brother, testified that although his general analogy was to a poker game he merely told the employees that they did not know what would be the consequence of selecting the Union, that they might end up with something if a favorable contract was negotiated, but they might also end up with something worse. L. Vainio further recalled he told employees that Respondents might not be able to negotiate a contract with the Union and that the employees would then probably be out on strike. The Vainios denied that they solicited or promised to solve employee grievances.

6. Postelection threat allegations

The election was held on 16 April and decided favorably to the Union. The certification of representative was issued on 24 April. Former employee Matt Grigsby testified that on 17 April, in the morning, D. Vainio walked into the surfacing lab and told Chris Knutson and Grigsby that he had no intention of engaging in collective bargaining and, in a heated voice, said that if the work "didn't shape up" he would turn it over to a subcontractor and shut down the lab. Grigsby testified that somewhat later that same morning he approached D. Vainio and asked him directly if he was going to shut down the lab and Vainio repeated his statement. Knutson testified that during this conversation D. Vainio was in the course of taking inventory. D. Vainio said no more materials would be ordered for the surfacing lab because, when the work then underway was finished, the lab would be shut down. Knutson recalled that he and Grigsby decided that Grigsby would ask D. Vainio about his intentions regarding closure, that Grigsby approached Vainio and, in Knutson's hearing, asked if he was going to shut the surface lab down. D. Vainio said yes. D. Vainio testified that no plans were made to shut down the surfacing lab or the entire lab of the facility, but there was a period when, in fear of a strike, he made certain arrangements to subcontract work if it became necessary. D. Vainio specifically denied making the threats attributed to him.

C. *Evidence Concerning Allegations of 8(a)(3) Violations*

1. The discharge of Beverly Riley

There is no dispute that Respondents decided to close the Mountain State Optical facility before they had any knowledge of employees' union activities. The facility was closed on 10 January 1985. D. Vainio testified that about 7 or 8 January he had a discussion with L. Vainio in which he informed L. Vainio that Beverly Riley, the clerk at the facility, was to be terminated with the closure. D. Vainio testified he neither spoke to laboratory employee Becky Hoffman, a supervisor and admitted agent of Respondents at this time, about his decision nor did he directly communicate his decision to Beverly Riley.

Becky Horrman testified that soon after the Union's demand letter arrived at the lab on 11 January, she had a conversation with L. Vainio. He told her to call Debbie Bjaoic, the clerk at Copper City Optical, and Beverly Riley to inform them that they would be laid off at the end of the day. He continued saying, "if you want to unionize, that's fine, but we don't need your kind of people, and we will shut the lab down." Hoffman testified that she was also told that she was to transfer to Copper City Optical the following Monday, which she did, working thereafter as a clerk. Debbie Bjaoic, who did not testify at the hearing, had been the dispensing employee at Copper City Optical until the events in question.

Beverly Riley testified that she had been employed at Mountain State Optical since at least June 1984. In very early January 1985, knowing that Mountain State Optical was to close and that her job there would thus be eliminated, Riley spoke with D. Vainio on an occasion when he was at the Mountain State facility and asked him if she would have a job after the closure. She testified that D. Vainio told her that she would still have a job. She recalled he told her that an employee at Copper City Optical would be let go and she would be transferred to that facility. Riley testified that on the morning of 11 January 1985, she commenced work at Copper City Optical. About 5 p.m. the same day she received a telephone call from L. Vainio, who told her that he would have to let her go. She testified: "I asked what his reason was, was it job performance or what I had done. He told me that he had to take this action, and I had the members of the lab to thank for his actions. He had been presented with some union papers and he was going to let me go."

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[4] The Regional Director for Region 19 determined after the initial hearing that a second hearing on the Union's representation petition was necessary and the hearing was held in early March 1985. Following that hearing, the Regional Director issued a Decision and Direction of Election on 19 March and soon thereafter an election was scheduled for 16 April 1985.

D. Vainio, testifying initially on behalf of the General Counsel, recalled he had a conversation with Riley by telephone about 11 January. He testified:

> I said that we were closing the location that she was working in, and we were going to have to lay her off. She said, well, could she work some place else. And I said, well, we might consider putting you in the lab. But, I was not able to because a letter that I had just received—maybe even that day—from the union, stating that we could not make any changes in the laboratory. I said that I couldn't use you down there.

L. Vainio testified that he had a conversation with D. Vainio about 7 or 8 January in which it was decided that Beverly Riley was to be released on the closure of Mountain State Optical and that Becky Hoffman would be transferred to the Copper City Optical facility. He testified that on 11 January he was not present at the lab until late in the day. Although he did not claim complete recollection of the events, L. Vainio testified that he had a conversation with Becky Hoffman in which he expressed some surprise that Riley was working at Copper City Optical that day and told Hoffman to call Riley up and terminate her. He recalled that Hoffman was reluctant to make the call and that he ultimately decided to call Riley himself. He testified that he called Riley at Copper City Optical and told her that Respondents were going to have to terminate her employment. She asked if there was any other place for her and L. Vainio responded that "at the current time" there was not. He recalled that she then asked about the lab and if there was a place for her there. He responded that there was nothing at the lab "because of this letter I just received from the Union. We were not to make any changes in the laboratory." Thereafter, effective the following Monday, Hoffman was transferred to Copper City Optical and Riley was terminated. About 5 May 1985, Hoffman was transferred back to the lab and Riley was rehired to her position at Copper City Optical.

2. The discharge of Leonard Dalasera

On 1 April 1985, Leonard Dalasera received a termination notice from Respondents effective by its term on 15 April. His last day of employment was 16 April 1985. Some 3 days later he was reinstated by Respondents.

Respondents' witnesses uniformly assert that Dalasera was a longtime employee of marginal skills and special sensitivities. The evidence clearly reflects Dalasera has long had more than a simple employer-employee relationship with D. Vainio and his wife, Marie Vainio, as well as other members of the Vainio family. The Vainio family testified to a longstanding attachment to Dalasera, which caused him to remain in their employ despite his numerous work inadequacies and subsequently caused him to be reinstated a few days after his discharge. The Vainios explained that the discharge was simply a result of the continuing difficulties with Dalasera's quality of work, a matter made more important by the optician's letter attaching the quality of lab work for which Dalasera was responsible as final inspector—coupled with the fact that lab employees recommended that Dalasera be transferred or terminated.

3. The discharges of Knutson and Grigsby

On the morning of 11 June 1985, D. Vainio entered the lab area and observed employees Matt Grigsby, Chris Knutson, Tom Patton, and Mike King out of their work stations talking. D. Vainio testified essentially without contradiction that he lectured the employees about the quality of their work, and that work was "stacked up in here, and all you guys are doing is sitting around. Everytime I come in here, you are sitting. And if I come in here one more time, and catch you meeting like this, some of you are going to go."

The events of 12 June are partially disputed. D. Vainio testified that when he arrived at the lab that morning he observed a repeat of the prior day's events. When the employees saw him, Vainio recalled they jumped up and returned to work. David Vainio again rebuked the employees, telling them that he had caught them off task the day before and adding, according to Knutson and Grigsby, that if he caught them "one more time, that's it, you are gone." At this point, D. Vainio picked up a telephone in the lab area and placed a call. During the course of the call, D. Vainio testified that he was interrupted by comments from employee Knutson standing some 10 feet away. Vainio recalled that Knutson, in derogatory terms, challenged Vainio's authority to hire or fire employees. D. Vainio testified that he got very, "perturbed" immediately ended the telephone call, walked over to Chris Knutson and said, "you're fired, get out of here." He recalled that Knutson was in a defiant mood, telling Vainio he had no authority to terminate him. The conversation developed into a shouting match with Vainio demanding Knutson to leave the facility and Knutson declining to do so.

At this point Vainio testified that he grabbed Knutson's shirt and that Knutson stepped back, ripping the shirt. Knutson then punched Vainio in the eye and knocked off Vainio's glasses. Vainio testified that at this juncture he observed employee Matt Grigsby blocking his exit and that Grigsby would not let him pass. Vainio testified he then told Grigsby to "get out," passed through the lab exit and, as he did so, told the employees "this lab is closed," pointing to the surfacing rather than the edging portion of the lab. He also repeated to Grigsby and Knutson that they were to leave. D. Vainio testified that sometime during these events he realized that other employees were in the process of leaving. He went to another part of the building, obtained a secretary as witness, and returned to the lab. There he announced, pointing to the surface lab, "This lab is closed" and pointing to the edging lab, "This lab is open." Vainio then turned to employees Patton, King, and Dalasera and told them, "If you three decide to leave you are leaving on your own, I am not firing you, this area will continue, but the other two employees must get out."

Former employee Matt Grigsby testified that D. Vainio had lectured both him and employee Chris Knutson on 11 June for being out of their work area talking to other employees. On the morning of 12 June Grigsby and other employees were engaged in a conversation when they were again surprised by D. Vainio. Grigsby recalled that Vainio was unhappy and cursed the fact that another "meeting" was going on and asserted he had specifically told Knutson and Grigsby before about being out of their work area. Vainio told them "not to sit around wasting his money." Grigsby testified that Vainio's outburst caused the employees to disburse to their individual work areas. Grigsby then observed Vainio walk around the area in obvious anger gesticulating and hectoring employees and finally going to the phone and placing a call. Grigsby testified that during this call Chris Knutson challenged D. Vainio's right to hire or fire employees by stating in a voice that could be heard by all that "Vainio couldn't hire us and if he didn't hire us he sure couldn't fire us." Grigsby recalled that Vainio was angered by these remarks, terminated his phone call, walked up to Knutson, and exchanged profanity and abuse with him. At this point Grigsby testified he could not follow events but soon after heard a scuffle and looked up to see D. Vainio being pushed away from Knutson. Then Grigsby heard D. Vainio announce, "That's it, everyone's gone. That's it, everyone's fired." Grigsby then challenged Vainio to "put it in writing." He testified that D. Vainio declined his invitation, left the room, and came back pointing to Grigsby and Knutson saying, "You and you are fired and this area is shut down." A few minutes after leaving, Vainio again returned with a clerical employee as a witness and pointed to Grigsby and Knutson and announced that they were fired and that the lab area was shut down.

Former employee Chris Knutson testified that on the morning of 12 June employees Grigsby, King, Patton, and he were discussing Board proceedings when David Vainio entered the lab and told the employees that they were to return to their work stations. Vainio said in Knutson's memory: "I've warned you for the last time. The next time it happens, you'll be fired." At this point D. Vainio went to the telephone and began to order lenses from a supplier. Knutson testified:

> I began to stew over what had been said, and I said, in a loud enough voice where I knew he could hear me, isn't it strange that a person who stood up in court, under oath, and told these people that he could not hire nor fire nor had the authority to do so, now is going to tell me that he's going to fire me. I said, I don't buy it. Then I said, isn't it strange—Tom—referring to Lloyd Patton. Tom stood up and said, yes, I think it is a little strange. He came over to my area and we began to talk about it in a loud enough voice to where we knew David could hear.
>
> Upon hanging up the phone, David [Vainio] came over and said, look you smart aleck, you say something like that again and you're out the door. And I said, hey don't tell me you're going to fire me, because you don't have the authority remember? You told me you couldn't fire anyone, so, you know, don't tell me you're firing me. He came up to me and said, you're fired.

The conversation then escalated to exchanges of abuse and insults with a concomitant increase in the temper of each party. Knutson recalled that at one point D. Vainio made contact with him and in the ensuing scuffle Knutson's shirt was ripped. In response Knutson "put my hand in his face and pushed him away." Vainio's glasses fell to the floor.

Knutson recalled that during his altercation with D. Vainio, Matt Grigsby interjected, challenging one of D. Vainio's remarks. Knutson testified, "It was at that point that the attention was switched from myself to Matt and David and Matt had words, and Matt ended up getting terminated as well." Knutson recalled that David Vainio told Grigsby that he had been warned and to "basically either keep your mouth shut or you'll be fired as well. And [Grigsby] refused to do so at which time, David [Vainio] did terminate him." Dalasera's testimony was not at odds with the above sequence of events.

Grigsby and Knutson were terminated that day and have not been offered reinstatement.

D. *Evidence Concerning Allegation of 8(a)(5) Violations*

1. Chronology of bargaining[5]

Following the Union's certification on 24 April 1985, Gary Taylor, the Union's representative, attempted to reach the Vainios by telephone at the lab and by leaving messages soliciting return calls without success. On 30 May 1985, still unable to make contact with agents of Respondents, Taylor sent a letter to the lab seeking to meet and bargain with Respondents. Taylor followed up this letter with a visit to the lab on 3 June but found no principals available. On 5 June he again visited the lab and spoke to D. Vainio, who indicated he would have to get together with his brothers and could give no date for beginning bargaining. On 25 June, Taylor called K. Vainio in response to a message left on his recording machine. In their conversation a bargaining session was set for 12 July 1985. On 28 June Taylor again went to the lab and spoke to David Vainio seeking reinstatement for terminated employees Knutson and Grigsby. In his conversation with D. Vainio, Taylor asked if the Vainio brothers were coming to the then-scheduled 12 July meeting. D. Vainio said no. Taylor asked when the parties were going to sit down and negotitate a contract and, in response, D. Vainio indicated "never."

On 19 July[6] Gary Taylor and Kevin Vainio held initial negotiations at the lab. Taylor offered a standard Machinists contract as the Union's initial written proposal. K. Vainio argued the contract was not suitable to the optical business. Taylor responded that while this was true with respect to certain portions of the proposed contract, those portions could be modified. Wages were then discussed with K. Vainio seeking substantial economic relief from current wage rates. Under questioning, Vainio indicated that he did not know the rates of current unit employees. K. Vainio also rejected the Union's proposals with respect to health insurance stating that Respondents wished to maintain its own health plan. When pressed for details of the plan, Vainio confessed ignorance and suggested those details would be supplied later. K. Vainio also demurred with respect to Taylor's questioning of Respondents' policies regarding paid holidays indicating he would have to talk to his brothers. With respect to vacation pay, K. Vainio indicated that Respondents did not wish to offer paid vacations for employees and that they had never done so. As the meeting progressed, Respondents essentially rejected all the Union's proposals dealing with certain of the proposals with a degree of purported levity, i.e., suggesting the Union's funeral leave proposal should be written so that if an employee died he could take off as much time as he wished. The meeting ended without a second meeting being scheduled, but K. Vainio agreed to contact Taylor once he had gotten together the necessary information promised.

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[5] The following chronology is based on record documents and the essentially unchallenged credible testimony of Gary Taylor.

[6] The 12 July bargaining session was canceled by Kevin Vainio and a new session was scheduled for 19 July.

K. Vainio did not thereafter contact Taylor and as a consequence Taylor tried numerous times to contact Vainio by telephone. By letter dated 26 August, Taylor wrote Respondents demanding continued bargaining. Respondents did not respond to Taylor's letter at which point Taylor again called Kevin Vainio about 4 September. A message was left in mid-September, and K. Vainio reached Taylor by telephone and they scheduled a bargaining session for 23 September. Taylor went to the lab as scheduled on 23 September, but only M. Vainio was present. No Vainio brother was available and no meeting occurred. Taylor left after asking that K. Vainio call him. Again Respondents' agents failed to contact the Union and Taylor again made numerous attempts to contact Respondents. Ultimately K. Vainio returned Taylor's phone calls on 17 October. In that telephone call the parties agreed to meet on 28 October.

On 28 October K. Vainio and Taylor met at the Union's offices. The parties again utilized the Union's initial proposal as a basis for bargaining. Vainio declined to accept any proposal involving holiday pay reasserting that Respondents did not pay employees holiday pay. Respondents subsequently modified their proposal and agreed to a progressive vacation policy of 1 week paid vacation after 1 year of service, with 2 weeks paid vacation after 3 years of service. Wage rates were again discussed with Respondents repeating the need for substantial economic relief in wages and proposing that employees should pay for any and all damages occurring during the production process. Taylor argued that the damage proposal suggested by Respondents could mean employees might have a zero net wage rate.[7] The meeting ended with a later meeting being scheduled for 22 November.

Taylor canceled the 22 November meeting based on a scheduling conflict and a later meeting was scheduled for 13 December. On that date Taylor, Jim Duggan, a union representative, and K. Vainio met in K. Vainio's Belgrade, Montana offices. Respondents again submitted no written proposals and, in Taylor's recollection, K. Vainio said he had lost the proposals Taylor had previously given him. K. Vainio announced that his brothers had refused to approve his earlier offer of paid vacation based on service. He indicated that Respondent would offer only 1 week paid vacation irrespective of employees' length of service. The Union protested the change in Respondents' proposal and the apparent lack of authority of K. Vainio to commit Respondents. K. Vainio demurred reasserting his brothers' unwillingness to offer greater vacation benefits. No further progress was made at the meeting and it ended with an agreement to meet again in January. A few days later Taylor received a letter from K. Vainio announcing Respondents' intention to lower employee Leonard Dalasera's wages to $5 per hour and offering to bargain concerning the matter. Taylor responded and a negotiation session was set for 17 January 1986. The hearing in the instant matter closed on 16 January 1986 before additional bargaining occurred.

2. The transfer of work to Idaho

Respondents had operated an optical lab in Bozeman, Montana, until sometime in September 1984. At that time the lab was closed and its equipment, at least in part, was transferred to the Butte lab. Respondents also operated a retail optical facility in Idaho Falls, Idaho. At the time the Idaho facility was opened it was contemplated that lab services would be provided on site. The space provided in Idaho Falls, however, had never been physically equipped as a laboratory, nor had any personnel been hired to staff that lab until the events in question.

About April 1985, Respondents hired a new lab employee, Keith Du Frame. Du Frame had initially expressed a desire to work in Missoula, Montana, but Respondents hired him for the Butte lab with the understanding that if a job opening became available in Missoula, he would be transferred. In early May, Du Frame approached D. and L. Vainio about employment other than at the Butte lab. Respondents determined it would be appropriate to transfer Du Frame to the Idaho Falls facility and instructed him to take laboratory equipment from the Butte lab as necessary to establish the Idaho Falls lab. Thereafter Du Frame took certain equipment from the Butte facility, moved it to the Idaho Falls facility, and commenced operation of the lab there about 20 May 1985. The Idaho Falls lab thereater did the work generated by the Idaho Falls retail facility and, insofar as the record reflects, continues in operation.

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[7] D. Vainio testified that Respondents felt that employees were deliberately damaging materials and that this proposal was designed to reduce such vandalism.

There is no dispute that Respondents at any time notified the Union of its intention to transfer personnel and equipment from the Butte lab to the Idaho Falls facility nor offered to bargain concerning the decision or its effects on lab unit employees.

3. Holiday pay issues

It is clear that with respect to all of Respondents' operations, bookkeeping procedures and payroll practices tended to be ad hoc rather than standardized. Clearly, they were not subject to written or fixed personnel policies and practices. Respondents' lab is normally closed on such traditional holidays as New Year's Day, Fourth of July, Thanksgiving, and Christmas. The General Counsel adduced testimony that until July 1985 when such holidays fell on normal workdays for lab employees, they received pay for the holiday. For example, in 1983 when Christmas fell on a Sunday, a day when the lab is normally closed, employees were paid for the day following Christmas, 26 December, whether they worked the entire day or not. D. Vainio testified that in July 1985 he decided that lab employees should not receive pay for holidays not worked and instructed his bookkeeper to so restrict pay. He made this decision to standardize practices within Respondents' operations. Consistent with the instructions, Respondents' employees were not paid for the Fourth of July, Labor Day, and Thanksgiving holidays in 1985.[8]

There is no dispute that Respondent did not inform the Union of the changes initiated in either holiday or vacation pay.

4. Vacation time

The General Counsel introduced testimonial evidence that lab employees such as King, Dalasera, and Patton received a week's paid vacation after 1 year of service and that employees were told that this was Respondents' policy by Supervisor Becky Hoffman in the period before union organization. Dalasera testified that around 20 July 1985 he requested permission from D. Vainio to take a day of paid vacation and that D. Vainio said he would let Dalasera know later. Several days later Dalasera testified that he again requested vacation time of D. Vainio and was told that he would not get vacation time because he was a "union employee" and because vacations had to be "negotitated." D. Vainio testified that he declined Dalasera's request for time off because of the press of business at the lab and, while he did mention that vacations were a negotiable item with the Union Vainio denied that he told Dalasera he could not have a vacation because he was a union employee.[9]

E. *Analysis and Conclusions*

1. Initial comments on credibility

While substantial parts of the testimony in the instant matter were undisputed, significant portions of the testimony regarding conduct alleged to be violative of Section 8(a)(1) and (3) of the Act involved direct testimonial conflicts between the members of the Vainio family and various current and former employees. Generally, where statements were attributed to members of the Vainio family, particularly to D. Vainio, by current and former employees, unless specifically discussed below, I have credited the employees. While I do not believe that any witness wilfully misstated events in his or her testimony, I believe that in several of the rather impassioned encounters, described in part, supra, K. and D. Vainio and, at least in one instance, K. Vainio, in the heat of the events, were unable to retain their perspective and, as a consequence, were unable to recall all they said and did. So too, the denials of the Vainio family members addressed to attributed acts and conversations were often general denials denying only the making of wrongful statements and corroborating employees concerning other portions of alleged conversations. In contrast, I found the demeanor of the present and former employees superior.

In making this credibility resolution, which is based in large part on demeanor, I am cognizant of the fact that Respondents adduced evidence that current and former employees have differing degrees of bias against Respondents that would tend to diminish their credibility. I also note that the employees too became impassioned during events. I have considered all of these factors and the record as a whole as well as demeanor in reaching this general credibility determination. However, this initial credibility resolution does not resolve several specific conflicts, which are further discussed below.

2. Alleged 8(a)(1) violations

Consistent with the credibility resolutions set forth above, I find, as alleged by the General Counsel in its consolidated complaints, that during the organizational campaign D. Vainio made numerous statements violative of Section 8(a)(1) of the Act. Thus, on the day the Union demanded recognition, I find D. Vainio interrogated employee Dalasera about his union activities and changed his shift because of his role in supporting the Union. The following week I find that D. Vainio informed employees that it would be futile for them to select the Union, that he would sign a contract only over his dead body, and that if the Union came in he would close the lab. I find further he made similar comments on numerous subsequent occasions as alleged in the General Counsel's complaints. I further find that in April, hard after the election, he threatened to subcontract unit work and that in July he informed employee Dalasera that he could not have a vacation because he was a union employee. All the above acts chill employees' Section 7 rights by making it obvious to them that Respondents would punish employee union activities. The acts thus violate Section 8(a)(1) of the Act as alleged.

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[8] Respondents adduced evidence of payment practices at its facilities other than the lab. I received such evidence over relevant objections from the General Counsel. They are relevant to practices at those facilities. Considering the record as a whole, I find the evidence of Respondents' payroll practices outside the lab insufficient to overcome the uncontradicted testimony of employees regarding practices at the Butte lab.

[9] The General Counsel also alleges that in telling Dalasera his vacation was lost because of the Union Respondents violated Sec. 8(a)(1) of the Act and in actually denying him the requested vacation because of his union activities violated Sec. 8(a)(3) and (1) of the Act.

Discrediting the denials of D. Vainio and K. Vainio, I find as alleged in the complaint described by Leonard Dalasera and other employees that D. Vainio harassed Dalasera by both verbal abuse and the throwing of items because of Dalasera's union activities and because of his testimony at a Board hearing. I reject Respondents' defense that, in effect, the acts and conduct of D. Vainio directed against Dalasera had been longstanding in nature and had not changed as a result of Dalasera's union activities. Conceding these things are matters of degree, the evidence seems clear, and I find, that the abuse Dalasera had previously suffered was significantly increased both in duration and type during the union campaign. The harassment of Dalasera following the second representation hearing by K. Vainio was not, I find, based on a legitimate need of Vainio to inquire of Dalasera's activities at the workplace for purposes of litigation. Rather, I find K. Vainio's badgering of Dalasera was at least in part because of Dalasera's testimony at the hearing, an activity protected under the Act. There is no question, given the finding above, that Respondents' conduct violates Section 8(a)(1) of the Act. I find by engaging in such acts, Respondents violated Section 8(a)(1) of the Act.

The General Counsel alleges surveillance of the employees' union activities at The Restaurant on 13 January apparently based on the admitted opening remark of L. Vainio to the employees: "What's this a union meeting." Even under the employees' version of events, no surveillance occurred in this meeting as alleged in the complaint. There is no doubt that the Vainio's meeting with the employees was coincidental, and that following a brief conversation with the employees L. Vainio did not attempt to observe or listen in on the employees' conversation. Thus, the surveillance allegation is without merit and will be dismissed.[10]

The General Counsel alleges that K. Vainio solicited employees' grievances at an 18 March 1983 meeting. There is no dispute that K. Vainio held an employee meeting to discuss problems in the production process and to solicit employees' suggestions with respect to those production problems. It is also true that K. Vainio indicated to the employees that he would at least attempt to meet some of their grievances in order to improve the lab's quality of output.

During a union campaign, as was underway at that time, such conduct has been held standing alone to violate Section 8(a)(1) of the Act. This is so because the solicitation of employee grievances and the promise of meeting those grievances may be seen as an effort by an employer to undermine support for the Union. Not all such conduct, however, violates Section 8(a)(1) of the Act. See, for example, *PYA/Monarch, Inc.*, 275 NLRB 1194 (1985). There, reversing an administrative law judge, the Board found that the solicitation of grievances relating to the production process and the supplying of new equipment to employees was not a violation where the solicitation of grievances was related to pure production problems and the subsequent remedying of those grievances was simply the result of previous business decisions.

Here, I find that K. Vainio's meeting with employees was specifically related to the letter Respondents had received from one of its opticians attacking the quality of lab products and threatening to resign in consequence. Therefore, I find that Respondents' decision to hold the meeting and the solicitation of grievances that occurred in it were narrowly related to an important and suddenly developing business problem and was not related to employees' union activities. Even during an election campaign, an employer is not foreclosed from addressing business problems as they arise. On this record, and even though as found elsewhere in this decision, there was a pattern of antiunion activities by agents of Respondents, the 18 March meeting was justified by business reasons. Therefore, I find that the General Counsel failed to meet her burden of proof with respect to this allegation. Accordingly, I shall dismiss the 18 March grievance solicitation allegation at the meeting of D. and K. Vainio.

At the meeting of D. and K. Vainio with employees the day before the election, the General Counsel alleges that Respondents' agents solicited grievances from employees, promised to remedy those grievances, threatened to close the facility, and informed employees it would be futile for them to choose the Union as their bargaining representative since Respondents would not sign a contract. Consistent with my credibility resolutions described above, I find that the conduct alleged by the General Counsel occurred as the employees testified. Unlike the 18 March meeting held by K. Vainio, this meeting was clearly a preelection meeting dealing with Respondents' attempts to convince employees that it was unnecessary to vote for the Union. There can be no benign aspect or business justification for the grievance solicitation and promises to remedy these grievances that occurred. The threats to close and the statements that no contract would be signed are classic violations of Section 8(a)(1) of the Act. I find that the General Counsel has sustained her burden with respect to these allegations and find therefore that Respondents violated the Act as alleged.

3. The discharges

a. *Beverly Riley*

The discharge allegation concerning Beverly Riley presents both factual and legal issues. Respondents agents testified to a management decision to transfe Becky Hoffman from the lab to the Copper City Optica facility, which decision was made before Respondent had knowledge of union activities. Thus, under Respond ents' view of the facts, Riley was to have been termina ed with the closure of the Mountain States Optical facil ty on 10 January 1985. L. Vainio testified that onl through an administrative error was Riley still employe on 11 January. The General Counsel produced eviden from both Hoffman and Riley that management had d cided to transfer Riley from the Mountain State facili to the Copper City Optical facility where she would replace the previous Copper City Optical employee and that she was fired only after and because of the lab employees' union activities. Thus, there is directly contradictory testimony between D. and L. Vainio on the one hand and Beverly Riley and Becky Hoffman on the other. The General Counsel also adduced evidence, previously credited, that Leonard Dalasera was interrogated by D. Vainio on receipt of the Union's demand letter and informed D. Vainio that he, Patton, and significantly Hoffman, were behind the union drive. As previously found, Patton and Dalasera had their shifts changed and, the General Counsel argues, Hoffman was immediately transferred because of her union activities.

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[10] The General Counsel also alleges interrogations and threats occurring in this conversation. I credit the employees here over the denials of K. Vainio. These violations are merely cumulative with those found, supra.

I find Hoffman and Riley to be credible witnesses with a superior demeanor and an accurate memory of what transpired. I credit their testimony over that of D. and L. Vainio. Thus, I find, consistent with the General Counsel, that in fact a decision had been made and implemented by Respondents to place Riley at the Copper City Optical facility effective 11 January and that decision was changed only after Respondents learned of the union activities at the lab. Then, in response, they determined to transfer Hoffman to the Copper City facility. In making this factual resolution I rely on the credibility resolutions noted above. I further find that the version of the events given by the Vainios is simply inconsistent and illogical given the undisputed fact that Riley had been transferred from the Mountain State to the Copper City Optical facility and was working there on 11 January. L. Vainio's suggestion that this was a simple administrative mistake seems farfetched given the total pattern of events. Accordingly, I find that Riley was, as of 11 January, the permanent employee at Copper City Optical and was discharged thereafter only as a consequence of Respondents' learning of the employees' union activities.

The General Counsel argues from these facts that Riley was simply an innocent victim of Respondents' decision to transfer Hoffman and as such she was an "innocent bystander" who suffered as a result of the personnel actions Respondents took to retard employees' union activities at the lab. Thus, argues the General Counsel, despite the fact that Riley did not engage in union activities and was not suspected of engaging in union activities by Respondents, her discharge was a consequence of Respondents' illegal acts and hence violates the Act. Respondents challenge the legal contentions of the General Counsel and argue that inasmuch as Riley did not engage in either union activities or other protected concerted activities the General Counsel's discharge allegation cannot stand as a matter of law.

The General Counsel's arguments, supported by case citations on brief, are correct. Where an employer discriminates against an employee, irrespective of that employee's real or suspected union or protected concerted activities, as a consequence of or in an attempt to hide wrongful acts directed against other employees because of their protected conduct, the "innocent bystander" is protected by the Act. Thus, an employer may not with impunity terminate employees in an attempt to conceal the discharge of other employees for their union activities. Nor may an employer discharge an employee in order to make room for the transfer of a union employee from one location to another where the transfer is designed to discourage the latter employees' union activities.

However, the instant case presents a more complicated situation than that argued by the General Counsel. Granted it is a convention notion that those injured as a consequence of the employer's illegal act are protected irrespective of their union activities, the situation here is made more complex by the fact that the transferred employee was a statutory supervisor. The General Counsel does not contend in its complaint that the transfer of Becky Hoffman from the lab to the Copper City Optical was because of her union activities and was in any way illegal. This is a correct view of the law because an employer has an absolute right under Board law to take advance action against statutory supervisors because of their union activities. Put another way, a supervisor engaging in union activities is not protected. Under the Act an employer is free to transfer a statutory supervisor. Thus, on the facts of this case, the legal arguments the General Counsel makes is that an employee or "innocent bystander" is protected from discharge if the discharge results from an employer's transfer of a supervisor because of the supervisor's union activities. The General Counsel has not incorporated this final legal complexity into her legal arguments at trial or on brief. I find the issue on this narrow question presents difficult issues the resolutions of which are far from free from doubt.

It is unnecessary to resolve the legal questions presented by the General Counsel's "innocent bystander" theory, however. This is so because in crediting the testimony of employees Hoffman and Riley, I have credited Riley's version of the conversation between herself and L. Vainio on 11 January 1985. In that credited version of the conversation L. Vainio informed Riley not only that she was discharged but that she was discharged as a consequence of the Union's organizational activities at Respondents' lab and that she had lab employees to blame. That conversation, coupled with Hoffman's credited version of an earlier conversation with L. Vainio that he well knew that in transferring Hoffman, Riley would be laid off, I find that the layoff of Riley was not a simple consequence of Respondents' decision to transfer Hoffman. Rather, I find, based on the credited testimony, that the decision to transfer Hoffman and the decision to lay off Riley were separate decisions consciously reached by Respondents' agents. Thus, I find that not only did Respondents seek to transfer Hoffman, but they further sought to cause the discharge of an employee, here Riley, and to inform that employee that her discharge was caused by the Union. Thus, rather that characterize Riley's discharge as an "innocent bystander" discharge here, I find that her discharge was designed to indicate to those who would support the Union the power Respondents have over their employees. She is therefore an example to other employees that they could lose their jobs because of union activities. Given this determination, the Riley discharge ceases to be an exotic theoretical construct with the legal difficulties described above and is rather a conventional "exemplary" discharge designed to show union employees Respondents' power. As such, the violation is a traditional violation of Section 8(a)(3) of the Act. This is so because, irrespective of the union activities of Riley, Respondents' actions, indeed their explict statements, made it clear to employees that lab employees' union activities caused Riley's discharge. Accordingly, I find the General Counsel has met her burden concerning the Riley discharge and find a violation of Section 8(a)(3) of the Act.

b. *Leonard Dalasera*

The General Counsel correctly asserts that: (1) Leonard Dalasera's union activities became known to Respondents as of the Union's demand for recognition in January; (2) thereafter, Respondent committed various unfair labor practices against him including interrogations, shift changes, and harassment; (3) his termination notice was received about 1 April but was to be effective by its terms on 15 April, the day before the scheduled union election, and (4) the discharge was, in fact, carried out on 16 April 1985.

In defense Respondents argue that: (1) Dalasera was an unsatisfactory employee, (2) his failures as a final inspector of lab work were the cause of commercial difficulties including a complaint by an optician in Respondents' employ, and (3) on 18 March 1985 K. Vainio solicited employees' suggestions to improve production—a meeting I found not to violate the Act—and was told by employees that Dalasera should be terminated or transferred from the work he had done up to that time. Respondents further showed that Dalasera and the Vainio family had a longstanding relationship that transcended simple employer-employee relations, that the decision to terminate Dalasera was reached only reluctantly, and was rescinded but a few days after its taking effect. In essence Respondents argue that as a result of D. Vainio's feelings toward Dalasera, the Vainios' fears about his sensitivity and his long service and special relationship with the family, Dalasera's relationship to Respondents cannot be viewed in simple employer-employee terms but must be judged as a family matter transcending union questions. To these contentions, the General Counsel demurs arguing that the only change in Dalasera's work performance in April 1985 was the employees' union activities and the scheduled 16 April election.

The bulk of the assertions made by both the General Counsel and Respondents are uncontestably true to a degree but must be weighed and balanced. On the basis of the record as a whole and in particular the unfair labor practices already found, I am convinced that while Dalasera's employment relationship with Respondents was undoubtedly special, the timing of the termination notice and actual discharge itself turned on the employees' union activities and the upcoming union election. Under the Board's *Wright Line* analysis[11] the General Counsel by the above-credited evidence has established a strong prima facie case that Dalasera's union activities were the cause of his discharge. Consequently the burden of proof shifted to Respondents to show that Dalasera would have been terminated even if he had not engaged in such activities. I do not credit the testimony of the Vainio family, primarly D. Vainio, that his decision to fire Dalasera was free from antiunion motivation. On this record, and in particular in light of the close timing of the termination notice, the termination itself and the time of the election—even considering the admittedly highly special relationship between the Vainio family and Dalasera—I find Respondents have not met their burden of proof as assigned it under *Wright Line*. In part, this is based on my agreement with the General Counsel that Dalasera's work quality and other employees' views about his work were longstanding and unchanged. Accordingly, I find that the General Counsel has sustained her burden of proof on this allegation. Therefore, I find that in terminating Dalasera, Respondents violated Section 8(a)(3) and (1) of the Act.

c. *Chris Knutson and Matt Grigsby*

The Knutson and Grigsby terminations occurred after or as a part of a confrontation between D. Vainio and the employees. Respondents argue provocation, insubordination, and, in effect, discharge for cause. The General Counsel argues that the true reason for the discharges was the employees' union activities including their intention to participate in trial preparation with counsel for the General Counsel. The General Counsel argues Respondents' reasons for the discharges are mere pretext. For the reasons appearing below I reject the General Counsel's imputation of knowledge of employee pretrial preparation to Respondents and find the discharge allegations without merit.

The General Counsel contends that during the week of 10 June 1985, counsel for the General Counsel was in the area preparing for the then-scheduled 25 June hearing in this matter. Various employees testified that they were aware of the Government lawyers' presence in the area and it is clear that this was a matter of common interest to employees in the lab on 11 and 12 June. On the morning of 12 June there was a discussion among the employees regarding the upcoming hearing and their preparations for that hearing with Government lawyers. It was this conversation that D. Vainio came upon and which caused the rebuke of the employees for not being on task. The General Counsel argues that it is a permissible inference that D. Vainio heard or learned of the Government lawyers' activities and/or the subject matter of the employees' lab conversation and that the subsequent events were a result of that fact. Conceding that this inference is critical to the Government's case concerning the 12 June discharges, I find there is insufficient evidence on this record to draw such an inference. I specifically decline to do so. The record contains no other evidence of any kind that the Vainios were aware of the employees' activities vis-a-vis trial preparation. There is no evidence that D. Vainio could have heard the conversation's specifics and he denied that he did. Accordingly, I find that D. Vainio had no knowledge of employees' activities as witnesses and did not overhear the conversations at issue.

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[11] *Wright Line*, 251 NLRB 1083 (1980), see also *NLRB v. Transportation Management Corp.*, 462 U.S. 393 (1983).

Given that Respondents had no knowledge of the nature of the employees' conversations on the mornings of 11 and 12 June, there was nothing inherently suspicious in D. Vainio's rebukes to employees on those occasions to cease their conversation and resume work. While it is undisputed that D. Vainio's manner on those occasions was curt and perhaps even abusive, there is ample record testimony to indicate that his conduct on other occasions was sufficiently similar that no adverse inference arises from his unhappy or abusive manner.

Rejecting the General Counsel's claim that the 12 June altercation was but a pretext seized on by Respondents to cloak its true motive for discharging the employees, it is appropriate then to look to the actual events for purposes of evaluating Respondents' defenses. Regarding Chris Knutson, unchallenged evidence clearly indicates that Knutson's remarks during D. Vainio's telephone call and thereafter during his confrontation with Vainio constituted a direct challenge to Vainio's authority and, without doubt, enraged Vainio. On this record the evidence is clear, and I find, that D. Vainio terminated Chris Knutson because of Knutson's remarks made during and after his telephone call on the morning of 12 June and for no other reason. Challenging the authority of a supervisor and owner under the circumstances presented here constitutes insubordination sufficient to justify the discharge and rebut any contention of pretext. I find the General Counsel had not met her burden with respect to Knutson's discharge.

The General Counsel argued that the altercation between Knutson and Vainio occurred after Vainio's announcement of Knutson's discharge and, as a consequence, Knutson's conduct during that altercation could not be a basis for sustaining Respondent's defense as to Knutson. The altercation between Knutson and Vainio is, however, highly relevant to the Grigsby discharge. It is clear that Vainio's initial rage was directed at Knutson. Relying on Knutson's testimony, which I credit here, Grigsby later interjected himself into the altercation in a manner that caused Vainio to fix on him as an ally of Knutson. Grigsby's testimony on this question is not inconsistent. Thus I find that D. Vainio, initially upset by Knutson's remarks, terminated Knutson. The subsequent altercation between Vainio and Knutson exacerbated Vainio's unhappiness and, during those events, through misfortune or otherwise, Grigsby's conduct directed D. Vainio's attention to him and Grigsby's discharge resulted. Inasmuch as I have found Vainio's discharge of Knutson unrelated to union activities, so too I find his discharge of Grigsby equally devoid of impermissible motivation. Given this finding, it is unnecessary to make a determination regarding the "fairness" of Grigsby's termination. Irrespective of the events as they occurred on 12 June, I find that D. Vainio perceived Grigsby's conduct as allying him with Knutson at a time when D. Vainio had fired and then had an altercation with Knutson. I find that this perception precipitated Grigsby's discharge.

Having found that the discharges on 12 June did not result from the employees' union or other protected concerted activities, the allegations of the General Counsel fail and I shall dismiss these allegations. The General Counsel also alleges a 3-day closure of the lab commencing on 12 June as a violation of the Act. In light of the lack of merit of the discharge allegations, I shall also dismiss the General Counsel's contention that the surface lab was improperly closed for 3 days commencing on 12 June.

4. Allegations of 8(a)(5) violations

a. *The course of conduct allegation*

The General Counsel argues Respondents engaged in a course of conduct of bad-faith bargaining based on the essentially undisputed details of bargaining described above. Thus, the General Counsel argues Respondents were dilatory at best and more generally unwilling to communicate with the Union with respect to scheduling of bargaining sessions. The General Counsel argues the bargaining sessions that were held were rendered unproductive by Kevin Vainio's (1) lack of authority to commit Respondents to fixed proposals, (2) lack of knowledge regarding current terms and conditions extant in the unit, and (3) unwillingness to make concessions on any of the Union's proposals, or to submit proposals of his own other than regressive or static proposals. Thus, the General Counsel argues over the entire bargaining process there were few meetings. Respondents never submitted a written proposal—indeed lost and treated with less than business formality the proposals of the Union. Respondents made essentially but a single concession and subsequently withdrew that concession. Finally, Respondents consistently made wage proposals that were significantly less than the status quo. The General Counsel also argues that Respondents would make proposals, for example, the proposal to retain its existing health plan, but would at all times fail to supply details despite requests to do so. Thus, the General Counsel argues Respondents' conduct indicates a complete lack of good faith and the absence of any intention to reach an agreement with the Union regarding terms and conditions of employment. This conduct, argues the General Counsel, coupled with the statements of Respondents' agents expressing an intention not to bargain in good faith found violative above, demonstrates that Respondents engaged in a course of conduct designed not to reach agreement with the Union but rather to delay bargaining and to undermine the Union. With a plethora of authority cited on brief for both the individual elements of insufficient bargaining and her final bad-faith conclusion, the General Counsel argues that Respondents must be found to have engaged in a general course of bad-faith bargaining.

Respondents on brief and at the trial correctly argued that it is not compelled to make concessions in bargaining. Respondents further argue that because of the unusual business nature of Respondents, it was necessary for K. Vainio to consult with his coowners before final commitments could be made, that the scheduling of meetings included cancellations on both sides, and that as a family-run business under economic duress, Respondents' conduct taken as a whole did not rise to the level of a violation of the Act.

The specifics of the negotiation process, as testified to by Union Representative Taylor essentially without contradiction from Respondents' agents, support the General Counsel's factual arguments that Respondents simply did not enter into the bargaining process in a businesslike way with a serious intention of coming to agreement. The entire course of Respondents' conduct over the entire period of negotiations, in light of D. Vainio's repeated statements that no contract would ever be reached, and the lack of any essential participation by Respondents in the bargaining process other than as a passive denier of union suggestions, renders it clear that no good-faith bargaining took place.

An imporatant factor in my finding was Respondents' technique of rejecting the Union's proposals and then counterproposing the terms of employment currently in place. When asked by the Union for specifics concerning such proposals, K. Vainio responded with an admission of ignorance or, in at least one case, incorrect statements,[12] and other statements were never followed up with more specific information despite requests. Thus, not only were Respondents unwilling to make changes in the terms and conditions of employment, they were unwilling even to describe in detail what the current terms and conditions of employment were. Further, looking at the pattern of bargaining, I agree with the General Counsel that Respondents did not engage in collective bargaining in a businesslike way. It is clear that the Union's numerous telephone messages were usually not returned.[13] Respondents simply treated bargaining in a less than serious way. Respondents never submitted written proposals to the Union, on at least one occasion lost the Union's proposals, and Respondents' agent clearly was not prepared for the bargaining. Thus, K. Vainio was uninformed regarding terms and conditions of Respondents' employees and had not either consulted the coowners or obtained sufficient bargaining authority to make proposals varying from the status quo. Finally, Respondents sought substantial wage concessions without making any concessions on noneconomic terms of employment. This conduct combined with the other failings described above make it clear that Respondents simply did not intend to reach an agreement with the Union or enter into a collective-bargaining agreement.

Based on all the above, the record is clear and I find that Respondents have engaged in a course of conduct designed to avoid reaching an agreement with the Union. This conduct included failure to address bargaining seriously, failure to provide requested information to the Union concerning current terms and conditions of employment or the specifics of its proposals, and the failure to provide an informed bargaining representative the sufficient authority to effectively negotiate with the Union on Respondents' behalf. Such conduct violates Section 8(a)(5) of the Act and I so find.

b. *Unilateral change allegations*

(1) Lab transfer

The General Counsel contends that on 20 May 1985 Respondents transferred personnel, equipment, and work from the Butte lab to the Idaho Falls facility in violation of Section 8(a)(5) of the Act. Respondents do not dispute that some work, some equipment, and one employee were transferred to the Idaho Falls facility. Nor do they dispute that the Union was never informed of the actions nor offered an opportunity to bargain regarding the decision to transfer what had, up to that time, been unit work. Respondents in essence make two arguments, first that the transfer was made in good faith and, second, that the transfer to Idaho Falls and long been intended and that the timing of the transfer was caused by a fortuitous transfer request of an employee.

The Supreme Court's decision in *NLRB v. Katz*, 369 U.S. 736 (1962), addresses each of Respondents' defenses here. First, the Court held that good faith by an employer in making unilateral changes is not a defense to a violation of Section 8(a)(5) of the Act. Second, concerning Respondents' argument that the transfer to the Idaho Falls facility had been set in motion prior to the Union's certification as representative of lab unit employees, the Supreme Court in *Katz* considered merit pay increases that had been granted by an employer during union negotiations. The Court distinguished between the simple implementation of previously determined business decisions and the implementation of management decisions about which there was a large measure of discretion.[14] Here, the decision to staff equip the Idaho lab facility had not been firmly decided until well after the union certification. This later decision to initiate the transfer was based on the "informed discretion" of Respondents by Respondents' own admission. Under such circumstances the decision was not yet fixed and Respondents were obligated to notify and bargain with the Union. Accordingly, sustaining the General Counsel's allegation, I find that by transferring the equipment, work, and personnel from the lab in the Idaho Falls facility, Repondents violated Section 8(a)(5) of the Act.

(2) Holiday pay

The General Counsel also contends that Respondents violated Section 8(a)(5) of the Act by unilaterally changing unit employees' holiday pay without bargaining with the Union. The record reflects that D. Vainio changed the holiday pay practice previously in effect among lab employees in July 1985. Respondents' defense in essence is that like so many of the personnel practices at the lab an informal, perhaps ad hoc, system had previously been in effect. In July Respondents put order and consistency into effect—here making the lab practice consistent with the practice in place at Respondents' retail facilities. Thus, in effect Respondents argue that they merely brought order out of chaos and that their actions must be viewed as benign in context. Again, essentially for the reasons asserted in *Katz*, supra, I reject Respondents' defense. There is no doubt, irrespective of however employees have been treated in Respondents' retail facilities, that lab unit employees were made worse off by the changes instituted in July. The Union had no opportunity to bargain regarding the matter. Such conduct violates Section 8(a)(5) of the Act, and I so find.

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[12] Such as the statement that Respondents did not have paid vacations.

[13] There was some dispute at the hearing regarding the proper location at which to contact K. Vainio, i.e., either at the lab or at his Belgrade, Montana office. I find that dispute unnecessary to resolve. The lack of communication continued over a sufficient period that, irrespective of what might have initially been a mistake, Respondents' failure to make it clear to Taylor where and how he should contact K. Vainio rebuts any argument of innocent mistake in the continuing inability to return calls.

[14] *NLRB v. Katz* 369 U.S. at 746.

5. Summary

As set forth in detail above, I have found that Respondents have violated Section 8(a)(1) of the Act by engaging in numerous acts of threats, interrogations, solicitation of grievances, harassment of employees, and changes of working conditions because of employees' union activities. Save for the solicitation of grievance allegations involving K. Vainio and the surveillance allegations involving L. Vainio, I have sustained the General Counsel's allegations of violations of Section 8(a)(1) of the Act.

I have found that Respondents violated Section 8(a)(3) and (1) of the Act by discharging employees Dalasera and Riley. I have dismissed the General Counsel's allegations that Respondents improperly discharged employees Knutson and Grigsby.

I have found that through (1) dilatory bargaining, (2) the failure to supply relevant requested information to the Union, and (3) the failure to supply an informed negotiator cloaked with sufficient authority, and (4) other conduct described above, Respondents engaged in a general course of conduct designed to avoid reaching an agreement with the Union in violation of Section 8(a)(5) and (1) of the Act. Further, I have found that Respondent, in transferring personnel, equipment, and work from the Butte lab to an Idaho Falls lab and in changing lab employees' holiday pay, in each case without notifying or bargaining in good faith with the Union concerning such changes, violated Section 8(a)(5) of the Act. I have determined that the General Counsel's allegations that Respondent violated Section 8(a)(5) of the Act by a 3-day closure of the lab commencing 12 June 1985 is without merit.

THE REMEDY

Having found that Respondents engaged in certain unfair labor practices, I shall recommend that they be ordered to cease and desist therefrom and to take certain affirmative action designed to effectuate the policies of the Act. With respect to the discharges of Dalasera and Riley I shall recommend that Respondents make whole their employees for any loss of earnings or other rights and benefits they may have suffered by reason of Respondents' discrimination against them. Backpay shall be computed in the manner set forth in *F. W. Woolworth Co.*, 90 NLRB 289 (1950), with interest as provided in *Florida Steel Corp.*, 231 NLRB 651 (1977). See also *Isis Plumbing Co.*, 139 NLRB 716 (1962).[15] Respondents shall also be required to remove any reference to these discharges from their files and to so notify the employees. *Sterling Sugars*, 261 NLRB 472 (1982).

To remedy the unilateral changes found violative of the Act, I shall order Respondents to restore the status quo ante and to make employees whole for any loss of wages and benefits the unilateral changes caused, with interest, as set forth in the cases cited above. The General Counsel seeks an order extending the Union's certification year to a period extending to 1 year after the commencement of bargaining in good faith. In light of my findings regarding Respondents' failure and refusal to engage in good-faith bargaining to date, the requested extension of the certification years is in accord with Board policy and will be granted.[16]

The General Counsel also seeks an order requiring Respondents to, inter alia (1) bargain on request within 15 days of the Board order; (2) bargain on request for a minimum of 15 hours per week until agreement or lawful impasse is reached or until the parties agree to a cease bargaining; and (3) prepare bargaining progress reports every 15 days and submit them to the Regional Director for Region 19, and also serve such reports on the International Association of Machinists and Aerospace Workers Local Lodge 88, AFL-CIO, so as to provide the Union with an opportunity to reply. Given that I have found that Respondents have engaged in a uniform course of conduct designed to defeat the Union as representative of employees and not to engage in good-faith bargaining, I find the General Counsel's requested remedy here appropriate.

The General Counsel seeks special language in the order to assist in policing compliance with the order. The nature of this order does not warrant the extraordinary language requested.

Respondents' unfair labor practices were widespread, involved essentially all unit employees, and spanned the entire period from the commencement of the union activity to the time of the hearing. I find that Respondents' general disregard for the employees' fundamental statutory rights warrant the imposition of a broad order directing Respondents, its officers, agents, successors, and assigns, from engaging in unfair labor practices "in any other manner." See *Mid-Continent Refrigerated Service Co.*, 228 NLRB 917 (1977); *Federal Alarm*, 230 NLRB 518 (1977).

On the basis of the above findings of fact and on the entire record, I make the following

CONCLUSIONS OF LAW

1. Respondents, and each of them, are employers engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

2. The Union is a labor organization within the meaning of Section 2(5) of the Act.

3. The following employees of Respondents constitute a unit appropriate for purposes of collective bargaining within the meaning of Section 9(b) of the Act:

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[15] As in each case the discharged employee was subsequently reinstated, no reinstatement order is appropriate.

[16] See *Mar-Jac Poultry Co.*, 136 NLRB 785 (1962), and its progeny.

> All laboratory employees employed by Respondents at their facility located at 225 South Idaho, Butte, Montana; but excluding all office clerical employees, guards and supervisors as defined in the National Labor Relations Act.

4. Respondents violated Section 8(a)(1) of the Act by interrogating employees about their union activities and sympathies and the sympathies of other employees, by soliciting employee complaints and grievances and promising to remedy such grievances, by threatening employees with closure of the facility or the subcontracting out of work if employees selected the Union as their collective-bargaining representative, by harassing employees because of the employees' union activities or because of their testimony in Board representation hearings, by informing its employees that it would be futile to choose the Union as its collective-bargaining representative, by threatening to bargain in bad faith, and by changing the shifts and holiday pay of employees because of their support for the Union.

5. Respondents violated Section 8(a)(3) and (1) of the Act by discharging employees Beverly Riley and Leonard Dalasera because of their union activities or because of the union activities of other employees.

6. Respondents violated Section 8(a)(5) and (1) of the Act:

a. By transferring personnel and work from its Butte, Montana lab to its Idaho Falls, Idaho facility without notice to the Union and without affording the Union an opportunity to bargain concerning the decision and the effects of such removal.

b. By unilaterally changing employees' terms and conditions of employment without first bargaining with the Union in good faith regarding those changes.

c. By engaging in a course of conduct designed to undermine the Union and to avoid reaching agreement with the Union, including dilatory communication and scheduling of meetings with the Union, failure to conduct bargaining in a businesslike fashion, making regressive proposals while failing and refusing to supply specific information concerning those proposals or current conditions of employment of unit employees.

[Recommended Order omitted from publication.]

International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, Local 25, AFL-CIO[1] ***and*** **Emery Air Freight Corporation d/b/a Emery Worldwide.** Case 1-CD-757

July 29, 1988

DECISION AND DETERMINATION OF DISPUTE

By Chairman Stephens and Members Johansen and Babson

The charge in this Section 10(k) proceeding was filed October 1, 1985,[2] by Emery Air Freight Corporation d/b/a Emery Worldwide (the Company or Emery). The charge alleges that International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, Local 25 (Local 25) violated Section 8(b)(4)(D) of the National Labor Relations Act by engaging in proscribed activity with an object of forcing Emery to assign certain work to employees it represents rather than to employees of Visa International (Visa). The hearing was held on December 4 before Hearing Officer Thomas J. Morrison.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board affirms the hearing officer's rulings, finding them free from prejudicial error. On the entire record, the Board makes the following findings.

I. JURISDICTION

The Company is a Delaware corporation with an office and place of business in East Boston, Massachusetts, where it is engaged in the overnight airfreight forwarding of time-sensitive documents, packages, and freight. It annually derives gross revenues in excess of $50,000 from the transportation of freight from its facility in East Boston directly to points located outside the Commonwealth of Massachusetts. The parties stipulate, and we find, that the Company is engaged in commerce within the meaning of Section 2(6) and (7) of the Act and that Local 25 is a labor organization within the meaning of Section 2(5) of the Act.

II. THE DISPUTE

A. *Background and Facts of Dispute*

Emery operates an overnight airfreight forwarding delivery service with facilities around the world, including an East Boston, Massachusetts facility at Logan Airport. For many years in the Boston area, Emery had all of its pickup and delivery work performed by independent drayage companies or by common carriers. At that time, Emery employed dockmen at the East Boston location. In October 1972, Local 25 was certified as the collective-bargaining representative of the dockmen employed at the East Boston location. In 1982, a change was made in Emery's operations and Emery began to use some of its dockmen as drivers, and they began doing pickup and delivery work in the Boston metropolitan area with independent drayage companies providing backup service there. Emery continued to use various drayage companies to perform pickup and delivery work throughout the rest of its catchment areas in the Commonwealth.[3]

Emery's East Boston facility services most of eastern Massachusetts. In addition, Emery operates separate facilities in Manchester, New Hampshire, and Portland, Maine. Pickup and delivery work for the Manchester and Portland facilities is performed exclusively by independent drayage companies.

Customers call Emery for a shipment to be picked up, and Emery arranges for the pickup. Who actually picks up the shipment depends primarily on where the customer is located. Once a piece of freight is picked up, it is brought to the East Boston facility, where it is loaded into containers and, each evening, forwarded by plane to Emery's "hub" facility in Dayton, Ohio. In Dayton, the freight is sorted by destination. Each morning, freight from all areas of the country which has a destination that is serviced out of East Boston is flown there. In East Boston, the freight is distributed for delivery. As with pickup work, who delivers the freight depends largely on the location of the recipient.

Prior to August 12, Emery had an agreement with Dave's Motor Transport (Dave's), an independent drayage company that, pursuant to the above agreement, provided pickup and delivery of freight for Emery in areas outside the Metropolitan Boston area, including the Lowell-Lawrence area. Local 25 also represents employees of Dave's. On August 12, after having engaged in several discussions with Dave's and other independent drayage companies, including Visa, Emery began using Visa's employees instead of Dave's employees to perform the pickup/delivery work in the Lowell-Lawrence area. There is no evidence that the employees of Visa are represented by any labor organization. Emery decided to make the change from Dave's to Visa for various reasons, including the price and efficiency of operations. Prior to the August 12 change, Visa had performed pickup and delivery work for Emery in New Hampshire and had indicated that it could perform similar work in the Lowell-Lawrence area at a very competitive price. Emery had discussed the need to cut costs and improve service several times with Dave's, but was unable to reach agreement regarding the Lowell-Lawrence freight. Furthermore, Emery had received customer complaints about the level of service provided by Dave's employees. As a result, the decision was made to use Visa for the pickup/delivery work in the Lowell-Lawrence area previously performed by Dave's. Emery continues to use Dave's, as well as other drayage firms, in areas outside Metropolitan Boston and to supplement its own Metropolitan Boston service.

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[1] On November 1, 1987, the Teamsters International Union was readmitted to the AFL-CIO. Accordingly, the caption has been amended to reflect that change.

[2] All dates are 1985 unless otherwise specified.

[3] About this same time, the unit of employees which Local 25 represents was expanded, and Local 25 now represents all employees employed by Emery at the East Boston location, including drivers, dockmen, and carriers.

The relationship between Emery and the drayage companies is that of customer to suppliers. Emery, as the customer, purchases pickup and delivery services from these various companies. Emery pays an agreed-on price for these services. It is an arm's-length relationship. At Visa's suggestion, some Visa employees wear Emery uniforms and drive trucks similar to those used by Emery. Visa, however, is free to carry Emery's competitor's freight along with Emery's freight.

The current collective-bargaining agreement between Emery and Local 25 covering Emery's employees contains no restrictions on Emery's right to use independent drayage agents. Emery has always done this. The area of dispute, Lowell-Lawrence, has not been regularly served by Emery's employees. At the time of the hearing, Emery's employees did serve one select high volume customer in the area. Further, Emery's employees had, on earlier occasions, served one or two select high volume customers in the area. There is no evidence that the Emery employees' work for these few select high volume customers was affected by the August 12 change.

On August 12, Frank Hackett, a business agent for Local 25, called John Walters, Emery's East Boston service manager, to discuss Emery's change in drayage companies from Dave's to Visa. During this conversation, Hackett told Walters that the Union was going to take Emery "on" over the subcontracting, that Walters should look for informational pickets, and that Emery was going to have big trouble and problems with the changeover. Thereafter, on August 26, Hackett told Walters, during a meeting, that he was having grievances filed over the subcontracting, that Visa should expect informational pickets to be following them, and that Visa should get extra insurance on its employees because they might find "a container sitting on top of them." On September 19 and 24, Hackett repeated his earlier protests over Emery's change in its drayage assignment for the Lowell-Lawrence area.

On October 1, Emery changed its method of shipping freight to and from the Lowell-Lawrence area by changing the "tariff point" from East Boston, Massachusetts to Manchester, New Hampshire. Prior to October 1, freight bound for the Lowell-Lawrence area was picked up at the East Boston facility by individual delivery drivers from Dave's (prior to August 12) or Visa (after August 12). Since October 1, a single Visa shuttle truck picks up the freight and transports it to Visa's Hudson, New Hampshire facility where it is distributed to delivery drivers according to route.

B. *Work in Dispute*

The work in dispute involves the pickup and delivery of freight in the Lowell-Lawrence, Massachusetts area.[4]

C. *The Contentions of the Parties*

Local 25 argues that there is no jurisdictional dispute as contemplated in Section 8(b)(4)(D) and Section 10(k) of the Act. It contends the dispute involves its attempts either to recover work lost by Emery's employees whom it represents or to enforce the terms of its contract. It therefore maintains that the notice of hearing under Section 10(k) of the Act should be quashed.

The Employer contends that this is a jurisdictional dispute. It argues that Local 25 has claimed the right to perform work that Emery has assigned to employees of Visa and has taken unlawful action, an object of which is to force Emery to assign that work to members of Local 25. It maintains that this work has never been performed by Emery employees represented by Local 25. Accordingly, it argues Local 25 has no claim to the disputed work, and Emery is free to assign the work to whichever independent contractor it chooses. The Employer claims that Visa employees should be awarded the work based on, among other reasons, industry practice, Emery's past practice and preference, and the economy and efficiency of operations.

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[4] The work in dispute does not include the pickup and delivery of freight for one select high volume customer served by Emery's employees at the time of the hearing or one or two select high volume customers that have been served by Emery's employees on occasion in the past.

D. *Applicability of the Statute*

Before the Board may proceed with a determination of the dispute pursuant to Section 10(k) of the Act, it must be satisfied that there is reasonable cause to believe that Section 8(b)(4)(D) has been violated and that the parties have not agreed on a method for the voluntary adjustment of the dispute. Section 8(b)(4)(D) makes it an unfair labor practice to take coercive action an object of which is to "for[ce] or requir[e] any employer to assign particular work to employees in a particular labor organization or in a particular trade, craft, or class rather than to employees in another labor organization or in another trade, craft, or class . . . ." In order to find reasonable cause to believe Section 8(b)(4)(D) has been violated, "there must be evidence that one group of employees has exerted improper pressure upon the Employer to compel it to assign certain work to that group of employees rather than to another group which also seeks the work." *Auto Workers Local 957 (General Motors)*, 239 NLRB 365, 366 (1978).

As indicated above, on August 12 Emery entered into a contract with Visa for the pickup and delivery of freight in the Lowell-Lawrence area, thus "assigning" the work to Visa's employees. On the same day, August 12, Local 25 Business Agent Frank Hackett told Emery's East Boston service manager, John Walters, that Local 25 was going to take Emery "on" over the "subcontracting," that Walters should look for informational pickets, and that Emery was going to have "big trouble" with the changeover. Thereafter, Hackett made similar statements and threats to Walters on August 26 and September 19 and 24.

We find reasonable cause to believe that Local 25 has violated Section 8(b)(4)(D). There is evidence that on August 12, when Emery assigned the Lowell-Lawrence work to Visa's employees, Local 25 threatened to take action in order to pressure Emery to reassign the Lowell-Lawrence work from Visa's employees to Emery's employees.[5] Cf. *Auto Workers Local 957*, supra. Contrary to Local 25's contention, we do not find that Local 25's object was to preserve work for its members employed by Emery because, as of August 12, the date Local 25 began pressuring Emery, Emery employees had not lost any work.[6] Thus, we find reasonable cause to believe that a violation of Section 8(b)(4)(D) has occurred and that there exists no agreed-on method for voluntary adjustment of the dispute within the meaning of Section 10(k) of the Act. Accordingly, we find that the dispute is properly before the Board for determination.

Section 10(k) requires the Board to make an affirmative award of disputed work after considering various factors. *NLRB v. Electrical Workers IBEW Local 1212 (Columbia Broadcasting)*, 364 U.S. 573 (1961). The Board has held that its determination in a jurisdictional dispute is an act of judgment based on common sense and experience, reached by balancing the factors involved in a particular case. *Machinists Lodge 1743 (J. A. Jones Construction)*, 135 NLRB 1402 (1962).

The following factors are relevant in making the determination of this dispute.

1. Certification and collective-bargaining agreements

On October 16, 1972, the Board certified Local 25 as bargaining representative of "all full and regular part-time dockmen" employed at Emery's East Boston location.[7] The certification does not cover the work in dispute.

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[5] Interestingly, Local 25 also represents the employees of Dave's, who may have lost work as a result of the August 12 change from Dave's to Visa. Nonetheless, although the alleged threat arguably might also be read to pertain to Dave's employees, Local 25's position throughout these proceedings has been that the dispute between Local 25 and Emery concerned lost work for Emery bargaining unit members.

[6] Local 25 argues that the work in dispute concerns work previously performed by Emery's dock employees which, as a result of the change in delivery operations, is presently being performed by Visa's employees. We do not agree. On August 12 Emery changed drayage subcontractors serving the Lowell-Lawrence area from Dave's to Visa. It was on August 12 that Local 25 first began protesting Emery's "subcontracting." Emery's August 12 action resulted in a change in the *identity* of the drayage subcontractor, but it did not result in a change in the *way* Emery employees performed their work. It was not until October 1, 7 weeks after Local 25 began pressuring Emery, that Emery changed its *method* of shipping freight to and from the Lowell-Lawrence area. This October 1 change may have resulted in the loss of some work previously performed by Emery employees. Since at the time Local 25 began pressuring Emery, however, no work had been lost by Emery's employees and no evidence shows that on August 12 Local 25 knew of the upcoming October 1 change in operations, we conclude that Local 25's protests concerned Emery's August 12 change to Visa.

Local 25 also argues that Emery violated the parties' bargaining agreement's prohibition against Emery's use of "any leasing device to a third party to evade [the] contract." However, nothing in the parties' agreement prohibits Emery from using independent drayage contractors to serve the Lowell-Lawrence area. Thus, we reject Local 25's contention that Emery violated the bargaining agreement by assigning the work in dispute to the employees of Visa.

Furthermore, although Visa's drivers would wear Emery uniforms and drive trucks with the Emery logo on them, this is insufficient to establish that Emery violated the contract's prohibition on the use of a "leasing device" to avoid the terms of the agreement. Emery has no control over the way Visa's employees perform their work, not all Visa employees wear Emery uniforms or drive trucks similar to Emery's, and Visa is free to handle Emery's competitors' freight. We note that Local 25 does not contend Emery and Visa are joint employers.

[7] Dave's employees are also represented by Local 25, although no Board certification was introduced into evidence. Visa's employees are not represented by any labor organization.

Emery and Local 25 are also parties to a collective-bargaining agreement. However, the agreement does not cover the pickup and delivery of freight in the Lowell-Lawrence area. Under these circumstances, we find that the factors of certification and collective-bargaining agreements do not favor an award of the disputed work to either group of employees.

2. Company preference and past practice

Emery prefers to use Visa's employees to perform the work in dispute. Emery has always used independent drayage contractors to serve the Lowell-Lawrence area and, prior to August 12, Emery's practice was to use Dave's employees (not Emery's). We find that the factor of company preference and past practice favors an award to the employees of Visa.

3. Industry practice

The evidence reveals that Emery's competitors use independent drayage contractors to pick up and deliver freight. The larger freight carriers, like Emery, use both independent drayage contractors and their own employees for pickup and delivery work. The smaller freight carriers use independent drayage contractors almost exclusively. No evidence was introduced showing what particular criteria the industry uses to determine which routes will be handled by a freight carrier's own employees and which will be handled by an independent drayage contractor's employees. Thus, contrary to Emery's contention, we conclude that the factor of industry practice does not favor an award of the work to either group of employees.

4. Economy and efficiency of operations

Use of Visa's employees to deliver freight to the Lowell-Lawrence area has resulted in early customer deliveries. Local 25 submitted no evidence regarding the economy and efficiency of operations of using Emery's employees. Accordingly, on the evidence before us, we find that the factor of economy and efficiency of operations favors an award of the disputed work to the employees of Visa.

Conclusions

After considering all the relevant factors, we conclude that the employees of Visa are entitled to perform the disputed work. We reach this conclusion relying on the factors of company preference and past practice and economy and efficiency of operations. The determination is limited to the controversy that gave rise to this proceeding.

DETERMINATION OF DISPUTE

The National Labor Relations Board makes the following Determination of Dispute.

1. Employees of Visa International are entitled to perform the work of pickup and delivery of freight in the Lowell-Lawrence, Massachusetts area for Emery Air Freight d/b/a Emery Worldwide, East Boston, Massachusetts.

2. International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, Local 25, AFL-CIO is not entitled by means proscribed by Section 8(b)(4)(D) of the Act to force Emery Worldwide to assign the disputed work to employees represented by it.

3. Within 10 days from this date, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, Local 25, AFL-CIO shall notify the Regional Director for Region 1 in writing whether it will refrain from forcing Emery Worldwide, by means proscribed by Section 8(b)(4)(D), to assign the disputed work in a manner inconsistent with this determination.

Cisco Trucking Company, Inc. ***and*** **United Mine Workers of America.** Case 9-CA-23231

July 28, 1988

DECISION AND ORDER

BY CHAIRMAN STEPHENS AND MEMBERS BABSON AND CRACRAFT

On April 15, 1987, Administrative Law Judge William F. Jacobs issued the attached decision. The General Counsel filed exceptions and a supporting brief, and the Respondent filed an answering brief.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings, and conclusions only to the extent consistent with this Decision and Order.

The judge found that by failing to request bargaining over the Cisco Trucking Company's (the Respondent) unilateral implementation of wage and benefit changes, United Mine Workers of America (the Union) waived its right to assert that the Respondent's conduct violated Section 8(a)(5) and (1) of the Act. We disagree for the reasons set forth below.

The Respondent, a West Virginia corporation, has been engaged in the business of coal hauling from various minesites in Kentucky and West Virginia as well as providing other mine-related services. Since 1974, the Respondent has recognized and bargained with the Union as its truckdrivers' exclusive bargaining agent. The last effective collective-bargaining agreement between the Respondent and the Union, the 1981 National Bituminous Coal Wage Agreement (NBCWA), expired September 30, 1984. The Union struck the Respondent the next day.

The first meeting between the Respondent and the Union following commencement of the strike occurred on November 1, 1984. Wilson Cisco, the Respondent's owner, offered to sign the 1984 NBCWA, but Union Attorney James Hampton counteroffered with an additional Supplemental Unemployment Benefits Program and severance pay provisions. Each side rejected the other's offer. During sessions on November 28, 1984, and January 28, 1985, Cisco again offered to sign the 1984 NBCWA but was rejected. Cisco did not offer to sign the 1984 NBCWA during subsequent meetings in 1985. Although the Respondent and the Union continued to formulate various proposals during several meetings in 1985, no agreement or impasse had been reached when the instant charge was filed on July 19, 1986.

On December 23, 1985, the Union made an unconditional offer to return to work. The Respondent did not operate during the strike or until March 3, 1986.[1] Cisco, however, did lease the Respondent's trucks to other companies and allowed the Respondent's drivers to operate those trucks.

On February 10, Hampton wrote a letter to the Respondent's attorney, Louis Dene, requesting information on any strike replacements. On February 19, Dene replied that the requested information would be forthcoming and that the Respondent wished to continue negotiations with the Union.

The Respondent and the Union met again on March 3. Before this meeting, the Respondent had received a tentative offer of a contract to haul coal from an inaccessible site in Glen Allen, West Virginia. Before Dene arrived for formal negotiations, Cisco informed Hampton about the potential coal haul and the necessity for building a road to gain access to the site. Cisco further explained that "red dog" would have to be hauled in to help build the road.[2] Cisco then asked Hampton if Cisco could use his striking unit employees to haul the red dog on a "per load" paid basis. Hampton replied by inquiring whether Cisco would recall his employees if he obtained a coal hauling contract. When Cisco answered in the affirmative, Hampton approved the temporary per-load agreement stating that it was important to get the truckdrivers back to work.

During formal negotiations on March 3, Hampton asked Cisco if he would sign the 1984 NBCWA. Cisco replied that he could not sign the 1984 NBCWA without a coal hauling contract. Hampton then inquired whether Cisco would sign any agreement without a coal hauling contract. Hampton was advised that he would receive an answer some time in the future.[3]

Following the March 3 negotiations, Cisco spoke to several of the truckdrivers and offered them the red dog per-load payment plan agreed to by Hampton. Several truckdrivers accepted the offer and red dog hauling to the Glen Allen site began in early March. The truckdrivers were hired as con-

289 NLRB No. 150

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[1] All dates hereafter refer to 1986 unless otherwise indicated.

[2] Red dog is a substance used especially for paving in mining areas. As found by the judge, the Respondent's employees were never required to haul red dog under the 1981–1984 collective-bargaining agreement.

[3] Hampton sent a letter to Dene on March 5 memorializing the contents of the March 3 negotiations. In the letter, Hampton stated he was advised that the Respondent was not operating and had no coal haul; that in the event of the resumption of operations by the Respondent, employees would be recalled according to a seniority list provided to Hampton; and that the Respondent agreed to advise Hampton whether the Respondent would execute a new collective-bargaining agreement without its first obtaining a contract to haul coal.

tract laborers and were not on the Respondent's payroll.

Later in March, the Respondent was able to haul small amounts of coal out of the Glen Allen site while still hauling in red dog. In early April, some full loads of coal were being hauled out of the site and by mid-April, with the completion of the road, the Respondent was able to resume full-time coal hauling operations. On April 16, the Respondent put the truckdrivers back on its payroll, but continued to pay them on a per-load basis while failing to provide benefits required by the expired 1981 NBCWA. As the Glen Allen haul became unprofitable, the Respondent secured other coal hauling jobs but continued to pay by the load as a result of discussions it had directly with employees.[4] The Respondent ignored the 1981 NBCWA benefit provisions.

On April 28, Hampton wrote to Dene advising Dene that since March 3 Respondent's trucks had been seen hauling coal in the Union's jurisdictional area. On May 2, Dene replied that the Respondent was operating as an independent contractor and that its "former" employees were hauling coal and being paid by the load. On June 19, Hampton filed the instant charge.

It is clear from the record that the temporary per-load agreement on March 3 applied to the hauling of red dog only[5] and that, as the judge found, "[b]y May conditions had sufficiently changed whereby the Union could properly expect to sit down with Respondent and negotiate toward a new and permanent agreement." The judge further found that "Hampton did not request bargaining but instead filed the instant charge." The judge concluded that by failing to request bargaining the Union effectively waived its right to assert that the Respondent's unilateral actions violated Section 8(a)(5) and (1) of the Act (citing *U.S. Lingerie Corp.*, 170 NLRB 750 (1968), and *Golden Bay Freight Lines*, 267 NLRB 1073 (1983)). The judge also concluded that the continued pay-per-load agreement with the truckdrivers did not constitute individual bargaining in violation of the Act, because the Union could have also requested bargaining on this subject.

An employer has a statutory obligation to continue to follow the terms and conditions of employment governing the employer-employee relationship in an expired contract until it has bargained to impasse with the collective-bargaining representative of its employees, unless the union fails to timely request bargaining following the employer's notice of an intention to modify. *NLRB v. Antonino's Restaurant*, 648 F.2d 1206, 1214 (9th Cir. 1981); *Hen House Market*, 175 NLRB 596 (1969), enfd. 428 F.2d 133 (8th Cir. 1970). Even if an impasse is reached, a unilateral change cannot be made unless it is reasonably encompassed within the employer's pre-impasse proposal. *Taft Broadcasting Co.*, 163 NLRB 475, 478 (1967), enfd. sub nom. *Television Artists AFTRA v. NLRB*, 395 F.2d 622 (D.C. Cir. 1968). There are circumstances, however, which the Board accepts as excusing or justifying unilateral action. These would include situations in which, after timely notice of proposed changes by the employer, the union waives or acquiesces, by inaction or otherwise, in the employer's action. *U.S. Lingerie Corp.*, supra; *Stone Boat Yard*, 264 NLRB 981 (1982), enfd. 715 F.2d 441 (9th Cir. 1983), cert. denied 466 U.S. 937 (1984).

Of particular relevance here is the rule that the Union's failure to protest the unilateral change does not constitute "acquiescence" where the employer's decision has already been made and implemented, thus making any protest by the Union futile. *Soule Glass & Glazing Co. v. NLRB*, 652 F.2d 1055, 1084 (1st Cir. 1981); *Caravelle Boat Co.*, 227 NLRB 1355, 1358 (1977). Such cases are distinguishable from those where the union receives timely notice of a change and fails to demand bargaining. *U.S. Lingerie Corp.*, supra; *Golden Bay Freight Lines*, supra; *Clarkwood Corp.*, 233 NLRB 1172 (1977); *Charlie's Oil Co.*, 267 NLRB 764 (1983).

On April 16 when the Respondent resumed full-time coal hauling operations and placed the truckdrivers back on its payroll, the Respondent was obligated to apply the terms of the expired 1981 NBCWA to its employees. The Respondent continued to pay its drivers by the load, however, and did not accord the drivers the benefits provided by the expired contract. Since the March 3 temporary agreement, as found by the judge, applied only to the hauling of red dog, the Respondent effectively implemented unilateral changes in the truckdrivers' wages and benefits on April 16 when it ignored the 1981 NBCWA and implemented a per-load pay system without providing notice to or an opportunity to bargain with the Union.

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[4] Cisco stated he would talk to the truckdrivers and agree on a price for each hauling job. Cisco set a hauling rate based on the per-ton price negotiated with a particular customer and the distance of each haul.

[5] The evidence shows that under this informal agreement with the Union, the Respondent hired the drivers as contract laborers to haul red dog and that there was no offer to recall them as employees until the Respondent was operational again as a coal hauler. In this regard, the drivers initially hauled no coal, and they began to haul coal only in nominal amounts as the road building progressed. It was not until April 16, when the Respondent resumed its business of hauling coal on a full-time basis, that the Respondent recalled the strikers as its employees. In these circumstances, we reject the Respondent's contention that the March 3 agreement represented the Union's acquiescence in the Respondent's use of its payment-per-load formula for normal coal hauling work.

The record indicates that the Respondent failed to give the Union any notice concerning the wage and benefit changes prior to April 16. Furthermore, there is no evidence that Hampton knew about the Respondent's coal hauling activities before April 16.[6] Because the Union never received any advance notice of the wage and benefit changes prior to their unilateral implementation, it could not have waived its bargaining rights. *Gulf States Mfg. v. NLRB*, 704 F.2d 1390, 1397 (5th Cir. 1983) ("It is . . . well established that a union cannot be held to have waived bargaining over a change that is presented to it as a *fait accompli*"). Contrary to the judge's apparent finding, the Union's failure to request bargaining *after* the changes were implemented did not constitute a waiver. *Intersystems Design Corp.*, 278 NLRB 759 (1986).

Further, as indicated above, the record shows that the Respondent, after resuming full-time coal hauling operations in mid-April, discussed the coal hauling contracts with its employees and offered them wage rates on a per-load basis. In so doing, the Respondent dealt directly with its employees concerning wages and in derogation of the Union's status as the exclusive bargaining representative of the employees.

Accordingly, we find that the Union did not waive its bargaining rights and that the Respondent violated Section 8(a)(5) and (1) on and after April 16, 1986, by implementing unilateral changes in wages and benefits, and by dealing directly with employees.

CONCLUSIONS OF LAW

1. By failing to adhere to the terms and conditions of employment provided in its last collective-bargaining agreement without reaching either impasse or a new agreement with the Union, the Company has engaged in unfair labor practices affecting commerce within the meaning of Section 8(a)(5) and (1) and Section 2(6) and (7) of the Act.

2. By bypassing the Union and dealing directly with its employees in the unit by soliciting the employees to work at a wage rate less than that specified under the terms of its last collective-bargaining agreement with the Union, the Company has engaged in unfair labor practices affecting commerce within the meaning of Section 8(a)(5) and (1) and Section 2(6) and (7) of the Act.

REMEDY[7]

Having found that the Respondent has engaged in certain unfair labor practices, we shall order it to cease and desist and to take certain affirmative action designed to effectuate the policies of the Act.

Having found that the Respondent has failed to adhere to the terms and conditions of employment provided in its last collective-bargaining agreement with the Union without reaching impasse or signing a new agreement and has dealt directly with its unit employees by soliciting and engaging employees to continue working at a wage rate less than that specified under the terms of the last collective-bargaining agreement, we shall order that the Respondent restore the status quo ante by giving full force and effect to the provisions of its collective-bargaining agreement governing terms and conditions of employment, retroactive to April 16, 1986, and to make whole those unit employees who worked at a wage rate less than that specified under the terms of the collective-bargaining agreement, according to the rates specified in the collective-bargaining agreement. To the extent that the Respondent's failure to adhere to any other terms and conditions of employment provided in the collective-bargaining agreement was economically detrimental to the employees or to any trust fund established under the agreement, the Respondent shall be required to make such employees and trust funds whole for all losses suffered as a result of the Respondent's conduct. The amount of backpay due the employees shall be computed in the manner provided by the Board in *Ogle Protection Service*, 183 NLRB 682 (1970), with interest on any amounts due paid in the manner prescribed in *New Horizons for the Retarded*.[8] We shall leave to the compliance stage of the proceeding the determination of whether the Respondent must pay any additional amounts into the trust funds. See *Merryweather Optical Co.*, 240 NLRB 121 (1979).[9] Finally, the Respondent shall be required to post the attached notice to employees at its offices and at any site where individuals performing unit work are employed.

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[6] On cross-examination, Hampton testified that he could not recall the date he received the information that the Respondent was paying its truckdrivers as independent contractors to haul coal in the Pike County area.

[7] We deny the General Counsel's request for a visitatorial provision. Under the circumstances of this case, we find such a provision unnecessary. *Cherokee Marine Terminal*, 287 NLRB 1080 (1988).

[8] 283 NLRB 1173 (1987). Interest on and after January 1, 1987, shall be computed at the "short-term Federal rate" for the underpayment of taxes as set out in the 1986 amendment to 26 U.S.C. § 6621. Interest on amounts accrued prior to January 1, 1987 (the effective date of the 1986 amendment to 26 U.S.C. § 6621), shall be computed in accordance with *Florida Steel Corp.*, 231 NLRB 651 (1977).

[9] The Respondent shall also reimburse its employees for any expenses ensuing from its failure to make contributions to various funds established by the collective-bargaining agreement between the Union and the Company. *Kraft Plumbing*, 252 NLRB 891 fn. 2 (1980), enfd. 661 F.2d 940 (9th Cir. 1981).

ORDER

The National Labor Relations Board orders that the Respondent, Cisco Trucking Company, Inc., Varney, West Virginia, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Refusing to bargain collectively with United Mine Workers of America as the exclusive representative of its employees in the unit set forth below with respect to rates of pay, wages, and other terms and conditions of employment by failing to adhere to the terms and conditions of employment provided in its last collective-bargaining agreement with the Union and by bypassing and dealing directly with employees by soliciting them to and engaging them to work at a wage rate less than that specified under the terms of the collective-bargaining agreement. The unit is:

> All employees of the Respondent engaged in the production of coal, including removal of overburden and coal waste, preparation, processing and cleaning of coal and transportation of coal (except by waterway or rail not owned by the Respondent), repair and maintenance work normally performed at the mine site or at a central shop of the Respondent and maintenance of gob piles and mine roads, and work of the type customarily related to all of the above; excluding coal inspectors, weigh bosses, all office clerical employees, and all professional employees, guards and supervisors as defined in the Act.

(b) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Restore the status quo ante by giving full force and effect to the provisions of the 1981-1984 collective-bargaining agreement with the Union governing terms and conditions of employment retroactive to April 16, 1986.

(b) Make whole those unit employees who worked at a wage rate less than that specified under the terms of the collective-bargaining agreement according to the rate specified in the collective-bargaining agreement, in the manner set forth in the remedy section of the decision.

(c) To the extent that the Respondent's failure to give full force and effect to the provisions of the 1981–1984 collective-bargaining agreement was economically detrimental to employees or to any trust fund established under the agreement, make such individuals and trust funds whole for all losses suffered as a consequence of the Respondent's conduct, in the manner set forth in the remedy section of the decision.

(d) Preserve and, on request, make available to the Board or its agents for examination and copying, all payroll records, social security payment records, timecards, personnel records and reports, and all other records necessary to analyze the amount of backpay due under the terms of this Order.

(e) Post at its facility in Varney, West Virginia, copies of the attached notice marked "Appendix."[10] Copies of the notice, on forms provided by the Regional Director for Region 9, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material.

(f) Notify the Regional Director in writing within 20 days from the date of this Order what steps the Respondent has taken to comply.

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice. Section 7 of the Act gives employees these rights.

To organize
To form, join, or assist any union
To bargain collectively through representatives of their own choice
To act together for other mutual aid or protection
To choose not to engage in any of these protected concerted activities.

WE WILL NOT refuse to bargain collectively with United Mine Workers of America as the exclusive representative of our employees in the unit set forth below with respect to rates of pay, wages, and other terms and conditions of employment, by failing to adhere to the terms and conditions of employment provided in our collective-bargaining agreement with the Union and by bypassing the Union and dealing directly with employees by soliciting them and engaging them to work at a wage rate less than that specified under the terms of the collective-bargaining agreement. The unit is:

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[10] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

> All our employees engaged in the production of coal, including removal of overburden and coal waste, preparation, processing and cleaning of coal, and transportation of coal (except by waterway or rail not owned by us), repair and maintenance work normally performed at the mine site or at a central shop of ours and maintenance of gob piles and mine roads, and work of the type customarily related to all of the above; excluding coal inspectors, weigh bosses, all office clerical employees, and all professional employees, guards and supervisors as defined in the Act.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL restore the status quo ante by giving full force and effect to the provisions of the 1981–1984 collective-bargaining agreement retroactive to April 16, 1986.

WE WILL make whole, with interest, those unit employees who worked at a wage rate less than that specified under the terms of the collective-bargaining agreement according to the rate specified in that agreement.

WE WILL make whole, with interest, employees and any trust fund to which we were obligated to contribute on behalf of the employees for any losses they may have suffered as a result of our failure to adhere to the terms of the collective-bargaining agreement.

CISCO TRUCKING COMPANY, INC.

Engird Emerson Vaughan, Esq., for the General Counsel.
Louis Dene, Esq., of Abingdon, Virginia, for the Respondent.
James R. Hampton, Esq., of Hazard, Kentucky, for the Charging Party.

DECISION

STATEMENT OF THE CASE

WILLIAM F. JACOBS, Administrative Law Judge. This case was tried before me on 14 October 1986 at Pikeville, Kentucky. The charge was filed 19 June 1986 by United Mine Workers of America (the Union). The complaint issued 1 August 1986 alleging that Cisco Trucking Company, Inc. (Respondent or the Company) violated Sections 8(a)(1) and (5) and 8(d) of the Act by failing to continue in full force and effect all of the terms and conditions of the 1981 collective-bargaining agreement; by failing to pay employees in the unit the wage rates set forth in the wage rate appendix of the 1981 collective-bargaining agreement; by failing to pay benefits required by the 1981 collective-bargaining agreement;[1] and bypassing the Union and dealing directly with unit employees regarding wages although the Union has been the exclusive collective-bargaining representative of those unit employees.[2] The answer,[3] duly filed, denies the commission of any unfair labor practices. The allegations contained in the amended complaint and the amended answer frame the issues.

All parties appeared at the hearing and were afforded full opportunity to be heard and present evidence and argument. The General Counsel and Respondent filed briefs. On the entire record, my observation of the demeanor of the witnesses and after giving due consideration to the briefs, I make the following

FINDINGS OF FACT[4]

The Respondent has recognized the Union as the exclusive collective-bargaining representative of its drivers for many years. The Respondent and the Union have been signatory to a series of collective-bargaining agreements, most recently to the 1981–1984 National Bituminous Coal Wage Agreement (NBCWA), which expired 30 September 1984. During the life of this agreement Respondent paid its drivers the hourly wages and provided the fringe benefits required by the agreement.

With the expiration of the collective-bargaining agreement on 30 September 1984 the Union chose to strike a number of companies including the Respondent. During the strike a series of collective-bargaining sessions took place. Participants in these negotiations were James Hampton, attorney for the Union, and Louis Dene, attorney for several of the companies participating in the collective-bargaining process, including Respondent. Various officers of the Union and members of management of the participating companies also took part in the bargaining sessions including Wilson Cisco Jr., Respondent's owner and operator. Hampton was the only union representative to negotiate with Respondent during this period.

Bargaining during negotiations did not take the form of group bargaining. Although representatives of the various companies involved would meet with the Union at the same time and place, the bargaining was for individual contracts with each participating employer; the union representative, James Hampton, proceeding from one independent contractor to another, making proposals, and receiving counterproposals. Sometimes the collective-bargaining sessions would overlap, one party or the other agreeing to a proposal that had been made and discussed at a previous session. Sometimes bargaining was between the attorneys, Dene and Hampton, whereas on other occasions the Union's representative would deal directly with owners or other members of management.

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[1] The complaint was amended at the hearing to include this allegation.

[2] Ibid.

[3] The answer was amended at the hearing to admit allegations concerning jurisdiction, supervision and agency, and unit description.

[4] The complaint and answer, as amended at the hearing, alleges and admits that the Board has jurisdiction and that the Union is a labor organization within the meaning of the Act.

The first bargaining session following initiation of the work stoppage occurred on 1 November 1984. Although at the time, coal haulers were bidding jobs so low that they were pricing themselves out of the market, barely being able to meet expenses, Respondent offered to sign the new 1984 National Bituminous Coal Wage Agreement. The Union, however, refused Respondent's offer. The Union explained that, at the time, a third of its membership was idle and that the boom-and-bust nature of the industry required some additional protection for its people. It proposed, therefore, institution of a supplemental unemployment benefits program with severance pay provisions. These proposals were unacceptable to Respondent and no agreement was reached.

On 28 November 1984 the parties held their second negotiating session of the series. Again Respondent offered to sign the 1984 NBCWA, but the Union counterproposed additional holidays and improvements in the area of wages and hours. No agreement was reached.

On 25 January 1985[5] the parties held their fourth[6] negotiating session. Once again Respondent offered to sign the 1984 NBCWA with the proviso that the Union accept its offer immediately. Respondent took the position that if the Union again rejected its offer, it would subsequently want to bargain from scratch. The Union nevertheless rejected Respondent's offer and counterproposed a number of changes in the 1984 agreement. No agreement was reached.

The parties met to negotiate again on 20 March, 16 April, 20 May, and 7 October.[7] In accordance with the position taken by Respondent on 25 January, it offered specific individual proposals at each of these sessions along with counterproposals to the Union's demands and did not offer to sign the 1984 NBCWA as it had done previously. The Union offered its own proposals and counterproposals. No agreement was reached.

On 23 December, the Union, on behalf of the striking employees, offered to return to work. At the time the strike ended Respondent was not operating. In fact, Respondent hauled no coal from the beginning of the strike until its conclusion. It did, however, at times lease out its trucks to other companies and although Respondent's bargaining unit employees sometimes drove these trucks they were not on Respondent's payroll.

On 10 February 1986[8] Hampton wrote to Dene inquiring whether any of Respondent's unit employees had been permanently replaced and requesting information when and in what manner they were replaced if, in fact, they had been replaced. Hampton advised Dene that the information requested was necessary for the Union to adequately represent unit employees in collective bargaining and to protect their rights.

On 19 February Dene replied to Hampton promising to supply him with certain of the requested information following a scheduled 25 February meeting with various contractors whom he represented, including Respondent. Dene assured Hampton that the contractors he represented were prepared to meet individually with the Union and to continue to negotiate toward an agreement. He suggested several dates for the proposed meeting.

On 3 March Respondent and other companies met with the Union at the Western Steer Restaurant to continue negotiating toward their respective collective-bargaining agreements. As was the usual situation the various company representatives were scattered about the restaurant. Hampton arrived late, then became engaged in lengthy conversation with Dene at one table. Dene, as usual, was representing a number of different employers. Cisco was seated at another table in the back of the restaurant some distance from where Hampton and Dene were conversing, waiting for an opportunity to speak to Hampton.

About this time Cisco had received an offer from the Bethany Coal Company to haul coal from a rather inaccessible site. Any contract with Bethany would be dependent on Respondent's ability to build a road to the site over which to drive the trucks to haul the coal. During the initial roadbuilding period, no coal would be hauled and thereafter only partial loads would be hauled until the road was completed. It was this "promise" of a coal haul and the hope that it might eventually lead to a coal hauling contract about which Cisco wished to talk to Hampton. He wanted to get back to work and wanted clearance from the Union.

Finally, Hampton got up from the table where he had been talking to Dene and walked by where Cisco was sitting, apparently on his way to get a cup of coffee. Cisco called Hampton over and told him that he wanted to speak to him. Hampton came over. Cisco told him that he was trying and might be able to take a coal haul job at Glen Allen, West Virginia.[9] He described the job, including the necessity of hauling red dog[10] to build the road before actually being able to haul coal. Hampton asked Cisco whether he was going to call his men back if he succeeded in getting the coal haul contract. Cisco advised Hampton that he would call them back if he obtained a contract. Hampton asked Cisco what he intended to pay his employees. Cisco replied, referring to the early roadbuilding stages of the job, that he was going to pay them $20 to $25 per load. Hampton commented that he did not see anything wrong with that, that it was all right. Hampton added that his main concern was getting the men back to work.[11]

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[5] All subsequent dates are in 1985 unless otherwise indicated.

[6] The third negotiating session scheduled for 5 January was rescheduled when Hampton was unable to attend.

[7] Wilson Cisco was unable to attend the 7 October meeting so Hampton requested Dene to reschedule another meeting with Cisco being present. The meeting was not, however, immediately rescheduled and Hampton did not then pursue the matter.

[8] All subsequent dates are in 1986 unless otherwise indicated.

[9] The Bethany Company minesite.

[10] A substance composed of reddish ashes, derived from burning piles of rejected coal, and used especially for paving in mine areas.

Following the short discussion between Hampton and Cisco described above, the two joined Dene in more formal negotiations toward a new contract. At these negotiations, the subject of employees being paid $20 to $25 per load never came up. Dene was not made aware of the earlier conversation between Cisco and Hampton until several months later.

At the formal negotiations on 3 March no specific proposals were made by either the Union or the Respondent. Though the Union had a $2-per-hour wage increase proposal on the table over and above the 1984 NBCWA, this was not discussed because Respondent had no coal-hauling contract at the time. When Hampton asked Dene and Cisco if Respondent was willing to sign a collective-bargaining agreement for 1984, Cisco replied that he did not, at the time, have a coalhauling contract that would enable him to pay the wages and benefits provided for by the 1984 NBCWA. Hampton then asked Dene and Cisco if Respondent would be willing to sign an agreement for 1984 if the Company did not obtain a coal hauling contract. They advised Hampton that they would have to let him know some time in the future. Because Respondent declined to sign an agreement at that time, absent a coal hauling agreement, Hampton felt it was fruitless to attempt further negotiations and none took place.[12]

Following the end of the strike the employees of Respondent and of other struck employers were instructed to return to work unconditionally, regardless of working conditions or wages. They were advised that after they returned to work the Union would negotiate a contract on their behalf.

As of 3 March Respondent employed no bargaining unit employees because it did not have a coal hauling contract.[13] The hiring of employees was not contemplated until the road to Glen Allen was built and it was possible to haul coal from that site.

As Cisco advised Hampton on 3 March, he was trying about that time to get a coal haul started at Glen Allen, West Virginia, for the Bethany Coal Company. There was no contract with Bethany at the time because before hauling any coal Respondent first had to build the road. For this purpose Cisco contacted the men who had been his employees before the strike and offered to pay them $20 to $25 per load to carry red dog to the new roadsite. He also made the same offer to three individuals who had never before worked for him. Under the old 1981–1984 contract, Respondent's employees were never required to haul red dog.

A number of individuals accepted Cisco's offer and began to haul red dog as contract laborers. Initially, they hauled no coal. Indeed, Cisco chose to pay these individuals as contract laborers because he was not sure whether the Company was going to be able to build a road successfully and obtain a coal hauling contract.

As contract laborers the drivers were paid fully what they earned with no taxes withheld. No workmen's compensation or unemployment was paid and no fringe benefits were granted. Unlike before the strike when Respondent paid it employees the hourly wage and fringe benefits provided for in the contract, the drivers hauling red dog in March were paid $20 to $25 per load and nothing more.

Later in March when the road was partly built Respondent was able to haul small amounts of coal out of the mine for which Bethany paid Respondent $3 per ton, then $3.25 to haul the coal to Logan, West Virginia. For the partial loads of coal as well as for the red dog, Respondent continued to pay the drivers $20 to $25 per load.

The road during this period was almost unusable, being knee deep in mud. Trucks could barely get in and out and some would get stuck even when empty. Thus, partial loads only were carried back and forth throughout the remainder of March for fear of damaging the equipment. Partial loads of red dog were carried in and partial loads of coal were carried out. It was not until April that the first full load of coal was hauled out of the mine.

On 5 March Hampton wrote a letter to Dene outlining his understanding of what had occurred at the formal negotiations conducted on 3 March. In relevant part, he advised Dene that he understood that the Respondent was not working at the time and had no contact with anyone to haul coal; and that if Respondent obtained work, Cisco would call back his old bargaining unit employees in accordance with an attached seniority list. The letter also noted that Dene had agreed to advise him whether Respondent would execute a collective-bargaining agreement without first obtaining a contract to haul coal. Dene did not reply to Hampton's letter.

By April some full loads of coal were being hauled out of Glen Allen. still, a load of red dog was being hauled in with each load of coal being hauled out, and this continued to the last of April. In each case the drivers continued to be paid by the load, whether it was for hauling a load of red dog in or a load of coal out.

By mid-April the red dog road to Glen Allen was about completed although thereafter, apparently, it was in constant need of repair. With the road's completion, Respondent was thereby enabled to haul out full loads of coal for Bethany. About 16 April Respondent rehired all of its former employees plus three new employees and put them all on its payroll. It began to pay the drivers as its own employees rather than as contract laborers. Although Respondent continued thereafter to pay the drivers on a per-load basis, it began, at that time, to deduct taxes from their wages and to make contributions to workmen's compensation.

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[11] The content of this conversation is based on the credited testimony of Cisco and of Hubert Randy Farley, a witness thereto. Where Hampton's testimony differs from that of Cisco and Farley, his is not credited.

[12] Subsequently, Hampton and Cisco discussed further the possibility of executing a new collective-bargaining agreement. However, no agreement was reached.

[13] Joseph May, an employee of Respondent, testified that he returned to work for Respondent in February. Carol Cisco, Respondent's secretary and treasurer, testifying from company records, stated that he was rehired in March. It would appear that if May were driving one of Respondent's trucks in February he may have been doing so as an independent contractor under an arrangement agreed on by Mate Creek Coal and Cisco Trucking Company, Inc. The record is not complete on this point.

From mid-April Respondent continued to haul for Bethany from Glen Allen and for other companies from other sites to various locations. The coal companies continued to pay Respondent by the ton of coal hauled and it continued to pay its employees by the load. At some point in time, Respondent gave up hauling from the Glen Allen site because the difficulty of the haul was losing money for the Company. It continued, however, to haul for other companies and each time it obtained an agreement to haul for a particular company at a certain amount per ton, Cisco would discuss the haul with his drivers and in turn offer them a per-load dollar amount. The amount agreed on per haul would be between $20 and $50 depending on the per-ton figure offered by the coal company, the size of the load, and the distance of the haul. This system of remuneration continued through the date of the hearing.

On 28 April Hampton wrote to Dene advising him that since 3 March Respondent's trucks had been seen hauling coal in the Pike County area. Hampton asked Dene if this were, in fact, the case, and if so to advise him who was driving the trucks, for whom, and under what arrangements. He asked Dene to produce the coal hauling contracts. In addition Hampton noted that he had learned that Cisco was driving a truck for Mate Creek Trucking Company on an independent contractor basis and requested Dene to advise him if the truck that Cisco was driving was one of his own and to furnish documentation on the arrangement between the Respondent and Mate Creek.

Dene responded promptly on 2 May. He advised Hampton that Respondent's trucks had been hauling coal since about 18 February[14] and that by the date of the letter all the former employees who could be contacted were driving trucks for Respondent. He added that the drivers were being paid $25 per load hauled. He then confirmed that Cisco was operating as an independent contractor hauling for Mate Creek and that Mate was leasing the trucks from Respondent.

Hampton testified that the first notification he received from Cisco trucking that its drivers were being paid by the load was the letter he received from Dene dated 2 May.[15] Hampton's reaction to this notification was to file the charge in the instant case on 19 June. At no time after learning that Respondent was paying its drivers by the load did the Union request negotiations concerning this method of payment.

Conclusions

My analysis of the above-described events leads me to conclude that Respondent did not refuse to bargain with the Union in violation of Section 8(a)(1) and (5) of the Act as alleged.

On 3 March Cisco advised Hampton that he was trying to obtain a coal haul job at Glen Allen and that to do so he would have to first build a road to the minesite. In reply to Hampton's questions, he told him that he intended to put the striking drivers back to work and pay them $20 to $25 per load. Hampton stated that he did not see anything wrong with that; that his main concern was getting the men back to work. Thus, when Respondent began to pay the drivers $20 to $25 per load shortly thereafter, this was not a unilateral change in wages and working conditions but rather the direct result of a bilateral aleatory, oral agreement whereby the new arrangement would be put in place pending Respondent's obtaining a hauling contract that would enable Cisco to sign a formal collective-bargaining agreement containing wages and benefits provided in the typical NBCWA. Indeed, when Dene, Hampton, and Cisco met later that day at the formal negotiating session, the informal "per load " agreement was not discussed because it was, of course, meant to be temporary in nature, a means by which both Respondent and the employees could get back to work. Inasmuch as Respondent had no coal hauling agreement at the time, no serious negotiations toward a permanent agreement took place during the formal session.

After he obtained permission from the Union to pay his drivers by the load, Cisco approached each of them and asked if he would be willing to work for $20 to $25 per load. This was not individual bargaining in violation of the Act but rather, an attempt to put into effect the agreement reached with the Union's representative. Indeed, because the Union and the Company had agreed on the new wage arrangement to pay by the haul was no guarantee that the drivers would be willing to work under these conditions. Cisco had to find out by speaking to them individually and obtaining their agreement. The unthinkable alternative would have been for Cisco not to tell them of the new arrangement and to surprise them at the end of the pay period with a paycheck reflecting a sum for less than they were expecting.

Hampton testified that Dene's 2 May letter was the first indication that he had from Respondent that it was paying its drivers by the load. By this time the situation had changed markedly from that which had existed back on 3 March when he agreed that a per-haul wage was all right with the Union. Since the earlier date Respondent had completed the red dog road to Glen Allen and was hauling full loads of coal from that minesite. Respondent had rehired most of its former employees, hired additional employees, and put them on its payroll. Respondent was by this time hauling for a number of coal companies and was clearly back in business.

By May conditions had sufficiently changed whereby the Union could properly expect to sit down with Respondent and negotiate toward a new and permanent agreement to take the place of the temporary "per load" agreement to which Hampton had consented on 3 March. However, Hampton did not request bargaining but instead filed the instant charge. The law under these circumstances is clear:

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[14] Dene was apparently referring to the period of time during which Cisco, his son, and his former employees were driving Cisco's trucks but were not on Respondent's payroll.

[15] Hampton testified that he heard from a third party that Respondent was paying drivers by the load but could not say whether he obtained this information before or after he received the 2 May letter.

> A union cannot charge an employer with refusal to negotiate when it has made no attempt to bring the employer to the bargaining table. *NLRB v. Columbia Enameling & Stamping Co.*, 306 U.S. 292. . . . Nor is a Union in a good position to charge an employer with bargaining in bad faith when the Union itself has exhibited little, if any, real desire to reach a bona fide contract benefiting the members of the bargaining unit which it, by law, is required to represent.[16]

Mere protesting or the filing of an unfair labor practice charge does not suffice or adequately take the place of a demand for bargaining over the issue in question.[17] I find that by failing to request bargaining over the issues involved, the Union effectively waived its right to assert that Respondent's conduct constitutes unilateral action in violation of Section 8(a)(5) and (1) of the Act.[18] Similarly, Respondent's continued practice of determining the amount of pay per haul based on the dollar-per-ton charge to the customer, the size of the load, and the distance of the haul is not individual bargaining in violation of the Act within the meaning of Section 8(a)(5) but a mere mechanical device for determining wages to be paid per load. This device could also have been the subject of bargaining if the Union had so demanded. Because the Union did not avail itself of the opportunity to request bargaining on this subject, I find it has waived its rights regarding this matter also.[19]

CONCLUSIONS OF LAW

1. Cisco Trucking Company, Inc. is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

2. The Union is a labor organization within the meaning of Section 2(5) of the Act.

3. Respondent has not engaged in unfair labor practices within the meaning of Section 8(a)(1) and (5) of the Act.

[Recommended Order omitted from publication.]

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[16] *NLRB v. Alwa Allen Industries*, 369 F.2d 310, 312 (8th Cir. 1966).

[17] *Citizens National Bank*, 245 NLRB 389 (1970); *Medicenter, Mid-South Hospital*, 221 NLRB 670 (1975).

[18] *U.S. Lingerie Corp.*, 170 NLRB 750 (1986); *Golden Bay Freight Lines*, 267 NLRB 1073 (1983).

[19] Ibid.

Casci Decorators, Inc. *and* Painters and Allied Trades Union, Local No. 61, AFL–CIO. Case 18–CA–9647

July 29, 1988

DECISION AND ORDER

BY CHAIRMAN STEPHENS AND MEMBERS BABSON AND CRACRAFT

On January 6, 1987, Administrative Law Judge Walter J. Alprin issued the attached decision. The General Counsel filed exceptions and a supporting brief.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and brief and has decided to affirm the judge's rulings, findings,[1] and conclusions[2] only to the extent consistent with this Decision and Order.

The judge found the Respondent, as a member in good standing of a multiemployer bargaining association, was bound by the terms of the 1984–1986 agreement negotiated and signed on its behalf by the St. Paul Chapter, Painting and Decorating Contractor's Association (the Association). He further found a violation of Section 8(a)(1) and (5) of the Act by the Respondent's denial of the Union's request to inspect the Respondent's records in accordance with the contract. The judge concluded, however, that because the Respondent already was bound to the 1984–1986 agreement by the Association, its refusal to execute a copy of the contract on the Union's request was not a violation of the Act. The General Counsel has excepted to this failure to find a violation.

It is an unfair labor practice for an employer to refuse to execute a collective-bargaining agreement negotiated on its behalf by a multiemployer association. *H. J. Heinz Co. v. NLRB*, 311 U.S. 514, 525–526 (1941); *Strong Roofing & Insulating Co.*, 152 NLRB 9, 13 (1965), affd. 393 U.S. 357 (1969). Accordingly, we find the Respondent's refusal to execute a copy of the contract on the Union's request violated the Act, and we will order that the Respondent remedy its violation by signing the contract.[3]

We agree with the judge in finding that the Respondent was bound by the contract, and thus ordering the Respondent to permit the Union to inspect its records on request. The General Counsel has excepted to the judge's failure to additionally provide a make-whole remedy in the event the record inspection reveals a failure to abide by the contract. Because the judge found the Respondent to be bound by the terms and conditions of the contract, and because we have found above that the Respondent unlawfully failed to execute the agreed-upon contract, we deem it appropriate to order the Respondent to make employees whole, with interest,[4] for any failure to comply with the

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[1] We correct the judge's inadvertent failure to find that the Union is the collective-bargaining representative for the Respondent's employees in the following appropriate unit:

> All journeymen and apprentice painters, decorators, paperhangers, drywall finishers and applicators, drywall sanders, using tools of the trade to apply or remove materials used for, or preparatory to decorating, protecting surfaces, coatings, and/or coverings employed by the employer members of the Association, including Respondent; excluding office clerical employees, professional employees, guards and supervisors as defined in the Act, and all other employees.

The General Counsel has excepted to the judge's failure to provide for the mailing of the notice to employees. We find no merit to this exception. The General Counsel also has requested the inclusion of a visitatorial clause in the Order. Under the circumstances of this case, we find it unnecessary to include such a clause. *Cherokee Marine Terminal*, 287 NLRB 1080 (1988).

[2] We find it unnecessary to rely on the judge's reference to *Torrington Construction Co.*, 235 NLRB 1540 fn. 2 (1978), as all the Union's requests to examine the Respondent's records occurred within the 10(b) period. Moreover, with respect to the alleged violation concerning the refusal to sign the collective-bargaining agreement, we find no event in 1984, or indeed at any time outside the 10(b) period, which would constitute clear notice to the Union that the Respondent was refusing to execute the agreement sufficient to render the limitation provisions in Sec. 10(b) a bar. See *L. C. Cassidy & Son, Inc.*, 185 NLRB 920, 926 (1970).

[3] Contrary to our dissenting colleague, we find that the violation alleged in the complaint and litigated at the hearing was failure to execute the collective-bargaining agreement—not repudiation of the contract. Although the charge alleged repudiation, we find no reference to this issue in the complaint. In any event, based on our review of the record, we cannot agree the repudiation theory was fully litigated.

Further, we find our colleague's attempt to distinguish this case from *Strong Roofing*, supra, unpersuasive. First, the Respondent in this case has never claimed or conceded that it was already bound by the signature of the president of the multiemployer association and never argued therefore that it was not obligated to execute the contract. Second, in a departure from its own recent past practice, the multiemployer association here did advise the Union after the contract was negotiated that each individual employer would need to sign the contract on its own behalf. In this respect, this case is akin to *Strong Roofing* except that there the practice of individual members of the multiemployer association signing association-negotiated agreements was clear and longstanding. Third, in *Strong Roofing*, the Court noted broadly that "the Board is expressly invited by the Act to determine whether an employer has refused to bargain in good faith and thereby violated § 8(a)(5) by resisting 'the execution of a written contract incorporating any agreement reached if requested by either party.'" 393 U.S. 357 at 361 (citations omitted). Moreover, in *H. J. Heinz*, supra, in which the Court held that the refusal to sign a collective-bargaining agreement on request is an unfair labor practice, the Court underscored, likewise in broad language, the importance of the obligation to sign a contract, if requested, once agreement has been reached: "[E]xperience has shown that refusal to sign a written contract has been a not infrequent means of frustrating the bargaining process . . . . [T]he signed agreement has been regarded as the effective instrument of stabilizing labor relations and preventing, through collective bargaining, strikes and industrial strife." 311 U.S. 514, 523–524 (footnote omitted). Accordingly, we view our granting of the remedy sought by the General Counsel in this case as proper.

[4] In accordance with our decision in *New Horizons for the Retarded*, 283 NLRB 1173 (1987), interest on and after January 1, 1987, shall be computed at the "short-term Federal rate" for the underpayment of taxes as set out in the 1986 amendment to 26 U.S.C. § 6621. Interest on amounts accrued prior to January 1, 1987 (the effective date of the 1986 amendment to 26 U.S.C. § 6621), shall be computed in accordance with *Florida Steel Corp.*, 231 NLRB 651 (1977), or *Merryweather Optical Co.*, 240 NLRB 1213 (1979), as appropriate.

289 NLRB No. 155

contract. See, e.g., *Seneca Environmental Products*, 243 NLRB 624 fn. 2 (1979).

ORDER

The National Labor Relations Board orders that the Respondent, Casci Decorators, Inc., St. Paul, Minnesota, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Refusing to permit Painters and Allied Trades Union, Local No. 61, AFL-CIO to inspect employee lists, payroll records, and timecards regarding all employee members of the bargaining unit, for the period between June 25, 1984, and April 30, 1986.

(b) Refusing, on request by the Union, to execute the 1984-1986 collective-bargaining agreement negotiated on its behalf by the St. Paul Chapter, Painting and Decorating Contractor's Association.

(c) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Provide Painters and Allied Trades Union, Local No. 61, AFL-CIO, on request, inspection of employee lists, payroll records, and timecards regarding all employee members of the bargaining unit for the period between June 25, 1984, and April 30, 1986.

(b) In the event of a failure to comply with the terms and conditions of the 1984-1986 collective-bargaining agreement, make employees whole for any losses they have suffered by reason of its failure, plus interest.

(c) Preserve and, on request, make available to the Board or its agents for examination and copying, all payroll records, social security payment records, timecards, personnel records and reports, and all other records necessary to analyze the amount of backpay due under the terms of this Order.

(d) On request by the Union, execute the 1984-1986 collective-bargaining agreement negotiated on its behalf by the St. Paul Chapter, Painting and Decorating Contractor's Association.

(e) Post at its facility in St. Paul, Minnesota, copies of the attached notice marked "Appendix."[5] Copies of the notice, on forms provided by the Regional Director for Region 18, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material.

(f) Notify the Regional Director in writing within 20 days from the date of this Order what steps the Respondent has taken to comply.

CHAIRMAN STEPHENS, concurring and dissenting.

I join my colleagues in adopting the judge's factual findings and his conclusion that the Respondent violated Section 8(a)(5) and (1) of the Act by refusing to provide certain information to the Union. I also join them in granting the General Counsel's exception to the judge's failure to provide a make-whole remedy to cover any losses resulting from the Respondent's failure to comply with the collective-bargaining agreement. I would not, however, grant the General Counsel's exception regarding the judge's failure to find a violation of the Respondent's failure to execute the collective-bargaining agreement. Rather, I would predicate the make-whole remedy on what, in my view, was the violation actually litigated—the Respondent's repudiation of the agreement, quite apart from any obligation the Respondent might have had to add its signature to that of the president of its bargaining representative, the St. Paul Chapter, Decorating Contractor's Association.

The complaint in this case alleged that the Respondent violated Section 8(a)(5) and (1) of the Act by failing to recognize the Union as the unit employees' collective-bargaining representative and, in particular, by failing to comply with the Union's request that it execute the agreement reached on the Respondent's behalf by the Association and by failing to furnish the Union information it needed to determine whether contract terms, including pension provisions, were being complied with. At the hearing, however, apart from the refusal-to-provide-information allegation, the main issue actually litigated was whether the Respondent had any obligation to honor the 1984-1986 agreement at all or whether it had been privileged to repudiate it from the outset.

The Respondent contended that the execution of the agreement by the Association did not bind the Respondent to the agreement. The judge, however, properly rejected that argument, finding that the established practice had been for the agreement to be executed on the members' behalf through the signature of the Association's president. Thus, the Respondent's refusal to sign the agreement and the reason it has given for that refusal (i.e., its rejected claim that it had made a timely withdrawal from the Association before the agreement was negotiated) are simply manifestations of the Respondent's unlawful repudiation of the agreement and not a failure to provide a signature that the parties had agreed was legally significant.[1] Therefore, under the reasoning of the judge, which I would adopt, a signature by the Respondent on the now expired collective-bargaining agreement is a meaningless act. It is the Respondent's agreement to cease and desist from repudiating a properly executed and fully binding contract that is required to remedy the essential violation here.

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[5] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

I would therefore deny the General Counsel's exception to the judge's failure to find an independent refusal-to-sign allegation, but I would conform the Conclusions of Law and the Order to the violations that the parties actually litigated and that the judge's factual findings support. As explained above, I would find that those violations include the Respondent's repudiation of a properly executed collective-bargaining agreement and, for that violation, I would grant a make-whole remedy for any losses resulting from the repudiation of the agreement.

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[1] This case is therefore unlike *NLRB v. Strong Roofing & Insulating Co.*, 393 U.S. 387 (1969), affg. 152 NLRB 9 (1965). There the evidence showed a practice under which members of the multiemployer association would separately sign copies of the association agreement after it was negotiated. 152 NLRB at 13.

Although the Respondent was first requested to sign the agreement in 1984, I find no merit in the Respondent's contention that the limitations provision in Sec. 10(b) is a bar. The Respondent sporadically submitted fringe benefit reports to the Union after the contract at issue here became effective and, as the evidence supporting the refusal-to-provide-information allegation shows, the Respondent sought to evade the Union's attempts to secure records to see whether the Respondent was in fact honoring the agreement. Therefore, it cannot be said that the Union was on notice more than 6 months before April 29, 1986, when it filed its charge, that the Respondent was taking the position that it was not bound by the agreement.

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

WE WILL NOT refuse to permit Painters and Allied Trades Union, Local No. 61, AFL–CIO to inspect employee lists, payroll records, and timecards regarding all employee members of the bargaining unit, for the period between June 25, 1984, and April 30, 1986.

WE WILL NOT refuse, on request by the Union, to execute the 1984–1986 collective-bargaining agreement negotiated on our behalf by the St. Paul Chapter, Painting and Decorating Contractor's Association.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL provide Painters and Allied Trades Union, Local No. 61, AFL–CIO, on request, inspection of employee lists, payroll records, and timecards regarding all employee members of the bargaining unit, for the period between June 25, 1984, and April 30, 1986.

WE WILL, in the event of a failure to comply with the terms and conditions of the 1984–1986 collective-bargaining agreement, make employees whole for any losses they have suffered by reason of our failure, plus interest.

WE WILL, on request by the Union, execute the 1984—1986 collective-bargaining agreement negotiated on our behalf by the St. Paul Chapter, Painting and Decorating Contractor's Association.

CASCI DECORATORS, INC.

Robert V. Johnson, Esq., for the General Counsel.
Ronald J. Raich, Esq. (Peterson, Franke, Gray & Raich), of Roseville, Minnesota, for the Respondent.

DECISION

STATEMENT OF THE CASE

WALTER J. ALPRIN, Administrative Law Judge. Painters and Allied Trades Union, Local No. 61, AFL–CIO (the Union) filed a charge on 29 April 1986[1] against Casci Decorators, Inc. (Respondent). Complaint issued 20 June, and hearing was held at Minneapolis, Minnesota, on 16 and 17 July. The ultimate issues of this matter are whether Respondent refused to execute a bargaining agreement entered into with the Union through an employers' association, and whether Respondent refused to provide the Union with information properly demanded by the Union, all in violation of Section 8(a)(1) and (5) of the National Labor Relations Act (the Act).

On the entire record, including my observation of the demeanor of the witnesses and consideration of the briefs submitted, I make the following

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[1] All dates are in 1986 unless otherwise indicated.

Findings of Fact

I. JURISDICTION

Respondent is a painting and decorating contractor in St. Paul, Minnesota. There is neither allegation nor proof that Respondent individually met the jurisdictional requirements for this proceeding, but it is alleged that Respondent was for the period here involved a member of the St. Paul Chapter, Painting and Decorating Contractor's Association (Association) and that the Association has met the jurisdictional standards. Schletty-McCann, a painting and decorating contractor member of the Association, did business in Wisconsin during 1985 on a contract value at $350,000, had a volume of business in South Dakota of $100,000, and had purchases delivered to it or to a jobsite, from outside of Minnesota, of over $400,000. Hamernick Decorating is also a member of the Association and meets jurisdictional standards for this proceeding. All members of the Association thereby come within the jurisdiction of the Act. This decision will find that Respondent was a member of the Association, and hence is subject to the jurisdiction of the Act.

Respondent admits and I find that the Union is now and has at all material times been a labor organization within the meaning of Section 2(5) of the Act.

II. BACKGROUND

A. *Prior Dealings*

The Association has for at least 20 years functioned as a multiemployer bargaining agent with the Union. The last two agreements were effective from 9 June 1981 to 30 April 1984, and from 25 June 1984 to 30 April 1986. The 1984–1986 agreement, which is the subject matter of this dispute, merely extended the 1981–1984 agreement with several changes not here relevant.

The last "long form" agreement was 1981–1984. The following provisions of that agreement are pertinent:

> Article II—Parties:
>
> Whenever the word "Association" is used herein it shall mean the St. Paul Chapter, Painting and Decorating Contractors Association and all of its members individually and collectively, whether now belonging to said Association or who may hereafter be admitted to membership.
>
> Article III—Recognition
>
> Section 1: The Association and the Union recognize that the Unit for collective bargaining, hereinafter referred to as the "Bargaining Unit" is: All . . . painters, decorators . . . who are employed to do such work by the present and future employer members of the Association.
>
> Section 2(a): [The Association][2] recognizes [the Union] as the bargaining agent of all the Employees employed by the Contractors herein wherever such employees may be employed.
>
> Section 2(b): [The Union] recognizes [the Association] as the representative of all its members present and future and all signators to this instrument[3] until its termination date for such purposes as may be necessary for the administration of this agreement.
>
> Section 3(a): Each employer agrees to . . . permit duly acredited representatives of the Union to visit his shop and office . . . for the purpose of inspecting lists of Employees, payroll records and timecards in order to determine whether the shop is being conducted in accordance with this Agreement.
>
> Article XXVIII Fringe Benefit Trust Funds
>
> (a) HEALTH AND WELFARE FUND—All employers covered by this Agreement shall contribute to the St. Paul Painting Industry Welfare Fund.
> (b) PENSION FUND—[Same Provision]
> (c) VACATION FUND—[Same Provision]
>
> Article XXX Duration of Agreement
>
> This Agreement shall be in full force and effect . . . [to] April 30, 1984, and shall continue from year to year thereafter unless written notice of desire to change, cancel or termination is served . . . not less than (6) nor more than (90) days prior to April 30, 1984 [or expiration date] of any subsequent contract year.

At the end of the agreement it is stated "In witness whereof the parties have hereunto set their hands and seals, this (blank) day of (blank), 19 (blank)." Space is provided thereafter for "Name of Employer (please print)" and address, phone, liability insurance and bond company and certificate numbers, whether "employer" is a sole proprietorship, partnership, or corporation, the printed names, residence, and phone numbers of partners or corporate officers and the State of incorporation.

The 1981–1984 agreement was signed "For Employer" by the Association president. The same form of signature had been used in at least the two prior agreements, from 1977–1978 and from 1978–1981. In the pertinent agreement, however, 1984–1986, none of the individual information of the prior agreement was called for, and only the signatures of the Union's business manager and of the Association president are called for or given.

Various letters and other documents exchanged during negotiations have been entered in the record. In February 1978, the Association noted reopening of negotiations between the Association "and its members and the" Union. In March 1978, the Association advised the Union "that per Article III, Section 3, Paragraphs (a) and (b) we do represent all signators," referring to Association members and to nonmembers who authorized the Association to negotiate on their behalf. An Association letter requested the Union to provide "a current list of all such signators with proof of bonds, Employment identification number and insurance" referring to nonmembers who had agreed with the Union to comply with the terms of the union agreement with the Association.

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[2] Parenthetical provisions are all added or are substitutions.

[3] Oral testimony established that at times the Association nonmembers authorized the Association to be their bargaining agent and executed the agreements in addition to the execution by the Association on behalf of its members.

Minutes of the Association meeting of 17 January 1984 advised that: "Must let Union know by 2/1/84 if you wish to negotiate on your own or do not want to be part of bargaining. Get an attorney." Respondent also produced an undated letter, signed by Jesse Marks, the Association's financial secretary, that "effective May 1, 1984" the Association would not sign the new agreement on behalf of the members, but that each member would have to sign on his individual behalf. Marks testified that he prepared this document 10 days prior to the opening of the hearing, that it represented his best recollection of a letter signed and sent to the Union by the Association president prior to the opening of negotiations, and that he could find no copy of that actual letter in the Association files. The Association's president at that time, Draeger, had previously testified that neither he nor anyone else on behalf of the Association had advised the Union prior to 15 October 1984 that they desired the already negotiated agreement to be executed by the individual members for themselves. On that date, 15 October 1984, Draeger did send the Union a letter advising that he was signing the agreement "on behalf of the St. Paul Chapter PDCA Negotiating Committee with acceptance of the language as agreed and not acceptance for the St. Paul Chapter as a whole." The letter continued that "It has been decided, by our members, that each individual member should sign any agreement with [the Union] for themselves." That letter was after the 1984–1986 contract had been fully negotiated, but prior to negotiations for the next contract. In February 1986, the Association advised the Union that it would serve in future negotiating sessions only "as a negotiator solely in a representative capacity" and that the 16 listed employers, including Respondent, "in behalf of whom we negotiate have reserved the right to determine whether they wish to be bound or not to be bound . . . on an individual employer basis."

B. *Respondent's Connection with the Association*

Respondent was a member of the Association since at least 1974. During 1984, while the 1984–1986 agreement was negotiated, Respondent was a member of the Association, paying dues and submitting its monthly reports for the various funds. It further made monthly payments to the funds, ranging up to $806, on behalf of employees Lampman, Johnson, and Mikelsoo through 1985. The 1985 and 1986 classified telephone directory display listings of the Association identified Respondent as a member. Respondent never took any action to withdraw from the Association, and never directly notified the Union that it did not intend to be bound by any agreement negotiated by the Association unless it signed it separately. When Lampman was hired in 1985, he was told by Respondent that it operated a union shop. Respondent testified that since about 1984 it had begun using independent contractors, in addition to work by corporate officers. It still had one union employee shortly before the hearing, but he was not a member of the Charging Party local.

III. UNFAIR LABOR PRACTICES

On 4 November 1985, counsel for the Union sent Respondent a letter citing the appropriate authority of the 1984–1986 agreement, stating that "You will be contacted by Eugene C. Roberson, Certified Public Accountant, to arrange a time for him to inspect employee lists, payroll records, and time cards" in accordance with that provision of the contract. It is admitted that oral requests were also made on 13 January and 4 February 1986.[4] Respondent has refused to permit such inspection, and has consistently refused to execute the 1984–1986 agreement.

IV. DISCUSSION

Respondent paid its Association dues and assessments, and has made no attempt to disclaim membership in or disassociate itself from the Association. It clearly did not withdraw from Association membership or from multiemployer bargaining prior to negotiation of the 1984–1986 agreement. See *Edward Cooper Painting*, 273 NLRB 1870, 1877 (1985). It is therefore subject to the jurisdiction of the Act as conferred through the Association, discussed above.

Respondent is also clearly subject to the 1984–1986 agreement executed by the Association, effective 25 June 1984. The "letter" signed by Marks attempting to show that Respondent had withdrawn its authority from the Association is undoubtedly the most questionable piece of evidence I have ever seen. While I permitted the document to be entered as a notation of best recollection, it was not contemporary with the act, it was not even what it purported to be, i.e., a copy of a letter by Draeger to the Union, and was completely disavowed by the supposed author and sender, Draeger. There was not even an attempt to subpoena a supposed original copy of such a letter from the union files. Draeger testified that neither he nor anyone else on behalf of the Association had advised the Union prior to 15 October 1984 that they desired the already negotiated bargaining agreement to be executed by each member for himself. Board policy and case law is clearly that "an employer or union is free to withdraw from the multiemployer unit if it gives adequate written notice [footnote deleted] prior to the date set by the contract for notification, or to the agreed-upon date to begin the multiemployer negotiations and, in those cases where multiemployer negotiations have begun, the Board stated it would not permit, except on mutual consent, an abandonment of the unit upon which each side has committed itself to the other, absent unusual circumstances."[5] I find no unusual circumstances in this matter.

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[4] Respondent's answer admitted only that the requests were for "payroll records." In view of the demand letter I find that the requests were all for the three types of records enumerated. The oral demands bring the allegations within the 6-month limitation period of Sec. 10(b) of the Act, since it represents a continuing demand. See *Al Bryant, Inc.*, 260 NLRB 128, 135 (1982), citing *Torrington Construction Co.*, 235 NLRB 1540 fn. 2 (1978).

Respondent is therefore bound by the terms of the 1984–1986 agreement, and was required to submit to the examination requested. Its failure to do so was a violation of Section 8(a)(1) and (5) of the Act. Its refusal to execute a copy of the agreement, however, was not a violation. Being already bound to the agreement by the Association's execution on its behalf, Respondent was not required to execute it a second time.

CONCLUSIONS OF LAW

1. Casci Decorators, Inc. of St. Paul, Minnesota, the Respondent, is an employer engaged in commerce within the meaning of the Act.

2. Painters and Allied Trades Union, Local No. 61, AFL–CIO is a labor organization within the meaning of Section 2(5) of the Act.

3. Casci Decorators, Inc. and Painters and Allied Trades Union, Local No. 61, AFL–CIO are parties to a collective-bargaining agreement effective from 25 June 1984 to 30 April 1986.

4. By failing and refusing to permit inspection of employee lists, payroll records, and timecards, Casci Decorators, Inc. violated Section 8(a)(1) and (5) of the Act.

5. The aforesaid violation constitutes an unfair labor practice effecting commerce within the meaning of Section 2(6) and (7) of the Act.

THE REMEDY

Having found that Respondent engaged in certain unfair labor practices, I find it necessary to order it to cease and desist and to take certain affirmative action designed to effectuate the policies of the Act, to wit, permitting inspection of the records demanded for any period covered by the collective-bargaining agreement, up to 30 April 1986.

[Recommended Order omitted from publication.]

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[5] *Acropolis Painting*, 272 NLRB 150, 154 (1984), citing and quoting *Retail Associates*, 120 NLRB 388, 395 (1958). Parenthetical material added. See in particular *Edward Cooper Painting*, supra.

York Products, Inc., d/b/a Mastercraft Casket Company *and* **Chester J. Golat et al.** Case 18-CA-9923

July 29, 1988

DECISION AND ORDER

BY CHAIRMAN STEPHENS AND MEMBERS JOHANSEN AND BABSON

On September 30, 1987, Administrative Law Judge Michael O. Miller issued the attached decision. The Respondent and the General Counsel filed exceptions and supporting briefs.[1] The Respondent filed a response brief and a motion to strike the General Counsel's exceptions and brief.[2] The General Counsel filed a statement in opposition to the motion to strike.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings, and conclusions[3] and to adopt the recommended Order.[4]

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge and orders that the Respondent, York Products, Inc., d/b/a Mastercraft Casket Company, Ladysmith, Wisconsin, its officers, agents, successors, and assigns, shall take the action set forth in the Order.

James L. Fox, Esq., for the General Counsel
Donald W. Jones, Esq. (Hulston, Jones & Sullivan), of Springfield, Missouri, for the Respondent.
Chester J. Golat, of Ladysmith, Wisconsin, for the Charging Party.

DECISION

STATEMENT OF THE CASE

MICHAEL O. MILLER, Administrative Law Judge. This case was heard in Ladysmith, Wisconsin, on 12 and 13 May 1987 based on an unfair labor practice charge filed by Chester J. Golat, et al., on 23 January 1987 and a complaint issued by the Regional Director for Region 18 of the National Labor Relations Board (the Board), on 27 March 1987. The complaint alleges that York Products, Inc., d/b/a Mastercraft Casket Company[1] (Respondent) violated Section 8(a)(3) and (1) of the National Labor Relations Act (the Act) by failing and refusing to recall employees from layoff because of their union activity; by blaming an earlier layoff on the employees' union activity; and by threatening loss of employment if the employees supported a union. Respondent's timely filed answer denies the commission of any unfair labor practices.

All parties were afforded full opportunity to examine and cross-examine witnesses, to argue orally, and to submit briefs. Briefs, which have been carefully considered, were submitted by the General Counsel and the Respondent.

Based on the entire record,[2] including my observations of the demeanor of the witnesses, I make the following

FINDINGS OF FACT

I. THE RESPONDENT'S BUSINESS AND THE UNION'S LABOR ORGANIZATION STATUS—PRELIMINARY CONCLUSIONS OF LAW

Respondent, a Delaware corporation, is engaged at Ladysmith, Wisconsin in the manufacture, sale, and distribution of caskets. Jurisdiction is not in issue. The complaint alleges, Respondent admits, and I find and conclude that Respondent is, and has been at all times material, an employer engaged in commerce and in operations affecting commerce within the meaning of Section 2(2), (6), and (7) of the Act.

The complaint alleges, Respondent admits, and I find and conclude that General Teamsters Union, Local 662, affiliated with International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America (th Union) is, and has been at all material times, a labor or ganization within the meaning of Section 2(5) of the Act

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[1] The General Counsel and the Respondent except to the judge's findings concerning the seniority of the sewers who were recalled. As the judge noted in his decision, under the Respondent's seniority policy, an employee's seniority date is July 1 following his or her date of hire. Thus, although an individual may have started working prior to the time another employee was hired, he or she would not necessarily have greater seniority then the later hired person. Applying this policy, the judge's conclusions that Winter had more seniority than any of the sewers not recalled except Barber and that no sewer with less seniority than Yakovetz was recalled are correct. In addition, although Barber and Coats had the same seniority date, the judge did state correctly that Barber was "nominally more senior" than Coats by virtue of the fact that Barber was hired 17 days before Coats.

The General Counsel also requested that a visitatorial provision be granted. We deny this request as unnecessary. *Cherokee Marine Terminal*, 287 NLRB 1080 (1988).

[2] The Respondent's motion to strike the General Counsel's exceptions and brief is denied.

[3] Chairman Stephens would not find that the Respondent violated Sec. 8(a)(1) of the Act through its plant manager's statement that he had laid off his wife and daughter-in-law because the Union had discovered that he was favoring his family. There is no suggestion that this action was taken because of the two women's sentiments either for or against the Union; and Chairman Stephens is unable to find that any employee would reasonably tend to be coerced in the exercise of Sec. 7 rights by the suggestion that favoritism towards managers' relatives might be discouraged or even eliminated once the Union learned of it.

[4] The parties submitted to the judge a stipulation to correct certain errors in the transcript. The judge's decision notes that the stipulation was received, but relies on the uncorrected testimony. We rely on the transcript as corrected, but find that the differences do not affect the outcome of this case.

[1] Respondent's name was amended at the hearing.

[2] The stipulation to correct the record submitted jointly by counsel the General Counsel and Respondent is received.

289 NLRB No. 157

II. THE UNFAIR LABOR PRACTICES

A. *Background*

Respondent, a Mastercraft Casket Company, began its operations about 1961. In 1984, Mastercraft was acquired by Amedco and, in turn, Amedco was acquired by Service Corporation International (SCI) on 26 September 1986. SCI is a publicly held corporation owning and operating about 300 funeral homes, cemeteries, and flower shops and had previously been one of Respondent's customers. Robert Betthauser, one of Mastercraft's founders, continued throughout its operation to be the chief executive officer and is presently the president of Mastercraft and vice president of manufacturing for York Products.

B. *Union Activity*

Respondent's employees are not represented by any labor organization. In February 1986,[3] however, a union organization campaign began. Among the employees involved from the start were Chester Golat, Harold Novak, Larry Kroening, Bernie Marshall, and Joe Smith. The first union meeting was held about 7 February, attended by 30 to 40 employees. A petition for an election was filed about 24 February and, following the execution of a consent agreement, an election was held on 18 April. All but two or three of Respondent's employees voted. The vote was 64 for no union, 38 for the Union.

While Respondent had campaigned against the Union, no objections to the conduct of the election were filed. However, on 16 April the Union filed an unfair labor practice charge that led to the 26 June issuance of a complaint alleging that Respondent had violated Section 8(a)(3) and (1) by laying off 27 employees between 21 March and 11 April and by otherwise engaging in conduct that interfered with, restrained, and coerced the employees. On 13 August, prior to a hearing, Respondent and the Union adjusted the allegations of the complaint. The employees who had been laid off received backpay, the charge was withdrawn, and the complaint was dismissed.[4] There has been no resumption of union activity since the election.

C. *Evidence of Antiunion Animus and 8(a)(1) Allegations*

Respondent concedes that it campaigned against the Union during the election campaign. It denies, however, that its campaigning overstepped statutory bounds. The General Counsel contends that there was extensive evidence of antiunion animus. Eight witnesses for the General Counsel testified that they heard James Ewer, the plant foreman, threaten that if the Union came in, the plant's doors would be shut. These witnesses claim to have heard it varying numbers of times. Thus, Susan Celske and Carol Braden heard him say it at least once, Mark Stranger heard it more than once, Joe Marshall heard it twice, and Mildred Yakovetz heard it at least four times. Chester Golat and Priscilla Barber recalled hearing him say it as often as three or four times per week and Harold Novak claimed to have heard it two or three times per day. James Ewer did not deny having said it; he admitted saying it to Golat in 1984 and further admitted the possibility that he may have said it sometime during 1986. Priscilla Barber also testified, without contradiction, that during the week of the election, Jim Ewer told her that after the plant shut down, Respondent would select the people they wanted to come back and production would get tougher. Even allowing for some exaggeration by Novak, Golat, and Barber with respect to the frequency of threats to close, I am convinced that James Ewer repeatedly told employees that the plant would close if the Union came in. He also threatened to eliminate union supporters during a layoff. James Ewer was opposed to the Union, even according to Foreman Ray Frafjord, and expressed his animus to the employees.

Shortly after the start of the union activity, Carol Braden heard Jim Ewer refer to Mildred Yakovetz and Priscilla Barber as troublemakers and say that Barbara Novak was working on the Union's behalf with her husband, Harold. Her testimony is uncontradicted.[5] She further testified that she heard Jim Ewer's wife, Florence, repeat what had been said to her by Jim, to the effect that if the Union got in, the Company would have big layoffs and switch people around to get rid of the troublemakers, naming Yakovetz and Barber. Florence Ewer denied saying this to Braden. I deem Braden's credible testimony in this regard both corroborative of, and corroborated by, Barber's uncontradicted testimony, described above.

The General Counsel's witnesses also attributed animus-laden statements to Rick Ewer, Jim Ewer's son. To the extent that Rick Ewer was purporting to speak on his own behalf, I find that those statements, while undenied, are entitled to little weight inasmuch as Rick Ewer, as an assistant foreman, did not possess supervisory authority.[6] That principle does not apply, however, when Rick Ewer purported to speak for others with supervisory authority. Thus, around the time of the March layoffs, Rick Ewer told Chester Golat and Joe Marshall that Betthauser had referred to Golat, Marshall, Harold Novak, and others as being "up a creek without a paddle in a boat that was sinking fast" because of their support for the Union. Golat's testimony with respect to this statement was corroborated by Marshall; Bethauser did not deny having make such a statement to Rick Ewer. In view of those facts and both Rick Ewer's role as an assistant foreman and his relationship to the plant foreman, which give his statements the likelihood of reliability, this testimony has probative worth even though it is hearsay. See *K & S Circuits*, 255 NLRB 1270, 1274 fn. 10 (1981), and *RJR Communications*, 248 NLRB 920, 921 (1980). On the other side of the coin, I note that during the same period, Rick Ewer also told Golat that if he took a voluntary layoff he would probably not be called back. Jim Ewer, hearing the statement, contradicted Rick and stated that he believed Golat would be recalled.

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[3] All dates are 1986 unless otherwise specified.

[4] The General Counsel makes no contentions, and I make no conclusions, with respect to whether the March-April layoff was discriminatorily motivated.

[5] She also testified, without contradiction, that Ewer said that the Company would "try to unload [Mark Stranger] except that he had hurt his back and they thought he might sue him." She was unsure of the date, but placed this testimony about the inception of the union activity. However, Stranger's injury was sustained in June.

[6] Chester Golat allegedly observed Rick Ewer discharge an individual named Stanley Tims for returning late from an excused absence. Respondent's credible evidence indicates that there was no such employee. There had been an employee, Stanley Tipsin, who was fired by Rick Ewer but at his father's direction for insisting on taking unauthorized leave. The only other record evidence on the subject indicates that Rick Ewer attempted to direct the work of some employees, which direction was frequently ignored.

Several days before the 18 April election, Foremen Ray Frafjord told employee Joe Marshall that if he knew what was good for him, he would remove his union button and change his mind. This testimony is undenied. At the conclusion of the election on 18 April, Mark Stanger, who had been the Union's observer, allegedly heard Frafjord say, "You can kiss his ass goodbye." He did not hear his name mentioned. However, Priscilla Barber claims to have heard Frafjord say, "Stanger, your ass will be out the door when this union thing is over." Frafjord denies making any such statement. Noting the contradictions between Stanger and Barber and Frafjord's otherwise credible and candid testimony, I find the evidence that he made such a statement insufficient to sustain the General Counsel's burden.

In late or early July, Jim Ewer had a conversation at work with Florence, his wife, which Priscilla Barber overheard.[7] Ewer told his wife that "they are going to start thinning out---they are going to lay off and thin out the union people." In the same time period, he allegedly told Barber and two others employees that they would have to watch the capping table "because he had to lay off his wife and daughter-in-law because the damned union figured out that he was favoring his family." He repeated that "they would have to layoff and thin out the union people." Again, in mid-September, just before the September layoffs, Barber heard Jim Ewer tell Florence that he was going to clean house and throw out a few people.[8]

The General Counsel's complaint alleges Jim Ewer's July or August statement, blaming the Union's knowledge of his favoritism toward family members for the layoffs of his wife and daughter-in-law, as a violation of Section 8(a)(1). That complaint was expressly amended at the conclusion of the General Counsel's case, over Respondent's objection, to further allege as violative his late July/early August statements about using layoffs to thin out the union people. Notwithstanding those express allegations, neither Jim nor Florence Ewer contradicted Barber's testimony of the July/August statements. Barber's uncontradicted testimony, even if deemed uncorroborated, is sufficient evidence to sustain the General Counsel's burden of proof. Moreover, it was essentially corroborated by the similar statements Jim Ewer made before the election. I also find that Barber's testimony with respect to when these statements were made, late July or early August, is sufficiently definite to warrant the conclusion that they occurred after 22 July and within the 10(b) period. Accordingly, I find, as alleged in the complaint as amended, that Respondent violated Section 8(a)(1) of the Act by these inherently threatening statements.

Jim Ewer denied making the statement that Barber attributed to him as having occurred in September and Florence Ewer had no recollection of him making any such statement at that time. Although the matter is not altogether free from doubt, I am constrained to reject the General Counsel's contention with respect to this allegation. Barber acknowleged that there was no mention of the Union in this latter statement and, while Ewer's earlier statements would justify the suspicion that he was again referring to union supporters, the testimony is too ambiguous to warrant a finding of a violation, particularly in light of the quality control program being instituted at that time (discussed infra) to which he could conceivably have been referring. Accordingly, I shall recommend that this allegation be dismissed.

Barber further testified that while she was visiting the plant in mid-October during the layoff (discussed infra), Florence Ewer said that Jim told her that when he had gone to Betthauser with a list of employees he wanted to recall, Betthauser had rebuffed him. Betthauser allegedly said that he Betthauser would do the recalls, recalling his "loyal" employees. The statements are denied by both Ewers and by Betthauser and I find the hearsay evidence too remote to carry any weight in light of those denials.

D. *September 1986—Quality Control Program and Layoffs*

As noted, Respondent's customers included funeral homes and casket distributors who are not affiliated with SCI. Because those customers did not want to give their casket business to a competitor, "the bottom fell out" of Respondent's business in September when SCI took over. The Company ran out of orders, and between 15 September and 6 October, laid off 81 employees. The majority were laid off on 29 September. The General Counsel does not contend that the layoff, as distinguished from the failure to recall certain employees, was unlawful.

Conptemporaneous with this downturn in orders, Respondent was directed by its parent corporation to institute an improved quality control program. Instructions to that effect were received on 11 August, with 31 August date set for reporting back. Additional directives were received from both Amedco and SCI in September and October. As a result, Respondent implemented a quality control program in about early September. Frafjord, formerly a supervisor in the KD (welding) department, was made quality control supervisor. Joan Ewer (Jim Ewer's daughter-in-law), Sharon Hayes, and Larry Kroening (an early union supporter) were selected to work as inspectors, checking and doing minor fix-up on the caskets as they were produced. Additionally, in October after layoffs Respondent changed its written policy on layoffs and recalls to emphasize qualifications over seniority in a department were laid off first and recalled last. "Employee with the least seniority" was changed to "employee who is at least qualified." The General Counsel makes no contention that the quality control program or the changes in the policy manual were subterfuges for the discriminatory action or otherwise unlawful.

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[7] The 10(b) period began on 22 July and the General Counsel contends that this statement, if credited, should be found to violate Sec. 8(a)(1).

[8] On direct examination, Barber testified that Ewer had said that he was going to "clean house and thin out the union people." When recalled by Respondent, she acknowledged that he did not mention the Union in this September conversation.

At full capacity, with approximately 100 employees, Respondent can produce about 120 caskets per day. Its August shipments were at nearly that point. Shipments dropped to about 84 per day in September, 34 per day in October, and between 66 and 72 per day through February 1987. In March 1987 they dropped to about 53 per day.

E. *The Recalls*

On 13 and 14 October, Respondent recalled 50 employees. Between 20 October and February 1987, an additional 14 were recalled. According to Betthauser, the Company called the employees back by qualifications and seniority, by department. At the time the complaint issued, 27 March 1987, there were 17 laid-off employees who had not yet been recalled. Eight of them were alleged to be discriminatees: Chester Golat, Mark Singer, Priscilla Barber, Joseph Marshall, Mildred Yakovetz, Barbara Novak, Susan Celske, and Matthew Hall. Respondent recalled each of the eight in early April 1987, on being notified of the issuance of complaint, so as to limit its potential liability.

Included among those recalled in October were a number of individuals identified in the record as having been involved in the union activities to one degree or another. Joe Smith, Bernie Marshall, and Larry Kroening were active from the outset. Kroening, as noted, was made an inspector. Arlene Grey was promoted to leadperson. Frances Wojtyna and 20 to 30 others who had attended union meetings and/or voted for the Union were similarly recalled.

1. Paint department—Chester Golat and Joseph Marshall

Chester Golat began working for Respondent in June 1984,[9] in the paint department. For 4 months he worked as a stripper, for the next year as a primer, and thereafter, until his layoff, as the operator of a dual-action sander, a "DAer." In addition, he had loaded trucks, washed caskets, and done scuffing and capping. Jim Ewer testified that Golat was a versatile employee, one who had "helped me out a lot." In March 1986, Ewer had even written a letter of recommendation for Golat, at Golat's request, which was highly laudatory. He commented that Golat had an excellent attendance record, was dependable, conscientious, and adaptable.

Golat was one of the leaders of the union activity. He openly wore union buttons, he attended union meetings, and he passed out authorization cards. On at least one occasion, while displaying his union button, he questioned Betthauser about Respondent's encouragement of antiunion activity. Jim Ewer also observed Golat wearing a union button and Frafjord admitted discussing the union activities of Golat, Stanger, Barber, Yakovetz, Barbara Novak, Harold Novak, and others with Ewer. Betthauser had included Golat in his "sinking boat" statement, along with Joe Marshall and Harold Novak. Golat's support for the Union was known to Ray Frafjord and I find, contrary to their testimony, to Jim Ewer and Betthauser.

According to Betthauser's letter of 24 February 1987, setting forth Respondent's position on the charges (G.C. Exh. 3), Golat was not recalled earlier because, with lowered production needs, his DA job had been combined with that of the grinder, which job he had refused in March. In its subsequent statement setting forth its position (G.C. Exh. 9), Respondent further stated that had Golat not refused the grinder job in March 1986, he would have been recalled ahead of Jeff Papiernik.[10] Respondent contended that when the grinder, Harold Novak, quit on 19 March Ewer had offered that job to Golat and Golat refused. The job was then given to Jeff Papiernik. Ewer's testimony is corroborated by a note to the same effect in Golat's personnel file.

Golat and Novak, however, testified that they had trained Papiernik on the grinder job before Novak announced his intention to quit. According to Golat's specific and credible testimony,[11] he was working on the DA sander on 19 March and, because he was helping train Papiernik, was behind in his own work. At that time, Ewer asked him if he "wanted to grind a while." He replied "No. I'm behind here." He did not understand Ewer's statement to be an offer of a change in his regular job duties.

Jeff Papiernik began working in Respondent's paint department in September 1984; his seniority date was thus 1 July 1985, a year after Golat's. Nonetheless, he was recalled from layoff on 13 October and thereafter did both grinding (which Golat had taught him) and DA work. In addition, some DA work was done during this period by Max LaPorte. LaPorte had been hired in July to work part-time on the loading dock. He did not become a full-time employee until 8 September (and thus did not even have a seniority date). LaPorte had been laid off on 29 September and was recalled on 13 October. Thereafter, he loaded and unloaded trucks and helped Papiernik on the grinder and the DA sander. Respondent contended that LaPorte had been recalled ahead of those with greater seniority because he was "very versatile" and "best qualified." In light of his limited experience, especially when compared with an employee like Golat, I find this explanation to be, as claimed by the General Counsel, "demonstrable nonsense."

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[9] Under Respondent's seniority policy, an employee's seniority date is 1 July following his or her date of hire. Golat's seniority date was therefore 1 July 1984.

[10] In light of these written position statements, Ewer's testimony, and the letter of recommendation, I find that Respondent's contention on brief that Golat was not a highly regarded employee, with references to several adverse notations in his personnel file, to be mere afterthoughts entitled to weight only as evidence of a shifting position.

[11] Noting, among other things, Ewer's denial of knowledge of Golat's support for the Union and his subsequent admission that he saw Golat wearing a union button and Frafjord's candid admission that he discussed Golat's union support with Ewer, I find Ewer to be a less than fully credible witness.

Additionally, the record reflects that Brian Srp, who had only begun his employment in June, was recalled from layoff on 13 October and did grinding. He had done this work before the layoff and Respondent contended that he was the most qualified to do it. In November, during the layoff, Respondent hired a new employee, Earl Main, who was assigned to the maintenance department; he did various simple jobs such as installing handles on caskets. Two employees who quit during the layoff, Bruce Thomas and Delores Smith, were hired to do grinding and scuffing respectively while Golat, Marshall, and the others were still on layoff.

Joseph Marshall began working as a metal brusher in Respondent's paint department on 30 December 1981. He also loaded and unloaded trucks, washed caskets, installed beds and springs, operated the DA sander, and did both grinding and sanding. He had not been laid off prior to 29 September even when others in the plant had been and, before becoming involved in union activity, had frequently been called in for overtime work. Jim Ewer considered him to be an employee to whom an assignment could be given with confidence that it would be completed. Ewer testified that he "had nothing against him." His work was never criticized.

During the union campaign, Marshall talked up the Union among the employees who worked in the basement of the plant, he signed an authorization card and he attended union meetings. He also wore a union button; both Frafjord commented negatively about it. He was also one of the employees whom Betthauser included in the "sinking boat" statement as repeated by Rick Ewer to Golat.

Marshall was laid off on 29 September. Recalled to the paint department before he was offered (and declined) recall in April 1987 (in addition to Papiernik, Srp, Main, Thomas, and LaPorte, discussed above) were Joe Smith, Rick Ewer, Sharon Heath, Don Hunt, and Andrew Nelson. According to Respondent's initial statement of position, Marshall was not recalled because he was a very slow worker who was holding up production. In its subsequent statement, there was no mention of him being a slow worker. There, it was asserted that of the three people who could do the metal brushing job, including Marshall, two were recalled. One was Joe Smith who had substantially greater seniority than Marshall (and who has been identified in this record as a union supporter). The other was Rick Ewer, who, although he had less seniority, was an assistant foreman. With respect to the others, Betthauser testified that Sharon Heath had greater seniority than Marshall and was recalled to do touchup priming, scuffing, and inspecting; Don Hunt was called back to wash caskets, the job he had been doing for a number of years; and Andrew Nelson was similarly called back to do the priming work, which was his job before the layoff. Both Nelson and Hunt were less senior than Marshall but were the best qualified to do the job assigned them, according to Betthauser.

2. Mark Stanger

Mark Stanger was hired in September 1981 and was primarily a dockworker under the supervision of Delbert Thomas, foreman of shipping, receiving, maintenance, and trucking. Prior to June, the work he had done most was loading caskets; he had also installed springs and gaskets. In June, he sustained an injury and was placed on light duty. As his doctor restricted him from lifting more than 25 pounds, he was assigned to touchup work and he continued to do that job until the layoff. The General Counsel concedes that Stanger never gave the Company any written release from his lifting restriction. It appears that his work on the dock was taken over, at least in part, by Bernie Marshall.

Stanger was involved in the union activity from the beginning. He made the initial call to the Union's election observer. His union activity was known to at least Ewer and Frafjord.

Respondent asserts, and the General Counsel does not dispute, that following the layoff the touchup job was combined with the painter's. Stanger was not qualified to perform the combined job. Paul Dubiel and Bernie Marshall, both painters and loaders before the layoff, were recalled to do the combined job. Dubiel and Marshall both have less seniority than Stanger. Marshall, it should be noted, was heavily involved in the union activity.

The General Counsel does not contend that Stanger should have been recalled in place of Dubiel or Marshall. Rather, the General Counsel argues that less senior people were recalled to work in jobs that Stanger had done before his layoff. The only one suggested was Richard Kroening. Kroening was hired in August and company records show that he was listed as "dockworker, maintenance, gaskets and hardware" in the hardware (HD) department. The record does not show what Richard Kroening was doing during the period of Stanger's layoff. However, when Stanger was recalled in April, he worked for 1 day on touchup and then replaced Kroening on the job of installing springs and gaskets.

In addition to noting the weight restriction on Stanger's work, Respondent argues that his extensive tardiness record was a factor in the decision not to recall him. He had received a written warning for tardiness in February and his attendance record indicates that he was late for work virtually every day from June until he was laid off. There is no indication that he was given any further warning or discipline for his continued tardiness, which may have been occasioned by the fact that he was a farmer in addition to working for Respondent.

3. FT department—Sewers Priscilla Barber, Mildred "Bernie" Yakovetz, Barbara Novak, and Susan Celske

Recalled from layoff were sewers Dorothy Jenness, Victoria Hoeft, Kay Franzen, Pamela Bosteda, Arlene Grey, Harriet Reinaas, and Ruth Coats. All these except Coats had more seniority than any of the four sewers, named above, who were not recalled. Coats was hired 2 weeks after Barber (19 May 1983 vs. 2 May 1983) and before Yakovetz (6 August 1984), Novak (21 March 1985) and Celske (22 July 1985). Also recalled to the FT department, which included sewing, were Kathy Hoeft and Wendy Ralston. Kathy Hoeft, hired 31 August 1984, returned to do springs and gaskets, which had been her job before the layoff; she also did some sewing after her recall. Sewing was included in her job description and she had done some sewing before the layoff. Ralston, hired 13 August 1986, was a cap assembler and tacker and that is the job she did on her recall. In January 1987, after Jenness was injured, Respondent recalled Harriett as a sewer. Winter had more seniority (5 November 1984) than any of the sewers not recalled except Barber.

Betthauser and Jim Ewer denied knowledge that Barber, Yakovetz, Novak, and Celske had supported the Union. For the reasons previously stated, particularly the animus statements attributed to Ewer naming some of these individuals, and for the additional reasons set forth below, I do not credit their denials.

Priscilla Barber had attended all the union meetings, signed an authorization card, and talked in favor of the Union among the employees during their breaks. In preparation for the hearing scheduled in the prior case she had spoken with Respondent's counsel and had revealed her support and her vote for the Union.

In April, Bonnie Timmers, a relative of Joan Ewer, Jim Ewer's daughter-in-law, and a former friend of Barber's, allegedly told Joan and/or Florence Ewer that Priscilla Barber had said that when she got ready to quit, she would feign an injury at work and collect workman's compensation as she had allegedly done at her prior place of employment. Respondent never questioned Barber about this and never took any action to protect itself against an unwarranted claim or suit by Barber. If they had questioned her, they would have had her denial, as she denied it on the witness stand, and they would have learned that there was an ongoing property dispute between Barber's family and Timmers', rendering Timmers less than an unbiased reporter. Notwithstanding the uncorroborated nature of this hearsay, Respondent initially asserted this information as the sole reason why it did not recall Barber. Subsequently, Respondent added that Barber had less seniority than all of those called back except Coats and claimed that Coats had been working on a special project, sewing sets on cardboard. Respondent claimed that Coats was the only one doing this special project, which had been assigned to her because she had a new sewing machine. Barber credibly testified that all the sewers worked on this project and that their machines were fully capable of doing that work. Respondent considered Barber's work to be satisfactory and made no contention that it failed to recall her because of her job performance.

During the winter, Barber and her husband went to Arizona where he sought temporary work. Respondent learned of this when someone called her home and spoke with her daughter about an insurance matter. When Jenness was injured, Respondent made no effort to contact Barber to be her replacement, allegedly believing that she was unavailable for work. Harriet Winter was called back in January 1987 to replace Jenness. Barber testified that she was available to return and would have done so had they contacted her. Contact, she said, could have been made through her daughter.

Mildred "Bernie" Yakovetz had attended union meetings, signed a union authorization card, talked about the Union with her fellow employees, been named as an alleged discriminatee in the prior case, received backpay from the settlement of that case, and had been interviewed by Respondent's attorney in preparation for the earlier scheduled hearing. She was not a leader of the campaign but her feelings toward the Union were known and, as shown above, were not appreciated.

Respondent initially stated that Yakovetz was not recalled because her job had been combined with another and because of poor quality workmanship. In its subsequent statement, Respondent made no mention of the combining of Yakovetz' job with any others; it relied on her seniority and job performance. No specific evidence was ever introduced as to what other job Yakovetz may have been combined with and, when she returned to work in April, she saw no evidence of job combination.

According to Jim Ewer, Yakovetz was a fast sewer but she made a lot of mistakes requiring that her work be redone. His testimony is corroborated by two file notations, showing that work was returned to her on 29 May and 10 June. Yakovetz admitted that she made some mistakes in her sewing but volunteered that she did not do so anymore than anyone else. She also testified that before the layoff her leadlady, Arlene Grey, had told her that she would be recalled quickly because she was one of the best sewers.

Yakovetz was recalled on 6 April, worked 1 week, and since a plant shutdown of 1 week, has not been recalled. The General Counsel contends that there is a continuing discrimination against her.

Barbara Novak is the wife of Harold Novak, one of the principal union organizers, and this relationship was noted adversely by Respondent. She attended two union meetings and was observed at one of them, along with about 30 others, by Florence Ewers. She signed an authorization card, distributed two others, and received backpay as an alleged discriminatee in the ULP case, which was settled.

Respondent claimed in its position statements that she was not recalled because she had the least seniority among the sewers and her job had been combined with another. In his testimony, Ewer stated that she was a slow sewer; his notes on her work performance confirmed this. Yakovetz also corroborated it; she had heard Ewer criticize Novak's work pace. Novak admitted that she was not fast, but denied that she was the slowest.

Novak was recalled on 6 April, worked for a short while, and was then laid off again. She has not yet been recalled and, like Yakovetz, is claimed to be a victim of continuing discrimination.

Susan Celske, like Yakovetz, had attended some union meetings, had talked about the Union in the shop, and had been named as a discriminatee and received backpay as a result of the earlier settlement. Also, like Yakovetz, she was laid off again following her recall.

Respondent's position statements assert that she was not recalled because her job was combined with another and because she had the least seniority. In his testimony, Ewer claimed that she was a slow sewer, that she had been tried on several jobs on which she either could not keep up or complained about the work. His testimony is supported by file notations made in March and August.

4. Welding department—Matthew Hall

Matthew Hall did not testify in this proceeding. According to Golat, Hall was very vocal in his support of the Union and wore a union button. At one point, early in the campaign, when Jim Ewer was telling employees that they did not need a union, Hall replied that if it were not for people like Ewer in the plant, they would not need one. Ewer admitted that he was aware of Hall's strong support for the Union.

Hall was an automatic head welder. According to Respondent's initial statement of position, Hall was not recalled from layoff because his job had been combined with another and because he had moved out the area.[12] Subsequently, Respondent expanded on the first reason, pointing out that Hall's skills were limited to automatic welding; he could not do other types of welding. The extent of his experience was to put lids on, they were welded automatically, and he installed hinges. The automatic welder position, Respondent stated, was combined with the corner and finish welder positions. To perform this work, Respondent recalled Everett "Rusty" Junk, an employee whose seniority dates from 1971. Ewer further testified that Hall suffered from a hand tremor, causing him to be nicknamed "Shakey." This tremor prevented him from doing other work in Respondent's plant.

The General Counsel did not dispute the testimony concerning Respondent's reasons for not recalling Hall. Neither did the General Counsel suggest the name of any employee who was recalled in lieu of Hall.

5. Analysis and conclusions regarding the alleged discrimination

In *Wright Line*, 251 NLRB 1083, 1089 (1980), enfd. 662 F.2d 899 ((1st Cir. 1981),[13] the Board set forth the following causation test to be applied in all discrimination cases turning on employee motivation:

> First, we shall require that the General Counsel make a prima facie showing sufficient to support the inference that protected conduct was a "motivating factor" in the employer's decision. Once this is established, the burden will shift to the employer to demonstrate that the same action would have taken place even in the absence of the protected conduct.

Resolution of the 8(a)(3) allegations turns on motivation; accordingly, *Wright Line* provides the analytical framework for the discussion that follows.

The General Counsel has established that, to a greater or lesser extent, each of the alleged discriminatees engaged in union activity, that Respondent knew of that activity both generally and with respect to each of the alleged discriminatees, and that its supervisors dissembled ignorance of that knowledge. The attempt to conceal its knowledge of the union activity warrants an inference that it was seeking also to conceal unlawful motivation. *Shattuck Denn Mining Corp. v. NLRB*, 362 F.2d 466, 470 (9th Cir. 1966).

Unquestionably, it has also been established that Respondent harbored animus against union activists in general and the record reveals that its animus was specifically directed at Golat, Marshall, Stanger, Yakovetz, and Barber, and possibly others. Significantly, the record even reveals Respondent's intention to use layoffs as a means of ridding itself of prounion employees.

Finally, the General Counsel has shown that Respondent put forth pretextual or shifting reasons for its failure to recall some of the employees. The assertion of false or shifting reasons for its actions is strong evidence that its actions were unlawfully motivated. *Delta Gas*, 282 NLRB 1315 (1987); *Swift & Co.*, 250 NLRB 1223, 1225 (1980). I consider as patently pretextual Respondent's claim that La Porte was called back before Golat because he was a "very versatile employee." He had not worked there long enough to become versatile. Moreover, Golat was expressly referred to by Jim Ewer as a versatile and adaptable employee and had worked there long enough to have earned that credit. It is thoroughly implausible that Respondent would have recalled a very short-term employee because of his alleged versatility in place of a versatile and well-regarded long-term employee unless it had other motivations. In a similiar vein, one must view Respondent's contention that Golat was not a highly regarded employee; as noted, that contention was a mere afterthought, contradicted by other evidence. Likewise, the contention that Joe Marshall was a slow worker, which was clearly contradicted by Ewer's own testimony, and was advanced by Respondent and then not pursued.

Clearly pretextual, also, is Respondent's alleged reliance on the double hearsay statement attributed to Barber by Florence or Joan Ewer concerning her intended abuse of a workman's compensation claim, without even a perfunctory investigation. If Respondent had placed sufficient credence in this statement to have delayed Barber's recall from layoff because of it, it would have been sufficiently concerned to have confronted her about it when the allegation first surfaced or to have taken immediate remedial action. I find it totally implausible that an employer would believe that an employee intended to defraud it through an abuse of the workman's compensation laws and do nothing more than rely on such knowledge to delay the recall of that employee from a layoff. Its failure to do more, to even question the employee about it, shows pretext and makes clear its motivation.[14] *Kidde, Inc.*, 284 NLRB 78 (1987); *Brookshire Grocery Co.*, 282 NLRB 1273 (1987).

The General Counsel having established a strong prima facie case, the burden shifts to Respondent to show that it would not have recalled these employees even if they had not been identified with the Union. Much of its defense has, of course, been considered and rejected in the foregoing discussion; in pretext cases there is seldom a clear line between the General Counsel's burden and Respondent's.

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[12] This second reason was apparently "make weight." The only evidence that Hall moved comes from the fact that his letter of recall from the layoff, dated 31 March 1987, was returned undelivered. There is no evidence that Respondent knew of his move at any earlier time when other employees were being recalled.

[13] The *Wright Line* test was approved by the Supreme Court in *NLRB v. Transportation Management Corp.*, 462 U.S. 393 (1983).

[14] Additionally, I note that while Respondent contended that the jobs of sewers Yakovetz, Novak, and Celske had been combined with other jobs, it never made clear what other jobs, if any, they had been combined with. Regarding Matthew Hall, I note that Respondent threw in his change of address as a reason for not recalling him although there was no evidence that it knew of that change at any time prior to the turn of the 31 March recall letter.

Considering Respondent's arguments and evidence, I find that Respondent has failed to satisfy that burden with respect to Golat, Marshall, and Barber. Thus, Golat was a versatile and respected employee whom Respondent had falsely attempted to portray otherwise. He had experience on a number of different jobs, including grinding, scuffing, and loading, and could have been recalled ahead of Papiernik, Srp, La Porte, Thomas, and Smith and before Main was hired. Even assuming that Respondent honestly believed that Golat had declined the grinding job in March when Novak quit, I would find that he should have been offered the combined grinding/DA job ahead of Papiernik. It is one thing to decline a job transfer when one is fully occupied with a preferred job; it is quite another to be offered that job in combination with the preferred job when the alternative is layoff. Respondent did not follow its stated policy of recalling the employee who was both most qualified and most senior when it preferred Papiernik, Srp, LaPorte, Thomas, and Main over Golat.

Virtually all that has been said above concerning Golat applies with equal force to Joe Marshall. He had experience in grinding and loading and was considered a versatile and valuable employee, one who could be counted on, before he became involved in union activity. Respondent falsely attempted to portray him otherwise and then dropped that position. He could have, and should have, been recalled before Papiernik, Srp, or La-Porte and before Respondent hired Main to do simple tasks that could have as easily been assigned to Marshall.

A more difficult case is presented in Priscilla Barber. She was only nominally more senior than Ruth Coats, the only sewer recalled with less seniority. However, Respondent's reliance on the alleged workman's compensation matter is so blatantly pretextual that I must infer unlawful motivation. In this regard I have also considered that Barber was fully capable of doing the "special project" that Respondent claimed was Coats' assignment and, in fact, had done it. The "special project" was no justification for recalling Coats ahead of Barber.

Contrary to the situations presented by Golat, Marshall, and Barber, I do find that Respondent has met its burden of proof regarding Stanger, Yakovetz, Novak, Celske, and Hall. Stanger was classified as a dockworker. However, he could not be recalled to that position because Respondent understood him to be under a weight-lifting restriction. It was Stanger's obligation to secure a release from that restriction and he had not done so. Bernie Marshall, a prounion employee with greater seniority, was apparently recalled to the dockworker position, apparently in conjunction with other work. Richard Kroening, an employee with less seniority, was recalled to the maintenance department but apparently did some work that Stanger may have been capable of doing even under his weight restriction. For a light-duty assignment, Stanger had been giving touchup. The touchup job was combined with painting following the layoff and he was not qualified for the combined job. Additionally, Respondent introduced uncontradicted evidence of excessive tardiness by Stanger, a legitimate consideration when determining whom to recall.[15] Considering the lack of work for him within the weight-lifting restriction and his tardiness, I am convinced that Respondent would not have recalled Mark Stanger even if he had not been known as an employee who favored the Union.

The General Counsel did not dispute Respondent's adoption of a policy calling for recall by qualification and seniority within departments. In the sewing department, no sewers with less seniority than Yakovetz, Novak, and Celske were called. Two employees, Kathy Hoeft and Wendy Ralston, were recalled but they had jobs other than sewing and did not sew as their principal assignments following recall. I find that Yakovetz, Novak, and Celske were properly recalled within the terms of Respondent's written policy. There was no discrimination in Respondent's failure to recall Yakovetz, Novak, and Celske earlier.

Similarly, there is no evidence that anyone was recalled to a position that, by seniority or qualification, should have been Matthew Hall's. Absent such evidence, I can find no discrimination.

Accordingly, I shall recommend that Respondent be found to have violated Section 8(a)(3) and (1) of the Act by its failure to recall Chester Golat, Joe Marshall, and Priscilla Barber.[16] I shall further recommend that the allegations of discrimination against Mark Stanger, Mildred Yakovetz, Barbara Novak, Susan Celske, and Matthew Hall be dismissed.

THE REMEDY

Having found that Respondent has engaged in unfair labor practices in violation of Section 8(a)(3) and (1) of the Act, I shall recommend that it be ordered to cease and desist therefrom and take certain affirmative action designed to effectuate the policies of the Act.

Having found that Respondent unlawfully failed and refused to recall Chester Golat, Joe Marshall, and Priscilla Barber from layoff unitl 6 April 1987, I recommend that Respondent be required to make them whole for any loss of earnings and other benefits they may have suffered as a result of the discrimination against them, with interest to be computed in the manner prescribed in *New Horizons for the Retarded.*[17]

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[15] Even in the absence of evidence concerning the absenteeism records of other employees, Stanger's was obviously bad enough to cause concern.

[16] In so finding, I have not failed to consider that Respondent did recall and even promote some people who were known to it as union supporters. An employer need not discriminate against all known union supporters in order to effectively discourage union activity by discriminating against some. *Uptilt, Inc.*, 276 NLRB 583, 589 (1984).

[17] 283 NLRB 1173 (1987). Interest on and after January 1, 1987, shall be computed at the "short-term Federal rate" for the underpayment of taxes as set out in the 1986 amendment to 26 U.S.C. § 6621. Interest on amounts accrued prior to January 1, 1987 (the effective date of the 1986 amendment to 26 U.S.C. § 6621), shall be computed in accordance with *Florida Steel Corp.*, 231 NLRB 651 (1977).

The General Counsel has requested a visitatorial clause authorizing the Board, for compliance purposes, to obtain discovery from the Respondent under the Federal Rules of Civil Procedure subject to the supervision of the United States court of appeals enforcing this Order. Under the circumstances of this case, I find it unnecessary to include such a clause. See *BMD Sportswear Corp.*, 283 NLRB 142 fn. 3 (1987).

Conclusions of Law

1. By threatening to terminate or thin out employees because of their union membership, activities, or desires and by blaming the Union for the layoff of other employees, Respondent has interfered with, restrained, and coerced its employees in the exercise of rights guaranteed them under Section 7, thereby violating Section 8(a)(1) of the Act.

2. By discriminatorily failing to recall employees from layoff because of their membership in or support for the Union, Respondent has violated Section 8(a)(3) and (1) of the Act.

3. The unfair labor practices enumerated above are unfair labor practices affecting commerce within the meaning of Section 2(6) and (7) of the Act.

4. Respondent has not engaged in any unfair labor practices not specifically found.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[18]

ORDER

The Respondent, York Products, Inc. d/b/a Mastercraft Casket Company, Ladysmith, Wisconsin, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Threatening its employees with termination because of their union membership, activities, or desires.

(b) Blaming the Union for the layoff of employees.

(c) Discriminatorily refusing and failing to recall employees from layoff because of their union membership, activities, or desires or other union or protected concerted activities.

(d) In any like or related manner interfering with, restraining, or coercing its employees in the exercise of rights guaranteed under Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Make Chester Golat, Joseph Marshall, and Priscilla Barber whole for any loss of earnings and benefits they may have suffered as a result of the discrimination against them in the manner provided in the remedy section of this decision.

(b) Post at its Ladysmith, Wisconsin plant copies of the attached notice marked "Appendix."[19] Copies of the notice, on forms provided by the Regional Director for Region 18, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material.

(c) Notify the Regional Director in writing within 20 days from the date of this Order what steps the Respondent has taken to comply.

It is further recommended that the complaint be dismissed insofar as it alleges violations not specifically found herein.

APPENDIX

Notice To Employees
Posted by Order of the
National Labor Relations Board
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

Section 7 of the Act gives employees these rights.

To organize

To form, join, or assist any union

To bargain collectively through representatives of their own choice

To act together for other mutual aid or protection

To choose not to engage in any of these protected concerted activities.

We will not threaten to terminate or thin out employees because of their union activities, membership, or desires.

We will not blame the Union for the layoff of employees.

We will not discriminatorily fail or refuse to recall employees from layoff because of their union activities, membership, or desires.

We will not in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

We will make Chester Golat, Joseph Marshall, and Priscilla Barber whole for any loss of earnings and benefits they may have suffered as a result of the discrimination against them, with interest.

York Products, Inc. d/b/a Mastercraft Casket Company

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[18] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

[19] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

Hawkins-Hawkins Co., Inc. *and* **International Molders and Allied Workers, Local 164, AFL-CIO.** Cases 32-CA-7962 and 32-RC-2337

July 29, 1988

DECISION, ORDER, AND DIRECTION OF SECOND ELECTION

By Chairman Stephens and Members Johansen and Cracraft

On November 25, 1987, Administrative Law Judge Gordon J. Myatt issued the attached decision. The General Counsel and the Charging Party filed exceptions and the General Counsel filed a supporting brief. The Respondent filed a brief in opposition to the General Counsel's exceptions.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings,[1] and conclusions as modified and to issue an Order and Direction of Second Election.

The judge found that the Respondent's plant manager, George Hess, "did tell the employees that if they felt threatened or harassed by calls or visits at home from union representatives or employee supporters of the union, they should give statements to management." In making this finding the judge relied on the credited testimony of the Respondent's assistant plant manager, Duplessis, and acting plant manager, Cannon. The judge also found that Hess did not ask for a show of hands of people who had been harassed and did not threaten to fire any employees suspected of initiating such contacts on behalf of the Union. Based on these findings, the judge concluded that Hess' statement was not coercive and did not violate the employees' Section 7 rights. Counsel for the General Counsel excepted to this finding, claiming that the testimony of Duplessis and Cannon establishes an 8(a)(1) violation.[2] We agree.

In finding that Hess' statement is unlawful, we rely on a revised version of that statement because the judge's finding that Hess told employees to let management know if they felt "threatened or harassed" misstates the testimony on which he relies. Neither Duplessis nor Cannon testified that Hess used the word threatened.[3] Instead, Duplessis' testimony is as follows: "he [Hess] said that if anyone was harassed by the Union or by fellow employees to contact management and they would take care of it." Duplessis further testified that Hess did not explain what he meant by "take care of it" or by "harassed." Cannon testified that Hess said "that Mr. Hawkins wanted to know if any employee . . . felt that they were being harassed either by the Union or fellow employees." Thus, based on their combined testimony, we find that, in essence, Hess told the employees that if they felt "harassed" by supporters of the Union they should inform management, who would then "take care of it."[4]

The Board has found similar statements unlawful because they have the potential dual effect of encouraging employees to identify union supporters based on the employees' subjective view of harassment and discouraging employees from engaging in protected activities.[5]

The Respondent claims that the Union's supporters identified themselves by striking, that Hess never attempted to determine who was making the harassing statements, that he never threatened to fire or discipline union supporters and, consequently, that the statements had no chilling effect on the employees' exercise of their Section 7 rights.

Contrary to the Respondent's assertions, however, the judge merely found that Hess had not asked for a show of hands by the employees who had been "harassed." There was no finding that the identity of the union supporters or employees contacting their fellow employees would not be revealed. With respect to the identity of the union supporters already being known, it is true that the strikers identified themselves as union supporters, but the strike occurred 3 days after Hess made his March 21 statement. Also, the vote tally itself shows that there were more union supporters among the employees (seven) than there were strik-

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[1] The General Counsel and the Charging Party have excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

[2] The General Counsel and the Charging Party also excepted, inter alia, to the judge's failure to find that the Respondent implicitly had promised employee Lujan a raise if he ceased his union activities. The circumstances of the Respondent's meeting with Lujan, as established by the credited testimony, do not justify finding such an implicit promise, however. Thus, Lujan had requested the meeting, it was scheduled only a couple of days after the request was made, and Lujan was the one who brought up the issue of money by mentioning that he had not received a raise in several years.

[3] Even if Hess had used the word threatened in combination with the word harassed, the statement still would have been unlawful. See *Anja Engineering Corp.*, 256 NLRB 1083, 1093 (1981), reversed on other grounds 685 F.2d 292 (9th Cir. 1982). Member Cracraft finds it unnecessary to reach this finding.

[4] The credited testimony does not reveal that Hess' March 21, 1986 statements on this subject were in response to employees' questions. Duplessis testified that to the best of her recollection Hess just brought up the issue of harassment, whereas Cannon stated he could not say for sure if Hess or someone else raised the topic.

[5] See *Eastern Maine Medical Center*, 277 NLRB 1374, 1375 (1985); *J. H. Block & Co.*, 247 NLRB 262 (1980).

289 NLRB No. 158

ers (five). Thus, the strike did not identify all the Union's supporters. Besides, the tally may not represent an accurate reflection of the Union's support when Hess' statement was made. Indeed, the statement may well have had the tendency of inhibiting continued and future support for the Union among the employees. In this regard, although the judge found that Hess had not threatened to fire any employees who contacted their fellow employees to advocate support of the Union, the open-ended nature of Hess' statement—"harassed" employees should let management know so they could "take care of it"—announces the Respondent's intent to take unspecified action to stop the subjectively offensive activity without regard to whether or not the reported activity was protected by the Act.[6]

In light of these circumstances, Hess' statement reasonably could have interfered with, coerced, and restrained employees in the exercise of their Section 7 rights and violates Section 8(a)(1) of the Act.[7]

The judge found that the objections to the election were based on the same events alleged to be in violation of Section 8(a)(1) and recommended overruling the objections and certifying the election results as he found no 8(a)(1) violation. We have found, however, that Hess' statement violated Section 8(a)(1) of the Act. This unlawful statement was made during the election period and was communicated directly to all the Respondent's unit employees.

This statement, therefore, was likely to have had an impact on the results of the election. Accordingly, we shall order that the election held April 1, 1986, be set aside and a second election conducted.

AMENDED CONCLUSIONS OF LAW

Delete paragraph 5(g) from the judge's Conclusions of Law and insert the following as paragraph 3 and renumber the current paragraph 3 and all subsequent paragraphs.

"3. The Respondent, by telling its employees that if they felt "harassed" by supporters of the Union they should inform management who would "take care of it," has violated Section 8(a)(1) of the Act."

REMEDY

Having found that the Respondent has engaged in certain unfair labor practices, we shall order it to cease and desist and to take certain affirmative action designed to effectuate the policies of the Act.

ORDER

The National Labor Relations Board orders that the Respondent, Hawkins-Hawkins Co., Inc., Berkeley, California, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Notifying employees that they should inform management if they have been "harassed" by union supporters so that management can "take care of it" or otherwise inviting and encouraging employees to identify union supporters or discouraging employee involvement in protected activity.

(b) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Post at its facility in Berkeley, California, copies of the attached notice marked "Appendix."[8] Copies of the notice, on forms provided by the Regional Director for Region 32, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material.

(b) Notify the Regional Director in writing within 20 days from the date of this Order what steps the Respondent has taken to comply.

IT IS FURTHER ORDERED that the election conducted in Case 32-RC-2337 on April 1, 1986, is set aside and that a new election be conducted as directed below.

[Direction of Second Election omitted from publication.]

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[6] See *Electric Hose & Rubber Co.*, 267 NLRB 488, 493 (1983).

[7] The Respondent also claims that because the employees had already secured their right to have an election Hess' statement had no impact on their Sec. 7 rights. Sec. 7 rights, however, do not dissolve with the filing of a petition. Here, Hess' statement came during the critical campaign period when the Union's supporters presumably would have been contacting employees in an attempt to convince them to vote for the Union. Member Johansen notes that there was no exception to the judge's findings and conclusions relating to the Respondent's comments on the treatment of any strikers.

[8] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

WE WILL NOT notify our employees to inform us if they have been harassed by union supporters so that we can take care of it or otherwise invite or encourage employees to identify union supporters or discourage employee involvement in protected activity.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

HAWKINS-HAWKINS CO., INC.

George Velastegui, Esq., for the General Counsel.

Richard N. Hill and *Pamela D. Frasch, Esqs. (Littler, Mendelson, Fastiff & Tichy)*, of San Francisco, California, for the Respondent.

Paul D. Supton and *Robert M. Hirsch, Esqs. (Van Bourg, Weinberg, Roger & Rosenfeld)*, of San Francisco, California, for the Charging Party.

DECISION

STATEMENT OF THE CASE

GORDON J. MYATT, Administrative Law Judge. On a charge filed by International Molders and Allied Workers, Local 164, AFL-CIO (the Union) against Hawkins-Hawkins Co., Inc. (the Respondent), the Regional Director for Region 32 issued a complaint and notice of hearing on 30 June 1986.[1] The complaint was subsequently amended on several occasions and further amended at the hearing. The gravamen of the complaint is that during the Union's attempt to organize and represent Respondent's employees Respondent's agents and supervisors engaged in various acts of conduct that violated Section 8(a)(1) of the National Labor Relations Act (the Act).

More specifically, the complaint alleged that Respondent, acting through its agents and supervisors (1) promised an employee benefits if he ceased his activities in support of the Union; (2) threatened an employee with termination if he did not cease his activities on behalf of the Union; (3) told employees that (a) the Union would never be successful in organizing the employees, (b) Respondent would shut down its operation if the Union was successful in organizing the employees, (c) employees would be terminated if they engaged in a strike, (d) Respondent would never negotiate with the Union, (e) employees were prohibited from talking about the Union at any time on Respondent's property, (f) Respondent would terminate any employee suspected of encouraging other employees to join or support the Union, and (g) employees were to inform Respondent if the Union or employee supporters of the Union contacted them at their homes.

In addition, the Union filed a representation petition in Case 32-RC-2337 on 17 March. An election was held pursuant to a Stipulation for Certification on Consent Election Agreement on 1 April in the following unit of Respondent's employees:

> All full-time and regular part-time production, maintenance, janitorial, shipping, receiving employees and plant clerical employees, employed by the employer at its 1255 Eastshore Highway, Berkeley, California location; excluding all office clerical employees, sales employees, guards, and supervisors within the meaning of the Act.

The official tally of ballots revealed that of approximately 32 eligible voters, 7 voted for and 22 voted against representation by the Union. The Union filed timely objections to the election, and the Regional Director determined the alleged objectionable conduct was substantially similar to the conduct asserted to constitute the unfair labor practices alleged in the complaint. The Regional Director thereupon consolidated both matters for hearing.

A hearing was held in this consolidated matter on 12, 13, and 14 November 1986 in Oakland, California. All parties were represented by counsel and afforded full opportunity to examine and cross-examine witnesses and to present material and relevant evidence on the issues. Briefs were submitted by the parties and have been duly considered.

On the entire record in this matter, and from my observation of the witnesses while testifying, I make the following

FINDINGS OF FACT

I. JURISDICTION

Respondent, Hawkins-Hawkins Co., Inc., is a California corporation engaged in the manufacturing and distribution of traffic safety devices. Respondent maintains an office and principal place of business in Berkeley, California. During the course of its business operations in the 12 months preceding the issuance of the complaint, Respondent sold and shipped goods or provided services valued in excess of $50,000 directly to customers located outside the State of California. The pleadings admit, and I find, Respondent is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

II. THE LABOR ORGANIZATION INVOLVED

The pleadings admit, and I find, that International Molders and Allied Workers, Local 164, AFL-CIO is a labor organization within the meaning of Section 2(5) of the Act.

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[1] All dates refer to 1986 unless otherwise indicated.

III. THE ALLEGED UNFAIR LABOR PRACTICES

Most of the testimony relating to factual matters in this case is conflicting and in serious dispute. There are a few matters, however, about which there is no dispute and they are set forth first in this decision for ease of recital.

A. *The Undisputed Facts*

1. Lujan's employment history with Respondent

The evidence establishes that Paul Lujan had been employed by Respondent as a custom signmaker for approximately 3 years. At the time of the hearing in this case, Lujan was on disability and not working. He had been on disability status since 14 July 1986.[2] In 1985, Lujan was working in the pasteup department. Sometime in November of that year Mike Cannon, Respondent's plant manager, promoted Lujan to the position of leadman in the pasteup department to replace the foreman who was leaving.[3] Although Lujan was promoted to leadman, he did not receive a pay raise with the promotion. Although the precise time is not clear in the record, Lujan apparently went on vacation during the latter part of February 1986. When he returned on 4 March, Lujan was informed by Cannon that he was no longer the leadman in pasteup because Respondent had hired someone from the outside as foreman of that department.

2. Manuel Magana's employment with Respondent

Manuel Magana was the foreman of Respondent's metal shop.[4] The unrefuted testimony of Cannon discloses that Magana had an uncommon fear about being fired from his job. Cannon stated that in January and February Magana constantly asked if he were in danger of being fired. Despite repeated assurances from Cannon that this was not the case, Magana persisted in expressing fear that his job was in jeopardy. Because of what he considered to be an unwarranted fear on the part of Magana, Cannon arranged a meeting between himself, Magana, and Paul Black, Respondent's personnel director. The meeting occurred sometime in February. According to Cannon's unrefuted testimony, Black reassured Magana that he was in no danger of losing his job with Respondent. Black did express criticism, however, of Magana's job performance in the machine shop. Black felt Magana was not performing sufficient maintenance on the machinery and was thereby causing Respondent to incur more expense for outside repairs to the equipment. Despite this criticism, Black assured Magana that his job was not in jeopardy, and all he had to do was to continue to perform his work. Nonetheless, Magana continued to ask that he be informed about the date when he would be fired so that he could start looking for another job. Magana remained in Respondent's employ as foreman of the metal shop until mid-April 1986 when he voluntarily quit.

3. The organizing activity and the Board-conducted election

Although the precise time is not clear in the record, it is undisputed that while Lujan was on vacation during the latter part of February he contacted a representative of the Union about organizing Respondent's employees. Shortly after Lujan returned to work, he and Magana began soliciting employees and passing out literature on behalf of the Union in the plant during their working hours, as well as before and after work. They also visited employees at their homes on behalf of the Union. Several meetings were held with groups of employees by representatives of the Union and both Lujan and Magana were active participants in these meetings. It is also undisputed that the union activities of Lujan and Magana were openly conducted and generally known throughout the plant.

A Board-conducted election was held on 1 April and Lujan was an observer for the Union. The official tally shows that of approximately 32 eligible voters, 7 votes were cast for the Union, 22 were cast against union representation, and 2 ballots were challenged. The Union filed timely objections that the Regional Director consolidated with the unfair labor practice complaint for a hearing. (See G.C. Exhs. 2(a)–(h) and 3(a).)

B. *The Disputed Events*

1. The meeting between members of management and Lujan on 19 March

On 19 March there was a meeting in Cannon's office between Lujan and certain management officials. Depending on which witness was testifying, there were almost as many versions of this meeting as there were witnesses testifying about the event.

Lujan testified he was informed by Gene "DeCarlo," Respondent's labor consultant that Cannon wanted to speak with Lujan in his office.[5] Lujan further testified he had not requested a meeting with Cannon. Lujan stated when he entered the office, Cannon, Carlomagno, and Marie Duplessis were there. Duplessis was Cannon's assistant at the time. According to Lujan, he asked if he could have a witness present and Cannon agreed. Lujan stated he then went into the plant and had Magana come to the meeting as a witness.

Lujan testified that Cannon opened the discussion by saying he wanted to talk about any problems Lujan might have working with the new foreman in the pasteup department. Cannon told Lujan he wanted to make certain that any problems would be smoothed out, and he expected Lujan to give 100 percent to his job. At this point, according to Lujan, Carlomagno stated he had been hired to smooth out any problems the employees might have with Respondent and they could be worked out without a union.

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[2] Lujan testified his disability was due to job stress, depression, and high levels of anxiety.

[3] Throughout the testimony the job titles "leadman" and "foreman" were used interchangeably. It is clear from the record, however, that neither position is a supervisory one in Respondent's operation and the holders of these jobs are unit employees.

[4] The parties stipulated Magana was not a supervisor within the statutory sense but, rather, was a unit employee.

[5] The correct name of Respondent's labor consultant was Gene Carlomagno. Lujan, however, understood his surname to be "DeCarlo" and referred to Carlomagno by that name throughout his testimony.

Lujan also testified that Magana then mentioned he suspected he was being "setup" for a layoff. Magana stated he had spoken about this to Black, and Black indicated that such a possibility did exist. Lujan testified that both Cannon and Carlomagno denied any knowledge of a pending layoff. Lujan then mentioned that he had seen a layoff list and his name and that of another employee, Albertson, were on it.[6]

According to Lujan, Cannon said he wanted to get Lujan a raise, "if Lujan would stop influencing the employees." Lujan testified he asked if Cannon were referring to his support of the Union and Cannon nodded his head affirmatively. Lujan stated he told Cannon that he could not live with himself and he could not "sell out" the other employees. He stated, however, that he would drop the union matter if Respondent would sign a contract directly with employees without the Union. Lujan further testified that Cannon said he would check into the matters brought up during the meeting as well as the subject of Lujan's raise and would get back to the employee.

Magana's version of the meeting in Cannon's office on 19 March differed in some respects from that of Lujan. According to Magana, when Lujan returned from vacation in February the employee complained about his demotion in the pasteup department. Magana advised Lujan to discuss the matter with Cannon and, according to Magana, the meeting was held in Cannon's office a few days later.

Magana testified that shortly before the meeting Cannon asked him to call Lujan into the office. When Magana did so, Lujan asked Magana to attend the meeting as his witness. Magana stated that Cannon initiated the discussion by asking Lujan what would it take to get Lujan to do his job. Lujan protested that he was doing his work. Cannon then said he wanted things to run smoothly and Lujan asked if Cannon meant he wanted the employee to stop his activities on behalf of the Union.[7] Magana testified that Cannon nodded his head affirmatively in response to Lujan's question. According to Magana, Lujan replied he could not live with himself if he did what Cannon requested. Magana stated Cannon then became angry and walked away. Magana also stated that Carlomagno said during the discussion that Lujan and Magana should not be doing what they were doing on behalf of the Union because there were no jobs available.

Magana further testified that Cannon spoke with him several minutes before the meeting with Lujan. According to Magana's testimony, Cannon said he wanted to give Lujan a raise and "maybe that way he [Lujan] would stop organizing the Union." Magana testified he had seen a paper on Cannon's desk with Lujan's name on it and an amount of $1 or $1.50 beside the name. Magana testified he saw the paper on Cannon's desk before and after the meeting with Lujan. Magana stated, however, that Cannon never mentioned the raise to Lujan during the meeting nor did he refer to the paper that, according to Magana, was turned face down on Cannon's desk. Magana said he told Lujan about Cannon's proposed raise after the meeting in the office was concluded.

Cannon and Duplessis were the other witnesses who testified regarding the meeting on 19 March.[8] Cannon stated that when Lujan returned from vacation he met with Lujan and informed the employee that Respondent had hired a foreman for the pasteup department. Cannon asked Lujan's cooperation in working with the new foreman and testified that Lujan appeared to accept the arrangement. Approximately a week later, according to Cannon, Lujan asked Cannon to set up a meeting with Norman Hawkins, Respondent's owner, to discuss the reason why Lujan was not given the job as foreman. When Cannon brought the matter to Hawkins' attention, Hawkins designated Carlomagno to act as his representative in meeting with Lujan.

Cannon testified he arranged to have the meeting in his office. Cannon stated that Carlomagno and Duplessis were present during the meeting but that Magana was not. Cannon said that since Carlomagno was representing Hawkins he opened the meeting by asking Lujan two questions and then left the discussion to Carlomagno and the employee. Cannon asked Lujan what specifically was bothering him and what it would take for Lujan to become a productive employee again. According to Cannon, Lujan stated that he felt he should have been selected foreman of the pasteup department. Carlomagno then informed Lujan that Hawkins made the decision and it was final. Cannon further testified that Carlomagno observed the union button that Lujan was wearing and stated that he did not feel Respondent needed a union to solve its problems. Lujan at this point complained that he had not received a pay increase for over 2 years and Carlomagno expressed surprise at this. Carlomagno then told Cannon to recommend a raise for Lujan. Cannon testified that he merely looked at Carlomagno but did not take any steps to follow through on Carlomagno's suggestion. Cannon stated he did this because Norman Hawkins was the only person who could grant or approve a raise for any employee. Cannon denied he told Lujan to stop organizing or attempting to influence the employees to support the Union. Other than Carlomagno's statement that he did not think a union was needed to solve the problems at Respondent's plant, Cannon stated there was no discussion whatsoever concerning Lujan's union activities. Cannon further testified there was no mention at all during the meeting about the existence of a layoff list that included Lujan's name.

Duplessis acknowledged she attended the meeting involving Lujan on 19 March. Duplessis stated Magana was not at the meeting and only she, Cannon, Carlo-

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[6] Albertson was also a supporter of the Union and participated in a strike that occurred on 24 March. Lujan stated that Cannon continued to deny that a layoff list existed.

[7] On cross-examination, Magana added that Cannon said he wanted Lujan to stop organizing the Union after saying he wanted things to run smoothly.

[8] Carlomagno was not called as a witness in these proceedings.

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magno, and Lujan were present during the entire discussion. According to Duplessis, Lujan wanted to know why he was replaced as leadman and a foreman was hired to run the pasteup department. She stated Carlomagno responded to the employee and said the newly hired foreman had more experience than Lujan. Duplessis further stated that Lujan mentioned that it was the second time he had been "bumped" from consideration for a lead position and that he had not received a raise in a long time. At this point, according to Duplessis, Carlomagno instructed Cannon to put in a request for a pay increase for Lujan. Unlike Cannon's testimony, however, Duplessis stated that Cannon then started filling out a form requesting a wage increase for Lujan. Duplessis also testified there was no mention of Lujan's union activities during the course of the meeting, nor was Lujan told he would receive a raise if he stopped attempting to influence the employees to support the Union.

Contrary to the testimony of Cannon, Duplessis stated there was discussion during the meeting of a layoff list. Duplessis testified that on several occasions before the meeting, Lujan questioned her about the existence of a layoff list and she could not understand his concerns because she had no knowledge of such a list. Duplessis stated that Lujan again mentioned the existence of a layoff list at the meeting on 19 March and she and Cannon were puzzled by his question. Duplessis testified she and Cannon later determined Lujan was referring to a list that had been compiled during the preceding year when Respondent had occasion to lay off employees because business was slow. According to Duplessis, this list was setup by departments showing each employee's name, telephone number, and date of hire. She stated that after the layoffs Cannon decided that the list would prove useful as a personnel document that would enable Respondent's management to contact any of the employees when they did not show up for work or for other reasons. For this reason, Cannon instructed Duplessis to retain the list in the personnel file.[9]

2. The first meeting between Hess and the unit employees

George Hess was the secretary-treasurer of Respondent and was responsible for Respondent's accounting, tax reports, and financial information. Hess also had an outside business practice in which he served other clients on tax matters. Hess' unrefuted testimony indicates that he devoted approximately 50 percent of his working time to Respondent's business.

Lujan testified Hess held a meeting with the unit employees on 21 March. Lujan stated both Cannon and Duplessis attended the meeting along with the unit employees. Lujan testified the meeting was held at 10:40 a.m. When questioned on cross-examination and shown his timecard, which indicated Lujan did not report to work until the afternoon on that date, Lujan steadfastly maintained that he came to work at 7 a.m. that day and punched out at 4 p.m.[10] It was not until he had completed his testimony and then was later recalled as a witness by the General Counsel that Lujan acknowledged he took Magana to the hospital on the morning of 21 March and did not return to the plant until 2:30 that afternoon. Lujan further acknowledged that he filled out a sick leave request for 6 hours of sick leave to cover the time he missed that morning. (See R. Exh. 2.) The timecard indicated his request for sick leave on 21 March was denied. Based on this evidence, Lujan, when recalled, testified that the meeting Hess held with the employees occurred in the afternoon after he returned to the plant.

Concerning the meeting, Lujan recalled that Hess told the employees Respondent had received a petition for an election filed by the Union with the NLRB. Lujan stated Hess appeared angry and upset. According to Lujan, Hess read from the Board's statement accompanying the petition regarding the rights of the employees during a pending election petition. Lujan further stated Hess informed the employees the last time a union attempted to organize the plant he made certain the effort did not succeed. Lujan testified Hess said he was tough and would shut down the plant and that was why the Union would not be successful this time either. Lujan recalled that Hess said Respondent did not have to negotiate wth the Union and if it did, negotiations would take up to 6 years. Lujan stated Hess told the employees that it would take a long time before the employees "got anything out of the Union." According to Lujan, Hess went on to tell the employees it was illegal for union supporters to talk to or solicit employees on company property or on company time.[11] Lujan further testified that Hess told employees he wanted to know which employees were going to the homes of other employees soliciting on behalf of the Union. According to Lujan, Hess stated that if he found out which employees were doing this those employees would be fired. Finally, Lujan testified Hess told the employees he was aware that some of the employees were planning to engage in a strike the following Monday. Hess said he would give the striking employees 5 minutes to return to work after the buzzer sounded, and if they did not return they would be fired.

Charles Kelley, a former welder for Respondent, also testified about a meeting Hess had with the employees.[12] Although Kelley testified he only attended one meeting conducted by Hess, his testimony seemed to embrace statements alleged to have been made by Hess at two separate meetings with the employees. According to Kelley, the meeting he attended took place on the day some of the employees were on strike in support of the Union's organizing effort. Kelley stated that neither Lujan nor Magana was at the meeting because they were on the picket line. Kelley further testified that Cannon, Duplessis, Carlomagno, and John Hawkins were the management people attending the meeting.[13]

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[9] Duplessis testified that when she discovered the document, she went to Lujan and informed him that it was merely a list of all employees by department including employees who previously had been laid off.

[10] Lujan's timecard showed that the employee did not punch until 2:30 p.m. on 21 March and that he punched out at 4 p.m. (See R. Exh. 1.)

[11] On cross-examination, Lujan acknowledged that in the affidavit he gave to the Board agent investigating the case he stated that during this meeting Hess did not use the word "illegal" but rather said it was "unfair" for employees to talk about or solicit for the Union on company time or company property.

[12] At the time of the hearing, Kelley was no longer an employee of Respondent. Kelley voluntarily quit his job with Respondent on 11 September 1986.

Kelley stated Hess said if anyone went on strike and did not return in 5 minutes after they were supposed to be working, they would be fired. On cross-examination, however, Kelley recalled that Hess said Respondent could hire temporary employees to keep the Company going during a strike. Kelley further testified that Hess asked employees to raise their hands if they had been contacted at home, either by telephone or by visits, by union supporters or representatives. Hess urged these employees, according to Kelley, to go to the office and give statements about what occurred and promised that the statements would be sealed to protect their confidentiality. Kelley recalled that Hess also told the employees anyone supporting the Union could not solicit or talk about the Union on company time or property. If they did, they would be fired. According to Kelley, Hess did not tell the employees that they could discuss the Union during their lunch or breaktime.

Regarding the Union's organizing effort, Kelley testified Hess told the employees that the Union had tried to organize the plant in the past and failed because Respondent took care of its employees. Hess said Respondent would continue to do so. Hess also told the employees, according to Kelley, that there was no guarantee the Union would get what it wanted from Respondent because he was "a tough s.o.b. and any negotiations would be long and drawn out."

Daniel Gale, a screen printer and current employee of Respondent, also gave testimony regarding Hess' meetings, with the employees. Gale stated at the first meeting on 21 March that Hess told the employees that if anyone went on strike and did not return to work within 15 minutes after being ordered to do so they would be replaced in order to keep the plant running. Gale later changed his testimony regarding this statement and said Hess stated if the employees went on strike and did not return in 15 minutes they would be let go for leaving their posts. On cross-examination on this point, Gale added that Hess never told the employees that striking employees would be fired or terminated. Gale further testified that Hess told the employees at this meeting that they were "to keep all union activity off the clock and not to talk about the union stuff on company time." Gale stated during his testimony that Hess never mentioned anything to the employees about soliciting for the Union during lunchtime or breaktime. When further questioned about this statement by the General Counsel, Gale acknowledged that in the affidavit he gave the Board agent he said Hess told the employees it was all right to talk about the Union at lunchtime but not during breaktime because that was company time. On cross-examination, however, Gale testified Hess told the employees there was to be "no talking about the Union, either pro or con, during work hours" and Gale interpreted this to mean breaktime because all breaks were on company time.

Gale further testified that Hess told the employees if they were contacted at home about the Union and felt threatened they should let management know. Again, Gale acknowledged when questioned by the General Counsel that he did not include the expression "and felt threatened" in his statement in the affidavit regarding employees being contacted at home.[14] Gale denied on the stand that Hess said he would fire union supporters who contacted other employees at their homes about the Union. Finally, Gale testified Hess said if the Union got in negotiations would be long and could take up to a year because he was a tough negotiator.

The testimony by the witnesses presented by Respondent regarding the first Hess meeting was as conflicting in some respects as that given by the witnesses presented in the General Counsel's case. Hess testified he called the meeting on 21 March after the afternoon break because Respondent had received a formal copy of the Union's petition from the NLRB Regional Office earlier that morning.[15]

Hess stated he read the copy of the election petition, the Regional Director's letter, and the Board's formal notice setting forth the rights of the parties to the employees at the meeting. After this, according to Hess, he told the employees he was a "damn tough negotiator." Hess denied ever telling the employees Respondent would not negotiate with the Union or that Respondent would shut the plant down if the Union won the election. Hess stated that during the meeting employee Solomon Isom asked what would happen if employees went out on strike. According to Hess, he responded that Respondent could replace striking employees with temporary employees. Hess denied having any knowledge at the time that some employees were contemplating a strike. He stated he did not learn of a proposed strike until after the meeting ended and Duplessis notified him that one was scheduled for the following Monday. Hess further recalled that he told the employees there had been other unsuccessful attempts to organize Respondent's employees in 1972 and 1974. He stated he did not think the current union organizing campaign would be successful because he did not know if the Union had support of 30 percent of the employees. He stated this would have to be determined through the Board's election process.

Hess denied he asked employees to raise their hands if they had been contacted at home by union representatives or supporters. He also denied requesting employees who had been contacted to notify him of the facts surrounding the contact. Finally, Hess denied he ever told the employees they could not solicit on behalf of the

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[13] John Hawkins was Respondent's vice president and son of the principal owner, Norman Hawkins.

[14] When questioned about the inconsistencies between his testimony and the statements contained in his affidavit, Gale stated he notified counsel for the General Counsel the week before the trial that he wanted to change portions of the affidavit but received no response.

[15] The unrefuted testimony indicates the union representatives came to Respondent's plant on 19 March and left a copy of the election petition. Thus, Respondent was aware, at least by that date, of the Union's organizing campaign. After receiving the copy of the petition from the Union, Hess contacted Respondent's attorneys and, before the meeting on 21 March, was given a letter listing the things Respondent could and could not do during a union organizing campaign.

Union on Respondent's property or that employees supporting the Union would be fired by Respondent. He stated he never used the words "fired" or "terminated" during his meeting with the employees.

John Hawkins testified Hess read extensively from the papers received from the Board and then employees asked questions. Hawkins recalled an employee asking what would happen if employees went on strike. According to Hawkins, Hess replied the striking employees would be asked to return to work and if they refused Respondent could replace them to keep the plant running. Hess told the employees the petition had to go through the Board's process. Hawkins stated Hess told the employees he was a tough negotiator and negotiations would take a long time with no certainty as to what would end up being negotiated. Hawkins further recalled that an employee asked when employees could solicit in the plant for the Union and another employee, rather than Hess, responded to the question. The answer was that employees could solicit on their own time. Hawkins denied Hess said union supporters would be fired. Rather, Hawkins testified Hess told the employees it was against the NLRB rules to fire employees for supporting the Union. Finally, Hawkins denied Hess asked employees to identify themselves if they had been contacted at home by the Union by raising their hands or to inform management about the circumstances surrounding such contacts.

Duplessis testified that Hess was aggressive and forceful during his meeting with the employees. She stated that she felt Hess could have been "more tactful." According to Duplessis, Hess read to the employees the notice received from the Board. She stated Hess told the employees he did not think the Union would be successful in this organizing attempt because past efforts to organize Respondent's employees had failed. Duplessis recalled Hess stating that if the employees went on strike they would be replaced. Duplessis denied Hess told the employees that they would be fired for striking or supporting the Union. Duplessis further recalled that Hess told the employees the negotiations would take a long time. She stated Hess told the employees that they were not to stop their work to talk about the Union. Contrary to the testimony of Hess and Hawkins, Duplessis testified that Hess also told the employees if they were harassed by the Union or fellow employees to inform management of this fact. However, Duplessis denied that Hess asked for a show of hands from the employees who had been contacted at home by the union representatives or supporters.

Cannon testified that during the first Hess meeting with the employees Hess stated there was a possibility of a strike occurring at the plant on the following Monday. According to Cannon, Hess stated that if there were a strike, the striking employees could be replaced. Cannon denied that Hess said employees supporting the Union would be disciplined or fired. Cannon recalled that Hess told the employees that if they had been contacted at home by union representatives or supporters and felt they were being harassed they should inform management. Cannon denied Hess asked employees to raise their hands if such contact had been made. According to Cannon, Hess did not make any comment about employees engaging in union activities on company time and property. Finally, Cannon stated Hess told the employees that if the Union won the election there would be lengthy negotiations because he was a hard negotiator.

Several employees testified on Respondent's behalf regarding Hess' meeting with the employees. Clarance Jones, a general handyman for Respondent, stated that Hess read to the employees their rights contained in the NLRB documents. Jones recalled that in response to an employee's question about strikes Hess told the employees management would give the striking employees a chance to return to work and if they did not then management could hire temporary replacements. According to Jones, Hess stated that only "taxes and death were guaranteed and all else was negotiable." Jones testified that Hess said the Union could not guarantee wages and that they had to be negotiated. Jones further testified that Hess informed the employees they could only discuss the Union on their own time and not on company time. Jones had no recollection of Hess stating that Respondent would shut the plant down if the Union won the election. Jones stated he never heard Hess use the words "shut down" or "close down." Jones denied that Hess asked for a show of hands from the employees if they had been contacted by the union supporters at home.

Emmett Littlejohn, a machinist who became a foreman approximately 2 months before the strike commenced, also testified about the meetings between Hess and the employees. According to Littlejohn, Hess read from documents regarding the employees' rights. When asked about the possibility of a strike, Littlejohn recalled that Hess told the employees anyone picketing would be given a certain time within which to return to work and if they refused to do so Respondent would get someone to fill their positions. Littlejohn testified that Hess did not use the words "fired," "terminated," or "replaced" during the meeting with the employees.

The final employee testifying about Hess' meetings during the organizing campaign was Solomon Isom. Isom was an alodine operator in charge of the refurbishing department. Isom testified Hess mentioned there was a great possibility of a strike. Isom asked if any striking employee were out for more than 15 minutes would that employee be terminated. According to Isom, Hess replied that employees would not be terminated if they went on strike, but they would be replaced. Isom further testified that Hess did not state during the meeting that Respondent would shut the plant down if the Union were successful in the election. Hess stated, however, that he would be a tough negotiator. According to Isom, Hess also told the employees that they could discuss the Union on breaktimes, lunchtimes, and after work but not during production on company time. Isom denied that Hess asked employees who had been contacted at home by union representatives or supporters to raise their hands. Isom also denied that Hess made any threats to terminate employees who supported the Union.

3. The second meeting between Hess and the employees on 25 March

On 24 March, Lujan, Magana, and several other employees went on strike to show their support for the Union's organizing effort.[16] They began picketing Respondent's facility. Hess testified that he went to the Board's Regional Office on 25 March to arrange for an expedited election because of the disruption caused by the strike. An election agreement was reached and a strike settlement was arranged at this meeting. Hess then returned to the plant and held another meeting with the employees after their break that same afternoon.[17]

Gale recalled Hess read a letter informing the employees there would be an election on 1 April. Hess also told the employees, according to Gale, that the striking employees would return to work and instructed the nonstriking employees to treat the returning strikers as if nothing had happened.

Hess testified that after working out the arrangements for the election and the strike settlement he met with the employees to inform them about the agreement to end the strike. Hess stated that he read from some notes he made at the Board's Regional Office during the settlement arrangements. Hess denied he told the employees during the course of the meeting that the Union would be unsuccessful in the election or that Respondent would close the plant if the Union won the election. He also denied telling the employees that the striking employees and the union supporters would be terminated. Hess was unable to recall whether he mentioned when employees could solicit on behalf of the Union or discuss union matters on company property. Hess stated he said nothing at this meeting about employees being contacted at home by union representatives or supporters.

J. Hawkins testified that the meeting on 25 March was a short one. Hawkins said Hess read from the strike settlement and election agreements. Hawkins said Hess stated a number of employees asserted they had been harassed by the strikers and protested against the strikers returning to their jobs. Hess at this point, according to Hawkins, stressed that everyone including the strikers should go back to work and focus on their jobs.

Duplessis testified that the meeting on 25 March was brief. She stated Hess told the employees an election would be held and the striking employees were going to return to work. According to Duplessis, Hess also told the employees not to stop their work to discuss the Union. Duplessis stated that Hess said if the employees felt they were being harassed by the Union or other employees they should let management know. She testified that Hess stated if the employees did not feel safe in verbally informing management of any harassment they could put it in writing. Duplessis denied Hess ever told the employees the union supporters would be disciplined or fired.

Cannon also recalled that the second meeting was brief. According to Cannon, Hess read from some documents about the process to be followed for the election and the strike settlement. Cannon denied that Hess made any statements about closing the plant if the Union won the election or disciplining any employees for supporting the Union.

Jones recalled that Hess told the employees at the second meeting that if they wanted a union they should get one that did not use intimidation or engage in "scare tactics." Several employees, according to Jones, complained about being harassed by the strikers. Hess told the employees that anyone who felt harassed or pushed around by the union supporters should let management know so that the NLRB could be contacted. Jones testified Hess told the employees there was going to be a quick election and the strikers would be returning to their jobs. According to Jones, Hess stated that the nonstriking employees should not take any action against the strikers. Jones denied that Hess said anything at this meeting about shutting the plant down if the Union won the election or firing employees who supported the Union. He also denied that Hess said it was illegal for employees to contact other employees at home about the Union.

Littlejohn's testimony regarding the second meeting by Hess was very sketchy. According to Littlejohn this meeting took place in Cannon's office.[18] Littlejohn testified that Hess said nothing about shutting down the plant or about firing or disciplining union supporters. Littlejohn was unable to recall whether Hess made any statements at the meeting about employees engaging in union activity in the plant on company time.

Isom testified that Hess read from some documents at the second meeting advising the employees there would be an election. According to Isom, the second meeting was very short. He stated Hess informed the employees that the striking employees were going to return to their jobs. Isom denied that Hess made any threats at this meeting to discipline or terminate the striking employees or any employees supporting the Union.

4. The incidents involving Magana

Magana testified regarding several incidents that occurred at the plant that he attributed to his active role in support of the Union. According to Magana, sometime in mid-March he was confronted by Cannon and Duplessis in the plant.[19] Magana testified Cannon and Duplessis came up to him and Cannon told him to stop organizing for the Union or Norman Hawkins was going to fire the employee. Magana stated Cannon said he could not cover up for Magana anymore. Magana further testified that he replied that he was going to continue his activity in support of the Union. Magana stated that following the conversation with Cannon he became lightheaded and started shaking and had difficulty breathing. Magana testified he had to leave the job at 10 a.m. that morning to go to the hospital for emergency treatment.[20]

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[16] The other employees joining Lujan and Magana on strike were Jose Sato, Jim Albertson, and Gary Silva. All these employees returned to work on 26 March pursuant to a strike settlement agreement.

[17] Although a strike settlement had been arranged, the picketing continued until the end of the shift on 25 March. The striking employees returned to work the following morning.

[18] Littlejohn was the only person to testify that any of the meetings were held in Cannon's office. All other witnesses testified the meetings were held in the lunchroom after the breaks.

[19] The record establishes that the incident described by Magana took place on 21 March, the date of Hess' first meeting with the employees.

Cannon testified employees Littlejohn and Reboh[21] complained to him that Magana interrupted them during working time to talk about the Union. According to Cannon, this occurred sometime after the strike had ended. As a result, Cannon spoke to Norman Hawkins and Respondent's attorney about the matter. On their advice Cannon stated he told Magana he was not to discuss the Union with employees during working time. Cannon testified he further told Magana he could only talk about the Union with other employees during breaks, lunchtime, and before and after work. Cannon stated Magana became upset and angry during the conversation. Cannon then told Magana if he continued to pull employees off the machines and interrupt the flow of work to discuss the Union Magana would be sent home without pay. Cannon further testified that Magana came up to him approximately an hour later and apologized for his behavior.[22]

Duplessis recalled more specifically the incident that led to Magana's leaving the plant to go to the hospital on 21 March. Duplessis stated she and Cannon observed Magana filling out customers' names on "move tickets" in various departments of the plant other than his own department.[23] Duplessis testified this was unusual because Magana was only responsible for placing move tickets on jobs ready to leave his own department. She and Cannon concluded that Magana was placing the customers' names on the move tickets in other areas so he could secure the names of Respondent's customers and supply that information to the Union. According to Duplessis, she and Cannon went up to Magana and Cannon asked the employee why he was putting the customers' names on the tickets. Duplessis stated Magana then became very "upset and fidgety." Magana told Cannon he was not feeling well and had to leave the plant to go to the hospital. Duplessis further testified that during the organizing campaign she had several occasions to caution Magana not to let his union activities interrupt his work.

Magana next testified that Respondent's management employees were following him around the plant and using walkie-talkies to spy on his union activities. According to Magana, John Hawkins, Cannon, and Reboh would follow him around the shop conversing on their walkie-talkie units. Magana admitted he never overheard any of their conversations on the walkie-talkie units. Magana further admitted that as foreman of the metal shop he too had been provided with a walkie-talkie unit to be used in running his department. Nonetheless, Magana maintained that the others were using the equipment to spy on his activities.

John Hawkins testified he was the management official responsible for the introduction of the use of the walkie-talkies in the plant. He stated he bought two units in mid-February as a test to improve in-plant communications, especially in the production area. Hawkins gave one unit to Cannon and he kept the other. Over the next 6 weeks Hawkins purchased four additional units and provided them to the foremen and leadmen of various departments, including Magana. According to Hawkins, the use of the walkie-talkie equipment never proved successful because the machinery in the plant interfered with the voice transmissions over the units. Hawkins denied that the walkie-talkie equipment was ever used to spy on Magana or any of his union activities.

The final incident recited by Magana involved a conversation he testified he overheard between Hess and Black. Approximately a week after he left the plant to go to the hospital, according to Magana, he had occasion to walk behind Hess and Black in the plant and followed them into the office area. Magana testified he overheard Hess tell Black that Respondent would have to get rid of Magana because he was organizing a union. Magana stated he then turned and left the office area.

Hess denied ever telling Black that Respondent would have to get rid of Magana because the employee was active in the union organizing effort. Hess further testified that approximately 6 months before the union activity taking place in the plant Black expressed critical opinions about Magana's job performance and his ability to do the work. Hess stated he admonished Black and told the personnel director it was not his responsibility to evaluate Magana's job performance.

IV. CONCLUSION OF FINDINGS

It is apparent from the detailed recital of the testimony that the controlling issues of this case rest primarily on a determination of the credibility of the witnesses presented by the parties. This is a task made all the more difficult in this case because, in many material respects, there is conflict between the testimony of witnesses not only on opposing sides but also between witnesses testifying for the same party. In sifting through this maze of contradictions and relying on my close observation of the witnesses while testifying, I find certain distinctive factors that I deem critical in my assessment of the reliability of the testimony.

First I find the testimony of Lujan to be filled with distortions and exaggerations that I conclude were deliberately intended to create a scenario of unlawful conduct on the part of Respondent's management officials. For example, when testifying about his meeting in Cannon's office on 19 March, Lujan stated Cannon mentioned a raise and indicated the raise was conditioned on Lujan's cessation of his union activities. Magana, on the other hand, who purportedly attended this meeting, testified there was no mention of a raise for Lujan during the meeting. Indeed, Magana stated he did not inform Lujan until after the meeting had been concluded that Cannon proposed to give the employee a raise in order to stop his union activities. The circumstances surrounding Lujan's testimony about the time of the first Hess meeting with the employees is another example of the unreliability of his testimony. Lujan testified that Hess met with the employees at 10:40 a.m. on 21 March. Lujan steadfastly maintained the meeting occurred in the morning even when he was shown his timecard which established that he did not punch in for work until 2:30 that afternoon. It was only after he completed his testimony, on both direct and cross-examination, and was subsequently recalled that Lujan was prepared to admit he did not report to work until the afternoon of that day. In my judgment, Lujan's failure to recall that he did not appear at the plant until the afternoon of 21 March was not the result of a faulty memory. Rather, I find it to be an additional example of his willingness to distort the facts. I further find it is highly unlikely he would have forgotten that he accompanied Magana, the other principal union adherent in the plant, to the hospital after Magana's confrontation with Cannon and Duplessis that morning.

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[20] The statement Magana gave the Board agent indicates that he became "upset" because "he knew Cannon was going to fire him." This statement further indicates Magana's fear in this regard was based on his belief that Cannon blamed him for a machine breakdown that occurred 2 months earlier.

[21] Reboh was the leadman in the screening department.

[22] According to Cannon, Duplessis was with him at the time he had this discussion with Magana in the plant.

[23] Move tickets are apparently tags placed on job orders to indicate the job is to be moved to another department. It is unclear from the testimony whether customers' names are normally placed on the move tickets when they are attached to the job order.

Second, I find the testimony of Magana to be for the most part wholly unreliable. This witness appeared to me to be extremely unstable during his testimony. The unrefuted testimony demonstrates that Magana was obsessed with the thought that Respondent's management was searching for reasons to fire him. The testimony also indicates that this preoccupation with the fear of being discharged occurred well in advance of the advent of any union activity at the plant. Observing this witness, I find this obsessive thought not only colored Magana's perception of events that occurred during the organizing campaign but also caused him to weave out of whole cloth incidents involving him and members of management during the campaign.

Next I find the testimony of Kelley to be confusing and lacking in veracity in many respects. Kelley stated he only attended one meeting conducted by Hess, but his testimony about the meetings appeared to be a composite of both meetings. This raises a substantial question of whether he was recounting what he actually heard and saw or whether he was testifying about matters that he had been told had occurred. Therefore, unless corroborated by other credited testimony I find Kelley's testimony to be unreliable.

Similarly, I also find the testimony of Gale to be wanting in many respects. On the stand, Gale sought to contradict or change many critical statements that he had given in his sworn affidavit to the Board agent investigating this matter. I find his explanation for doing so to be totally unconvincing. Based on my observation of Gale while testifying, I find that his testimony is not to be credited unless corroborated by other credible testimony.

My critical analysis of the testimony of the witnesses is not limited, however, to those presented by the General Counsel and Charging Party. Hess, for example, appeared to attempt to so circumscribe his testimony that he seemed unwilling to reveal an accurate and forthright account of the events in which he was involved. Hess denied telling the employees at the first meeting they should inform management if they felt they were being harassed by union representatives or employee supporters of the Union. However, the testimony of the other witnesses on behalf of Respondent regarding this meeting demonstrates that he did make such a statement to the employees. During his testimony Hess also denied having any knowledge of a contemplated strike when he spoke to the employees at the first meeting. The testimony of Cannon and Isom, however, discloses that Hess told the employees at the first meeting there was a possibility of a strike the following Monday. For these reasons, I find the testimony of Hess was not completely candid or forthright and I take this into account in weighing the credibility of his testimony.

Finally, I find Cannon's testimony to contain certain critical omissions and denials that I do not deem to be the result of faulty memory. For example, Cannon denied that he prepared a wage increase request for Lujan when Carlomagno instructed him to do so. Duplessis, on the other hand, forthrightly recalled that Cannon began filling out a form for a wage increase request for Lujan after Carlomagno's suggestion. Next, Cannon specifically denied Lujan brought up the subject of a layoff list during that meeting, and again, Duplessis acknowledged this was mentioned by Lujan at the meeting. I find, therefore, that Cannon's testimony was less than candid in certain respects and consider this assessing the reliability of his testimony in general.

With the above in mind, I make the following findings concerning the specific matters alleged in the complaint.

A. *The Meeting with Lujan on 19 March*

In my judgment, the most reliable account of this event is found in the testimony of Duplessis. I find the testimony of this witness to be candid and forthright. My impression of Duplessis was that she was relating a truthful and accurate account of the events as she was able to recall them; even when this caused her testimony to differ from the testimony of other witnesses for Respondent. Therefore, based on Duplessis' testimony and the portions of Cannon's testimony to which I give credence,[24] I find that Lujan attended this meeting alone and Magana was never present. I also find that Cannon never offered Lujan a wage increase conditioned on the employee's abandonment of his union activities but, rather, that a raise was only proposed by Carlomagno when Lujan complained that he had not received one in several years. I further find that Cannon proceeded to fill out a wage increase request for Lujan at Carlomagno's suggestion while the meeting was in progress.[25] Based on the credited testimony, I further find there was no mention at this meeting of Lujan's activities on behalf of the Union. Rather, I find that when Carlomagno observed Lujan wearing a union button he stated a union was not needed to resolve the problems in the plant. In these circumstances, I find this statement by Carlomagno to be a noncoercive expression of opinion permitted by Section 8(c) of the Act. *Hearst Corp.*, 281 NLRB 764 (1986).

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[24] Although I have found portions of Cannon's testimony to be unreliable, I do not discredit his testimony in all respects. *NLRB v. Universal Camera Corp.*, 179 F.2d 749 (2d Cir. 1950); *Herrick & Smith*, 275 NLRB 398 (1985).

[25] To this extent I do not credit Cannon's testimony that he never filled out such a form at the meeting. The record does establish, however, that any decision to grant an employee a wage increase rested solely with Hawkins despite any recommendations from lesser management officials.

In light of the above analysis of the credited testimony, I find that during the meeting on 19 March Respondent's officials did not promise Lujan a raise if he ceased his activities in support of the Union. I further find that Respondent's officials at this meeting did not engage in any other conduct that violated Section 8(a)(1) of the Act. Accordingly, this allegation of the complaint shall be dismissed.

B. *The First Hess Meeting on 21 March*

In resolving the conflicting testimony regarding the statements made by Hess at this meeting, I rely heavily on the testimony of Duplessis, Isom, Jones, and Littlejohn in addition to the portions of the testimony of other witnesses, which I credit. As noted, I find Duplessis to be a credible witness and I likewise find the testimony of the above employee witnesses to also be reliable. In so doing, I am not unmindful that each of the employee witnesses worked during the strike but I do not find this to be a factor that militates against their veracity. Observing the demeanor of each of these employee witnesses, I find they testified in a candid and straightforward manner and gave the impression of giving a truthful account of the meetings as they recalled them.

On the basis of these determinations, I find, contrary to the testimony of John Hawkins, that Hess addressed the employees in an aggressive and forceful manner. Indeed, as Duplessis observed, Hess was less than "tactful" in addressing the employees. This alone does not constitute a violation of the Act. There is no requirement under the Act that an employer be tactful or impassive during a union organizing campaign. The lack of these characteristics only becomes important in assessing whether an employer's statements to the employees tend to, or do in fact, coerce, restrain, or interfere with their Section 7 rights.

Turning to the statements made by Hess at this meeting, I find the credited testimony establishes that after reading the contents of the Union's petition and the Board's documents accompanying the petition, Hess told the employees that unions had tied unsuccessfully in the past to organize Respondent's employees and he did not think the Union would be successful on this occasion. Contrary to the testimony of Lujan, I do not find that Hess threatened to shut the plant down if the Union was successful in its organizing campaign. I view this statement by Lujan as another example of his willingness to exaggerate and distort in order to bolster the allegation that the Respondent engaged in unlawful conduct. I further find from the credited testimony of the employee witnesses as well as Duplessis, Hess, and Cannon that Hess did not tell the employees that Respondent would not negotiate with the Union if it gained representative status. Rather, I find that Hess informed the employees that everything would be negotiable in those circumstances. Indeed, as employee Jones testified, Hess said "only death and taxes were guaranteed and everything else was negotiable." I further find that Hess told the employees the negotiations would be lengthy because he was a "damn tough negotiator." Statements of this nature, even when uttered in a forceful or aggressive fashion, are not coercive. These statements by Hess did not constitute a threat that the employees would lose existing benefits or a threat that Respondent would not bargain in good faith with the Union if it won the election. To the contrary, I find Hess was informing the employees, although perhaps not tactfully, about the bargaining process and that he was prepared to engage in hard bargaining on behalf of the Respondent should the Union become the representative of the employees. *Standard Products Co.*, 281 NLRB 141 (1986); *Clark Equipment Co.*, 278 NLRB 498 (1986); *Thriftway Supermarket*, 276 NLRB 1450, 1451 (1985). See also *Histacount Corp.*, 278 NLRB 681 (1986).

I do not credit Hess' testimony that he did not state there was a possibility of a strike the following Monday. However, neither do I credit the testimony of Lujan and Kelley to the effect that Hess said strikers would be given 5 minutes to return and if they did not they would be fired.[26] Rather, I credit the testimony of the other witnesses that Hess' comments about the treatment of striking employees was in response to a question raised by employee Isom. I find Hess stated Respondent would replace the striking employees to keep the business operating. It is of no consequence whether Hess said the strikers would be "replaced" or whether he said Respondent "would hire temporary replacements." It is settled Board law that economic strikers may be permanently replaced although they retain certain rights regarding reinstatement on unconditional offers to return to work. *Laidlaw Corp.*, 171 NLRB 1366 (1968), enfd. 414 F.2d 99 (7th Cir. 1969), cert. denied 397 U.S. 920 (1969). See also *NLRB v. Fleetwood Trailer Co.*, 389 U.S. 375 (1967). Nor does the fact that Hess said nothing about the rights of strikers who might be replaced convert his otherwise lawful comments into unlawful threats. In analyzing similar statements, the Board has said they merely describe "an employer's legal prerogative" and do not contravene any of the rights conferred on the employees by *Laidlaw*. *Eagle Comtronics*, 263 NLRB 515 (1982). Cf. *National Micronetics*, 277 NLRB 993, 995 (1985). Therefore, on the basis of the credited testimony I find Hess did not threaten to terminate employees if they engaged in a strike in support of the Union's organizing effort.

Next, I find, contrary to the testimony of Hess and Hawkins, that Hess did bring up the subject of employees being contacted at home by union representatives or employee union supporters. This finding is not based on the testimony of Lujan nor that of Kelley, which I discredit, but is based on the testimony of Duplessis and those portions of Cannon's testimony that I find reliable. Thus, I find Hess did tell the employees that if they felt threatened or harassed by calls or visits at home from union representatives or employee supporters of the Union, they should give statements to management. I do not find, however, that Hess asked for a show of hands from the employees when making this statement. Nor do I find that he threatened to fire any employees suspected of making such contacts on behalf of the Union. In these circumstances, I find Hess' request for employees who felt threatened or harassed to give statements to management to be noncoercive and not in violation of the Section 7 rights of the employees.

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[26] I find the shifting testimony of Gale to be completely untrustworthy on this point and place no reliance on his testimony regarding Hess' comments about strikers.

Finally, the most difficult aspect of the allegations is the verbal no-solicitation rule established by Hess during the 21 March speech to the employees. I credit that portion of Hawkins' testimony that an employee posed the question at the meeting regarding when employees could solicit for the Union in the plant and that another employee responded it was limited to the employees' own time. However, I also find from the credited testimony that Hess too responded on this subject.

I completely discredit the testimony of Lujan and Kelley that Hess told the employees they could not talk about or solicit for the Union on "company time or company property." Hess, on the other hand, merely summarily denied he forbade employee discussion about the Union on company property. Gale's testimony on this point was simply confusing and conflicting. Gale stated on the stand that Hess never mentioned anything about employees soliciting for the Union during lunchtime or breaktime, but acknowledged that in his affidavit he stated Hess said it was permissible to discuss the Union during lunchtime but not during breaks because the latter was company time. Gale subsequently changed his testimony to indicate Hess stated there would be "no talking about the Union during working hours" and Gale interpreted that to mean not during breaktime because breaks were paid for by the Company. Duplessis, on the other hand, said Hess told the employees they were not to stop their work to discuss the Union. Jones recalled that such activity was limited by Hess to the employees' "own time" and was not to be on "company time." Finally, employee Isom recalled Hess said employees were free to discuss the Union during breaks, lunchtime, and before and after work.

Because these varied recollections of Hess' statements regarding when employees could solicit or discuss the Union in the plant, it is virtually impossible to determine precisely what was said on this subject at the meeting. However, because of my finding that the testimony of Duplessis, Jones, and Isom is the most reliable presented in this case, I find that at the outer limits Hess told the employees they were to confine their discussion of the Union to their "own time." I further find that Hess' statements in this regard were in response to an employee's question during the meeting regarding when such activity could take place. Based on the testimony found to be reliable here, I find that Hess further refined the statement by telling the employees they were not to interrupt their work to discuss the Union and that they were free to engage in discussions about the Union during breaks, lunchtime, and before and after work. In this context, I find the verbal no-solicitation rule enunciated by Hess at the meeting met the standards set forth by the Board in *Our Way*, 268 NLRB 394 (1983). The verbal prohibition on union solicitation during working time defined with "sufficient clarity that employees [could] solicit on their own time." *Our Way*, supra. Nor does the fact that Hess' comments in this regard were limited to union solicitations compel a different conclusion under the circumstances presented here. The discussion about when union solicitations were permissible was initiated by a question from an employee during the meeting and was confined solely to that type of solicitation in the plant. Solicitations for other purposes were not mentioned or discussed either by the employees or Hess. There is no evidence in the record concerning solicitations for other purposes. In these circumstances, I find no reason to conclude that Respondent's prohibition on solicitations was invalid because it singled out union activities. In so doing, I am not unmindful of the Board's holding in *Montgomery Ward & Co.*,[27] and the line of cases that followed that decision.[28] However, I deem the facts in the instant case to be distinguishable from those contained in the above cases because the discussion on union solicitation here was employee initiated and was confined solely to that type of solicitation. Therefore, I find the rationale of *Montgomery Ward* does not apply here. Accordingly, I find Hess' prohibition on union solicitation in the plant was not invalid and did not violate Section 8(a)(1) of the Act.

C. *The Second Hess Meeting*

By the accounts of all the witnesses, the second meeting Hess had with the employees on 25 March was a brief one. Based on my previous findings concerning the reliability of the testimony of the various witnesses, I find Hess said nothing at this meeting that contravened the Section 7 rights of the employees. Rather, I find Hess informed the employees about the strike settlement arrangements and told them an election would be conducted by the NLRB. Hess also told the employees that the striking employees would be returned to their jobs and that everyone should focus on their work as if the strike had not occurred. In this regard, I also find that when some of the nonstriking employees complained about being harassed by the strikers, Hess told the employees to report any incident of harassment by union supporters or union representatives to management either verbally or in writing. Finally, I find Hess did not threaten to shut down the plant if the Union won the election nor did he threaten to discharge or discipline employees for supporting the Union. Accordingly, I find the credited testimony in the record establishes that Respondent did not engage in any conduct that violated Section 8(a)(1) of the Act during the second meeting Hess had with the employees on 25 March.

D. *Other Alleged 8(a)(1) Violations*

The remaining allegations of the complaint relate to incidents purportedly involving Magana. As previously noted, I find Magana to be a totally unstable witness who is prone to create scenarios where none in fact existed and whose testimony was completely untrustworthy. Based on this observation, I find Cannon did not tell Magana on 21 March that the employee would be fired if he did not stop his union activities. Rather, I credit the testimony of Duplessis regarding this incident and find that Cannon questioned Magana on that date about the reason the employee was placing customers' names on the move tickets in areas outside his own department. I further find that when Magana was questioned by Cannon, the employee became so upset that he had to leave the plant and go to the hospital.

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[27] *Montgomery Ward*, 269 NLRB 598 (1984).

[28] *Cerock Wire & Cable*, 274 NLRB 888 (1985); *Premier Maintenance*, 282 NLRB 10 (1986).

I also find that Magana's claim that he was being spied on by members of management using walkie-talkies in the plant to be totally incredible and unworthy of belief. In my judgment Magana's obsessive fear of being fired caused him to read ill-fated consequences into every situation, however innocent. I find this to be all the more true in this case because Magana himself was supplied with a walkie-talkie as part of his working equipment.

Finally, I totally disbelieve Magana's testimony that he followed Hess and Black into the office area and overheard Hess state that Respondent had to fire Magana because of his union activities. In my judgment, this is merely another example of Magana's compulsion to fabricate scenarios reflecting his fear of being fired and, in this instance, assigning his union activities as the contributing cause. Accordingly, I credit Hess' denial that any such statement was ever made.

In sum, I find the credited testimony in this case fails to establish that Respondent violated Section 8(a)(1) of the Act in any manner. Therefore, I find that the complaint in this case must be dismissed in its entirety.

CONCLUSIONS OF LAW

1. Respondent, Hawkins-Hawkins Co., Inc., is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

2. International Molders and Allied Workers, Local 164, AFL-CIO is a labor organization within the meaning of Section 2(5) of the Act.

3. Respondent did not promise an employee benefits if the employee ceased his union activities and, thus, did not violate Section 8(a)(1) of the Act.

4. Respondent did not threaten to terminate an employee if the employee did not cease his union activities and, thus, did not violate Section 8(a)(1) of the Act.

5. Respondent did not tell its employees (a) that the Union would never be successful in its organizing effort, (b) that Respondent would shut down its plant if the Union succeeded in organizing the employees, (c) that employees would be terminated if they engaged in a strike, (d) that it would never negotiate with the Union, (e) that employees were prohibited from soliciting for or discussing the Union at any time on company property, (f) that it would terminate employees suspected of encouraging employees to join or assist the Union, and (g) that employees were to inform Respondent if they were contacted at home by union representatives or supporters. Thus, Respondent did not engage in conduct that violated Section 8(a)(1) of the Act.

[Recommended Order for dismissal omitted from publication.]

Workroom for Designers, Inc. and Sidney H. Sisselman, *and* International Ladies' Garment Workers Union, AFL-CIO. Cases 1-CA-19731, 1-CA-19797, 1-CA-19903, 1-CA-20007, 1-CA-20157, 1-CA-20218, 1-CA-20442, 1-CA-20521, and 1-CA-21438

July 29, 1988

SUPPLEMENTAL DECISION AND ORDER

BY CHAIRMAN STEPHENS AND MEMBERS JOHANSEN AND BABSON

On March 12, 1985, the National Labor Relations Board issued a Decision and Order in Cases 1-CA-19731, 1-CA-19797, 1-CA-19903, 1-CA-20007, 1-CA-20157, 1-CA-20218, 1-CA-20442, and 1-CA-20521[1] ordering the Respondents, inter alia, to make whole various discriminatees for any loss of pay suffered as a result of the Respondents' unfair labor practices. On April 30, 1985, the Board issued an Order adopting, in the absence of exceptions, the decision of the judge in Case 1-CA-21438 directing the Respondents to make whole one of the discriminatees for losses resulting from the Respondents' discrimination against her. On July 10 and September 18, 1985, the United States Court of Appeals for the First Circuit entered its judgments, enforcing in full the provisions of the Board's Orders. A controversy having arisen over the amount of backpay due the discriminatees, the Acting Regional Director for Region 1, on March 27, 1986, issued a backpay specification and notice of hearing. Subsequently, Respondent Sisselman filed letters containing answers to the specification on behalf of himself and Respondent Workroom for Designers, Inc.

By letter dated December 19, 1986, the Region's compliance officer informed Sisselman that his answers did not conform to the requirements of Sections 102.52 through 102.59 of the Boards Rules and Regulations governing backpay proceedings. In particular, the letter directed Sisselman's attention to Section 102.54 concerning the contents of an answer to a specification. It stated that the answers lacked the specificity required, for example, as the answers neither admitted nor denied the gross backpay formula or proposed an alternative. It additionally stated that the Respondents neither admitted nor denied the interim earnings claimed for the discriminatees or offered any other facts concerning interim earnings. Finally, it sought to remind the Respondents that the backpay hearing was not an opportunity to relitigate the unfair labor practice case. The Respondents were given until the close of business on December 30, 1986, to file an amended answer. Sisselman, in letters dated December 23 and 30, 1986, responded that his answers were as specific as he could make them, contending that the Board had subpoenaed and had possession of all his records, thereby denying him access to them. In response, by letter of January 8, 1987, counsel for the General Counsel reminded Sisselman that, with only three exceptions, his records, which were earlier subpoenaed by a special master appointed by the U.S. district court, were still in the custody of the court and remained available for his inspection. Sisselman was also reminded that three of his payroll records were released by the district court to the Regional Office for the purpose of preparing the backpay specification and were also available for his inspection. Sisselman was given an extension of time for filing an amended answer. Sisselman did not do so.

Thereafter, on April 23, 1987, the General Counsel filed with the Board a Motion to Strike Answer and Motion for Summary Judgment. The General Counsel argued that the Respondents' answers are totally deficient because they are not sworn to and fail to specifically address the allegations in the backpay specification as required by Section 102.54(b) and (c) of the Board's Rules and Regulations. The General Counsel moved that the Respondents' answers be stricken in their entirety and that summary judgment be granted as to all matters contained in the backpay specification. Alternatively, the General Counsel moved that the Respondents' answers be stricken and that summary judgment be granted as to the gross backpay calculations and as to those discriminatees concerning whom no valid issue regarding interim earnings has been raised. On April 30, 1987, the Board issued an order transferring the proceeding to the Board and a Notice to Show Cause why the General Counsel's Motion for Summary Judgment should not be granted. By letter of May 4, 1987, the Respondents filed a response to the Notice to Show Cause contending that the Board's further litigation of this proceeding is futile, essentially based on the previously asserted inability to pay.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.On the entire record in this proceeding, the Board makes the following

Ruling on the Motion for Summary Judgment

Section 102.54(b) and (c) of the Board's Rules and Regulations states, in pertinent part, that:

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[1] 274 NLRB 840.

> (b) *Contents of the answer to specification.*— The answer to the specification shall be in writing, the original being signed and sworn to by the respondent or by a duly authorized agent with appropriate power of attorney affixed, and shall contain the post office address of the respondent. The respondent shall specifically admit, deny, or explain each and every allegation of the specification, unless the respondent is without knowledge, in which case the respondent shall so state, such statement operating as a denial. Denials shall fairly meet the substance of the allegations of the specification denied. When a respondent intends to deny only a part of an allegation, the respondent shall specify so much of it as is true and shall deny only the remainder. As to all matters within the knowledge of the respondent, including but not limited to the various factors entering into the computation of gross backpay, a general denial shall not suffice. As to such matters, if the respondent disputes either the accuracy of the figures in the specification or the premises on which they are based, he shall specifically state the basis for his disagreement, setting forth in detail his position as to the applicable premises and furnishing the appropriate supporting figures.
>
> (c) *Effect of failure to answer or to plead specifically and in detail to the specification.*—. . . If the respondent files an answer to the specification but fails to deny any allegation of the specification in the manner required by subsection (b) of this section, and the failure so to deny is not adequately explained, such allegation shall be deemed to be admitted to be true, and may be so found by the Board without the taking of evidence supporting such allegation, and the respondent shall be precluded from introducing any evidence controverting said allegation.

The General Counsel argues in support of her motion to strike the answers in their entirety that the Respondents' answers are not sworn to as required by Section 102.54(b) of the Board's Rules. As quoted above, that section states that an answer to a backpay specification shall be sworn to by a respondent or a duly authorized agent. The Board has recently emphasized that a pleading that substantially fails to conform to the Board's procedural rules will normally be stricken in its entirety.[2] However, we decline to strike the answers based on the Respondents' failure to have the answers sworn to under the particular circumstances presented. When Sisselman, who was proceeding pro se, was informed by the compliance officer by letter of December 19, 1986, that his answers did not conform to the requirements of Section 102.54(b), the letter then specified certain deficiencies as to the contents of the answers. These specified deficiencies did not include the failure of the answers to be sworn to. Thus, under the particular circumstance here, we find that Sisselman may reasonably have been led to believe that this procedural deficiency would not lead to the striking of his answers. Therefore, we decline to strike the answers in their entirety on that ground.[3] Moreover, although the Respondents' answers, as the General Counsel argues, are unnumbered and fail to explicitly admit, deny, or explain the allegations made, we find that his answers are sufficiently specific to fairly meet the substance of certain of the allegations of the specification and, thus, we deny the General Counsel's motion to strike them in their entirety.

At the outset, however, we must reject two general arguments made by the Respondents. Regarding the assertions as to the financial inability to satisfy the backpay order, it is well settled that the issue in a backpay proceeding is the amount due and not a respondent's ability to pay.[4] With respect to Sisselman's claimed inability to obtain records that would enable him to prepare more detailed answers, Sisselman's letters to the Region clearly indicated that he was aware that the Board had subpoenaed his records and that some of them were in the possession of the district court. Moreover, counsel for the General Counsel, by letter dated January 8, 1987, in response to Sisselman's letters to the Region's compliance officer, reminded Sisselman of the location of his records and that they were available for his inspection. There is no indication that Sisselman has ever attempted to inspect his records, and he has offered no explanation of his failure to do so. Thus, we reject the Respondents' contention that the failure to provide answers containing specific denials, as required by the Board's Rules, was justified because Sisselman's records were not in his possession.[5]

Further, notwithstanding our acceptance of these answers, we agree with the General Counsel that, with limited exceptions, the answers to the backpay specification are deficient insofar as they do not conform to the Board's requirements as to those compliance matters within the Respondents' knowledge. The answers do not specifically dispute the general accuracy of the gross backpay due. Section 102.54(b) specifies that a respondent's answer concerning all matters within its knowledge, including the various factors entering into the computation of gross backpay, must be specifically drawn and that a general denial about those matters will not suffice. Accordingly, as the Respondents have not specifically denied the allegations pertaining to the general computation of gross backpay, nor adequately explained the failure to do so, we strike the answers to the extent that they can be construed as addressing those general allegations of the backpay specification and deem those general allegations to be admitted as true.

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[2] *Scotch & Sirloin Restaurant*, 287 NLRB 1318 (1988).

[3] See *Lobster Trap & Casa Sirena Marina Hotel*, 287 NLRB 1322 (1988).

[4] See, e.g., *Scotch & Sirloin Restaurant*, supra at 1319 and cases cited there.

[5] *Master Foods Service*, 276 NLRB 1160, 1162 (1985).

However, with respect to the backpay due certain individual discriminatees, we find the answers are sufficiently specific to call into question the backpay period used to compute the gross backpay due these discriminatees, and thus sufficient to deny the General Counsel's motion with respect to these individuals. In this regard, the Respondents allege that the following specifically named discriminatees either refused or did not respond to the Respondents' offer of reinstatement or, alternatively, accepted such an offer and subsequently quit:[6] David Amlaw, Hannah Bontempo, Catherine Carlo, Christina Chrostowski, Gloria Civello, Donna Crawford, Leola Demary, John Descensi, Irma Dinicola, Linda Garneau, Sherry Briggs Gardner, Marie Moore Hebert, Charles Holmes, Valerie Johnson, Regima Lysecka, Rose Marchetti, Teresa McCormack, Deborah McGivern, William Paradysz, Donna Passons, Linda Peaslee, Yolanda Potter,[7] Kathleen Sabin, Ruth Sabin, Marion Smith, Ronald Smith, Thomas Spargo, Catherine Troiano, and Deborah Wood.

Similarly, we find the Respondents' answers sufficiently specific to raise issues covering employee[8] or job availability[9] with respect to the following named discriminatees: employee availability—Steffan Ashley, Leroy Barnes, Daniel Corrado, David Heath, Marie Moore Hebert, Deborah McGivern, and Connie Ruperto; job availability—Olive Bailey, Maria Blefari, Ann DeMarsico, Chong Gray, Jack Haskell, Rosa Palano, and Guiseppina Polce. Thus, with respect to the gross backpay formula used with respect to the above-named individuals, we deny the General Counsel's Motion for Summary Judgment and shall direct a hearing limited to (1) determining if these employees received a valid offer of reinstatement, which they did not accept or accepted such an offer and thereafter quit the Respondents' employ; and/or (2) determining if these employees were available for employment or if jobs were available to them during all or part of the backpay period, as appropriate.[10]

Finally, the Respondents essentially argue that certain named discriminatees received interim earnings affecting their backpay entitlement beyond the amounts set forth as interim earnings in Appendix A of the backpay specification. Such claims are sufficient to warrant a hearing on those matters.[11] Accordingly, we shall order a hearing limited to determining the amounts of interim earnings of the following individuals: Leroy Barnes, Daniel Corrado, Patricia Gage, Ruth Sabin, and Marion Smith.

With respect to the remaining discriminatees, we find that the Respondents' answers raise no valid issues. We therefore deem every allegation as to those discriminatees to be admitted as true and, thus, grant the General Counsel's motion as to these individuals. In this regard, the answers do not raise any valid claims as to the allegations contained in the backpay specification regarding Candace Cook, Kevin Fowler, Dianna Grace, Kathleen Hoffman, Stella Hoffman, Thelma Leveille, Steve Mathes, Gregory Smith, Michael Soules, and Bernadette Williams. Further, it is well settled that matters litigated in the unfair labor practice proceeding cannot be relitigated under the guise of avoiding backpay.[12] With respect to the following discriminatees, the only claims made by Respondent Sisselman were litigated in the underlying proceeding: Susan Barnes,[13] Josephine Daley, George Fiehrer, Juanita Fortune, Rose Galvagni, Anita Burnham Girard, Bernadette Holmes, Diane Andrzejewski Hostetter, Ann Marie Jamros, Walter Manning, Rose Noto, Laura Pike, Robert Sabin, Rose Sayers, and Louise Whelan.

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[6] See *United Hydraulic Services*, 282 NLRB 645 (1987), in which the Board denied a Motion for Summary Judgment because the answer alleged that an offer of reinstatement was made to a discriminatee.

[7] With respect to this discriminatee, the Respondents also argue that she received pension benefits. Pension benefits, which are, in effect, delayed compensation for earlier employment, are not earnings and thus do not affect the Respondents' backpay liability. *F & W Oldsmobile*, 272 NLRB 1150, 1152 (1984). We therefore reject the Respondents' argument in this regard.

[8] See, e.g., *Big Three Industrial Gas*, 263 NLRB 1189, 1200 (1982) (disallowance of backpay for periods of unavailability because of illness is proper under certain circumstances).

[9] See *Victoria Medical Group*, 274 NLRB 1006, 1008 (1985), overruled on other grounds in *Scotch & Sirloin*, supra at fn. 5 (issue of job availability during the backpay period is a valid matter for litigation at the compliance stage, therefore Motion for Summary Judgment denied where issue is raised).

[10] We emphasize, however, that at any hearing on such matters the burden is on the Respondents to establish facts that would negate or mitigate their backpay liability. See, e.g., *Niagara Falls Sightseeing*, 279 NLRB 35 (1986); and *Overseas Motors*, 277 NLRB 552, 559 (1985).

[11] See generally *Lobster Trap*, supra; *United Hydraulic Services*, supra.

[12] See, e.g., *Scotch & Sirloin*, supra at fn. 7, and *Overseas Motors*, 277 NLRB 552, 554, 557 (1985).

[13] With respect to discriminatee Barnes, as well as Walter Manning and Laura Pike, the Respondents claim that they have received unemployment compensation. It is well settled that unemployment compensation is not an offset to backpay. See, e.g., *Howard R. Singer Legal Services*, 278 NLRB 902, 904 (1986). We therefore reject the argument in this regard.

ORDER

IT IS ORDERED that the General Counsel's Motion for Summary Judgment is granted as to all allegations in the backpay specification with respect to the following discriminatees and that pursuant to Section 10(c) of the National Labor Relations Act, the National Labor Relations Board orders that the Respondents, Workroom for Designers, Inc. and Sidney H. Sisselman, Pittsfield, Massachusetts, their officers, agents, successors, and assigns, shall make whole the following discriminatees, by payment of the amounts set forth in the backpay specification,[14] plus interest thereon to be computed in the manner prescribed in *New Horizons for the Retarded*,[15] until payment of all backpay is made, less tax withholdings required by Federal and state laws:

Susan Barnes
Candace Cook
Josephine Daley
George Fiehrer
Juanita Fortune
Kevin Fowler
Rose Galvagni
Anita Burnham Girard
Dianna Grace
Kathleen Hoffman
Stella Hoffman
Bernadette Holmes
Diane Andrzejewski Hostetter

Ann Marie Jamros
Thelma Leveille
Walter Manning
Steve Mathes
Rose Noto
Laura Pike
Robert Sabin

Rose Sayers
Gregory Smith
Michael Soules
Louise Whelan
Bernadette Williams

IT IS FURTHER ORDERED that the General Counsel's Motion for Summary Judgment is granted as to the gross backpay due Patricia Gage and that this proceeding be remanded to the Regional Director for Region 1 for the purpose of arranging a hearing before an administrative law judge, and that such proceeding be limited to a determination of the amounts of her interim earnings.

IT IS FURTHER ORDERED that the General Counsel's Motion for Summary Judgment is denied as to the backpay due the following discriminatees and that this proceeding be remanded to the Regional Director for Region 1 for the purpose of arranging a hearing before an administrative law judge, and that such proceeding be limited to determinations as to the proper backpay period and the amounts of their interim earnings, as detailed in our decision above:

Leroy Barnes
Daniel Corrado
Ruth Sabin
Marion Smith

IT IS FURTHER ORDERED that the General Counsel's Motion for Summary Judgment is denied as to the backpay due the following discriminatees and that this proceeding be remanded to the Regional Director for Region 1 for the purpose of arranging a hearing before an administrative law judge, and that such proceeding be limited to determinations as to the proper backpay period, as detailed in our decision above:

David Amlaw
Steffan Ashley
Olive Bailey
Marie Blefari
Hannah Bontempo
Catherine Carlo
Christina Chrostowski
Gloria Civello
Donna Crawford
Ann DeMarsico
Leola Demary
John Descensi
Irma Dinicola
Linda Garneau
Sherry Briggs Gardner
Chong Gray
Jack Haskell
David Heath
Marie Moore Hebert

Charles Holmes
Valerie Johnson
Regima Lysecka
Rose Marchetti
Teresa McCormack
Deborah McGivern

Rosa Palano
William Paradysz
Donna Passons
Linda Peaslee
Guiseppina Polce
Yolanda Potter
Connie Ruperto
Kathleen Sabin

Ronald Smith
Thomas Spargo
Catherine Troiano
Deborah Wood

The judge shall prepare and serve on the parties a decision containing findings of fact, conclusions of law, and recommendations based on all the record evidence. Following service of the judge's decision on the parties, the provisions of Section 102.46 of the Board's Rules and Regulations shall be applicable.

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[14] The backpay due discriminatees George Fiehrer, Anita Burnham Gerard, and Bernadette Holmes shall be computed in accordance with the General Counsel's clarification to the backpay specification made in the Motion for Summary Judgment.

[15] 283 NLRB 1173 (1987). Interest on and after January 1, 1987, shall be computed at the "short-term Federal rate" for the underpayment of taxes as set out in the 1986 amendment to 26 U.S.C. § 6621. Interest on amounts accrued prior to January 1, 1987 (the effective date of the 1986 amendment to 26 U.S.C. § 6621), shall be computed in accordance with *Florida Steel Corp.*, 231 NLRB 651 (1977).

Jim Walter Resources, Inc. *and* William R. Foster. Case 10-CA-19452

July 29, 1988

DECISION AND ORDER

BY CHAIRMAN STEPHENS AND MEMBERS JOHANSEN AND BABSON

On January 18, 1984, Administrative Law Judge Hutton S. Brandon issued the attached decision. The Respondent filed exceptions and a supporting brief.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and record in light of the exceptions and brief and has decided to affirm the judge's rulings, findings, conclusions, and remedy[1] only to the extent consistent with this Decision and Order.

The complaint alleged and the judge found that the Respondent violated Section 8(a)(5), (3), and (1) by unilaterally ceasing to pay medical insurance premiums for employees receiving disability payments during a strike. We disagree with the judge that by this conduct the Respondent violated Section 8(a)(5) and (1).

These are the pertinent stipulated and credited facts. Following 2 months of unsuccessful contract negotiations with the Respondent, and on the expiration of the existing collective-bargaining agreement, on July 1, 1983, the Union went on strike. The Union, within the preceding few days, had contacted the Respondent about continuing medical insurance coverage for the striking employees with the strikers paying their own premiums.[2] According to credited and uncontradicted testimony, the Union's inquiries were limited to the employees on strike. The Union sought a similar arrangement to one reached during a 1977 strike when the Respondent had permitted striking employees to pay their own premiums and had continued to pay premiums for employees already on disability. The Respondent agreed to permit the strikers to pay their own premiums, and on July 4 sent a letter to all unit employees advising them of the arrangement for the duration of the strike and instructing them to forward their premiums by July 15.

On the morning of July 5, the Respondent's vice president, Frank Haver, called the Union's local president, Matthew Lee, and read him the letter. They met later that day to work out the details of the new premium arrangement. Other union representatives were present, as was Clarence Scogin, an insurance broker, present at the Union's request. The attendees discussed whether the premiums would be paid by a single check from the credit union or individually by the strikers. During this meeting, Scogin asked the Respondent about the coverage of employees already on disability. Haver responded that they would be covered for the specific illness for which they were currently collecting disability payments, but for any unrelated illness they, too, would have to pay their own premiums. Scogin questioned the legality of such a position. Haver replied that he did not know of any legal problems, but if there were, they would be straightened out "down the road."

That concluded the discussion by the parties of the premiums for the disabled employees, and when, on 15 July, the premium payments were forwarded to the Respondent, they included payments on behalf of four or five employees on disability at the beginning of the strike.

With respect to the allegation that by this conduct the Respondent violated Section 8(a)(5), the judge first noted that, pursuant to well-settled law, disability payments are a term and condition that survive the expiration of the collective-bargaining agreement and are a mandatory subject of bargaining that an employer cannot alter without providing the union an opportunity to bargain. The judge found that under article 17 of the expired agreement company-paid health insurance was to continue for disabled employees during the period when accident and sickness benefits were being paid. He determined that the health premium payments were, therefore, part of the overall disability benefit, and thus also a mandatory subject of bargaining. He then concluded that the Respondent violated Section 8(a)(5) by failing in its duty to provide the Union with an opportunity to bargain on the cessation of premiums paid by the Respondent for the employees on disability.

Thus, the judge found neither the July 4 letter to employees, which referred to "present circum-

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[1] In accordance with our decision in *New Horizons for the Retarded*, 283 NLRB 1173 (1987), interest on and after January 1, 1987, shall be computed at the "short-term Federal rate" for the underpayment of taxes as set out in the 1986 amendment to 26 U.S.C. § 6621. Interest on amounts accrued prior to January 1, 1987 (the effective date of the 1986 amendment to 26 U.S.C. § 6621), shall be computed in accordance with *Florida Steel Corp.*, 231 NLRB 651 (1977).

[2] The expired collective-bargaining agreement contained the following provision at art. 17, captioned "Group Insurance":

> The Company agrees to continue Provident Life & Accident Insurance Company Group Policy No. 5414 with the Company being the policy holder and paying the entire cost of the insurance.
>
> . . . .
>
> The Group Insurance terminates on any employee when his active employment terminates except that it continues during the period accident and sickness benefits are paid.

289 NLRB No. 163

stances,"[3] nor the Respondent's conversations before July 5 with the Union about continuing premiums for the striking employees gave clear notice to the Union that the company-paid premiums for the employees on disability would stop during the strike. Further, he found that the Respondent's position was not open to negotiation at the July 5 meeting when it informed the Union that disabled employees were also affected. The judge found this closed attitude to negotiation was evidenced by Haver's reply to Scogin that any legal problem would be addressed later and Haver's admission that the Respondent had made its decision on this issue on July 3, before informing the employees on July 4. That the Respondent informed the employees before it told the Union further convinced the judge that the change was a fait accompli, concerning which the Union did not have a realistic chance to bargain. On the basis of these factors, including the period of only 10 days between the announcement and the due date of the premiums, the judge concluded that the Respondent failed to give the Union a meaningful opportunity to bargain and, therefore, violated Section 8(a)(5) and (1).

In its exceptions, the Respondent contends, inter alia, that the Union had ample opportunity to request bargaining but failed to do so. We agree and on this basis dismiss the 8(a)(5) allegation.

It is uncontroverted that at the July 5 meeting the Respondent unmistakably informed the Union that it would not be paying premiums during the strike for those employees receiving disability payments. This was 10 days before the employee-paid premiums were due to be received by the Respondent. It is well settled that "[W]hen an employer notifies a union of proposed changes in terms and conditions of employment, it is incumbent upon the union to act with due diligence in requesting bargaining."[4] Here, the Respondent provided the Union with at least 10 days' notice of the change. The Board has on occasion found as little as 2 days' notice adequate; it has frequently found notice ranging from 4 to 8 days sufficient.[5] Therefore, we cannot agree with the judge that 10 days did not provide a meaningful opportunity to bargain.

Further, we do not agree with the judge that the July 3 decision about the employees on disability or the July 4 letter prove that the premium change was a fait accompli, which the Respondent was unwilling to discuss further. In cases where an employer has made a decision and announced it to the employees in a similar time period before its effective date, the Board has found the bargaining representative must do more than merely protest the change; it must meet its obligation to request bargaining.[6] As those cases hold, any less diligence amounts to a waiver by the bargaining representative of its right to bargain.[7]

Neither do we agree with the judge that Vice President Haver's reply to insurance consultant Scogin that any legal problems with the premiums payment change would be taken care of later indicated an unwillingness to discuss the issue. Haver was answering a specific question, significantly *not* a request for bargaining, and did not foreclose further discussion at that time or later.

Based on all the above, we find the Union had timely notice of the change in a term and condition of employment and did not take advantage of it to request bargaining. The Union thereby waived its right to bargain. We, therefore, dismiss the allegation that the Respondent violated Section 8(a)(5) and (1) by discontinuing the insurance premiums during the strike for the employees receiving disability benefits.[8]

However, we agree with the judge that by this same conduct the Respondent violated Section 8(a)(3) and (1). The judge, applying the then-controlling precedent in *Emerson Electric Co.*, 240

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[3] The judge found that disabled employees were entitled to the belief that "present circumstances" pertained to the strike and hence those circumstances were not applicable to them.

[4] *Clarkwood Corp.*, 233 NLRB 1172 (1977), citing *Medicenter, Mid-South Hospital*, 221 NLRB 670, 678–679 (1975).

[5] E.g., *Cherokee Culvert Co.*, 266 NLRB 290 (1983); *Clarkwood Corp.*, supra; *Medicenter, Mid-South Hospital*, supra.

[6] *Clarkwood Corp.*, supra; *Medicenter, Mid-South Hospital*, supra. Cf. *Owens-Corning Fiberglas Corp.*, 282 NLRB 609 fn. 1 (1987) (the Board, in finding that the employer's announcement 6 days before the implementation of changes in an employee purchase plan did not provide the union with a meaningful opportunity to bargain, relied on the fact that at the same time as the announcement the employer stated that nothing could be done about the changes); *Michigan Ladder Co.*, 286 NLRB 21 fn. 4 (1987) (the Board found that an employer's March 26 announcement of subcontracting to begin April 1 did not provide the union with a meaningful opportunity to bargain as it was presented as a fait accompli; Member Johansen and then-Member Stephens additionally noted that the employer not only concealed and misrepresented the details of an arrangement already worked out with the subcontractor, but agreed to put it into effect while the union was "still in the dark"); *Ciba-Geigy Pharmaceuticals*, 264 NLRB 1013, 1017–1018 (1982), enfd. 722 F.2d 1120 (3d Cir. 1983) (union found deprived of meaningful opportunity to bargain where it responded to employer's announcement of a new attendance program to be implemented 10 days later by requesting information about the details of the program and where employer actually began implementing the program before the announced date and before furnishing the requested information to the union).

We also note that the July 4 letter to employees would not reasonably have conveyed to them a fixed intention regarding the payment of premiums by disabled employees because, as the judge noted, the July 4 letter was sufficiently unclear that the Union sought clarification at the July 5 meeting concerning what the Respondent was proposing to do.

[7] The Board's decision in *Sherwin-Williams Co.*, 260 NLRB 1321, 1324 (1982), enf. denied 714 F.2d 1095 (11th Cir. 1983), relied on by the judge, is distinguishable. There, the Board, in concluding that the union had no opportunity to bargain, relied on its finding that the union did not have notice of a change until after it was effectuated.

[8] Member Johansen finds it unnecessary to determine whether the Respondent violated Sec. 8(a)(5) because he agrees that this same conduct did violate Sec. 8(a)(3).

NLRB 1143 (1979), enfd. as modified 650 F.2d 463 (3d Cir. 1981), cert. denied 455 U.S. 939 (1982), found that the withdrawal of the health insurance premiums for the employees receiving disability benefits was unlawfully discriminatory and, accordingly, violated Section 8(a)(3) and (1). In *Texaco, Inc.*, 285 NLRB 241 (1987), the Board overruled the *Emerson Electric* theory of violation. Accordingly, we apply the test of discrimination set forth in *Texaco* and, for the reasons explained below, agree with the judge's conclusion that the Respondent's treatment of the employees receiving disability payments amounted to a violation of Section 8(a)(3) and (1).

Texaco sets forth the following test. The General Counsel has the prima facie burden of proving some adverse effect of the benefit denial on employees, i.e., by showing that the benefit was accrued and that it was withheld on the apparent basis of the strike. The Respondent must meet any such prima facie showing with proof of a legitimate and substantial business justification, i.e., proving a clear and unmistakable waiver by the bargaining representative of the employees' statutory right to be free of the discrimination or coercion, or demonstrating reliance on a *nondiscriminatory* contract interpretation that is "reasonable and . . . arguably correct."[9] Further, even if the Respondent proves such a business justification, *Texaco* requires an 8(a)(3) finding if the conduct is proven "inherently destructive" of important employee rights or motivated by antiunion intent.[10]

Applying this test, we find that the General Counsel has met her prima facie burden of proving an adverse effect. It is undisputed that the premium payments were discontinued at the beginning of the strike and for the duration of the strike. Further, applying the guidelines and examples set forth in *Texaco* for determining when a benefit is accrued, we find that premium payments for those employees on disability were an accrued benefit.

Texaco held that a benefit is accrued when it is "due and payable on the date on which the employer denied [it]."[11] Further, *Texaco* provides that proof of accrual will be made on a case-by-case basis on relevant consideration of the collective-bargaining agreement, benefit plan, and past practice. In *Texaco*, the Board found accident and sickness (A&S) benefits were accrued because they were "due and payable based on past performance with no further work required for continuing receipt."[12] Similarly, the Board found an employee's monthly pension credit was accrued "in the sense that his accrued A&S benefit earned him the equivalent of full pay for the requisite number of days to qualify for monthly pension credit."[13]

We find the health insurance premium payments for the employees receiving disability payments in the instant case to be analogous to the employee's monthly pension credit in *Texaco*. Thus, the Respondent concedes that the disability payments were an accrued benefit (and that they were continued during the strike). Looking to the language of the contract, as *Texaco* directs, the receipt of health insurance premium payments for employees receiving disability payments was contingent only on the continued receipt of the disability payments.[14] Article 17 of the expired collective-bargaining agreement provides:

> The Group Insurance terminates on any employee when his active employment terminates except that it continues during the period accident and sickness benefits are paid.

As in *Texaco* where, by the terms of the collective-bargaining agreement, the employee's accrued A&S benefit earned him the equivalent of full pay for the number of days needed to qualify for his monthly pension credit, here the employees' accrued disability payments, by the terms of the collective-bargaining agreement, earned them payment of health insurance premiums for the same time period. The past practice of the Respondent continuing the premium payments for the disability employees during a strike further supports our finding that the premium payments under these circumstances were an accrued benefit.[15]

Turning to the Respondent's defense, we find that the Respondent has failed to prove a legitimate and substantial business justification. The Respondent makes no argument here that the Union expressly waived the right of the disabled employees to company-paid health insurance premiums during a strike.

The Respondent does argue that it relied on a nondiscriminatory contractual interpretation in suspending the benefits. It points to the language in article 17 providing that "the Group Insurance terminates on any employee when his active employment terminates." It argues that "active employment" is a prerequisite for the continuation of benefits, and that the article 17 provision that "active employment" continues during the period disability benefits are paid simply means that disabled employees receiving disability benefits will be deemed "active" during the term of the contract. Therefore, according to the Respondent's argument, once the contract expired, this article was no longer effective; the disabled employees were no longer deemed "active"; and the Respondent was not obliged to continue their premiums.

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[9] *Texaco*, supra, citing *Vesuvius Crucible Co. v. NLRB*, 668 F.2d 162, 168 (3d Cir. 1981). (Emphasis in *Texaco*.)

[10] Id.

[11] Ibid citing *Emerson Electric Co. v. NLRB*, 650 F.2d at 469.

[12] Ibid.

[13] Ibid.

[14] The judge and the Respondent are in error in describing active status as a requirement for the premiums being provided by the Respondent.

[15] Our holding here is limited to circumstances where the payment of prospective health insurance premiums is linked, by the collective-bargaining agreement, to disability benefits in such a way as to become incidental to and part of the overall disability benefits.

First, there is no evidence this argument by the Respondent is more than a post hoc rationalization. When the Respondent announced the cessation of premium payments for all unit employees on July 4, it was in terms of the strike and pursuant to the union-initiated discussions about allowing employees on strike to pay their own premiums during the strike. No mention was made of the contract nor did the Respondent at the July 5 meeting claim the cessation was based on its interpretation of the contract. In fact, it provided the Union with no explanation for stopping premium payments for the disabled employees.

Further, even assuming that the Respondent relied on article 17 of its contract in deciding to suspend the premiums, we find the suggested interpretation is both unreasonable and not arguably correct. That article provides, "The Group Insurance terminates on any employee when his active employment terminates *except* that it continues during the period accident and sickness benefits are paid." (Emphasis added.) Thus, according to the plain language of the contract, the continued payment of health insurance for employers receiving disability benefits is an exception to the requirement that the payment of health insurance terminates when active employment terminates and sets disabled employees apart from any requirement of active employment.

The Respondent additionally asserts that the cessation of premium payments for disabled employees was economically motivated. It claims that it had been suffering substantial business losses, in the range of approximately $400,000 per month, since March 1982. The insurance premiums that amounted to approximately $100,000 per month for the unit employees ($331.27 per employee), according to the Respondent's claim, would comprise a significant savings. This assertion, never mentioned in its dealings with the Union, was also post hoc. Further, the Respondent's three-part proposal during contract negotiations belies a financial motive in discontinuing the disabled employees' premiums. This proposal did not cut off premium payments altogether but gave the Union three options: (1) essentially the same coverage but without Vulcan or vision coverage, with the Respondent paying $275 of each employee's premium per month; (2) slightly revised benefits (also no Vulcan or vision coverage) with the Respondent paying no premiums the first year, but $275 and $310, respectively, for the second and the third years; and (3) the same coverage as salaried employees were currently receiving with the same percentage of premiums paid by the Respondent. Thus, even assuming economic motivation of the sort alleged by the Respondent here could be a substantial business justification, the Respondent has failed to establish such motivation.

The Respondent, having failed to prove a legitimate and substantial business justification for discontinuing the health insurance premium payments for the disabled employees,[16] we agree with the judge that the Respondent violated Section 8(a)(3) and (1) by suspending these premium payments.

ORDER

The National Labor Relations Board orders that the Respondent, Jim Walter Resources, Inc., Birmingham, Alabama, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Discriminating against its employees receiving disability benefits by discontinuing group insurance premium payments for such employees when other of its employees engage in a strike.

(b) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Reinstate the practice of paying group health insurance premiums for employees receiving disability benefits, and make whole, with interest, those employees on disability including William R. Foster, James Crisler, and Roy Owen for any loss they may have incurred as a result of the Respondent's action.

(b) Preserve and, on request, make available to the Board or its agents for examination and copying, all payroll records, social security payment records, timecards, personnel records and reports, and all other records necessary to analyze the amount of backpay due under the terms of this Order.

(c) Post at its Birmingham, Alabama facility copies of the attached notice marked "Appendix."[17] Copies of the notice, on forms provided by the Regional Director for Region 10, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material.

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[16] It is, accordingly, unnecessary to address whether the Respondent's conduct was "inherently destructive" of employee rights. *Texaco*, supra.

(d) Notify the Regional Director in writing within 20 days from the date of this Order what steps the Respondent has taken to comply.

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[17] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

WE WILL NOT discriminate against our employees receiving disability benefits by discontinuing payment of group insurance premiums for such employees when other of our employees are engaged in a strike.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL reinstate the payment of group health insurance premiums for employees receiving disability benefits and, WE WILL make whole, with interest, any such employees including William R. Foster, James Crisler, and Roy Owen for losses they may have suffered as a result of our discriminatory discontinuation of payment of their premiums.

JIM WALTER RESOURCES, INC.

Larry Rothman, Esq., for the General Counsel.

John J. Coleman Jr. and *Stephen E. Brown, Esqs. (Bradley, Arant, Rose & White)*, of Birmingham, Alabama, for the Respondent.

William R. Foster, of Birmingham, Alabama, pro se.

DECISION

STATEMENT OF THE CASE

HUTTON S. BRANDON, Administrative Law Judge. This case was tried at Birmingham, Alabama, on November 1, 1983.[1] The charge was filed on August 2 (amended August 24), and the complaint and notice of hearing was issued on September 1. The issues are whether Jim Walter Resources, Inc. (Respondents or the Company) violated Section 8(a)(5), (3), and (1) of the National Labor Relations Act (the Act) by unilaterally, without notice to or consultation with, the United Steelworkers of America, AFL-CIO-CLC (the Union), ceased to pay medical insurance premiums for certain of its employees due them under an expired collective-bargaining agreement, all because other of the Company's employees ceased work concertedly and engaged in a lawful strike against the Company.

On the entire record, including my observation of the demeanor of the witnesses, and after due consideration of the briefs filed by the General Counsel and the Company, I make the following

FINDINGS OF FACT

I. JURISDICTION

The Company is an Alabama corporation with an office and place of business located in Birmingham, Alabama, where it is engaged in the manufacture of coke, pig iron, mineral wools, and chemicals. During the calendar year preceding issuance of complaint, the Company sold and shipped from its Birmingham, Alabama facility goods valued in excess of $50,000 directly to customers located outside the State of Alabama. The Company admits, and I find, that it is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act. The complaint alleges, and the Company by its answer to the complaint also admits, that the Union is a labor organization within the meaning of Section 2(5) of the Act.

II. THE ALLEGED UNFAIR LABOR PRACTICES

The material facts in this case are not largely disputed. In fact, the parties entered into a joint stipulation setting forth substantially all the significant facts. The joint stipulation, in significant part, is as follows:

> 2. At all times material herein, the Union has been, and is, the recognized bargaining representative of the employees in the unit described in paragraph 6 of the Complaint and Notice of Hearing, for the purposes of collective bargaining and, by virtue of Section 9(a) of the National Labor Relations Act (herein call the Act), has been, and is, the exclusive representative of all the employees in said unit for the purposes of collective bargaining.
>
> 3. Respondent and the Union were parties to a collective bargaining agreement covering the employees of Respondent in the unit described in para-

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[1] All dates are in 1983 unless otherwise indicated.

graph 6 of the Complaint and Notice of Hearing, which collective bargaining agreement was in effect for the period July 1, 1980 to June 30, 1983 inclusive, on which date said collective bargaining agreement expired by its own terms.

. . . .

5. On or about May 1, 1983, Respondent and the Union commenced negotiations concerning a new collective bargaining agreement.

6. There is no issue as to whether the requirements of [Section] 8(d) of the Act have been met.

7. During the course of negotiations, Respondent and the Union exchanged various proposals, including proposals concerning medical and other insurance benefits for employees. At no time prior to July 1, 1983, did Respondent propose in said negotiations to completely eliminate medical insurance benefits for employees or propose that employees pay the full premium for medical insurance in any proposed collective bargaining agreement.

8. On or about July 1, 1983, the collective bargaining agreement described in paragraph 3 expired and employees of Respondent in the above described bargaining unit ceased work concertedly and engaged in a lawful economic strike.

9. On or about July 1, 1983, upon expiration of the collective bargaining agreement described in paragraph 3 and upon commencement of the strike described in paragraph 7, Respondent and the Union discussed whether employees in the unit would be allowed to continue medical insurance coverage as previously provided in the collective bargaining agreement described in paragraph 3 during the period prior to agreement on a new collective bargaining agreement.

10. On or about July 3, Respondent offered to the Union to allow employees in the unit to continue medical insurance coverage as previously provided in the collective bargaining agreement, but at the employees' own cost. Respondent further informed the Union that, in order to continue such insurance coverage, an employee would be required to provide Respondent with an individual check no later than July 15, 1983, said check to be in an amount equal to the regular monthly premium charged for such insurance coverage. The Union requested that each employee not be required to pay his respective monthly premiums separately and requested that alternative methods of payment be considered.

11. On or about July 15, 1983, the Respondents and the Union agreed to an alternative method whereby individual employees in the unit could pay their individual monthly insurance premiums and continue in effect medical coverage pending negotiations of a new collective bargaining [agreement]. Respondent agreed that it would accept individual checks from the Sloss Federal Credit Union payable jointly to the Respondent and to the designated individual employee in the unit and endorsed by the individual employee in question.

12. On or about July 4, 1983, by letter, Respondent notified all employees in the above described bargaining unit of the cessation of medical insurance coverage and of the method by which individual employees could keep in force their medical insurance coverage. A copy of said letter is appended hereto as Joint Exhibit 2.

13. On or about January 25, 1983, Charging Party William R. Foster, employed by Respondent at the time, sustained an on-the-job injury to his right elbow. Foster returned to work and continued to work for Respondent until on or about June 30, 1983, when he underwent surgery on his elbow. Foster was released to return to work by his physician, Dr. Edward Bromberg, on August 1, 1983. During the period of his disability, Foster received weekly disability payments from Respondent.

14. On or about July 7, 1983, Foster received a copy of Joint Exhibit 2. Consequently, Foster paid his own medical premium pursuant to the instructions contained in Joint Exhibit 2, for the month of July, 1983.

15. On or about August 1, 1983, upon being released to return to work, Foster did not return to work at Respondent's facility, but rather notified Respondent, by letter, that as of August 1, 1983, he was electing to join the Union in their strike against Respondent. At no time prior to his release to return to work did Foster affirmatively communicate to Respondent that he had joined the strike.

16. On or about May 23, 1983, employee James Crisler sustained an on-the-job injury, receiving a burn to his foot. Crisler was treated on that date and returned to work on May 24, 1983. Due to complications that resulted from his injury, Crisler was hospitalized on or about May 24, 1983, for a period of 24 days. He was released to return to work on or about October 16, 1983. During the period of his disability Crisler received disability payments from Respondent in the amount of $180.00 per week.

17. Between May 24 and July 1, 1983, Crisler continued receiving medical insurance coverage as provided in the collective bargaining agreement described in paragraphs 3 and 4 above. On or about July 7, 1983, Crisler received a copy of Joint Exhibit 2. Consequently, Crisler paid his own medical insurance premiums pursuant to instructions contained in Joint Exhibit 2, from on or about July 1, 1983, up to and including the date he was released to return to work on or about October 16, 1983. Upon his release to return work, Crisler did not return to work, but rather joined the strike already in progress at Respondent's facility. At no time prior to his release to return to work did Crisler affirmatively communicate to Respondent that he had joined the strike.

18. Employee Roy Owen has been disabled from work since on or about February, 1983. From the time of his disability to the present, Owen has received disability payments in the amount of $180.00 per week from Respondent. Until July 1, 1983, Owen continued to receive medical insurance coverage as provided in the collective bargaining

> agreement desccribed in paragraphs 3 and 4, above. On or about the second week of July, 1983, Owen had a conversation with Respondent's Vice President for Employee Relations, F. E. Haver, who informed Owen that unless he paid his own medical insurance premiums, he would no longer be covered by Respondent's medical insurance plan. Consequently, Owen has personally paid medical insurance premiums in order to maintain said medical insurance coverage. At no time between the commencement of the strike on or about July 1, 1983 and the present, has Owen affirmatively communicated to Respondent that he had joined the strike.
>
> 19. In addition to employees Foster, Crisler and Owen, there were other employees in the bargaining unit who were off work on sickness and accident disability as of July 1, 1983. These employees have continued to receive sickness and accident disability benefits, to the extent entitled to such benefits, but have not continued to receive prospective medical coverage except as by the method provided in Joint Exhibit 2.

The collective-bargaining unit, which is referred to in paragraph 3 of the stipulation, is as follows:

> All production and maintenance employees employed by Respondent at its by-products plant, energy department, Mary Lee department, blast furnace, slag plant, mineral wool, vehicle maintenance department and chemical plant, but excluding all foremen, salaried clerks, technical employees, guards and supervisors as defined in the Act.

In view of the collective-bargaining history between the parties referred to in the stipulation, and because Respondent's answer to the complaint admits that the above unit is appropriate, I find the unit to be an appropriate one for the purposes of collective bargaining.

The expired collective-bargaining agreement, which was received in evidence, contains the following pertinent provision at article 17, captioned "Group Insurance":

> The Company agrees to continue Provident Life & Accident Insurance Company group policy No. 5414 with the Company being the policy holder and paying the entire cost of the insurance.
>
> . . . .
>
> The Group Insurance terminates on any employee when his active employment terminates except that it continues during the period accident and sickness benefits are paid.

Joint Exhibit 2, which was referred to above in the stipulation between the parties, was a letter from the Company dated July 4, 1983, that was mailed to all the unit employees including those on disability. That letter addressed the concerns of the striking employees about the status of their insurance benefits. The letter stated:

> Your Company is equally concerned and realizes that without such protection, you and your family could be subjected to serious financial liability. The Company wiil, therefore, make the necessary arrangements which will permit you to continue your life, hospital, surgical, and dental insurance until further notice.

The letter then announced:

> Under the present circumstances you, of course, realize that the Company is not willing to continue paying the cost of your insurance. Should you decide to continue your insurance, you may do so; however, you must pay the full cost which, in the past has been paid for you by the Company.

The letter then proceeded to explain the cost of the insurance and described the arrangements for payments and the due date for payments. Also, the letter supplied telephone numbers that employees might utilize to ask questions of the Company concerning the insurance matter. However, the letter made no specific reference to premium payments for employees who were on disability due to a job-related injury at the beginning of the strike.

Both sides relied on oral testimony to "flesh out" the written stipulation. Clayton Robinson, financial secretary for Local Union 12014, and Matthew Lee, president for the Local Union, testified for the General Counsel while Frank Haver, the Company's vice president for employee relations, testified on behalf of the Company. There appears to be little conflict in the testimony between the witnesses that related to efforts by the Union to secure health insurance coverage for the bargaining unit employees during the course of the strike, which was continuing at the time of the hearing. To the extent of any differences between the testimony of the witnesses, I find the testimony of Haver more reliable and credible except when specifically noted otherwise. Haver impressed me as having a clearer recall concerning details and dates regarding his contracts with union officials and the content of his remarks to them.

Haver, in his testimony, acknowledged requests by both Lee and Robinson regarding the Union's desire to continue health insurance coverage of the strikers following the beginning of the strike with the strikers paying their own individual premiums. Haver's response to each was that he would check into the matter. The Company's position on the subject was subsequently arrived at and set forth in the letter to employees dated July 4. Haver testified that to be sure that the Union received the information contained in the July 4 letter, Haver called Lee on the morning of July 5 and read the letter to him. At Lee's request Haver met with Lee at a local credit union on or about July 5 to discuss arrangements for striking employees to pay their own insurance premiums. Other attendees at the meeting for the Union were John Griffith, an International representative, committeemen Willie Bush and Harry Griffith, and Clarence Scogin, an insurance broker who was present at the Union's request. Haver also identified Robinson as being there but was less clear about the presence of an International representative named Billy McColeman.[3] In any event, discussions were held regarding whether the credit union could issue a single check to the Company for the strikers' insurance coverage. Haver rejected this proposal insisting that the individual strikers had to pay their respective premiums to ensure that there would be no confusion concerning which employees were actually covered. Haver conceded that during the discussion Scogin raised the issue of coverage of people already off on disability. Haver responded that benefits would not be shut off for those people collecting disability for medical benefits because of an existing medical problem. More specifically, Haver said he advised union officials that employees who were getting disability would continue to get it so long as they were out for the specific illness that caused the disability, and that if they were hospitalized for a specific disability that occurred before June 30, they would still be covered. However, he related that for any unrelated-type illness, the employees would have to pay the premium for that because it was, in effect, new coverage as far as the Company was concerned. Haver conceded in his testimony that Scogin raised the question of whether that was legal, and Haver replied that he did not know, but if there were something illegal about it, they would straighten it out "down the road."

The meeting ended without a specific resolution with respect to how the insurance premiums were to be paid. Nevertheless, as the joint stipulation shows, on July 15, payment of the premiums for July coverage was made in an acceptable manner to the Company. Haver admitted that the premium payments included payments for about four or five employees who were off on disability at the beginning of the strike.

III. ARGUMENTS AND CONCLUSIONS

Based on the facts set forth in the written stipulation and the other facts set forth above, the General Counsel argues that employees on disability were entitled under the terms of the collective-bargaining agreement, article 17, to have their health insurance premiums paid by the Company during the period of their disability. That obligation on the part of the Company, according to the General Counsel, survived the expiration of the collective-bargaining agreement on June 30. Although Respondent and the Union had bargained over health insurance coverage during negotiations regarding a new contract, the Company had not proposed elimination of premium payments for health insurance for employees on disability. There was, therefore, no impasse on the point, and the Company's refusal to pay premiums for employees on disability at the commencement of the strike constituted, the General Counsel argues, a unilateral alteration of the terms and conditions that existed under the preceding contract and thus constituted an unlawful refusal to bargain with the Union in violation of Section 8(a)(5) and (1) of the Act.

The General Counsel concedes that the Company was not obligated by law to continue to make the health insurance premium payments for employees who were on strike. However, the General Counsel argues that the employees who were on disability at the beginning of the strike and who otherwise would have been entitled to have their insurance premiums paid for them because they were on disability were discriminated against in violation of Section 8(a)(3) and (1) of the Act by the Company. There was no evidence presented that such employees on disability joined or supported the strike before the time that the Company decided to cease premium payments for them. The Company, the General Counsel in effect argues, lumped the employees on disability in with the other employees who were on strike in making its decision to cease premium payments for all employees because of the strike. They penalized the employees who were on disability when the strike began because it put them in a position of having to disavow their support for the strike to have their health insurance premiums paid by Respondent under the provisions of article 17 of the agreement. The General Counsel, citing *Emerson Electric Co.*, 246 NLRB 1143 (1979), enfd. as modified 650 F.2d 463 (3d Cir. 1981), cert. denied 455 U.S. 939 (1982), asserts that the Company could not put employees on disability in a position where they would have to disavow the strike to keep receiving insurance coverage.

The Company contends initially concerning the 8(a)(5) allegation that it made no unilateral change in working conditions. This argument is based essentially on the proposition that the Company was privileged to terminate premium payments for the prospective insurance benefits for disabled employees because, in effect, their status as "active" employees derived from the collective-bargaining agreement and expired with the termination of that agreement. Even assuming, arguendo, that it did make a change in the employees' conditions of employment by requiring employees on disability to make their own premium payments, the Company argues that it did not violate Secction 8(a)(5) of the Act because the Union had notice of the change and failed to request to bargain about the matter. In support of this contention, Respondent cites *NLRB v. Sherwin-Williams Co.*, 714 F.2d 1095 (11th Cir. 1983); *NLRB v. J. P. Stevens & Co.*, 538 F.2d 1152 (5th Cir. 1976); and *S & W Motor Lines*, 236 NLRB 938 (1978). On the facts here, the Company asserts that the Union was aware on July 4 that Respondent would not pay the insurance premiums for employees on disability, but did not seek to bargain on the subject even though it had at least 10 days before the premiums were due. Thus, the Union had notice and an opportunity to bargain on the Company's action, but failed to do so and thus acquiesced in it.

Regarding the 8(a)(3) allegation, the Company urges that no evidence was shown to establish that Respondent intended to discriminate against employees as a result of the strike. In short, there was no evidence of union animus by the Company. Further, it is urged that the Company's actions were not inherently destructive of employee rights. In this connection, the Company contends that premium payments for prospective insurance coverage was not an accrued benefit under the collective-bargaining agreement. Denial of a prospective benefit, so the argument proceeds, is analogous to nonpayment of wages during a strike, which the Company may not be required to pay. Under the collective-bargaining agreement, payment of the premium is hinged on the employee's continued "active" status *during the term of the agreement*. Such payments would cease in any event when an employee on disability notifies the employer that he quits. Receipt of disability benefits, on the other hand, was pursuant to agreement between the insurance carrier and the employee and continued regardless of whether the employee receiving the disability benefits continued as an employee. The Company concedes that the disability payments are an accrued benefit. Since the Company concludes that the prospective insurance coverage for disabled employees was not an accrued benefit, its failure to pay the premium for such employees was not inherently destructive of employee rights, and the Company's action in this regard did not discriminate against employees because of the strike.

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[3] Lee also placed Robinson at the meeting. However, Robinson, in his testimony, denied that he was present at this meeting. The denial was emphatic and convincing. Accordingly, I find that Haver and Lee were mistaken regarding Robinson's presence at the meeting.

It is well established that an employer violates Section 8(a)(5) of the Act when it institutes changes in conditions of employment without first consulting the employee collective-bargaining representative and giving it an opportunity to bargain on the changes. *NLRB v. Katz*, 369 U.S. 736 (1962). Further, any changes that constitute modification of a collective-bargaining agreement without the consent of the union violates the employer's bargaining obligation. *ITT McDonnel & Miller*, 267 NLRB 1093 (1983). The Board has authority to construe collective-bargaining agreements and resolve ambiguities to determine whether an employer's action constitutes a unilateral change. *NLRB v. Strong Roofing & Insulating Co.*, 393 U.S. 357 (1969); *NLRB v. C & C Plywood Corp.*, 385 U.S. 421 (1967).

It has long been held that health and welfare plans as well as pension plans under an expired collective-bargaining agreement constitute aspects of employee wages and terms and conditions of employment that survive the expiration of the agreement and cannot be altered without bargaining. See *Hen House Market No. 3*, 175 NLRB 596 (1969), enfd. 428 F.2d 133 (8th Cir. 1970). Disability plans providing for accident and sick benefits have also been held to be mandatory subjects of bargaining under Section 8(d) of the Act so as to preclude employer unilateral action thereon. *McDonnell Douglas Corp.*, 224 NLRB 881 (1976).

Under article 17 of the expired agreement in the instant case, company-paid group health insurance was to continue for disabled employees during the period when accident and sickness benefits were being paid. There is nothing in the agreement that limits the provision to the term of the agreement, and the Company apparently recognizes this since it conceded that the disability benefits were accrued and payable after termination of the agreement and even after "active" employment ends due to the disabled employee's resignation. Payment of the premium for prospective insurance coverage was clearly incidental to, and part of, the overall disability benefit provided under the agreement. That benefit clearly related to terms and conditions of employment and was, I conclude, a mandatory subject of bargaining. Discontinuance of the insurance premium payment for disabled employees even after expiration of the expired agreement without giving the Union an opportunity to bargain on the subject would therefore violate Section 8(a)(5) and (1) of the Act. See *Sherwin-Williams*, supra. The question presented here then is whether the Union had an opportunity to bargain regarding the Company's cessation of the group insurance for the disabled employees.

It is clear that the Union was not advised before July 5 that the Company did not intend to continue premium payments for group health insurance for those on disability at the beginning of the strike.

Although the Company's July 4 letter was sent to all unit employees, there was nothing in the letter to lead disabled employees to believe that they would have to undertake payment of their own premiums while on disability. Disabled employees were entitled to the belief that the "present circumstances" referred to in the letter pertained to the strike, and since they were not withholding their services to the Company due to the strike, those "circumstances" were not applicable to them. They were further entitled to this belief on the basis of the Company's past action, for the undisputed and thus credited testimony of Lee establishes that at least on one prior occasion, during a contract renewal strike in 1977, the Company had continued to pay the premium for disabled employees during the strike. Accordingly, the letters, I conclude, were not sufficient to put the Union on notice that the refusal to pay the premiums was applicable to disabled employees. Moreover, I find nothing in the inquiries of Lee and Robinson to Haver before the strike, or Haver's responses thereto, that would reasonably serve to put the Union on notice that the Company intended to cease premium payments for disabled employees on commencement of the strike.

It was only at the meeting at the credit union with the union officials on July 5 that Haver made clear that the Company would not make premium payments for group insurance for the disabled employees. Haver's response to the question of legality raised by Scogin at the July 5 meeting was simply to dismiss the issue as something that would be subsequently "straightened out down the road." There was, under these circumstances, I conclude, no real opportunity to bargain about the matter and Haver's brief reply to Scogin's question served to indicate that the matter was not one that Haver was willing to discuss further at that time. Moreover, the Company's decision in this regard was not open to negotiations, as confirmed by Haver's admission that the determination not to pay the premiums for disabled employees was reached on or about July 3, and the Company's contention that the letter dated July 4 to employees on the subject was specifically designed to include disabled employees among those required to pay their own premiums during the strike. Thus, the decision in this regard was announced to employees before it was even made emphatically clear to the Union on July 5 that disabled employees were also to pay their own premiums. Under these circumstances, it is quite clear that the Company's letter of July 4 was simply an announcement of a fait accompli with, I conclude, no realistic opportunity to the Union to negotiate on the subject.

Respondent relies on *Sherwin-Williams*, supra, in arguing that the facts here establish an opportunity on the part of the Union to bargain concerning the termination of premium payments for the employees on disability during the strike. In the cited case, the Board had held that the employer there had violated Section 8(a)(5) and (1) of the Act by unilaterally changing employee benefits by withholding holiday pay from one of its employees during the course of a strike. The evidence there reflected that on the day following the expiration of the collective-bargaining agreement and on the first day of the strike, the employer notified the union of a cessation of all benefits provided under the expired contract, including apparently the provision that granted holiday pay to employees absent due to disability resulting from an industrial accident. The union protested the employer's announcement in this regard, but the employer adhered to its position. The Board found that the only evidence that the first notice the union actually had of the holiday pay being discontinued for disabled employees was after the fact, and that the union was not afforded an opportunity to negotiate the subject matter before respondent made the change. The Board stated that there was no precedent standing for the proposition that an employer with an outstanding bargaining obligation could unilaterally alter or change an existing benefit that is regarded as a mandatory subject of bargaining without prior notice or bargaining. The court refused to enforce the Board's order and found that the union had an opportunity to bargain on the subject of the holiday pay cessation not only on the day that the employer announced termination of the contract benefits, but also in subsequent bargaining sessions but that, for whatever reason, the union chose not to voice its concern about the termination of benefits. More specifically, the court held that after notifying the union of its withdrawal of benefits under the expired contract, the union had ample opportunity over a period of 2-1/2 months to bargain with the employer regarding the withdrawal of benefits. The court's decision in *Sherwin-Williams* is indisputably the law of that case. With all due respect, however, to the court's decision, the Board's decision in *Sherwin-Williams* is reflective of its position in cases of like nature. I am bound by the Board's precedent. See *Lenz Co.*, 153 NLRB 1399 (1965); *Iowa Beef Packers*, 144 NLRB 615, 616 (1963); and *Insurance Agents (Prudential Insurance)*, 119 NLRB 768, 773 (1957), revd. on other grounds 361 U.S. 477 (1960). In any event, I believe that the instant case may be distinguished from the *Sherwin-Williams* case, for here Haver's response to Scogin's protest about the legality of the Company's action reveals Haver's and thus the Company's lack of concern about the legality of its actions and demonstrated to the Union that the issue was not one that was subject to bargaining. Moreover, unlike the situation in *Sherwin-Williams*, the Union here only had 10 days between the date of the Company's announcement that it would not pay the premiums of disabled employees and the date such employees were compelled to pay their own premiums. This was clearly insufficient opportunity for the Union to bargain on the subject, particularly in light of Haver's expressed intention to consider the legality of the Company's action only at some indefinite time "down the road."

For the same reason, the instant case is distinguishable from *J. P. Stevens*, supra, and *S & W Motor Lines*, supra, relied on by Respondent. Here Haver's response to the issue of the legality of the Company's action, even if not considered as an outright refusal to bargain on the premium payments, effectively deferred bargaining on the matter, and the Union was not subsequently advised by the Company of a willingness to discuss the subject before the premium payments were due.

Considering the foregoing and the record as a whole, I conclude as argued by the General Counsel, that the Company's announcement that it would not pay the premiums for disabled employees at the beginning of the strike, though there was no evidence presented reflecting that such disabled employees had joined the strike, constituted a unilateral action in derogation of its obligation to notify the Union and give it a meaningful opportunity to bargain on the matter. I, therefore, find, as argued by the General Counsel, that Respondent violated Section 8(a)(5) and (1) of the Act in this regard.

The allegation of an 8(a)(3) violation by the Company becomes largely academic in view of the remedy provided hereinafter for the 8(a)(5) violation found above. However, a conclusion concerning the allegation is necessary should the Board conclude that the 8(a)(5) finding is erroneous. In considering the 8(a)(3) violation, it is first apparent, as the Company argues, that there is no evidence of specific union animus in the Company's termination of the premium payments of the disabled employees. Nevertheless, it is clear that termination of the premium payments for such employees was discriminatory with respect to them because it was part and parcel of the Company's decision not to pay the premium for the strikers.[3] In effect, the Company lumped the disabled employees with the strikers. Although the Company was not required to pay premiums for the strikers, its refusal to pay premiums for the disabled employees was directly related to the occurrence of the strike and penalized the disabled employees during the period of their disability although it was not shown that they were withholding their services from the Company because of the strike rather than their respective disabilities.

The Supreme Court has held that if it can be reasonably concluded that an employer's discriminatory conduct is "inherently destructive" of important employees rights, no proof of antiunion motivation is needed, and the Board can find an unfair labor practice even if the employer introduces evidence that the conduct was motivated by business considerations. *NLRB v. Great Dane Trailers*, 388 U.S. 26, 32 (1967). I conclude that the instant case is one in which the "inherently destructive" principle applies. It is quite clear from the record that the Company viewed the disability benefits payable under the expired agreement as accrued benefits for it did not terminate such benefits at either the expiration of the agreement or the commencement of the strike. Payment of the health insurance premium for disabled employees was clearly incidental to the employees eligibility for, and receipt of, disability payments. Payment of the premium was conditioned only on the disabled employees "active" status. A disabled employee's "active" status is not effected by the occurrence of a strike during the period of his disability. So long as the disabled employee retained employment status he was entitled to have his premium payment made for him by the Company. Indeed, even the Company during the 1977 strike apparently viewed the premium payment as an accrued benefit since it continued such payments for disabled employees during that strike. Accordingly, I conclude that the payment of group health insurance premiums for disabled employees was an accrued benefit under the expired agreement. Such payments constituted an element of the disability benefits that was clearly analogous to payment for past work performed. There is no evidence that they were in any way dependent on future services and, insofar as this record shows, they were due and payable for the disabled employees so long as they continued in their disability and remained employees.

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[3] The Company does not contend, and the evidence does not otherwise establish, that the Company would have discontinued premium payments for all its employees had there been no strike. Certainly, under the authority cited, the Company could not unilaterally have ceased such payments. Only the occurrence of the strike and its effect on the "active" employment status of the strikers excused the Company's refusal to pay their premiums.

In *Emerson Electric*, supra, the Third Circuit Court of Appeals held that termination of accrued disability benefits to employees before any showing that they affirmatively supported a strike evinces an intent on the part of the employer to discourage employees from exercising their Section 7 rights by coercing them to refrain from supporting a strike and retaliates against them in a discriminatory manner for their presumed, but not established, support of the strike. Such discrimination, according to the court, lasts for the duration of the employee's disability. The principles set forth by the court in *Emerson Electric* were followed by the Board in *Conoco, Inc.*, 265 NLRB 819 (1982). More recently in *Texaco, Inc. v. NLRB*, 700 F.2d 1039 (5th Cir. 1983), the court enforced a Board order finding a violation of Section 8(a)(3) of the Act in *Texaco, Inc.*, 259 NLRB 1217 (1982), followed the principles of *Emerson Electric* to the extent of deciding the "core question" whether an employer could in effect force a disabled worker to join a strike, absent disavowal, by canceling accident and sick benefits that would otherwise be available to the employee. The court held that the employer could not lawfully do so, and reached this conclusion without regard to whether the benefits were accrued.

On the record in the instant case, I have concluded that the premium payment for disabled employees was an accrued benefit like the disability benefits to which such payment was incidental. The Company's refusal to pay that benefit was, I find, because its employees engaged in a strike, and the Company presumed that the disabled employees supported the strike, thereby effecting their "active" status under the terms of the expired agreement. The net effect was discrimination against one group of employees because another group engaged in activity protected under the Act, a strike. I conclude that the Company's action in this regard was inherently destructive of employee rights under the Act and, therefore, violative of Section 8(a)(3) and (1) of the Act.

CONCLUSIONS OF LAW

1. Respondent Jim Walter Resources, Inc. is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

2. The Union, United Steelworkers of America, AFL-CIO-CLC, is a labor organization within the meaning of Section 2(5) of the Act.

3. The Union is the collective-bargaining representative of a majority of Respondent's employees in the following appropriate unit, which unit is appropriate for the purposes of collective bargaining within the meaning of Section 9(b) of the Act:

> All production and maintenance employees employed by Respondent at its by-products plant, energy plant, Mary Lee department, blast furnace, slag plant, mineral wool, vehicle maintenance and chemical plant, but excluding all foremen, salaried clerks, technical employees, guards and supervisors as defined in the Act.

4. By discontinuing group insurance premium payments for its employees, including William R. Foster, James Crisler, and Roy Owen, on July 1, 1983, as a result of the strike occurring on that date while such employees were receiving disability benefits, Respondent discriminated against such employees in violation of Section 8(a)(3) and (1) of the Act.

5. By unilaterally, without notice to or bargaining with the Union, changing the terms and conditions of employment of employees in the unit listed above by discontinuing group insurance premiums payments on disability as of July 1, 1983, Respondent violated Section 8(a)(5) and (1) of the Act. The aforesaid violations of the Act constitute unfair labor practices affecting commerce within the meaning of Section 2(6) and (7) of the Act.

THE REMEDY

Having found that Respondent has engaged in certain unfair labor pratices, I find it necessary to order it to cease and desist and to take certain affirmative action designed to effectuate the policies of the Act.

Having found that Respondent violated Section 8(a)(5), (3), and (1) of the Act when it refused to pay group insurance premiums for employees on disability on expiration of the former collective-bargaining agreement and on commencement of a strike on July 1, 1983, by other employees, and to restore the status quo ante existing before the violation, I shall recommend that Respondent be ordered to make such employees whole, with interest, for any losses occasioned by them as a result of Respondent's failure to pay the premiums for them during the period of their disability. This make-whole remedy is to be interpreted to require reimbursement of those employees, with interest, for premiums paid by them during the period of disability that would have been paid for them but for the Company's unilateral action. Interest is to be computed in the manner prescribed in *Florida Steel Corp.*, 231 NLRB 651 (1962).[4]

Moreover, to complete the restoration of the status quo ante, it shall be ordered that Respondent reinstate the program for paying premiums for disabled employees and henceforth bargain with the Union over termination of such payments.

[Recommended Order omitted from publication.]

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[4] See generally *Isis Plumbing Co.*, 138 NLRB 716 (1962).

San Juan Hotel Corporation d/b/a El San Juan Hotel *and* Union de Empleados de Casinos de Puerto Rico *and* Federacion General de Trabajadores de Puerto Rico[1]

Federacion General de Trabajadores de Puerto Rico *and* Union de Empleados de Casinos de Puerto Rico. Cases 24–CA–4663, 24–CA–4667, 24–CA–4676, and 24–CB–1179

July 29, 1988

DECISION AND ORDER

BY CHAIRMAN STEPHENS AND MEMBERS JOHANSEN AND BABSON

On May 3, 1983, Administrative Law Judge Thomas R. Wilks issued the attached decision. The General Counsel filed exceptions and a supporting brief, and the Federacion General de Trabajadores de Puerto Rico (Federacion) filed exceptions and a supporting brief.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings,[2] and conclusions only to the extent consistent with this Decision and Order.

1. The judge found that unilateral changes in wage rates and other terms and conditions of employment, which were implemented by Respondent Hotel on March 9 and June 14, 1982, did not violate Section 8(a)(5) and (1) of the Act and, therefore, that the Hotel did not violate Section 8(a)(3) and (1) by conditioning continued employment of unit employees on their explicit acceptance of those changes.[3] In reaching these conclusions the judge found that the General Counsel did not sustain the burden of proving that the Hotel did not bargain in good faith to impasse. The judge further found that the Federacion had been presented with sufficient opportunity to bargain about the changes, but waived its bargaining rights by a lack of diligence in demanding and pursuing bargaining. Based on these findings, the judge did not find it necessary to address whether, following the lawful rejection in bankruptcy of a collective-bargaining agreement, an employer must, on request, bargain to impasse prior to implementing new terms and conditions of employment.

We agree with the judge's conclusion that the Hotel's unilateral changes were lawful, but we do so on the basis of the analysis set forth in *NLRB v. Bildisco & Bildisco*, 465 U.S. 513 (1984), which issued after the judge's decision. In *Bildisco* the Supreme Court held that from the filing of a petition in bankruptcy until formal rejection, a collective-bargaining agreement is not an enforceable contract within the meaning of Section 8(d) of the Act. The Court thus held that a debtor-in-possession does not commit an unfair labor practice by unilaterally rejecting or modifying a collective-bargaining agreement after the filing of a petition but prior to court-approved rejection.[4]

In the instant case the Hotel and the Federacion were parties to a collective-bargaining agreement that was effective from May 1, 1977, until April 30, 1980. On May 20, 1980, the Hotel filed a petition for reorganization under Chapter 11 of the United States Bankruptcy Code. On June 23, 1980, the parties agreed to extend the collective-bargaining agreement to April 30, 1983. Thereafter, on October 5, 1981, the Hotel filed an application to reject the collective-bargaining agreement; on November 12, 1981, the bankruptcy court approved the rejection; and on March 8, 1982, the Hotel rejected the agreement. Thus, the Hotel's unilateral changes of March 9 and June 14, 1982, which occurred after court-approved rejection of the collective-bargaining agreement, were clearly implemented when the agreement was no longer an enforceable contract under Section 8(d). See *Bildisco*, above. Accordingly, we find that the unilateral changes were lawful and, therefore, that it was not unlawful for the

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[1] The name of the Federacion appears as set forth in the complaint.

[2] The General Counsel has excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

On August 18, 1983, the bankruptcy trustee for the Hotel filed a motion requesting stay of proceedings, in which he noted that the Hotel's Chapt. 11 petition was converted to Chapt. 7 on March 24, 1983. We deny the trustee's motion on the grounds that the Board's proceedings fall within the exceptions to the automatic stay provisions of the U.S. Bankruptcy Code. See 11 U.S.C § 362 (b)(4), (b)(5); *Phoenix Co.*, 274 NLRB 995 (1985); *J & B Smith Co.*, 280 NLRB 537 (1986).

In accordance with our decision in *New Horizons for the Retarded*, 283 NLRB 1173 (1987), interest on and after January 1, 1987, shall be computed at the "short-term Federal rate" for the underpayment of taxes as set out in the 1986 amendment to 26 U.S.C. § 6621. Interest on amounts accrued prior to January 1, 1987 (the effective date of the 1986 amendment to 26 U.S.C. § 6621), shall be computed in accordance with *Florida Steel Corp.*, 231 NLRB 651 (1977).

[3] The March 9 unilateral changes included, inter alia, reduced pay rates, shorter break periods, and discontinuance of deductions for union dues and the pension plan. The June 14 changes involved only a wage reduction.

[4] We are mindful that the Bankruptcy Amendments and Federal Judgeship Act of 1984, enacted by Congress on July 10, 1984, modifies *Bildisco* and governs a debtor-in-possession's rejection of a collective-bargaining agreement. The statute does not apply, however, to cases such as this in which the bankruptcy petition was filed prior to the enactment of the statute. Pub. L. 98–353 § 541, 98 Stat. 333, 390–391 (1984).

289 NLRB No. 164

Hotel to condition continued employment on the employees' acceptance of those changes.[5]

2. The judge found that Respondent Hotel did not violate Section 8(a)(3) and (1) by discharging employee Maldonado in connection with a leaflet that was distributed to employees and made available to hotel patrons on June 17, 1982. In this regard, the judge, relying on the line of cases beginning with *NLRB v. Electrical Workers IBEW Local 1229 (Jefferson Standard)*, 341 U.S. 694 (1953), found that the leaflet was unprotected under the Act. The leaflet read as follows:

> June 16, 1982
>
> To All Employees of Hotel San Juan
>
> Hereby we wish to invite all fellow workers of all the departments of the hotel to attend an informative protest picket, which will take place on Monday, June 21, 1982, at 10:00 a.m., due to the irresponsible manner in which Mr. Hector Rodriguez Estrada, trustee of the hotel, is administering the same; and to make publicly known the abuses that this individual is committing against us employees who are doing our best to keep this Hotel operating.
>
> Fellow Workers: let us defend what is ours, which we have obtained through 25 years of work and sacrifice. Let's not allow this Dictator to close the Hotel. Which has been his desire since he started to operate the same, this has been said by the latter on different occasions "that it is to his advantage to close to [sic] Hotel rather than keep it open," inasmuch as by selling it, he will earn 2% of the total sale (price). This man has turned into the Robin Hood of the Rich, taking the wages away from the poor in order to pay a multimillionaire company.
>
> Fellow workers: We'll see you on Monday, June 21, 1982, at 10:00 a.m.

Specifically, the judge found that the leaflet injured the trustee's personal status; dissuaded customers from patronizing the Hotel by portraying it as being mismanaged in order to justify closing it; and contained assertions regarding the trustee's intentions to sell the Hotel that were either deliberately and maliciously false or made in reckless disregard of the truth. The judge further found that the Hotel had reasonable cause to believe that employee Maldonado authorized the leaflet or, at a minimum, was responsible for its distribution. In view of these findings, the judge concluded that Maldonado's discharge for distributing the leaflet was not unlawful. We find merit in the General Counsel's exceptions in which she contends that the judge improperly assessed the content of the leaflet and that the leaflet was, in fact, protected.

The Supreme Court in *Jefferson Standard*, above, held that employee conduct involving a disparagement of an employer's product, rather than publicizing a labor dispute, is not protected. As *Jefferson Standard* and subsequent Board cases show, there is sometimes a fine line between raising highly sensitive issues that relate to terms and conditions of employment and those that relate to disparaging an employer's reputation. The leaflet found unprotected in *Jefferson Standard* was an employee handbill that contained a "vitriolic" attack on the quality of the employer's television broadcasts and management policies. It made no reference to the pending labor dispute between the parties or to wages, hours, or working conditions; and it was not an appeal for public sympathy or support. Employees distributed the handbill on their picket line and on public property. Similarly, in *Sahara Datsun*, 278 NLRB 1044 (1986), enfd. 811 F.2d 1317 (9th Cir. 1987), the Board found that an employee's statements that the employer falsified customer credit applications, which were made to the bank that granted financing to the employer's customers, were unprotected. The Board found that the statements, although related to terms and conditions of employment, were, nevertheless, unsubstantiated assertions that could have ruined a longstanding business relationship based on trust and fair dealing. *Sahara Datsun*, above. On the other hand, the Board in *Veeder-Root Co.*, 237 NLRB 1175 (1978), found that employee literature that was phrased in general political terms but made particular reference to the employer's activities regarding its employees and ended with the demand "FIGHT WAGE CUTS AND SPEED-UP!" was sufficiently related to wages, hours, and conditions of employment to be protected.

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[5] The Court in *Bildisco* made clear that a debtor-in-possession had a continuing obligation to recognize and bargain with the employees' certified representative over the terms of a new contract pending rejection of an existing contract or following formal approval of rejection by the bankruptcy court. In the instant case, it is clear that the March 9 changes were inextricably tied to the March 8 rejection of the contract. We further find that the Hotel's unilateral changes of June 14 were lawful even if implemented pursuant to negotiations for a new contract as to which good-faith bargaining to impasse was required. For the limited purpose of this finding we adopt the judge's conclusion that the Federacion had sufficient opportunity to bargain about the changes, but waived its bargaining rights by a lack of due diligence.

The complaint was amended at the hearing to allege that the Hotel bypassed the Federacion and dealt directly with its unit employees by asking them to accept the unilateral changes in terms and conditions of employment. Generally, an employer's attempts to deal directly with employees rather than their designated bargaining representative concerning terms and conditions of employment violates Sec. 8(a)(5). *Krolicki Wholesale Meats*, 270 NLRB 941 (1984), enfd. 763 F.2d 215 (6th Cir. 1985). Here, however, we find that the Hotel's direct dealing was an effort to implement the lawful unilateral changes. We further find that by failing to pursue its bargaining rights with due diligence the Federacion waived its right to object on the basis of direct dealing. See *Hiysota Fuel Co.*, 280 NLRB 763 (1986) (union waived right to object to direct dealing concerning the employer's unilateral implementation of new terms under *Bildisco*; the employer had sought to bargain over those terms, but the union refused to negotiate and the employer faced severe time constraints with respect to resuming operations).

In *Veeder-Root*, the Board also acknowledged that some cases approach the issue "from the viewpoint of the innate propriety of the activity, even though the activity is clearly related to wages, hours, working conditions, or grievances arising out of these conditions." 237 NLRB at 1177. For example, although the Act protects statements that are false, misleading, or inaccurate, as well as rhetorical hyperbole that is likely to be recognized for what it is, the Act does not protect information that is "deliberately or maliciously false," or made with "reckless disregard for the truth." See *National Steel Corp.*, 236 NLRB 1033, 1035–1036 (1978), enfd. 625 F.2d 131 (6th Cir. 1980). The Board's decision in *New York University Medical Center*, 261 NLRB 822 (1982), provides an example of how the Board applies this standard in an effort to balance the right of employees to organize and the right of employers to maintain discipline in their establishments. In that case the Board found that the assertion "[T]he NYU bosses have turned their security guards into a fascist gestapo illegally searching workers and firing them" was not deliberately or maliciously false because it was based on employee reports that the employer's guards were searching black and Hispanic employees.

In the instant case we conclude that the leaflet clearly is protected. We find initially that the leaflet does not involve an unlawful disparagement of an employer's product; in this regard, the leaflet is addressed "to all employees" rather than to customers, and seeks not to damage the hotel's reputation but to prevent its closure. Cf. *Jefferson Standard*, above; *Sahara Datsun*, above. Further, the leaflet concerns an ongoing labor dispute between the parties and refers specifically to abuses "against us employees" and to "wages." *Veeder-Root*, above.

We further find that there is nothing "innately improper" about the leaflet. It is factually accurate that the trustee would earn a 2-percent commission if the Hotel were sold and, as found by the judge, the trustee did not explicitly deny Maldonado's testimony that he had threatened to sell the Hotel if pressured by demands from the Federacion. Under the circumstances, we find that the leaflet's assertion that the trustee would benefit from the sale of the Hotel is not deliberately false or misleading or made in reckless disregard of the truth. *New York University Medical Center*, above. We additionally find that the leaflet's references to the trustee as a "Dictator" and as "Robin Hood" are obvious rhetorical hyperbole. Accordingly, we reverse the judge and find that the leaflet was protected under Section 7 of the Act and, therefore, that Maldonado's discharge in connection with the distribution of the leaflet violated Section 8(a)(3) and (1) of the Act.

3. The judge found that on June 17, 1982, the Hotel's employees commenced a protected economic strike. Specifically, the judge found that the employees began the strike, which was not authorized by the Federacion, to protest both Maldonado's discharge and reductions in their contractual benefits. Based on his prior findings that the discharge and the Hotel's unilateral changes were not unlawful, the judge found that the strike did not commence as an unfair labor practice strike but as economic activity.

The judge then addressed the Hotel's contentions that, as economic activity, the strike was unprotected because it violated the no-strike clause of the expired collective-bargaining agreement and was in derogation of the unit employees' bargaining relationship with the Federacion. Regarding the alleged breach of the no-strike clause, the judge initially found the rejected contract was terminated in its entirety and, therefore, that the no-strike clause did not survive by virtue of any partial survival of the contract itself. Addressing the issue of postexpiration arbitrability, the judge then found, citing *Goya Foods*, 238 NLRB 1465 (1978), that in the "normal bargaining stance," postexpiration survival of the no-strike clause is coterminous with survival of the obligation to arbitrate. The judge questioned, however, whether the presumption of postexpiration arbitrability set forth in *Nolde Bros. v. Bakery Workers Local 358*, 430 U.S. 243 (1977), is applicable when the contract expires not by its own terms, but by the extraordinary event of formal rejection in bankruptcy. In any event, on the specific facts of this case, the judge found it unnecessary to decide whether the no-strike clause survived the contract's rejection. In particular, the judge found that the nonarbitrable objects of the strike, involving a protest against reductions in salary and benefits, were so intertwined with what he viewed as the arbitrable issue of Maldonado's discharge that the dispute was not appropriate for arbitration and, therefore, that the strike would not breach the no-strike clause even if the clause had survived. The judge further found that even if the strikers—who constituted a large majority of the unit employees—sought recognition of the Union as their exclusive bargaining representative, the strike, although not authorized by the Federacion, was not in derogation of the exclusive bargaining status of the Federacion. In this regard the judge found, citing *Emporium Capwell Co. v. Western Addition Community Organization*, 420 U.S. 50 (1975), that the employees here did not seek parallel bargaining, but a total replacement of their bargaining agent during the period of contract negotiations.[6] Although we agree with the judge's finding that the strike was lawful, we find merit in the General Counsel's contention that the employees commenced an unfair labor practice strike rather than an economic strike.

The relevant facts are fully set forth in the judge's decision. In brief, as the Hotel attempted to negotiate changes in its contract with the Federacion to relieve its financial distress, the unit employees began to lose confidence in the Federacion as their bargaining representative. In December 1981 they hired an attorney to advise them regarding the formation of a new union. Employee Maldonado was a leader in this employee movement.[7] As indicated above, on June 17, 1982, Maldonado was discharged for distributing a leaflet alleging mismanagement on the part of the trustee and urging employees to attend an "informative protest picket" on June 21. That evening, both the day- and night-shift employees commenced a work stoppage. On June 18, the day after Maldonado's discharge, about 40 to 45 of the approximately 50 unit employees began picketing with signs. Some of the picket signs stated, "We Won't Enter Without Miguel";[8] the remaining signs reflected the language and tone of the June 17 leaflets. The strike was not authorized by the Federacion. An employee delegate told Federacion Agents Vega and Nicot, who learned of the strike from the trustee, that the employees were striking because of Maldonado's discharge.

As set forth above, we have found, contrary to the judge, that Maldonado's discharge violated Section 8(a)(3) and (1) of the Act. We further find that the discharge was the immediate precipitating cause of the strike. In so finding, we note that the picketing occurred a full 3 days prior to the scheduled June 21 protest of the reduction in contractual wages, and employee statements to Vega and Nicot indicated that the employees struck to protest the discharge. Accordingly, we find that the Hotel's employees commenced an unfair labor practice strike on June 17, 1982.

We agree with the judge, however, that the strike was protected. The Hotel formally rejected its collective-bargaining agreement in March 1982, prior to the strike. Thereafter, contrary to the Federacion's contentions in its exceptions, the agreement ceased to exist in its entirety. See 2 Collier on Bankruptcy, Chapt. 365.03 (15th ed. 1987) (an executory contract cannot be assumed in part and rejected in part).[9] Therefore, as the judge found, the no-strike clause in the parties' collective-bargaining agreement did not survive by virtue of any partial survival of the contract.[10]

We also agree with the judge that even if the employees were seeking recognition of the Union as their exclusive bargaining representative, the strike did not amount to the kind of demand for "separate bargaining" found unprotected in *Emporium Capwell*, above, 420 U.S. at 61, 66–70, i.e., a demand by a discrete group of employees that an employer deal with them regarding some particular contractual grievance, notwithstanding that the union which they acknowledge to be the unchallenged unit representative takes a contrary position on the matter. As the Supreme Court noted in *Emporium Capwell*, a union could not lawfully "bargain away the employees' statutory right to choose a new, or to have no, bargaining representative." Id. at 64 fn. 14 citing *NLRB v. Magnavox Co.*, 415 U.S. 322 (1974). Insofar as the employees here sought recognition of the Union as their bargaining representative, in place of the Federacion, this could reasonably be viewed as merely an effort to rebut the presumption of continuing majority status that, pursuant to *Bildisco*, the Federacion enjoyed following the collective-bargaining agreement's rejection in bankruptcy. We do not read *Emporium Capwell* as insulating an incumbent union from such employee efforts.[11] Accordingly, we find that the employees' unfair labor practice strike did not lose its protection under the Act.[12]

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[6] In *Emporium Capwell*, the Court held that the exclusivity principle of Sec. 9(a) of the Act proscribes attempts by a minority of employees to engage in separate bargaining with their employer.

[7] In early June 1982 the unit employees formed the Union de Empleados de Casinos de Puerto Rico (the Union) and elected Maldonado as their president. The General Counsel stated in her opening argument that the Union filed a representation petition on June 11, 1982. Thereafter on October 1, 1982, the Federacion and the Hotel executed a new collective-bargaining agreement that was submitted to the bankruptcy court for approval on October 4. We note that this collective-bargaining agreement would not bar the Union's prior June 1982 petition. Therefore, we shall delete from the judge's recommended Order that provision precluding a finding of contract bar on the grounds of the Federacion's unlawful conduct with respect to the discharge of the striking employees, as described below.

[8] It is undisputed that the signs referred to Miguel Maldonado.

[9] The Federacion, although acknowledging this bankruptcy principle, contends that here the testimony of the parties, the language of the contract, and public policy warrant a finding that a part of the collective-bargaining agreement survived rejection and, therefore, that the Federacion remained the exclusive bargaining representative of the striking employees. The Federacion further contends that the Board should depart from bankruptcy precedent and find that the agreement here was only partially rejected in order to prevent its exclusive bargaining status from being undermined for reasons unrelated to its performance as a labor organization. In this regard, the Federacion maintains that the disruption of established bargaining relationships caused by total rejection is especially damaging in the context of an attempted reorganization under Chapter 11. The Federacion's arguments do not persuade us to depart from established bankruptcy precedent.

[10] Moreover, we agree with the judge's conclusion, although not all his reasoning, that the strike would not breach the no-strike clause of the expired agreement under an analysis of postexpiration arbitrability.

We have found that the employees commenced an unfair labor practice strike. In *Mastro Plastics Corp. v. NLRB*, 350 U.S. 270 (1956), the Supreme Court held that a no-strike clause in a collective-bargaining agreement does not waive the employees' right to strike against an employer for unfair labor practices. In *Arlan's Department Store*, 133 NLRB 802 (1961), the Board limited the application of this rule to "serious" unfair labor practices. See *Studio 44, Inc.*, 284 NLRB 597 (1987); *Goodie Brand Packing Corp.*, 283 NLRB 673 (1987). In the instant case we do not have to reach this precise issue. In this regard we find that even if Maldonado's discharge was not a "serious" unfair labor practice—or, alternatively, even if the strike was economic activity—the strike did not breach the no-strike clause of the expired collective-bargaining agreement. In this case there is no indication that the parties did not intend the arbitration and no-strike clauses of the contract to have coterminous application. See *Goya Foods*, above. Further, the Board recently has held that postexpiration disputes concerning employee discharges, like that of Maldonado, do not "arise under" the expired contract within the meaning of *Nolde*, above, and are, therefore, not arbitrable. *Indiana & Michigan Electric Co.*, 284 NLRB 53 (1987); *American Gypsum Co.*, 285 NLRB 100 (1987). Thus, it follows under *Goya Foods* that the Hotel's employees were not bound by an agreement not to strike regarding the nonarbitrable issue of Maldonado's discharge. Further, although we recognize that another underlying cause of the strike, as indicated in the June 18 leaflets and on picket signs, was employee concern with reduced wages and benefits, we find in agreement with the judge that these matters also are not subject to postexpiration arbitration and, therefore, not subject to a coterminous duty not to strike.

Member Johansen finds it unnecessary to reach the issue of the duty to arbitrate postexpiration grievances under *Indiana & Michigan Electric*, above.

4. The judge found that Respondent Hotel violated Section 8(a)(1) of the Act by entering into an agreement with the Federacion to condition reinstatement of the striking employees on abandonment of their strike activity and on continued recognition of the Federacion as their exclusive bargaining agent, and violated Section 8(a)(3) and (1) of the Act by discharging those employees who failed to comply with the conditions. The judge further found that Respondent Federacion violated Section 8(b)(1)(A) and (2) of the Act by entering into and enforcing the agreement, and violated Section 8(b)(1)(A) by its June 19, 1982 letter to the striking employees that threatened loss of employment if the strikers failed to comply with the conditions. Although we have found that the employees commenced an unfair labor practice strike, we agree with the judge, for the reasons set forth by him, that the conditions on reinstatement and the discharge of the striking employees, because of their refusal to comply with those conditions, were unlawful.[13]

ORDER

The National Labor Relations Board orders that

A. Respondent San Juan Hotel Corporation d/b/a El San Juan Hotel, Carolina, Puerto Rico, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Either individually or by agreement with Respondent Federacion General de Trabajadores de Puerto Rico, or any other labor organization, conditioning the nondischarge of its employees on their abandonment of a lawful unfair labor practice strike or other concerted activity for their mutual aid or protection or on any other unlawful condition.

(b) Discharging or otherwise discriminating against employees because they have engaged in a lawful unfair labor practice strike or other concerted activity for their mutual aid or protection or because they refuse to accept any unlawful condition on their continued employment.

(c) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action designed to effectuate the purposes and policies of the Act.

(a) Offer to Miguel A. Maldonado and to the employees named in Appendix C, attached, full and immediate reinstatement to their former jobs or, if such jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority and other rights and privileges, dismissing, if necessary, any employees hired as replacements for the positions. Respondent Hotel shall jointly and severally with Respondent Federacion General de Trabajadores de Puerto Rico make them whole for any loss of earnings they may have suffered by reason of the discrimination against them in the manner set forth in the remedy section of the judge's decision.

(b) Remove from its files any reference to the unlawful discharges and notify the employees in writing that this has been done and that the discharges will not be used against them in any way.

---

[11] For similar reasons this strike would not fall into the category of strikes that are unprotected because they are unauthorized or "wildcat" strikes in derogation of the authority of the acknowledged and unchallenged bargaining unit representative regarding strike action. See *Buck Brown Contracting Co.*, 283 NLRB 488 and fn. 7 (1987). Where, as here, there is no collective-bargaining agreement in effect, it is inconsistent with employee free choice to require that employees obtain authority from the bargaining representative in order to engage in a strike that, in part, expresses employees' disclaimers of support for that representative.

[12] We note that the Board in *Colonial Haven Nursing Home*, 218 NLRB 1007 (1975), modified 542 F.2d 691 (7th Cir. 1976), held that striking employees did not lose their status as unfair labor practice strikers—and the attendant rights of reinstatement—because an object of the strike may also have been to obtain recognition and, to carry out this purpose, their picketing may have constituted a "technical" violation of Sec. 8(b)(7)(C). See also *Rapid Armored Truck Corp.*, 281 NLRB 371 (1986). There is no allegation in this case that the employees' picketing violated Sec. 8(b)(7)(C).

[13] We note that, even if the strike constituted economic activity, as found by the judge, the unlawful inducements would have converted the strike into an unfair labor practice strike. See *La Famosa Foods*, 282 NLRB 316 (1986). Further, it is well settled that unfair labor practice strikers are entitled to immediate reinstatement to their former positions or, if such are not available, to substantially equivalent positions on their unconditional offers to return, even when the employer must terminate strike replacements to make positions available for them. *Workroom for Designers*, 274 NLRB 840, 856 (1985).

(c) Preserve and, on request, make available to the Board or its agents for examination and copying, all payroll records, social security payment records, timecards, personnel records and reports, and all other records necessary to analyze the amount of backpay due under the terms of this Order.

(d) Post at its Carolina, Puerto Rico hotel copies of the attached notice marked "Appendix A."[14] Copies of the notice written in English and Spanish, on forms provided by the Regional Director for Region 24, after being signed by Respondent Hotel's authorized representative, shall be posted by Respondent Hotel immediately upon receipt, and be maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by Respondent Hotel to insure that the notices are not altered, defaced, or covered by any other material.

(e) On being furnished the same by the Regional Director, post the notice marked "Appendix B" in the same manner as "Appendix A."

(f) Notify the Regional Director in writing within 20 days from the date of this Order what steps the Respondent has taken to comply.

B. Respondent Federacion General de Trabajadores de Puerto Rico, its officers, agents, and representatives, shall

1. Cease and desist from

(a) Threatening employees with the loss of their jobs by enforcement of an agreement with Respondent Hotel which conditions their continued employment on the abandonment of a lawful unfair labor practice strike or other concerted activities for their mutual aid or protection or on any other unlawful condition.

(b) Entering into, maintaining, or enforcing an agreement with Respondent Hotel whereby employees' continued employment is conditioned on their abandonment of a lawful unfair labor practice strike or other concerted activities for their mutual aid or protection or on any other unlawful condition.

(c) In any like or related manner restraining or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action designed to effectuate the policies of the Act.

(a) Jointly and severally with Respondent Hotel make whole Miguel A. Maldonado and the employees named in Appendix C, attached, for any loss of earnings they may have suffered by reason of the discrimination against them in the manner set forth in the remedy section of the judge's decision.

(b) Post in its offices and meeting halls copies of the attached notice marked "Appendix B"[15] (in English and Spanish). Copies of the notice, on forms provided by the Regional Director for Region 24, after being signed by Respondent Federacion's authorized representative, shall be posted by Respondent Federacion immediately upon receipt, and be maintained for 60 consecutive days in conspicuous places including all places where notices to members are customarily posted. Reasonable steps shall be taken by Respondent Federacion and its agents to ensure that the notices are not altered, defaced, or covered by any other material.

(c) Forward to the Regional Director signed copies of "Appendix B" for posting by Respondent Hotel at its Carolina, Puerto Rico hotel for 60 consecutive days in places where notices to employees are customarily posted.

(d) Notify the Regional Director in writing within 20 days from the date of this Order what steps the Respondent has taken to comply.

APPENDIX A

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

Section 7 of the Act gives employees these rights.

To organize

To form, join, or assist any union

To bargain collectively through representatives of their own choice

To act together for other mutual aid or protection

To choose not to engage in any of these protected concerted activities.

WE WILL NOT either individually or by agreement with Federacion General de Trabajadores de Puerto Rico, or any other labor organization, condition the nondischarge of our employees on their abandonment of a lawful unfair labor practice strike or other concerted activity for their mutual aid or protection or on any other unlawful condition.

---

[14] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

[15] See fn. 14, above.

WE WILL NOT discharge or otherwise discriminate against employees because they have engaged in a lawful unfair labor practice strike or other concerted activity for their mutual aid or protection or because they refuse to accept any other unlawful condition for their continued employment.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL offer to Miguel A. Maldonado and to the employees who were discharged on June 20, 1982, reinstatement to their former jobs or, if those jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority and other rights and privileges, dismissing, if necessary, anyone hired as a replacement, and WE WILL jointly and severally with Federacion General de Trabajadores de Puerto Rico make them whole, with interest, for any loss of earnings they may have suffered by reason of the discharges.

WE WILL notify each of them that we have removed from our files any reference to his or her discharge and that the discharge will not be used against him or her in any way.

SAN JUAN HOTEL CORPORATION
D/B/A EL SAN JUAN HOTEL

APPENDIX B

NOTICE TO MEMBERS
POSTED BY ORDER OF THE NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

WE WILL NOT threaten employees with the loss of their jobs by enforcement of an agreement with San Juan Hotel Corporation d/b/a El San Juan Hotel that conditions their continued employment on the abandonment of a lawful unfair labor practice strike or other concerted activities for their mutual aid or protection or on any other unlawful condition.

WE WILL NOT enter into, maintain, or enforce an agreement with the above-named Employer whereby employees' continued employment is conditioned on their abandonment of a lawful unfair labor practice strike or other concerted activities for their mutual aid or protection or on any other unlawful condition.

WE WILL NOT in any like or related manner restrain or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL jointly and severally with the above-named Employer make whole, with interest, Miguel A. Maldonado and employees who were discharged on June 20, 1982, for any loss of earnings they may have suffered.

FEDERACION GENERAL DE TRABAJADORES DE PUERTO RICO

APPENDIX C

Acosta, Ventura
Alicea, Benjamin
Aponte, Javier
Batista, Alfredo
Blanco, Jorge
Calderon, Jose
Cardona, Ricardo
Cartagena, Benjamin
Casillas, Israel
Colon, Jose A.
Colon, Luis
Cruz, Roberto
Danuz, Angel
Diaz Castro, Jose
Dominguez, Cesar
Fernandez, David
Figueroa, Jose
Garcia, Carmelo
Garcia, Elionay
Gonzalez, Rene
Jaime, Filiberto
Linera, Rafael
Lopez, Leopoldo
Martinez, Fortunato
Melendez, Casimiro
Miranda, Jose
Montilla, Jose
Morales, Etanislao
Navarro, Martin
Oliver, Joaquin
O'Mahoney, John
Ortiz, Carlos
Pagan, Herminio
Pagan, Tomas
Perez, Antonio
Ramos, Jose
Ripoll, Juan A.
Rivera, Angel
Rivera, Anselmo
Rivera, Hector
Rivera, Juan
Rodriguez, Jose
Rodriguez, Ventura
Rosado, Hector
Sanchez, Juan
Solis, Carlos
Vilella, Luis
Zambrana, Kemuel

Graciela J. Belaval, Esq., for the General Counsel.
Augustin Collago Mojica, Carlos Del Valle, and *Angel Munoz Noya, Esqs.*, of San Juan, Puerto Rico, for the Respondent Employer.
Dennis Bechara, Esq., for Federacion General de Trabajadores de Puerto Rico.
Nicholas Delgado Figueroa, Esq., for Union de Empleados de Casinos de Puerto Rico.

DECISION

STATEMENT OF THE CASE

THOMAS R. WILKS, Administrative Law Judge. The trial in this case was held before me in Hato Rey, Puerto

Rico, on October 19-22, 1982. On June 18 and 28, 1982,[1] Union de Empleados de Casinos de Puerto Rico (the Union) filed charges in Cases 24-CA-4463 and 24-CA-4667, respectively, alleging that San Juan Hotel Corporation d/b/a El San Juan Hotel (Respondent Hotel) committed unfair labor practices within the meaning of Section 8(a)(1) and (3) of the Act. Thereafter, on July 21, a consolidated complaint and notice of hearing issued alleging that Respondent Hotel violated Section 8(a)(1) and (3) of the Act by threatening its employees with discharge and other reprisals for having engaged in protected concerted activity, discharging an employee because of his union or other protected concerted activity, conditioning the reinstatement of its striking employees on their reaffirmation of Federacion General de Trabajadores de Puerto Rico (Respondent Federacion) as the exclusive collective-bargaining representative of Respondent's casino employees and, finally, discharging 48 employees because the employees participated in a strike caused and prolonged by Respondent Hotel's unfair labor practices.

On July 16, Respondent Federacion filed a charge in Case 24-CA-4676 alleging, in essence, that Respondent Hotel committed unfair labor practices within the meaning of Section 8(a)(1) and (5) of the Act. On August 12, an order further consolidating cases, complaint, and notice of hearing issued consolidating Case 24-CA-4676 with the above-described case, alleging that Respondent Hotel violated Section 8(a)(1) and (5) by unilaterally changing, eliminating, reducing, or otherwise modifying existing wage rates and other terms and conditions of employment of its casino employees, and by threatening employees with layoff or discharge if they did not accept said unilateral changes.

Thereafter, on September 20, the Union filed a charge in Case 24-CB-1179 alleging that Respondent Federacion committed unfair labor practices within the meaning of Section 8(b)(1)(A) and (2) of the Act. Pursuant to that charge, an order further consolidating cases, complaint, and notice of hearing issued on September 30 alleging, in essence, that Respondent Federacion entered into an agreement with Respondent Hotel to condition the reinstatement of striking employees on the employees' reaffirmation of Respondent Federacion as the exclusive collective-bargaining representative of the casino employees and, as a result of that agreement, caused Respondent Hotel to discharge its striking employees who refused to comply with that requirement.

Thereafter, at the trial, pursuant to a notice of intention to amend complaints, the consolidated complaint was further amended to allege that Respondent Hotel bypassed the Union and dealt directly with its casino employees by requesting the casino employees to accept the unilateral changes described above. The complaints were further amended to reflect that Respondent Hotel's unilateral changes in terms and conditions of employment of its casino employees, in addition to the discharge of an employee, were motivating factors that caused and prolonged the unfair labor practice strike.

On August 2 and 23, Respondent Hotel and, on October 11, Respondent Federacion filed answers that denied the commission of any unfair labor practices.

At the trial the parties were afforded full opportunity to participate, to present relevant, material, and competently adduced evidence, and to argue orally. Briefs were subsequently filed by the parties on or about January 14, 1983.

On the entire record in this case, including my observation of the demeanor of the witnesses, and in consideration of all the briefs, I make the following

FINDINGS OF FACT

I. THE BUSINESS OF THE RESPONDENT HOTEL

Respondent Hotel, a corporation duly organized under, and existing by virtue of, the laws of the Commonwealth of Puerto Rico, has maintained its principal office and place of business at Isla Verde Road, Carolina, Puerto Rico, where it is and has been at all times material continuously engaged in providing facilities for lodging, entertainment, food, beverage, and related services. During a period representative of its annual operations generally, Respondent, in the course and conduct of its operations, derived gross revenues therefrom in excess of $500,000 and purchased and caused to be transported and delivered to its place of business, foodstuffs, beverages, and other goods and materials valued in excess of $50,000 that were transported and delivered to its place of business in interstate commerce directly from places located outside the Commonwealth of Puerto Rico.

It is admitted, and I find, that Respondent is, and has been at all times material, an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

II. LABOR ORGANIZATIONS

It is admitted, and I find, that the Federacion is, and has been at all times material, a labor organization within the meaning of Section 2(5) of the Act.

In the complaint issued on July 21, 1982, in Cases 24-CA-4663 and 24-CA-4667, the Union is also alleged to have been at all material times a labor organization within the meaning of the Act. However, Respondent's subsequent answer denied that allegation. Based on uncontradicted evidence in the record, I find that the Union at all times material is a labor organization within the meaning of Section 2(5) of the Act.

III. THE ALLEGED UNFAIR LABOR PRACTICES

A. *Facts*

1. Unilateral changes

Respondent Hotel has for many years operated as one of the San Juan area's prominent resort hotels. There is no dispute that by 1980 it had entered into a situation of financial distress, and that thereafter its conduct that is alleged to be violative of Section 8(a)(5) of the Act was motivated not by unlawful discrimination, but rather that it was motivated by economic considerations, i.e., business survival.

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[1] All dates herein are for the year 1982 unless otherwise noted.

A petition for reorganization under Chapter XI of the U.S. Bankruptcy Act was filed with the U.S. Bankruptcy Court by the Respondent on May 20, 1980. On July 10, 1980, the court appointed as operating trustee of Respondent Hotel, Hector Rodriguez Estrada, who is a member of the trustee board of the U.S. Bankruptcy Court. His function was directed to the operation and financial rehabilitation of the hotel. After having studied the hotel's operations, the trustee commenced on a course of instituting various cost-saving stratagems involving, e.g., the elimination of executive and managerial positions and unprofitable shops, restaurants, bars, etc.

The trustee then returned his attention to all nonmanagerial positions. He became aware that the hotel's employees were represented by labor organizations in separate units and covered by existing separate collective-bargaining agreements. The trustee discovered that one of these contracts was with Local 610 of the Gastronomical Workers Union, and was the subject of a petition for rejection filed by Respondent with the bankruptcy court the day preceding the trustee's own appointment. The trustee arranged to meet with Local 610 leaders in order to avoid the need for court rejection of their labor contracts. In October 1980, after negotiations, an agreement was reached with that labor organization, whereunder economic concessions were granted. The new agreement was approved by the bankruptcy court.

In addition to Local 610, the Federacion also represented certain employees of Respondent Hotel. In 1974, it had been certified by the Board as exclusive collective-bargaining agent for two separate units. In unit 1 were included all croupiers employed by Respondent at its hotel casino or gaming room, but excluding: all other employees, employees in the service and maintenance unit, casino cashiers, runners, waiters and doorman, guards, and supervisors as defined in the Act. In unit 2 were included all casino cashiers and runners employed by the Respondent at its hotel casino or gaming room, but excluding all other employees, guards, and supervisors as defined in the Act. The Respondent and the Federacion had entered into a collective-bargaining agreement effective from May 1977 until April 30, 1980, the terms of which covered the following unit:

> Included: all croupiers, cashiers and runners employed by the Casino of Hotel San Juan, in Isla Verde, Puerto Rico.
>
> Excluded: all other employees, office clerical employees, guards and supervisors as defined in the National Labor Relations Act.

On June 23, 1980, the Respondent had, by written agreement, extended the terms of its Federacion contract to April 1983.

Having received economic relief from Local 610, the trustee sought to discover other areas of effectuating economics. He had received information that the croupiers were opposed to economic reductions. However, the casino managers had agreed to certain concessions, and job vacancies were left unfilled. The outset of the 1980–1981 winter tourist season was at hand, and the trustee decided to evaluate the results of that season before acting further. March 1981 marked the end of the tourist season that proved to be financially disappointing. The trustee testified without contradiction that he next communicated with Federacion leaders and expressed the necessity for economic relief from its collective-bargaining obligations, to assure a continuation of operations and employment for all hotel employees.

According to the trustee's uncontradicted testimony, after a series of meetings concerning contractual concessions between the trustee and the union leaders, i.e., President Luis G. Nicot; Secretary-Treasurer Marcos Vega Robles; and employee delegates Miguel A. Maldonado Freites, Alfredo Battista, and Jorge Blanco. On September 24, 1981, the Respondent distributed to the unit employees a memorandum addressed to them that, inter alia, set forth its claim of financial distress, and stated further:

> At this time we are asking you, the Casino Union members, who earn more than twice as much as other hotel employees, and who are among the higher paid workers in Puerto Rico to also make sacrifices, to help keep your jobs as well as the jobs of the other hotel employees.
>
> Union Reply
>
> This situation was explained to your Union leader and delegates. The Union leader said he would not negotiate any changes in the contract. When it was suggested that the union members should have the opportunity to decide if they preferred to have the present contract, but no jobs, or have jobs with a modified contract, a delegate replied that they would make the decision for you.
>
> Next Steps
>
> During the week of September 28th, the Company will file a motion in Court to reject the contract, effective October 5, 1981. On Monday, October 5th the changes we have proposed will become effective. When you report to work, it will be under the new conditions.
>
> We are of course willing to negotiate with your union. However, their refusal to negotiate leaves us no choice, but to proceed as we are doing. This is in your interest as well as ours, as this is the only way we can save your jobs.

The memorandum referred to the existing contract as a "classic example of featherbedding" and entered specific areas of alleged "abuse."

On October 5, 1981, an application for rejection of collective-bargaining agreement was filed by Respondent with the Honorable Antonio I. Hernandez Rodriguez, judge of bankruptcy court. The petition set forth a claim that the Federacion contract would be onerous and detrimental to the estate and in particular it enumerated as such 15 specific areas of performance:

1. The restrictive scheduling of hours.
2. The lunch period duration.
3. Sick pay in excess of regular pay rates.
4. Vacation pay in excess of regular pay rates.
5. An increase in the number of paid vacation days.
6. A seniority proviso alleged to result in the inappropriate utilization of personnel.
7. A guarantee of a rotation of days off alleged to result in excessive overtime payment.
8. The institution of two work shifts allegedly necessitating excessive personnel.
9. The closing of the Casino on certain holidays when business would appear to be most profitable.
10. A guarantee of a Christmas bonus of 7 days' pay.
11. An increase of the number of sick days from 15 to 21.
12. A guarantee of employment to a minimum of 60 employees.
13. Guaranteed salaries to senior croupiers.
14. Paid holidays for Fathers Day and the employees' birthday or double pay for work required on those dates.
15. Severance pay in excess of that required by law.

On October 7, 1981, trustee Rodriguez distributed a memorandum to all croupiers, cashiers, and runners wherein he alluded to the collective-bargaining agreement as burdensome and onerous to the bankruptcy estate and subject to necessary change. He further stated: "we have tried to renegotiate the labor contract with the Union, but they refused to negotiate," and he notified them that a petition to reject the contract had been filed. He also announced the immediate implementation of unilateral contractual modifications concerning:

> 1. A limitation of vacation and sick leave.
> 2. Elimination of Fathers Day and employee birthday as paid holidays.
> 3. The opening of the Casino on New Year's Eve, Christmas and Holy Thursday.
> 4. Reduction of Christmas bonuses to that amount granted to other employees.
> 5. The setting of shift starting times in accord with business needs.
> 6. The programming of rotation of days off according to business needs.
> 7. Task and shift assignment in accord with business needs.
> 8. Layoff policy to conform with that of other nonunit employees.
> 9. The elimination of severance pay for temporary layoffs.
> 10. The determination that a workday consists of an 8-hour shift.

Trustee Rodriguez concluded:

> Also, we are studying other measures that will help the company in achieving additional savings in order to retain our rehabilitation program.
>
> We hope that you will continue cooperating with the Hotel, as usual. We are still willing to meet with your Union to discuss the above changes and any future changes. If you do not wish to work under these new conditions, please notify the Casino Manager.

Rodriguez testified, without contradiction, that prior to the hearing on the rejection petition he had met with the Federacion representatives in order to obtain concessions from the contractual obligations and thus avoid a court-ordered rejection of the contract, as he had done with Local 610, but that in negotiations the Federacion did not agree to change the contract. He conceded that he had effectuated the modifications prior to any court-approved contract rejection, but that he had done so on a temporary basis subject to negotiations with the Federacion.

The bankruptcy court hearing on the rejection petition was held on November 2, 1981. Prior to that date the Federacion, through its attorney, was given access to Respondent Hotel's business records. The Federacion was represented at the hearing. At one point during the hearing, the parties were provided an opportunity during a recess to negotiate further. It is Rodriguez' uncontradicted testimony that he was advised by the Federacion attorney that although the Federacion officers were willing to negotiate, the delegates were opposed to negotiations for the purpose of reducing contractual benefits and that the leaders therefore preferred to have a ruling by the court that would obligate them to negotiate. On November 12, 1981, Bankruptcy Judge Hernandez-Rodriguez issued an opinion and order in which he *authorized* the trustee "to reject the contract," and stated therein:

> In the case before us at this time, the trustee did bring forth evidence to the effect that the collective bargaining agreement was burdensome and onerous to debtor's estate. *The union failed to refuse this evidence*. This court was convinced that should the agreement remain in effect, it would thwart debtor's efforts to rehabilitate itself and that it could be forced to default in its payments to the secured creditors and to the taxing agency . . . .
>
> The case of *Brotherhood* v. *Rea Express Inc.* (523 F.2d 164) also pre-Code, went even further than *Kevin* (519 F.2d 698), in requiring a showing that "unless the agreement is rejected, the debtor will collapse and the employees will no longer have their jobs." Although we are not willing to say that this showing will be required in all cases where we are presented with a similar controversy as to authorization to reject a collective bargaining agreement, we can safely say that the trustee in this case came forward and met this more stringent test. Moreover, the "Federacion" failed to present any evidence whatsoever to the contrary.

Trustee Rodriguez testified further without contradiction that after November 12, and prior to the opening of the tourist season on December 1, 1981, he met again several times with the leaders of the Federacion, i.e., Nicot and Vega, and with delegates Maldonado, Battista, and Blanco. The last of that series of meetings was held on or about November 24. The subject of these meetings was the changes already effected as well as other additional new concessions, including a reduction in salary. At one point, according to Rodriguez' uncontradicted testimony, the union leaders came to an agreement on these concessions, subject to membership approval. On such submission, however, the membership rejected the tentative agreement. Several more meetings were held between Rodriguez and the Federacion negotiators in late November and early December 1981. Rodriguez testified (without contradiction):

> Yes, I met with them during that same period and we agreed to leave things pending to see what would happen during the winter season that was coming, to see if there was a need for any economic modification in the collective-bargaining contract.

Vegas testified that the Federacion bargaining representatives met with the trustee "more or less" toward the end of November and early December 1981, that a full agreement was reached but rejected in part with respect to the salary reduction; that after further negotiations an agreement on salary reduction was again reached with the Federacion leaders over the objection of the delegates. That agreement on salary reduction was thereafter, in accordance with the delegates' objection, rejected by the members.

On December 8, 1981, Nicholas Delgado Figueroa, who now represents the Union, drafted a motion requesting permission to intervene, which was signed by Maldonado as "union representative," and filed by him with the bankruptcy court.

In that motion, Maldonado asserted, inter alia, that he represents the croupiers as union delegate, and that the trustee relying on the court's November 12 contract rejection authorization had informed the croupiers of his authority to reduce all salaries, that the trustee "shows complete disregard for the clauses of the Bargaining Agreement that has no economic impact," and that he and the croupiers have proposed "several ideas" to the trustee to save money. On December 16, the court denied that motion on the grounds that the court had before it "nothing pending in this matter to resolve." Maldonado testified that he filed that motion "based on the fact that I was leader of the group." On direct examination, he evaded a question whether he had made any effort to communicate with the Federacion. On cross-examination, he conceded that he was not authorized by the Federacion leaders to file that motion. He testified that prior to the filing of that motion there had been unsuccessful negotiations between the trustee and the Federacion, although he conceded that agreement had been reached in negotiations in November or December 1981 that was subsequently rejected by the members of the bargaining unit.

On December 15, Respondent, by its attorney, filed a report with the bankruptcy court in which it stated that although the court had issued its prior contract rejection authorization, the Respondent would continue to comply with the terms and conditions of the contract until such time as an agreement with the Union would occur or become unfeasible.[2] By letter dated December 22, addressed to trustee Rodriguez, signed by Maldonado, a request was made to meet, pursuant to the December 15 bankruptcy court report, on January 4, 1982. Rodriguez testified that he hoped that economic conditions would improve, and he was therefore receptive to the idea of meeting. He testified, without explicit contradiction and in large part corroborated by Vega, that he communicated with the Federacion leaders to confirm the meeting date but was advised that Maldonado was not authorized to arrange for meetings and that he ought "to forget about the meeting."

The 1981-1982 tourist season turned out to be economically dissatrous, and the Respondent Hotel's situation deteriorated from that of the previous year. It is Rodriquez' uncontradicted testimony that he had individual conversations on unrecalled dates that winter with Vega and Nicot in which he told them that although he was awaiting the final outcome of the tourist season, he insisted to them that the casino employees were the only employees not to have made some sacrifcies and that they ought to "start thinking about the possibility to renegotiate economic clauses," and further he testified that it was understood that the collective-bargaining agreement continued to be in effect until 1983.[3] Vega testified that he was supplied with a copy of the December 15 report, but did nothing immediately thereafter. He did not contradict Rodriquez. He could not recall whether he had individual conversations with Rodriquez that winter and did not deny them. He did not deny that there had been a mutual agreement to postpone further meetings pending the outcome of the tourist season. Rodriquez' testimony is therefore unchallenged and I credit him. Vega corroborated Rodriquez with respect to the existence of a mutal "understanding" that the unchanged remainder of collective-bargaining agreement remained in effect and that Respondent continued to abide by the unchanged clauses. He testified that Rodriquez had been "mentioning that from way back, that he was going to make changes," i.e., more changes.

On February 11, 1982, Maldonado by letter dated and addressed to Respondent's counsel alluded to the December 15 trustee report, expressed doubts concerning that report and the doubts concerning rights of the employees, and further requested a meeting. There had been no change with respect to Maldonado's lack of authority to schedule meetings. Maldonado did not clarify in that letter whether he was acting as spokesman for the Federacion or as spokesman for employees in an unofficial capacity. He conceded that he was not in fact authorized by the leaders to write the letter. He received an acknowledgment of receipt but not further contact. In any event, a meeting was arranged to be held between the trustee and the Federacion bargaining committee, i.e., Nicot, Vega, and delegates, on March 3. It is not clear who initiated that arrangement. That meeting was subsequently aborted, according to the trustee and Vega because of Maldonado's unauthorized intervention and individual misrepresentations to Vega and Rodriguez. I credit the testimony of Rodriguez and Vega in this regard which I find more certain and convincing than that of Maldonado whom I found to be a far less responsive and a highly evasive witness.[4]

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[2] There is no evidence that Respondent had rescinded any of the earlier unilateral changes.

[3] His testimony is unclear whether he explicitly stated this "understanding."

Vega testified that on March 4, he became aware of Maldonado's conduct, and that the March 3 meeting was not canceled by the Respondent. Vega testified on direct examination without context and without detail that a meeting was arranged a week prior to March 9, to hold a negotiation meeting on that date at 2 p.m. at the hotel. On cross-examination, he affirmed the truth of his pretrial affidavit in which he recounted a March 8 midnight conversation with Rodriguez that "ended on the promise that we would meet at 2 p.m. on the following date,"

Rodriguez testified, without explicit and clear contradictions, that on March 8, Federacion delegates Maldonado, Battista, Blanco, and Attorney Delgado appeared at his office and requested that he bargain with them as representatives of the Federacion. Maldonado testified hesitantly and uncertainly that he did not recall whether he had met with the trustee subsequent to his letter of February 11 to Respondent's counsel. I credit Rodriguez' more certain and detailed testimony as to the occurrence of such a meeting and what transpired. At that encounter, Rodriguez who had never negotiated with the Federacion in the absence of Vega or Nicot, and who had always dealt with another attorney as a legal representative of the Federacion, deferred to the request to bargain and suggested that when they presented to him written authorization of their status he would thereupon bargain.

Trustee Rodriguez testified that on departure of Maldonado's committee, he telephoned Vega about 2 or 3 p.m. on March 8 and informed him of his earlier encounter with Attorney Delgado and the delegates and offered to meet with them and call them the next day if Vega could confirm their authority to represent the Federacion. Rodriguez testified further that Vega responded that he should take no such action because they did not represent the Federacion for contract concession bargaining. According to Rodriguez, he then informed Vega that he had newly acquired information about further deterioration of the financial position of the Respondent Hotel that indicated that operations under the economic burdens of the collective-bargaining agreement could not continue and that "since there was an impasse in the negotiations" that he would have to take "economic measures in order to guarantee" continued employment for the employees, and further that he was then in process of consulting his accountant and "economic counselors" with the objective of preparing "modifications" to the collective-bargaining agreement. Rodriguez testified that he told Vega that he would call him to talk about those modifications as soon as he had finished compiling them that day and that Vega told him to telephone him at midnight.[5]

That same day Rodriguez distributed a written notice of meeting to all unit employees to be held exclusively with employees on March 9 at 11 a.m. in the Dolce Vita Room of the hotel. Simultaneously, Rodriguez issued the following letter of March 8 to the Federacion:

> More than 5 months ago, we started talking with you about changes in the Union contract that are needed in order for the hotel to continue operating and for your members to continue working. Your main interest appears to be in "keeping the Union benefits, we have worked so hard for." The fact that these benefits will be worth nothing if your members are unemployed, seems to be something that you do not wish to accept.
>
> As you know, we went to Court to request permission to end the Union contract. The Court granted us permission, and pointed out that it was necessary for the hotel to survive, and for your members to keep their jobs. Still, you have not been willing to make any major concessions.
>
> Accordingly, as of March 8, 1982, by the authority granted us by the Bankruptcy Court, we are terminating our contract with your Union.

According to Rodriguez, he called Vega about midnight and read to him a draft of intended modifications and the following conversation transpired. Vega stated that he understood the economic problems of the hotel and that although "he was not rejecting them he could not say either that he was accepting them because he had not consulted [concerning] them with the members." Rodriguez asked Vega to meet with the delegates that night and that it would be discussed at the 2 p.m. meeting that had previously been tentatively arranged on March 4 for March 9. Vega responded:

> Look, there is no doubt we have reached an impasse. It's not worth [it] for me to submit these changes to the members because I don't think they will approve them. I am tired of wasting my time.

Rodriguez testified that he informed Vega of a request by Maldonado that the checkoff of Federacion dues cease and that in light of the overall economic problems of the members, he agreed to waive further dues checkoff by stating that he would not "fight it."[6] Rodriguez testified that he was then faced with two alternatives, "either to continue negotiating and close the hotel and continue negotiating afterwards, or not to close the hotel and make the necessary economic changes, and then continue negotiating." However, he testified that he found himself at that state of events where he and the leadership of the Federacion had come to agreement on economic concessions, but where the Federacion members "would not arrive at anything or reach agreement." Accordingly, he proceeded to implement economic modifications on March 9.

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[4] Maldonado telephoned the trustee and informed him that Vega and Nicot could not meet that day but desired to meet on March 4. On March 4, the trustee was prepared to meet, but Vega and Nicot were out of the city in Mayaguez. Vega testified that the Federacion did not cancel the March 3 meeting, and further were not advised of the substitute date of March 4.

[5] Rodriguez testified without contradiction that Vega had on past occasions met with delegates at the casino late at night. Vega did not deny that he suggested the midnight call.

[6] Maldonado, in cross-examination, after an evasion, denied that he had ever asked the payroll master to cease Federacion's dues checkoff. I credit the more convincing and certain testimony of Payroll Master Ramon Perez Agosto that Maldonado came to his office about noon March 8 and made such request and that he subsequently advised Rodriguez.

Vega testified to one conversation with Rodriguez at midnight on March 8, in which reference was made to the delegate committee visit with Attorney Delgado that Vega assured him was unauthorized, and also in which Rodriguez announced an intention of making further changes in the collective-bargaining agreement to which Vega responded: "We have a meeting tomorrow at 2:00, not to do anything . . . we're going to negotiate tomorrow." According to Vega, the trustee then stated, "I'm going to do what I'm going to do and that's it," and then Vega said: "Well, it's 12:00 at night, I can't do anything now, we're going to be there tomorrow at 2:00 so I suggest you wait until 2:00 tomorrow." He testified that Rodriguez ended the conversation by saying, "Well, I'll see you tomorrow at 2:00, you come tomorrow at 2:00 but I'm going to do what I'm going to do. I've got my decisions made."

Vega denied that any specific changes were stated in the foregoing conversation, but when asked whether a specific reduction in wages was stated, he answered "not that I recall." On cross-examination he recalled that Rodriguez did make reference to a request by Maldonado to cease the dues checkoff and testified, "I was disgusted, and I knew that couldn't be done because of Maldonado's saying that." He could not recall further details. When pressed further to make an effort to recall, he testified with a furtive grin and abashed manner, "Frankly, it was 12:00 midnight, I can only tell you what I remember because I had a nice night that night." His testimony concerning his response to Rodriguez became more cryptic and was given grudgingly as follows: "I told him not to do it." He was thereafter confronted with his pretrial affidavit in which he delineated the conversation in somewhat more detail by recounting that Rodriguez made reference to the results of the fall-winter season that were such as to render the collective-bargaining agreement unaffordable, and that the trustee also referred to the paralysis of negotiations and conflict among union members, all of that necessitated that he must proceed to modify the bargaining contract. In that affidavit, which he testified was "basically" true, he stated, "I informed the Trustee that he could do whatever he pleased, but the union would then decide whether to accept the changes or not." In that affidavit he also stated, in response to the trustee's reference to the dues-checkoff request by Maldonado, that Vega "would not make an issue of it."

The affidavit statement concludes the conversation "on the promise we would meet at 2:00 p.m., on the following day." The affidavit does not recite a clearcut demand for negotiations prior to any change; nor does it recite that Vega disagreed with the accusation of an internal union conflict nor that he disagreed with the contention that negotiations were at an impasse. In any event, I credit the testimony of Rodriguez as far more certain, detailed, spontaneous, responsive, and convincing than Vega who was markedly hesitant and uncertain about the events of March 8. I therefore conclude that Rodriguez had two conversations with Vega on March 8, which transpired as testified to by Rodriguez.

The Dolce Vita Room meeting between the trustee and unit employees was held as announced at 11 a.m. on March 9. At that meeting Rodriguez read a memorandum that was addressed to and distributed to the assembled employees. The memorandum commenced by stating that on March 8, Respondent Hotel had "ended [the] contract with the [Federacion]," and attached thereto a copy of the March 8 letter to the Federacion. The memorandum set forth, inter alia, changes in the following:

> 1. *Hours of work*—8 hour day, 30 minute rest periods, 1 hour lunch, etc., resulting in shorter break periods.
>
> 2. *Fringe Benefits*—continuation of contractual health plan, discontinuation of pension plan, and "all other benefits will be as prescribed by law."
>
> 3. *Pay Grades*—reductions in salary for Croupiers, Cashiers, and Runners, by setting new maximum rates and the effectuation of future promotions by merit exclusive of seniority.
>
> 4. *Union Dues*—checkoff deductions from pay checks discontinued.

Vega became aware of the meeting by chance conversation with Maldonado. He arrived at the hotel and entered the meeting at the outset. He was advised by the trustee that the meeting was exclusively with employees but he was invited to stay as an observer. Vega elected to leave and proceeded to wait in the lobby where for the first time he received a copy of the March 8 letter of contract rejection and the March 9 memorandum to employees, from one of the unit members as they departed from the Dolce Vita Room.

It had been arranged that Vega and Nicot and the Federacion attorney were to have been accompanied to the 2 p.m. March 9 meeting by delegates Maldonado, Battista, Blanco, Aponte, and Fortunato Martinez. However, the delegates refused to attend. The Federacion leaders met with Rodriguez without the delegates. Nicot, in reference to the trustee's announcements of changes, accused him of acting precipitously and stated that he should have waited for the scheduled meeting at 2 p.m. Rodriguez protested that he had earlier communicated with Vega. Vega insisted that he told Rodriguez not to make any changes. Rodriguez again recited the reasons he acted, inter alia, past failure to reach agreement, and the rapid economic deterioration of the hotel that required immediate action to forestall closing, and the internal conflict within the Federacion as evidenced by Maldonado's individual actions that were unauthorized and even unknown by the Federacion, and that tended to have a disruptive effect on negotiations. Rodriguez proposed that further negotiations be continued by committees of four persons on each committee to be nominated by each party, and that his representatives would be named in a subsequent letter. The subject of the changes announced on March 9 was not raised. With respect to the collective-bargaining agreement benefits not explicitly referred to in the March 8 and 9 written communications, Rodriguez made explicit reference only to the medical plan that he stated would remain unchanged.

With respect to the March 9 meeting, there is no evidence that the Federacion representatives challenged the assertions of Rodriguez as to a past impasse, nor the accuracy of his position that the economic situation demanded immediate action. Nor is there evidence that the Federacion demanded that Rodriguez forestall further implementation of the changes, nor that they submitted any proposals to him, nor that it on March 9 expressed any desire to submit economic proposals nor that it made any demand to bargain about these changes or the effects of these changes at that meeting or at a later meeting. Finally, there is no evidence that the Federacion made any response to the trustee's assertions regarding the conflict within the ranks of the association. It thus appears that the Federacion, except for accusing the trustee of acting precipitously, stood mute and unresponsive.

As to the subject of the continued negotiations thereafter, such is clearly revealed by Rodriguez' letter of March 9 addressed to the Federacion that states:

> Even though we have terminated our contract with your Union, we still recognize you as the bargaining agent for the Casino Croupiers, Cashiers and Runners. We are willing to meet with you and carry out negotiations, possibly leading to a new contract.
>
> To accomplish this we have designated a Committee, composed of the following management personnel.
>
> Melba Curet Brugueras
> Miguel D'Angel
> Marshall J. Kagan
> Samuel Schweitzer
>
> This committee will be pleased to meet with your representatives (we would suggest about 4). When you have selected your representatives, and wish to have a meeting, please let me know, and we will arrange it at a time convenient to both parties.

On March 9, Respondent Hotel's payroll master received a memorandum from Rodriguez, which stated:

> As a result of our cancellation of the Casino Union contract, the following changes will go into effect immediately.
>
> 1. No deduction of Union dues.
>
> 2. Vacation & sick pay accruals at rate prescribed by law.
>
> 3. No pension plan deduction or contributions.
>
> 4. Working day will be 8 hours. Sick pay and vacation pay per day will be equal to a regular day's pay.
>
> 5. Holidays will be as follows (five holidays set forth).
>
> 6. New pay rates become effective March 9, 1982.

On March 11, Casino Manager Rafael Diaz presented Maldonado with a memorandum acknowledgement of acceptance of the reduction in wages to be executed by Maldonado and all unit employees. Diaz stated that any employee who refused to execute the document would be laid off pursuant to the explicit terms of that document.

No response was made by the Federacion to the trustee's March 9 invitation to negotiate a new contract until on April 26 it forwarded to Rodriguez a letter signed by Nicot which stated that it was "most willing to sit down and bargain concerning the collective Bargaining Agreement." In that letter the Federacion suggested that Rodriguez set the date, time, and place for negotiation at the trustee's "best convenience." The union negotiating committee was named to consist of Nicot, Vega, Blanco, and Maldonado.[7]

On May 3, Rodriguez acknowledged the April 26 Federacion letter and suggested a meeting date of May 11 at the Dolce Vita Room. A meeting was held on that date between the Federacion committee, and a committee of Respondent Hotel representatives headed by Sam Schweitzer, former president of the hotel and counsel to the trustee, who was not to participate at that meeting. After he had presented an oral report to the Federacion of the hotel's economic crises, Schweitzer asked if the Federacion had brought any proposals to further reduce the hotel's expenditures. Vega responded that the Federacion proposal was the unchanged collective-bargaining agreement, but that the Federacion was willing to negotiate from that contract, clause by clause, to determine where reductions might be made and that a mutally agreeable resolution might be effectuated. Schweitzer stated that he was authorized by the trustee to negotiate only from the status of the already effectuated economic changes for further economic concessions. Vega protested that the unilateral changes previously effected had never been accepted by the Federacion despite Respondent's assumption of such acceptance. Vega announced that the Federacion committee was leaving because Schweitzer did not have authority to negotiate from the status quo, before the unilateral changes, i.e., October 1981 and March 9, 1982. Vega suggested that Respondent Hotel obtain Rodriguez for another meeting because only he had authority to negotiate from the premise sought by the Union. Schweitzer said he would notify the Federacion, and the meeting of 20 minutes' duration ended, as Vega said the Federacion was available at "any time."

At the beginning of May, Rodriguez received an audit report that reflected a loss of $1.6 million for the economic year of May 1981–1982, due to the cancellation of a British tourist contract.

On June 4, the Federacion by letter from Nicot to Rodriguez, referred to the agreement to negotiate an "agreement concerning the Casino's collective Bargaining Agreement," by the reduced committee format, and noted its request at the last meeting to enlarge the committee to six persons. The letter gave notice of the addition of two persons "for the next morning." No request to bargain at any specific time set forth, nor were there any proposals submitted by the Federacion, nor was there any indication that the Federacion was willing to moderate its position that any negotiations must commence from the point of status quo ante, and the old contract.

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[7] On April 14, the bankruptcy court conducted a hearing pursuant to a motion filed by Delgado. On that date the bankruptcy court ordered the Federacion and Respondent Hotel to meet and attempt to enter into a collective-bargaining agreement.

At the beginning of June, Maldonado engaged in the leadership role of initiating the existence of a new union. He met with unit employees in the croupiers' restroom at the hotel. Thirty-eight croupiers were present. Attorney Delgado addressed them.[8] In consequence, the Union was formed and its executive board was named by the employees. Maldonado was elected president and Blanco was elected vice president. Eliont Garcia was elected secretary-treasurer. Other positions were created and officers elected. The purpose of the organization was to negotiate a collective-bargaining agreement, resolve grievances on behalf of employees, and negotiate better working conditions with Respondent Hotel. Thereafter, bylaws and a constitution were devised. Within 2 days the Union filed a representation petition seeking certification of its status with the Board.

On June 10, trustee Rodriguez sent by messenger the following letter to Nicot:

> We appreciate your patience in waiting to resume negotiations.
>
> The obligation that prevented us from meeting are now reduced and we can meet with you next week. We suggest Tuesday, June 15, 1982, at 10 A.M., in La Dolce Vita Room at the hotel. If this is not convenient, please call and we will arrange a meeting for another date and time.
>
> Enclosed is a notice to the Casino employees regarding a reduction in salary that will go into effect Monday, June 14, 1982. We will explain in detail the economic problems that make this necessary.

The attached notice to employees was dated June 10, and set forth further salary reductions, to be effective June 14, with the explanation that recent worsening economic conditions necessitated these reductions in order to keep the hotel operational.

Vega testified on direct examination that the June 15 meeting was postponed at the request of the Federacion.[9] Vega testified that there had been no other meeting held or scheduled, and no discussions concerning the subject of the June 10 notification, receipt of which he admitted on June 10. Clearly then, the Federacion made no demand to bargain about these additional reductions, nor did it make a request to postpone the effectuation of these reductions in order to bargain about the subject. Rodriguez testified that he had private, individual conversations with the Federacion's leaders (i.e., Vega and Nicot) about further salary reductions. His testimony as to these conversations was generalized and conclusionary, but to the effect that the Federacion leaders (Vega and Nicot) stated that they understood the inevitability of these reductions and that negotiations were a waste of time. Rodriguez testified that nevertheless they did decide to meet formally and he therefore invited discussions about salary reductions thereafter in the June 10 letter. In cross-examination Vega conceded that during May and June he and Nicot individually and separately talked to the trustee by telephone on an indeterminate number of times. Vega could not recall the substance of the conversations except that part of it related to setting a date for meeting "for June 10 or 15th, those dates." He admitted that these conversations were not routine. He was asked the following:

> (By Mr. Del Valle) During these conversations (of May and June) did (the Trustee) ever tell you that the need to make the change was a question of jobs or salary, between one of the two?
>
> He probably mentioned that, but that was normal for him to mention that. He's been mentioning that from way back, that he was *going to make changes, that he was going to make the changes*. And like I stated, he said, I'm going to make some changes. We did not agree we did not accept them.

Vega did not categorically deny that he told Rodriguez during these May-June individual conversations that he understood the need for further salary reductions and that negotiations were a waste of time. Although he insisted that the Federacion never affirmatively agreed to these reductions, he admitted in cross-examination that even after the receipt of the June 10 letter the Federacion made no request to meet with Rodriguez prior to the effectuation date. Nicot did not testify. Thus the testimony of Rodriguez concerning these May-June conversations, although generalized and conclusionary, stands virtually uncontradicted. Furthermore, there is no evidence that the June 10 announcement was irrevocable, or that a request to postpone the effective date and negotiate would have been futile.

On June 11, Maldonado and Blanco visited Rodriguez and personally delivered to him and signed by Maldonado as president of the Union, the following letter:

> Hereby we wish to inform you that at a meeting held the 8th of June 1982 at 8:00 in the evening, all the croupiers of the Hotel made the decision to form a labor organization independent from any labor union in the country.
>
> Our organization adopted the name of Union de Empleados de Casinos de Puerto Rico, Inc.
>
> A provisional board of directors was chosen consisting of the following: Miguel Maldonado, president, Jorge Blanco, Vice-President, Elionary Garcia, Secretary-Treasurer, Javier Aponte, Records Secretary and four members-at-large. We also approve a Constitution and Bylaws.

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[8] Maldonado testified that Delgado had been retained as early as December for the purpose of organizing the Union.

[9] Vega was confused whether the meeting was scheduled for June 17 or 21. Rodriguez testified credibly that a meeting was set for June 17 at 11 a.m., and that the Respondent Hotel bargaining committee waited in vain for Federacion negotiators who failed to appear.

> It was agreed that upon advising you about the organization that will represent us in all labor-management matters, we request your voluntary recognitions of our organization and that we set a date to commence negotiations.
>
> Due to the anxiety reigning among our membership and the need for us to adequately prepare ourselves before the new tourist season commences, we wish to meet with you on Tuesday, June 15 of this year, at 3 in the afternoon to commence said negotiations.

Rodriguez declined recognition of the Union until such time as the Federacion was decertified and the Union was certified as exclusive bargaining agent by the Board. He also stated that the bargaining date they sought was precisely the same that had been set for meeting with the Federacion. As of the filing date of the Union's representation petition with the Board on or about June 11, the Federacion had not as yet filed any unfair labor practices against the Respondent with respect to the alleged breach of bargaining obligations.

At undisclosed dates prior to this hearing, the Federacion and Respondent Hotel met and, in consequence, negotiated and excuted on October 1, 1982, a new collective-bargaining agreement, which was submitted on October 4 for approval to the bankruptcy court.

On October 7, Respondent Hotel submitted for approval of the bankruptcy court a settlement agreement purportedly remedying some but not all allegations of violations in this case. On October 15, the Regional Director for Region 24 of the Board filed an opposing motion with that court wherein he argued that the remedy provided was inadequate, and further requested that the bankruptcy court refrain from adjudicating an unfair labor practice. On October 15, the Regional Director by letter informed Respondent Hotel of his own refusal to approve that settlement agreement, and set forth therein a recitation of the inadequacies of the settlement. At the hearing herein, Respondent submitted to me for approval the same document. I also refused to approve that agreement for the same reasons recited by the Regional Director, i.e., it does not provide for a full *remedy* or substantially full remedy for the violations alleged.

2. The 8(a)(3) allegations—discharge—strike

The hotel casino operated on the following shift basis. On the day shift, one group of employees worked from 12 noon to 7 p.m., and another group worked from 1 until 8 p.m. On the night shift, one group worked from 8 p.m. until 3 a.m., and the other group worked from 9 p.m. until 4 a.m.

On June 17, Maldonado was scheduled for the 12 noon to 7 p.m. shift. From 11 a.m. until noon, Rodriguez and his negotiatiors waited for the Federacion representatives who did not appear.

Sometime between 11:15 to 11:45 a.m., Hotel Resident Manager Charles Garcia was in the office of Hotel General Manager Stewart Waters with Waters and Chief Maintenance Engineer Marcos Acquino Rochette, who was there discussing a maintenance problem concerning the hotel pool. The reservation manager, Miriam Vidal Dominguez, entered with a handful of leaflets that she displayed to Garcia and Waters and informed them of their distribution in the lobby where they were being handed out. The unsigned leaflet, the distribution of which ultimately led to Maldonado's discharge, stated as follows:

> June 16, 1982
>
> To All Employees of Hotel San Juan
>
> Hereby we wish to invite all fellow workers of all the departments of the hotel to attend an informative protest picket, which will take place on Monday, June 21, 1982, at 10:00 a.m., due to the irresponsible manner in which Mr. Hector Rodriguez Estrada, trustee of the hotel, is administering the same; and to make publicly known the abuses that this individual is committing against us employees who are doing our best to keep this Hotel operating.
>
> Fellow Workers: let us defend what is ours, which we have obtained through 25 years of work and sacrifice. Let's not allow this Dictator to close the Hotel. Which has been his desire since he started to operate the same, this has been said by the latter on different occasions "that it is to his advantage to close to Hotel rather than keep it open, inasmuch as by selling it, he will earn 2% of the total sale (price). This man has turned into the Robin Hood of the Rich, taking the wages away from the poor in order to pay a multimillionaire company.
>
> Fellow workers: We'll see you on Monday, June 21, 1982, at 10:00 a.m.

Acquino had about 11 a.m. observed some hotel maids with leaflets but had not read them and had said nothing when Vidal presented the leaflets. In fact, Acquino paid little attention to the leaflet conversation. Waters and Garcia then delivered the leaflets to Rodriguez who became effronted and directed Garcia to investigate and discover the distributor. Garcia proceeded to the hotel lobby and noticed many of the same leaflets on a table provided for the use of hotel patrons then attending a convention. He failed to discover who placed those leaflets. Meanwhile, Acquino had left the meeting in Waters' office, proceeded to the engineering office that is located in the back basement area of the hotel along with the housekeeping and hotel security officers.[10] At his office, Acquino observed a group of employees reading the leaflets. He read the leaflet and shortly thereafter he proceeded to Waters' office where he carried one of the leaflets. On his way to Waters' office he observed a casino worker, distinctive in appearance because of his uniform, walking in the engineering office area. Casino workers do not normally frequent that area. Acquino observed nothing else, i.e., he did not observe that casino worker distributing nor carrying leaflets. At trial he identified that worker as Maldonado. In Waters' office he told Garcia that he had seen a casino worker walking in the engineering area, and that he had seen employees in the area who were reading that leaflet. Garcia asked whether he knew the identity of the worker. He answered negatively.[11] Both Acquino and Garcia place this about 11:45 a.m.

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[10] Maldonado who had worked at the hotel since 1965 testified that he did not know the location of the engineering department, but quickly added that he was aware that it was "somewhere" in the basement.

Garcia immediately proceeded to the casino without Acquino and encountered Assistant Casino Manager Adalberto Rivera who was engaged in preparations for opening the casino at noon. Garcia asked him to assist in identification of the leaflet distributor. As Rivera was busy, he assigned his assistant, Arroyo, to Garcia. At that moment, according to Rivera and Garcia, Maldonado appeared in the casino from the croupiers' resting area, and the following conversation took place. Rivera confronted him and asked if he had knowledge of the distribution of leaflets by any of the casino employees to which Maldonado stated: "It is impossible, the leaflets are in my locker and that is impossible that anybody is handing out the leaflets." Maldonado and Garcia with Arroyo departed in different directions. Rivera had not yet read a copy of the leaflet that Garcia had given him.

Garcia and Arroyo proceeded to the outside of the hotel. As they did so, while passing through the casino, Garcia noticed numerous employees reading leaflets. Having discovered nothing outside, they reported to Rodriguez and thereafter proceeded to question the hotel security guard, Angel Rivera. According to Angel Rivera's testimony, as he returned from lunch sometime after 11:30 a.m. on June 17, in the hotel security area he was given a leaflet by Maldonado, whom he did not know by name. Maldonado told him that the leaflet was for all hotel employees regardless of their particular union representation. Thereafter when Garcia questioned Angel Rivera about 1:30 p.m., he was told what occurred earlier and given a description of the leaflet distributor.

Garcia returned to Acquino, from whom he also obtained a physical description of the casino employee which, he concluded, matched that given by Angel Rivera. Garcia took Acquino to the hotel personnel office where, from a file of photographs, he selected Maldonado's photograph and thus identified him. Garcia did not arrange for the same procedure with Angel Rivera until 2 p.m. of the next day, when Rivera similarly identified Maldonado. On the afternoon of June 17, Garcia reported the results of his investigation of that day to Rodriguez.

Manager Adalberto Rivera testified that shortly after the noon conversation with Garcia and Maldonado, he proceeded to the casino employee rest area, and while Maldonado was speaking on the telephone, he read the flyer that was posted on the employee bulletin board and then removed it. Maldonado finished his telephone conversation and reproved Garcia for removing the leaflet from the employee bulletin board. Rivera apologized and replaced it.

Maldonado testified that he was unaware of who prepared, delivered, or distributed the leaflets on June 17 and also unaware of who sponsored the picketing or was behind the leaflet.[12] He testified that he arrived "at work" on June 17 at 12 noon. He also testified that he discovered about 25 leaflets on the table in the rest area on his entrance there. After reading one of them and because he did not "see anything incorrect" thereon, he proceeded to put a copy on the employee bulletin board.[13] According to Maldonado, at that moment Manager Rivera entered, proceeded toward the bulletin board, and removed the leaflet.[14] Maldonado told him he had no right to do so and Rivera apologized and reported it, although manifesting a demeanor of displeasure. Maldonado testified that he then immediately telephoned Delgado and reported these events.[15] He next proceeded to his assigned post at one of the gaming tables but was called aside to the manager's desk in the room by Manager Rivera. Maldonado summoned another employee as a witness. It is Maldonado's uncontradicted testimony that Rivera told him that "disciplinary measures were going to be taken against the persons who distributed this leaflet," and that his response was that if Respondent Hotel had proof of the identity of that person and if they understood discipline was justified, it should proceed according to its "best judgment."[16]

Maldonado left the manager's desk and summoned the shop stewards to the casino. When they arrived, he informed them of these events and they remained until 4:30 p.m., at which time they were dispatched home by Maldonado inasmuch as nothing had occurred. However, at 4:45 p.m. Maldonado was directed to report to the office of Personnel Director Melba Brugeras. He did so and there was confronted by Brugeras and Garcia. Brugeras presented Maldonado with a letter of discharge to which were attached two documents; one of which was addressed to the Federacion and which withdrew recognition of Maldonado as a Federacion steward; and the other was an order to Maldonado to leave the premises immediately. The letter of discharge signed by Personnel Director Brugeras states the reason for discharge as the distribution of the June 17 leaflet "which injures the moral integrity of persons composing the Hotel's management and is deterimental to the good functioning of this business establishment." In the letter to the Federacion executed by Rodriguez, it is stated as follows:

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[11] Contrary to Acquino, whom I credit as the more certain in his recollection, Garcia on direct examination testified that Acquino told him that he had observed a casino employee distributing leaflets downstairs in the back basement area. On cross-examination his testimony is in accord with Acquino.

[12] He asserted further that total ignorance as of the time of the trial. After some evasion, he conceded to have given affidavit testimony prior to this trial, to the effect that after the discharge he had received information that Blanco had brought the leaflets to the hotel.

[13] On cross-examination, he testified that the only reference he found untrue was the characterization "dictator."

[14] On cross-examination, he testified that he discovered the leaflets in the rest area shortly before noon and that he proceeded to the gaming room at noon.

[15] He did not contradict Manager Rivera's testimony as to the confrontation in the gaming room that preceded this event. I therefore credit Rivera. Maldonado explained that he called Delgado because of the "atmosphere" in the hotel, i.e., a "worried state" of supervisors and employees.

[16] On cross-examination, Maldonado attempted to explain how he had time to have become aware of the worried state of employees to have prompted a call to Delgado while in the rest area. He then testified that the ascertainment of the worried state was concurrent with the Rivera warning. However, this contradicts his direct examination that placed it at a subsequent time.

> During the course of today, June 17, 1982, Mr. Miguel Madonaldo Freites, Union steward, distributed among the guests, employees and everyone who was at the Hotel, the enclosed leaflet. He also posted the same on the Casino's bulletin board.
>
> Mr. Maldonado's conduct shows that he has gone way beyond what is required by a steward's function. He has charged this Hotel's Management with ulterior intentions contrary to the genuine interests of the company, which charge entails an idea of immorality and is insulting to the persons who are members of Management. Furthermore, the written statements made with the intention that they be read by the guests of the Hotel, and which have been read, have the intention of preventing said guests from continuing to use the facilities of the Hotel.
>
> For the above-stated reasons, we shall not continue to recognize Mr. Maldonado as a steward or otherwise a representaive of Federacion General de Trabajadores de P.R.

Trustee Rodriguez testified that the motivation for his decision to discharge Maldonado rested solely on his conclusion based on the reports of the investigation that Maldonado distributed the June 17 leaflet. Rodriguez testified most vividly and convincingly that he found that memo to be personally offensive and insulting. He also testified that he viewed the leaflet as an act of disloyalty to the hotel. He testified correctly that the Bankruptcy Code imposed an obligation on the trustee to seek the rehabilitation of the hotel. Although he conceded that the leaflet accurately reflects that he had the authority to sell the assets and that it accurately states the rate of commission he denied that he was motivated in his management decision by a desire to run down the hotel so as to be put into a position of justifying the sale as was clearly implied in the leaflet and denied that the alleged quotation within the leaflet was truthful. Such a motivation, he claimed, was deterimental to him professionally as it was to the business of the hotel. However, Rodriguez did not explicitly deny Maldonado's generalized testimony that the trustee stated during several informal confrontations over grievances in the lobby and in the office that he would convert the hotel from a Chapter XI Bankruptcy to a Chapter VII Bankruptcy and close the hotel if he were to be subjected to further "pressures," i.e., presumably by Maldonado and/or the Federacion. Maldonado gave no details nor any context for these confrontations. It is therefore unclear whether Rodriguez was referring to the Federacion's economic position or to grievance filing relating to other matters.

After the receipt of the discharge notice, Maldonado testified that he left the hotel and waited on the street for the stewards to arrive. He also testified on cross-examination that in his pretrial affidavit he testified that he did not leave the hotel immediately but that he first went to the casino to speak with the other croupiers about his discharge. He also testified on cross-examination that he telephoned the Federacion for assistance.[17]

According to Maldonado, after he left the hotel about 5:15 p.m., he proceeded to wait at an ice cream restaurant across the street from the hotel pursuant to the instructions of Battista, one of the two delegates who had left at 4:30 p.m. and who had returned and talked to Maldonado as he was being escorted by Garcia.[18] Maldonado testified that Battista told him as he was escorted out to wait outside while "we decide your problems." According to Maldonado, he waited outside the hotel at the ice cream restaurant from 5:15 until 10 p.m., without further communication with other employees.

After an unsuccessful effort by the stewards (delegates) to obtain rescission of the discharge, they spoke with Maldonado at the ice cream restaurant, and informed him that all the unit employees had stopped work in protest of his discharge. At 10 p.m., the day-shift unit employees appeared and joined the night-shift employees out on the sidewalk and formed a united work stoppage. According to Maldonado, as the employees appeared they told Maldonado that they were striking because of his discharge.

Maldonado testified that he informed the employees that they could not erect a picket line because of the lack of picket signs. Thereafter, Maldonado and Battista constructed picket signs, and picketing with placards commenced, at 10 a.m. on June 18, by about 40-45 unit employees.[19] The picket signs bore the following legends that in part reflect the language and tone of the June 17 leaflets:

1. We Won't Enter Without Miguel.
2. Trustee's poor judgement Closing the Hotel.
3. Do You Want To Gamble—Go to The Palace.
4. 23 Years of Conquests In Fight [illegible] Federal Trustee.
5. Trustee Is Treating Us Abusively.
6. Trustee Protects Interests of Conneticut [sic] Life.
7. Working hours are Increased and Salary Reduced.
8. Fellow Worker (Cooperate) and (Don't) Cross the Picket Line.
9. Croupiers of The Casino of Hotel San Juan are on strike.
10. Casino Employees Hotel San Juan Almost On The Street.

Neither Vega nor Nicot had authorized the strike. On the morning of June 18, the trustee accused Vega of calling a strike. Vega denied having authorized a strike. He immediately proceeded to the hotel. He encountered Battista and asked why the employees were on strike. According to Vega's uncontradicted testimony, Battista told him that the employees were on strike because of Maldonado's discharge. Vega spoke to Maldonado and discovered that he had already filed an unfair labor practice charge with the Board with the assistance of Attorney Delgado.

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[17] At one point he testified on cross-examination that he did not know the telephone number of the Federacion. When asked whether in 9 years of representation he had never called the Federacion, he explained that he did not memorize the number. He conceded that he knew the location of the Federacion's headquarters. In a pretrial affidavit he testified that he did not know whether the Federacion had an office, a telephone, or employees other than Vega and Nicot.

[18] Maldonado explained that he had telephoned Battista from the personnel office. He did not explain the logistics of these confusing events.

[19] From Rodriguez' testimony, I conclude there were about 50 employees in the unit represented by the Federacion.

Subsequently on June 18, Nicot and Vega met with delegates Aponte and Battista to discuss the reason for the strike, i.e., Maldonado's discharge. Vega reproved them for acting without informing him. He reminded them that just a few weeks earlier a discharged employee by the name of Calderon had been reinstated pursuant to a grievance filed by the Union. According to his testimony, Vega advised the delegates that they should not have walked out because the collective-bargaining agreement does not expire until April 1983 and that it contains a no-strike clause, and that according to the internal Federacion rules only Nicot, the president, can authorize a strike. He told them that all their jobs were now in jeopardy.[20] Vega testified that Battista acknowledged he had erred in calling a strike and Aponte conceded that they now were faced with a "big problem." To that, Nicot stated that he and Vega were scheduled to meet with Rodriguez that afternoon and perhaps they could resolve the situation. Vega then told them that the strike was not a Federacion strike but an "illegal strike" in violation of the no-strike clause of the old contract, but that the Federacion would in any event seek to assist them.

In the afternoon of June 18, Nicot and Vega met with Estrada at the hotel coffeeshop. They asked why Maldonado was discharged and, according to Vega, the trustee responded that Maldonado had distributed a leaflet that denigrated the hotel. The Federacion officers asked whether he had proof, and Rodriguez stated that he had witnesses who had observed it. Thereafter, Rodriguez agreed to reinstate the strikers without reprimands with the exception of Maldonado, whose discharge would be resolved through some appropriate forum such as the Board. It was agreed that the hotel could operate without them throughout the weekend, i.e., Father's Day weekend, but that they would have to return by Monday, June 21. Acceptance of that offer and a cessation of picketing was given a deadline of 8 p.m., June 18.

Both Vega and Rodriguez testified that those were the only conditions discussed and agreed on for ending the strike.

Vega testified that during this conversation, in Rodriguez' presence, he stated to Nicot that the employees were talking "about this independent union, etc.," and Nicot stated as follows:

> Well, they're going back to work, they know there's a contract, the contract has got an expired date which is for 1983, so this union, they can't have an election now, or anything like that, they'll go by our union, we'll throw the people out, but we got a contract. I'll explain to them (that in order) to have another union come in they will have to wait 60, 90 day period before the expiration of the contract they'll come back to work and they have a new contract for the last two years, and they know its like that, we'll explain to them.

Vega testified that they told Rodriguez that they would "explain" the foregoing to the strikers. Nicot and Vega promised to notify Rodriguez of the results of their efforts at 8 p.m. Thereupon, Vega and Nicot departed for the picket line about 4 p.m.

Vega testified that the foregoing described agreement was conveyed to the picketing strikers that afternoon and that they were urged to comply. He also told them that, with respect to an outside union, because of the duration term of the old contract, they would have to wait for the expiration date before they could organize and file a petition. Some strikers refused to discuss it without Blanco and Maldonado, who were not present. Others became boisterous. Vega testified that he decided that it was not feasible to meet there on the street, and requested that Aponte convey to Maldonado the agreement and that he and Nicot would await their decision at the union hall. They waited until 10 p.m., but no one called. Vega notified Rodriguez of the nonresponse and it was agreed between them that the Union would publish leaflets explaining the settlement to the strikers and the deadline for acceptance of the agreement and concurrent withdrawal of pickets would be extended to 6 p.m. Saturday. Consent was given to Rodriguez to distribute his own leaflet reflecting the agreements.

On Saturday, June 19, the Union distributed to the striking employees the following leaflet, a copy of which was provided to Rodriguez at 3 p.m.:

> Yesterday afternoon, June 18, 1982, we met with Mr. Hector Rodriguez Estrada (Hotel San Juan Trustee) to attempt to resolve the problem of the strike called by yourselves.
>
> *This strike was not authorized by our Union. This strike is illegal.* Now all our efforts are aimed at trying to resolve the problem which is no other but to protect all of our jobs.
>
> The agreements reached between Mr. Rodriguez and this Union were the following:
>
> 1—That you remove the pickets that same afternoon at or before 8 p.m., and advise the Union as to re-

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[20] Vega testified without contradiction that on May 11, prior to meeting with Schweitzer, he had engaged in a discussion, in the hotel lobby, with Aponte, Battista, Martinez, Blanco, and Maldonado, while all were seated around a table, wherein Nicot told them, in answer to a question, that "*the agreement we were going to make* with the hotel" was to be for the duration of the old contract. In that same conversation Nicot spoke in conciliatory terms of the attempt to obtain representation by an independent union, their loss of faith in the Federacion, and requested understanding of the difficulities of negotiating with a bankrupt employer that made unilateral changes that the Federacion had not "accepted." Nicot also told them that they would have to wait for the expiration date of the older contract, i.e., another year, before they could seek other representation. There is no other evidence, except for the documentary evidence, of representations to employees of the status of the old contract.

> turning to work on Monday, June 21, 1982, except Mr. Miguel Maldonado.
> 2—That Mr. Miguel Maldonado's case be handled through the Hon. Federal Labor Relations Board.
> 3—To ratify Federacion General de Trabajadores de P. R. as the only Union representing the casino employees of Hotel San Juan.
>
> Although these conditions were notified to you verbally yesterday and you were given a deadline until 8 p.m. yesterday to remove the pickets, our Union can get said deadline extended until 6 p.m. today, Saturday, June 19, 1982.
>
> Anyone interested in returning to work under these conditions please get in touch immediately, at or before 6 p.m. today, personally with our offices where we shall be waiting for you until that time.
>
> Colleagues, our only interest now is to protect your jobs. It is your turn to speak now.

Vega remained at the picket line but heard only one thing for 45 minutes, i.e., the repeated chant: "Without Miguel, No!" Vega returned to the Federacion headquarters where he stayed until 9 p.m., but received no acceptance of the offer by any striker.

Trustee Rodriguez, pursuant to prior consent of Nicot and Vega during their earlier telephone conversation, concurrently drafted and caused to be delivered to the strikers at a time not clearly established in the record the following leaflet that he testified contained the only conditions agreed to with the Federacion. That leaflet states:

> Yesterday afternoon I had the pleasure of meeting with the Messrs. Luis G. Nicot and Marcos A. Vega, for the purpose of together seeking a solution to the problems that have motivated your strike.
>
> Although the strike called by you was not authorized by the Union that represents you and the same has been branded as illegal by said Union, we have agreed to allow you to desist from the picketing and to return to your usual duties on your respective shifts next Monday, June 21, 1982. This was subject to the pickets being removed yesterday, Friday, at or before 8:00 in the evening, which was notified to you by the Messrs. Nicot and Vega.
>
> Today, Saturday, June 20, 1982, early in the morning, we have met again in order to extend to you the same invitation that was made to you yesterday, conditioned upon your removing the pickets this afternoon at or before 6:00 p.m.
>
> I urge you to please desist from your attitude and today, at or before 6:00 p.m., to remove the pickets and accept our invitation to go back to your jobs next Monday as usual on your respective shifts.

Rodriguez received a copy of the Federacion leaflet about 3 p.m. on June 19, and immediately drafted and sent a responding letter of acknowledgment. That letter is translated in the record as follows:

> Receipt is acknowledged of the copy you sent me of the circular letter addressed to all the croupiers at the Hotel San Juan's Casino, dated June 19, 1982.
>
> The agreements entered upon yesterday between your distinguished Union and us are enumerated[21] in said circular letter. You also invite our fellow croupiers to desist from their attitude of maintaining pickets in front of the Hotel and warn them that "this strike was not authorized by your union" and that "the strike is illegal."
>
> You continue to invite them to rectify their positions and urge them to return to their duties under the conditions we agreed upon and which you verbally informed them about yesterday, indicating to them that you could succeed in having the time limit they were given yesterday extended until today at 6:00 p.m.
>
> I am pleased to inform you that if agreements entered upon between us yesterday are complied with by the croupiers, we are most willing to extend the above-mentioned period until today, Saturday, June 19, 1982, at six in the evening (6:00 PM).
>
> If the above is achieved, you must inform me about it on or before six in the evening today (6:00 PM). Otherwise we will regretfully be forced to understand that those represented by you have permanently abandoned their duties in our Casino and will have to be immediately replaced. We hope that God will enlighten them in making their decision.

Rodriguez testified that he, Nicot, and Vega discussed only two conditions for the reinstatement of strikers, i.e., return to work and resolution of Maldonado's case by an appropriate forum.

Vega testified that there was no discussion between them relating to the pledging of loyalty to or ratification of the Federacion as exclusive bargaining agent a condition of the employees' reinstatement. Vega testified that the use of the word "ratify" was not intended to be understood as a pledge of loyalty by the strikers to the Federacion, but instead was intended to relate to the strikers the Federacion's understanding with the Respondent that it had a collective-bargaining agreement and that under Board rules no question of representation could be raised nor any representation election conducted during the term of that contract. He conceded that the leaflet, as phrased, did actually set forth three conditions to be accepted by the strikers precedent to their employment.

No other communications were delivered to the employees nor were any received from them. On June 20, Respondent Hotel sent the following letter to each of the striking unit employees:

> Last Thursday evening some of you abandoned your jobs and others failed to report to their corresponding shifts the next day. Subsequently, up to this date, June 20, 1982, none of you have reported to your jobs on your corresponding shifts.

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[21] Respondent Hotel argues correctly that the Spanish verb actually used, "detallan," should be more accurately translated as "detailed" or "particularized," whereas "to enumerate" is usually reserved for the Spanish phonetic twin "enumerar," citing New Revised Valezquez Spanish and English Dictionary, Follett Publishing Co. (1967).

> Although both the Hotel's Management as well as Federacion General de Trabajadores de Puerto Rico has invited you to return to your jobs, we have not achieved our purpose. We understand and accept as a fact that you have resigned from your jobs and therefore we are proceeding to replace you permanently.

On Friday, June 25, the following letter executed by Jorge Blanco as vice president of the Union was sent to and received by Trustee Rodriguez:

> We, the employees of the San Juan Hotel casino, received, on June 21, 1982, a written notification in the form of a certified letter where we are informed the following:
>
> 1. That we have been replaced in our employment due to the fact that we abandoned our work.
> 2. That the Hotel extended an invitation to us for us to return to work so that you could later sit down with representatives of the Federacion General de Trabajadores to discuss the differences that existed.
>
> We wish to inform you about the points we object to:
>
> *First*: That, as you allege, we abandoned our work because you, with your anti-labor action, were the one who provoked this situation. You fired our leader, Mr. Miguel Maldonado. We could not allow you to continue acting, when faced with our claims, in such a negative manner.
>
> *Second*: You lowered our salary on two consecutive occasions; all this in an arbitrary manner.
>
> *Third*: The Union dues checkoff was discontinued as per your orders.
>
> *Fourth*: You owe us vacations and other working conditions that had already been agreed to; in other words, you yourself eliminated Federacion General de Trabajadores as our labor representative and now you are the one who are contradicting yourself and you want that the Union that you rejected be the one to represent us and we do not want that Union.
>
> *Fifth*: We have organized ourselves into an independent union and asked you to recognize us and you also rejected that and, to top it all, you now discharge our leader without having any arguments or proof of your allegations against him.
>
> *Sixth*: You refuse to bargain concerning employment conditions.
>
> Therefore, all of us are willing to work right now, if you change your attitude.
>
> We are hereby requesting that Mr. Miguel Maldonado be reinstated in his employment and that the Union that we have voluntarily chosen, UNION DE EMPLEADOS DE CASINO DE P.R., INC., be recognized for us.
>
> It is your turn now, Mr. Rodriguez.

The hotel and casino continued to operate and virtually all the croupiers remained on strike, i.e., they continued to picket. The record is not clear whether the cashiers and runners joined in the strike. It is clear, however, that the vast preponderance of bargaining unit engaged in the strike. It is also unclear when any permanent replacement employees were hired.

On June 19, 1982, the Union filed an unfair labor practice charge against Respondent Hotel in Case 24-CA-4663 alleging that the Employer terminated the employment of Miguel A. Maldonado because of his membership in and activities on behalf of the Union. On June 28, 1982, the Union filed a charge against Respondent Hotel in Case 24-CA-4667 alleging that Employer terminated the employment of 46 casino employees because of their membership in and activities on behalf of the Union and because they engaged in protected concerted activities on behalf of themselves. On July 8, 1982, this charge was amended by the inclusion of two additional casino employees. On July 16, 1982, the Federacion filed a charge against Respondent Hotel in Case 14-CA-4676, alleging that Respondent Hotel refused to bargain in good faith with it. On September 20, 1982, the Union filed a charge in Case 24-CB-1179 alleging, as amended on October 5, as an unfair labor practice the entering into, enforcement of, threat to enforce, and maintenance of the June 19 agreement with Respondent Hotel insofar as it conditions reinstatement of striking employees on their reaffirmation of Respondent Federacion as the exclusive bargaining representative of casino employees; and that Respondent Hotel on June 20 discharged striking employees because of their refusal to comply with that condition.

On September 23, Respondent Federacion, by President Nicot, sent a letter to the trustee, and copies to all unit employees, in which it stated:

> We refer to the several meetings which we have had with you as Operating Trustee of El San Juan Hotel and us as representatives of the Casino employees involved in a labor dispute with the Hotel. We also refer to a leaflet dated June 19, 1982 from myself and Marcos Vega, Secretary-Treasurer of the Union, issued to the striking employees of the Casino.
>
> We wish to advise you and we are advising those employees that it was never a condition for them to return to work that they reaffirm our Union as their representative. That was never the agreement with you. At the same token, we reaffirm to you and to them what we advised them at that time, namely, that in our opinion the strike was illegal because it was in violation of the no-strike clause of the agreement. We made all the efforts to settle the strike, but the employees did not accept the settlement bargained by us. For this reason, we are not liable for any damages that the strike may cause the Hotel.

The strike, i.e., picketing, has continued and there has been no evidence of further communications between the strikers and either of the Respondents.

B. *Conclusions*

1. The 8(a)(5) allegations

Section 8(d) of the Act provides that "to bargain collectively is the performance of the mutal obligation of the employer and the representative of the employees to meet at reasonable times and confer in good faith with respect to wages, hours, and other terms and conditions of employement."

Section 8(a)(5) and (1) of the Act obliges an employer to notify and bargain with the designated exclusive bargaining agent concerning changes in wages, hours, and other terms and conditions of employment. *NLRB v. Katz*, 369 U.S. 736 (1962). On notice of such proposed change, the employees' bargaining agent must timely request and diligently pursue bargaining if it wants to preserve its right to bargain on that subject. Otherwise it may be deemed to have waived its right to bargaining. *Emporium*, 221 NLRB 1211 (1975); *City Hospital of East Liverpool, Ohio*, 234 NLRB 58 (1978); *Citizens National Bank of Wilmar*, 245 NLRB 196 (1979); *Salem College*, 261 NLRB 327 (1982).

However, when the proposed change concerning wages, hours, or other terms and conditions of employment encompasses a change or modification of an existing collective-bargaining agreement, a stricter obligation is imposed on the employer. It is well settled law that modification of a clear and unambiguous term of contract of fixed duration, regardless of economic motivation or necessity must be obtained pursuant to a positive affirmance by the employees' bargaining agent, otherwise the requirements of Section 8(d) of the Act are not met and a violation of Section 8(a)(5) results. *C & S Industries*, 158 NLRB 454, 456–457 (1966); *Oak Cliff-Golman Baking Co.*, 207 NLRB 1063 (1973); *Struthers Wells Corp.*, 245 NLRB 1170 (1979). Thus contractual modification concerning wages, hours, or other terms and conditions of employment cannot be effectuated by merely providing to the bargaining agent an opportunity for negotiation.

The General Counsel, in this case, concedes that the Respondent Hotel acted lawfully by rejecting the collective-bargaining agreement as authorized by the bankruptcy court. The complaint alleges, and the General Counsel argues, that the Respondent violated the Act by refusing and failing to bargain with the Union with respect to unilateral changes in conditions of employment after it had lawfully rejected the contract.

The General Counsel argues that once having lawfully rejected the collective-bargaining agreement the Respondent was nevertheless obliged to notify and provide the Federacion with an opportunity to bargain and on demand to bargain in good faith on demand to agreement or to impasse prior to implementing new terms and conditions of employment. The General Counsel cites in support of its position *Iron Workers Local 455 v. Kevin Steel*, 519 F.2d 698 (2d Cir. 1975); *Century Printing Co.*, 242 NLRB 659, 669 (1979); *Airport Limousine Service*, 231 NLRB 932 (1977); *Jersey Juniors, Inc.*, 230 NLRB 329 (1977); *Bell Co.*, 225 NLRB 474 (1976).

Respondent Hotel argues that it fulfilled its bargaining obligations prior to implementing changes in terms and conditions of employment. It further argues that its position under a Chapter XI bankruptcy entitled it to unilaterally implement changes in terms and conditions of employment, citing *NLRB v. Bildisco & Bildisco*, 682 F.2d 272 (3d Cir. 1982), cert. granted 459 U.S. 1145 (1982).

It is unnecessary to discuss the conflicts between the aforecited decisions of the Second and Third Circuit Courts of Appeals, inasmuch as I conclude that the General Counsel did not sustain the burden of proving that Respondent did not bargain in good faith to impasse, and that the record establishes that the Federacion had been presented with sufficient opportunity to bargain about the changes but waived its bargaining rights by the lack of diligence in demanding and pursuing bargaining.

The first alleged changes in employment, which is alleged in the complaint to be violative of the Act, occurred on March 9. These changes were preceded by a longstanding demand of many months that the Federacion agree to economic changes and notification that changes were inevitable because of economic necessity. The Federacion was told of the trustee's intention to effectuate economic retrenchment from the contractual salary and fringe benefits. Some changes were made in October 1981. The Federacion at no time challenged the trustee's assertions of economic crises and a continuing deterioration in the hotel's financial status.

Thus the Federacion entered the fall of 1981 against a background that put it on notice that economic changes were going to be made by Respondent Hotel. During the negotiations immediately preceding the December 1 commencement of the tourist seasons, Respondent Hotel and the Federacion negotiators twice agreed on salary and other economic benefits reductions but were twice frustrated by the Federacion members whose opposition to salary concessions were aligned with the position of the delegates of whom Maldonado was the leader. The parties agreed to suspend negotiations in the hope that the new season might provide economic relief. It proved otherwise. Respondent Hotel's economic position deteriorated from what it had been when the members had rejected the negotiated changes in salary and benefits. Clearly Respondent Hotel's position changed to that of requiring additional concessions. The Federacion leaders were warned during that disastrous winter season to prepare to negotiate concessions, i.e., there was no economic relief to cause a change in Respondent Hotel's position.

The trustee was presented with no demands to negotiate by the Federacion and given no intimation that the Federacion was willing to moderate its earlier adamancy imposed by the will of the members and delegates. Concurrently, the trustee witnessed the actions of Maldonado that reasonably indicated to him that there was a growing internal conflict within the Fedracion. Thus the earlier division between the leaders and delegates appeared to be worsening.

On March 8, the trustee received more information about the growing economic crises and acted quickly. I do not find the speed with which he put the Federacion on notice of further changes to be unreasonable. There is no challenge to his testimony that the economic situation was desperate. His past experience in negotiations with the Federacion and his exposure to a growing internal conflict in the Federacion led him to conclude that further bargaining would be futile. His sudden notification to Vega served as a prod to action to Federacion leaders, one of whom gave some testimony as to not accepting changes but no testimony of having proposed anything to negotiate. Vega was clearly one of two responsible Federacion leaders. Had he on March 8 and during the midnight conversation protested to the trustee and demanded prior negotiations before the salary reduction became effective, the trustee's good faith would have been put to the test. As the evidence indicates, he did not do so but, at most, merely withheld affirmative agreement. Moreover, he agreed with the trustee that impasse had been reached, and that further negotiations would be futile, as the members had not moved from their opposition to salary concessions. Even during the meeting of March 9, the Federacion manifested a continuing internal conflict by appearing to meet with the trustee in the absence of the delegates who did not wish to attend. The Federacion leaders' conduct described herein amounted to little more than mild objections to the speed of implementation and constituted, in effect, acquiecence to the trustee's assertion that past impasse and internal Federacion conflict portended futility to further negotiations.

After the March 9 changes in employment conditions, and the rejection of the old contract, the trustee invited the Federacion to negotiate for a "new contract." The Federacion was notably lax in pursuing further negotiations. When a meeting was finally held on May 3, the Federacion was again confronted with a report of continuing economic crises and a request for further economic reductions to be incorporated in the new contract. The Federacion thereupon attempted to do, what in the past it had been presented with the opportunity of doing, but which it had wasted, i.e., to bargain about the March 9 economic changes. The Federacion insisted that it would only bargain from a status quo ante, i.e., the original contract conditions. Respondent Hotel was equally insistent that economic conditions necessitated not only retention of old concessions, but also the addition of new concessions. The meeting broke off as Vega stated that the Federacion would not meet until Respondent Hotel was represented by negotiators with authority to agree to negotiate from the status quo ante.

As the Respondent's economic situation is conceded to have been in dire straits, I cannot conclude that it acted unreasonably on insisting on retention of the lawfully implemented March 9 changes. This meeting, in any event, is not alleged to have constituted bad-faith bargaining.

The Federacion permitted matters to drift thereafter. It made no demands to bargain, no demands to meet, made no request for information, made no challenge to the trustee's claims of poverty, and gave no indication that it would be willing to modify its past position of opposition to salary reductions. Meanwhile, the trustee continued to encounter economic losses for the year ending May 1982. In early June, Maldonado accelerated his dissident activity by spearheading the formulation of the Union. Concurrently in May and early June, the trustee held individual conversations with the Federacion leaders that reinforced his conclusions that negotiations about further salary reductions would be futile. On June 10, by letter, he announced the changes to be effective June 14 and suggested a meeting with the Federacion for June 15 for further new contract negotiations. Again, the good faith of the trustee could have been put to the test by a vigilant Federacion. Instead, no bargaining demands were made and no requests to defer implementation were demanded. The Federacion's conduct was in accord with the individual conversations between its leaders and the trustee, i.e., that of quiescence. The only movement from the Federacion was a request to postpone the next contract bargaining session even later than proposed by the trustee! Shortly after his letter of intent to reduce salary further, the internal conflict blossomed in full, with a demand to be recognized by the Union. The June salary reductions proceeded into effect on June 14, with hardly a sign of protest by the Federacion. Subsequently, Maldonado was discharged on June 17, virtually all employees went on strike, and the meeting of June 17 was postponed at the Federacion's request to June 21 and apparently not held.

I therefore conclude that in view of the foregoing factual conclusions that the General Counsel has failed to prove its allegations with respect to violations of Section 8(a)(5) of the Act regarding the unilateral charges of terms and conditions of employement. Inasmuch as I conclude that the March 9 and June 14 changes were not proven to be unlawfully implemented, I do not find unlawful Respondent's conduct in conditioning employment of unit employees on their explicit acceptance of those changed conditions of employment.

2. The 8(a)(3) allegations

a. *Discharge of Maldonado*

Respondent Hotel contends that it had reasonable cause to believe that Maldonado had ultimate responsibility for the publication of the June 17 leaflet and that he was identified as the distributor of the leaflet. The General Counsel argues that Maldonado had not been identified as the distributor of the leaflet until June 18 and Respondent Hotel "either assumed his complicity because of his prior protected activities or seized upon the leaflets as a pretext for ridding itself of a nettlesome, activist employee."

I conclude that the record contains substantial evidence to support the position of Respondent Hotel. There is insufficient evidence that Respondent was so hostile to Maldonado's activities on behalf of either the Federacion or the Union that it seized on the leaflet incident as a pretext for discharge. As will be further explored, the leaflet publication and distribution is a serious matter that cannot be dismissed as so frivolous as to necessitate an inference of other unlawful motivation, as the General Counsel suggests. However, I agree that the Respondent probably relied on its knowledge of Maldonado's concerted and union activities in forming its belief of his culpability. Indeed, Maldonado was the leader of the croupiers, and the spearhead of the formation of the Union. The leaflet was in accord with his past conduct and the objective of the new challenging Union and patently not a product of the less aggresive incumbent Federacion leaders. Such knowledge reinforced Respondent Hotel's conclusions, but that is not to say that it was motivated by the subject of that knowledge, i.e., union or other protected activities.

That Respondent's assumptions were reasonable is supported by the evidence. Maldonado admitted to Garcia and Rivera that he had the leaflets in his locker and, by such statement, implied that he had authority and responsibility for their distribution. He personally posted a copy on the employee bulletin board and possessively intervened when a manager attempted to remove it. By the reports of Garcia based on a combination of interviews with both Angel Rivera and Acquino, Respondent Hotel had identified Maldonado as a distributor of the leaflet to employees in the basement area. Although no one identified Maldonado as having placed the leaflets in the public area on the table provided for the convention patrons, I conclude that under the factual circumstances Respondent Hotel reasonably concluded that Maldonado either placed the leaflets or caused them to be placed there for access by the public and was responsible for their distribution throughout the hotel.

Maldonado was the leader of the delegates, the president and leader of the new Union, and, as he described himself, "the leader of the group," i.e., all unit employees. He was responsible for the composition and construction of picket signs of which necessity he reminded the strikers. The contents of those signs are strikingly similar, in part, to the language of the leaflet. I find that Respondent's conclusions regarding Maldonado's responsibility for the June 17 leaflet was not shown to have been unsupported by facts to the contrary, as I discredit the denials of Maldonado whom I do not find to be a persuasive, forthright, or candid witness.[22]

The Respondent contends that Maldonado's conduct with respect to the June 17 leaflet distributions is not protected by the Act because: (1) the leaflet disloyally disparages the operations of the hotel to employees and to the public;[23] and (2) the leaflet distribution was activity in derogation of the Federacion as the duly designated exclusive bargaining agent.[24]

The General Counsel argues that the June 17 leaflet is distinguishable from the *Jefferson Standard* case and its progeny because unlike those cases the employees in its communications to the public omitted reference to a labor dispute with the employer and engaged in an attack on the employer's product or services. The General Counsel argues that the leaflet contained truthful assertions as to the receipt of commission by the trustee in the event of a sale and was not so disloyal, opprobrious, or defamatory as to be removed from the protection of the Act.[25]

The General Counsel further argues that the characterization of the trustee as a "Dictator" or "Robin Hood" constitutes "rhetorical hyperbole" found by the Board to be protected in other similar circumstances.[26] The General Counsel argues that there is no evidence herein on which to conclude that the leaflet contained deliberate or malicious falsehoods, and that similar attacks on management have been held protected.[27]

Respondent Hotel contends that the leaflet is part of Maldonado's activities that formed an attempt to undermine the incumbent Federacion and to cause Respondent Hotel to recognize and bargain with the Union as a new bargaining agent and as such is unprotected. However, without deciding at this point whether his other conduct with respect to the status of the Federacion is or is not protected, it is clear that that leaflet distribution is a discrete and separate action having a meaning and existence of itself, i.e., it constitutes an appeal to fellow workers to join in public protest of an alleged disagreeable working condition and to protest again the loss of negotiated benefits. This leaflet is not an appeal for the support of the Union nor a call for separate negotiations. The leaflet's purpose is in accord with that of the leaders of the Federacion who told its members that at no point had it assented to contract concessions. Thus the leaflet reinforced the official public Federacion position. Cf. *East Chicago Rehabilitation Center*, 259 NLRB 996 (1982). Even if this activity was more of a spur to the Federacion to take more aggressive action rather than a reinforcement of what the Federacion was already doing, such conduct still would not lose its protected nature. *Pacemaker Yacht Co.*, 253 NLRB 828, 831 fn. 8 (1980); *Armco Steel Corp.*, 232 NLRB 696 (1977). The leaflet also constituted a way of presenting a grievance to the Respondent Hotel and alerting it to what the employees considered disagreeable working conditions. The *Emporium* case does not permit the discharge of employees for presenting grievances. *Richardson Paint Co. v. NLRB*, 574 F.2d 1195 (5th Cir. 1978).

As to the June 17 leaflet, the question arises as to whether it constituted such egregious conduct as to forfeit the protection of the Act. With respect to engaging in protected activities, it has been held:

> [Offensive], vulgar, defamatory or opprobrious remarks uttered during the course of protected activities will not remove activities from the Act's protection unless they are so flagrant, violent, or extreme as to render the individual unfit for further service.[28]

In situations where vulgar or obscene epithets were uttered in the heat of argument arising during a protected employer-employee confrontation, the Board has excused such conduct particularly where provoked by the conduct of the employer.[29]

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[22] Good-faith belief of misconduct engaged in during the course of known concerted, protected activities is no defense if it is *proven* that such misconduct had in fact *not* been engaged in. *NLRB v. Burnup & Sims*, 379 U.S. 21, 23 (1964); *General Motors Corp.*, 218 NLRB 472 (1975).

[23] Citing *NLRB v. Electrical Workers IBEW Local 1229*, 346 U.S. 464 (1953); *American Arbitration Assn.*, 233 NLRB 71 (1977); *Southwestern Bell Telephone Co.*, 200 NLRB 667 (1972), and similar related cases.

[24] Citing *Emporium Capwell Co. v. Western Addition Community Organization*, 420 U.S. 50 (1975).

[25] Citing and referring to *Veeder-Root Co.*, 237 NLRB 1175, 1177 (1978); *National Steel Corp.*, 236 NLRB 1033, 1035–1037 (1978), enfd. 625 F.2d 131 (6th Cir. 1980); *Southwestern Bell Telephone Co.*, 200 NLRB 667 (1972).

[26] *Boaz Spinning Co.*, 165 NLRB 1019 (1967); *National Steel Corp.*, supra; *New York University Medical Center*, 261 NLRB 822 (1982), enfd. 702 F.2d 284 (2d Cir. 1983).

[27] Citing *Hamlet Steak House*, 197 NLRB 632 (1972); *Crown Central Petroleum Corp.*, 177 NLRB 322 (1969), enfd. 430 F.2d 724 (5th Cir. 1970); *Blue Bell, Inc.*, 107 NLRB 514 (1953), enf. denied 219 F.2d 796 (5th Cir. 1955).

[28] *Jacobs Transfer*, 201 NLRB 210 (1973), as cited in *Dreis & Krump Mfg.*, 221 NLRB 309, 315 (1975), enfd. 544 F.2d 320 (7th Cir. 1976).

However, the Board has taken particular care to evaluate, inter alia, the place of the confrontation.[30]

In *Hawthorne Mazda*, 251 NLRB 313 (1980), insulting epithets concerning managerial competency, uttered during an employee-employee office confrontation were held protected, but the Board took care to note that such conduct was not made on the shop floor where it could have negatively affected the (general manager's) status in the eyes of other employees. The Board also noted therein that the protection of the Act is afforded to misstatements made during the course of protected activities unless they are "deliberately or maliciously false."[31]

Without consideration of the impact on the public, the addressee of the leaflet was not only the unit employee, but employees of the entire hotel. The language of the leaflet was not the result of some intemperate personal outburst. It was drafted, printed, and distributed and tended to disparage the authoritative status of the trustee. It cannot therefore be excused as part of the give and take to be expected in the heat of grievance presentation or similar protested activities.[32] Nonetheless, concerted activity in the form of leafleting has similarly been held to be protected. Thus, in *Great Lakes Steel*, supra, a leaflet with references to "murder" was excused as rhetorical hyperbole used to bring about improvements in medical and ambulance practices of the employer and clearly not intended to be literally interpreted as accusations of criminal conduct. In *Veeder Root Co.*, supra, sidewalk leaflets of employer-employee relations but that were not true. However, there was no evidence that the misstatements contained therein were deliberately false. In *New York University Medical Center*, supra, it was found that leafleting was protected where there was a failure of proof that the author knew that its accusations were false or that he acted in a reckless disregard of the truth. The author-distributor, in that case, had, in good faith, relied on reports of other persons and based his accusations that Respondent's guard had engaged in unlawful searches on those reports.[33]

With respect to the presentation of the leaflet to the public, the Board has stated:

> [An] employee may properly engage in communication with a third party in an effort to obtain the third party's assistance in circumstances where the communication was related to a legitimate, ongoing labor dispute between the employees and their employer, and where the communication did not constitute a disparagement or vilification of the employer's product or its reputation.[34]

Either viewed as a communication to fellow employees above, or viewed as a communication also to the public, I conclude that the distribution of the June 17 leaflet does not fall within the protection of the Act. I agree with the General Counsel that insofar as the leaflet refers to the trustee as a "dictator" and a "robin hood," it merely engages in "rhetorical hyperbole." But I find that the leaflet exceeds that point and attacks the ethics and integrity of the trustee by attributing to him a motivation and plan of action that conflicts with his primary obligations as a bankruptcy court trustee. Such an attack injures the trustee's professional status. Insofar as it was presented to the hotel guests, it portrays to the public that Respondent Hotel is being so mismanaged as to justify closure. Clearly, a prospective customer expects high caliber service and accommodations from a resort hotel and will be dissuaded from patronage by the knowledge that the management is motivated by a desire to purposely run down the business.

As severe as the disparagement is, I find that the egregiousness of the accusations is compounded by the clear assertion that the trustee has stated "on different occasions" that it was his desire from the onset of his trusteeship to close down the hotel in order to reap a commission on the sale of assets. I credit the trustee that his primary intention was in accord with his duty as trustee to rehabilitate the hotel, and that he on no occasion stated his purpose to close the hotel for the sake of a personal commission.

Respondent had reasonable cause to believe that Maldonado authored the leaflet. The evidence reveals that he, at the very minimum, adopted it and was responsible for its distribution. His vague testimony, even if credited, as to grievance confrontations relate to references to closure statements made in an entirely different context. Maldonado testified to no basis whatsoever to support the accusations of the leaflet as to the trustee's intent and motivations. No evidence was adduced to support a contention that the leaflet was premised on reports, hearsay, rumor, or any basis to support a colorable good-faith belief in its truthfulness.

It is too long a leap to conclude that because the trustee obtains a commission on sale of assets, that the trustee actually intended to run down the hotel for personal profit, and that he in fact announced such intentions. I therefore conclude that the assertions made in that leaflet were deliberately and maliciously false or were made in such reckless disregard of the truth as to fall beyond the protected reach of the Act. I therefore conclude that Respondent Hotel did not discharge Maldonado because of any activities protected by the Act.

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[29] *Thor Power Tool Co.*, 148 NLRB 1379 (1964), enfd. 351 F.2d 584 (7th Cir. 1965); *Crown Central Petroleum Corp.*, 177 NLRB 322 (1969), enfd. 430 F.2d 724, 731 (5th Cir. 1970); *Webster Men's Wear*, 222 NLRB 1262 (1976); *Coors Container Co.*, 238 NLRB 1312 (1978), enfd. 628 F.2d 1283 (10th Cir. 1980); *Postal Service*, 250 NLRB 4 (1980); *Sullair P.T.O., Inc.*, 250 NLRB 614 (1980), enf. denied 641 F.2d 500 (7th Cir. 1981); *Illinois Bell Telephone Co.*, 259 NLRB 1240 (1981); *Southwestern Bell Telephone Co.*, 260 NLRB 237 (1982).

[30] *Atlantic Steel Co.*, 245 NLRB 814 (1979); *Leshner Corp.*, 260 NLRB 157 (1982), the Board held to be not protected unprovoked obscene remarks made to the supervisor on the production floor in the hearing of other workers and following an office confrontation.

[31] Citing *Jacobs Transfer*, supra, and *NLRB v. Cement Transport*, 490 F.2d 1024, 1029–1030 (6th Cir. 1974).

[32] Compare *Boaz Spinning Co.*, supra (confrontation during a speech); *Hamlet Steak House*, supra (complaint raised in a private conference); *Central Petroleum Corp.*, supra (grievance meeting).

[33] Citing *Linn v. Plant Guards Local 114*, 383 U.S. 53, 63 (1966), in which the Supreme Court observed in similar circumstances that "the most repulsive speech enjoys immunity provided it falls short of a deliberate or reckless untruth."

[34] *Allied Aviation Service Co. of New Jersey*, 248 NLRB 229, 230 (1980), enfd. 636 F.2d 1210 (3d Cir. 1980), cases cited and discussed therein by the Board and the administrative law judge.

b. *The nature of the strike*

The factual findings herein necessarily lead me to conclude that the employees engaged in the June 17 strike to protest the discharge of Maldonado and to seek his reinstatement and to protect reductions in their contractual benefits. Both the discharge of Maldonado and the effectuation of salary and other benefit changes have not been proven to constitute unfair labor practices. Accordingly, I conclude that the strike that commenced on June 17 did not commence as an unfair labor practice strike. A further question to be resolved is whether the strike as an economic strike was protected activity whereby the employees could be permanently replaced, but not unlawfully discharged, as is alleged by the General Counsel, or whether their strike constituted unprotected activity under the rationale of the *Emporium* case, supra, or in breach of the no-strike clause of the rejected contract as is argued by Respondent Hotel. It is contended by Respondent Hotel that the strikers were not in fact discharged but that they refused an unconditional offer to return to work. The General Counsel argues that the offer of reinstatement to the strikers was premised on their acceptance of an unlawful condition, i.e., reaffirmance of the incumbent Federacion as exclusive bargaining agent, and that the strikers were in fact discharged prior to replacement and that they were discharged because of their support of the Union.

The Respondents correctly contend that the strike of June 17 was unathorized by the Federacion and argue that it was therefore conduct in breach of article XII, section 2 (no-strike clause) of the collective-bargaining agreement. Respondents argue that despite the rejection of the collective-bargaining agreement that those portions of the collective-bargaining agreement covering conditions of employment unchanged by Respondent Hotel's unilateral actions survived despite the bankruptcy law principle that an executory contract cannot be rejected in part and assumed in part.[35] Respondents cite the "understandings" of the trustee and Federacion leaders, and the fact that Respondent complied with the contract in all respects. I conclude to the contrary.

The evidence, particularly the documentary evidence, reveals that the old contract was terminated in its entirety and that bargaining took place for the purpose of agreement on a new succeeding contract. Merely because the terms of an expired contract are complied with in the sense that no further unilateral changes are effectuated in the established terms and conditions of employment in no manner effectuates the continued life, in shrunken form, of the rejected and thus expired agreement. Surely, if Respondent Hotel desired to alter further conditions of employment covered by that rejected contract, it would not have been required to apply to the bankruptcy court for another rejection authorization, nor would it need to announce again that the contract is rejected. Instead, it would merely provide sufficient notice, opportunity to bargain, and on request bargain with the Federacion to agreement or to impasse before instituting the desired changes. Once having fulfilled that obligation, it would not require the positive affirmance of the Union in order to make a midterm change in the terms and conditions of employment covered by the rejected contract, as it would if the remaining contract were in effect.

The allegations to "understanding" of contract partial survival of Vega and Rodriguez are based on vague, generalized, subjective, and conclusionary testimony, unworthy of credence or probative value. Far more credible is the documentary evidence that clearly indicates that the contract had been expired by force of its total rejection. The only other evidence to the contrary is the ambiguous references by Vega to the trustee and to the employees on May 11 and after the strike, to the effect that the duration clause of the rejected contract precluded the raising of a question concerning representation. Such testimony does not rebut the weight of the evidence. I therefore find that what the Respondents had understood and had acted on was the "understanding" that the remaining terms and conditions covered by the rejected contract would not be altered unilaterally without bargaining and that a new written contract would be negotiated. Accordingly, I conclude that the no-strike clause of the contract did not survive by virtue of the survival of the contract itself.

The Respondent contends that the motivating factor for the strike was the discharge of Maldonado, which, as a disciplinary matter, was arbitrable under the terms of the rejected contract, and that even if the contract had expired by force of bankruptcy court rejection the duty to arbitrate survived the March 8 rejection. Article XVII, grievance procedure, states:

> A. A grievance within the meaning of the Collective Bargaining Agreement shall be a dispute or difference of opinion arising and the express provisions thereof during the life of this Collective Bargaining Agreement.
>
> B. If any issue, dispute, conflict or any discrepancy or differences in interpretation should arise between the Union and the Company involving the meaning or the application of the express provisions of this agreement or should any issue arise between the Union and the Company in regard to disciplinary measures imposed by the Company, said issue shall be compulsively resolved by following the procedure set forth below.

Respondent further argues that the survival of the no-strike clause was necessarily coterminous with the survival of the obligation to arbitrate. Accordingly, it is argued that the strike was therefore unprotected as a breach of that surviving concomitant obligation to submit to the surviving mandatory arbitration provision.[36]

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[35] 8 Collier, *Bankruptcy*, § 3.16(7) (1978).

[36] Citing *Goya Foods*, 238 NLRB 1465 (1978).

Respondent Hotel contends that the record evidence affirmatively establishes a recognition by Maldonado and the Federacion that the grievance and arbitration process survived. I do not agree. At most, the evidence indicates that with respect to the discharge of employee Calderon on or about March 17, the Federacion presented a grievance that was resolved at some preliminary stage in the grievance process in the office of the trustee. There is no evidence that the Respondent understood and explicitly recognized or agreed to the survival of the compulsory arbitration proviso. It has long been a basic principle that employees lose their rights to engage in protected activities only on the effectuation of a clear waiver, but in the *Goya* case relied on by Respondent, the Board construing decisions by the Supreme Court, stated:

> In sum the Court in *Nolde* [*Bros. v. Bakery Workers Local 358*, 430 U.S. 243 (1977)] found that the duty to arbitrate extended beyond the contract term if over a matter covered or created by the contract and in [*Teamsters Local 174 v.*] *Lucas Flour* [*Co.*, 369 U.S. 95 (1962)] and *Gateway Coal* [*Co. v. Mine Workers*, 414 U.S. 368 (1974)] found that, absent express negation, the contractual duty to arbitrate over a particular issue implied a duty not to strike over the same issue.

Goya Foods, supra at 1467. The Board therefore found that employees were bound by the no-strike clause of an expired contract in the absence of an "an express negation that the duty to strike should continue with the duty to arbitrate."[37]

The Board and the Courts, however, were in the foregoing cases construing the relationship of the parties in a normal bargaining stance and certain presumptions of intent of the parties were made as to the survivability of arbitrability in that context. The instant case involves expiration of the contract by the extraordinary event of bankruptcy court intervention. A doubt therefore arises whether the Court and Board would have made the same presumptions in this context.[38]

It is unnecessary to decide whether the no-strike clause survived the contract's rejection because I conclude that even had it survived, the subject dispute that motivated the strikers did not consist of a simple arbitrable issue of discipline, but rather concerned matters not subject to the arbitration process.

Although the facts demonstrate that the discharge of the strike was precipitated by the discharge of Maldonado, it also constituted a protest against the economic policies of Respondent Hotel that the employees viewed as regressive and arbitrary. Maldonado, the leader of the delegates who were backed by the membership, opposed salary reductions. The very conduct for which he was discharged constituted a protest against reductions of salary and benefits.

The Respondent Hotel itself implicitly recognizes that the strike motivation cannot be viewed as a simple matter of one employee's discharge inasmuch as it argues that the strike was not protected because it formed part of an effort to obtain bargaining with an outside union, which it argues is unprotected activity in derogation of the incumbent Union, with which it is obliged to bargain exclusively.[39] Respondent argues that the June 25 letter from Union Vice President Blanco is evidence of the strikers' intent. There is no evidence to support the conclusion that all or a majority of the striking employees desired representation by the Union, or recognition and bargaining with it by Respondent Hotel on June 17. The letter itself constitutes a self-serving claim by a union official of majority status, but there is no evidence that a majority of unit employees or strikers authorized that letter. The evidence clearly establishes that the majority of unit employees engaged in a strike in support of opposition to further loss of salary and benefits. It can readily be inferred that they endorsed Maldonado's leadership role in opposing attrition of their pay and benefits, but there is insufficient evidence to support the conclusion that on June 17 they commenced striking for the purpose of obtaining Respondent Hotel's recognition of and bargaining with the Union. I do find that the nonarbitrable objects of the strike were so entwined with the disciplinary issue, that the dispute was not appropriate for the arbitration process, and therefore the strike was not a breach of the no-strike clause, even if it and the arbitration clause survived the expiration of the contract. I therefore conclude that the strikers on June 17 commenced a lawful economic strike.

Although I cannot conclude that as of June 17 the strikers, i.e., the majority of unit employees, sought the recognition of the Union as their exclusive bargaining agent, as Respondent Hotel seems to suggest, I could not, in any event, conclude that such objective would have rendered their strike as nonprotected as an act in derogation of the exclusive bargaining status of the Federacion. The *Emporium* case and its progeny dealt with situations in which a dissident or minority faction of employees sought parallel bargaining that conflicted with the position of the designated, exclusive bargaining agent. In *RCA Del Caribe, Inc.*, supra, the employer was engaged in negotiations with an incumbent union and was found not to have violated the Act by negotiating and executing a contract with the incumbent union after an outside union filed a representation petition with the Board. The Board recognized the special status of an incumbent union and decided that it would effect an undue hardship to suspend negotiations because of the filing of a petition, and that continued bargaining with an incumbent union "is the better way to approximate employer neutrality." However, the Board made clear that it did not intend its decision "to have the effect of insulating incumbent unions from a legitimate outside challenge." Clearly then, the Board did not intend to render as unprotected the activities of employees in support of a total replacement of their bargaining agent, during the contract renegotiation period. In a subsequent decision the Board found it violative of the Act for an employer to have negotiated and entered into a renewal contract with an incumbent union when it possessed affirmative knowledge that a majority of its employees no longer desired representation by that union. *Type Rite Ribbon Mfg. Co.*, 264 NLRB 650 (1982).

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[37] The Board found that the words "during the life of this Agreement" contained in the no-strike clause did not constitute "express negation."

[38] The General Counsel contends that sec. 362 of the Bankruptcy Code automatically stays Respondent Hotel's obligation to arbitrate private rights.

[39] Citing *RCA Del Caribe, Inc.*, 262 NLRB 963 (1982); and the *Emporium* case, supra.

Respondent finally argues that the Board should, as a matter of policy, view the position of bankrupt employer and incumbent union as occupying a special status and in order to provide a breathing spell and to insulate the incumbent from outside challenges and enable it to negotiate a renewal contract without having the outside challenger reaping the benefits of disenchantment of employees, by finding that the unchanged part of the contract, the no-strike clause, and recognition clauses of the contract survived the rejection of that contract. Whatever the merits may be for a prospective construction of employer and incumbent union rights and obligations differently during a bankruptcy situation, I find no precedent to enable me to find that the employees here were vulnerable to discharge because they engaged in activity that under longstanding Board precedent should be deemed protected. Therefore, I find that the employees on June 17 commenced and continued a lawful, protected economic strike.

c. *The discharge of strikers*

The Respondents in combination issued letters to the striker's soliciting the return to work. The June 19 Federacion letter was read by the trustee and never explicitly disavowed to the strikers. The trustee acknowledge to the Federacion the receipt of the June 19 letter and although some quibble may be engaged in whether he characterized the letter as "enumerating" or "detailing" the understandings between parties, nowhere did he assert that the understandings were mistated or improperly augmented. Regardless of what was explicitly discussed at the meeting among Vega, Nicot, and Rodriguez, the trustee by inaction and by confirming letter adopted the condition of reinstatement as set forth in the Federacion letter to employees.[40] Furthermore, by its own letter to the strikers he confirmed to them that agreements were reached with the Federacion and by explicit reference to notification to them by the Federacion he suggested to them that he was aware of the Federacion's communications to them and the substance thereof. Although Rodriguez did not recite in his own letter condition three, as set forth in the Federacion letter, if Rodriguez did not agree to such condition it was incumbent on him to have explicitly disavowed such condition in his own letter, for otherwise the reader would necessarily have concluded that Respondent Hotel was in agreement with the Federacion's representations as to the conditions presented to the strikers.

I therefore conclude that the strikers were on June 19 presented with three conditions to which they were required to accept in order for them to avoid the loss of their jobs. The Federacion letter set forth the phrases "to protect your jobs," and Vega orally told the strikers that their jobs were in jeopardy. Clearly then, the strikers were informed by the Federacion and implicitly by Respondent Hotel that they would be discharged if they did not at a set time and date abandon their strike, which I find was economic and protected.

The final and third condition set forth in the Federacion letter was that the strikers must satisfy, i.e., accept Respondent Hotel's recognition of the Federacion as their exclusive bargaining agent. The meaning of such condition within the context of what was told to them was that the strikers were obliged to forgo their rights to seek representation by any other union.[41] As I have concluded above that such activity was protected by the Act, I must necessarily conclude that the Respondents jointly imposed on the strikers an unlawful condition as a condition precedent to not being discharged. Furthermore, the Respondents also threatened the loss of jobs, i.e., discharge for economic strikers who refused to abandon their protected activities by a specified time and date.

In his June 20 letter to the strikers, Trustee Rodriguez discharged all the strikers who had up to that time refused to abandon the economic strike. That is the clear meaning of his words:

> We understand and accept as a fact that you have resigned from your jobs and therefore we are proceeding to replace you immediately.

By such conduct Respondent Hotel construed the status of the strikers not as economic strikers who may be replaced but whose employment relationship remains to the extent that they are entitled to reinstatement privileges. *Laidlaw Corp.*, 171 NLRB 1366 (1968). Rather, the Respondent construed to be and informed the strikers that were in fact terminated and severed from their jobs, i.e., discharged. Regarding similar conduct the Board recently observed in *Cooperative de Credito y Ahorro Vegabajena*, 261 NLRB 1098, 1099 (1982):

> [It] is well established that an employer lawfully may replace economic strikers but that it violates the Act by discharging them prior to replacement. *NLRB v. International Van Lines*, 409 U.S. 48 (1972). Thus, even assuming, *arguendo*, the strike was an economic strike at its inception, Respondent's discharge of all the strikers violated Section 8(a)(3) and (1) since all were terminated prior to being replaced.

I conclude that Respondent Hotel and Respondent Federacion jointly agreed to the termination of economic strikers who failed to abandon their protected activities by a certain deadline, and also jointly agreed to the termination of strikers who refused to accept the continued recognition of the Federacion as their exclusive bargaining agent. I further conclude that pursuant to their agreement, Respondent Hotel on June 20 discharged its striking employees who failed to comply with those conditions, i.e., the abandonment of lawful protected activity, an economic strike, and the continued acceptance of the Federacion as their exclusive bargaining agent.[42] I further find that subsequent to June 20, Respondent Hotel has since failed and refused to rescind the June 20 discharge.[43] I conclude that by the foregoing conduct Respondent Hotel has violated Section 8(a)(1) and (3) of the Act as alleged in the complaint, and that Respondent Federacion has violated Section 8(b)(1)(A) and (2) as alleged in the complaint. I further find that Respondent Federacion violated Section 8(b)(1)(A) of the Act as alleged in the complaint by the June 18 letter that threatened economic strikers with a loss of their employment if they failed to comply with conditions set forth therein, i.e., abandonment of the strike and acceptance of the Federacion as exclusive bargaining agent.

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[40] It should be recalled that according to Vega, Nicot did discuss with the trustee the incumbency status of the Federacion and its presumed protected status during the duration term of the rejected contract. Furthermore, when Vega orally solicited the strikers' return, he told them that they could seek outside union representation during that period of time.

[41] The meaning is the same whether the reading is that the strikers must ratify the Federacion or that the strikers must accept Respondent Hotel's agreement to ratify the Federacion as exclusive bargaining agent

Conclusions of Law

1. Respondent San Juan Hotel Corporation d/b/a El San Juan Hotel is an employer within the meaning of Section 2(2) of the Act and is engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

2. Respondent Federacion General de Trabajadores de Puerto Rico is a labor organization within the meaning of Section 2(5) of the Act.

3. Union de Empleados de Casinos de Puerto Rico is a labor organization within the meaning of Section 2(5) of the Act.

4. Respondent Hotel, in agreement with Respondent Federacion, conditioned the nondischarge of its employees on their abandonment of a lawful strike, and on their acceptance or ratification of Respondent Hotel's recognition of Respondent Federacion as their exclusive bargaining agent, and thereby violated Section 8(a)(1) of the Act.

5. Respondent Federacion threatened employees with discharge by enforcement of the agreement with Respondent Hotel described in paragraph 4, above, and thus violated Section 8(b)(1)(A) of the Act.

6. On June 20, Respondent Hotel, pursuant to the agreement with Respondent Federacion described in paragraph 4, above, discharged the employees named in Appendix C attached to this decision because the employees refused to abandon a lawful economic strike, and/or because they refused to ratify or accept Respondent Hotel's continued recognition of Respondent Federacion as their exclusive bargaining agent, and thereby Respondent Hotel violated Section 8(a)(1) and (3) of the Act.

7. By having entered into the agreement described above in paragraph 4 and by virtue of the enforcement of the agreement whereby Respondent Hotel engaged in the conduct described above in paragraph 6, Respondent Federacion violated Section 8(b)(1)(A) and (2) of the Act.

8. The above unfair labor practices occurring in connection with Respondent Hotel's business have a close, intimate, and substantial relationship to trade, traffic, and commerce among the several States and among the States and the Commonwealth of Puerto Rico and tend to lead to labor disputes burdening and obstructing commerce and the free flow of commerce.

The Remedy

Having found that the Respondents violated Section 8(a)(1) and (3) and Section 8(b)(2) and (1)(A) of the Act, I shall recommend that they cease and desist therefrom and take certain affirmative action designed to effectuate the policies of the Act.

Board precedent requires that unlawfully discharged economic strikers are entitled to an offer of reinstatement and backpay even in the absence of an unconditional offer by them to return to work. *Abilities & Goodwill*, 241 NLRB 27 (1979), enf. denied on other grounds 621 F.2d 6 (1st Cir. 1979); *Tamara Foods*, 258 NLRB 1307 (1981), enfd. 692 F.2d 1171 (8th Cir. 1982); *Serendippity-Un-Ltd. & Tigerr, Inc.*, 263 NLRB 768 (1982). Having found that Respondent Hotel discharged striking employees in violation of Section 8(a)(1) and (3) of the Act pursuant to an agreement enforced by Respondent Federacion in violation of Section 8(a)(1)(A) and (2) of the Act, it will be ordered that Respondent Hotel be required to offer them reinstatement to their former positions of employment or to substantially equivalent positions, without prejudice to their seniority or other rights and privileges and to remove from its files any references to their discharge and notify them in writing that this has been done and that evidence of these unlawful discharges will not used as a basis for future personnel actions against any of them. I shall also recommend that Respondent Hotel and Respondent Union jointly and severally be required to make them whole for any loss of pay they may have suffered because of the discrimination against them with interest calculated in the manner set forth in *F. W. Woolworth Co.*, 90 NLRB 289 (1950), and *Florida Steel Corp.*, 231 NLRB 651 (1977).[44]

[Recommended Order omitted from publication.]

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[42] Although there is evidence that Respondent Federacion publicly renounced its agreement with respect to conditioning the nondischarge of strikers on their continued acceptance of it as exclusive bargaining agent, it is impossible for it to undo the concurrent unlawful condition, i.e., abandonment of a strike by a date past.

[43] Those discharged are named in App. C attached to this decision.

[44] See generally *Isis Plumbing Co.*, 138 NLRB 716 (1962).

Local Union 33, United Brotherhood of Carpenters and Joiners of America *and* Associated General Contractors of Massachusetts, Inc. (on behalf of Blount Brothers Corporation)

Boston District Council of Carpenters, affiliated with the United Brotherhood of Carpenters and Joiners of America, and Local Union 218, United Brotherhood of Carpenters and Joiners of America *and* Associated General Contractors of Massachusetts, Inc. (on behalf of Volpe Construction Co., Inc. and G. J. Luchetti, Inc.). Cases 1-CD-714 and 1-CD-715

July 29, 1988

DECISION AND ORDER

BY CHAIRMAN STEPHENS AND MEMBERS JOHANSEN AND BABSON

On June 3, 1985, Administrative Law Judge Norman Zankel issued the attached decision. Thereafter, the Respondent Unions filed exceptions and a supporting brief; the Charging Party, Associated General Contractors of Massachusetts (AGC), filed a brief in support of the judge's decision; and the General Counsel filed a brief in support of the judge's decision and in answer to the Respondents' exceptions. Thereafter, the Respondents filed a copy of an arbitrator's decision in a related matter, as described below.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings,[1] findings,[2] and conclusions only to the extent consistent with this Decision and Order.

The judge found that Local Union 33, United Brotherhood of Carpenters and Joiners of America (Local 33) violated Section 8(b)(4)(ii)(D) of the Act by filing and pursuing an arbitration claim against general contractor Blount Brothers Corporation (Blount) alleging Blount to have breached its contract with Local 33 by subcontracting certain scaffolding work to Anastasi Brothers Corporation (Anastasi) at the Lafayette Place construction site in downtown Boston, Massachusetts. For the reasons explained below, we reverse the judge's finding and shall dismiss the complaint.

Blount was the general contractor for the construction of a hotel and retail store complex at Lafayette Place in Boston, Massachusetts. At all pertinent times, Blount, a member of the Associated General Contractors of Massachusetts (AGC), and Local 33 were parties to a collective-bargaining contract which provided, inter alia, for Local 33's members' performance of certain work including the erecting of all scaffolding for all trades.[3] The contract also provided that Blount would not subcontract any work encompassed in the contract to a subcontractor who did not have a contract with Local 33.[4] Sometime prior to mid-May 1983, Blount subcontracted the masonry work to Filloramo Construction Company, which was later replaced by Anastasi, whose employees erected the scaffolding for the masonry work. Anastasi's employees were represented by Laborers, and it did not have a contract with Local 33. Officers of Local 33 informed Blount that the scaffolding work was within the jurisdiction of Local 33 and, from August 24 to 30, 1983, employees represented by Local 33 ceased working off the scaffolding erected by Laborers. On August 31, 1983, Local 33 initiated a grievance against Blount for violation of the contract's subcontracting clause and, in December 1983, Local 33 demanded arbitration of the issue.

Thereafter, on January 20, 1984, the AGC initiated 10(k) proceedings before the Board by filing a charge on behalf of Blount. The Board subsequently issued a Decision and Determination of Dispute on October 22, 1984, in which it found Anastasi to be the "employer" for the purpose of determining the work dispute and, after weighing various factors in that light, awarded the work at issue to employees of Anastasi who were represented by the Laborers.[5]

In the meantime, the initial arbitration hearing involving Blount and Local 33 had taken place in September 1984. Counsel for Local 33 argued that Blount had breached its collective-bargaining agreement by subcontracting the work to a subcontractor who was not under contract with Local 33 and requested a remedy making whole the employees represented by Local 33 for loss of earnings in lieu of the scaffolding work already performed.[6]

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[1] We adopt the judge's recommended remand of Case 1-CD-715 to the Regional Director for further appropriate action.

[2] In sec. III, B,2, par. 10 of his decision, the judge referred to arbitration testimony of an individual the judge erroneously identified as Union Representative Grosso. The record shows that James Grosso is executive director of AGC. This inadvertent error is insufficient to affect our decision.

[3] Blount, through the AGC, had a similar provision in a contract with Laborers Local 223, Laborers International Union of North America (Laborers).

[4] A similar provision was contained in Blount's contract with Laborers.

[5] See 272 NLRB 860 (1934).

[6] By letter of March 22, 1985, however, counsel for Local 33 advised the arbitrator that it was not seeking a backpay remedy or any money damages for breach of the collective-bargaining agreement.

289 NLRB No. 167

The arbitration proceeding resumed on November 6, 1984, shortly after the Board's 10(k) decision had issued. On November 9, 1984, the AGC filed suit in the U.S. District Court for the District of Massachusetts seeking to enjoin the arbitration proceeding on the ground that it was preempted by the Board's 10(k) decision. The court refused to grant the injunction and found the arbitration proceeding to involve a contract issue separate from, and not in conflict with, the Board's 10(k) decision. The court noted that the Board's decision merely held that Anastasi, the designated "employer" for determining the work dispute, had correctly awarded the work to employees represented by Laborers, while the arbitration involved only the contract rights of Local 33 vis-a-vis Blount. The court indicated that a decision by the arbitrator that Blount had breached its contract with Local 33 by subcontracting work to Anastasi would not cause Blount to be subjected to conflicting requirements of the Board's 10(k) decision and any arbitration award. Thus, the court indicated that cases cited by AGC and Blount:

> [B]eginning with *Carey v. Westinghouse Electric Corp.*, 1963, 375 U.S. 261, which held that an employer is not liable in damages when it makes a disputed job assignment in conformity with the Board's determination are not on point. The rationale for immunizing an employer from contract liability in a jurisdictional dispute is to prevent the employer from being subjected to the "conflicting demands of two or more unions." *Associated General Contractors v. International Union of Operating Engineers, Local 701*, 9th Cir. 1976, 529 F.2d 1395, 1397 ("AGC v. Local 701"). Blount was not an employer making job assignments to one of two rival unions: as was recognized in the Board's decision, the employer subject to conflicting demands in the present case was Anastasi. Since Anastasi is not even a party to the arbitration, an award favorable to the Carpenters would have no impact on Anastasi's assignment of the work to the Laborers.[7]

On December 28, 1984, the present complaint issued. Thereafter, on June 3, 1985, the judge found that Local 33's pursuit of its contract claim violated Section 8(b)(4)(ii)(D) as it was in derogation of the 10(k) determination of dispute. In this regard, the judge found that Local 33's arbitration claim was a mere extension of the work jurisdiction dispute which the Board had earlier decided adverse to Local 33 in the related 10(k) proceeding. The judge noted that Local 33 initially had based its claim to the work wholly on jurisdictional grounds and did not file a grievance over the matter until 3 months later. He also noted that the grievance was filed on August 31, 1983, the day after the end of Local 33's work stoppage in support of its jurisdictional claim. Moreover, Local 33 had claimed before the arbitrator that the disputed work belonged to carpenters and had requested an award of pay in lieu of the lost work. The judge, relying on *Longshoremen ILWU Local 7 (Georgia-Pacific)*, 273 NLRB 363 (1984), noted that the Board has held a claim for "in lieu of" pay to be tantamount to a claim for the disputed work.

Thereafter, in finding Local 33's pursuit of the arbitration claim to be coercive and to have had the object of forcing the assignment of the disputed work to employees represented by Local 33, the judge relied on Local 33's having earlier threatened and then engaged in a work stoppage in pursuit of the work. The judge further noted that Blount, the general contractor, was a neutral employer with no direct control over the work assignment at issue and that it was inherently coercive to enmesh a neutral in a work dispute. Relying on, inter alia, *Longshoremen ILWU Local 32 (Weyerhaeuser Co.)*, 271 NLRB 759 (1984), enfd. 773 F.2d 1012 (9th Cir. 1985), the judge also noted that an arbitral award of "in-lieu-of" pay would work an economic hardship on Blount by compelling it to pay for work not performed and thus inducing Blount to cease engaging subcontractors who have no collective-bargaining contract with Local 33. While Blount did assent to limit its subcontracting rights in its collective-bargaining contract with Local 33, the judge found such assent could not have contemplated the contract's enforcement to seek objectives proscribed by the Act. Finally, the judge found that he was not bound by the arbitrator's views because under *Carey v. Westinghouse Electric Corp.*, 375 U.S. 261 (1963), the Board's 10(k) decision takes precedence over the arbitration process.

In the related arbitration proceeding, Arbitrator Tim Bornstein issued his decision and award on October 18, 1985, and found that Blount had violated its contract with Local 33 by subcontracting the scaffolding work to one or more subcontractors who were not signatory to a contract with the Carpenters. Consistent with the Union's request, the arbitrator did not award any money damages or make an award of the work, but issued only a declaration of the Union's contract rights.

Based on the above, contrary to the judge, we find Local 33's action did not constitute proscribed economic coercion within the meaning of Section 8(b)(4)(ii)(D), and we find no violation of that section of the Act in this proceeding in Local 33's filing and pursuit of its arbitration claim.

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[7] *Associated General Contractors of Massachusetts v. Boston District Council of Carpenters*, 599 F.Supp. 1560, 1561-1562 (D. Mass. 1985).

In this regard, in the circumstances of the present case, we find that there is no conflict between the arbitration proceeding and the 10(k) proceeding. While the Board determined in the 10(k) proceeding that the employees of Anastasi were entitled to perform the disputed work, the Board did not consider the issue of whether Blount, in subcontracting this work to Anastasi, thereby had breached its contract with Local 33 and, if so, whether Local 33 is entitled to a remedy for that breach. Thus, we find that the Board's 10(k) decision precludes Local 33 from forcing the use of employees it represents on the disputed scaffolding work, but does not preclude Local 33 from asserting its contract rights against Blount, including possible money damages for breach of contract.[8] See also the analysis in *Associated General Contractors v. Operating Engineers Local 701*, 529 F.2d 1395 (9th Cir. 1976), cert. denied 429 U.S. 822 (1976).[9] In this regard, we disagree with the judge's conclusion that Local 33's pursuit of its arbitration claim was unlawful coercion in that it enmeshed a neutral employer, Blount, in a work dispute. Because Blount, while in a contractual relationship with Local 33, had control of the work which it ultimately subcontracted, Blount is not a "neutral" employer at least with respect to Local 33's breach of contract claim.[10] Moreover, because the Union's contract action against Blount will have no effect on Anastasi's assignment of the work, it cannot be said that the contract action runs afoul of the award made by the Board in the 10(k) proceeding. Accordingly, in the circumstances of this case, Local 33's grievance does not amount to unlawful coercion within the meaning of the Act.[11]

Importantly, and contrary to the judge, *Carey v. Westinghouse*, supra, is not authority for depriving Local 33 of its right to pursue its grievance. In fact, in *Carey*, the Court, relying on *Smith v. Evening News*, 371 U.S. 195 (1962), held that a union *is* entitled to arbitrate an issue even though the dispute could involve matters within the Board's jurisdiction such as a work jurisdiction claim. While there is language in the *Carey* decision to the effect that if the Board should disagree with the arbitrator the Board's ruling would take precedence, that language is inapplicable to the instant case because *Carey* involved a grievance filed against an employer which had assigned certain work to employees represented by one union and which was involved in a dispute with that and another union over the assignment of work. In the event of inconsistent Board and arbitral decisions, such an employer would be presented with a choice of either complying with the Board's decision and risking Section 301 damages, or complying with an arbitrator's decision which was contrary to the Board's determination. Such a result is not possible here because, as noted earlier, Blount is not the employer who made the work assignment, Anastasi is. Accordingly, *Carey* is inapposite to the present case.

For the foregoing reasons, we shall dismiss the complaint.

ORDER

The complaint is dismissed.

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[8] Although Local 33 withdrew its request for money damages as a remedy in its breach of contract claim, we would find in the circumstances of this case that Local 33 properly could seek such a remedy without running afoul of Sec. 8(b)(4)(ii)(D). Thus, in this case, we view the request for money damages as consistent with Local 33's Sec. 301 right to sue for breach of contract and to receive an appropriate remedy. See generally *McNeff, Inc. v. Todd*, 461 U.S. 260, 261 (1983). As the judge himself noted, the question of whether resort to contractual procedures for the collection of money damages constitutes proscribed threats, coercion, or restraint depends on the circumstances of each case and for the reasons elaborated here we find no proscribed activity in this particular case.

[9] Blount argues that *AGC v. Local 701* is distinguishable because there the general contractor was signatory to a contract with only one of the two competing unions but here Blount is signatory to contracts with both Local 33 and Laborers. We reject this argument for reasons the district court set out in denying the AGC's earlier attempt to enjoin the arbitration proceeding that Local 33 was pursuing. The court held there that

> Contrary to the argument of the plaintiffs, *AGC v. Local 701* is not limited merely to those situations in which a general contractor is signatory to only one relevant union agreement, but to any case in which the general contractor is not subjected to inconsistent demands by two or more union agreements. While the presence of a second union agreement may result in a jurisdictional dispute at the subcontractor level, the Carpenters may be entitled by virtue of the agreement with Blount to have entered that struggle on equal footing with the Laborers, at least to the extent of having a collective bargaining agreement with the employer [footnote omitted]. [599 F.Supp. at 1562.]

As noted supra, the court had earlier underscored its conclusion that Blount was "not subjected to inconsistent demands by two or more union agreements" by noting:

> The plantiffs do not dispute that Blount could have fulfilled their [sic] contractual obligations to *both* unions by subcontracting the scaffolding work to a subcontractor who had signed agreements with both unions just as Blount itself had done. Nor is it disputed that Blount could have retained the work for its own employees without breaching the agreements. Therefore, a decision by the arbitrator that the Carpenters' agreement was breached by Blount would not cause Blount to be subjected to conflicting requirements. [599 F.Supp. at 1561, emphasis in original.]

[10] See, e.g., *Longshoremen ILWU Local 32 v. Pacific Maritime Assn.*, 773 F.2d 1012, 1017 (9th Cir. 1985). We note that the present case is factually and analytically distinguishable from *Longshoremen ILWU Local 7 (Georgia-Pacific)*, supra, and from *Longshoremen ILWU Local 32 (Weyerhaeuser Co.)*, supra. In these latter cases, inter alia, the employers against whom the unions filed grievances and sought money damages never had control of the work and the employer who did control the work had no contractual obligations to the unions. Here, Blount did have such control, but decided to subcontract the work, and Local 33 did have a contractual relationship with Blount.

[11] We overrule *Iron Workers (Hoffman Construction)*, 273 NLRB 260 (1984), and *Carpenters Local 102 (Meiswinkel Interiors)*, 260 NLRB 972 (1982), to the extent they are inconsistent with our decision herein.

Genevieve Pluhowski, Esq., for the General Counsel.

Michael A. Feinberg, Esq. and *Aaron D. Krakow, Esq. (Feinberg & Feld)*, of Boston, Massachusetts, for the Unions.

John D. O'Reilly III, Esq., of Framingham, Massachusetts, for the Charging Party.

DECISION

STATEMENT OF THE CASE

NORMAN ZANKEL, Administrative Law Judge. These cases came before me on 18 March 1985 at Boston, Massachusetts.

On a charge filed by Associated General Contractors of Massachusetts, Inc. (AGC) in Case No 1-CD-714 on 20 January 1984;[1] and a charge filed by AGC, in Case 1-CD-715, on 8 February, and an amended charge in Case 1-CD-715 filed by AGC on 22 February, the Acting Regional Director for Region 1 of the National Labor Relations Board (the Board) issued an order consolidating cases, complaint, and notice of hearing on 28 December against the Unions alleging they violated Section 8(b)(4)(ii)(D) of the National Labor Relations Act (the Act).

The complaint alleges: (1) that since on or about mid-May 1983, Carpenters Local 33 demanded that Anastasi Brothers, a subcontractor to Blount Brothers Corporation, assign the work of erecting and dismantling pipe scaffolding for the installation of masonry work at a project at Lafayette Place, Boston, Massachusettes (Lafayette Place site) to employees who are members of, or are represented by, Local 33 instead of to employees who are members of, or represented by, Laborers Local 223; and (2) that since on or about 1 November 1983, Boston District Council of Carpenters and Local 218 demanded that G. J. Luchetti, Inc. and Volpe Construction Company assign the work of erecting and dismantling pipe scaffolding for the installation of masonry work at a construction project in Malden, Massachusetts (Malden Hospital site), to employees who are members of, or are represented by, Local 218 instead of to employees who are members of, or are represented by, Laborers Local 22.

The complaint also alleges that all the Unions have failed and refused to follow the Board's Decision and Determination of Dispute (*Laborers Local 223 (Anastasi Bros.)*, 272 NLRB 860 (1984)), which awarded the disputed work at the Lafayette Place site to employees of Anastasi represented by Laborers Local 223, and the disputed work at the Malden Hospital site to employees of Luchetti represented by Laborers Local 22 by failing to give the Regional Director timely and unequivocal notice of their intention to comply therewith.

Additionally, the complaint alleges that to compel and coerce assignment of the disputed work to it, Local 33 (on 21 September) instituted and is pursuing arbitration proceedings against Blount charging that Blount violated its collective-bargaining agreement with Local 33 by allowing Anastasi to use employees of Laborers Local 223 to perform the disputed work at the Lafayette Place site.

The Unions filed a timely answer to the complaint. The answer admitted certain of the complaint allegations, but denied the commission of any unfair labor practices. Also, the answer avers that, by letter dated 5 November, each Union notified the Board that it would refrain from forcing assignment of any of the disputed work to employees represented by any of them. Also, while admitting it is pursuing its claim against Blount in arbitration, Local 33 denies that the arbitration proceedings are to force assignment of any of the disputed work to employees who are its members or represented by it.

At the hearing, no party produced any witness to testify. All parties agreed to submit the issues to me for resolution based on the pleadings, their oral stipulations of facts, and the documentary evidence.[2] In addition, the parties submitted written briefs which have been duly considered.

On the entire record, I make the following

FINDINGS AND CONCLUSIONS

I. JURISDICTION

AGC is an association representing employers engaged in the construction and related industries. Blount and Volpe are two of its members. Blount, a general contractor incorporated in Delaware, and Volpe, a general contractor in Massachusetts, annually receives goods, products, and materials valued in excess of $50,000 directly from points located outside the States of Delaware and Massachusetts, respectively.

Anastasi, a Pennsylvania corporation, and Luchetti, a Massachusetts corporation, are both masonry subcontractors, and receive goods, products, and materials valued in excess of $50,000 directly from points located outside the States of Pennsylvania and Massachusetts, respectively.

The answer admits, the record reflects, and I find that the Employers are engaged in commerce within the meaning of Section 2(6) and (7) of the Act and that Boston District Council of Carpenters, Local 33 and Local 218 are labor organizations within the meaning of Section 2(5) of the Act.

Also, the record reflects, and I find, that Local 22, Laborers International Union of North America and Local 223, Laborers International Union of North America are labor organizations within the meaning of Section 2(5) of the Act.

II. THE ISSUE

Is the pursuit of a grievance, into arbitration, by Local Union 33, United Brotherhood of Carpenters and Joiners of America against Blount Brothers Corporation violative of Section 8(b)(4)(ii)(D) of the Act even though Local 33 gave the Regional Director notice of its intention to comply with the Board's 10(k) decision?

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[1] All dates hereafter are 1984 unless otherwise stated.

[2] I have also taken official notice of the entire record in the 10(k) proceedings underlying the Board's decision reported at 272 NLRB 860 (1984). See, e.g., *Electrical Workers IBEW Local 3 (Mansfield Contracting)*, 206 NLRB 432 (1973).

As noted above, in the section entitled "Statement of the Case" other issues were raised by the consolidated complaint against Local 33, and also Carpenters Local 218 and the Boston District Council of Carpenters. Those other matters are disposed of as follows.

First, it is noted that Local 33 and Blount are parties in Case 1-CD-714 only. Carpenters Local 218, the Boston District Council of Carpenters, and Volpe Construction Company are parties in Case 1-CD-715 only.

As earlier stated, all the labor organizations involved have been charged, in the complaint, with violation of Section 8(b)(4)(ii)(D) by not advising the Regional Director of their intention to comply with the Board's 10(k) decision. In addition, Local 33 is alleged to have violated that same section of the Act by its processing, into arbitration, of its grievance which, on its face, alleges Blount is in violation of its subcontracting agreement with that labor organization.

At the hearing, counsel for the General Counsel presented me with a withdrawal request in Case 1-CD-715, and moved that I approve it. As a result of discussion among counsel for the General Counsel, counsel for the Charging Party in Case 1-CD-715, and me, regarding the effect of approval of a withdrawal in light of the Board's decision in *Ducane Heating Corp.*, 273 NLRB 1389 (1985), the motion to approve the withdrawal request was withdrawn. This was done because the Charging Party's counsel asserted he "could easily envision there being a future basis for reactivating the charge (1-CD-715)."

The basis for such potential "reactivating" is clarified by one of the parties' stipulations. Specifically, by stipulations 4 and 5 (Tr. 18-19, 18 March 1985), it became clear that Local 218 had filed a grievance against Volpe (identical to that filed by Local 33 against Blount) asserting a violation of its subcontracting clause, but processing of that grievance is being held in abeyance by the parties' agreement pending resolution of the Local 33-Blount arbitration proceedings, which are the subject of the issue before me. Thus, the parties contemplated the possibility exists that the complaint allegations, pertaining to the parties in Case 1-CD-715, might be expanded in the future to include an allegation that the Local 218-Volpe grievance (and its possible arbitration) comprises an 8(b)(4)(D) violation.

The hearing proceeded. All evidence was by nature of stipulations among the parties and related only to the allegations pertaining to the unfair labor practices alleged to have been committed by Local 33, in Case 1-CD-714. All such evidence relates to the single issue as I have formulated it above.

With respect to the allegation (complaint pars. 11(a)(ii), 11(b), and 12(b)) that all three labor organizations violated the Act by failing to inform the Regional Director of intention to comply with the Board's 10(k) decision, the parties stipulated that each such Respondent actually had written the Regional Director on 5 November 1984 that each would comply with the Board's decision. Thus, counsel for the General Counsel noted, in her posthearing brief, that she "does not urge a finding of violation with respect to complaint paragraphs 11(a)(ii), 11(b) and 12(b)." In the Union's brief, it is contended "there is no longer any factual basis for maintaining this complaint against the Boston District Council and Local Union 218," because of the 5 November 1984 letter.

In the above posture, I deem it procedurally sound to distinguish the instant cases from one another. For clarity, and ease of disposition, I conclude the merits of the allegations in Case 1-CD-714 should be determined separately from those in Case 1-CD-715. This approach will promote the parties' apparent intentions in dealing with the Local 218-Volpe grievance being held in abeyance. Clearly, all parties understood that the allegations of Case 1-CD-715 that pertain to the legality of continued processing of the Local 218 grievance against Volpe should remain extant.

Accordingly, I sua sponte sever Case 1-CD-714 from Case 1-CD-715; and shall proceed to resolve all the issues in Case 1-CD-714, while recommending that the Board remand Case 1-CD-715 to the Regional Director for appropriate action.

As earlier described, the parties' stipulations show that each Respondent Union literally notified the Regional Director of its intention to comply with the Board's 10(k) decision. Accordingly, in order to dispose of all the allegations involving Local 33, I conclude it is appropriate to dismiss the allegations relating to its failure to give the notice to the Regional Director as unsupported by the evidence. I shall also recommend no conclusions or findings will be made on the failure-of-notice allegations directed against Local 218 and Boston District Council of Carpenters. Instead, those allegations (part of Case 1-CD-715) will remain unresolved, and subject to my remand recommendation.[3]

I now turn to consideration of the sole issue remaining, as I have framed it, in Case 1-CD-714.

III. THE ALLEGED UNFAIR LABOR PRACTICES

A. *The Facts*[4]

The operative facts are straightforward and substantially unrefuted. They fairly may be summarized as follows

1. Blount, a member of AGC, has authorized AGC to enter into collective-bargaining agreements with Local 33, among others.

2. At all material times Blount and Local 33 were parties to a collective-bargaining agreement, which contains, inter alia, a subcontracting provision that, in relevant part, provides:

> . . . the Employer (Blount) agrees that he will not sub-contract any work covered by this Agreement . . . except to contractors who are parties to a col-

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[3] If the Board adopts my procedural actions, all future formal documents relative to the complaint allegations that are resolved by this decision necessarily should refer to Case 1-CD-714 only.

[4] The recitation of facts is a composite of facts that appear in the record of the 10(k) proceeding and those stipulated by the parties at the hearing before me.

All facts and argument of counsel have been considered. Omitted material is considered irrelevant, of little probative value, or superfluous.

> lective-bargaining agreement with the Union (Local 33).

Also, the collective-bargaining agreement provides that Local 33 shall perform all work concerning:

> The building, erecting and dismantling of all scaffolding and staging for all trades.

3. Some time before mid-May 1983, Blount, as general contractor for the Lafayette Place project, subcontracted the masonry work at that project, including erection of scaffolding for the installation of masonry work, to Filloramo Construction Company (not a party to this case). Filloramo was later replaced by Anastasi.

4. Anastasi was not a signatory to a collective-bargaining agreement with Local 33. Anastasi assigned the scaffolding work to members of Laborers Local 223.

5. In mid-May 1983, Local 33 Business Agent Ed Thompson told Blount's project manager for Lafayette Place that Local 33 was claiming jurisdiction over the scaffolding work.

7. The claim for the scaffolding work was repeated later on a number of occasions before August 1983 by R. Erickson, steward for Local 33.

8. On 24 August 1983, Carpenters Business Agent Marshall and Steward Erickson met with Blount's project manager Humphrey. Marshall said he was directing employees represented by Local 33 to discontinue working off the scaffolding which had been erected by Laborers pursuant to the subcontractor's assignment.

9. From 24 August until 30 August 1983, carpenters did not work off the scaffolding.

10. On 31 August 1983, Local 33, by telegram, requested meeting with AGC (apparently on behalf of Blount) "concerning the violation of our subcontracting clause." Pursuant to the grievance procedure (art. XXVII) of the Carpenters-AGC collective-bargaining agreement, this telegram effectively initiated a grievance by Local 33 against Blount.

11. On 16 December 1983, Local 33 demanded arbitration before the American Arbitration Association of the Union's claim that Blount violated its subcontracting agreement by allowing its masonry subcontractors to use laborers, instead of carpenters, for the scaffolding work at the Lafayette Place site.

12. On charges duly filed with the Board, the 10(k) hearing, underlying the instant proceeding, was conducted on 9 and 30 April and 4 May 1984.

13. Arbitration hearing on the Local 33 grievance described above, in paragraph 11, began on 21 September 1984.

14. On 22 October 1984, the Board issued its 10(k) decision, supra, 272 NLRB 860.

15. On 5 November 1984, Local 33 wrote the Regional Director it would refrain from forcing or requiring Blount (and Anastasi) to assign the disputed work, by means paroscribed by the Act, to employees represented by Local 33.

16. On 6 November 1984, the arbitration hearing resumed on the Local 33 grievance. At that session, the arbitrator ruled that the grievance was arbitrable.[5]

17. Further arbitration hearings were conducted on 3 and 4 January 1985, the arbitration remains in progress.[6]

18. Local 33 and Blount framed the following issues for the arbitrator: Is the grievance arbitrable; if so, did Blount violate the collective-bargaining agreement when it subcontracted certain work to a subcontractor who was not a signatory to a contract with the Carpenters Union; and, if so, what shall the remedy be? The AGC and Blount contended that the grievance was not arbitrable because of the Board's 10(k) award and because jurisdictional disputes are excluded from the grievance machinery by the terms of the collective-bargaining agreement.

19. In support of its claim the grievance was arbitrable, Local 33 argued, during the 6 November 1984 arbitration hearing "we are not here claiming that the subcontaractor on this particular job made an error in his work assignment, that's not the issue before you. . . . (the arbitrator)."

Also, on the same date, counsel for Local 33 asserted:

> The NLRB has come down in the meantime and said with respect to the work performed by these masonry subcontractors on these two particular jobs, the work should be that of the laborers. This grievance is not being brought under the jurisdictional procedure provisions of the contract. . . . All we are here to determine, I suggest to the arbitrator, is whether or not there is a violation of our agreement with Blount Brothers as to whether or not Blount Brothers violated the subcortracting clause.

20. Also, on 6 November 1984, Local 33 compared the work jurisdictional clauses of both the Carpenters' and the Laborers' collective-bargaining agreements and concluded that while the laborers agreement "does not in the agreed upon section contain a recitation that the erecting and dismantling of scaffolding is laborers' work," in the Carpenters contract there is "a clear agreement that erecting and dismantling of work is covered by our agreement." (Jt. Exh. 2(d), pp. 39–40). Also, Local 33 Representative Marshall testified that any scaffolding over 14 feet in height should be erected by members of the Carpenters Union. (Jt. Exh. 2 (d), pp. 79–80.)

21. During the 3 January 1985 arbitration hearing, Local 33 maintained:

> [a] Our dispute was always, as we maintained, a subcontracting dispute. We conceded, as we've con-

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[5] On 9 November 1984, AGC and Blount filed suit in the U.S. district court to enjoin the arbitration on the ground the Board's 10(k) decision preempted it. The injunction was denied on 3 January 1985. In salient part, the court agreed with the Carpenters' contention that "the dispute is purely contractual and is not preempted or controlled by the 10(k) determination" *AGC v. Carpenters*, Case 84–3603–G, 3, U.S. District Court (Mass).

[6] At the hearing before me, additional dates for resumption of the arbitration had not yet been arranged.

> ceded from the date that the Board issued a determination, that the work performed by Anastasi's employees was not work to be performed on that job site by carpenters, because the Board had made a determination utilizing its factors not germane to an arbitration proceeding, that that particular work on that job for the reasons it gives in that decision should have been done by laborers. [Jt. Exh. 2, January 3, 1985 arbitration hearing, pp. 77–78.]
>
> [b] We've gone so far as to spell out that in subcontracting situations, the general jurisdictional dispute arguments don't apply. We're not arguing with Anastasi here over which of his employees should not have subcontracted the work to Anastasi because it is in violation of our particular contract, because certain work performed by Anastasi is ennumerated [sic], covered by the list in this contract. [Jt. Exh. 2, January 3, 1985 arbitration hearing, p. 87.]
>
> [c] We're not asking Blount Brothers to force Anastasi to use anyone else but laborers. That is not the claim before the arbitrator. (Jt. Exh. 2, January 3, 1983 arbitration hearing, p. 90.]

22. As to remedy sought from the arbitration proceeding, Local 33 urged:

> We would seek against the general contractor here—because the work has already been performed by laborers, we would seek . . . that individuals [who would have gone to work for Blount Brothers or any other sub who was signatory to this agreement] be made whole for any loss of pay that they would have suffered because the carpenters [sic] were given the work, and that contributions be made to the various benefit funds for all the hours which it took laborers to erect and dismantle the pipe scaffolding as opposed to carpenters [Jt. Exh. 2(d), pp. 40–41.]

B. *Analysis*

1. Parties' contentions

The General Counsel and AGC (for Blount) contend the filing of the grievance by Local 33 against Blount, and its pursuit in the arbitration proceeding, especially after the Board's 10(k) decision, has, as an object, the forcing or requiring of Blount to assign the disputed work to members of the Carpenters Union rather than to members of Laborers. They argue that such conduct by Local 33 contravenes and undermines the Board's 10(k) decision and violates Section 8(b)(4)(ii)(D).

Local 33 contends continued pursuit of its grievance against Blount, into arbitration, is a lawful exercise of its right to rectify what it believes to be a breach of their subcontracting clause, and that the arbitration is not intended to require assignment of the disputed work to the carpenters.

2. Discussion

In my view, resolution of the issue requires an assessment of the positions taken by, and conduct of, representatives, of Local 33. If, as Local 33 asserts, the evidence demonstrates its arbitration case is solely designed to remedy an alleged breach of contact, then Local 33 should prevail. If, on the other hand, the record shows that the arbitration is merely an extension, and continuation, of jurisdictional claims that the Board found to exist, then the General Counsel and the Charging Party will have satisfied the burden of proving the violation charged.

The position of Local 33 is superficially appealing. However, it does not withstand scrutiny. Evaluation of all relevant evidence persuades me that there is merit to the position of the General Counsel and the Charging Party.

My analysis proceeds from the Board's 10(k) decision. There, the Board found that Local 33 orally claimed the disputed work, engaged in a work stoppage to enforce that claim, and filed a grievance against Blount. The Board, in that decision, concluded that a jurisdictional dispute existed between Local 33 and Blount. Based on that finding, I conclude that there is present herein a jurisdictional dispute over the scaffolding work. That issue was raised and fully litigated in the 10(k) proceeding. It may not be relitigated in the instant case. *Longshoremen ILWU Local 7 (Georgia-Pacific Corp.)*, 273 NLRB 363 (1984).

The critical question presented is whether the arbitation proceedings are in furtherance of the Carpenters jurisdictional claim to the disputed work. The answer to this factual question may be found by resort to the following evidence.

The following factors tend to show, as the General Counsel claims, that the arbitration issue, "although referred to as a breach of the subcontracting clauses, was actually bottomed on" the Carpenters' original jurisdictional claim.

1. The grievance was filed on the very next day following the end of the Carpenters' 1-week work stoppage. As earlier noted, the Board (in the 10(k) decision) found that work stoppage was conducted in support of the jurisdictional claim.

Also significant is the fact that the grievances, *for the first time*, articulated the issue in terms of a contractual dispute. Thus, the record reflects that, from at least mid-May 1983 until the grievance filing (on 31 August 1983), no representative of Local 33 claimed a breach of the subcontracting clause. Until the grievance was filed, Local 33 based its claim to the disputed work purely on jurisdictional grounds.

In my view, the approximately 3 months during which Local 33 laid its claim to the disputed work in terms of a jurisdictional dispute tends to diminish the strength of that union's protestations that the grievance and arbitration are based on a breach of contract. This view is buttressed by the evidence (not previously described) which shows that a grievance normally would have been filed sooner than it was, had the issue been contractual rather than jurisdictional in character. Thus, during the arbitration hearing, Marshall testified that when the Carpenters perceives a contractual violation, the matter is customariy processed in the grievance procedure (Jt. Exh. 2, pp. -66-77; 3-79-80; 3-31-137).

In the peculiar circumstances of this case, I conclude the delay in resorting to the grievance procedure, coupled with the filing of the grievance, virtually contemporaneous with the end of the jurisdictional work stoppage, tends to show the grievance was an extension of the jurisdictional dispute. I concede the possibility the grievance filing is susceptible to an acknowledgment by Local 33 that it erroneously perceived the issue to be jurisdictional and the filing of the grievance constituted corrective action to more accurately characterize the dispute. Nonetheless, I find such an interpertation highly speculative in all the surrounding circumstances, and negated by the other events, and their import, to be described below.

2. At the arbitration hearings, Local 33 assiduously sought to impress the arbitrator with the point that Local 33 believes the disputed work is to be performed by carpenters. At one point, it was argued that the Carpenters-AGC collective-bargaining agreement contains an agreement that "erecting and dismantling of work is covered by our [the Carpenters'] agreement" (Jt. Exh. 2, p. 40). Later, Union Representative Grosso testified that, when he learned that Blount's Masonry subcontractor had no contract with the Carpenters, he advised Blount that the disputed work "was traditionally done by the carpenter(s) . . . . (Jt. Exh. 2, p. 3-21). Also, Marshall testified, at the arbitration hearing, that he had claimed (to Blount) the disputed work "was covered within the craft jurisdictional claim of the carpenters" (Jt. Exh. 2, pp. 3-57, L.15-19). Marshall, during the arbitration, acknowledged he met at least once with representatives of the Laborers Union (to whom the Board later awarded the disputed work) to discuss the issue in a jurisdictional framework (Jt. Exh. 2, pp. 3-69-3-70). He also claimed, during his arbitration testimony, "we feel [the disputed work] is the work of the carpenters," and cited jurisdictional decisions in the so-called green book as the basis for the carpenters claim (Jt. Exh. 2, pp. 3-80).

The repetitious emphasis, during the arbitration proceeding, of the Carpenters' belief that performance of the disputed work belonged to employees it represented, I find, casts light on the true nature of the arbitration. Though that emphasis does not conclusively foreclose the issue, it is some indicator that an objective of the arbitration is to assure the disputed work is awarded to the Carpenters. Such an obligation is more consistent with continued pursuit of the Carpenters' jurisdictional claim than with its claimed contractual breach. It entirely undermines the Board's 10(k) decision.

3. The remedy sought by Local 33, through arbitration, tends to demonstrate the dispute continues to bear its juridictional character. In paragraph 22, section IIA, supra, there is abstracted a statement, made during the arbitration, of the remedy Local 33 seeks to achieve from it. That abstract shows Local 33 would expect the arbitrator to render an award which compensates its members as if they had performed the disputed work. Seeking such a remedy, so-called in lieu-of, has been held tantamount to a claim that the disputed work belongs to the claimant's members. As such, the claimed remedy is indicative of a jurisdictional claim. *Longshoremen Local 7 ILWU (Georgia-Pacific)*, supra.[7]

Also, in *Longshoremen ILWU Local 32 (Weyerhauser Co)*, 271 NLRB 759 at 762, the Board left undisturbed its judge's observation that "[i]t is implicit that if [the employer] is compelled to pay wages for work not performed, it will suffer economically, and the incentive will be to either cease doing business with Weyerhauser or to force or require Weyerhauser to reassign the disputed work to Respondent's members." I conclude the arbitration remedy requested by Local 33 will have the same result herein. Obviously, an order requiring Blount to pay the members of Local 33 what they would have earned had they been assigned the disputed work will be to Blount's economic detriment.

Moreover, it is rather disingenuous for Local 33 to claim that it seeks only a backpay remedy from the arbitration. Clearly, if Blount is required to pay twice for work performed only once, it is logical to assume Blount will seek ways to extricate itself from similar double-liability. The method of doing so is to cease engaging subcontractors who have no collective-bargaining agreements with the Carpenters, and make subcontracting arrangements which will assure assignment of the disputed work to the carpenters. The ultimate effect of such arrangements clearly reflects an object proscribed by Section 8(b)(4)(D). The fact that the arbitration claim is ostensibly predicated on contractual obligations does not affect the impact of other evidence that tends to portray the jurisdictional nature of the dispute. *Teamsters Local 85 (Pacific Maritime Assn.)*, 224 NLRB 801, 806 fn. 3 (1976); *Electrical Workers IBEW Local 354 (Johnson Co.)*, 200 NLRB 599, 601 (1972); *Carpenters Local 735 (Blount Bros.)*, 175 NLRB 496, 497 and cases at fn. 3 (1969).

In the context of the above-described factors, the numerous assertions and contentions by Local 33 (see pars. 19 and 21, section I,Ia, supra, that its pursuit of the arbitration case against Blount does not have, as an object, the assignment of the disputed work to its members wholly unpersuasive. The Board views such bare disclaimers with skepticism where, as here, there is extrinsic evidence that the disclaiming party has engaged in conduct inconsistent with the disclaimer's terms.

In *Carpenters Local 102 (Meiswinkel, Inc.)*, 260 NLRB 972, 975 (1982), the Board commented, in circumstances similar to the instant case, "The Board will not honor a hollow disclaimer." Also, in *Iron Workers Local 350 (Cornell & Co.)*, 271 NLRB 1182 (1982), in which the Carpenters pursued a grievance against the general contractor, not the subcontractor who assigned the disputed work (a situation analogous to the present case), the Board held the pursuit of a similar grievance is inconsistent with the grievant's disclaimer that the grievance was in furtherance of a jurisdictional dispute.

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[7] I note that, in the cited case, the charged union had not notified the Regional Director it intended to comply with the 10(k) award in that case. This distinction is not significant because I conclude the instant circumstances render the 5 November 1984 Local 33 letter to the Regional Director of little probative value herein. The evidence, described immediately above in the text of this decision, is, to me, more cogent evidence of the true nature of the arbitration objective than the purely self-serving assertion made in the 5 November letter.

Local 33 strongly suggests that I am virtually precluded from concluding a proscribed object exists because (1) its 5 November letter to the Regional Director effectively dispels the existence of such an objective; (2) the arbitrator's conclusion the grievance is arbitrable and that an "in-lieu of" remedy is unlikely vitiates such a finding; and (3) the U.S. district court's denial of the Charging Party's petition to enjoin the arbitration included the judge's observation that "the dispute is purely contractual and is not preempted or controlled by the 10(k) determination." (See fn. 5, supra). I disagree. Instead, I conclude none of these elements prevents the finding, which I make, that an object of the arbitration contravenes Section 8(b)(4)(D). I have already noted (fn. 7, supra) the contents of the 5 November letter are of little probative aid to Local 33. This is so because I conclude the Union's subsequent activity, both factually and legally, belie the assertions in the letter.

Regarding the contention that the pronouncements of the arbitrator require me to rule in favor of Local 33, while it is clear that though national labor policy encourages the arbitral process, it is equally clear that the Board's 10(k) decision is entitled to precedence over the arbitration process. *Carey v. Westinghouse Electric Corp.*, 375 U.S. 261, 272 (1963). Thus, I conclude, I am not bound by the arbitrator's views.

Similarly, I need not give dispositive weight to the conclusions of District Court Judge Garrity. It is my obligation to follow Board precedent until the Board or the Supreme Court overrules them; and this is true despite contrary authority in courts of appeals. *Waco, Inc.*, 273 NLRB 746 fn. 14 (1984); *Iowa Beef Packers*, 144 NLRB 615 (1963).[8]

Likewise, the following other cases cited by Local 33 are found not to be conclusive precedent *Laborers Local 1140 (Lanco Corp.)*, 227 NLRB 1247 (1977); *Operating Engineers Local 12 (Robert E. Fulton)*, 154 NLRB 839 (1965). Each of these cases is materially distinguishable from the instant case in that each was decided, in relevant part, on a totally different statutory scheme, namely, enforcement of an agreement governed by 8(e) or 8(b)(4)(B) violations (the secondary nature of which do not involve jurisdictional issues), not Section 8(b)(4)(D) and Section 10(k) as in the case at bar.

Finally, I find the efforts of Local 33 to distinguish the *Weyerhauser* and *Georgia-Pacific* cases, supra, relied on by the General Counsel and the Charging Party, unconvincing. In the particular circumstances of this case, I conclude the differences noted by Local 33 are not sufficiently cogent to remove the applicability of relevant legal principles of those cases to the instant matter.

Having determined a jurisdictional dispute is present, and that an object of the Local 33 arbitration is proscribed by Section 8(b)(4)(D), I turn now to the coercive nature of the Union's activity.

The circumstances of this case persuade me that the coercive nature of Local 33's pursuit of its arbitration case is as implicit here, as in *Weyerhauser*, supra. Whether or not resort to contractual procedures for collection of money damages for alleged violations of work assignments provisions comprise proscribed threats, coercion, or restraint depends on the circumstances of each case. Compare, *Sheet Metal Workers Local 49 (Los Alamos Contractors)*, 206 NLRB 473 (1973), with *Pulp & Paper Workers Local (Georgia-Pacific Corp.)*, 267 NLRB 26 (1983), and *Teamsters Local 85 (Pacific Maritime Assn).*, supra. Here, I interpret pursuit of the arbitration case by Local 33 against Blount an effort to achieve, by indirection, what the Union failed to accomplish in the 10(k) proceeding, namely, assignment of the disputed work to the carpenters. Pursuit of in-lieu-of grievances has been found to possess proscribed coercion in cases analogous to the instant matter *Georgia-Pacific*, supra; *Weyerhauser*, and *Teamsters Local 85*, supra.

Here, the coerciveness of Local 33's activities is further demonstrated by its activities beyond the mere pursuit of the arbitration. First, Local 33 threatened a work stoppage. Later, albeit of brief duration, it actually engaged in a work stoppage. It requires no extensive analysis for discussion to perceive the plainly coercive character of that conduct.

Finally, I consider the fact that Local 33 is pursuing its arbitration against Blount, a neutral employer having no direct control over the disputed assignment, an important and revealing factor in assessing the coerciveness of its conduct. Such pressure both diminishes the thrust of Local 33's contention that its arbitration is designed to resolve a contractual dispute, and also nurtures a coercive atmosphere. Enmeshing a neutral within the ambit of a dispute to which it is not a party patently is inherently coercive because, absent the presence of the arbitrtion, the neutral employer would be free to pay only once to have the disputed work performed and would not have to act more cautiously in future acquisition of its subcontractors to perform that work. Stated another way, the presence of the arbitration impedes the neutral's freedom to select its subcontractors.

While I acknowledge it is arguable that Blount's agreement to the subcontracting clause may be viewed as its voluntary relinquishment, or qualification, if that freedom, Blount's assent to the subcontracting limitations could not have contemplated its enforcement to seek objectives proscribed by the Act. On the foregoing, I conclude that, in all the present circumstances, pursuit of the abitration is coercive within the meaning of the Act.

On all the above, I find that the record supports the conclusion, which I make, by a preponderance of the evidence, that Local 33 is violating Section 8(b)(4)(ii)(D) of the Act by initiating and pursuing its arbitration against Blount over the disputed work.

Conclusions of Law

1. Blount Brothers Corporation is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

2. Local 33, United Brotherhood of Carpenters and Joiners of America is a labor organization within the meaning of Section 2(5) of the Act.

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[8] For these reasons, I find *Associated General Contractors v. Operating Engineers Local 701*, 91 LRRM 2426 (9th Cir. 1976), cited by Local 33, not controlling here.

3. Local 33 did not fail to notify the Regional Director of its intent to comply with the Board's 10(k) decision underlying the instant proceedings. Hence, there is no merit to the allegations contained in complaint paragraphs 11(a)(ii) and 12(a).

4. Local 33 has engaged in unfair labor practices proscribed by Section 8(b)(4)(ii)(D) of the Act by filing, and pursuing into arbitration against Blount, in-lieu-of claims for work performed by Laborers Local 223 with an object of forcing or requiring Blount to assign the work, described below, to employees represented by Local 33 rather than to employees represented by Laborers Local 223. The work consists of: Erecting and dismantling of pipe scaffolding for the installation of masonry work on the Lafayette Place project.[9]

5. The aforesaid unfair labor practices affect commerce within the meaning of Section 2(6) and (7) of the Act.

THE REMEDY

Having found that Local 33 has engaged in unfair labor practices proscribed by Section 8(b)(4)(ii)(D) of the Act, I shall recommend that it cease and desist therefrom and take certain affirmative action designed to effectuate the purposes of the Act.

[Recommended Order omitted from publication.]

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[9] This conclusion is not mooted by the fact the work on the Lafayette Place project has been completed. There is no evidence to show that the dispute will not recur should Blount perform future similar work within the geographic jurisdiction of Local 33. *Boston Building Trades Council*, 269 NLRB 479, 480 (1984).

Brannan Sand and Gravel Co. *and* Laborers' International Union of North America, Local No. 86. Cases 27-CA-9329-2,[1] 27-CA-9391, and 27-CA-9527

July 29, 1988

DECISION AND ORDER

BY CHAIRMAN STEPHENS AND MEMBERS BABSON AND CRACRAFT

On September 23, 1986, Administrative Law Judge Gerald A. Wacknov issued the attached decision. The Respondent filed exceptions and a supporting brief, and the General Counsel filed a cross-exception,[2] a supporting brief, and an answering brief.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the portions of the decision relating to Cases 27-CA-9329-2, 27-CA-9391, and 27-CA-9527 and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings,[3] and conclusions [4] relating to the above cases and to adopt the recommended Order as modified and fully set forth below.

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge as modified and fully set forth below and orders that the Respondent, Brannan Sand and Gravel Co., Denver, Colorado, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Failing and refusing to bargain in good faith with Laborers' International Union of North America, Local No. 86 as the exclusive collective-bargaining representative of its employees in the following appropriate bargaining unit:

> All employees employed as asphalt laborers and general laborers, but excluding office clerical employees, salesmen, professional employees, and all guards and supervisors as defined in the Act, and employees represented under collective-bargaining agreements in effect between the Respondent and Teamsters Local No. 13, and Operating Engineers Local No. 9, and all other employees.

(b) Failing and refusing to enter into, execute, and abide by the terms of a collective-bargaining agreement reached with the Laborers on July 24, 1985.

(c) Failing to reinstate immediately unfair labor practice strikers upon application.

(d) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) On request, bargain collectively with the Laborers as the exclusive representative of the employees in the above-described Laborers unit, and enter into, execute, and give retroactive effect to the provisions of the collective-bargaining agreement reached with the Laborers on July 24, 1985. Make employees whole, with interest,[5] for any losses resulting from the Respondent's failure to comply with the terms and conditions of the collective-bargaining agreement.

(b) Make whole employees Allan Hillard, Tom Garcia, and Fred Stemen for the discrimination against them, in the manner set forth above in the remedy section of the judge's decision.

(c) Preserve and, on request, make available to the Board or its agents for examination and copying, all payroll records, social security payment records, timecards, personnel records and reports, and all other records necessary to analyze the amount of backpay due under the terms of this Order.

(d) Post at its facility in Denver, Colorado, copies of the attached notice marked "Appendix."[6] Copies of the notice, on forms provided by the Regional Director for Region 27, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material.

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[1] Case 27-CA-9329-3 involving the Respondent and Teamsters Construction Workers, Local Union No. 13 was severed from these cases by Board Order dated October 30, 1987.

[2] The General Counsel's request for a visitatorial clause is denied as the circumstances of this case do not "demonstrate a likelihood that [the] [R]espondent will fail to cooperate or otherwise evade compliance." See *Cherokee Marine Terminal*, 287 NLRB 1080 (1988).

[3] The Respondent has excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

In sec. III,C,1, par. 12 of his decision, the judge referred to a July 22 contract proposal. The correct date of the proposal is July 2. We correct this inadvertent error.

[4] In accordance with our decision in *New Horizons for the Retarded*, 283 NLRB 1173 (1987), interest on and after January 1, 1987, shall be computed at the "short-term Federal rate" for the underpayment of taxes as set out in the 1986 amendment to 26 U.S.C. § 6621. Interest on amounts accrued prior to January 1, 1987 (the effective date of the 1986 amendment to 26 U.S.C. § 6621), shall be computed in accordance with *Florida Steel Corp.*, 231 NLRB 651 (1977).

[5] Interest shall be computed in accordance with *New Horizons*, supra, and *Merryweather Optical Co.*, 240 NLRB 1213 (1979), as appropriate.

[6] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

289 NLRB No. 169

(e) Notify the Regional Director in writing within 20 days from the date of this Order what steps the Respondent has taken to comply.

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

WE WILL NOT refuse to bargain with Laborers' International Union of North America, Local No. 86 as the exclusive representative of the employees in the bargaining unit.

WE WILL NOT fail and refuse to execute the collective-bargaining agreement that was accepted on July 24, 1985, by Laborers' International Union of North America, Local No. 86.

WE WILL NOT refuse to reinstate unfair labor practice strikers on application.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL, on request, bargain with the Union as the exclusive representative of employees in the following appropriate bargaining unit:

> All employees employed as asphalt laborers and general laborers, but excluding office clerical employees, salesmen, professional employees, and all guards and supervisors as defined in the Act, and employees represented under collective-bargaining agreements in effect between us and Teamsters Local No. 13, and Operating Engineers Local No. 9, and all other employees.

WE WILL, on request, execute the agreement reached with the Union on July 24, 1985, and WE WILL give retroactive effect to its terms.

WE WILL make employees Allen Hillard, Tom Garcia, and Fred Stemen whole, with interest, for our failure to timely offer them reinstatement.

BRANNAN SAND AND GRAVEL CO.

Michael J. Belo, Esq. and *Michael T. Pennington, Esq.*, for the General Counsel.

Gustav V. Achey, Esq. and *Kermit L. Darkey, Esq.*, of Mountain States Employers Council, Denver, Colorado, for the Respondent.

Walter C. Brauer, III, Esq. (Brauer & Buescher, P.C.), of Denver, Colorado, for Laborers Local No. 86.

DECISION

STATEMENT OF THE CASE

GERALD A. WACKNOV, Administrative Law Judge. Pursuant to notice, a hearing with respect to this matter was held before me in Denver, Colorado, on 6-9 May 1986. The initial charges were filed as follows: Case 27-CA-9329-2 (1 August 1985, Laborers); Case 27-CA-9329-3 (2 August 1985, Teamsters); Case 27-CA-9391 (18 September 1985, Laborers); and Case 27-CA-9527 (27 January 1986, Laborers). Pursuant to the various charges, complaints were issued by the Regional Director for Region 27 on 2 and 30 October 1985, and a final consolidated complaint was issued on 18 February 1986. The consolidated complaint alleges violations by Brannan Sand and Gravel Co. (Respondent) of Section 8(a)(1), (3), and (5) of the National Labor Pelations Act (the Act).

The parties were allowed full opportunity to be heard, to call, examine, and cross-examine witnesses, and to introduce relevant evidence. Since the close of the hearing, briefs have been received from the General Counsel and counsel for Respondent.

On the entire record,[1] and based on my observation of the witnesses and consideration of the briefs submitted, I make the following

FINDINGS OF FACT

I. JURISDICTION

The Respondent is engaged in the asphalt paving and sand and gravel business, and maintains its office and principal place of business in Denver, Colorado. In the course and conduct of its business operations, the Respondent annually purchases and receives goods, materials, and services valued in excess of $50,000 directly from points and places outside the State of Colorado, and annually sells and ships goods, materials, and services valued in excess of $50,000 directly to other enterprises or entities within the State of Colorado, including the State of Colorado and the city and county of Denver, which other enterprises are directly engaged in interstate commerce.

It is admitted, and I find, that the Respondent is now, and has been at all times material, an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

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[1] The General Counsel's 17 July 1986 unopposed motion to correct transcript is granted.

II. THE LABOR ORGANIZATIONS INVOLVED

It is admitted, and I find, that Laborers' International Union of North America, Local No. 86, and Teamsters Construction Workers, Local Union No. 13 are now, and have been at all times material, labor organizations within the meaning of Section 2(5) of the Act.

III. THE ALLEGED UNFAIR LABOR PRACTICES

A. *The Issues*

The principal issues raised by the pleadings are whether Respondent has refused to bargain in good faith with the Teamsters, and has refused to enter into and execute a collective-bargaining agreement with the Laborers. Subsidiary issues concern the effects of such alleged violations of Section 8(a)(5) of the Act.

B. *The Facts*

1. Background—The Teamsters negotiations

The Respondent has maintained a collective-bargaining relationship with Teamsters Local 13 for in excess of 30 years. Historically, the Respondent has been one of the three major paving contractors in the greater Denver geographic area, and has entered into the same or substantially similar collective-bargaining agreement with the Teamsters as Western Paving and Peter Kiewit, the other two major contractors. The Respondent has also maintained a collective-bargaining relationship with the Laborers and Operating Engineers. Each of the three contracts between Respondent and the aforementioned Unions expired simultaneously on 30 June 1985.[2]

Negotiations for new contracts commenced on 7 June. The Teamsters negotiated independently, although they frequently attended bargaining sessions of the other two unions. The Laborers, for convenience, frequently negotiated in the same sessions with the Operating Engineers, but it was understood that each union was negotiating a separate agreement.

Written proposals were exchanged at the outset of the first negotiating session between Respondent and the Teamsters. The proposal handed to the Respondent at that first meeting by the Teamsters assumed continuation of the existing agreement except for some modification of the hours of work and overtime article. The proposal also contained a request for a general increase in wages of 65 cents per year for each year of a proposed 3-year agreement, and yearly increases in health and welfare, pension, and vacation benefits.

Respondent's chief spokesman, Kermit Darkey of Mountain States Employers Council, enunciated the Respondent's bargaining position at the outset of that first meeting. Darkey stated that the paving industry environment in Colorado and in the metropolitan Denver area had become increasingly nonunion, that this was making it more difficult for the Company to be competitive, and that it was important for Brannan to be competitive to survive. Darkey then went on to name some 30 or 40 contractors in the Denver metropolitan area that, according to Darkey, were Brannan's competitors. He pointed out that these competitors were either no longer unionized and therefore not restricted by collective-bargaining contracts, or had never been unionized. Darkey went on to state that for Brannan to remain competitive, survive, stay in business, and continue to provide jobs for union members, the restrictions and inefficiencies embodied in the existing contract must be deleted. Darkey advised the Teamsters that for Brannan "to survive or compete, it must operate as efficiently, as economically, as productively as the largest or smallest nonunion Company against which we competed. That we're not restricted with what was in the Union contracts."

Darkey's emphasis on the inefficiencies in the existing contract prompted Jack Parker, the Teamsters' president and chief negotiator, to point out specific areas of inefficiency on the part of management. Darkey said the Company knew about these matters but intended to do nothing about them. Rather, Brannan wanted to get concessions at the bargaining table.

Respondent's contract proposals, which were presented to the Teamsters that day, constituted a radical departure from the existing agreement and sought to delete or substantially change virtually every significant current provision:

1. The union membership article would be changed to delete the 8-day requirement for employees to become union members, and a 30-day requirement period would be substituted.

2. The hiring procedure article, which established a formal hiring hall system, was deleted. In its place the Respondent proposed the following:

> The Employer reserves and retains the right to hire any employee from any source. NOTE: This Article is modified because of the Union's reluctance and opposition to assisting the Employer in manning an efficient and productive operation.

3. The safety article, which, inter alia, provided that employees could refuse to work under unsafe conditions, was deleted.

4. The Respondent proposed to delete the new inexperienced employees article, which provided that in the event an experienced employee was unavailable, the Union could refer an inexperienced employee at a rate of 25 cents per hour below the contract classification rate. In its place the Respondent proposed a new article entitled "Trainees and Helpers," which would establish a $6-starting rate for new employees classified as trainees and helpers.

5. The Respondent proposed that the management article contain, inter alia, the following:

> Notwithstanding the Recognition Article or any Article of this Agreement, the Employer retains the right to assign, transfer or interchange employees under this Agreement to perform work and duties as assigned even though the work is not covered by this Agreement. Said employees may be assigned, transferred or interchanged to work with other em-

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[2] All dates or time period hereinafter are within 1985 unless otherwise specified.

ployees of the Employer in the interest of an efficient, economic and productive operation.

6. The Respondent proposed to delete the job stewards article, which provides that the Union may appoint a job steward for each shift on each job or project, who is authorized to carry out duties relating to enforcement of the agreement. In its proposal the Respondent gave the following reasons for deleting this article:

> Delete this Article because the Union fails or refuses to consider the wishes of Stewards, or to consider judgments of a Steward in matters affecting unit employees.
>
> The Union has threatened action against Stewards. Because the Article has not been used as a positive Article to promote harmony and cooperation, but rather has been used as a coercive and intimidating Article, it must be deleted.

7. The Respondent proposed to delete the work jurisdiction article, which provides that unit employees may not be assigned work not covered by the agreement, and that nonunit employees may not be assigned unit work covered by the agreement. In its proposal the Respondent gave the following reason for deleting this article.

> Delete this Article because Employer must compete with an increasingly union-free asphalt industry that is not burdened by costly, inefficient and restrictive practices, procedures and language.

8. The Respondent proposed to delete the hours of work and overtime article that, inter alia, provides for showup pay, overtime pay for work in excess of 8 hours per day, and premium pay for certain Sunday and holiday work. Respondent proposed to delete this article for the following reason:

> *Delete* this Article to meet increasingly union-free asphalt industry practices which operate without the payment of daily overtime and premium pay for Saturday and Sunday operations. *Less than six* of over 50 asphalt operations statewide are unionized by the Union.

In its place the Respondent proposed that overtime pay would be paid for all hours worked in excess of 40 hours per week, with no provision for showup pay.

9. The Respondent proposed that the working conditions article be amended to delete the clause providing that a discharged or laid-off employee is entitled to regular hourly pay for the hours he is required to wait for his final paycheck.

10. Respondent proposed to delete the subcontractors article, which is in effect a work-preservation clause whereby the Respondent shall require the subcontractor to abide by all the terms of the agreement including payment to the various union trust funds (health and welfare fund, pension fund, vacation fund, and the industry fund).

11. Respondent proposed that the wage scale and zones article, which, inter alia, sets forth wage scales and classifications, contain the following:

> The hourly rates of pay set forth in this Agreement are and shall be considered to be minimum rates of pay. Attached as an appendix entitled Minimum Hourly Wage Rates and Classifications of Work is a schedule establishing classifications A, B, C, and D, each with a minimum hourly wage rate.

12. The Respondent proposed to delete the employees article, which listed and defined 13 general job descriptions, including drivers, warehousemen, greasers, servicemen, mechanics and other classifications of employees within the unit. The Respondent gave the following reason for deleting this proposal:

> Delete this Article because the Employer retains the right to interchange drivers to drive equipment the employee is qualified and licensed to operate.

13. The Respondent proposed to delete the truck rental conditions article, which in effect provides that the drivers of rental or lease vehicles shall be paid the contract wage and benefits, including payments to the various trust funds. The Respondent gave the following reasons for deletion of this article:

> *Delete* this Article because existing circumstances and economics require the use of non-employer owned equipment to meet the peak demands of a business. It is necessary for the Employer to operate more efficiently and economically to survive in a union-free asphalt industry and in order to provide jobs for employees.

14. The Respondent proposed deletion of the fringe benefits article, which provides for payment to a Teamsters health and welfare trust fund, a Teamsters pension fund, and a Teamsters vacation fund. The Respondent proposed to establish its own health and welfare plan, including a life and accidental death benefit, and its own retirement-deferred compensation plan.

At the second meeting, on 17 June, Parker requested copies of the Respondent's proposed health and welfare and retirement plans. Gus Wittenberg, one of Respondent's officials, said the Company also intended to propose a profit-sharing plan and that he would provide the Union with that information when it was available. There was a discussion of Respondent's proposals. At one point Darkey said no current employee would initially suffer a reduction in pay under the new A, B, C, and D wage classification schedule (see proposal number 11, above), but that an employee's pay could be reduced under this proposal if his performance, ability, or efficiency was not satisfactory in the opinion of management. Each new employee, according to Darkey, would be placed in a particular classification according to the Company's evaluation of his competence, and this could vary from day to day; nor would there be automatic progression to a higher wage category.

Darkey said the Respondent intended to subcontract out any and all work at the cheapest rate possible, in every situation, as the nonunion companies were able to do; that such contracting out would not be limited to overflow work that could not be handled by the current employee complement; and that this would necessarily result in the need for fewer Brannan trucks and therefore fewer Brannan employees.

Parker inquired whether in light of Respondent's negation of the entire contract, it was pleading poverty. Darkey said no and added that the Company had made a profit during each year of the 3-year term of the current contract. At the end of the meeting Parker again requested written copies of the various plans proposed by Respondent, and was told that the Company would provide that information as soon as it was available.

The next meeting was on 26 June. A Federal mediator was present. Parker requested the plan booklets and was told that the Company was in the process of gathering this information and would put it in the mail. A written summary of the proposed pension and profit-sharing plans was handed to the Union. The Respondent submitted a modified proposal, withdrawing its prior proposals on union membership (No. 1, supra), safety (No. 3, supra), and trainees and helpers (No. 4, supra). It continued to delete the new inexperienced employees article; proposed under the work jurisdiction article the same paragraph as originally proposed under management-rights (No. 5, supra); provided that the hours of work and overtime article shall include that overtime at the rate of time and one-half shall be paid for all hours worked on Sunday; proposed a deferred compensation profit-sharing article; and proposed a 1-year agreement. Also, the proposal listed the names of the 77 current unit employees, and classified all except 5 of them within wage group A.

There was discussion regarding whether, under Respondent's wage proposal, the employees could suffer a demotion to a lower wage rate. Darkey said yes, if their performance was not satisfactory. When asked if this change would be subject to the grievance and arbitration procedure, Darkey said that under Respondent's proposal it would not be grievable.

The proposed pension plan was described by Respondent's representatives, and it was stated that whether any money was allocated to the pension fund depended on the profitability of the Company and was solely at the Company's discretion; moreover, that an employee must work 1000 hours a year to qualify. Darkey said there would no longer be a vacation fund nor would employees receive a vacation. Rather, the deletion of the vacation pay provision would just result in a 70-cent-an-hour takeaway from the employees.

Darkey responded to the Union's initial proposal by summarily rejecting each item. He insisted that there would be no increase in wages, and adamantly maintained that the Company would accept only the health and welfare and pension plans it proposed. Parker advised Darkey that the Union had scheduled a membership meeting, and stated that the Union needed to get a firm indication of the Company's willingness to make any movement. Darkey made no response to this query. At the conclusion of the meeting Parker said that the Union neither accepted nor rejected any of the Company's proposals and would continue to consider them.

The 28 June union membership meeting was held as scheduled. The employees voted to reject the Respondent's proposed contract and to strike on 3 July if Parker observed that no progress was made at the 2 July negotiating meeting with the Laborers and Operating Engineers.[3] Parker attended the meeting on 2 July as an observer and saw that no progress was being made. Therefore, the Teamsters struck the morning of 3 July. The other two unions observed the picket line.

On 3 July the Respondent hand-delivered a letter, signed by Respondent's president, W. W. Sellers, to the Union stating that it intended to resume and continue operations; that it would begin hiring permanent replacements; that "effective immediately, we are discontinuing enforcement of the Union Security provisions of the Collective Bargaining Agreement"; and that the Company made the Union its best offer on 26 June and "because of the impasse which exists the Company will impasse the wage rate offer made the Union June 26, 1985."

Parker attended the 8 July meeting between Respondent and the Laborers and Operating Engineers. At this meeting Darkey said that he had a proposal for the Laborers and Operating Engineers but that the Teamsters would not get a proposal because they were on strike. Parker said that even though there was a strike there was no impasse, and that the Teamsters had not rejected any of Respondent's proposals and expected to continue negotiating with the Company. Darkey replied, according to Parker, that when there was a picket line the parties were at impasse. Parker again requested the booklets on the health and welfare and pension plans so that he could give them to the Union's actuary for studying. Shortly after the meeting, Parker wrote a letter to Darkey confirming Parker's statements at the meeting, namely, that the Union disagreed that an impasse had been reached; that the Union had not received the promised health and welfare information so that it could be sent to the Union's actuary for analysis,[4] and that the Union had rejected none of the Company's proposals and intended to submit counterproposals at the next meeting.

By letter dated 9 July the Respondent advised the Teamsters that the Company intended to implement certain terms and conditions of employment for the returning strikers and replacement employees. The letter stated that the subcontractor's article would not be enforced; the proposed hours of work and overtime pay provisions would be put in effect; and all returning strikers and replacement employees would be covered by the Respondent's health and welfare and deferred compensation plan.

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[3] The Respondent's bargaining position and contract proposals submitted to the Laborers and Operating Engineers were similar in certain respects to those directed toward the Teamsters. However, many significant items in the Teamsters contract had never been included in the contracts with the other Unions.

[4] Certain information regarding the Respondent's proposed health and welfare plan was hand-delivered to the Union later that day.

The Union replied on 10 July, strongly objecting to the foregoing unilateral action, and stated that it was ready and willing to meet.

Parker attended another meeting as an observer on 12 July. Darkey announced at this meeting that the union-security and hiring hall provisions would no longer be enforced. Parker maintained that the Respondent was not bargaining in good faith, and that Darkey had been less than honest and had refused to respond to the Union's repeated requests to advise the Union what was really needed, in specific terms, to reach agreement. Darkey replied that the Teamsters were inflexible and would not deviate from the subcontracting and rental clauses that was of great concern. Parker said that the Teamsters were flexible and could meet the Company on common ground on those issues if Darkey would forgo the generalities about the nonunion economic climate and articulate what the Company really needed. Darkey asked whether the Union could agree to anything different than what was contained in the Western Paving contract, one of the three major contractors. Parker said yes. Darkey nevertheless reiterated that the parties were at impasse.

The next meeting was held on 19 July. Darkey handed the Union a position statement setting forth, in summary form, the current status of the various proposals and said he was withdrawing the union-security provision. The Union handed the Company a new proposal requesting a wage increase of 50 cents rather than 65 cents as originally proposed. Parker also made a verbal proposal on subcontracting whereby the contract fringe benefits would be included in the paychecks of subcontractors' employees, in response to Respondent's contention that it could not hire certain subcontractors because their employees did not want those benefits paid to the union trust funds. Darkey rejected this proposal, without discussion, and reiterated that the Company would not agree to any contract that had any subcontracting provision in it. Parker maintained that the Union was flexible and that common ground could be reached if the Company would just make counterproposals. Darkey said a compromise might have been possible prior to the strike, but there could no longer be any compromises.

The Union received a letter from the Company dated 23 July stating that the Respondent had implemented its various proposals and had deleted and discontinued enforcement of all those contract provisions that during bargaining, it had proposed to delete.

Parker replied on 24 July as follows:

> I am in receipt of your July 23, 1985 Hand Delivered letter informing this Local of the implementation of the Brannan Company's Hospitalization and Medical Benefits Plan, the Profit Sharing and Productivity Incentive Bonus Plans and overtime proposal effective July 22, 1985 and the deletion of the Truck Rental and Sub-contractor provisions of the contract.
>
> Please be advised we continue to strongly object to all the above changes and insist you make no changes from the status quo until a new agreement or impasse is reached. Impasse definitely has not occurred as we have several new proposals to submit.
>
> As you are aware this Local has rejected none of the Company's proposals and have made several counter proposals in an effort to reach compromises. You, however, have continued your unyielding position and have refused to make any concessions or counter proposals, which smacks of not bargaining in good faith. It now appears our only alternative is to file charges at the Board.
>
> We also continue ready and willing to bargain at any mutually agreed time and place.

The Company's reply, dated 29 July, is as follows:

> Reference is made to your respective letters which responded to the hand-delivered letter of July 23, 1985, which letter you were advised that certain proposals of Brannan Sand & Gravel Co. would be implemented.
>
> Both Unions have repeatedly been offered the opportunity to make proposals since the strike of July 3, 1985. The Employer was willing and remains willing to answer any questions and/or negotiate and bargain over any proposal made by the Unions.
>
> The purpose of this letter is to advise you almost four weeks after the strike began July 3, 1985 that Brannan Sand & Gravel Co. is unwilling, based upon the existing circumstances and the present business and competitive conditions, to modify its proposals of June 26, July 2 and July 8 respectively. The offers made to both the Teamsters Union and the Operating Engineers Union represent the final offer of the Employer. The offers and positions of the Union have been rejected and the impasse continues. The law "does not compel either party to agree to a proposal or require the making of a concession."

The next meeting was held on 29 July. Darkey said there would be no new proposals, and that no subcontract language was acceptable. The Union made another verbal proposal to reduce its former wage and fringe benefits offer. Also, Parker asked whether the Company would consider accepting the Union's pension trust plan if the Union would accept the Company's health and welfare plan; and requested that the Company initiate a vacation schedule in place of the vacation trust fund contribution. Darkey rejected each of these proposals in their entirety. Darkey presented the Union with a written position statement reiterating that the Company was unwilling to change any of its prior proposals. Parker again said the Union neither accepted nor rejected any proposals, and would take them under consideration.

A meeting was scheduled for 5 August at the Teamsters building. The unit employees had been invited to attend to observe the negotiations, and many employees had assembled at the prescribed time. The company representatives refused to meet because of the large audience, believing that negotiations under such condition would be undesirable. The meeting was rescheduled for the next day, 6 August, and was held as scheduled.

At the 6 August meeting, Parker offered to reduce the pension and vacation increase contained in the Union's last offer, and again asked if the Company would consider the Union's prior proposal on subcontracting. Darkey rejected the pension and vacation offer and said he would not consider or accept any subcontract language as the Company could get trucks and drivers at a cheaper rate than it would have to pay under the contract. Darkey also said that disputes over health and welfare coverage, as well as disputes under the proposed profit-sharing provision, would not be subject to the grievance procedure. John McKendree, the Union's attorney, asked for the Company's profit and loss statements for the prior 3 years. He also requested a list of the projects the Company had allegedly lost due to the subcontract language, and was apparently told that the Company did not have any records containing such information. McKendree also asked for information regarding health and welfare costs, the pension and profit-sharing plans, and the proposed incentive plan. He inquired whether there might be a year when the Company might not make a pension contribution to the plan on behalf of the employees. Darkey said he was not sure, but would check. Darkey maintained at this meeting, as he had at prior meetings, that the Company would accept no jointly trusteed plans, and insisted on being in sole control of any fringe benefit plans.

The next session took place on 13 August. The Respondent had no new proposals. The Union further reduced its request for a pension increase, and this proposal was rejected. Darkey presented the Union with a written statement of position that emphasized that no concession or further proposals would be forthcoming. There was discussion of the Company's proposed incentive program. In response to various questions by Parker about this proposed plan, Darkey stated that if the plan presented a problem he would just withdraw it from consideration. He then handed the Union a written statement to this effect. Regarding the deletion of the subcontracting article, Parker predicted that this would result in fewer unit employees, as the truckdriving work would probably be contracted out. Parker was told that his presumption was correct and that the Company would no longer need as many trucks.

The next meeting was held on 27 August. Darkey reiterated that there would be no concessions or further proposals. The Union submitted a new proposal, again offering to reduce its request for a pension increase. This was rejected.

Parker addressed the health and welfare and pension plan issues and asked how much Respondent anticipated it would save by discontinuing the various contract trust funds and implementing the plans it had proposed. Although the record does not indicate whether this question was specifically answered, Parker then inquired whether the Respondent would consider reducing wages by that amount, but leaving the trust fund provisions intact. He explained that the employees, some of whom were within perhaps just a year of being vested in the plan, were very concerned about losing their pensions, and that the employees were conversant with the parameters of that plan and had relied on the projected benefits in terms of planning for their retirement. The Respondent was not interested in this proposal.

Parker also asked, in response to a statement by Darkey that the Respondent had come into negotiations trying to freeze labor costs, whether Respondent would consider continuation of the contract, together with a freeze of labor costs. Darkey said, "We will not consider anything except what we have proposed," and added that it would be fruitless to meet further.

The last meeting occurred on 21 October. An attorney for the Union, Karen Yablonski-Toll, who was present at this negotiating session, asked the Respondent to specify with particularity the contract language that it considered to be restrictive, rather than just declare each entire contract provision unacceptable, in order that the problems could be addressed. She inquired specifically about the subcontracting article saying, "We want to know how they restrict." Darkey replied, "We want to operate in the same manner as other union-free contractors." No progress was made. Darkey questioned the Union's majority status and the Union maintained that it represented a majority of the unit employees. Darkey reiterated that the parties were at impasse, and again stated that the Company was totally inflexible and would enter into no contract except on the terms it had previously established.

2. The Laborers negotiations

The contract with the Laborers expired on 30 June. At the outset of the 24 June bargaining meeting, the Respondent presented the Laborers, represented by Business Manager and Secretary/Treasurer Ted Doxtater, with a written proposal embodying similar wage classification language to that proposed to the Teamsters. The Laborers contract, extending from 1 July 1984 to 30 June 1985, contained no trust fund provisions, nor did it have any type of subcontracting provision. It did contain a provision for health and welfare and dental coverage, giving the Respondent the option of using either an insurance company of its choice or the Colorado Laborers Health and Welfare Fund. It also contained a provision, article 17, entitled "Independent Retirement Deferred Compensation" (IRA), as follows:

> INDEPENDENT RETIREMENT DEFERRED COMPENSATION (IRA)
>
> The Employer will pay a year-end payment to each eligible employee covered by this Agreement. An eligible employee is defined as an employee who has worked for the Company one thousand (1,000) hours or more December 1 of the preceding year through next November 30th. For each employee who meets the eligibility requirement, the payment is as set forth in the Appendix "A" schedule. For employees who do not meet the one thousand (1,000) hour requirement, no payment will be made.

> Effective May 1, 1983, the payment is Ninety-Five Cents (95 cents) per hour for each hour worked.
>
> The amount will be effective for the term of this Agreement, July 1, 1984, through June 30, 1985.

At the 2 July negotiating meeting the Respondent proposed that the Laborers select either the same health and welfare plan as proposed to the other unions or the current Laborers health and welfare plan; the same pension productivity bonus and profit-sharing plans as proposed to the other unions; and a wage provision that included pay classifications for different categories of work, minimum hourly rates of pay, and the right to increase the rate of pay based on whether the Respondent believes that the employee has the experience, qualifications, skill and ability to perform the assigned duties."

As set forth above, the Teamsters struck on 3 July and the Laborers and Operating Engineers honored the picket lines.

The next meeting after the strike commenced was held on 8 July. The Respondent handed the Laborers a handwritten document stating that "Brannan's proposal of 7-2-85 is submitted as company's final offer." At this point the parties were close to reaching an agreement, and this apparently prompted a company representative to say, according to Doxtater, the Union's representative, that the Company did not want a contract with just one union.

The parties met again on 12 and 22 July. No progress was made. Kathy Nissen, president of the Laborers Union, was present for the Union at both meetings. Nissen testified that she recalled no discussion of union security at either of these meetings. At the next meeting, on 24 July, Doxtater announced that the Union would agree to the Respondent's contract proposals as of 2 July. Darkey said that was fine but that there would be no union-security clause in the contract. An argument ensued, and Darkey explained that the union-security clause was withdrawn by a letter dated 8 July that had previously been given to the Union. Doxtater said the Company could not now withdraw that proposal and Sellers, Respondent's president, said, "We won't sign a contract with just one union."[5]

Darkey testified regarding the 12 July meeting. When asked by his counsel whether the union-security article had been pulled from the table at that meeting, Darkey answered yes, and explained that it had been withdrawn [b]y a letter that had been sent to all three of the unions." The letter to which Darkey referred was signed by President Seller and sent to each of the unions on about 8 July, after the strike began. Respondent's letter to the Laborers reads as follows:

> Dear Mr. Doxtater:
>
> 1. As you are now aware, the Brannan Sand & Gravel Company responded to the Union's offer of July 2, 1985, and rejected them. The Employer has carefully reviewed its situation and has concluded that it is the intention of the Employer to resume and continue its operations in spite of the strike.
>
> Accordingly, the Employer will begin hiring permanent replacements. Letters are being mailed to the employees advising them of the Employer's intentions.
>
> 2. Please be advised, effective immediately, we are discontinuing enforcement of the Union Membership provisions (Article 5) of the Agreement between the Union and Brannan Sand & Gravel.
>
> 3. Be further advised that because of the impasse which exists in the current bargaining situation, Brannan Sand & Gravel Company will impasse the wage offers made and confirmed July 2, 1985.
>
> Brannan stands ready and able to meet at a mutually convenient date and time.

On 12 August and again on 20 August, Doxtater wrote to the Respondent advising that the Union had a contract with Respondent and that because of the existence of this contract the striking employees had either unconditionally returned to work or, in the cases of Hillard, Garcia, and Stemen, infra, had offered to return to work.

Employees Alan Hillard, Tom Garcia, and Fred Stemen, who had been on strike, had been advised by the Laborers to return to work. They returned to Respondent's premises on the morning of August 8. They were told that no work was available, and were instructed that they could place their names and phone numbers on a rehire list. Respondent destroyed the rehire list shortly thereafter, and no representative of Respondent called or wrote letters to Hillard, Garcia,[6] or Stemen until 14 October, when Respondent mailed letters to them offering reinstatement.

C. *Analysis and Conclusions*

1. Teamsters negotiations

At the very outset of negotiations the Respondent, one of the three major paving contractors in the Denver area, stated that to remain competitive and survive in an industry that was becoming increasingly nonunion it would no longer agree to any provisions in a collective-bargaining agreement that in any manner restricted it from most efficiently conducting its business operations. Thus, the Respondent demanded that any collective-bargaining agreement must allow it the flexibility to operate as the some 30 or 40 smaller nonunion companies operated, that is, with no union contract and therefore no requirements whatsoever other than those imposed by state and Federal laws. Consistent with this position the Respondent's proposals constituted a radical departure from the contractual relationship that had been established as a result of a 30-year bargaining history. Respondent's initial position was not merely a strategic one designed to evoke concessions from the Union. Rather, its unwavering position from the very outset of bargaining may be aptly characterized as a fixed resolve that absent complete capitulation by the Union, which necessitated that the Union agree to forgo whatever benefits and job security it had obtained for the employees through the years, there could be no contract.

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[5] Sellers did not testify in this proceeding and Doxtater's account of the negotiations is unrebutted.

[6] Garcia's father worked for the Respondent and Garcia testified that about 22 August his father told him that he could probably get his job back. Garcia, who was then employed elsewhere, chose not to attempt to return at that time. There is no evidence indicating that Garcia's father was told by any supervisor or management representative to relay this message to Garcia.

The Board has summarized certain general requirements of good-faith bargaining in *Atlanta Hilton & Tower*, 271 NLRB 1600, 1603 (1984), as follows:

> Under Section 8(d) of the Act, an employer and its employees' representative are mutually required to "meet at reasonable times and confer in good faith with respect to wages, hours, and other terms and conditions of employment . . . but such obligation does not compel either party to agree to a proposal or require the making of a concession." Both the employer and the union have a duty to negotiate with a "sincere purpose to find a basis of agreement,"[9] but "the Board cannot force an employer to make of a concession" on any specific issue or to adopt any particular position."[10] The employer is, nonetheless, "obliged to make *some* reasonable effort in *some* direction to compose his differences with the union, if (a)(5) is to be read as imposing any substantial obligation at all."[11]

The foregoing clearly enunciates the Board's role in cases of this nature, namely, to ascertain whether the parties are making a sincere effort to find a basis of agreement by making some reasonable effort in some direction to resolve their differences. Any rational employer must necessarily understand that its refusal to agree to an increase in wages or benefits operates as an impediment to the culmination of an agreement; that its insistence on reducing those wages or benefits that the employees have previously enjoyed makes the negotiation of an agreement highly unlikely unless the employer can convincingly demonstrate that economic necessity mandates such reductions to provide continued employment; that, absent economic necessity, its withdrawal of significant terms and conditions of employment, which the employees have enjoyed and relied on over extended periods of time, and which provide for job security during their employment and economic security thereafter, virtually mandates that no agreement will be reached; and that its total negation of each and every significant contract provision and its insistence that it maintain total control over each aspect of the employment relationship absolutely precludes, beyond a shadow of a doubt, the reaching of an agreement, as no self-respecting union will execute such a document. Thus it is crystal clear that the Respondent, from the very inception of bargaining, could not have harbored the slightest hope that its initial contract proposals, from which it did not deviate in any significant respects throughout the entire course of bargaining, would ever be acceptable to the Union.

The Respondent reserved for itself the absolute right to ignore established jurisdictional lines for the work historically performed by the various units, and insisted that it be permitted to assign any work to any employee, thus totally rendering meaningless the historic unit descriptions in the various contracts; at the same time it reserved the right to unilaterally demote to a lower wage classification employees who, in its estimation, were unable to satisfactorily perform the newly assigned work. The Respondent insisted on the deletion of the subcontracting clause, which had operated as a work-preservation clause for the unit employees, and specifically reserved the right to lay off or discharge its employees when it deemed that the work could be subcontracted out more cheaply; moreover, the Respondent not only proposed no alternative means of safeguarding employees' jobs, but deemed it necessary to emphasize that subcontracting the work out would be one of its significant objectives. The Respondent also deleted the vacation trust fund premium providing for 60 cents per hour, and insisted that no funds for employees' vacations would be paid and that no paid vacations would be given.

In place of the contractual health and welfare trust fund that provided for fixed amounts credited to each employee, the Respondent established its own companywide health and welfare plan to have a uniform plan covering all employees, apparently for the purpose of facilitating its intent to transfer employees at will across jurisdictional lines from one job to another; and in place of the long-established pension trust fund that the employees had relied on for years and that enabled them to accurately determine the benefits they would obtain on disability or retirement, the Respondent established an independent pension plan reserving to itself the right to make contributions as it deemed expedient.

The foregoing is but a brief recapitulation of some of the Respondent's proposals. Collectively, they are not merely regressive, but rather may be reasonably characterized as an attempt to totally negate every substantial term and condition of employment that the employees had acquired through years of good-faith bargaining, indeed, the very framework of the parties' relationship. And the Respondent, specifically not pleading financial inability as a basis for its position, and admitting that it has been a profitable business, advanced as its rationale for the foregoing the general principle that it wanted to be able to compete more favorably with the scores of incomparably smaller nonunion operations that employ workers who enjoy only the job security and benefits that the employers are willing to provide on an ad hoc basis.

The Respondent was angry with the Union from the very outset of negotiations as the footnotes to its proposals clearly demonstrate. Thus, the Respondent deleted the established hiring hall provision (see proposal No. 2, supra) "because of the Union's reluctance and opposition to assisting the employer in manning an efficient and productive operation." Similarly, the Respondent proposed to delete the job stewards article in its entirety (see proposal No. 6, supra) "because the Union fails or refuses to consider the wishes of Stewards, or to consider judgments of a Steward in matters affecting unit employees," and further "because the Article has not been used as a positive article to promote harmony and cooperation." Certainly the Respondent could have engaged the Union in intelligent discussions in an attempt to reach mutual agreement about the operation of the hiring hall and the duties and responsibilities of job stewards, rather than summarily strike these important provisions from the contract. Such an attitude of automatic and total rejection of these significant contract items can only hinder negotiations, and becomes an impediment to the very objective of bargaining. The foregoing, along with other footnotes to various proposals, demonstrates, at the least, the Respondent's disregard for the bargaining process, and provides additional support for the conclusion that the Respondent was not interested in finding a means of accommodating varying points of view, but rather was determined that whatever negotiations took place would be abrupt and devoid of meaningful discussion and, most importantly, unproductive.

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[9] *NLRB v. Herman Sausage Co.*, 275 F.2d 229, 231 (5th Cir. 1960).

[10] *NLRB v. Reed & Prince Mfg. Co.*, 205 F.2d 131, 134 (1st Cir. 1953), cert. denied 346 U.S. 887 (1953).

[11] Id. at 135.

The Respondent apparently argues that, absent a formal rejection of the proposals, it was legally permitted to refrain from advancing alternate proposals. Thus, the Respondent emphasizes that throughout the course of bargaining Parker repeatedly stated that the Union neither accepted nor rejected any of the Respondent's proposals. It is crystal clear that the Union's failure to agree to any proposals and its decision to strike constituted expressions of the Union's disregard for Respondent's proposals; and that Parker's aforementioned remarks were designed to be understood in the context of bargaining rhetoric, namely, that contrary to Respondent's repeated assertions that an impasse existed, the Union believed that there was no impasse because there had been no good-faith bargaining on the part of Respondent, and that bargaining should continue. Therefore, I find Respondent's contention to be without merit.

The entirety of the record makes it clear, and I find, that the Respondent did not, even initially, attempt to consider and explore with the Union methods to enhance its competitive position vis a vis other companies within the framework of the established bargaining relationship. Rather, from the outset, it determined that the way to compete with nonunion companies was to become a nonunion company. Indeed, Respondent's expressed position at the outset of bargaining, coupled with the proposals it advanced, and the intransigence it thereafter displayed, mandates such a conclusion. This is not to say that had there been good-faith negotiations the parties would have necessarily reached total accord. However, the Respondent's contrived bargaining strategy virtually ensured the futility of these negotiations. And bargaining premised on such an inflexible approach to resolving differences can never constitute good-faith bargaining. See *A-1 King Size Sandwiches*, 265 NLRB 850 (1982), enfd. 732 F.2d 872 (11th Cir. 1984); *Atlanta Hilton*, 271 NLRB 1600, 1603 (1984); *Struthers Wells Corp.*, 262 NLRB 1080 (1982), enfd. 721 F.2d 465 (3d Cir. 1983); *Alba-Waldensian, Inc.*, 167 NLRB 695, 696 (1967). Cf. *Reichhold Chemicals*, 277 NLRB 639 (1985).

From the foregoing I find that the Respondent did not engage in good-faith negotiations from the outset of bargaining on 7 June 1985. It therefore follows that the strike that commenced on 3 July 1985 was an unfair labor practice strike in protest of the Respondent's unlawful conduct, and that each and every unilateral change made by the Respondent thereafter was violative of Section 8(a)(5) of the Act. Further, under the above circumstances, the Respondent's contention that subsequent to the unfair labor practice strike the Union has failed to maintain its majority status as the representative of the unit employees, is clearly without merit. *Pittsburg & New England Trucking*, 249 NLRB 833, 836 (1980).

2. The Laborers negotiations

The Laborers met with the Respondent on 8 July, subsequent to the commencement of the 3 July strike. During that meeting Respondent furnished the Laborers with the written statement that "Brannan proposal of 7-2-85 is submitted as company's final offer." The 2 July proposal to which Respondent refers is also a written proposal that states, inter alia, that Respondent proposes the union-security clause contained in the expired contract.

Respondent contends that at the bargaining session on 12 July it "pulled" the union-security clause from its 22 July contract proposal. However, the testimony of Union Representative Kathy Nissen, which I credit, shows that Respondent did not withdraw this as a proposal at the 12 July meeting. Moreover, the Respondent called no witnesses to corroborate Darkey's vague testimony that he mentioned this at the bargaining session, nor do the contemporaneous notes made by Respondent's attorney Gustav Ackey, who attended and took notes during this meeting, substantiate Darkey's testimony. Further, Darkey's direct response to Attorney Ackey's question seems dispositive of the matter. Thus, Darkey testified that the union-security clause had been pulled from the table at the 12 July meeting by the 8 July letter, supra, from the Respondent to the Laborers.

Respondent's reliance on the language of the 8 July letter is misplaced. The letter advises the Union of the Respondent's intention to begin hiring permanent replacements, and its intention to simultaneously discontinue enforcement of the union-membership provision (article 5) of the agreement. The Respondent's decision to discontinue enforcement of this provision was in conformity with the law as there was no contract then in existence. *Leveld Wholesale*, 218 NLRB 1344, 1349-1350 (1975). However, discontinuing enforcement of a union-security provision during a strike and withdrawing it from the bargaining table are entirely different concepts, particularly to an experienced labor attorney like Darkey. Indeed, on 19 July, during a negotiating session with the Teamsters, Darkey specifically withdrew the union-security provision from the table, and did not simply assume that the earlier 9 July letter to the Teamsters, stating that the union-security provision of the expired contract would not be enforced, constituted withdrawal of the provision. Respondent's subjective opinion that the 8 July letter operates as a withdrawal of the union-security provision is irrelevant. *Teamsters Local 287 (Reed & Graham)*, 272 NLRB 348 (1984). Nor could the Union have reasonably known of the Respondent's professed intent. See *Carpenters Local 1476 (Lake Charles AGC)*, 270 NLRB 1432 (1984).

Clearly, Doxtater's acceptance of the contract on 24 July surprised the Respondent, and Darkey attempted to use the letter as a means of precluding agreement. Seller's statement that the Company did not want a contract with just one union, rather than Darkey's ostensible belief that the union-security clause had been withdrawn, demonstrates Respondent's true motivation.

I therefore find that by refusing to enter into, and thereafter execute the complete agreement that the Union accepted, the Respondent has violated Section 8(a)(5) of the Act. *Ashe Brick Co.*, 280 NLRB 1383 (1986). Further, by such conduct, the strike became an unfair labor practice strike on that date. Therefore, it follows that Respondent's failure to offer employees Hillard, Garcia, and Stemen immediate reinstatement to their former jobs is violative of the Act.[7] See *Robbins Co.*, 233 NLRB 549 (1977); *Ashe Brick Co.*, supra.

The complaint alleges that the Respondent violated Section 8(a)(5) of the Act by refusing to furnish requested information covering the eligibility of employees for "IRA" bonus pay under article 17 of the expired contract, and by refusing to pay the bonus to eligible employees. Article 17 of the prior agreement, set forth above, provides that the yearly computation for the IRA payment shall commence on 1 December 1985 and that to become eligible an employee must have worked at least 1000 hours during the applicable 1-year period.

Darkey testified that at the 2 July meeting he proposed the same pension and profit-sharing plan to the Laborers as had been proposed to the Teamsters and Operating Engineers. He further explained that the IRA provision would be eliminated at the expiration of the contract, that no payments would be made under it, and that the newly proposed plan would become effective for the Laborers retroactive to 1 January 1985. No testimony by any representatives of the Laborers was offered to refute or contradict Darkey's assertions regarding this issue.

On the basis of the foregoing, I find that, consistent with the Respondent's 2 July proposal and explanatory comments, there was no obligation on the part of Respondent to either make such IRA payments to the employees or to furnish the requested information. Therefore, I shall dismiss this allegation of the complaint.

CONCLUSIONS OF LAW

1. The Respondent is an employer within the meaning of Section 2(2), (6), and (7) of the Act.

2. The Unions are labor organizations within the meaning of Section 2(5) of the Act.

3. The Respondent has violated Section 8(a)(5) of the Act by failing to bargain in good faith with the Teamsters regarding the terms of a successor collective-bargaining agreement, by unilaterally discontinuing provisions of the expired collective-bargaining agreement, and by placing contract proposals into effect prior to a bargaining impasse.

4. The Respondent has violated Section 8(a)(5) of the Act by failing and refusing to enter into and execute the agreement it reached with the Laborers on 24 July 1985, and has violated Section 8(a)(3) of the Act by failing to reinstate unfair practice strikers upon application.

5. The above unfair labor practices affect commerce within the meaning of Section 2(6) and (7) of the Act.

THE REMEDY

Having found that the Respondent has failed to bargain in good faith with the Teamsters by engaging in surface bargaining, by unilaterally discontinuing provisions of the expired contract, and by unilaterally initiating various contract proposals prior to a bargaining impasse, the Respondent shall be required to bargain in good faith with the Teamsters, to discontinue the implementation of its unilaterally established contract proposals, to revert to and abide by the contract provisions contained in the expired agreement, and to make the unit employees whole by making all wage payments and trust fund contributions[8] to which the employees are entitled thereunder until the Respondent negotiates in good faith with the Teamsters and reaches agreement on a new contract or an impasse.

Having found that the Respondent has failed to bargain in good faith with the Laborers by failing and refusing to enter into and execute an agreement reached on 24 July 1985, and by failing to immediately reinstate unfair labor practice strikers on application, the Respondent shall be required to execute that agreement forthwith and to give effect to all terms and provisions of that agreement retroactive to the effective date. Moreover, the Respondent shall be required to make employees Allan Hillard, Tom Garcia, and Fred Stemen whole for any loss of earnings they incurred. The backpay shall be computed in the manner set forth in *F. W. Woolworth Co.*, 90 NLRB 289 (1950), plus interest, as set forth in *Florida Steel Corp.*, 231 NLRB 651 (1977)[9]

Under the circumstances it does not appear that the remedial provision requested in the complaint and in the General Counsel's brief is necessary to ensure compliance with the recommended Order and the General Counsel's request for a visitatorial provision as a matter of course in all unfair labor practice proceedings where violations are found should be properly addressed to the Board.

[Recommended Order omitted from publication.]

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[7] Respondent's brief on this issue, premised on the theory that the employees were economic strikers rather than unfair labor practice strikers, is not in point.

[8] See *Fox Painting Co*, 263 NLRB 437 (1982); *Merryweather Optical Co*, 240 NLRB 1213 (1979).

[9] See generally *Isis Plumbing Co.*, 138 NLRB 716 (1962).

River City Mechanical ***and*** **Sheet Metal Workers Union Local No. 162, Sheet Metal Workers International Association, AFL–CIO.** Case 20–CA–16451

July 29, 1988

DECISION AND ORDER

By Chairman Stephens and Members Babson and Cracraft

On January 7, 1983, Administrative Law Judge Russell L. Stevens issued the attached decision. The General Counsel and the Respondent[1] filed exceptions and supporting briefs, and the Respondent filed an answering brief in opposition to the General Counsel's exceptions.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings,[2] and conclusions only to the extent consistent with this Decision and Order.

The judge found that Respondent River City Mechanical violated Section 8(a)(5) and (1) of the Act by bargaining in bad faith and by making unilateral changes in wages and working conditions. The Respondent contends that it unilaterally implemented its final bargaining proposals after it had reached impasse in good-faith negotiations with the Union. We agree with the Respondent that it bargained in good faith to impasse. We nevertheless find that the Respondent violated the Act by unilaterally implementing certain wages and benefits not reasonably encompassed by its proposals to the Union.

The Respondent is a heating and air-conditioning contractor in northern California. In February 1981, River City timely resigned from Sheet Metal and Air Conditioning Contractors National Association (SMACNA), through which it had concluded its previous collective-bargaining agreement. That agreement was scheduled to expire on June 30, 1981. At 8 negotiating sessions from June 2 to July 1, 1981, the Respondent and 11 other sheet metal contractors engaged in coordinated bargaining with the Union.

As negotiations began, the employers' bargaining representative, Mark Thierman, emphasized the declining fortunes of his clients, who were suffering from a significant labor cost disadvantage in competitive bidding with nonunion contractors for residential jobs in the Sacramento area. Although most residential jobs entailed installation of flexiduct, an operation requiring minimal skills and training, contractors under the SMACNA contract had to hire their work force through the Union's hiring hall at a ratio of four journeymen to one apprentice and at high wage and benefit levels. Their nonunion competitors hired unskilled workers off the street at much lower wage rates.

Thierman sought to divorce his clients from the SMACNA system by negotiating independent agreements with a new residential worker classification as the central feature. Under this proposal, the employers would agree to "red-circle" journeymen then employed, retaining them at the wage and benefit levels of the old SMACNA contracts, but they could hire directly an unlimited number of lower-paid residential workers for residential projects.

Thierman also objected to the interest arbitration provision in the SMACNA contract. The provision—article X, section 8—required parties at impasse to refer unresolved bargaining issues to the National Joint Adjustment Board (NJAB) for binding arbitration. As all Thierman's clients had timely withdrawn from SMACNA, none of them were represented on the NJAB. Thus, he interpreted article X, section 8 to apply only to negotiated renewals of the SMACNA standard-form agreement, not to the separate and independent agreements sought by his non-SMACNA clients. In addition, Thierman informed the Union that he regarded interest arbitration as a permissive bargaining subject, so that any binding effect of the disputed provision would expire with the existing contract on June 30.

Union Attorney Robert Jesinger's initial reply to Thierman was that the Union had no authority to abandon the SMACNA standard-form agreement. Jesinger also rejected negotiating a separate contract for each employer represented by Thierman. Although the Union might have been willing to execute certain addenda to the SMACNA contract, it demanded a fixed ratio of four journeymen to each apprentice on residential jobs. Jesinger also asserted the applicability of the SMACNA interest arbitration provision to the negotiations at issue.

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[1] This proceeding had been consolidated for hearing and decision by the judge with Case 20–CA–16449. While the judge's decision and exceptions were pending before the Board, the General Counsel entered into a joint stipulation with Sheet Metal Workers Local 162 and Respondent Perrin Heating and Air Conditioning to sever and dismiss in Case 20–CA–16449. Thereafter, on May 21, 1985, the Board granted the General Counsel's request to withdraw exceptions and dismissed the complaint in Case 20–CA–16449, ending Perrin Heating's involvement as a respondent.

[2] The Respondent has excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

289 NLRB No. 170

The parties maintained these positions until the session held on June 17. At that session Thierman cited several residential and commercial projects that his clients had lost to nonunion competition. He handed Jesinger separate but similar economic proposals from the individual contractors. River City reiterated its commitment to "red-circle" existing employees, and proposed a separate lower-paid employee classification for apprentices with no prior experience. Jesinger handed to Thierman a proposed renewal of the standard contract with three addenda. Addendum 3 created a new class of "residential workmen," and permitted the employers to hire one of these employees for every four journeymen they retained.

On June 30, Thierman presented a single contract counterproposal from contractor B.J. Heating. He had indicated that if agreement were reached with B.J., other clients would probably follow along. The June 30 contract proposal called for: (1) the new residential worker classification; (2) red-circling journeymen at the top rate under the expiring contract of $14.80; (3) health, welfare, and pension coverage for new residential workers under employer plans rather than under the Union-SMACNA trusts; and (4) no ratio limitation or hiring hall requirement for the employment of residential workers.

On July 1, the Respondent unilaterally terminated benefit fund payments under the expired SMACNA contract. At the bargaining table that day, the Respondent and six other contractors adopted the June 30 B.J. proposal as their final offer. B.J. and the remaining four contractors modified the previous day's proposal and made their final offer to accept the Union's standard-form agreement, modified by addenda including provisions creating the residential worker classification with a ratio limitation of four such workers to one journeyman on residential projects.

Union negotiator Jesinger declined on July 1 to accept any residential work force ratio with less than three journeymen for every one residential worker. The Union had agreed to the concept of a residential worker classification. In addition, Jesinger revealed that on June 25 the Union had sent a letter to its International stating that the parties had reached impasse and requesting NJAB interest arbitration. Jesinger stated that he had written this letter before actual impasse in order to secure an early date on the NJAB agenda in the event of impasse.

The Respondent's final offer was never submitted to the Union's membership. B.J.'s final proposal was presented and formally rejected by the Union's membership on July 6. On July 7 the Respondent was struck by the Union. All River City's employees joined the strike at its outset. Within the next 3 weeks, however, employees Melton and Birchfield returned to work. Their new wage was $15 per hour, rather than their previous $14.80 journeyman rate under the old contract. All other River City employees during the strike were replacements paid as residential workers.

In considering the record before us, we first address the issue of the Respondent's alleged bad-faith bargaining in negotiating a successor agreement before considering its subsequent implementation of different terms and conditions of employment. Our analysis of the Respondent's good faith is guided by the fundamental principle that Section 8(d) does not "compel either party to agree to a proposal or require the making of a concession." *NLRB v. American National Insurance Co.*, 343 U.S. 395, 404 (1952). Our responsibility is to determine, from an examination of the totality of the Respondent's conduct, whether that conduct evidences a real desire to reach an agreement. See *Atlanta Hilton & Tower*, 271 NLRB 1600, 1603 (1984).

The judge found that the Respondent attached principal concern to the matter of employee ratios, and that by insisting on an unlimited ratio of lesser-paid apprentices to journeymen for residential work it was making proposals that it knew the Union could not accept. Contrary to the judge's analysis, we find insufficient evidence here that the Respondent and its fellow contractors intended to frustrate negotiations with the employee ratio proposals. Obviously, these employers sought to extract substantial economic concessions. Evidence of the undisputed economic considerations underlying these proposals indicates, however, that they were not clearly unreasonable and belies an intent to undermine the Union's representative status. We note that the Respondent consistently offered to retain current journeymen at existing wage and benefit levels. Furthermore, the Respondent's firm stand on the residential worker issue must be weighed against the Union's equally hard line on interest arbitration.[3] We conclude that the Respondent's insistence on the residential worker proposal did not manifest bad faith in the circumstances of the instant negotiations. See *Reichhold Chemicals*, 288 NLRB 69 (1988).

Although not determinative, other elements of the Respondent's behavior at the negotiations also fail to manifest bad faith. The Respondent met with the Union's representatives at regular intervals and supplied pertinent information to them. The judge in fact found that both sides often changed their positions and that the "negotiations were not barren of fruit." The Respondent engaged in none of the dilatory maneuvers associated with surface bargaining. Its conduct exceeded the mere "sterile discussion of union-management differences" properly condemned as a manifestation of bad faith. *American National Insurance Co.*, 343 U.S. at 402.

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[3] We need not decide here whether the Union's bargaining position violated the Act. But see *Sheet Metal Workers Local 59 (Employers Assn.)*, 227 NLRB 520 (1976).

There remains the question of whether the Respondent's conduct away from the bargaining table during negotiations demonstrated bad faith in bargaining. We adopt, with one exception,[4] the judge's conclusion that the Respondent violated Section 8(a)(5) and/or (1) in several conversations between its agents and unit employees. We will order the Respondent to cease and desist from such conduct. Although these independent violations, which included direct dealing with employees and expressions of intention to go nonunion, can be indicia of bad faith in the bargaining process, we consider them insufficient to prove overall surface bargaining in the totality of circumstances of this case. In this regard, we note that there has been no showing that the provocative and unlawful away-from-the-table statements of the Respondent's officials influenced the aims or attitudes of Thierman in advancing contract proposals on behalf of the Respondent—proposals that were substantially similar to those that Thierman was advancing on behalf of the 11 other employers, who are not alleged to have engaged in any unlawful away-from-the-table conduct. We therefore conclude that the parties engaged merely in hard bargaining, and we shall dismiss the allegation that the Respondent violated Section 8(a)(5) by bad-faith bargaining in its 1981 negotiations with the Union.

Our conclusion as to the Respondent's good faith does not extend to the legality of its conduct after the negotiations, however. To the extent that the Respondent unilaterally modified the wages due its journeymen employees and unilaterally terminated their contractual benefit fund payments, we find that the Respondent violated Section 8(a)(5).

A bargaining impasse arises when the parties' good-faith negotiations have exhausted the prospects of concluding an agreement.[5] Following impasse an employer is free to make unilateral changes in working conditions reasonably encompassed by its pre-impasse proposals.[6] Such changes may not be substantially different or greater than any offers that the employer proposed.[7]

In the present case, we conclude that the parties had reached impasse when their negotiations terminated on July 1. Following the onset of the strike, River City employed replacements at less than the $14.80-per-hour contractual rate. This procedure is lawful under Board precedent. E.g., *Marbro Co.*, 284 NLRB 1303 (1987); *Capitol-Husting Co.*, 252 NLRB 43, 45 (1980), enfd. 671 F.2d 237 (7th Cir. 1982); *Imperial Outdoor Advertising*, 192 NLRB 1248 (1971), enfd. 470 F.2d 484 (8th Cir. 1972).

On the other hand, the record reveals that the Respondent raised the wages of returning strikers Melton and Birchfield. It is also undisputed that on July 1 the Respondent unilaterally terminated contractual benefit fund payments for all its employees, including journeymen. Contrary to the Respondent's argument that it was permitted to make these changes in accord with its treatment of strike replacements, we note that the cessation of benefit fund payments preceded the strike and that the wages paid to the returning strikers were not made pursuant to any claim that the strike relieved the Respondent of the duty to bargain and were not expressly limited to the period of the strike. These changes were also inconsistent with the Respondent's offer to the Union to "red-circle" current journeymen at their contractual rates of wages and benefits.[8] We therefore find that the Respondent violated Section 8(a)(5) in these respects.[9] We will order it to cease and desist from doing so, and to make affected employees whole for any losses resulting from the unlawful unilateral changes.[10]

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[4] With regard to sec. E of the judge's decision, we conclude that the singing by River City Co-Owner Fish of the song, "Do You Know the Way to San Jose?" in the presence of two employees did not violate the Act. The judge found that Fish's action constituted an implied threat in view of the employees' common knowledge that construction employment was then depressed in the Sacramento area, whereas San Jose presented the main locus for such employment. We find Fish's conduct too ambiguous to justify the judge's speculation that Fish thereby threatened the employees with discharge.

[5] *Taft Broadcasting Co.*, 163 NLRB 475, 478 (1967).

[6] *NLRB v. Katz*, 369 U.S. 736 (1962); *Western Publishing Co.*, 269 NLRB 355 (1984).

[7] *Atlas Tack Corp.*, 226 NLRB 222, 227 (1976), enfd. 559 F.2d 1201 (1st Cir. 1977).

[8] We reject the Respondent's contention that the Union's insistence on interest arbitration made permissible the unilateral changes not encompassed by prior contract proposals. See, e.g., *Tampa Sheet Metal Co.*, 288 NLRB 322 (1988). We also reject River City's contention that its 20-cent-per-hour wage increase was de minimis.

[9] See, e.g., *Schmidt-Tiago Construction Co.*, 286 NLRB 342 (1987); *Marbro Co.*, supra.

Member Cracraft continues to adhere to her position that in certain circumstances an employer's obligation to bargain may be suspended with regard to the wages, hours, and terms and conditions of employment of employees who abandon a strike and return to work. See *Schmidt-Tiago*, supra, at fn. 9 (joining then Chairman Dotson's dissent in relevant part). This position was and continues to be a minori[illegible]. For institutional reasons, Member Cracraft will apply precedent in [illegible]a.

[10] Any interest due on trust fund payments shall be computed in the manner prescribed in *Merryweather Optical Co.*, 240 NLRB 1213 (1979).

ORDER

The National Labor Relations Board orders that the Respondent, River City Mechanical, Rancho Cordova, California, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Threatening its employees with discharge, business closure, more onerous working conditions, or lockout because of their union sympathies, membership, or activities.

(b) Promising its employees better benefits if they withdraw their support for the Union as their bargaining representative.

(c) Bypassing the Union and dealing directly with unit employees concerning wages and other terms and conditions of work.

(d) Unilaterally paying returning journeymen strikers an additional 20 cents an hour, and unilaterally terminating journeymen's benefit fund payments, where those actions vary from contract terms proposed to the Union; providing, however, nothing in this Order shall be construed as requiring rescission of any wage increase previously granted.

(e) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Restore and give retroactive effect to the unlawfully terminated benefit fund contributions in effect for journeymen employees on June 30, 1981.

(b) Make whole the employees in the appropriate unit who were adversely affected by the Respondent's unlawful unilateral failure to make benefit fund payments.

(c) Preserve and, on request, make available to the Board or its agents for examination and copying, all payroll records, social security payment records, timecards, personnel records and reports, and all other records necessary to analyze the amount of backpay due under the terms of this Order.

(d) Post at its principal place of business in Rancho Cordova, California, copies of the attached notice marked "Appendix."[11] Copies of the notice, on forms provided by the Regional Director for Region 20, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material.

(e) Notify the Regional Director in writing within 20 days from the date of this Order what steps the Respondent has taken to comply.

MEMBER CRACRAFT, concurring in part and dissenting in part.

Finding that there has been no showing that the Respondent's "provocative and unlawful away-from-the-table statement" influenced the "aims or attitudes" of a coordinated bargaining negotiator, my colleagues conclude that the Respondent did not engage in bargaining in bad faith during its 1981 negotiations. I disagree with my colleagues only as to their conclusion that the Respondent's conduct away from the bargaining table, contemporaneous with negotiations, did not demonstrate bad faith in bargaining.[1] Our disagreement is factual. We agree that the Respondent's good or bad faith in bargaining must be detemined based on the totality of its conduct.[2] We also agree that the Respondent's bargaining table conduct alone does not support a finding that the Respondent bargained in bad faith. However, my analysis of the Respondent's unlawful away-from-the-table conduct leads me to the conclusion that the Respondent was not negotiating in good faith during its 1981 negotiations.

Coordinated bargaining[3] between the Union and 14 independent contracting companies[4] began on June 2, 1981. The Respondent and the other companies were represented during bargaining by Attorney Mark Thierman.[5] Eight bargaining sessions were followed on July 7 by a strike of the Respondent's employees.

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[11] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

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[1] I agree with my colleagues' findings that the Respondent violated Sec. 8(a)(5) and (1) by engaging in direct dealing with its employees and Sec. 8(a)(1) by interrogating its employees, threatening not to hire employees based on their union membership, promising benefits to employees, threatening to close its operation, and threatening employees with discharge.

[2] See, e.g., *NLRB v. Virginia Electric & Power Co.*, 314 U.S. 469 (1941); *Atlanta Hilton & Tower*, 271 NLRB 1600 (1984).

[3] *Atlanta Hilton & Tower*, 271 NLRB 1600 (1984). The parties herein agreed on the term "coordinated bargaining" to describe their negotiations. Ordinarily, this term is utilized to describe bargaining by different unions that retain separate, independent decision-making authority. See, e.g., *AMF Inc.*, 219 NLRB 903 (1975); *Harley Davidson Motor Co.*, 214 NLRB 433 (1974). In any event, it is clear that the parties herein agreed that the bargaining was on a single-employer basis.

[4] Several of the companies ceased taking part in these negotiations. Eventually, only 12 of the companies remained.

[5] Additionally, representatives of the Respondent were present at at least 3 of these meetings.

Contemporaneous with this bargaining, the Respondent, through its co-owners, Fish and Keeling, negotiated directly with the vast majority of bargaining unit employees. Their specific, detailed proposals covered hourly wages, vacation, health insurance, and pension. Their direct offers varied from the offers made to the Union. Frequently, the Respondent's offers to its employees were contingent on resignation from the Union. The Respondent's offers were carefully explained to employees by its bookkeeper, who provided a dollar-for-dollar comparison of the "direct" offers to the offers being advanced at the bargaining table. In response to employee concerns about job security or vested pension benefits, the Respondent offered personal contracts guaranteeing area wage and formation of an area labor pool for steady employment. The Respondent's bookkeeper also reported to employees that pension benefits would not be forfeited on resignation from the Union.

Interspersed throughout this period of direct dealing, the Respondent also committed numerous violations of Section 8(a)(1) including interrogations, threats of closure, and promises of benefits.

In these circumstances, I conclude that the totality of the Respondent's conduct evinces bad faith.[6] My colleagues' conclusion to the contrary effectively insulates the Respondent from its unfair labor practices by virtue of its coordinated bargaining representative.[7]

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

Section 7 of the Act gives employees these rights.

To organize

To form, join, or assist any union

To bargain collectively through representatives of their own choice

To act together for other mutual aid or protection

To choose not to engage any of these protected concerted activities.

WE WILL NOT threaten you with discharge, business closure, more onerous working conditions, or lockout because of your union sympathies, membership, or activities.

WE WILL NOT promise you better benefits if you withdraw your support from Sheet Metal Workers Union Local No. 162, Sheet Metal Workers International Association, AFL-CIO as your bargaining representative.

WE WILL NOT bypass the Union and deal directly with you concerning wages and other terms and conditions of work.

WE WILL NOT unilaterally change your wages and benefits, after bargaining to impasse with the Union, where those changes vary from contract terms proposed to the Union.

WE WILL NOT, however, withdraw any wage increase previously granted.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL restore and give retroactive effect to the benefit fund contributions for journeymen employees that we unlawfully changed on and after July 1, 1981.

WE WILL make whole, with interest, our employees in the appropriate unit who were adversely affected by our unlawful unilateral changes in their benefits.

RIVER CITY MECHANICAL

Kathleen Aure, Esq., for the General Counsel.

Dennis Cools and *Robert Brown (Thierman & Simpson)*, of Sacramento, California, for the Respondent.

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[6] Because I would find that the Respondent engaged in bad-faith bargaining, I would also find that a lawful impasse in bargaining was precluded. See, e.g., *United Contractors*, 244 NLRB 72 (1979); *Palomar Corp.*, 192 NLRB 592 (1971). For this reason, I concur in the result reached by my colleagues and conclude that the Respondent violated Sec. 8(a)(5) in unilaterally modifying its journeymen employees' wages and terminating their contractual benefit fund payments.

I also reject the Respondent's argument that the Union's insistence that the Respondent was bound by the interest arbitration provisions of the expired SMACNA contract constitutes a defense. As the judge concluded, the Respondent's unlawful conduct predated the Union's invocation of the interest arbitration provisions of the expired contract. The Union continued to meet and negotiate despite its contention that the Respondent was bound by interest arbitration. There is simply no evidence to link the Union's position regarding interest arbitration to the Respondent's unfair labor practices.

[7] See *Berbiglia, Inc.*, 233 NLRB 1476 (1977) (appearance of good-faith bargaining at the table negated by the respondent's unlawful conduct away from the table including circulation of a decertification and deauthorization petition, statements of employees that they would receive better benefits without the union, and a letter circulated by the respondent to all unit employees informing them that the union did not desire to represent them); *Safeway Trails, Inc.*, 233 NLRB 1078 (1977) (bad-faith bargaining found despite apparent good-faith bargaining at the table where the respondent engaged in repeated communications directly to unit employees in which it disparaged the efficacy of the union negotiator). Admittedly, these cases may be distinguished factually. Nevertheless, I find their logic equally applicable in the instant case.

Kathryn A. Sure (Wylie, Blunt, McBridge & Jesinger), of San Jose, California, for the Charging Party.

DECISION

STATEMENT OF THE CASE

RUSSEL L. STEVENS, Administrative Law Judge. This case was tried in Sacramento, California, on August 31 and September 1, 2, and 3, 1982.[1] The complaint in Case 20-CA-16449 is based on a charge filed July 21 by Sheet Metal Workers Union Local No. 162, Sheet Metal Workers International Association, AFL-CIO (Union); a first amended charge filed by the Union on August 14; and a second amended charge filed by the Union on October 1. The complaint in Case 20-CA-16451 is based on a charge filed by the Union on July 21, and a first amended charge filed by the Union on August 14.[2] By order dated September 30, the Acting Regional Director for Region 20 consolidated the two cases for trial. The two complaints, as amended January 29, 1982, allege that Perrin Heating and Air Conditioning (Perrin) and River City Mechanical (River City) (Respondents) violated Section 8(a)(1), (3), and (5) of the National Labor Relations Act (Act).

All parties were given full opportunity to participate, to introduce relevant evidence, to examine and cross-examine witnesses, to argue orally, and to file briefs. Briefs, which have been carefully considered, were filed on behalf of the General Counsel and Respondents.

On the entire record, and from my observation of the witness and their demeanor, I make the following

FINDINGS OF FACT

I. JURISDICTION

At all times material, Perrin, a California corporation with an office and place of business in Sacramento, California, has been engaged in the sale and installation of heating and air-conditioning units to contractors and homeowners and, during the 12-month period ending August 6, 1981, in the course and conduct of its business operations, purchased and received at its Sacramento facility products, goods, and materials valued in excess of $50,000 directly from points outside the State of California.

At all times material, Respondent River City, a California partnership with an office and place of business in Rancho Cordova, California, has been engaged in the sale and installation of heating and air-conditioning units to contractors and homeowners, and during the 12-month period ending August 31, 1981, in the course and conduct of its business operations, purchased and received at its Rancho Cordova facility products, goods, and materials valued in excess of $50,000 directly from points outside the State of California.

At all times material, Respondent River City, a California partnership with an office and place of business in Rancho Cordova, California, has been engaged in the sale and installation of heating and air-conditioning units to contractors and homeowners, and during the 12-month period ending August 31, 1981, in the course and conduct of its business operations, purchased and received at its Rancho Cordova facility products, goods, and materials valued in excess of $50,000 directly from points outside the State of California.

I find that Perrin and River City each is, and at all times material has been, an employer engaged in commerce within the meaning of Section 2(2), (6), (7) of the Act.

II. THE LABOR ORGANIZATION INVOLVED

Sheet Metal Workers Union Local No. 162, Sheet Metal Workers International Association, AFL-CIO is, and at all times material has been, a labor organization within the meaning of Section 2(5) of the Act.

III. THE ALLEGED UNFAIR LABOR PRACTICES

Background[3]

At times relevant, Perrin principally was owned by Robert Tarabetz,[4] who was the company president, and Dave Rossi, who was secretary-treasurer. Also at times relevant, River City was owned by partners James Keeling and James Fish. Both organizations were small companies, engaged primarily in the installation of heating and air-conditioning facilities in residential and small commercial establishments.

Perrin and River City formerly were members of Sheet Metal and Air Conditioning Contractors National Association, Sacramento Valley Chapter, Inc. (SMACNA), which had a contract with the Union effective July 1, 1978, through June 30, 1981.[5] Both companies resigned their memberships in SMACNA in timely manner before expiration of the contract, and advised the Union that they intended to bargain with the Union separately and independently.[6]

Before expiration of the SMACNA-Union contract, Mark Thierman, an attorney, was retained by 14 sheet metal contractors, including Perrin and River City, to negotiate separate and individual labor agreements with the Union. Thierman was retained by the various companies approximately in February 1981, and thereafter personally visited all their shops to learn more about their operations and their problems. The principal problem was that the depression of the housing industry was resulting in an equally depressed heating and air-conditioning industry. Competition among companies in the latter industry was keen, and the 14 organizations represented by Thierman were adversely affected by the ability of nonunion companies to underbid them on the reduced number of jobs that were available. Further, companies from outside the Sacramento area who ordinarily did not compete in that area, were coming into Sacrameto and bidding with the advantage of labor costs appreciably below those prevailing among the 14 companies represented by Thierman.

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[1] All dates are 1981 unless stated otherwise.

[2] The complaint in Case 20-CA-16621, consolidated on December 30 with Cases 20-CA-16449 and 20-CA-16451, was severed at trial by counsel for the General Counsel, with leave of the administrative law judge, and later was withdrawn by the Regional Director for Region 20.

[3] This background summary is based on stipulations of counsel and on credited testimony and evidence not in dispute.

[4] Individuals are referred to by their last names, except as noted below relative to two individuals named Keeling.

[5] Keeling testified that River City never had been a member of SMACNA, but G.C. Exhs. 2 and 3 are, respectively, resignations of River City from the association, and notification to the Union of the resignation. In any event, there is no dispute concerning association membership or withdrawal therefrom by any contractor.

[6] The fact that the resignations were timely and effective is not in dispute.

The first negotiation session between the 14 "independent" contractors and the Union was held June 2, and 7 other sessions were held thereafter. Among those who attended all sessions were Thierman; Roy White, who was the Union's business manager and financial secretary and who represented the Union; and Ronald Brown, who was an employee of Thierman's law firm. Others, including some individual contractors or their representatives, attended some of the session. At the first session,[7] Thierman announced that he was representing the 14 contractors, who were named. Thierman said he would be negotiating separate contracts for each contractor, and Robert Jesinger, who was in attendance as a union attorney, suggested the term "coordinated bargaining," which was accepted. Jesinger requested that Thierman submit written authorization of his representation of all the contractors who were negotiating. Thierman emphasized he was seeking new contracts and not renegotiation of the SMACNA contract that was expiring. Thierman stated that the two principal concerns of the contractors were their impaired inability to compete in the Sacramento area and their dissatisfaction with the Union's apprenticeship system. The apprenticeship problem was a part of the competition problem and, Thierman explained, was occasioned by the fact that the ratio of apprentices to journeymen required by the Union's standard contract, i.e., one apprentice to four journeymen, was unrealistic because of the extensive use in small jobs of flexiduct, which required very little skill or training. Thierman stated that he would agree, however, to retain journeymen then employed, at the wage and benefit levels of the SMACNA contract that was expiring.[8] Thierman gave Jesinger proposed wage rates, and Jesinger stated that the Local had no authority to change the International contract; he said it only had authority to change the International contract; he said it only had authority to execute some addenda to that contract. Thierman then objected to section 8 of article 10 of the International agreement, which provided that controversies arising out of the failure of the parties to negotiate a renewal of the agreement must be settled in accordance with section 8, which includes referral of the controversy to the National Joint Adjustment Board (NJAB). Jesinger said[9] that, in his opinion, section 8 of article 10 applied to the contractors Thierman represented and, if an impasse was reached, that section would be invoked. Thierman replied that, in his opinion, such action would violate the National Labor Relations Act (Sec. 8(b)(1)(B) and (4)(A)). The Union asked for the contractors' specific proposals, and Thierman said they would be available at the next session.

At the next session, held on June 5, Thierman told Jesinger he had written the latter a letter outlining his position relative to section 8, article 10 of the expiring contract. The text of the letter, which later was received by Jesinger, read as follows:

> During our bargaining session on June 2, you indicated that it was the Union's position that the impasse resolution procedures set forth in Article X, Section 8 of the Standard Form of Union Agreement would be operative for purposes of resolving disputes arising out of negotiations for a new agreement for those of my clients who have withdrawn from the multiemployer unit. We contend that this is not a "renewal" but an entirely separate agreement with different parties. Notwithstanding, this is to inform you that it is our position that the procedures in question constitute a permissive subject of bargaining (*Sheet Metal Workers, Local 59*, 227 NLRB 520, 94 LRRM 1602 (1976)), and are thus subject to unilateral modification or rescission by management at any time (*Chemical Workers v. Pittsburgh Plate Glass Co.*, 404 U.S. 157, 78 LRRM 2974 (1971)) particularly after expiration of the agreement itself. Accordingly, as of the expiration date of the agreement, please be advised that management will consider this, and all other permissive subjects in the Standard Form of Union Agreement to have expired and to be of no further force and effect. We believe any action to enforce these abrogated provisions by your client would constitute an unfair labor practice. I trust we can continue negotiations without any further digressions.

Jesinger told Thierman he was not interested in negotiating separate wage scales for all the contractors represented by Thierman, and gave to Thierman a copy of the Union's proposal, which basically was the International agreement negotiated with SMACNA. Wage rates were to be worked out later, the Union wanting a journeyman rate for residential workers and another rate for individuals who were not journeymen. Thierman reiterated that, although some provisions possibly could be applicable to, and acceptable by, all the contractors he represented, he wanted separate contracts for each employer, and not a common contract.

On June 11 Thierman mailed to Jesinger proposed noneconomic contract provisions that were acceptable by all the contractors he represented, and those proposals were discussed at the third session, held June 15. Thierman reiterated that he would not agree to any

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[7] The facts stated in this paragraph, and in the paragraphs next following, relating to bargaining sessions, are from the testimony of Brown, whose notes of the sessions are R. Exh. 7. Brown was an unusually straightforward, convincing witness, and his testimony is credited. To the extent that his testimony differs from that of White, Brown is credited. White appeared throughout his testimony to be confused, uncertain, and unreliable. His testimony is not credited, except as otherwise noted.

[8] This retention sometimes is referred to as "red circling" or "red lining."

[9] Jesinger did not testify.

NJAB provision. Wage rates were discussed, but only in general terms, with each side insisting on its position.

At the next session, held June 17, Thierman handed to Jesinger 12 sheets of paper, each listing the economic proposals of the individual contractors.[10] Thierman related instances wherein contractors he represented had lost contracts to nonunion contractors, and requested copies of union contracts with other employers in the Sacramento area. Several contractors who were present related wages then being paid by nonunion contractors, which were well below those then being paid under the SMACNA union agreement. Jesinger gave to Thierman a complete union proposal, which was the standard (International) contract with addenda 1, 2, and 3. The contractors' wage proposals included a separate employee classification for residential workers who had no prior sheet metal experience.

The next negotiation session was held on June 22. Some of the employers' proposals were discussed, and Jesinger said he was withdrawing the Union's proposal for the "equal contracts"[11] clause contained in the International agreement. Thierman reiterated his request for other area contracts, given orally in the meeting of June 17 and by letter to Jesinger dated June 19. Some contractors were at the meeting with their bookkeepers, and they illustrated the problem they were having in competing with nonunion contractors who paid wages far below the union scale. In response to Jesinger's question concerning Thierman's proposed action if a contract was not concluded by July 1, Thierman replied that no unilateral changes would be made in working conditions subject to mandatory bargaining so long as the parties were negotiating, and that, if impasse were reached, he would advise Jesinger before any unilateral implementation of contract proposals. Jesinger said he was not precluding individuals' contracts, but if impasse was reached, he wanted to know which contractors would be willing to submit the matter to NJAB without "a court fight." Thierman replied that the question was premature, but in any event, he felt that no contractor would be legally bound by the NJAB provision of the SMACNA agreement after it expired July 1, because that was a permissive, not a mandatory contract provision. Thierman said that, if the employees went out on strike, the contractors' last best offers would be implemented and replacement workers would be hired. Jesinger said the Union only had one residential agreement for outlying areas, and he gave a copy of that agreement, plus copies of five other agreements the Union had in the local area, to Thierman. Thierman presented counterproposal from B. J. Heating and Air Conditioning, Inc. (B.J.) and said that the most likely candidate for agreement with the Union was B.J.; that if agreement was reached with one contractor, all other contractors probably would "follow suit."

The next session was held on June 30. The Union was given a copy of B.J.'s economic proposals, to which much of the Union agreed, including health, welfare, and pension plans. Jesinger agreed to B.J.'s residential wages scale, and agreed to some modification of the Union's standard employee classifications. A ratio proposal (apprentices to journeymen) was discussed, with B.J. proposing no ratio for residential work, four apprentices (which B.J. referred to as residential workers) to each journeyman for light commercial work, and one residential worked to each journeyman for heavy commercial work. No agreement was reached on proposals for shop fabrication to be done by residential workers; the wage rate for journeymen ($14.80 per hour vs. $16.50); or term of contract (2-1/2 years vs. 1 year).

The final bargaining session was held on July 1. B.J. agreed to accept the Union's standard form of contract (International), with some minor modifications in the grievance procedure, which the Union accepted, and duration of the contract, with which the Union agreed in part. B.J. proposed a modification of addendum 1 relating to an industry promotion fund, and White said he would submit that to the membership. B.J. proposed several substantial changes in addendum 3, concerning shop fabrication, employee ratios (residential workers to journeymen), and the "red circle" provision. Thierman said B.J.'s offer was the final offer of B.J., Placer Heating and Air Conditioning, Don Ring Heating and Air Conditioning, Horrel and Sons, and Sorocco Heating and Air Conditioning, although Ring and Horrel wanted to make some minor modifications to the proposal. Thierman said that, if agreement with the five contractors was reached, some others may agree after a week or so of picketing. However, he said, some would not agree with B.J.'s last offer. Jesinger submitted the Union's standard (International) form of agreement with some modifications, refused to go beyond a ratio of three journeymen to one residential worker; and agreed to B.J.'s proposed pay for residential workers. Jesinger said he wanted a last offer from "those hiding out in the weeds," i.e., Perrin, River City, and others who had not adopted B.J.'s final offer. Jesinger handed a copy of a letter signed June 25 by White, reading as follows:

June 25, 1981

Mr. Edward J. Carlough, G. P.
Sheet Metal Workers Int'l. Assn.
1750 New York Avenue, N.W.
Washington, D. C. 20006

Dear Sir and Brother:

On June 20, 1981 Local 162 requested the services of the N.J.A.B. should negotiations between S.M.A.C.N.A., Sacramento Valley Chapter and Local 162 reach an impasse. The parties mentioned above have sucessfully reached an agreement for a new two (2) year agreement; but an impasse has been reached between Local 162 and a group of independent contractors and contractors that have pulled away from S.M.A.C.N.A. in negotiations for a residential addendum.

We have reached an impasse with this group of contractors (list attached) and respectfully request the services of the Board at their meeting in Denver, Colorado the week of July 6–10, 1981, to

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[10] At a time not established during trial, but before June 17, 2 of the original 14 contractors represented by Thierman, Madding, and Beutler, withdrew their authorizations of their representation. Subsequently, Thierman represented only 12 contractors.

[11] This sometimes is referred to as a favored nations clause.

> resolve any and all deadlocked issues between this group and any other independent contractors involved.
>
> Due to prior commitments, I respectfully request this case be docketed for July 6th or 7th, 1981. All necessary data and documents will be submitted as quickly as possible.
>
> Fraternally yours,
> /s/ Roy C. White
> ROY C. WHITE
> Business Manager

Jesinger explained that the letter was written before impasse, in order to be placed early on NJAB's agenda, in the event an impasse was reached. He also explained that, although all contractors were listed on the attachment to the letter, the letter was intended to apply only to contractors who adopted B.J.'s last offer on July 1, i.e., B.J., Placer, Ring, Horrel, and Sirocco. Thierman told Jesinger that the contractors who did not join B.J. would have as their final offer, the offer of B.J. submitted on June 30. That offer included the noneconomic proposals previously submitted to the Union, and the economic proposals attached to Brown's notes of June 30. Jesinger told Thierman, "if the members reject their offer we are at impasse and you can implement." Jesinger also told Thierman that he should see White about making arrangements to go to NJAB.

On July 2 Thierman wrote a letter to NJAB[12] stating, inter alia, that section 8, article 10 of the SMACNA agreement did not apply to contractors he named as his clients, i.e., B.J., Placer, Ring, Horrel, Sierra, and Soraccos (elsewhere spelled Sirocco).

An NJAB meeting was held in Denver, Colorado, on July 7.[13] Thierman attended, accompanied by Ring and Bob Johnson (B.J. Heating). Thierman advised the members of NJAB that he was appearing specially since, in his opinion, the contractors he represented were not members of SMACNA. Thierman contested NJAB jurisdiction over the contractors he represented and presented a copy of his letter to Jesinger dated June 4 (quoted supra). Later in July, Thierman received a telegram from NJAB, advising him that NJAB had ruled in favor of the Union and demanding compliance with NJAB's award. Thierman sent a reply telegram refusing to comply with the award. On July 20 Jesinger's office sent a letter to Thierman[14] stating that the Union considered all 12 of the contractors represented by Thierman to be bound by article 10, section 8 of the SMACNA agreement and demanding that all 12 of those contractors submit to the NJAB award.[15] None of the 12 contractors has complied with the award.

On July 7 the employees of Perrin and River City went out on strike, pursuant to a union member vote taken before the NAJB meeting. B.J. and those emloyers allied with B.J. were not struck until sometime in August.

Contentions of the Parties

The General Counsel contends that Respondents violated Section 8(a)(1) and (3) of the Act on several occasions, as discussed below, and through those actions and the refusal of Respondents to bargain in good faith with the Union, precluded agreement with the Union in violation of Section 8(a)(5) and (1) of the Act.

Respondents deny any 8(a)(1) and (3) violations of the Act; and contend that the Union illegally insisted on submission of the 12 contractors, including Respondents, to the NJAB process, and otherwise bargained in bad faith, thereby precluding further productive bargaining and thereby authorizing Respondents to implement their final offer without further bargaining.

A. *Alleged Threat by Rossi*

Paragraph 10 of the complaint[16] alleges that, on or about July 6, Rossi of Respondent Perrin threatened employees with discharge unless they withdrew their support of the Union as their bargaining representative.

James Merritt was employed by Respondent Perrin on three occasions in 1978, 1980, and 1981. His 1981 his employment ended July 6 after being employed approximately 10 days. Merritt testified that, at the end of the workday on July 6, he talked with Rossi:

> We were still in the shop, but everybody else was talking and Dave came over and he and I were talking. He told me he would like for me to stay with the company and that—we didn't talk money. We talked, you know, just about that. And I was kind of uncommittal because, to tell you the truth, I didn't really want to get into a big discussion. I believe that union is the only way to go and that's the way I was staying. So I told him I would really, you know, I hadn't really made a decision.
>
> Then he told me that unless we went non-union that would be the last day we would work, that we would work.

Rossi denied meeting with Merritt on July 6, and denied Merritt's testimony on this subject.

Discussion

The fact that employees and supervisors, among themselves and between supervisors and employees, frequently talked about the Union and negotiations between the Union and several contractors is not in dispute. Such talk was common in the shops, including that of Perrin.

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[12] R. Exh. 10.

[13] The facts in this paragraph are from Thierman's credited testimony. To the extent of any discrepancy between Thierman and White on this subject, Thierman is credited. As noted supra, White's testimony appeared quite confused and unreliable.

[14] R. Exh. 4.

[15] Thierman's letter to NJAB dated July 2 only listed five of the contractors, and White testified that only those five were involved in the NJAB process. However, it is quite clear that both NJAB and Jesinger considered all 12 contractors represented by Thierman to be bound by the NJAB award. Thierman credibly testified to that effect; the letter from Jesinger's office so states; and the Union's complaint for injunctive and declaratory relief, filed with the U.S. District Court for the Eastern District of California on September 3, 1981, so states. Perrin and River City are included within the 12 contractors. White's testimony that Thierman stated at the negotiation session of July 1 that he no longer represented Perrin and River City credibly was denied Brown and Thierman. White's testimony on this point is given no credence.

[16] References to the "complaint" subsequently refer to the amended consolidated complaint issued January 29, 1982.

Rossi's supervisory status is not in dispute, and it is clear that, if the statement alleged to have been made was made, it would have been a violation of the Act. The alleged threat was loss of jobs unless the employees, including Merrit, gave up one of their statutory rights, i.e., union membership.

The only question relative to this issue is that of credibility. Merritt was a convincing witness, and his testimony on this issue is credited. Rossi's statement was a threat in violation of Section 8(a)(1) of the Act, as alleged.

B. *Alleged Direct Dealing with Employees*

Paragraph 11(a) of the complaint alleges that, in mid-June and on or about July 2 or 3, Tarabetz and Rossi of Perrin bypassed the Union and dealt directly with employees in the appropriate unit.

Jack Johnston had been employed by Perrin as a journeyman approximately 15 months, as of June 1981. Johnston testified that he talked with Rossi in mid-June, while Tarabetz was present:

> From what I can recall and by rereading the deposition I made right after in August, they offered if there was no agreement with the union, if they couldn't reach an agreement, that they would offer $15 an hour and some other things, too.
>
> Q. What were the other things, if you recall?
>
> A. The only thing I can remember was medical insurance, and that's all I know about that, and a one week vacation.[17]

Johnston also stated, after some leading questions, that possibly Rossi also talked about pensions, and that Rossi told him Perrin would pay his union reinstatement fee if he was laid off by Perrin within a year. Johnston replied that he "would think about it," and asked if Perrin's offer would be put in writing, to which Rossi replied "yes."

Johnston testified that he talked again with Rossi and Tarabetz during the first couple of days in July and that they reiterated their earlier offer. They also told him that if Perrin did not reach agreement with the Union "I could stay and work for them if I wanted to."

Rossi and Tarabetz denied Johnston's testimony relative to this issue.

Discussion

Respondents argue that Johnston's memory was fuzzy, that he harbored a grudge against Perrin, and that he was not a credible witness. It was apparent that Johnston's memory was not clear and sharp, but he appeared to be telling the truth, and there was no appearance of obfuscation or evasion. The fact that he was somewhat uncertain lent credence to his recitation. The denials of Rossi and Tarabetz, and their testimony in general, seemed less reliable than the testimony of Johnston. Johnston is credited.

The alleged unit at Perrin, which is denied by Respondents, is:

> All employees covered under the terms of the June 30, 1978 to June 30, 1981 collective bargaining agreement between Sheet Metal and Air Conditioning contractors National Association, Sacramento Valley Chapter, Inc. and the Union.

Respondents offered no evidence to show that the above unit is not appropriate. It is found to be appropriate, based on the testimony of record and the past acceptance and practice of Respondents.

The contract between SMACNA and the Union expired June 30, 1981, and it had been honored by Respondents and the Union throughout its 3-year life. Continuation of work terms and conditions set forth in the expired contract is required, unless changed by the parties, or the parties have bargained to impasse, or the Union no longer represents the employees. The Union is presumed to be the continuing representative of Respondents' employees. Therefore, Respondents were obligated to deal with their employees only through the Union, so far as work terms and conditions were concerned unless one or more of the above conditions prevailed. Respondents did not show either that the parties agreed to changes in work terms and conditions, or that the Union no longer represented the employees. Respondents argue that the parties were at impasse July 1, but the first offer made to Johnston was before that date. The offer was made in mid-June, although it was reiterated on July 1 or 2.

Respondents' direct dealing with Johnston during pending negotiations with the Union constituted a violation of Section 8(a)(5) and (1) of the Act, as alleged

C. *Alleged Threat by Fish*

Paragraph 12(a) of the complaint alleges that, on or about June 17, Fish threatened employees with more onerous working conditions because they selected the Union as their bargaining representative.

Throughout June, supervisors of Respondents commonly talked with employees, individually and in groups, concerning union matters. Prework coffee sessions, and "bull sessions" of employees, sometimes alone and sometimes in company with supervisors, were common. The matter of negotiations frequently was discussed and was of keen interest to employees. A frequent topic of discussion was the possibility of Respondents "going non-union." During these conversations, Respondents' supervisors often made remarks concerning the Union, which were derisive or disparaging.

John Moss, a union member who had been employed by River City as a journeyman approximately 3 years, testified that Fish talked with him approximately June 17:

> Okay. I was not in the office. I was out in the front of the shop loading my truck to go out to the job. At that time Jim Fish come up to me and was

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[17] As of Mid-June, Perrin's highest proposal was to "red line" journeymen at their then wage of $14.80 per hour.

> in kind of a lousy mood and made the statement that from now on we're going to have to start working about 10 hours around here and I'm not paying no doubletime and that I'm not hiring anymore of these union guys and anybody that don't like it, I'll get somebody that does.

Fish denied John Moss' testimony on this subject.

Discussion

The alleged statement by Fish would, if true, constitute an unlawful threat under the circumstances of this case. As discussed elsewhere here, River City was in the midst of negotiations in mid-June and was not favorably disposed toward the Union. The wages required under the then-existing SMACNA agreement, and wages being sought by the Union for a new contract, were burdensome and, in some instances, not conducive of competitive bidding. The Union knew that fact, and acknowledged to Thierman that some relief was necessary in the residential area, for the 12 contractors Thierman represented. Fish's statement to John Moss, if made, would have constituted a threat of working conditions that would more nearly conform with the requirements of the business, so far as its competitive position was concerned. Whether John Moss was friendly and sometimes socialized, as John Moss and Fish testified, and whether lengthy work hours were not instituted, as Fish testified, are irrelevant facts.

The only question is one of credibility. John Moses was a credible witness, and his recitation of events relative to this issue is accepted as factual.

It is found that River City violated Section 8(a)(1) of the Act as alleged.

D. *Alleged Direct Dealing with Employees*

Paragraph 12(b) of the complaint alleges that, on or about June 17, June 29, July 2, July 6, and on several unknown dates in June, Fish bypassed the Union and dealt directly with its employees in the appropriate unit.[18]

Billy Bush was employed as a journeyman by River City approximately 7 months, from January to July 1981. Bush credibly testified that he was present at early morning sessions commonly attended by employees and supervisors in June, when union negotiations and other union matters were discussed. On one such occasion in June, Bush testified, several employees were talking with Fish, who said that the benefit package the Union was seeking in negotiations was too high. Bush testified that Fish said "they could give us a better coverage for $50 than what the Union was . . . for Kaiser plan . . . than what the Union had for us." Bush also testified that Fish told him approximately June 20:

> He said work was slowing down but he wanted to keep five of us going. There was me, my brother, John and Jack and Dan. But he said he had plenty of work coming up after the 1st of July.

On another occasion before June 20, Bush said, Fish told him "that they could pay us $15 an hour, plus give us a better health plan, and we'd take more money home." Bush further testified that Fish came to the Auburn Oaks Plaza job he was working on in late June and

> He said they'd give us $15 an hour, a week's vacation the first year, two weeks the second year, a retirement plan after six months, and maybe eventually a profitsharing, plus a health plan.[19]

Bush also testified that, sometime between July 1 and 6, he and three other employees talked with Fish, Keeling, Liana Keeling (River City's bookkeeper, and the wife of James Keeling), and Roy Harris (a supervisor, who was the stepfather of John and of Jack Moss, another employee of River City):

> A. Well, we was talking about the offer they gave us and Liana said that she would take—using me as an example.
>
> Q. Was that Liana Keeling?
>
> A. Yes. To show me how much more I'd bring home a week, you know, if I went non-union with them. And she figured it out, because I have a wife and three kids, and figured out I'd take home $25 a week more. Then I asked if that was above my vacation pay and they said no, that they couldn't pay that. So I said I was losing $50 a week then. They—
>
> Q. Was there any response to that?
>
> A. They said they couldn't help that.[20]

Bush testified that he overheard Keeling talking with Jack Moss later the same day at the preceding conversation:

> Moss was talking to Jim Keeling and asked him if we dropped out of the union and stayed with him what's happen if he got mad at us and fired us or let us go. And he said that there was I think he said 25 shops that were in this that were going to drop out and they were going to form like their own little union and they'd loan people back and forth so there'd be plenty of work for everbody no matter what happened at River City.

During the same converstion, Bush said, Fish told the employees River City would have a pension plan for employees within 6 months. Bush said he had a union pension plan, but was not yet "vested." Fish stated:

> He said that he had heard, you know, we had talked about losing our pensions and stuff and he said that we didn't lose it, we couldn't lose a pension as long as we were vested in the union. That all we had to do was just send a letter in and drop

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[18] The allegations of par. 13(a) of the complaint, concerning Keeling's participation in direct dealing with employees, are included within this section of the decision.

[19] Journeyman wages were $14.80 per hour plus benefits of approximately $6 per hour.

[20] It is noted that this conversation was after July 1, the date Respondents allege the parties reached impasse.

> out of the union and our pensions would still be there.

John Moss corroborated Bush's testimony relative to the frequent early morning sessions of employees, frequently attended by Fish and other supervisors, wherein union negotiations and other union matters were discussed. John Moss testified that on June 29 Fish was with several employees during an early morning session and stated:

> How if we made $15 an hour, because of the different tax bracket we'd be in and not having to pay union dues, that we would actually bring more money home on our check. And at that point I remember saying to Jim Fish well, what if you get mad at me and just lay me off, what am I going to do.
>
> Q. Did Mr. Fish respond?
>
> A. No. Mr. Keeling did. And he broke in and said well, there are going to be approximately 27 shops that we're forming our own worker pool and that you can go to any one of these shops and get a job if you leave here. And at which point my brother broke in and said what guarantee do we have that you wont lower our rate to $4 in six months, you know, we have no guarantees if we go non-union. And at that point Jim Fish said they were going to get together and draw up a complete contract of our package and all the shops would sign it and that way we'd be guaranteed certain pay and certain benefits from shop to shop.
>
> Q. Anything else that you recall about that conversation?
>
> A. Yes. I remember my brother Jack asking him, because he wasn't sure what would happen to his ten years that he had put into the union toward his retirement.
>
> Q. What did he say?
>
> A. And they both told him that there was no way—Jim Fish and Jim Keeling both told him that there was no way that the union could hold back anything that he had accumulated up to that date.

John Moss testified:

> On July 2nd Jim Fish—it was four o'clock in the afternoon after work and there was the same guys just getting ready to go home in there and he called me out of the office separate and took me around to the, I guess it would be the west side by the gutter rack and told me that he would be able to pay me $15 an hour, that I'd have a Kaiser health plan better than the union's than the one I had now. He said the first year I'd have a one week paid vacation, the second year would be a two week paid vacation and that he couldn't go over retirement right now, but that in six months we'd sit down and talk about a retirement plan.
>
> Q. Did you respond to Mr. Fish at that time?
>
> A. Yes. He asked for my answer and I was kind of afraid to give it to him because I didn't know what would happen as far as my job status. So I told him that I would have to go home and talk to my wife and make plans.

Robert Luke, a union member, was hired by Fish in April 1981 as a journeyman to work for River City. Luke testified that, approximately on June 25, he and employee Dan Flanagan talked with Liana Keeling and Fish "and [they] stated that they were going to go non-union and they wanted us to go non-union with them." Liana Keeling stated that she had talked with an International (union) representative, who assured her that, if the employees sent letters to the Union and "disaffiliated," they could not be fined and would not lose their pensions. She told Luke and Flanagan that the union costs to employees were too high, and that, if they went non-union, the employees would get more take-home pay each week, and also would get pension and health plans at less cost to the employees than what the Union was charging them. Fish said Luke could send the Union a letter of resignation, and stated "take a week off and do it." Luke testified that, approximately 3 weeks before expiration of the contract (the expiration date was June 30), he was called into Fish's office, where Liana Keeling was present, and

> Jim asked me if I would go non-union with him and made me an offer of $15 an hour, a pension plan, I believe it was after six weeks' employment, a medical plan through Kaiser, one week's vacation the first year, two weeks' vacation the second year. And after the business got going I'd go into the profit sharing plan.

Luke said he gave no answer to Fish.[21]

Wayne Lofgren presently is employed by River City, and worked at the Auburn Oaks Plaza project as a journeyman in mid-June 1981. Lofgren testified that, on June 12 or 13, Fish came to the Auburn Oaks Plaza jobsite, took him to one side, and said "he was offering $15 an hour and a health and welfare plan and one week's vacation if you stayed a year, something like that." Lofgren testified that he did not give Fish an answer.

Daniel Flanagan was employed by River City approximately 3-1/2 years as a journeyman. He was a union member. Flanagan testified that he talked with Fish and Liana Keeling on June 29 or 30, and that Luke also was present. Fish and Keeling showed the two employees the benefits they pay the Union and "then broke it down in what they could pay us." Keeling said the employees would make $50 more than they then received. Fish agreed with what Keeling told the employees. After the meeting with Fish, Flanagan stated:

> That was I believe the same day right after that meeting. Jim Fish took me out the back door of the shop and offered me, he said you will make a little more than $15 an hour, since I was the shop foreman then. And I get one week's vacation with pay, a health plan, and eventually work into a profit sharing program.

---

[21] Luke presently is employed by Fish at Fish's "new shop."

Jack Moss worked as a journeyman for River City approximately 3 years. He testified that in October or November 1980 Fish came to the job he was working on and offered him and his brother John $4 more per hour "if he went non-union." Moss said he did not reply. Moss further testified that, in June 1981, several employees and he were having an early morning discussion with Fish and Harris, and that Fish said he could pay the employees $15 per hour and if they did not pay union dues they would take home more money. At that time Moss testified, the negotiations between River City and the Union were a common source of conversation. Moss further testified that, approximately on June 17, Fish came to the project where he was working:

> It was in West Sac and he come out there and he said Jack, I'd like to know what you plan on doing. Are you going to go non-union with us? I can pay you $15 an hour. I can give you a better health plan than you are getting now. And in time maybe we can work a pension plan out and some vacation. And I told him at that time no, I was not going to be able to do that.

Jack Moss further testified that he overheard an argument on June 29 among John Moss, Bush, Keeling, and Fish, and that he entered the argument. The topic of discussion was River City's proposed personal contracts with its employees. Jack Moss said he asked how the employees could be protected against River City's possible reduction of pay and benefits (after the Union was out), and "Jim Fish interrupted and said that they were going to draw up a contract with all these provisions on it for us to sign." They then discussed possible loss of less-than-vested interests in union pension plans, and Fish told Jack Moss that, since he was close to vesting, he could take off a couple of months until he was vested, after which he would not lose his union pension.

Harris testified that, in mid-June, he went to the Auburn Oaks Plaza site with Fish, who talked individually with Bush, Lofgren, and employee Tom Melton. Harris said he did not overhear all the private conversations, but that he did hear Fish tell Bush "something about wanting to get negotiations going, that if anyone stayed they'd get $15 an hour I think was mentioned."

Liana Keeling denied ever talking with any employees concerning union wages or benefits, and also denied ever being with Fish and employees when Fish made an offer of $15 per hour to employees. However, she stated that Fish told her in June, when they were alone "possibly if any of the men stayed or wanted to or whatever that he would pay $15." Liana Keeling later testified that, sometime after July 1, Jack Moss came to the office and talked with her concerning River City's intentions relative to the employees. She said she replied that she did not know, but "We'll be paying medical, and dental, and good wages," and that the employees would vote on medical plans which she had researched.

Fish denied ever talking with employees concerning offers if River City went nonunion. He said he only responded to employees' questions concerning the status of negotiations. Fish said Luke asked him sometime between July 1 and 6 what River City would do if everyone walked out, and that he replied he would get replacements. Luke said, "make me an offer" and Fish replied, "It's basically what you're getting now and the health and welfare plan."

David Birchfield, who worked for River City as a union member and journeyman from 1979 until 1981, testified that, approximately July 1, Fish talked with the employees and said, "our jobs was there if we wanted them. If we didn't, we would probably go out on strike. And he said, you know, he had the job if we wanted to work."

Keeling testified that his principal job was to solicit contracts and to do estimating for jobs. He said Fish and Harris supervised the employees. Keeling testified that he did not attend any negotiation sessions, and that he never discussed any union matters with employees. He denied telling employees that River City was going nonunion, and denied being present at any conversation when Liana Keeling discussed employees' take-home pay.

Discussion

It is clear that, so far as this allegation is concerned, Flanagan must be considered separately because he was a supervisor as that term is defined in the Act. Flanagan was a credible witness, and testified without contradiction that he was paid at the Union's foreman scale, directed the work of employees in the shop; gave work assignments to employees; worked with his tools 5-1/2 to 6 hours each day and spent the rest of the time doing paperwork and "keeping everybody and keeping everything moving"; admonished employees who made errors; read the blueprints for jobs and distributed the work among employees; rejected or accepted employees' work; effectively recommended employees for hire and layoff; evaluated the work of employees and informed Fish or Harris of those evaluations; and effectively recommended suspension and discharge of employees. The shop had from two to four employees, and Flanagan was the only shop foreman. Flanagan worked alongside other employees, dressed as they did at work, parked where they did, and did not attend management meetings. However, he clearly was boss of the shop, and it is found that he was a supervisor within the meaning of the Act. Therefore, so far as this allegation of the Act is concerned, his testimony is given no weight.

If accepted as true, the testimony of Bush, John and Jack Moss, Luke, and Lofgren would establish violations of the Act as alleged. As discussed above, Respondents and the Union were in the midst of negotiations in June. The Union represented Respondents' employees in the appropriate unit, and it would be unlawful for River City to deal directly with employees without participation of the Union, relative to wages, hours, and other terms and conditions of work. The testimony of the named employees was that Fish did, as alleged, deal directly with them and attempt to persuade them to "go nonunion."

The question is whether the named employees testified truthfully. It is found that they did. Bush, Luke, and the two Moss brothers particularly were credible witnesses.

The pattern of the conversations between Fish and the employees was a common one, and the testimony of the employees did not appear illogical or contrived. All the employee-witnesses answered in a forthright manner, and none of them appeared antagonistic toward Fish or River City.

It is found that, by dealing directly with employees as alleged, Respondent River City violated Section 8(a)(5) and (1) of the Act.

E. *Alleged Threat by Fish*

Paragraph 12(c) of the complaint alleges that, in mid-June, Fish threatened employees with discharge because they selected the Union as their representative.

John Moss testified that in late June:

> I remember one morning my brother Jack and I were walking up to the shop and Jim Fish was standing at the big door in front of the shop and as we walked up he grinned at us and started singing "Do You Know the Way to San Jose."
>
> . . . .
>
> Q. At the time that Mr. Fish sang "Do You Know the Way to San Jose" did you have any knowledge of jobs in San Jose?
>
> A. Yes. It was common knowledge throughout all the union members there that the only work right now in this time was in San Jose.

Moss presently is employed in San Jose.

Fish denied this testimony by John Moss, and said he can barely whistle.

Discussion

Under the circumstances described by John Moss, which were corroborated to the extent that several employees testified relative to depressed work availability in the Sacramento area, Fish's actions, if accepted as true, would constitute a job threat. The threat was there, even if no words were spoken.

The question is one of credibility, and John Moss was a convincing witness. It is clear throughout the record that River City wanted to be free of the Union, and adopted several measures, as discussed here, to achieve that goal. This testimony by John Moss was consistent with the general scene then prevailing, and is credited.

It is found that Respondent River City violated Section 8(a)(1) of the Act as alleged.

F. *Alleged Promise of Better Benefits*

Paragraph 12(d) of the complaint alleges that, on several dates in June and July, Fish promised employees they would receive better benefits if they withdrew their support from the Union.

These promises are included within the discussion above in section D and are found to constitute a separate violation of the Act.

G. *Alleged Threat by Fish*

Paragraph 12(e) of the complaint alleges that, on or about July 6, Fish threatened employees that River City would discontinue negotiations with the Union if the employees did not vote to ratify a proposed contract between River City and the Union.

The General Counsel introduced no testimony or evidence in support of this allegation.

Paragraph 12(f) of the complaint alleges that, in June 1981, Fish threatened to close the River City shop if the Union received the same benefits negotiated by the San Francisco Bay area Union.

Bush testified that, in early June, Fish told him, "if our union tried to get a contract like the Bay Area got that he'd close the doors down."

Fish denied this testimony by Bush.

Discussion

An unlawful threat is apparent if Bush's testimony is credited. That credit is given, and it is found, that Respondent River City violated the Act as alleged.

H. *Alleged Instructions to Employees to Resign from Union Membership*

Paragraph 12(g) of the complaint alleges that, in June 1981, Fish instructed employees to send resignation letters to the Union.

Lofgren testified that, on June 12 or 13, he talked with Harris on the job at Auburn Oaks Plaza, which was the same day Fish came to the jobsite and talked privately with him:

> [H]e suggested that I just send a letter in or something like that to drop out of the union or something.
>
> JUDGE STEVENS: Send a letter to who?
>
> THE WITNESS: To I guess the union or whatever.
>
> JUDGE STEVENS: The union?
>
> JUDGE STEVENS: All right. Thank you.
>
> BY MS. AURE:
>
> Q. Did you say anything to him in response to that?
>
> A. No. I didn't say anything.
>
> Q. Did you tell him you wanted to get out of the union?
>
> A. I didn't say nothing.

Harris denied telling any employee to resign from the Union.

Discussion

There is some testimony in the record concerning Flanagan's possible resignation from the Union, but that testimony was vague and inconclusive, and did not establish a violation of the Act, regardless of Flanagan's supervisorial status. As noted supra, Flanagan was a supervisor within the meaning of the Act.

So far as Lofgren's testimony is concerned, it was cryptic and unconvincing. It is given no credence. Harris' denial is credited, and no violation of the Act is found relative to this issue.

I. *Alleged Threat to Lock Out Employees*

Paragraph 12(h) of the complaint alleges that, on or about July 6, Fish threatened to lock out River City's employees if they failed to ratify a proposed contract between River City and the Union.

Employees who were members of the Union were scheduled to meet the evening of July 6 for the purpose of voting on Respondent's proposed contract. Rush testified that he talked with Fish before starting work the morning of July 6, and that "he told me to take my tools home that night, that we'd be locked out the next day." Bush further testified that Fish "said he knows that we wouldn't accept the contract that they offered the Union and they wouldn't accept the union contract."

John Moss testified that, on July 6:

> It was just a normal working day. We'd come in and park our trucks and were walking down the driveway heading out and Jim Fish ran out of the shop and called my brother and I back and said that hey, you guys had better take your tools with you because if you don't vote the way we want you to vote tonight there won't be a job to come to tomorrow.

Jack Moss testified that Fish told him on July 6:

> As we were leaving the shop that day as we were done working, my brother and I. We were walking out the gate and Mr. Fish said to us that we had ought to take our tools with us because if the vote didn't go in Mr. Fish's favor tonight with our union there would be no job for us to come back to tomorrow. So we of course went in and got our tools.

Fish denied the testimony of Bush and John and Jack Moss on this issue, and denied telling any employee to take his tools home.

Discussion

Fish's statement, if it was made, clearly was a coercive threat. The only question is one of credibility.

Bush and John and Jack Moss were convincing witnesses and they are credited.

A violation of Section 8(a)(1) of the Act is found, as alleged.

J. *Alleged Interrogation of Employees*

Paragraph 12(i) of the complaint alleges that in mid-June Fish interrogated employees concerning their union activities.

No evidence was introduced relative to this issue, and a violation as alleged is not found.

K. *Alleged Direct Dealing with Employees*

Paragraph 13(a) of the complaint alleges that, on or about June 29 and on an unknown date in June, Keeling bypassed the Union and dealt with unit employees.

Luke testified that, on June 26, Keeling asked him if he "was going to go non-union with him" and Luke replied that he could not give him an answer at that time.

As discussed supra, Keeling was present at, and participated in, conversations wherein Fish, assisted by Liana Keeling, dealt directly with employees by describing the exact differences between pay and benefits the employees received through the Union, and pay and benefits they would receive if they dealt with River City as a nonunion employer.

Keeling denied ever dealing directly with employees.

Discussion

Based on the credited testimony of Luke, and on the testimony of other witnesses discussed supra, under section D, it is found that Keeling, alone and together with Fish, dealt directly with employees and bypassed the Union as alleged in the complaint.

L. *Alleged Promise of Benefits*

Paragraph 13(b) of the complaint alleges that in June Keeling promised employees better benefits if they withdrew their support of the Union.

These promises are included with the issues discussed supra, where it was found that Fish and Keeling dealt directly with employees in violation of the Act. A separate violation of Section 8(a)(1) of the Act is found, based on the promises of Keeling.

M. *Alleged Threat to Close the Business*

Paragraphs 13(c) and (d) allege that in June 1981 Keeling threatened to close River City if the Union received the same benefits negotiated by unions in the San Francisco Bay area, and also threatened to close the business rather than sign a contract with the Union.

Bush testified that in June Keeling stated to him and other employees "if our union tried to get a contract like the Bay Area got that he'd close the doors down" and on a separate occasion stated to him and other employees "if the union found a loophole to make him sign a contract he'd shut the doors."

Keeling denied the threats attributed to him.

Discussion

Bush is credited, and these allegations are found, to be supported by the record.

N. *Alleged Interrogation of Employees*

Paragraph 13(e) of the complaint alleges that on or about June 26 Keeling interrogated employees concerning their union activities.

No evidence was introduced in support of this allegation, and a violation is not found.

O. *Alleged Promise of Benefits*

Paragraph 14 of the complaint alleges that, on June 25 and 30 and on July 3, Liana Keeling promised employees better benefits than the Union offered, if they withdrew their union support.

Liana Keeling's participation with Fish and her husband when various unlawful promises were made to employees is discussed supra, particularly in section D.

Testimony concerning Liana's preparation of a comparison of benefits and costs of union proposals to River City, and concerning her presentation of the comparison at a negotiation session with the Union and to employees, was conflicting. However, based on the testimony of employees discussed above, it is found that Liana did talk with employees as alleged and tried to get them to stay with River City in a nonunion capacity in exchange for which they would receive better benefits than they would get through the Union.

Liana's agency status is clear. She was the wife of one of River City's owners, she attended at least one negotiation session as a representative of River City, and she often dealt with employees as a management representative. When she made the promises to employees, she made them on behalf of River City and in violation of the Act, as alleged.

P. *Alleged Threat by Harris*

Paragraph 15(a) of the complaint alleges that, on or about June 10, Harris threatened employees with discharge because they selected the Union as their bargaining representative.

Harris' supervisory status is not in dispute.

John Moss testified that on June 10 he and his brother Jack Moss talked with Harris:

> He came out to us and looked around and made sure that just Jack and I were there and he told us that he had been told by Jim Fish and Jim Keeling that they were not going to continue to stay in the union when the contract expired and that [it] would be to our benefit to go out and try to find another job. And at which point I remember Jack—
>
> Q. Your brother Jack?
>
> A. Right. Had said are you sure about this, Dad, is this definite. And he said yes, there's no doubt about it.
>
> Jack Moss corroborated John Moss' testimony on this issue.

Harris testified that he talked with John and Jack Moss about their jobs on three occasions in June. He said the first occasion was in early June, when the two sons were worried about what was happening concerning the Union. Harris said he told them, "I think you probably know more about it than I do" because they attended union meetings, which Harris did not. Harris said he told them "if they were worried . . . why don't you look for another job." Harris testified that the next conversation was a week or so later, when Jack called him aside, with John present:

> He says Dad, what should we do. I said I can't answer that for you, you are big boys, I said, you know, whether they should stay or look for another job or what. And that was the extent of that conversation.
>
> Q. Did you mention anything to them about whether they should stay union or nonunion?
>
> A. Yes, I did. In fact, I said it in front of Mr. Keeling and—and I told them both, I said I know how you feel, stay union, and later on down the line if you have to come back, come back.

The third conversation, Harris testified, was near the end of June, when he asked John and Jack Moss if they wanted to be laid off so they could draw unemployment insurance payments. Harris said they replied no, because they wanted to stay "to the end" and make as much money as they could.

Discussion

Harris had been a union member since 1969, but resigned his membership on July 7, after which he remained employed by River City. Harris denied telling John or Jack Moss, or any other employee, that River City was going nonunion, or that Keeling or Fish told him River City was going nonunion. Harris said he never talked with Keeling concerning the business possibly being closed in June 1981. He said, however, that Keeling told him "if negotiations didn't work out that he wouldn't be able to pay the Bay Area wages."

John and Jack Moss were credible witnesses, and their testimony was supported in part by Harris, who acknowledged that he told them they should look for another job if they were worried about River City. Harris acknowledged during testimony on another issue (discussed supra) that he overheard Fish telling Bush he would give employees $15 per hour if negotiations with the Union were not successful. Harris was aware of the uncertainty and concern of employees, particularly John and Jack Moss, about their jobs, and he testified that he told some employees River City could not pay bay area wages. Harris denied that he knew Fish and Keeling were thinking about "going non-union," but that testimony is inconsistent with much of his other testimony, and is subject to doubt. In any event, it is clear that Harris told John and Jack Moss, who were concerned about their job because of difficulties between River City and the Union, that perhaps they should look for other employment. The three witnesses were on good terms and had a family relationship, but John and Jack Moss did not live at home and, as Harris testified, he considered them "big boys" who could take care of themselves. Perhaps Harris' statement was veiled, but it was, nonetheless, an implicit threat that, if they wanted to stay in the Union, they should look for another job. Whatever the relationship was among the three men, Harris' advice was that of River City, and it was coercive in violation of the Act, as alleged.

Q. *Alleged Direct Dealing with Employees*

Paragraph 15(b) of the complaint alleges that, in June, Harris dealt directly with unit employees.

There is no evidence to support this allegation. Harris went to the Auburn Oaks Plaza jobsite with Fish on June 12, when Fish talked with employees as discussed supra, but there is no evidence that Harris talked with any employee that day, or any other day, concerning wages, benefits, or working conditions.

R. *Alleged Instruction to Employees to Resign from the Union*

Paragraph 15(c) of the complaint alleges that, in June, Harris instructed an employee to send a letter of resignation to the Union.

This allegation refers to an alleged conversation between Harris and Lofgren, discussed above in section I. As there noted, Lofgren's testimony on this subject is given no credence. No violation is found relative to this issue.

S. *Alleged Threat to Close the Business*

Paragraph 15(d) of the complaint alleges that in June Harris threatened that River City would close its business rather than sign a contract with the Union, and stated that River City would not sign a contract with the Union.

No testimony or evidence was introduced in support of this allegation, and no violation of the Act is found.

T. *Alleged Discharge of Employees*

Paragraph 16 of the complaint alleges that River City discharged employees Lofgren and Dave Chassey because of their union activities and in violation of the Act.

The General Counsel withdrew the allegation relative to Chassey, during the trial.

So far as Lofgren is concerned, the General Counsel argues that he was discharge d because he failed to give River City a commitment "to go non-union."

Harris testified that he laid off Chassey and Lofgren approximately on the same day because the Auburn Oaks Plaza job was coming to an end.

Lofgren testified that, when he was laid off, Harris said something like "if I decided to go no-union" there may be later worker for him, but Lofgren testified several times that he was having considerable difficulty recalling events because "it's been a long time" since they happened. Harris credibly denied making the statement Lofgren said he made. Lofgren testified that, when he was laid off, "Things were winding up there at Auburn Oaks," and that "everybody knew it." The only job at that time was for rough duct work, and nearly all that duct had been installed. Employee Tom Melton, who also was on the job, was laid off a few days after Chassey and Lofgren.

As noted supra, Lofgren's uncertain testimony concerning Harris' alleged statement about going "non-union" is given no credence, and that statement consitutes almost the entire case so far as Lofgren's layoff is concerned. Even if that testimony were to be credited in its entirety, arguendo, there still would be inadequate basis for finding that the layoff was in violation of the Act.

This allegation was not proved.

U. *Alleged Lockout*

Paragraph 17 of the complaint alleges that on or about July 6 River City locked out its employees because of their union activity.

Fish was a union member, and knew that River City's employees were scheduled to vote the evening of July 6, relative to contract proposals and a proposed strike. Fish scheduled a meeting with employees the evening of July 6, which was to be held after the union meeting. Fish threatened two employees with a lockout July 7 if the proposals of River City were not accepted, as discussed in section J, above. However, River City did not lockout its employees, because it never had an opportunity to do so. Pursuant to vote taken the evening of July 6, the employees went on strike July 7, and commenced picketing approximately at 7 a.m. that day. There is no evidence that River City instructed its employees the evening of July 6 that they were locked out and could not come through the doors the following day. John Moss testified that on July 7, "Well, I was locked out. Right. They went non-union." That testimony is conclusionary, unsupported, and ambiguous. It is given no weight in view of the clear record that, in fact, no lockout took place.

This allegation was not proved.

Respondents' Files

Although River City's representatives were more forceful in their efforts than were those of Perrin, it is clear from the actions of both firms, as discussed in detail above, that they intended throughout negotiations either to go nonunion or to achieve through union concessions the same competitive advantages they could achieve without a union contract.

Respondents' need for relief from high union-inspired costs, particularly in the residential area, is clear, and their attmepts to negotiate such relief are both understandable and lawful. As shown by the testimony of White, Brown, Fish, and other witnesses, the negotiations were not barren of fruit. Both sides often changed their positions during negotiations, even relative to the acceptance, or refusal to accept, the Union's standard (International) contract. However, it is clear that Respondents were making concessions that appeared conciliatory, with the goal constantly in mind of either going nonunion, or obtaining a contract that would give them the same advantages they would have without a contract. Patently, the Union could not yield to the extent desired by Respondents. The testimony of employees discussed above shows the parameters within which Respondents were willing to move. The offers employees received personally from both Respondents show what Respondents wanted if they were to sign a contract. Further, that testimony establishes that, if they did not get what they wanted, Respondents planned to discontinue recognition of the Union as the representative of their employees.

In addition to the lack of good faith exhibited by the violations of the Act during negotiations, as discussed above, River City indicated its intentions in other ways.

1. John Moss credibly testified that, in September or November 1980, Fish said to him and his brother Jack, "they had thought about going non-union and if they ever did he could probably pay us approximately four more dollars an hour than we make right now."

2. Bush credibly testified that, during the negotiation period in June, Fish stated to several employees "if the union agreed to what they [the contractors] were trying

to get passed that they were stupid." Bush later testified that the contractors were going to propose a ratio of four nonskilled workers to each journeyman. Later, Bush credibly testified, Fish told several employees that the contractors were insisting on the four-to-one ratio, but that the Union was not budging.

3. Bush credibly testified that, in mid-June, Keeling stated to several employees that he had just sent a $20,000 check to the Union "and said he just bought them a new Cadillac and he wasn't going to buy them no more." Bush's testimony on this matter credibly was corroborated by John Moss. Keeling denied the testimony of Bush and John Moss.

4. John Moss credibly testified that on one occasion during negotiations Fish told him and several other employees that the Union was "cheating" the employees by not giving them the health coverage they were paying for, and that River City could get better coverage for them.

5. John Moss credibly testified that, in June, Fish told him and other employees "how many shops had gone non-union and were going non-union and just made a reference that, in his opinion, he didn't see the union could make it another year."

Fish and Keeling testified that River City's principal concern was a lower rate of pay for residential workers, and that the matter of a ratio of residential workers to journeymen never was of particular concern to River City. Brown partially supported that testimony by stating that ratios first were discussed by the parties at the negotiation session of June 30. However, that testimony later was changed on cross-examination, and Brown acknowledged that ratios were discussed on June 5 (Thierman said ratios were a matter of difference between the parties); June 15 (Thierman said his clients could not agree to any ratios); June 17; June 22 (Jessinger said the Union would not agree to a ratio of four residential workers to one journeyman); June 25; and June 30 (B. J. offered four residential workers to one journeyman). Brown said neither River City nor Perrin ever offered anything other than unlimited ratios. In any event, the question still remains whether Fish made the statements attributed to him by the General Counsel's witnesses as discussed above, and it is found that he did. Further, Fish acknowledged that B. J. wanted a ratio of workers, and Fish's statements to employees did not necessarily reflect what was going on during negotiations. Still further, Keeling and Tarabetz testified that their principal concern during negotiations was the ratio of apprentices to journeymen, and that they wanted an unlimited number of apprentices to journeymen. He said he did not want any set ratio at all—he wanted to hire the numbers of each classification that he desired. Finally, Johnston credibly testified that, in the morning of July 6, Tarabetz told a group of employees "an agreement hadn't been made yet and he wasn't sure if there was going to be one made because of the amount of helpers per journeymen." Tarabetz stated that, if the Union accepted the conractors' offer, they would stay with the Union. The record is replete with incidents showing that Respondents were hard pressed financially, were suffering from nonunion competition, were pushing the Union for relief, were blaming much of their plight on the Union, did not like the Union's representation of their employees, and wanted to become nonunion employers if they did not get the relief they sought through negotiation.

A question arises whether Respondents urged conditions on the Union that they knew the Union would not accept. It is found that they did. All witnesses who attended the negotiation sessions agreed that the parties frequently changed their positions on many items and were close to agreement on June 30. It is clear, and I find, that one of Respondents' principal concerns as of June 30 was the matter of employee ratios, and that Respondents' position was its insistence on an unlimited ratio. That position is stated in Perrin's proposal that was made available to Perrin's employees the afternoon of July 6. It reads:

> There shall be no limit placed on the company as to the number of residential workers it may employ for the purpose of residential work. When engaged in "light commercial work" (individual units of ten (10) tons or less used in non-residential construction) the Employer will use at least one sheet metal journeyman for every four residential journeymen (A or B). When engaged in "heavy commercial work" (individual units exceeding ten (10) tons in non-residential construction) the Employer may use one residential worker or every four sheet metal journeymen.

The proposal also provided that residential employees and employees other than journeymen could be hired solely by Respondent Perrin, free of any control by the Union. Only journeymen were to be red lined. It is apparent that the Union would not accept such stringent limitations on its position as representative of unit employees.[22] Respondents already have prepared proposals for presentation to employees the evening of July 6, after the Union meeting that day, and Perrin made its proposals available to employees for their scrutiny before the union meeting. The logical conclusion is that Respondents knew before the union meeting that the employees would not accept Respondents' proposals to the Union.

It is found that Respondents River City and Perrin bargained in bad faith with the Union during the time of their negotiations, as alleged by the General Counsel.[23]

Respondents' Unilateral Implementation of Offers

At the union meeting of July 6 the members voted to reject Respondents' offers, and to strike commencing the following day.[24] As previously scheduled, and as the employees previously had been notified, Perrin held a meeting of employees just after the union meeting on July 6. Tarabetz and Rossi attended, as did several employees. Tarabetz handed to the employees Perrin's proposal under which Perrin offered jobs to them. The proposal was somewhat different from the proposal offered to the Union.[25] Included in the offer was a journeyman (foreman) wage of $15 per hour,[26] a dental plan, profit sharing, and personal use of company trucks. Some employees resigned from the Union that evening by telegram, and the following day, July 7, former apprentices Miles and Cheshire reported for work as nonunion foremen. Employee Reek also returned as a nonunion employee.

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[22] See *Tomco Communications*, 220 NLRB 636 (1975).

[23] *NLRB v. Reed & Prince Mfg. Co.*, 205 F.2d 131 (1st Cir. 1953).

[24] The Union recommended to the employees that they reject Respondents' offers.

Only one employee, Birchfield, accepted River City's offer to return to work as a nonunion employee. He resigned his union membership, and came back to work 2 weeks later, at $15 per hour as a journeyman.

The record shows beyond any reasonable doubt that Respondents entered into bargaining in bad faith—they intended to go nonunion, unless they could bring the Union to heel on a subject they knew the Union would not agree to; i.e., the matter of unlimited ratios of journeymen to residential workers.[27] There was no showing that the Union did not represent Respondents' unit employees as of the time Respondents refused further to recognize the Union and bargain with it as required by the Act. Even existence of an impasse would not relieve Respondents from further bargaining.[28]

In light of Respondents' bad-faith bargaining, no impasse was reached, and Respondents' unilateral implementation of its own schedule of wages and benefits was a violation of the Act, regardless of whether the implemented wages and benefits were the same, or substantially the same, as Respondents proposed during negotiations.[29]

V. *Respondents' Discontinuance of Contributions*

The fact that, subsequent to June 30, Respondents failed and refused to continue payment of contributions on behalf of employees as required by the old contract is not in dispute.

Such failure and refusal by Respondents constituted violations of the Act, as alleged by the General Counsel.[30]

Respondents' Defense

Respondents argue that their duty to bargain was discharged as a result of Local 162's bad-faith bargaining by insisting on the NJAB procedures to replace the parties at the bargaining table.

Respondents argue that the Union violated Section 8(b)(1)(B) of the Act when it insisted on, and invoked, the NJAB procedure against them. However, that issue is not before me.[31] Whether the Union violated the Act is not dispositive of the issue whether Respondents violated the Act as alleged in the complaint involved in this decision.[32] In any event, whether the Union violated the Act is irrelevant because, by the time the Union invoked the NJAB procedure, Respondents already had decided to go nonunion, had dealt with employees independently of the Union, and had violated the Act in several instances, all of which established bad-faith bargaining. Clearly, anything the Union did concerning NJAB did provoke those actions by Respondents, or justify their violations of the Act that preceded any NJAB procedures. The Union's initial letter to NJAB was no more than a request to be placed on the agenda, and the date of that letter is not controlling so far as any issue is concerned. The NJAB matter was discussed during several bargaining sessions, with the Union threatening to invoke the procedure and Respondents denying that the procedure was applicable, but that fact did not control, or even have any apparent influence on, the course of negotiations. Legal arguments during negotiations are a common fact of life. Further, while those arguments were going on, Respondents systematically were approaching their employees with the proposal that they stay with Respondents as nonunion employees, pursuant to separate and independent agreements with those employees. Clearly, the arguments at the negotiation table were not keeping the parties apart, or coercing Respondents in any manner.

Respondents rely on *Sheet Metal Workers Local 59 (Employers Assn.)*, 227 NLRB 520, 521 (1976), but that case does not control the issues here because there, a charge against the union was the only charge being litigated. The Board there stated, inter alia, "our finding of an 8(b)(1)(B) violation in this case rests not only on the fact that the Union insisted to impasse on certain nonmandatory bargaining subjects, but also on the basis that the entire thrust of the Union's tactics was to force the negotiations to a deadlock in order to submit the dispute to" NJAB. Such facts are not present in this case. Here, it is clear that the reason for the impasse was that Respondents wanted no ratio of residential workers to journeymen, and the Union wanted such a ratio. Respondents knew the Union would not accept their proposal, hence they were prepared for independent employee contracts the evening of July 6, in keeping with their earlier direct dealing with employees. There was no deadlock because of the NJAB procedure—that matter was brought in by the heels, so to speak, after the real damage already had been done. It is noted, parenthetically, that by July 1 the Union already had agreed not to include the NJAB procedures within its proposals for a new contract.

Respondents argue that they were privileged unilaterally to institute changes in their employees' working conditions on July 7 because the employees' strike of July 7 was illegal under the expired SMACNA agreement. That argument is based on assumption, arguendo, of the Union's position that article X, section 8 of the expired agreement survived that expiration. However, as discussed above, whether the Union violated the Act by insisting on application of article X, section 8 is irrelevant, because by July 7, when Respondents' instituted changes in employees' wages and working conditions, Respondents already had violated the Act as alleged by the General Counsel, and had "gone nonunion." As noted in Respondents' brief, the Union did not attempt to enforce the NJAB award until approximately 2 weeks after July 7.

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[25] This proposal to employees is not in evidence.

[26] As previously noted, journeyman wages as of July 6 were $14.80 per hour.

[27] For discussion of bad faith in proposing terms and conditions patently unacceptable to the Union, see *NLRB v. Cable Vision*, 660 F.2d 1 (1st Cir. 1981).

[28] For discussion of the nature of impasse as a "hiatus" in bargaining, see *Hi-Way Billboards*, 206 NLRB 22, 23 (1973).

[29] *United Contractors*, 244 NLRB 72 (1979); *James A. McBrady, Inc.*, 238 NLRB 847 (1978); *Schuck Component Systems*, 230 NLRB 838 (1977).

[30] *Schuck Component Systems*, supra.

[31] Respondents' earlier charge of such a violation was dismissed by the Regional Director for Region 20. That dismissal was sustained on its appeal to NLRB.

[32] *American Gypsum Co.*, 231 NLRB 1291 (1977).

Respondents also argue that the Union's failure to provide them with copies of all contracts the Union had negotiated (as of the June 17 bargaining session) was a breach of the Union's duty to bargain in good faith. The Union later provided Respondents with copies of all such contracts, except for the one applicable to the Sacramento SMACNA group. However, that failure was an incidental matter, and one that is lost in the jungle of events. It had nothing to do with the basic issues, which spring from Respondents' expressed intention to "go nonunion" or to obtain concessions from the Union which would be tantamount to no contract. Surely, failure to provide the requested contract did not cause, or contribute to, Respondents' various threats, promises, direct dealing with employees, and other violations of the Act described above.

IV. THE EFFECT OF THE UNFAIR LABOR PRACTICES ON COMMERCE

The activities of Respondents, set forth in section III, above, occurring in connection with their operations described in section I, above, have a close, intimate, substantial relationship to trade, traffic, and commerce among the several States, and tend to lead to labor disputes burdening and obstructing commerce and the free flow of commerce.

THE REMEDY

Having found that Respondents have engaged in certain unfair labor practices in violation of Section 8(a)(1) and (5) of the Act, it will be recommended that they be ordered to cease and desist therefrom and take certain affirmative action designed and found necessary to effectuate the policies of the Act.

The appropriate remedy for Respondents' unilateral action in discontinuing contributions to the health, welfare, and pension plans provided in the collective-bargaining agreement between the parties, which expired June 30, 1981, is to reinstate the status quo ante and retain it until Respondents fulfill their obligation by bargaining a new agreement or by bargaining in good faith to impasse. For this reason, I shall recommend that Respondents make whole its employees affected by Respondents' unilateral change in benefits. It will be recommended that the terms of the collective-bargaining agreement which expired on June 30, 1981, be reinstated forthwith and continued in effect until after the terms of a new agreement are agreed on or until impasse is reached.

It is recommended that all allegations of the complaint found not to have been proved, be dismissed in their entirety.

On the basis of the above findings of fact and on the entire record in the case, I make the following

CONCLUSIONS OF LAW

1. Perrin Heating and Air Conditioning and River City Mechanical are, and at all times material have been, employers engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

2. Sheet Metal Workers Union Local No. 162, Sheet Metal Workers International Association, AFL-CIO is, and at all times material has been, a labor organization within the meaning of Section 2(5) of the Act.

3. The following two units are appropriate for purposes of collective bargaining within the meaning of Section 9(b) of the Act:

> All employees of (Perrin Heating and Air Conditioning) and (River City Mechanical) covered under the terms of the June 30, 1978 to June 30, 1981 collective-bargaining agreement between Sheet Metal and Air Conditioning Contractors National Association, Sacramento Valley Chapter, Inc., and Sheet Metal Workers Union Local No. 162, Sheet Metal Workers International Association, AFL-CIO.

4. The Union is, and at all times material has been, the exclusive bargaining representative of all employees in the appropriate unit described above.

5. Respondent Perrin violated Section 8(a)(1) of the Act by threatening employees with discharge unless they withdrew their support of the Union as their bargaining representative.

6. Respondent Perrin violated Section 8(a)(5) and (1) of the Act by bypassing the Union and dealing directly with unit employees concerning wages and other terms and conditions of work; by unilaterally implementing its contract proposals without bargaining in good faith to impasse with the Union; and by discontinuing making contributions to unit employees' benefit funds without bargaining in good faith to impasse with the Union.

7. Respondent River City violated Section 8(a)(1) of the Act by threatening its employees with discharge, business closure, more onerous working conditions, and lockout because of their union sympathies, membership, and activities; and by promising employees better benefits if they withdrew their support of the Union as their bargaining representative.

8. Respondent River City violated Section 8(a)(5) and (1) of the Act by bypassing the Union and dealing directly with unit employees concerning wages and other terms and conditions of work; by unilaterally implementing its contract proposals without bargaining in good faith to impasse with the Union; and by discontinuing making contributions to unit employees' benefit funds without bargaining in good faith to impasse with the Union.

9. The aforesaid unfair labor practices are unfair labor practices affecting commerce within the meaning of Section 2(6) and (7) of the Act.

10. Respondents did not otherwise violate the Act as alleged in the complaint.

[Recommended Order omitted from publication.]

Stroehmann Bakeries, Inc. ***and*** **International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, AFL–CIO, Local Union No. 791, Local Union No. 687, Local Union No. 182, Local Union No. 316, Local Union No. 529, Local Union No. 669, Local Union No. 693, and Local Union No. 648.** Case 3–CA–13439–2

July 29, 1988

DECISION AND ORDER

BY CHAIRMAN STEPHENS AND MEMBERS JOHANSEN AND CRACRAFT

On November 30, 1987, Administrative Law Judge Karl H. Buschmann issued the attached decision. The Respondent filed exceptions and a supporting brief, and the General Counsel and the Charging Parties filed cross-exceptions and supporting briefs. The Respondent and the Charging Parties additionally filed reply briefs.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings,[1] and conclusions, as modified, and to adopt the recommended Order.

As set forth more fully in the attached judge's decision, the parties began negotiating for a collective-bargaining agreement in March 1985.[2] On June 13, the parties reached agreement on five items: health benefits, severance pay, vacation pay, breakdown time, and job security. The parties memorialized their agreement in a handwritten document that provided that the agreement was made "pending the resumption of negotiations" and, inter alia, "[t]hese changes will be incorporated into any agreement entered into by the parties following July 31, 1985."

Negotiations for a final agreement continued into the fall and in October, the Local Unions notified the companies that they had changed their position on the job-security issue. The Local Unions further indicated that they were willing to strike if the companies would not modify the job-security provision.

At the parties' November 14 meeting, Harry Graham, labor relations manager of Continental Baking Company, offered a complete contract proposal containing a modified job-security provision, the four other provisions of the June agreement, and other contract terms. With minor modifications, Graham's proposal was agreed to and signed by all parties, including Joseph Giunta, the Respondent's personnel director who was representing the Respondent at that bargaining session. The Respondent later refused to sign the agreement in its final form and refused to be bound by the agreement.

The judge found that the Respondent violated Section 8(a)(1) and (5) and Section 8(d) of the Act by failing and refusing to execute the collective-bargaining agreement reached on November 14, 1985. In so finding, the judge reasoned that the June agreement constituted a binding settlement on those terms that the parties were free to change only by mutual consent. As the Respondent consented to changing the June agreement when it willingly entered into the November agreement, the Respondent was required to execute the November agreement.

The Respondent has excepted to the judge's decision, arguing that it did not voluntarily enter into the November 14 agreement. Rather, the Respondent asserts that because the June agreement was a binding settlement, the Local Unions were not free to threaten to strike if the companies did not renegotiate the job-security provisions and that, by threatening to strike, the Local Unions coerced the Respondent into agreeing to the November 14 proposal. In effect, the Respondent argues that it was no more lawful for the unions to resort to economic weapons in support of their bargaining position on these provisions than it would be for a party to insist on midterm alterations in a collective-bargaining agreement governed by the requirements of Section 8(d) of the Act. The General Counsel and the Local Unions filed limited exceptions to the judge's decision, asserting that the June agreement was not a binding settlement, but rather a statement of progress on the negotiations that was intended to be incorporated into a final agreement, if one were reached. We find merit only in the General Counsel's and the Local Unions' exceptions.

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[1] The judge inadvertently stated that an agreement was reached by the parties on November 16, 1985. The record is clear that the agreement was reached on November 14, 1985.

The judge further found that "[o]nce agreement was reached between the parties on a multiemployer and multilocal level, each company executed a separate collective-bargaining agreement with the Local Union which represented the Company's employees." The record testimony indicates that once agreement was reached between the parties on a multiemployer and multilocal level, each company executed that agreement with the Local Union representing the company's employees. Thus, all three companies had identical contracts with the various Local Unions representing their different work forces.

[2] All dates refer to 1985 unless otherwise indicated.

The Charging Parties, eight local unions of the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, AFL–CIO (Local Unions), bargained on a multiemployer basis with Stroehmann Bakeries, Inc. (the Respondent), Continental Baking Company and Interstate Brands Corporation. The collective-bargaining agreements in effect from 1982–1985 expired on March 30.

289 NLRB No. 171

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There is no dispute that, following a period of negotiations, the parties agreed to five provisions on June 13. It is also clear that the handwritten document memorializing that agreement was not intended to be a final contract, as that document expressly stated that the provisions would "be incorporated into any agreement entered into by the parties following July 31, 1985." The only question is what effect that document had on the parties' further obligations to bargain in good faith.

In the normal course of negotiations, there is much give and take until a final collective-bargaining agreement is reached. Frequently, agreement may be reached on some issues, only to be modified as other issues come into play. Consequently, there is usually no binding agreement until a final, complete agreement is reached.[3] Notwithstanding that practice, parties negotiating for a contract always have the ability to make any provisions final and binding along the way, thus precluding any further negotiations on those issues.

The parties here agreed to five provisions in June. There is no evidence, however, that when they agreed to those provisions, they intended them to be final and binding. Thus, there was no indication that the parties intended those subject matters to be off limits for further discussion. Absent such evidence, we conclude that, as in the normal course of negotiations, the parties here reached agreement on several provisions en route to reaching a final agreement, but that no agreement became final and binding until the final contract was made.

As we find that the June 13 agreement was not a binding agreement, the Local Unions were free to seek modifications of those provisions in negotiating a final agreement.[4] Such modifications were sought, and they were agreed to by the Respondent.[5] The Respondent, having agreed to the contract, violated Section 8(a)(5) and (1) of the Act as defined by Section 8(d) of the Act, by failing and refusing to execute the collective-bargaining agreement.

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge and orders that the Respondent, Stroehmann Bakeries, Inc., Williamsport, Pennsylvania, its officers, agents, successors, and assigns, shall take the action set forth in the Order.

Michael Cooperman, Esq., for the General Counsel.

Timothy P. O'Reilly, Esq. (Morgan, Lewis, Bockius), Philadelphia, Pennsylvania, for the Respondent.

Robert M. Baptiste, Esq. (Baptiste & Wilder), of Washington, D.C., for the Charging Party.

DECISION

STATEMENT OF THE CASE

KARL H. BUSCHMANN, Administrative Law Judge. This case was tried in Buffalo, New York, on 11 and 15 December 1986. The charge in Case 3-CA-13439-2 was filed by International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, AFL-CIO[1], Local Union No. 791, Local Union No. 687, Local Union No. 182, Local Union No. 316, Local Union No. 529, Local Union No. 669, Local Union No. 693, and Local Union No. 648[2] (Local Unions) on 8 October 1986. The complaint, dated 22 October 1986, and amended 29 October 1986 and 11 December 1986, alleges that the Respondent, Stroehmann Bakeries, Inc. violated Section 8(a)(1) and (5) and Section 8(d) of the National Labor Relations Act by refusing to execute the collective-bargaining agreement reached 14 November 1985. The Respondent filed its answer on 10 November 1986, admitting certain allegations, including the jurisdictional and supervisory aspects of the complaint and denying the substantive allegations that it violated the Act.

On the entire record, including my observation of the demeanor of the witnesses, and after consideration of the briefs filed by the General Counsel, the Union, and the Company, I make the following

FINDINGS OF FACT

The Company, Stroehmann Bakeries, Inc., is a Delaware corporation, with an office and place of business in Williamsport, Pennsylvania, and plants throughout New York State. It is engaged in the manufacture and wholesale sale of bakery products and is admittedly an employer engaged in commerce within the meaning of the Act.

The Charging Parties (Locals 791, 687, 182, 316, 529, 669, 693, and 648) are labor organizations within the meaning of Section 2(5) of the Act. The various Local Unions have in the past negotiated jointly as the Upstate Bakery Council with the Respondent on a multiemployer basis, which, in addition to Stroehmann, included Continental Baking Company [Continental] and Interstate Brands Corporation [Interstate]. Once agreement was reached between the parties on a multiemployer and multilocal level, each Company executed a separate collective-bargaining agreement with the Local Union that represented the Company's employees.

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[3] See *American Steel Line Co.*, 210 NLRB 811, 814 (1974).

[4] In light of this finding, we find it unnecessary to address the judge's conclusion that Sec. 8(d) is not applicable to a binding interim agreement.

[5] We agree with the judge's finding that the Local Unions were under no contractual prohibition against striking and therefore their threat of a lawful strike did not constitute duress or in any way vitiate the validity of the Respondent's consent to the final collective-bargaining agreement.

[1] On 1 November 1987 the Teamsters International Union was readmitted to the AFL-CIO. Accordingly, the name of the International has been amended to reflect that change.

[2] The complaint was amended 29 October 1986 by adding Locals 693 and 648.

The collective-bargaining agreements in effect from 1982 to 1985 expired on 30 March 1985, and negotiations for new agreements commenced in March 1985 between the Employers and the Local Unions. The Unions were represented by Harold Ulrich from Local 182 as the main spokesman,[3] assisted by William Phillips from Local 791 and Robert Dietrich from the Eastern Conference of Teamsters. Charles Caffrey, senior vice president and general counsel of Stroehmann, and Harry Graham, area labor relations manager of Continental, reperesented the three Companies.[4] Their efforts were directed at drafting a collective-bargaining agreement to be effective from 1 April 1985 to 31 March 1988.

On 13 June 1985 the parties had reached an agreement on five items and signed a document that Caffrey had prepared in handwritten form (G.C. Exh. 7). The five items dealt with health benefits, severance pay, vacation pay, breakdown time, and job security. The last item was, according to Caffrey, the most important issue raised by the Local Unions.

The agreement provided, inter alia, "These changes will be incorporated into any agreement entered into by the parties following July 31, 1985." As contemplated by the express terms of the June agreement, the parties met again on 31 July 1985 to resume negotiations on a final agreement with the presence of Richard Cook, industrial relations manager for Interstate.

The next negotiation meeting occurred on 11 September 1985. By that time, Stroehmann had agreed to buy from Interstate its Millbrook, Dolly Madison Division. The sale became effective 12 October 1985. At the September meeting, it was agreed that the terms of the June agreement would also be applicable to Interstate employees.

Of great importance during these negotiations was the issue of job security because of a trend to convert employee-operated delivery routes to owner-operated routes. The provision in the June agreement that prohibited the Companies from converting their drivers to independent contractors until 31 March 1986 was designed to deal with that issue.

The parties met in October after Stroehmann's acquisition of Interstate's Dolly Madison Division. At that time, and at subsequent meetings, the Local Unions made it clear that they had revised their position on the issue of job security, and that they were demanding added job security. On 6 November 1985, union negotiators Dietrich and Phillips specifically urged the companies' representatives Caffrey and Graham that the job-security provision in the 13 June 1985 agreement be changed to provide "protection for the full term of the contract." Graham testified that he was apprehensive about a strike if they did not change the job-security provision of the June agreement. This was confirmed by Caffrey, who testified that they either agree to the change or there would be a strike. About that time, the Union voted strike.

Caffrey was unable to attend the next meeting scheduled for 14 November 1985. He directed Stroehmann's personnel director, Joseph Giunta, to attend the negotiation and to protect the Company's interest. Graham had informed Caffrey in advance of the meeting of provisions of the proposal that Graham was about to offer and Caffrey instructed Giunta to sign the proposed agreement. At the meeting, Graham offered Continental's proposed contract that contained the four provisions of the June agreement. The fifth provision dealing with job security had been changed. With minor modification, the proposal offered by Graham was signed by the parties in attendance, including Giunta on behalf of Stroehmann. The agreement, as signed, was subsequently ratified by the union membership.

Subsequent developments showed that Stroehmann refused to be bound by the agreement. First, Stroehmann refused to sign the agreement in its final form with the Local Unions; furthermore, Stroehmann informed the Local Unions that it had withdrawn from the multiemployer negotiations; and Stroehmann filed a charge with the National Labor Relations Board against the Local Unions for their failure to give proper notice under Section 8(d), when they changed the terms of the June agreement.

Analysis

According to the complaint, the Respondent's refusal to execute the September agreement amounted to a failure to bargain in good faith in violation of Section 8(a)(5) and (1) and Section 8(d) of the Act. In support, the General Counsel argues that the June agreement was merely a "tentative agreement" which was changed "through lawful economic pressure" in the course of subsequent negotiations, and that the final agreement was reached on 14 November. The Union similarly argues that the June agreement "did not constitute a final and binding immutable agreement" but a tentative agreement subject to change as negotiations continued. The Respondent's failure to execute the agreement reached on 14 November was, according to the Union, a willful violation of the Act.

The Respondent argues that the parties had reached a final agreement on the most important issue—job security—on 13 June 1985, and that Stroehmann's signing of the November memorandum under threat of a selective strike is ineffective to constitute a voluntary agreement to reopen negotiations on the job-security issue. The Respondent states that the June agreement was not a progress report, and that the Local Unions had no right to modify the June agreement under Section 8(d) of the Act without proper notice.

Under Section 8(a)(5) of the Act, it is an unfair labor practice to refuse to bargain collectively, and Section 8(d) of the Act requires "the execution of a written contract incorporating any agreement reached if requested by either party." The failure to sign a written memorandum of the agreement reached between the parties constitutes a per se refusal to bargain. *H. J. Heinz Co. v. NLRB*, 311 U.S. 514, 525 (1941), *NLRB v. Midvalley*

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[3] Ulrich died prior to the hearing.

[4] Interstate did not initially participate in the negotiations until Richard Cook, its industrial relations manager, appeared at the meetings in July 1985.

Steel Fabricators, 243 NLRB 516 (1979), enfd. 621 F.2d 49 (2d Cir. 1980).

The evidence here shows that the Respondent had signed the November agreement, but that it refused to execute the final collective-bargaining agreements with the individual Local Unions, claiming that the June agreement was the final agreement on the five issues, including the job-security provision. Whether the Respondent was justified in its failure to execute the final agreement with the Local Unions on this basis requires a determination whether the November agreement constitutes a valid contract.

In determining whether parties agreed to a contract, the Board is not bound by technical questions of traditional contract interpretations. Rather, the Board is free to use general contract principles adapted to the collective-bargaining context to determine whether the two sides have reached an agreement. *NLRB v. Electra-Food Machinery*, 621 F.2d 956, 958 (9th Cir. 1980), *NLRB v. World Evangelism, Inc.*, 656 F.2d 1349, 1355 (9th Cir. 1981). To be sure, there is no dispute that following negotiations over a 3-month period all parties agreed on 13 June 1985 to five provisions. On that day, Caffrey, representing Respondent Stroehmann Bakeries, drafted a memorandum agreement (G.C. Exh. 7). That document, in handwritten form, was signed by Caffrey for Stroehmann, Graham for Continental Baking Co., and Harold K. Ulrich on behalf of the Local Unions. It is also clear from the testimony, and from the document itself that it was not intended as the final contract. Caffrey testified as follows about the significance of that agreement: "I regard it as a final settlement of those five issues, and that there was agreement that those five items would be included in any agreement executed thereafter." This testimony and the document itself makes no provisions for pay or any other issue that shows a final and comprehensive contract was contemplated. This agreement was more than a "progress report" and can properly be characterized as an interim settlement on certain issues. This is confirmed by the express language in the initial paragraph that states, inter alia: "These changes will be incorporated into any agreement entered into by the parties following July 31, 1985." Clearly, the parties contemplated further negotiations and intended to incorporate the five provisions into their final agreement.[8] Indeed, following further meetings between the parties, all the provisions, except one, were incorporated into the final agreement. For example, proviso 1 of the June document, dealing with health and welfare benefits, became paragraph 14 in the November agreement; proviso 2 regarding severance pay was adopted as paragraph 1 of the final agreement; the vacation pay provision, proviso 3, in the June memorandum, became paragraph 2 in the final document; and proviso 4, dealing with breakdown time, became paragraph 3 in the November agreement. The last paragraph of the June agreement concerning job security was changed. The reason that the provision did not appear in the November agreement was that Dietrich, speaking for the Local Union, was dissatisfied with it and informed Caffrey during meetings in October and early November that the job-security provision was unacceptable. In this regard, Caffrey testified as follows: "[The Union] changed its position with respect to the so-called job security provision and from that moment on, the union wanted to jettison that part of the June 13th agreement and replace it with a provision that would tie the parties to a prohibition against conversion to owner/operators for the term of the agreement."

The new provision dealing with job security was initially proposed by Graham because he was concerned about a strike by the Union. He read the language over the telephone to Caffrey. Although he believed that Continental and the Union had reached the agreement behind his back, Caffrey instructed Giunta to sign the agreement on 14 November. Significantly, there is no suggestion that Giunta was either unauthorized to represent the Respondent or that he did not know the significance of what he was signing. To the contrary, Caffrey had been made aware prior to the meeting that the new provision would be the subject of negotiations, and specifically instructed Giunta to protect the Company's interest and to sign the document. The Respondent's conduct in this regard differed with that of the parties in *Heavy Contractors Assn. v. Hod Carriers Local 1140*, 312 F.Supp. 1345 (D. Neb. 1969), affd. 430 F.2d 1350 (8th Cir. 1970), a case relied on by the Respondent. There, the parties had reached an agreement and "discussed modification but never agreed to modify or to reopen or to be bound by subsequent negotiations." The court recognized that following an agreement, the "parties are free, if they wish, to discuss wage changes but are not required to do so." Under the facts in the present case, the parties were free to discuss changes in the agreement reached on 13 June 1985 and to change the agreement by mutual consent. Accordingly, although I agree with the Respondent that the June document constituted a binding settlement, the parties were free to change it by mutual consent. The Respondent's conduct leaves no doubt that it was aware of the dissatisfaction of the Local Unions with the job-security provision. The Respondent knowingly and willingly negotiated a final agreement containing a changed job-security provision and the parties signed the agreement. It is well settled that the acceptance of a final offer of a bargaining agreement manifests mutual assent, creating a binding bargaining agreement, and therefore triggers the duty to execute a written contract on request embodying that agreement. *NLRB v. Electra-Food Machinery*, 621 F.2d 956, 958 (9th Cir. 1980); *NLRB v. H. Koch & Sons*, 578 F.2d 1287, 1291 (9th Cir. 1978). Moreover, the notice requirement of Section 8(d) was not applicable to the June agreement, since it was not the final "collective-bargaining contract."

The Respondent's final argument that it is not bound by the contract because it signed the final agreement under the threat of a strike is not convincing. Because the collective-bargaining agreement had expired, the Local Unions were under no contractual prohibition to strike. It has long been settled that the threat of a lawful strike does not constitute duress or vitiates a collective-bargaining agreement. 13 Williston, *Contracts*, § 1617A (3d ed. 1970).

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[8] The parties reaffirmed their agreement on the five issues on 11 September 1985, when the parties signed an agreement whereby Stroehmann agreed to apply the June agreement to the facilities purchased from Interstate (R. Exh. 12).

CONCLUSIONS OF LAW

1. Stroehmann Bakeries, Inc. is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

2. International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, AFL-CIO, Local Union No. 791, Local Union No. 687, Local Union No. 182, Local Union No. 316, Local Union No. 529, Local Union No. 669, Local Union No. 693, and Local Union No. 648 are labor organizations within the meaning of Section 2(5) of the Act.

3. The following employees of the Respondent constitute units appropriate for the purpose of collective bargaining within the meaning of Section 9(b) of the Act:

> All driver-salesmen employed by Respondent within the geographic jurisdiction of each Local named above.

4. By failing and refusing to execute the collective-bargaining agreement reached on 14 November 1985, the Respondent failed and refused to bargain collectively and in good faith with the representatives of its employees, and violated Section 8(a)(1) and (5) and Section 8(d) of the Act.

5. The unfair labor practices of the Respondent as described affect commerce within the meaning of Section 2(6) and (7) of the Act.

THE REMEDY

Having found that the Respondent has engaged in certain unfair labor practices, I find it necessary to order it to cease and desist and to take certain affirmative action designed to effectuate the policies of the Act. More specifically, having found that the Respondent failed to bargain in good faith, I shall issue a bargaining order and an order to sign the agreement reached on 16 November 1985.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[6]

ORDER

The Respondent, Stroehmann Bakeries, Inc., Williamsport, Pennsylvania, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Failing and refusing to bargain with International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, AFL-CIO, Local Union No. 791, Local Union No. 687, Local Union No. 182, Local Union No. 316, Local Union No. 529, Local Union No. 669, Local Union No. 693, and Local Union No. 648 with respect to rates of pay, wages, hours of employment, and other terms and conditions of employment.

(b) Failing or refusing to execute the final agreement reached on 14 November 1985 with representatives of the Local Unions.

(c) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) On request, bargain with the Local Unions as the exclusive representatives of the employees in the appropriate bargaining units described below with respect to rates of pay, wages, hours of employment, and other terms and conditions of employment.

> All driver-salesmen employed by Respondent within the geographic jurisdiction of each Local named above.

(b) Execute the collective-bargaining agreement reached on 14 November 1985 with the Local Unions.

(c) Post at is facility in Williamsport, Pennsylvania, and its plants in New York State copies of the attached notice marked "Appendix."[7] Copies of the notice, on forms provided by the Regional Director for Region 3, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in consipicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material.

(d) Notify the Regional Director in writing within 20 days from the date of this Order what steps the Respondent has taken to comply.

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

WE WILL NOT fail and refuse to bargain with International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, AFL-CIO, Local Union No. 791, Local Union No. 687, Local Union No.182, Local No. 316, Local Union No. 529, Local

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[6] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

[7] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

Union No. 669, Local Union No. 693, and Local Union No. 648 with respect to rates of pay, wages, hours of employment, and other terms and conditions of employment.

WE WILL NOT fail or refuse to execute the final agreement reached on 14 November 1985 with representatives of the Local Unions.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL, on request, bargain with the Local Unions or the exclusive representatives of the employees in the appropriate bargaining unit described below with respect to rates of pay wages hours of employment, and other terms and conditions of employment.

> All driver-salsesmen employed by the Employer within the geographic jurisdiction of each Local named above.

WE WILL execute the collective-bargaining agreement reached on 14 November 1985 with the Local Unions.

STROEHMANN BAKERIES, INC.